CONSULTATION

Criminal Law

CONSENT IN THE CRIMINAL LAW

A Consultation Paper

LAW COMMISSION
CONSULTATION PAPER No 139

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

The Law Commissioners are:

The Honourable Mr Justice Brooke, *Chairman*
Professor Andrew Burrows
Miss Diana Faber
Mr Charles Harpum
Mr Stephen Silber, QC

The Secretary of the Law Commission is Mr Michael Sayers and its offices are at Conquest House, 37-38 John Street, Theobalds Road, London WC1N 2BQ.

This Consultation Paper, completed for publication on 1 November 1995, is circulated for comment and criticism only. It does not represent the final views of the Law Commission.

The Law Commission would be grateful for comments on this Consultation Paper before 30 June 1996. All correspondence should be addressed to:

Mr M Chapman
Law Commission
Conquest House
37-38 John Street
Theobalds Road
London WC1N 2BQ

Tel: 0171- 453 1288
Fax: 0171- 453 1297

It may be helpful for the Law Commission, either in discussion with others concerned or in any subsequent recommendations, to be able to refer to and attribute comments submitted in response to this Consultation Paper. Any request to treat all, or part, of a response in confidence will, of course, be respected, but if no such request is made the Law Commission will assume that the response is not intended to be confidential.

The Law Commission

Consultation Paper No 139

Criminal Law

CONSENT IN THE CRIMINAL LAW

A Consultation Paper

HMSO

ISBN 0 11 730224 4

Printed in the United Kingdom for HMSO
Dd 301848 12/95 C15 59226

17-384-06

THE LAW COMMISSION

CONSENT IN THE CRIMINAL LAW

CONTENTS

	Paragraphs	*Page*
PART I: GENERAL OVERVIEW		
Introductory	1.1 – 1.9	1
The current proceedings before the Strasbourg Commission	1.10	4
The present law	1.11 – 1.13	4
Offences against the person	1.11	4
Sexual offences	1.12 – 1.13	5
Modern proposals for law reform	1.14 – 1.17	6
Offences against the person	1.14 – 1.16	6
Sexual offences	1.17	7
The doctrine of necessity	1.18 – 1.19	7
Secondary liability for consenting parties	1.20 – 1.23	8
Consent as a defence in the wider criminal law	1.24 – 1.27	10
The structure of this paper	1.28 – 1.30	11
PART II: POLICIES FOR REFORM		
Introductory	2.1 – 2.2	13
Liberal responses	2.3 – 2.4	13
Paternalist and legal moralist responses	2.5 – 2.9	14
Pragmatic considerations about law enforcement	2.10	16
A recent indication of Parliamentary opinion	2.11	16
Recent case law	2.12	17
Our preferred approach	2.13 – 2.19	18
PART III: THE EUROPEAN CONVENTION ON HUMAN RIGHTS		
Sado-masochism	3.1 – 3.11	21
Lawful correction	3.12 – 3.21	24
Religious and cultural practices	3.22 – 3.27	27
Suicide and euthanasia	3.28 – 3.32	29

	Paragraphs	*Page*
PART IV: CONSENT TO INJURY OR THE RISK OF INJURY AND THE CRIMINAL LAW BILL		
Introductory	4.1 – 4.2	32
Consent to injury	4.3 – 4.6	32
Consent to risk of injury	4.7 – 4.28	33
Reasonableness of risk to be assessed in the light of all the circumstances	4.9 – 4.14	34
Unreasonable risk and consent	4.15	35
Consent a complete defence?	4.16 – 4.17	36
Consent wholly immaterial?	4.18 – 4.20	36
Consent relevant to reasonableness of risk	4.21 – 4.28	37
The definition of seriously disabling injury	4.29 – 4.40	39
Consent and the legal burden of proof	4.41 – 4.45	44
Law reform proposals	4.46 – 4.53	46
Intentional causing of seriously disabling injury	4.47	46
Reckless causing of seriously disabling injury	4.48	46
Intentional causing of other injuries	4.49	47
Reckless causing of other injuries	4.50	47
Definition of seriously disabling injury	4.51	47
Meaning of consent	4.52	48
Burden of proof on the issue of consent	4.53	48
PART V: CAPACITY TO CONSENT		
Introductory	5.1	49
Capacity to consent	5.2	49
Capacity to consent: minors	5.3 – 5.11	50
Introductory	5.3	50
Offences against the person	5.4 – 5.7	50
Sexual offences	5.8	51
The responses on consultation	5.9 – 5.11	52
Mental incapacity	5.12 – 5.18	53
The present law	5.12 – 5.15	53
Legal competence	5.16 – 5.17	54
The responses on consultation	5.18	55
Law reform proposals	5.19 – 5.22	56
Persons without capacity	5.21	56
Definition of persons without capacity	5.21	56
Capacity and minors	5.21	57
Capacity and the mentally disabled	5.21	57
Capacity to understand in broad terms	5.21	57

	Paragraphs	*Page*
PART VI: FRAUD, MISTAKE, FORCE, THREATS, ABUSE OF POWER AND OTHER PRESSURES		
Introductory	6.1 – 6.4	59
The CLRC Review and the Draft Criminal Code	6.5 – 6.7	61
Consultation on the meaning of consent	6.8 – 6.10	62
Fraud and mistake	6.11 – 6.33	62
The requirement for information to be given	6.22 – 6.23	67
Self-induced mistake and non-disclosure	6.24 – 6.33	68
Force and threats of force	6.34 – 6.37	70
Other threats and intimidation	6.38 – 6.72	72
Whether the act threatened is lawful	6.50	75
Whether the consent is voluntary	6.51 – 6.58	75
Whether the threat is legitimate	6.59 – 6.64	78
Threats, offers and abuse of power	6.65 – 6.72	80
Other pressures	6.73 – 6.77	82
Law reform proposals	6.78 – 6.90	85
Types of deception that may nullify consent	6.79	85
Other types of fraudulent misrepresentation that may nullify consent	6.80	85
An offence of procuring consent by deception	6.81	85
A definition of "deception"	6.82	86
Inducing another person to perform an act on oneself by deception	6.83	86
The duty to communicate information	6.84	86
Self-induced mistake	6.85	86
Non-disclosure	6.86	87
Inducement by threats of non-consensual force	6.87	87
The effect of other threats on the validity of consent	6.88	87
An offence of procuring consent by threats	6.89	87
Special consideration for a particular class of threat	6.90	88
PART VII: THE DEFENDANT'S MENS REA	7.1 – 7.35	89
PART VIII: MEDICAL AND SURGICAL TREATMENT		
Introductory	8.1 – 8.6	102
The approach adopted in other criminal codes	8.7 – 8.11	104
The relevant issues	8.12 – 8.24	105
The nature and scope of the defence of necessity	8.13	106
Who may lawfully administer medical treatment	8.14 – 8.15	106
That the treatment is performed with reasonable skill and care	8.16	107
That it is reasonable to administer the treatment	8.17	107
That the treatment is for a therapeutic purpose, for the purposes of medical research, or for another lawful purpose	8.18	107

	Paragraphs	*Page*
That if the person in question is capable, he or she has given consent	8.19 – 8.21	107
That if the person in question is not capable or is under 18 a lawful consent has otherwise been given	8.22	108
That the treatment is for the patient's benefit	8.23	108
That the treatment, or research, involves a risk of harm that is not disproportionate to the expected benefits	8.24	108
The formulation of a medical exemption	8.25 – 8.48	109
Sterilisation	8.26	109
Abortion	8.27	109
Sexual reassignment operations	8.28 – 8.29	110
Cosmetic surgery	8.30	110
Organ transplants	8.31 – 8.37	111
Medical research	8.38 – 8.48	114
Law reform proposals	8.49 – 8.52	117

PART IX: CIRCUMCISION, TATTOOING, COSMETIC PIERCING, BRANDING AND SCARIFICATION

Introductory	9.1	119
Circumcision	9.2 – 9.3	119
Male circumcision	9.2	119
Female circumcision	9.3	120
Tattooing	9.4 – 9.6	120
Piercing, branding and scarification	9.7 – 9.21	122
Decorative practices	9.7 – 9.12	122
Religious and cultural practices	9.13 – 9.19	124
Piercing etc: a general comment	9.20 – 9.21	126
Law reform proposals	9.22 – 9.29	127

PART X: THE INFLICTION OF INJURY BY CONSENT FOR THE PURPOSE OF CAUSING PAIN

The causing of pain for religious or spiritual purposes	10.1 – 10.15	130
The causing of pain to enhance sexual pleasure	10.16 – 10.41	133
The borderline between sex and violence	10.42 – 10.51	144
Law reform proposals	10.52 – 10.55	146
Injuries intentionally caused for sexual, religious or spiritual purposes	10.55	148

PART XI: LAWFUL CORRECTION 11.1 – 11.20 149

	Paragraphs	*Page*
PART XII: SPORTS, GAMES, MARTIAL ARTS AND DANGEROUS EXHIBITIONS		
Introductory	12.1 – 12.6	157
The intentional infliction of injury	12.7 – 12.8	159
The reckless infliction of injury	12.9 – 12.31	159
The test of "reasonableness"	12.15 – 12.16	161
The court's power to determine whether the rules are reasonable	12.17 – 12.23	162
How our proposals would work in practice	12.24 – 12.31	163
Boxing	12.32 – 12.38	165
Martial arts	12.39 – 12.50	167
Amateur play and practice	12.51	170
Secondary liability	12.52 – 12.59	170
Presence at the scene	12.55 – 12.57	171
Failure to exercise control	12.58 – 12.59	172
School games and compulsory sports activities	12.60 – 12.63	173
Dangerous exhibitions	12.64 – 12.67	174
Law reform proposals	12.68 – 12.69	175
PART XIII: A RECOGNITION SCHEME FOR SPORTS AND MARTIAL ARTS		
Introductory	13.1 – 13.5	177
Recognition machinery	13.6 – 13.18	178
Law reform proposals	13.19 – 13.20	182
PART XIV: FIGHTING, HORSEPLAY AND PUBLIC ORDER		
Introductory	14.1	184
The law relating to offences against the person	14.2 – 14.3	184
The law relating to the preservation of public order	14.4 – 14.7	185
The responses on consultation	14.8 – 14.15	186
Law reform proposals	14.16 – 14.21	188
PART XV: OFFENCES CONCERNED WITH PUBLIC MORALITY AND PUBLIC DECENCY		
Introductory	15.1	191
Keeping a disorderly house	15.2 – 15.4	191
Brothel-keeping	15.5	192
Previous law reform proposals	15.6 – 15.8	193
Offences against public decency	15.9 – 15.11	194
Conclusions	15.12	195
PART XVI: SUMMARY OF PROVISIONAL PROPOSALS AND ISSUES FOR CONSULTATION		197

	Paragraphs	*Page*
APPENDIX A: RELEVANT PROVISIONS IN THE PRESENT LAW, THE CRIMINAL LAW BILL, AND THE DRAFT CRIMINAL CODE		
Offences against the person		210
Relevant extracts from the 1993 Criminal Law Bill		210
Sexual offences		211
(i) Some relevant provisions of the present law		211
(ii) Some sample extracts from the 1989 Draft Criminal Code		213
APPENDIX B: COMPARATIVE LAW		
European penal code jurisdictions	B.1 – B.22	214
Introduction	B.1 – B.2	214
Denmark	B.3 – B.5	214
Finland	B.6 – B.7	215
France	B.8	215
Federal Republic of Germany	B.9 – B.11	215
Greece	B.12 – B.13	216
Italy	B.14 – B.15	216
Norway	B.16 – B.18	217
Sweden	B.19 – B.20	218
Turkey	B.21 – B.22	218
Common law jurisdictions	B.23 – B.86	219
Australia	B.23 – B.33	219
The degree of harm or injury to which it is possible to give a valid consent	B.23 – B.29	219
The validity of consent	B.30 – B.32	221
A mistaken belief in the victim's consent	B.33	222
Canada	B.34 – B.49	222
Introduction	B.34 – B.35	222
The degree of harm or injury to which it is possible to give a valid consent	B.36 – B.40	223
The validity of consent	B.41 – B.43	224
A mistaken belief in the victim's consent	B.44	225
The special categories	B.45 – B.49	225
New Zealand	B.50 – B.54	226
Scotland	B.55 – B.63	228
The degree of harm or injury to which it is possible to give a valid consent	B.55 – B.58	228
The meaning of consent	B.59 – B.62	230
A mistaken belief in the victim's consent	B.63	231
South Africa	B.64 – B.74	231
Introduction	B.64 – B.65	231
The degree of harm or injury to which it is possible to give a valid consent	B.66 – B.68	232
The validity of consent	B.69 – B.70	233
A mistaken belief in the victim's consent	B.71	233
The special categories	B.72 – B.74	233

	Paragraphs	*Page*
United States of America	B.75 – B.86	235
Introduction	B.75 – B.77	235
The degree of harm or injury to which it is possible to give a valid consent	B.78 – B.80	235
The validity of consent	B.81 – B.82	236
The special categories	B.83 – B.86	237
Consent and sexual offences in selected common law jurisdictions	B.87 – B.103	238
Australia	B.87 – B.94	238
New South Wales	B.87	238
Victoria	B.88 – B.90	239
Australian Capital Territory	B.91 – B.92	240
Queensland	B.93 – B.94	241
Canada	B.95 – B.97	241
New Zealand	B.98 – B.100	242
United States of America	B.101 – B.103	243

APPENDIX C: CONSENT AND THE CRIMINAL LAW: PHILOSOPHICAL FOUNDATIONS

Introductory	C.1 – C.4	245
The quantitative approach to injury	C.5 – C.15	246
A different start: constructing a framework for philosophical investigation	C.16 – C.21	249
Stage one: philosophical approaches to criminalisation	C.22 – C.91	251
Liberalism	C.25 – C.57	252
The harm principle and the offence principle	C.25 – C.33	252
Liberal ideals and values	C.34 – C.38	255
Liberalism and criminalisation	C.39 – C.41	257
Consent and the harm principle	C.42 – C.44	258
Consent and its counterfeits	C.45 – C.53	259
The harm principle and the quantitative approach to consent	C.54 – C.57	261
Paternalism	C.58 – C.69	263
Paternalistic ideals and values	C.60	263
Paternalism and criminalisation	C.61 – C.65	263
Paternalism and the quantitative approach to consent	C.66 – C.69	265
Legal moralism	C.70 – C.91	267
Moralistic values and ideals	C.73 – C.74	268
Moral conservatism	C.75 – C.79	269
Strict legal moralism	C.80 – C.85	271
Legal moralism and consent in the criminal law	C.86 – C.87	273
Moralism and the quantitative approach to consent	C.88 – C.91	273
Stage two: criminal legislation and the criminal process	C.92 – C.107	276
Criminal legislation is the least coercive means that will be effective in combatting the conduct in question	C.94 – C.95	276
The new legislation will not produce side-effects that are morally worse than the conduct to be prohibited	C.96 – C.97	277

	Paragraphs	*Page*
The new legislation will not impugn cherished process values. In particular, it will not be inconsistent with the Rule of Law, and it will not require for its enforcement investigatory techniques that are morally odious and, on balance, worse than the conduct to be prohibited	C.98 – C.102	278
The new legislation will in fact be effective, because its successful operation is consistent with the limitations on criminal justice resources and the priorities of investigators and prosecutors	C.103 – C.104	279
The new legislation is consistent with the existing law and with other law reform priorities	C.105 – C.107	280
Conclusion	C.108 – C.111	281

APPENDIX D: MARTIAL ARTS

A description of some of the martial arts which are recognised by the Sports Council	D.1 - D.16	283
Aikido	D.1 – D.4	283
Ju Jitsu	D.5	284
Karate	D.6 – D.7	284
Kendo	D.8	285
Kung Fu	D.9	285
Taekwondo	D.10 – D.16	285
Martial arts activities not recognised by the Sports Council	D.17 – D.26	287
Grappling format: Knockdown Sport Budo	D.17	287
Full-contact Karate	D.18	287
Knockdown Karate	D.19	287
Semi-contact Karate	D.20	288
Thai boxing and Kick-boxing	D.21 – D.26	288

ABBREVIATIONS

In this paper we use the following abbreviations:

ACPO: the Association of Chief Police Officers

BKF: British Karate Federation

BTC: British Taekwondo Council

CCPR: Central Council of Physical Recreation

CLRC: Criminal Law Revision Committee

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

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

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

Code Report: A Criminal Code for England and Wales (1989) Law Com No 177, 2 vols

Consultation Paper No 134 *or* the first Consultation Paper: Criminal Law: Consent and Offences Against the Person (1994) Law Commission Consultation Paper No 134

the Convention: the European Convention on Human Rights

CPS: Crown Prosecution Service

Criminal Law Bill: the Draft Bill implementing the recommendations in Law Com No 218, contained in Appendix A to that Report

Draft Code (or Draft Criminal Code): the draft Bill contained in Volume 1 of A Criminal Code for England and Wales (1989) Law Com No 177

EKGB: English Karate Governing Body

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

ITF: International Taekwondo Federation

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

MLCL vols 1–4: Joel Feinberg, *The Moral Limits of the Criminal Law*, Volume One: *Harm to Others* (1984); Volume Two: *Offense to Others* (1985); Volume Three: *Harm to Self* (1986); Volume Four: *Harmless Wrongdoing* (1988)

SPTL: Society of Public Teachers of Law

the Strasbourg Commission: the European Commission of Human Rights

the Strasbourg Court: the European Court of Human Rights

TCCB: Test and County Cricket Board

WAKO: World Association of Kickboxing Organisations

WTF: World Taekwondo Federation

WUKO: World Union of Karate Organisations

PART I

GENERAL OVERVIEW

INTRODUCTORY

1.1 In February 1994 we published a Consultation Paper entitled "Consent and Offences Against the Person".[1] As we explained, this was an extension of the earlier work we had been doing on the law of offences against the person.[2] When we started that earlier work we were inclined to think that issues relating to consent should be left to be developed by the common law. We were persuaded, however, that we should not leave things like that. Instead we should carry out our own critical scrutiny of the relevant common law rules, in order to see whether it was possible to reach agreement on their limits and express them in statutory terms. At about the same time the decision of the House of Lords in *Brown*[3] cast fresh light on the unprincipled way in which these rules had developed, and revealed considerable disagreement about the basis and policy of the present law, its detailed limits and its scope for future development.

1.2 In the event it turned out that we were obviously right to carry out this study. The consultation we conducted last year brought to light a wealth of valuable new evidence which we are setting out in the body of this second Consultation Paper. It also revealed serious deficiencies in the present law[4] as well as considerable disagreement, in certain areas, as to what the policy of the law ought to be. Some of the topics we discuss in this Paper are novel and controversial, and even though we have now felt able to put forward provisional proposals in relation to many of them, these do not necessarily represent the views we will eventually express at the end of this project. Because some of the issues in this Paper are exceptionally difficult, we have sometimes been obliged to set out the evidence about them, and the different approaches that might be adopted to them, at considerable length. In any event, whatever conclusions we may eventually arrive at, the answers to these questions are ultimately for the Government and Parliament to decide, after thorough public debate. The statutory function of this Commission is to keep the law under review, to identify weaknesses and to make suggestions for reform which may or may not be taken up by others.[5]

[1] Consultation Paper No 134.

[2] Law Com No 218.

[3] [1994] 1 AC 212.

[4] For example, the serious gaps in the powers given to local authorities to control tattooing and piercing in their local areas (see Part IX) or the lack of statutory or other really effective control over certain modern martial arts in which there is a substantial risk of serious injury (see Part XII).

[5] See Minutes of Evidence, Home Affairs Committee, the Work of the Law Commission, (1993-4) HC 418 i, Q12. See also Law Commissions Act 1965, s 3(1).

1.3 The questions we posed at the end of the first Consultation Paper reflect the approach we were then adopting to possible options for law reform. We asked whether it was agreed that the law should place some limit on the degree of injury to which a victim might consent, and in general the response came back that it should. We then asked whether consultees supported the present general limit, as stated by the majority of the House of Lords in *Brown*,[6] that consent is no defence in respect of an act that is intended or likely to do actual bodily harm, or injury. Again, the main thrust of the responses was to the effect that the present limit was restrictively low, although there were some powerful voices declaring that the present balance of the law should not be altered.

1.4 On the hypothesis that the law might be altered, we asked a number of technical questions about the form that a revised law should take, and we followed these up by asking some more general questions about the way that the law of consent might be recast to make it easier to detect the cases where consent is not in fact "real" or "voluntary". Parts IV–VII of this Paper contain a detailed examination of the responses we received and a description of the new provisional proposals we make for law reform in this very difficult area of the law.

1.5 In the first Consultation Paper we specifically excluded any detailed study of three complex or controversial areas of activity: surgical interference, boxing and "lawful correction".[7] We remain of the view that consideration of any reform of the law relating to lawful correction should form no part of the present study, since for all practical purposes it has nothing to do with consent, but in deference to our critics we have included in this paper a short Part[8] which sets out the present law and explains why we think it inappropriate to expand our present work into that area. On the other hand, we have been persuaded that it would be useful to extend the scope of this project to include issues relating to medical and surgical treatment: it would be difficult, for instance, to include cosmetic piercing and exclude cosmetic surgery in our final report.

1.6 On boxing we have adopted a middle course. The evidence we received on consultation revealed to us that boxing is by no means an exceptional case, and there are a number of martial arts activities being practised in this country which expose their participants to just as much potential risk without being subjected to regulatory control of the quality of that now being exercised by the boxing authorities. We remain of the view that the question whether boxing, and some of these other activities, should remain lawful, or should be treated as being lawful, is ultimately a matter for political decision, and Parliament has recently re-affirmed its wish that boxing should not be outlawed. Our function is the less ambitious one of identifying and recommending the framework of law in which such activities should be set. This approach enables us to identify the weaknesses of the

[6] See n 3 above.

[7] For our reasons, see Consultation Paper No 134, paras 2.4, 2.7 and 2.9.

[8] See Part XI below.

present system of controls, if these activities are to be treated as being within the law, and to suggest ways in which these weaknesses may be addressed more effectively and systematically.

1.7 We have also decided that it is now necessary to extend the scope of this study in one further way. In the first Consultation Paper we were concerned only with the law relating to offences against the person, and not with the law relating to sexual offences. We were convinced, however, by the responses we received on consultation that it would be unsatisfactory to emerge with recommendations that did not take into account other aspects of the law of consent. If Parliament were ever to consider that the time had come to liberalise the law on certain types of sado-masochistic activity which are now fairly widely practised,[9] one would have to visualise a case in which a woman accused her male partner of both beating her and having sexual intercourse with her without her consent. Our present view is that it would make things extremely difficult for those who have to enforce the law if two quite separate regimes for consent operated in relation to these two types of offence which, although obviously different in their distinctive subject matter, are often very closely linked in practice.

1.8 It is not our purpose, however, to conduct a very radical review of the present structure of the law on sexual offences. We have not been asked by the Government to do so, and the more broadly based CLRC, working closely with the then Home Secretary's Policy Advisory Committee, has carried out such a review itself fairly recently.[10] There was very little in the responses we received on consultation in the course of the present project to persuade us that there would be much general support for any very substantial departures from the CLRC's approach in advance of a major re-examination of the whole topic.[11] On the other hand, the need to state the law along the clear lines recommended by the CLRC and codified by us, without amendment, in our Draft Criminal Code in 1989 became more and more obvious as the present study proceeded, and in Parts VI and VII of this Paper we suggest further ways in which the CLRC's proposals might be altered in the light of the discussion contained in those two Parts.

1.9 Another reason why we have decided to carry out this further consultation exercise is that we received so much evidence in response to our 1994 consultation relating to activities which have never, so far as we know, been the subject of an official study of this nature that we believed that we ought to publish this evidence now in order that those who respond to the proposals in this paper may share with

[9] See Part X below.

[10] CLRC, 15th Report. This report was preceded by the Heilbron Report and the enactment of the Sexual Offences (Amendment) Act 1976.

[11] We are at present conducting a major study on that scale in relation to the law of dishonesty. In our Sixth Programme of Law Reform (1995) Law Com No 234 we said, at p 39, that we believed that it was desirable to re-examine a country's dishonesty laws once in every generation. The same might be said about a country's laws relating to sexual offences.

us a sounder understanding of the nature and extent of these activities and the problems created by their present uncertain relationship with the criminal law.[12]

THE CURRENT PROCEEDINGS BEFORE THE STRASBOURG COMMISSION

1.10 We refer in paragraph 3.1 below to the fact that the Strasbourg Commission is going to give its opinion quite soon on the issues arising in the case lodged by some of the unsuccessful applicants in *Brown*.[13] This opinion should become available long before the end of the consultation period on this Paper, and we see nothing to be gained by delaying the publication of this Paper until after the Commission's opinion is known. If the case proceeds from the Commission to the Strasbourg Court,[14] there is always a possibility that the Court may take a different view from the Commission. In the circumstances, it seemed to us to be preferable to set out in Part III of this paper our present understanding of relevant principles of Convention jurisprudence, and to allow our respondents to take the opinion of the Commission into account when in due course it becomes available.

THE PRESENT LAW

Offences against the person

1.11 The present law was fully set out in the first Consultation Paper, to which readers must refer for a detailed exposition. Four cases decided in the last 120 years[15] trace the development of this part of the law from Victorian times until the present day. In short, the consent of the injured person does not normally provide a defence to charges of assault occasioning actual bodily harm or more serious injury. Onto this basic principle the common law has grafted a number of exceptions to legitimise the infliction of such injury in the course of properly conducted sports and games, lawful correction, surgery, rough and undisciplined horseplay, dangerous exhibitions, male circumcision, religious flagellation, tattooing and ear piercing.[16] It is part of the purpose of the present project to identify the principles which ought to underpin the criminal law in this area, and to recommend appropriate reform if the present state of the law conflicts with those principles.

[12] We refer, in particular, to the evidence about piercing, branding and scarification in Part IX below; to the evidence about religious and spiritual mortification, and about sado-masochistic activities, in Part X below; and about certain dangerous martial arts activities that are not at present recognised by the Sports Council in Part XII and Appendix D below.

[13] See n 3 above.

[14] The procedure is described in para 3.1 and n 4 in Part III below.

[15] *Coney* (1882) 8 QBD 534; *Donovan* [1934] 2 KB 498; *Attorney-General's Reference (No 6 of 1980)* [1981] QB 715; *Brown* [1994] 1 AC 212.

[16] In the unreported case of *Oversby*, Central Criminal Court, Judge Rant QC ruled at first instance in December 1990 that piercing other parts of the body for decorative or cosmetic purposes could be lawfully carried out, distinguishing this practice from body-piercing for sexual gratification which he, and the higher courts, held to be unlawful. See para 9.7 below.

Sexual offences

1.12 The law is largely to be found in a 1956 consolidation Act, with some more recent statutory modifications and a very considerable continuing contribution of judge-made law.[17] Last year Parliament, for instance, enlarged the offence of rape. By section 1 of the Sexual Offences Act 1956[18] a man can now commit the offence on a woman or another man. It is now provided that a man commits rape if he has sexual intercourse with a person (whether vaginal or anal) who at the time of the intercourse does not consent to it, and at the time he knows that the person does not consent to it or is reckless as to whether that person consents to it. This section provides that a man also commits rape if he induces a married woman to have intercourse with him by impersonating her husband.[19] It is also "declared" by statute that if at a trial for a rape offence the jury has to consider whether a man believed that a woman or a man 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.[20] There are two other statutory offences running alongside the statutory offence of rape. It is an offence for a person to procure a woman, by threats or intimidation, to have unlawful sexual intercourse in any part of the world.[21] And it is also an offence for a person to procure a woman, by false pretences or false representations, to have sexual intercourse in any part of the world.[22]

1.13 "Consent" is therefore explicitly mentioned in the statute law governing offences of sexual penetration, even though Parliament has not yet implemented the recommendations of the CLRC which were designed to clarify its meaning.[23] So far as the law of indecent assault is concerned, it is expressly provided that neither a boy nor a girl under the age of sixteen can in law give any consent which would prevent an act being an assault for the purposes of the relevant sections.[24]

[17] See Appendix A for relevant provisions of statute law.

[18] As substituted with effect from 3 November 1994: see Criminal Justice and Public Order Act 1994, ss 142 and 172(4).

[19] Sexual Offences Act 1956, s 1(3), as substituted: see n 18 above for the substitution, which reflected Parliament's implementation of Clause 1 of the draft Sexual Offences Bill contained in Criminal Law: Rape Within Marriage (1992) Law Com No 205. The precise status of the decision of the Court of Appeal in *Elbekkay* [1995] Crim LR 163, which expanded the law just before the enactment of the 1994 Act, by making it clear that such fraud is not limited to fraudulently impersonating one's husband, may now be in some doubt, in the absence of further primary legislation: see para 6.14 below.

[20] Sexual Offences (Amendment) Act 1976, s 1(2), as amended by the Criminal Justice and Public Order Act 1994, s 168(2) and Sched 10, paras 35(1) and (2).

[21] Sexual Offences Act 1956, s 2(1), as amended by the Criminal Justice and Public Order Act 1994, ss 168(1) and (3), and Sched 9 para 2 and Sched 11.

[22] Sexual Offences Act 1956, s 3(1), as amended by the Criminal Justice and Public Order Act 1994, ss 168(1) and (3), and Sched 9 para 2 and Sched 11.

[23] See para 1.17 below. In the meantime courts and juries are constrained to follow the guidance given by the Court of Appeal in *Olugboja* [1982] QB 320, for which see para 6.39 below.

[24] Sexual Offences Act 1956, ss 14(1) and (2), and 15(1) and (2).

Offences against the person

1.14 For over 20 years this Commission and others have been concerned about the very poor quality of the law relating to offences against the person. A succession of working papers and reports on this topic culminated in November 1993 with the publication of our report on Offences Against the Person.[25] In the draft Bill attached to that report, the three new grades of offence (assault; causing injury; causing serious injury) may be committed intentionally or recklessly.[26] Clause 1 of the Bill provides that a person acts intentionally with respect to a result when it is his purpose to cause it,[27] and that a person acts recklessly with respect to a result, when he is aware of a risk that it will occur, and it is unreasonable, having regard to the circumstances known to him, to take that risk.[28] The draft Bill reflects the present state of the law in that the absence of consent is only mentioned as a prerequisite in the least serious of the three new grades of offence, and also in the offence of administering a substance without consent.[29] Clause 20 of the Bill preserves the existing common law defences, which will include, in the present context, the categories of exception to the general rule which are now recognised by the law.[30]

1.15 In the first Consultation Paper we said that we would assume that the structure of offences and the terminology of the law that applies to a force or impact more serious than that which founds an offence of assault would be that which is set out in paragraph 1.14 above.[31] We will continue to act on this assumption, even though Parliament has not yet implemented our recommendations, because we consider that there is no other course of action realistically open to us, and our proposals encountered very widespread support when they were submitted to consultation three years ago.[32] We will explain the effect of this decision in more detail in Part IV below, because it is clear to us from the responses on consultation that the practical effect of our proposals, particularly in relation to reckless injury, is not widely understood.

[25] Law Com No 218. This report sets out very clearly what is wrong with the present law and the history of the efforts to reform it.

[26] For the full text of the recommended draft clauses, see Appendix A below.

[27] Or, although it is not his purpose to cause it, he knows that it would occur in the ordinary course of events if he were to succeed in his purpose of causing some other result. Criminal Law Bill, cl 1(a)(i) and (ii).

[28] A person acts recklessly with respect to a circumstance, when he is aware of a risk that it exists, or will exist, and it is unreasonable, having regard to the circumstances known to him, to take that risk. *Ibid*, cl 1(b)(i) and (ii).

[29] *Ibid*, cls 5 and 6.

[30] See para 1.11 above.

[31] Consultation Paper No 134, para 1.7.

[32] See Law Com No 218, paras 3.1 – 3.7, where we say in particular that our proposals were strongly supported by the Council of Circuit Judges, the CPS, ACPO, the Metropolitan Police, the Police Federation of England and Wales, the Bar Council, the Criminal Bar Association, the Criminal Law Committee of the Law Society, the Institute of Legal Executives and by a number of academic commentators.

1.16 The concept of consenting to the intentional infliction of injury raises no particular difficulties in principle. In some of the present exceptions to the rule injury is *intentionally* inflicted with consent,[33] and the question in issue in the present project is the extent to which the criminal law should continue to intervene in other contexts to protect people who are willing that harm should be inflicted on them by others. Consent to the risk of injury, on the other hand, raises rather different issues. In most lawful sports the rules of the sport do not permit the intentional infliction of injury, but the existence of a risk of injury often adds to the excitement of the sport.[34] We will consider these issues in Parts IV and XII below.

Sexual offences

1.17 For modern law reform proposals in relation to sexual offences it is to the cogent but as yet unimplemented recommendations of the CLRC[35] that it is necessary to turn. These recommendations were codified, without amendment, in our Draft Criminal Code. They provide that a man will be guilty of rape if he has sexual intercourse with a woman without her consent and he knows that she is not consenting, or he is aware that she may not be, or does not believe that she is, consenting. A woman is to be treated as not consenting to sexual intercourse if she consents to it because a threat, express or implied, has been made to use force against her or another if she does not consent and she believes that, if she does not consent, the threat will be carried out immediately or before she can free herself from it; or because she has been deceived as to the nature of the act or the identity of the man.[36] The two ancillary offences are committed if a person procures a woman by threats or intimidation, alternatively by deception, to have sexual intercourse in any part of the world.[37]

THE DOCTRINE OF NECESSITY

1.18 Nothing in this Consultation Paper is intended to diminish or affect the common law defence of necessity.[38] In the context of medical treatment, for instance, the doctrine of necessity may be invoked where a patient is incapable of giving consent, for whatever reason,[39] and treatment is required. In Law Com No 218 we explained why we had decided to follow the approach adopted in the Draft Code and to make no attempt to codify this common law principle which is still of

[33] Ear-piercing, surgery, male circumcision, tattooing and religious flagellation, for instance.

[34] So, too, in the case of dangerous exhibitions.

[35] CLRC, 15th Report.

[36] Draft Criminal Code, s 89. An identical provision is made, mutatis mutandis, in relation to the offence of buggery, *ibid*, s 95. See now the Criminal Justice and Public Order Act 1994, s 142 and para 1.12 above.

[37] Draft Criminal Code, ss 90 and 91. And see Appendix A below.

[38] Cases of necessity arise where a person does not rely on any allegation that circumstances imposed an irresistible pressure to act as he or she did, but rather that, although his or her conduct fell within the definition of an offence, it was not harmful because it was, in the circumstances, justified.

[39] Eg knocked unconscious, under anaesthesia, or mentally incapable of comprehending the need for treatment.

uncertain scope.[40] We suggested that a defendant who relies on this doctrine is in effect claiming that his or her conduct, which would otherwise fall within the definition of an offence, was not harmful because it was in the circumstances justified. In *Re F*[41] the sterilisation of a 37-year old woman who suffered from a mental disorder was held to be justified by the doctrine of necessity provided that the treatment was in her own best interests. The House of Lords deliberately decided not to give an answer to a point which has troubled the courts in Canada, as to the circumstances in which a surgeon may lawfully deal with a condition discovered during an operation conducted for a quite different purpose without first allowing the patient to recover consciousness and decide whether to give consent to this further treatment.[42]

1.19 For the purposes of the present study it is not necessary to explore the nature and scope of this defence any further. It is sufficient to note that it exists, that it is not abrogated by the Criminal Law Bill in Law Com No 218, and that it has very little to do with the defence of consent.[43]

SECONDARY LIABILITY FOR CONSENTING PARTIES

1.20 In the first Consultation Paper we reluctantly made use of the word "victims" when referring to persons who consented to the causation of injury to themselves. We emphasised at the same time that this word may carry "connotations of reluctance or oppression that are not appropriate in many of the cases that we review."[44] In addition to the semantic problems that result from our adoption of this convenient word there is also a legal difficulty. It is possible that the case law discloses a general principle that a statute designed to protect a specific category of persons implicitly excludes the secondary liability of a "victim" who falls within the protected class.[45] While the people involved in the sado-masochistic activities

[40] Law Com No 218, paras 27.4 – 27.5 and 35.4 – 35.7; and see J C Smith and B Hogan, *Criminal Law* (7th ed 1992) pp 245–252.

[41] [1990] 2 AC 1.

[42] *Ibid*, at p 77B–C, *per* Lord Goff of Chieveley, referring to *Marshall v Curry* (1933) 3 DLR 260 (diseased testicle removed during operation for hernia: surgeon claimed successfully he had acted to avert a risk of serious injury or death) and *Murray v McMurchy* (1949) 2 DLR 442 (plaintiff sterilised during Caesarean section: surgeon's defence that the condition of her uterus would make it dangerous to go through another pregnancy rejected on the grounds that he should have obtained her consent). See also *Devi v West Midlands Health Authority* [1980] CL 687 for a comparable English case where the surgeon was held liable for an unlawful battery.

[43] It is very dangerous, for example, for a surgeon to act in the circumstances described in n 42 above on the principle that the patient would have consented had he or she known the circumstances. See the last two cases cited in that note.

[44] Consultation Paper No 134, para 1.2 n 5.

[45] See *Tyrrell* [1894] 1 QB 710 and *Whitehouse* [1977] 1 QB 868. The same principle was more recently confirmed in the first instance case of *Congdon* (1990) 140 NLJ 1223 where the trial judge ruled in favour of the defence submission that aprostitute could not be convicted of aiding and abetting her husband, the principal offender, in living on her immoral earnings. It is unclear quite how far the principle applied in these cases will extend. The textbook writers have expressed doubts about the effect of the leading cases. For commentaries see J C Smith and B Hogan, *Criminal Law* (7th ed 1992) pp 155–157 and C M Clarkson and H M Keating, *Criminal Law: Text and Materials* (3rd ed 1994) pp 538–539.

that formed the background to the *Brown*[46] appeals were, in general, willing and enthusiastic participants in such activities, our policy is that their consent should not *automatically* exclude them from the protection of the criminal law while not excluding completely the possibility of secondary liability.

1.21 In that our general policy is aimed at preventing the infliction of *seriously disabling* injury[47] we take the view that there is no *necessary* contradiction between the protection that is afforded to the public through criminalising the actions of principal offenders and the imposition of secondary liability on those who actively encourage the infliction of such injury on themselves.[48] In the *Brown* case itself, 26 persons who were participants in sado-masochistic activity were cautioned for aiding and abetting offences against themselves.[49]

1.22 This is not the first occasion on which the Commission has grappled with questions of this kind. In the Code Report we recommended that "it is right in principle to exempt even from theoretical liability a person whom it was the very purpose of the legislation to protect so long as the definition of the offence does not describe his or her conduct as that of a principal."[50] These issues were also considered in our recent Consultation Paper on Assisting and Encouraging Crime.[51] In that Paper we concluded that the Draft Code formula, which was limited to those offences that were enacted with the purpose of protecting a certain class, should be extended so that "a person is not guilty of complicity by assisting an offence if the offence is so defined that his conduct is inevitably incidental to its commission and that conduct is not made criminal by that offence."[52] We were concerned, however, to leave open the possibility that those secondary parties who "positively" sought the commission of the principal offence should face liability: such persons, we suggested, may need to be protected "against themselves".[53]

1.23 In the context of this Paper it is our provisional view that, while these issues can be more fully canvassed as part of the project on assisting and encouraging crime, in appropriate cases the imposition of secondary liability on consenting parties is

[46] [1994] 1 AC 212.

[47] See para 2.18 below.

[48] See C M Clarkson and H M Keating, *Criminal Law: Text and Materials* (3rd ed 1994) p 539: "It thus seems that the passive participants in *Brown* were not 'victims' for the purpose of the protection afforded by the rules on accessorial liability but, of course, were regarded as 'victims' for the purpose of assessing the criminal liability of the principal offender." The secondary liability of those who willingly take the passive role in sado-masochistic activity will, under our proposals, depend upon whether the injuries that they sustain can be described as seriously disabling: see paras 4.29 – 4.40 below.

[49] See C M Clarkson and H M Keating, *Criminal Law: Text and Materials* (3rd ed 1994) which refers, at p 539, to an article covering this police action in *The Guardian*, 8 February 1992.

[50] Code Report, vol 2, para 9.39. See Draft Code, s 27(7).

[51] Assisting and Encouraging Crime, Consultation Paper No 131 (1993), paras 4.01 – 4.105 and 4.138 – 4.140.

[52] *Ibid*, para 4.103.

[53] *Ibid*, para 4.139.

entirely consistent with the general policy described in Part II of this Paper. **We therefore provisionally propose that, where a person causes seriously disabling injury to another person who consented to injury of the type caused, and the person causing the injury is guilty of an offence under the proposals in paragraphs 4.47 and 4.48 below, the ordinary principles of secondary liability should apply for the purpose of determining whether the person injured is a party to that offence.**

CONSENT AS A DEFENCE IN THE WIDER CRIMINAL LAW

1.24 This paper is primarily concerned with issues relating to the law of offences against the person and sexual offences. There are, however, a number of other criminal offences in which the victim's consent, or the defendant's belief in the existence of such consent, can provide a defence to liability. The offence of burglary,[54] for example, cannot be committed by a person to whom the owner has given consent to enter his or her premises, because the owner's consent means that the defendant does not commit the trespass that is a necessary element of the offence;[55] and the Court of Appeal in *Collins*[56] has held that an honest, if mistaken, belief in the existence of the owner's consent will also provide a defence to a charge of burglary. Other applications of the defence of consent can be found in certain property offences: making off without payment,[57] criminal damage,[58] and taking a conveyance without authority.[59] The existence of a valid consent on the part of the victim will, in all these offences, provide a complete defence, as will the defendant's honest belief in the existence of such consent.

1.25 Since the decision of the House of Lords in *Gomez*,[60] the relevance of consent to the offence of theft has been confined to the defence provided in section 2(1)(b)

[54] Theft Act 1968, s 9.

[55] A number of new offences of criminal trespass were created by the Criminal Justice and Public Order Act 1994. The Act provides defences for defendants able to prove that they are not trespassing.

[56] [1973] QB 100.

[57] Theft Act 1978, s 3(1). See *Hammond* [1982] Crim LR 611 in which the trial judge ruled that the payee's consent to the defendant's departure prevented the latter from "making off" within the meaning of s 3 of that Act. There is also a good deal of academic support for the view that a permitted departure cannot give rise to liability for the making off offence: see F Bennion, "The Drafting of section 3 of the Theft Act 1978 (Letter to the editor)" [1980] Crim LR 670 and "Making Off Without Payment (Letter to the editor)" [1983] Crim LR 205. See also A T H Smith, *Property Offences* (1994) para 20-94.

[58] Criminal Damage Act 1971, s 1(1). *Ibid*, s 5(2) provides that an honest, even if mistaken, belief that the owner of property consented, or would have consented, to the damage to his property shall be a lawful excuse. In *Denton* (1981) 74 Cr App R 81 the Court of Appeal said that, quite apart from that section, the actual consent of the owner of property can provide a defence to liability for criminal damage.

[59] Theft Act 1968, s 12(1). In common with the other offences listed in the text, 2 consent-based defences exist in respect of this statutory offence. The first is a justificatory defence based on an actual consent by the owner of the conveyance; the second, mens rea, defence, provided by *ibid*, s 12(6), is based on the defendant's *belief* "that he has lawful authority ... or that he would have the owner's consent if the owner knew of his doing it and the circumstances of it."

[60] [1993] AC 442.

of the Theft Act 1968, by which a person is not dishonest if "he appropriates the property in the belief that he would have the other's consent if the other knew of the appropriation and the circumstances of it."

1.26 Despite the fact that the factual circumstances to which the consent defence is applied will vary from offence to offence we are at present of the view that the provisional recommendations we will be making in Parts V and VI of this Paper[61] should in general be the same in respect of all the criminal offences to which the defence applies.[62] In paragraph 7.28 below, however, we will be saying that our new provisional proposals that are contained in Part VII in relation to mens rea should be limited to the law of sexual offences and offences against the person. We are very anxious to receive the views of respondents on the issues we have discussed in this section, as there may be matters that we have overlooked.

1.27 **We therefore provisionally propose that the recommendations contained in Parts V and VI of this paper should apply not only to offences against the person and sexual offences but also to every other criminal offence in which the consent of a person other than the defendant is or may be a defence to criminal liability.**

THE STRUCTURE OF THIS PAPER

1.28 In Part II we draw on the responses to consultation and on what appears to be Parliament's present approach to questions of criminalisation in order to suggest a law reform philosophy that might underpin the recommendations we ultimately make. In Part III we endeavour to describe the contribution of the jurisprudence being developed from the European Convention on Human Rights. Parts IV–VII contain our present provisional views on issues of law, taking into account the responses on consultation and the law reform philosophy we are suggesting. In Parts VIII–XII and XIV we consider the issues in relation to all the problematic areas we have identified in the course of this study, and we describe the responses we received to our first Consultation Paper. This section of the paper contains a quite new Part devoted to medical and surgical treatment, and a short Part summarising the law on lawful correction.

[61] In Part V below we discuss issues relating to capacity to consent, and in Part VI below we discuss the effect of fraud, mistake, force, threats and abuse of power.

[62] In *Whittaker v Campbell* [1984] QB 318 Goff LJ observed, at p 326F, that "the concept of consent is relevant in many branches of the law, including not only certain crimes but also the law of contract and the law of property. There is ... danger in assuming that the law adopts a uniform definition of the word 'consent' in all its branches." A good example of the discrepancies in the criminal law is the rule relating to the nullification of consent by fraud. While it is established law that a fraud that goes to the nature of the transaction, a fraud *in the factum*, will nullify the consent obtained thereby for the purposes of the offence of rape, it remains unclear whether the defendant who makes off without payment, after fraudulently obtaining the payee's consent by giving him a worthless cheque, commits a *fraud in the factum* of a kind that will lead to liability under section 3(1) of the Theft Act 1978 (see n 4 above). For a discussion of the rule on nullification of consent by fraud, as applied to the offences of rape, burglary and taking a conveyance without authority, see G Virgo, "When is Consent not Consent?" (1995) 6 Archbold News 6, 8. See further paras 6.11 – 6.18 below.

1.29 In Part XIII we describe proposals for new recognition machinery for sport and martial arts. In Part XIV we discuss the role played in this field by the laws relating to public order and in Part XV by the laws relating to public morality and public decency. In Part XVI we set out a summary of our provisional recommendations and other consultation issues.

1.30 In Appendix A we have set out relevant extracts from the 1993 Criminal Law Bill, the present law on sexual offences, and the 1989 Draft Criminal Code. Appendix B contains a survey of comparative law in a number of civil law and common law jurisdictions, and Appendix C contains the general tenor of the advice we have received from Mr Paul Roberts of the University of Nottingham on three different philosophical perspectives to issues of criminalisation.[63] Appendix D contains a description of some of the modern martial arts to which reference is made in Part XII. We hope that the comparative law which is to be found in Parts III and Appendix B, and the guidance on contemporary philosophical perspectives in Appendix C, may be helpful to our readers when they are preparing responses to the issues we are inviting them to consider in this paper.

[63] See para 2.1 below for a fuller explanation.

PART II

POLICIES FOR REFORM

INTRODUCTORY

2.1 Respondents to our first Consultation Paper referred us to a number of different philosophical approaches to criminalisation when they put forward their widely differing views. After we had considered their responses, it seemed to us to be essential to seek expert advice, and we are very grateful to Mr Paul Roberts, of the University of Nottingham, for the invaluable assistance he gave us. Mr Roberts identified for us the three main philosophical perspectives on these issues.[1] We believe that it will greatly assist respondents to this second paper if we make available to them the general tenor of Mr Roberts's advice, even if we have not been able to adopt the approach he would favour in the law reform strategy we suggest at the end of this Part. We are therefore reproducing it as Appendix C to this Paper.

2.2 When formulating our suggested strategy we have felt constrained to take much greater account of what we believe to be the contemporary approach of members of both Houses of Parliament to issues of criminalisation, even if they do not fit coherently into any consistent pattern of modern philosophy. We hope the responses that this Paper will elicit will guide us towards creating a much firmer foundation for any recommendations we may ultimately make. We must add that we have also been greatly assisted by the responses we received on consultation, although the sharply conflicting nature of many of them has not made our task any easier. In paragraphs 2.3 to 2.9 below we give a small sample of the different views that were expressed to us. Other examples will follow in the text of later Parts of this Paper where we address specific issues.

LIBERAL RESPONSES

2.3 "Every human being of adult years and sound mind has a right to determine what should be done with his body".[2] We were repeatedly urged to start from this well-known principle. Respondents expressed the idea in a number of different ways:

> Respect for personal autonomy is important in our law in maintaining liberties. An argument which denies people autonomy is particularly subversive of liberties, since it impliedly fails to treat the person concerned as worthy of the respect which is normally a citizen's due.
>
> An individual's desire to express himself in sexual terms is no less deserving of legal recognition and protection than a person's need for and right to, say, religious freedom and other ideological liberties.

[1] These are liberalism, paternalism and legal moralism. An explanation of each of these perspectives can be found in Appendix C at paras C.25 – C.57 (liberalism), C.58 – C.69 (paternalism) and C.70 – C.91 (legal moralism).

[2] *Schloendorff v Society of New York Hospital* 105 NE 92, 93 (1914) *per* Cardozo J.

> Ideally a person should be free to do as they wish with their own body. However bizarre it may seem to most people that a person should wish violence to be inflicted on themselves it is their right.

2.4 Many respondents told us that it was no business of the state to pick and choose for criminalisation the activities it found distasteful, provided that those who participated in them were doing no harm to others. Typical comments include:

> [The present limit] makes the law unduly intrusive in areas which many find morally objectionable but which really cause no danger to society at all.
>
> The fact that I find tattooing, boxing and sado-masochism all distasteful is no reason to make some of these activities lawful and some not.
>
> A rule which overrides the decision of an autonomous person merits exhaustive scrutiny because it may go beyond legitimate action respecting autonomy and become a means whereby those in power may impose their version of the good life on rationally capable people who lack power and in the result lose their autonomy.
>
> A law on consensual assault should be even-handed and should not discriminate against some groups of people or activities.
>
> Attempts to distinguish between physical injury which has social merit and that which does not is purely arbitrary. Why should one set of prejudices be imposed on the many responsible and sensible people whose outlook may be quite different?
>
> The attraction of nipple or genital piercing may be bewildering to the unpierced majority, but it would astound those whose bodies are so decorated that they might be charged with a criminal offence.

PATERNALIST AND LEGAL MORALIST RESPONSES[3]

2.5 In contrast, a number of those who preferred to see no change in the present law did so because they were anxious about the effect of a law change on the vulnerable people the law should be protecting, or about the messages the effect of a law change would be sending out to a society already sated with violence, or about the practicality of drafting a satisfactory new codified law which would cover all the cases where vulnerable people need protection.

2.6 Some of these respondents also urged us to take very seriously the messages which would be sent out if the laws permitting consent to violence were liberalised, although very few contended that the content of the criminal law should be dictated by the tenets of any particular religion, Christian or otherwise. The most powerful of these concerns was expressed by the Legal Committee of the Magistrates' Association:

[3] For paternalism and legal moralism see the references in n 1 above.

> The abuse of sex and violence is not conducive to the public interest. Society should set its face against such abuse, in the law and in other ways. The infliction of bodily harm imposes burdens on the victims and upon society (eg family, dependants, friends, the health service, social services, the community). Breeding and glorifying cruelty is barbaric and degrading to body and mind of everybody involved. Individual membership of society carries obligations and duties and responsibilities as well as rights. Society does have the moral and ethical and social right to insist upon minimum standards of acceptable conduct.

2.7 The Justices' Clerks' Society, for its part, attached great importance to the question whether the public would regard itself as being protected adequately if the current rules were relaxed at a time when levels of violence generally had increased. The Law Reform Committee of the Bar Council believed that the current law was workable *and in line with public expectations*. One academic respondent[4] observed that even in the Netherlands, where consent is given the greatest respect, the consensual infliction of serious injury in a sado-masochistic context is regarded as criminal,[5] and he added that this *clearly accords with public opinion*. He said that comparable legal systems had solved the problem by placing an upper limit on the amount of injuries that could be consensually inflicted, and he cautioned us to be wary of straying too far along the lines of liberal tolerance.

2.8 Another academic respondent[6] considered that it was material whether consensual acts involving two or more people were performed in private or in public.[7] If they are performed in private, the only societal involvement is one of moral outrage or discomfort, when such acts get known about, apart from any economic costs involved. If they are performed in public there is the additional likelihood of tangible harm to society by any disturbance that is caused because the events are actually witnessed by others. The Standing Legal Committee of the Metropolitan Stipendiary Bench shared this approach in relation to acts involving serious injury committed by consent between adult persons in private:

> Of course such acts should doubtless invite disapprobation, but this is an area where argument, education and exhortation may well be justifiable but legal punishment is simply inappropriate, ultimately futile and, we suspect, would enjoy little if any contemporary public support.

2.9 All those who addressed the issue considered that there must be safeguards in the law to take account of concerns about the young and the vulnerable and the

[4] D J Ibbetson, of Magdalen College, Oxford.

[5] Wetboek van Strafrecht, Art 300 para 9.

[6] D Ormerod, of Nottingham University.

[7] Cf the Report of the Committee on Homosexual Offences and Prostitution (1957) Cmnd 247, para 64: "It is our intention that the law should continue to regard as criminal any indecent act committed in a place where members of the public may be likely to see and be offended by it, but where there is no possibility of public offence of this nature it becomes a matter of the private responsibility of the persons concerned and as such, in our opinion, is outside the proper purview of the criminal law."

preservation of public decency. Liberty, for example, considered that there was already ample provision in English law to protect minors and vulnerable adults, and to protect public decency (including in this context laws forbidding compulsion in sexual matters or solicitation for sexual purposes).

PRAGMATIC CONSIDERATIONS ABOUT LAW ENFORCEMENT

2.10 Concern was expressed by some respondents about laws which were so regularly broken that they were in practice unenforceable, if taken literally. The CPS said that the present rule has some difficulties, because it captures conduct that is not generally regarded as criminal[8] and relies on the discretion of police and prosecutors to keep the law within the bounds of acceptability: this means that its reach cannot be predicted in advance (until a prosecution actually happens) with any certainty. The English Collective of Prostitutes was among the respondents who protested against laws which placed much too much power within the arbitrary discretion of the prosecuting authorities.

A RECENT INDICATION OF PARLIAMENTARY OPINION

2.11 There has been a good deal of recent debate as to whether English law should now permit voluntary euthanasia.[9] In 1994 the multi-disciplinary House of Lords Select Committee on Medical Ethics decided unanimously that there ought to be no change in the substantive law relating to euthanasia, mercy killing or complicity in suicide.[10] The committee regarded society's prohibition of intentional killing as the cornerstone of law and of social relationships, and it did not want to see the protection afforded to every citizen by this part of the criminal law weakened in any way. Although the committee acknowledged that there were individual cases in which euthanasia might be seen by some to be appropriate, the issue of euthanasia was one in which the interest of an individual could not be separated from the interests of society as a whole. The committee was influenced by a number of practical considerations. It did not think it possible to set secure limits on voluntary euthanasia, for example, nor did it believe that it would be possible to frame adequate safeguards against non-voluntary euthanasia if voluntary euthanasia were to be legalised. It was also concerned that vulnerable

[8] It instanced as extreme examples rupturing the hymen during sexual intercourse and lovebites. In *Boyea* (1992) 156 JP 442; [1992] Crim LR 574 the Court of Appeal tried to introduce some semblance of commonsense into the law by ruling that the expression "trifling and transient" (for which see *Donovan* [1934] 2 KB 498), in the context of injuries incurred during sexual activities between adults, must be understood in the light of conditions in 1992. It was indicted by D Kell, "Bodily Harm in the Court of Appeal" (1993) 109 LQR 199 of allowing itself to be influenced by legal moralism (see Appendix C, paras C.70 – C.91 below) as if it was not bound by the earlier decision in *Donovan*. For the CPS's anxieties, see also Appendix C, para C.99 below.

[9] The Law Reform Commission of Canada has defined euthanasia as the "act of ending the life of a person, from compassionate motives, when he is already terminally ill or when his suffering has become unbearable": see Euthanasia, Aiding Suicide and Cessation of Treatment (1983) Report No 20, p 17. For this debate, see, inter alia, J Feinberg, MLCL vol 3, p 385: A Ashworth, *Principles of Criminal Law* (2nd ed 1995) p 285; R Dworkin, *Life's Dominion* (1993) p 213.

[10] Report of the Select Committee on Medical Ethics (1993-1994) HL Paper 21-I, pp 48–49, 53–54.

people would feel pressure, whether real or imagined, to request early death, and that a change in the law would send the wrong message to such people.[11]

RECENT CASE LAW

2.12 Running parallel with this unwillingness of Parliament to countenance decriminalising the act of someone who takes active steps to end the life of another is the developing case law[12] which recognises an individual's right to request that treatment should not be given, or that treatment should be withdrawn, even if the inevitable consequence will be the acceleration of death.[13] This case law is founded on a distinction between positive acts[14] and omissions, and not on any attempt to reconcile conflicting, but not mutually exclusive, principles. This can be seen in the House of Lords' unwillingness to adopt as the ratio of its decision the approach of one of the judges in the Court of Appeal in *Airedale NHS Trust v Bland*, who had said that although a belief in the sanctity of human life and its corollary, the *inviolability* of human life, requires that the criminal law be invoked to punish those who kill others even with consent, there may be cases in which a proper recognition of the mortal nature of human life requires that the duty to provide care and assistance should cease.[15] Although English common law appears, for the time being at any rate, to be firmly opposed to sanctioning the taking of active steps to end the life of another, with the consent of that other, recent developments in the Netherlands show that the criminal law of one of our European Union partners recognises a person's right to

[11] *Ibid*, paras 237–239. These views were shared by the Law Reform Commission of Canada: see Some Aspects of Medical Treatment and the Criminal Law (1986) Report No 28, p 13, where it concluded that active euthanasia was unacceptable and could only result in a significant reduction in the protection provided by the criminal law for the integrity of the person.

[12] See *Airedale NHS Trust v Bland* [1993] AC 789; *Re C* [1994] 1 WLR 290; *Secretary of State for the Home Department v Robb* [1995] 2 WLR 722. In the last of these cases, involving a prisoner on hunger strike, the prisoner's right to self-determination took precedence over any countervailing interest of the state in preserving life and preventing suicide.

[13] See the Report of the Select Committee on Medical Ethics (1993-1994) HL Paper 21-I, para 240, which acknowledged the consensus that was steadily emerging over the circumstances in which life-prolonging treatment might be withdrawn or not initiated, and considered that this might increasingly allay the fears of those who advocated voluntary euthanasia because they felt that lives were being artificially prolonged beyond the point at which the individual felt that continued life was a benefit rather than a burden.

[14] See *Cox* (unreported), cited in I Kennedy and A Grubb, *Medical Law* (2nd ed 1994) p 1308, *per* Ognall J (summing-up): "what can never be lawful is the use of drugs with the primary purpose of hastening the moment of ... death".

[15] *Airedale NHS Trust v Bland* [1993] AC 789, 831–832, *per* Hoffmann LJ. See, further, a recent case-note on physician-assisted suicide in 105 Harv LR 2021 (1992), in which it was said: "The patient has a single, undivided interest in controlling what happens to her body. The right of self-determination, although subject to some overriding state interests, does not cease to exist at some indeterminate, imaginary line between having life-saving treatment withdrawn and receiving suicide assistance." See also B Bix, "Physician-Assisted Suicide and the United States Constitution" (1995) 58 MLR 404.

self-determination in this area of the law as well, so long as the criteria prescribed by the Dutch courts are satisfied.[16]

OUR PREFERRED APPROACH

2.13 We have not been invited by anyone to adhere to any particular philosophy, and it would be quite wrong to bring our own personal predilections into the equation. Moreover, in the light of the wide divergences of opinion expressed in the responses to consultation we do not believe that it would be useful for us to move forward by following what we assess to be the weight of that opinion one way or another. As we have seen, on the one hand there were many individual and group respondents, particularly among those who advocated the de-criminalisation of sado-masochistic practices, who adopted a distinctly liberal approach.[17] On the other hand there were those with very considerable experience of the practical side of law enforcement who adopted an approach which is determinedly paternalist.[18]

2.14 In these circumstances, for this second consultation exercise we consider it best if we adopt an essentially pragmatic approach. It is obvious to us that if our eventual recommendations do not follow what we perceive to be the grain of contemporary majority attitudes within Parliament to questions of criminalisation they are unlikely to be taken at all seriously by those who are ultimately responsible for taking decisions about the future shape of the criminal law. We have thought it valuable, therefore, to study recent decisions taken by Parliament in relation to the kind of issues we discuss in this Paper to see if we can detect any consistent pattern.

2.15 The decisions that have been made by Parliament or Parliamentary committees in recent years appear to us on examination to be redolent of a paternalism that is softened at the edges when Parliament is confident that there is an effective system of regulatory control, whether this is created by a licensing regime, by the standards or ethics of a profession, or by a species of self-regulation in which Parliament has trust.[19] Occasionally, we find, Parliament intervenes on an ad hoc basis to tighten or loosen the reins.

2.16 Good recent examples of this Parliamentary ethos appear frequently in this paper. Obvious instances are:

[16] For a description of the situation in the Netherlands, see the Report of the Select Committee on Medical Ethics (1993-1994) HL Paper 21-I, pp 28–29 and Appendix 3. Euthanasia remains an offence, but a recent amendment to the Burial Act 1955 has established a policy of non-prosecution where the correct procedure is followed and criteria similar to those developed by the Dutch Supreme Court have been fulfilled.

[17] See paras 2.3 – 2.4 above.

[18] See paras 2.5 – 2.9 above. Some of the responses, which employ concepts like "harm to society" and "the public interest", without explaining what is meant by these expressions, are hard to place in any recognisable category.

[19] This is not to say that measures aimed at the protection of minors are not consistent with modern liberalism, or that liberals might not find it possible to approve some of the measures we mention: see, for example, Appendix C, paras C.25 – C.33 and C.46 – C.48 below. For a definition of the legal paternalist, see Appendix C, para C.58 below.

- the recent refusal by the House of Lords to outlaw boxing, coupled with a general consensus in the debate that the risks of the sport should be made controllable and containable;[20]

- the recent decision by the House of Commons, endorsed by the House of Lords, to reduce the age at which a valid consent may be given to anal intercourse from 21 to 18, but its refusal to reduce it further to 16;[21]

- the unanimous view of the House of Lords Select Committee on Medical Ethics that it would be wrong to legalise euthanasia;[22]

- the endorsement by the same committee of the jurisprudence now being developed by the courts which recognises that an adult person of sound mind should be entitled to refuse invasive medical treatment, whether on a contemporary basis or in anticipation of future incapacity;[23]

- the decision by Parliament to intervene with legislation to control the transplantation of human organs from one human being to another if they are not genetically related;[24]

- the decision by Parliament to prohibit female circumcision in all circumstances.[25]

2.17 In this Paper we have been concerned to look very carefully at all the different problem areas that have been illuminated by this study and the comments and factual contributions it has elicited, even though our critics may maintain that our provisional conclusions still show too much evidence of a broadbrush approach that does not do justice to the sophistication of the subject-matter. As we have said, we have endeavoured to follow what we perceive to be the prevailing attitude in Parliament to questions of criminalisation, and this may lead us into what our critics may believe to be attitudes on related issues that are mutually inconsistent in a philosophical sense. It will be an important part of this consultation exercise to identify such inconsistencies and to seek ways of remedying them that do not cut across the prevailing Parliamentary culture, although we recognise that in the last resort we may simply have to live with them.

2.18 It is for these reasons that we have decided to propose on a provisional basis a law reform strategy that recognises people's entitlement to make choices for themselves but has the following distinctive features:

[20] See paras 12.2 and 12.37 below.

[21] See para 5.3, n 6 below and the Criminal Justice and Public Order Act 1994, s 143(3). See also *Hansard* (HC) 21 February 1994, vol 238, cols 74–123.

[22] See para 2.11 above and Appendix C, para C.106 below.

[23] See The Report of the Select Committee on Medical Ethics (1993-1994) HL Paper 21-I, para 263. See also para 2.11 above.

[24] See paras 8.36 – 8.37 below, and the Human Organ Transplants Act 1989.

[25] See para 9.3 below, and the Prohibition of Female Circumcision Act 1985.

(1) We will start by identifying the rules that will be needed in order to ensure, as far as practicable, that non-voluntary consents are treated as ineffective.

(2) This exercise will involve making special rules for the young and the disabled: in certain circumstances the state will be entitled to dictate that there is an age below which no consent shall be valid, but this must be determined on a case by case basis.

(3) Next, we will take into account a person's interests in his or her own physical health and vigour, the integrity and normal functioning of his or her body, the absence of absorbing pain and suffering or grotesque disfigurement.

(4) As a consequence of the concern expressed in (3), if seriously disabling injury results, we will take the view that a person who consents to it has made a mistake and that to be really disabled is against his or her interests.

(5) On the other hand, we will not take that view if the consent is given in the context of an activity that is very widely regarded as beneficial and for which the state is satisfied that the risks are properly controllable and containable (for example, surgery and risky sports).

(6) We are also unwilling to decriminalise the consensual infliction of seriously disabling injury in other circumstances because, in the absence of effective regulation, we cannot be sure that the consent will be entirely voluntary.

(7) In certain cases we will not permit the causing of injury to others, even with a completely voluntary consent, because we are concerned to prevent the increased likelihood of harm to others. It is for this reason that we will be provisionally proposing that the criminalisation of causing injury in the course of casual fighting should remain in place.

2.19 Although we will be examining each fact-situation on its own merits we have found it convenient to use shorthand expressions to identify situations that will derogate from a general principle that a person with capacity should be able to give a legally effective consent to any injury up to a level which we will be describing as "seriously disabling injury".[26] If we propose to legalise the causing of a higher level of non-fatal consensual injury we will call this a Class I exception. If we propose a rule which continues to set the permitted level of consensual injury at the same level as is now set by the law we will call this a Class II exception. And, finally, if we propose to set an age limit below which no valid consent may be given, however mature and intelligent the young person concerned, we will call this a Class III exception.

[26] See paras 4.29 – 4.40 below.

PART III

THE EUROPEAN CONVENTION ON HUMAN RIGHTS

SADO-MASOCHISM

3.1 In the first Consultation Paper[1] we considered the possible impact of the European Convention on Human Rights ("the Convention") on the present law relating to sado-masochistic activities. This is essential because the United Kingdom has an obligation in international law to conform its domestic law to the requirements of the Convention.[2] Since then, the Strasbourg Commission has declared admissible the case lodged by some of the unsuccessful appellants in *Brown*,[3] and in due course it will give an opinion on the issues arising in that case. The case may then proceed to the Strasbourg Court for decision.[4]

3.2 The central contention of the unsuccessful appellants is that English law in this area is incompatible with Article 8 of the Convention. This provides that:

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a

[1] Consultation Paper No 134, paras 32.1 – 34.1.

[2] "The Contracting Parties have undertaken ... to ensure that their domestic legislation is compatible with the Convention and, if need be, to make any necessary adjustments to this end": European Commission on Human Rights, *Yearbook*, vol 2, 234. In *Ireland v United Kingdom* (1978) 2 EHRR 25 the court said, at p 103 (para 239): "By substituting the words 'shall secure' for the words 'undertake to secure' in the text of Article 1, the drafters of the Convention also intended to make it clear that the rights and freedoms set out in Section 1 would be directly secured to anyone within the jurisdiction of a Contracting State."

[3] *Brown* [1994] 1 AC 212.

[4] Under Article 45 of the Convention, the Strasbourg Court has jurisdiction over all cases concerning "the interpretation and application" of the Convention. A case can only be referred to the Court: (a) if the Commission has acknowledged the failure of efforts for a friendly settlement; (b) within a period of 3 months after the transmission of the report of the Commission to the Council of Ministers; and (c) if the State party or parties have accepted the jurisdiction of the Court. Article 48 of the Convention provides that the Commission and State parties have the right to refer a case to the Court (individuals may also have the right to refer a case under a procedure established by Protocol 9, although this only applies if the State party has accepted the Protocol). In practice, the Commission makes the majority of references to the Court and, while the Convention itself contains no guidance on the criteria that the Commission will apply in deciding whether to make a reference, it is possible to speculate that a case with such important moral and legal implications as *Brown* is likely to be referred. In the absence of a reference to the Court within the stipulated time-limit it falls to the Council of Ministers, under Article 32, to decide if the Convention has been violated. For more guidance on these matters, see A H Robertson and J G Merrills, *Human Rights in Europe: A Study of the European Convention on Human Rights* (3rd ed 1993) pp 299–319.

democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

3.3 In the first Consultation Paper we concluded that the most that the application of the jurisprudence of the Convention might produce was a special rule relating to *sexual* violence or, possibly, to any violence committed in private. It may be difficult to take matters much further than this in the absence of authoritative guidance from Strasbourg, although some clues may be found in the existing case law.

3.4 The Strasbourg Court has already held that Article 8(1) protects certain types of consensual homosexual activity.[5] It had previously ruled that there must be a "pressing social need" before an interference with the right conferred by Article 8(1) is permitted under Article 8(2) on the ground that such an interference is "necessary in a democratic society".[6] In the context of homosexual activity the Strasbourg Court has held that this activity, as such, will not justify the intervention of the criminal law as "a pressing social need".[7] Its approach was based on the belief that people have a right to privacy in the context of sexual activity.[8]

3.5 Central to this discussion is the question whether sado-masochistic activities of the type discussed in paragraphs 10.21 – 10.26 of this Paper should be properly characterised as violent rather than sexual. In the first Consultation Paper we observed that in *Dudgeon* the Strasbourg Court had been strongly influenced by the private nature of *sexual* behaviour, seeing it as "an essentially private manifestation of the human personality". The majority of the House of Lords in *Brown*, however, were concerned with the violent nature of the appellants' activities,[9] and they were charged with and convicted of offences of violence.[10]

[5] See *Dudgeon v United Kingdom* (1981) 4 EHRR 149; *Norris v Ireland* (1989) 13 EHRR 186; and *Modinos v Cyprus* (1993) 16 EHRR 485.

[6] See *Handyside* (1976) 1 EHRR 737 and *Sunday Times v United Kingdom* (1979) 2 EHRR 245. The effect of these decisions on Article 10(2) (freedom of expression) was confirmed by the Strasbourg Court in relation to Article 8 in *Dudgeon v United Kingdom* (1981) 4 EHRR 149 (paras 51–52).

[7] See cases noted in n 5 above.

[8] *Dudgeon v United Kingdom* (1981) 4 EHRR 149 (para 52). The court observed of this case that it "concerns a most intimate aspect of private life. Accordingly, there must exist particularly serious reasons before interferences on the part of the public authorities can be legitimate for the purposes of Article 8(2)."

[9] In *Brown* [1994] 1 AC 212 Lord Templeman said, at p 237: "I do not consider that Article 8 invalidates a law which forbids violence which is intentionally harmful to body and mind. Society is entitled and bound to protect itself against a cult of violence. Pleasure derived from the infliction of pain is an evil thing". See further paras 10.42 – 10.51 below.

[10] In his recent textbook Professor David Feldman, who also responded separately to the first Consultation Paper, made the following prediction: "It is doubtful whether the European Commission and Court of Human Rights will consider that the interference with the right to private life which the decision in *Brown* represents can be justified as necessary in a

3.6 The decision of the Strasbourg Commission in 1978 in the case of *X v United Kingdom*[11] may provide some clues to the possible approach of the Commission or the Court at Strasbourg in cases of this kind. The applicant had argued that his rights under Articles 8, 10 and 14 of the Convention had been violated as a consequence of his conviction for buggery. The Commission rejected his case under Article 8 on the ground that there was evidence[12] that his 18-year old "victim" had been the recipient of sado-masochistic beatings. In these circumstances "the prosecution and sentence of the applicant was justified ... [under Article 8(2)] for the protection of the rights and freedoms of others."[13] The Commission also said that the element of force involved in the applicant's relationship with his "victim" meant that his prosecution and sentence was justified under Article 8(2) as "necessary in a democratic society".

3.7 The Commission's decision on Article 8 was not based solely on the alleged use of force. More attention seems to have been paid to the considerations that an 18-year old was involved[14] and that there were doubts about his consent, notwithstanding the fact that the defendant was originally sentenced for a *consensual* buggery. These factors resemble a point relied on by the higher courts in the *Brown*[15] case. In the House of Lords mention was made of the fact that two of the appellants were responsible for what Lord Lane CJ, in the Court of Appeal, had referred to as the "corruption of a youth".[16]

3.8 Very few of the respondents to the first Consultation Paper addressed these issues at all, and when they did, their responses were conditioned by their approach to the central issue whether the activities in question were primarily concerned with sex or with violence. Thus, the Justices' Clerks' Society was of the view that an interference would be permissible in this context under Article 8(2) for the prevention of crime, for the protection of health, and for the protection of another person's right to go free from bodily attack. The Magistrates' Association, for its

democratic society for the purpose of protecting morality or the rights of others under Article 8(2) of the European Convention on Human Rights. The defendants in that case were not proselytizing for a sado-masochistic lifestyle. They were not forcing themselves on an unwilling public, or corrupting youth. They were not inflicting grievous bodily harm." D Feldman, *Civil Liberties and Human Rights in England and Wales* (1993) p 518.

[11] (1978) 3 EHRR 63.

[12] The applicant's indictment made no mention of the use of force by the applicant or the possibility that his "victim" ("V") may not have consented. The applicant also made use of a recent statement by V to the effect that the relevant sexual acts had been consensual and had not involved any use of force. Nevertheless, the Commission relied on the fact that an *earlier* statement by V had made allegations of intimidation and the use of force against the applicant and that these allegations, although not tested in the Crown Court because the applicant pleaded guilty, had been tested by a magistrates' court during committal and had been referred to in the Court of Appeal judgment.

[13] (1978) 3 EHRR 63, 68 (para 135).

[14] At the relevant time 21 was the age of consent in England for homosexual acts performed between males in private.

[15] [1994] 1 AC 212.

[16] [1994] 1 AC 212, 235G–236A, *per* Lord Templeman, where the relevant passage from Lord Lane CJ's judgment is set out and approved. The boy in question was 15 when he was first befriended by one of the appellants.

part, was concerned that bodily and sexual autonomy were not absolutes, and that society had the moral, ethical and social right to insist upon minimum standards of acceptable conduct, a principle it said was accepted in the Convention. It said that breeding and glorifying cruelty was barbaric and degrading to the body and mind of everybody involved.

3.9 One academic respondent, Mr Nicholas Bamforth, on the other hand, considered it essential to keep sight of the social meaning of sado-masochistic activity for the participants. He adopted the arguments we have set out more fully in paragraph 10.48 below, and contended that the policy criteria covering the law's approach to sado-masochism should be those relating to sex, not violence.

3.10 Liberty, for its part, considered that there was ample provision in English law to protect minors, vulnerable adults and public decency, to prevent solicitation for sexual purposes, and to protect against violence. It also considered that the law, as prescribed by the majority of the House of Lords in *Brown,* was confused and unclear, particularly in relation to the amount of injury that can lawfully be inflicted during consensual sexual activity, and that for this reason it did not comply with the Convention's requirement for certainty in the criminal law. It contended that the case for such sweeping interference with the private sexual activities of adults was not made out, and that there was no pressing social need for widescale criminalisation so long as the legitimate interests of society were appropriately protected.

3.11 It is not necessary in this paper to address Article 7 of the Convention.[17] Whatever may have been believed to have been the law before *Brown* was decided, the law is now clear and well-known, and Article 7 is concerned only with transitional protection at a time when the law has been altered.

LAWFUL CORRECTION

3.12 Article 3 of the Convention has been considered at Strasbourg in a number of cases concerned with corporal punishment. This Article, which is not expressly limited, provides that:

> No one shall be subjected to torture or to inhuman or degrading treatment or punishment.[18]

3.13 In *Tyrer v UK*[19] the Strasbourg Court was concerned with a 15-year old applicant who had been sentenced to three strokes of the birch by the Manx juvenile court

[17] Article 7 provides that: "No one shall be guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed".

[18] See also the United Nations Convention on the Rights of the Child (to which the United Kingdom is a State party), Article 37 of which provides that: "No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment."

[19] (1978) 2 EHRR 1. See G Zellick, "Corporal Punishment in the Isle of Man" (1978) 27 ICLQ 665 for a contemporary critique of the court's decision in *Tyrer* and P J Duffy, "Article 3 of the European Convention on Human Rights" (1983) 32 ICLQ 316, 328 for a defence of that decision.

following his conviction for assault occasioning actual bodily harm. The court adopted a disjunctive interpretation of Article 3. After finding that the treatment of the applicant amounted neither to torture nor inhuman punishment, it then went on to consider whether the punishment could be classified as degrading. It held that:

> [I]n order for a punishment to be "degrading" and in breach of Article 3 the humiliation or debasement involved must attain a particular level and must in any event be other than the usual level of humiliation ... The assessment is, in the nature of things, relative: it depends on all the circumstances of the case and, in particular, on the nature and content of the punishment itself and the manner and method of its execution.[20]

3.14 The Strasbourg Court had recourse to similar considerations to those used by English courts[21] to assess the reasonableness of a parent's administration of corporal punishment. It referred to the fact that a prior medical examination had taken place; the limited number of the strokes administered and the regulated dimensions of the birch used to administer them; and the considerations that a doctor was present at the birching, that a parent was entitled to attend, and that the police constable administering the birching was attended by a senior colleague.[22] Despite all these control factors the court nevertheless concluded that the birching involved a level of humiliation sufficient to contravene Article 3 of the Convention.

3.15 In the later case of *Campbell and Cosans v UK*[23] the court was concerned with an application by a mother of two boys who were pupils at a school where the use of "the tawse" was an integral part of the disciplinary regime. Despite the fact that neither child had actually received corporal punishment the Strasbourg Court was prepared to accept that "provided it is sufficiently real and immediate, a mere threat of conduct prohibited by Article 3 may itself be in conflict with that provision."[24] The court affirmed the decision it had reached in *Tyrer* but held on the facts that there had been no contravention of Article 3. The threatened use of the tawse did not reach the requisite level of humiliation or debasement to establish degrading treatment.[25]

3.16 More recently, the Strasbourg Court has returned to these issues in *Costello-Roberts v UK*.[26] This case was concerned with a 7-year old pupil at an English

[20] (1978) 2 EHRR 1 (para 30).

[21] See paras 11.1 and 11.9 below.

[22] The court also referred to the fact that the birching was administered to the appellant's bare posterior and stated that although this was a factor in assessing the level of humiliation experienced by the appellant it was not *the* determining factor.

[23] (1982) 4 EHRR 293. See also para 11.11, n 30 below.

[24] *Ibid*, at para 26.

[25] The court did, however, state that the fact that the use of the tawse was traditional in Scotland did not prevent it from amounting to degrading treatment or punishment.

[26] (1993) 19 EHRR 112.

independent school who had received corporal punishment as a result of a series of minor breaches of the school rules. The school was not within any of the categories of educational institution to which section 47 of the Education (No 2) Act 1986 applies.[27] The applicant's mother opposed corporal punishment but she had made no mention of this when selecting the school. The school prospectus was equally reticent about the school's policy on corporal punishment. The applicant's arguments were based, inter alia, on contravention of the rights contained in Articles 3 and 8 of the Convention.

3.17 The court referred to its previous decision in *Tyrer* and the distinction drawn in that case between the level of humiliation attendant upon punishment in general and the higher level of humiliation necessary to give rise to a finding that the applicant was subjected to degrading punishment.[28] The court held that the nature and context of the punishment, the manner and method of its execution, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the applicant,[29] were the factors that would affect the assessment of whether or not the punishment was degrading within the meaning of Article 3.

3.18 In *Costello-Roberts* the court found, with four dissentients, that the level of humiliation inflicted did not bring the punishment within the meaning of "degrading" for the purposes of Article 3 of the Convention. The minimum level of humiliation necessary to give rise to a finding that the punishment was "degrading" must therefore result from conduct which occurs at some point along a continuum from that found in *Tyrer* to that found in *Costello-Roberts*.[30]

3.19 In *Costello-Roberts* the court also considered the application of Article 8 of the Convention. A majority of the court acknowledged that the concept of "private life" covered a person's physical and moral integrity. The court did not "exclude the possibility that there might be circumstances in which Article 8 could be regarded as affording in relation to disciplinary measures a protection which goes

[27] See para 11.11 below.

[28] See para 3.13 above.

[29] (1993) 19 EHRR 112 (para 30).

[30] The difficulty of finding clear guidance on these issues in the Convention was pointed out by the Scottish Law Commission in its Report on Family Law, (1992) Scot Law Com No 135, para 2.89. While saying that it was "most unlikely that an ordinary smack by a loving parent" would amount to a contravention of Article 3, the Commission said that "international obligations do not ... provide a ready made answer." In its Report in App No 9471/81 *Warwick v UK* (1986) 60 DR 5 the Strasbourg Commission concluded that the administration of one stroke of the cane to the hand of a 16-year old schoolgirl, leaving a mark visible 8 days later, was degrading treatment contrary to Article 3 of the Convention. Similarly, in the case of *Y v United Kingdom* (1992) 17 EHRR 238, heard before *Costello-Roberts*, the Strasbourg Commission found that the caning of a 15-year old schoolboy, which resulted in the appearance of four large wheals on his buttocks, *did* cause humiliation sufficient for it to constitute degrading punishment contrary to Article 3. It may be that these cases establish the lowest level at which conduct will be an infringement of Article 3, although it should be noted that the Strasbourg Court did not deliver a judgment in either case.

beyond that given by Article 3."[31] It held unanimously, however, that a condition of sufficiency attached to the application of Article 8 and that the facts of *Costello-Roberts* did not disclose "adverse effects for ... [the applicant's] physical or moral integrity sufficient to bring it within the scope of the prohibition contained in Article 8."[32]

3.20 Another aspect of Article 8 in this context is illustrated by *X and Y v Sweden*,[33] a decision of the Strasbourg Commission on the admissibility of an application by Swedish nationals who were also members of the Free Protestant church. The parent applicants practised corporal punishment on their children and justified this by reference to biblical and theological texts which their Church interpreted literally.[34] The application was prompted by a provision in the Swedish Code of Parenthood to the effect that children should "not be subjected to corporal punishment or any other form of humiliating treatment."[35] The Code had no direct legal effect although it *was* taken into account in making decisions about when the state should intervene in child care. The applicants argued that this made it more likely that practitioners of the Free Protestant religion would have their children taken into care.

3.21 The Commission ruled that the application was inadmissible on the grounds that the Code of Parenthood had no *direct* legal effects and the applicants had not shown that they had suffered or were at a substantial risk of having their family life interfered with on account of their religious practices and, specifically, their practice of administering corporal punishment.

RELIGIOUS AND CULTURAL PRACTICES

3.22 Any attempt to prohibit or restrict certain of the religious and cultural practices discussed in this paper[36] may contravene Article 9 of the Convention. This provides that:

> (1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others

[31] See also the United Nations Convention on the Rights of the Child, Article 28(2) of which requires states to "take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity."

[32] The court had regard to the fact that the sending of a child away to boarding school, which was the type of institution attended by the applicant in *Costello-Roberts*, must of itself involve some degree of interference with his private life. The decision of the Strasbourg Court has been criticised on the ground that, having liberalised (by means of Article 8) the severity threshold for challenging certain forms of punishment, the court then failed to develop this approach: B Phillips, "The Case for Corporal Punishment in the United Kingdom. Beaten into Submission in Europe?" (1994) 43 ICLQ 153, 158.

[33] (1982) 29 DR 104.

[34] See, "He that spareth his rod hateth his son; but he that loveth him chasteneth him betimes" (Proverbs 23:13); "For whom the Lord loveth he chasteneth, and scourgeth every son whom he receiveth" (Hebrews 12:6).

[35] Code of Parenthood 1979, chapter 6 section 3.

[36] See paras 9.13 – 9.19 and 10.1 – 10.15 below.

and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

(2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

3.23 It should be noted that Article 9(1) draws a distinction between the right to freedom of thought, conscience and religion and the right to *manifest* one's religion or beliefs. The limitations contained in Article 9(2) apply only to the latter of these rights and, therefore, it is necessary to consider not only whether a restriction of a particular religious practice infringes Article 9(1) but also whether such restriction can be justified under Article 9(2).

3.24 In his response to the first Consultation Paper Professor David Feldman dealt directly with the impact of the Convention on the law relating to the religious and cultural practices that are discussed again in the present paper.[37]

3.25 He suggested that a parent's consent to the ritual, non-therapeutic, circumcision of a male child may amount to a form of inhuman treatment contrary to the right contained in Article 3 of the Convention. He acknowledged, however, that it was assumed that the parent's consent to the practice will generally be sufficient to prevent the circumcision from constituting a criminal act. He added that while an interference with parents' practices of circumcising their male children may constitute a prima facie violation of Article 9(1) of the Convention he felt that such restriction could be shown to be justified under Article 9(2).

3.26 In relation to religious flagellation[38] Professor Feldman predicted that any attempt to forbid consent to religious flagellation would breach the right contained in Article 9(1) and could not be justified under Article 9(2). It may be that even if case law[39] makes clear that the infliction of a certain level of bodily injury for religious purposes will, notwithstanding consent, be unlawful and that, therefore, the restriction of the Article 9(1) right is "prescribed by law", such restriction may not be justified as "necessary in a democratic society". The issues here are similar to those discussed above in relation to sado-masochistic practices. It is possible that where a person freely consents to the infliction of pain as a manifestation of their religion or beliefs the Commission and the Court at Strasbourg would be

[37] See also A H Robertson and J G Merrills, *Human Rights in Europe: A Study of the European Convention on Human Rights* (3rd ed 1993) p 147 where it is argued that a special feature of Article 9 is "the variety of claims that can be made reflecting, of course, the range of religious, moral and other experiences."

[38] See paras 10.1 – 10.7 below.

[39] We have located only one reported English case on ritual scarification that, incidentally, involved the infliction of pain for cultural and religious reasons: *Adesanya, The Times* 16–17 July 1974. See paras 9.14 – 9.15 below.

reluctant to find that there is a "pressing social need" sufficient to justify the restriction of such conduct.[40]

3.27 It has been pointed out that while the Article 9(1) right cannot be absolute, because the interests of other people may be involved,[41] such a right involves a basic and "vital liberty" and "[i]t is therefore important to ensure that restrictions on the manifestation of beliefs are recognised by the Convention organs only when they are strictly necessary."[42] In the absence of specific guidance from Strasbourg it is only possible to speculate whether, where an adult consents to the infliction of pain as a means of manifesting his or her religion or beliefs, any restriction of this conduct will amount to an infringement of Article 9(1) and will not be justified.[43] The position may, as Professor Feldman suggests, be different in circumstances where the rights of another individual are affected and, therefore, the restriction is "necessary in a democratic society ... for the protection of the rights and freedoms of others."

SUICIDE AND EUTHANASIA

3.28 This is another area of the law mentioned in this Paper[44] where the Convention may have an impact. Article 2 of the Convention contains the following provisions relating to the individual's right to life:

> (1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of the sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> (2) Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;

[40] That the "pressing social need" issue is relevant to the limitation contained in Article 9(2) of the Convention was recently confirmed by the Strasbourg Court in *Kokkinakis v Greece* (1994) 17 EHRR 397, 422 (para 49).

[41] See (1967) *Yearbook of the European Convention on Human Rights*, vol X, 472: in this case a Dutch applicant was convicted for driving without insurance. He argued that this constituted a violation of his Article 9(1) rights as he argued that compulsory motor insurance contradicted his belief in predestination. The Commission held that there was no violation because compulsory motor insurance could be justified under Article 9(2) as "necessary for the protection of the rights and freedoms of others."

[42] A H Robertson and J G Merrills, *Human Rights in Europe: A Study of the European Convention on Human Rights* (3rd ed 1993) p 147.

[43] See *Kokkinakis v Greece* (1993) 17 EHRR 397, 418 (para 31) where the Strasbourg Court held that religious freedom is one of the "most vital elements that go to make up the identity of believers and of their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned." The court added that the Article 9(1) right to "manifest" one's religion was based on a belief that "Bearing witness in words and deeds is bound up with the existence of religious convictions."

[44] See para 2.11 above and Appendix C, paras C.54 – C.57 below.

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

3.29 The prohibition on the intentional deprivation of life, contained in Article 2(1), may be relevant to the question of euthanasia, although neither the Commission nor the Court at Strasbourg have, as yet, addressed this question under Article 2. In the absence of consensus in the Council of Europe on the complex moral and legal issues involved in this area it seems likely that they would show a good deal of restraint in their examination of such issues.

3.30 There has, however, been some consideration of assisted suicide under Article 8 of the Convention. In 1982 the Strasbourg Commission considered the admissibility of the complaint of a British citizen, an employee of the Voluntary Euthanasia Society, who had been convicted of conspiring with his co-accused to aid and abet suicide and of two offences of aiding and abetting suicide under section 2 of the Suicide Act 1961.[45] The applicant based his application, inter alia, on Article 8 of the Convention and argued that his conviction and sentence[46] violated his right to respect for private life. He submitted that "the offering of assistance to those who wanted to commit suicide falls within the domain of private life."

3.31 The Commission held that the aiding and abetting of suicide could not be described as falling within the sphere of private life, the right protected under Article 8(1), and that "while it might be thought to touch directly on the private lives of those who sought to commit suicide, it does not follow that the applicant's rights to privacy are involved. On the contrary, the Commission is of the opinion that the acts of aiding, abetting, counselling or procuring suicide are excluded from the concept of privacy by virtue of their trespass on the public interest of protecting life."[47]

3.32 This is, of course, an area in which the jurisprudence at Strasbourg is likely to continue to develop in order to reflect contemporary moral and political beliefs and conditions. However, even if in connection with euthanasia the right to privacy contained in Article 8 cannot override the state's legitimate and justifiable interest in preventing the taking of human life, notwithstanding the consent of the

[45] Appl 10083/82; (1982) 6 EHRR 140, 143 (para 11). The Strasbourg Commission relied on its earlier opinion in *Bruggemann and Scheuten v Federal Republic of Germany* (1977) 3 EHRR 244, in which it concluded that not every restriction on abortion for unwanted pregnancies will constitute an infringement of the mother's right to privacy under Article 8(1) of the Convention.

[46] He was initially sentenced to two and a half years' imprisonment, although this was reduced to 18 months on appeal.

[47] (1982) 6 EHRR 140 (para 13).

deceased, it may be that the Strasbourg Commission, in the first instance, will provide more guidance on the limits of the State's justifiable interest in prohibiting the consensual infliction of bodily injury when it comes to give its opinion on the *Brown* application.[48]

[48] See para 3.1 above.

PART IV

CONSENT TO INJURY OR THE RISK OF INJURY AND THE CRIMINAL LAW BILL

INTRODUCTORY

4.1 The responses to the first Consultation Paper have convinced us, if any further proof was needed, that it would be quite impracticable to try and rationalise the rules relating to consent in the context of the present unreformed criminal law. The serious mismatch between mens rea and result to which we drew attention in Law Com No 218[1] makes it very difficult for the criminal courts to appear to operate fairly in cases involving consent of one kind or another, because the attention of the tribunal of fact is focused unduly on the injuries in fact sustained and insufficiently on the issues that ought properly to determine criminal culpability at different levels of seriousness.

4.2 Because we are considering law reform proposals in relation to a new regime for criminal liability which is unfamiliar and which has not yet been implemented by Parliament, we believe that we should say something at this stage in general terms about the relationship between the concept of consent to acts which may in the event cause injury and the new offences of intentional injury and reckless injury which we propose in our Criminal Law Bill, and how we envisage that that relationship might best be clarified.

CONSENT TO INJURY

4.3 In Parts VIII–X of this Paper we will be considering a range of activities in which a person agrees quite specifically that an injury of a particular kind should be intentionally inflicted. Surgery, tattooing, piercing and religious flagellation are obvious examples. A person gives his or her consent to the process in broad terms and the consent may be specific ("consent to the amputation of my left leg above the knee") or general (consent to that procedure and "to such further or alternative operative measures as may be necessary").

4.4 In these cases the broad consent that is given before the procedure can be carried out will legitimise, expressly or impliedly, the intentional acts that are then performed to carry out the procedure that the client, patient or "victim" desires. If some quite different procedure follows, or if the initial consent did not on its proper interpretation cover what was in fact undertaken, then the act that has been performed without consent will constitute an unlawful assault, or an intentional injury within the meaning of the new Criminal Law Bill.

4.5 This distinction, between those acts that are done with the consent of the "victim" and those that are not, is not always easy to draw. If the person inflicting the injury does so without the care and skill that the subject reasonably expects, does

[1] See, for example, Law Com No 218, paras 12.21 – 12.35.

this render the act unauthorised? Can it be said that what the subject consents to is the doing of that act *with* the necessary care and skill, and that if the act is done negligently it therefore falls outside the scope of the consent?

4.6 In our view, it is essential that the criminal law should be simple and easy to administer. If consent is given to the *intentional* infliction of injury, then, unless the activity in question is prohibited by the law, the focus of the court's inquiry should be whether the injury in question was inflicted within the four corners of the consent that was expressly or impliedly given. The *mere* fact that an act of piercing, for example, was incompetently performed ought not without more lead to criminal liability on the part of the piercer if consent was given. Whether consent *was* given to what was actually done must to some extent be a question of degree: if the piercer were to do the job with a rusty nail and a hammer, it might reasonably be said that this was not what the subject had consented to. But we think it should be made clear that a failure to take such precautions as a reasonable practitioner would have taken does not *in itself* render the injury non-consensual.

CONSENT TO RISK OF INJURY

4.7 In Part XII of the Paper we will move on to consider a range of activities in which, by consenting to take part in the activity, a person consents to an act or omission which he or she knows to carry a risk of injury to himself or herself (for a convenient shorthand, we will refer to this briefly as "consent to a risk of injury" in the rest of this paper). Some of these activities, like boxing or some of the martial arts, are governed by rules that permit the *intentional* infliction of injury; even if a participant in such an activity hopes to escape injury through superior skill, he or she consents to the risk of being injured all the same. But in most cases a participant consents only to the risk of being injured *unintentionally*. If injury is inflicted intentionally, no question of consent arises, because intentional injury is not what the victim has consented to. What will be much more to the point in this type of activity is the possibility of criminal liability for *recklessly* inflicted injury, and the responses we received on consultation have shown us that we ought to say rather more about the effect of the proposals in our Criminal Law Bill in this context.

4.8 In the activities to which we are now devoting our attention the *intentional* infliction of injury is not permitted, either by the individual injured or by any rules that may govern the activity in question; but the existence of a *risk* of injury often adds to the activity's excitement. In such contexts, if non-fatal injury is accidentally inflicted, there can be no question of a criminal offence being committed unless the person who inflicted the injury acted recklessly: in other words he or she must have been *aware* of a risk that injury might result, and it must have been *unreasonable*, having regard to the circumstances known to him or her, for him or her to take that risk.[2]

[2] See para 1.14 and n 28 above.

Reasonableness of risk to be assessed in the light of all the circumstances

4.9 This concept of unreasonable risk caused a good deal of difficulty on consultation, particularly among sports administrators.[3] They wanted the criminal law to intervene in really serious cases of recklessly inflicted injury, but they were unhappy about magistrates or a jury being concerned with assessing whether a player's conduct, in effecting a crash tackle for example, was unreasonable in the circumstances known to him or her.[4] It appears to us that there is a basic misunderstanding about the meaning of the word "unreasonable" which needs to be brought clearly to the surface before this second round of consultation begins.

4.10 In the civil law a distinction has always been made between consenting to the certainty of physical injury (during a visit to the dentist or the surgeon, for instance), where one's consent to what is done is a defence to an action for a trespass to the person (or civil battery), and consenting to the risk of injury (playing cricket, fencing etc) where the existence and nature of one's consent may be a factor in determining whether an injury was inflicted negligently.[5]

4.11 Even in those cases where the defence of volenti non fit injuria[6] is not directly invoked, the approach of the English common law has always been to take into account all the matters which sports administrators drew to our attention in determining whether in this second type of case someone acted unreasonably, or in breach of a civil duty of care. Thus in *Wooldridge v Sumner*[7] Diplock LJ said:

> A reasonable spectator attending voluntarily to witness any game or competition knows and presumably desires that a reasonable participant will concentrate his attention upon winning, and if the game or competition is a fast-moving one, will have to exercise his judgment and attempt to exert his skill in what, in the analogous context of contributory negligence, is sometimes called "the agony of the moment". If the participant does so concentrate his attention and consequently does exercise his judgment and attempt to exert his skill in circumstances of this kind which are inherent in the game or competition in which he is taking part, the question whether any mistake he makes amounts to a breach of duty to take reasonable care must take account of these circumstances ...
>
> [A] participant in a game or competition gets into the circumstances in which he has no time or very little time to think by his decision to take part in the game or competition at all ... If, therefore, in the course of the game or competition, at a moment when he really has

[3] See further paras 12.17 – 12.23 below.

[4] See further paras 12.13 – 12.23 below.

[5] See *Dann v Hamilton* [1939] 1 KB 509, 516–517, *per* Asquith J.

[6] This maxim represents the well-established rule that the person who consents to the infliction of injury cannot later complain of it or bring an action in respect of it. See *Smith v Baker* [1891] AC 325, 360, *per* Lord Herschell: "One who has invited or assented to an act being done towards him cannot, when he suffers from it, complain of it as a wrong."

[7] [1963] 2 QB 43, a case in which a spectator injured at a horse show claimed damages for negligence.

not time to think, a participant by mistake takes a wrong measure, he is not, in my view, to be held guilty of any negligence.[8]

4.12 Much the same point was made by Kitto J in the Australian case of *Rootes v Shelton*:[9]

> In a case such as the present it must always be a question of fact what exoneration from a duty of care otherwise incumbent upon the defendant was implied by the act of the plaintiff in joining in the activity ... [The] conclusion to be reached must necessarily depend, according to the concepts of the common law, upon the *reasonableness, in relation to the special circumstances*, of the conduct which caused the plaintiff's injury.
>
> This does not necessarily mean the compliance of that conduct with the rules, conventions or customs (if there are any) by which the correctness of the conduct for the purpose of carrying on of the activity as an organised affair is judged; for the tribunal of fact may think that in the situation in which the plaintiff's injury was caused a participant might do what the defendant did and still not be acting unreasonably, even though he infringed the rules of the game. Non-compliance with such rules, conventions or customs (where they exist) is necessarily one consideration to be attended to upon the question of reasonableness; but it is only one, and it may be of much or little or even no weight in the circumstances.[10]

4.13 In *Condon v Basi*[11] Sir John Donaldson MR preferred this approach to that adopted by Barwick CJ in the same case, which was based on a modification of the general duty of care to take account of the implied consent of the sportsman to risks which, outside the context of sport, would amount to breaches of duty. He added that he did not think that it made the "slightest difference in the end" which approach was employed. The two other members of the court agreed with his judgment without adding anything of their own.

4.14 These considerations suggest that the concept of unreasonable risk, which is an essential element of the requirements for recklessness, permits – indeed, *requires* – the tribunal of fact to take account of *all* the circumstances in which the defendant acts. There is no reason why the taking of a risk that would be unreasonable in any other setting should not be regarded as reasonable in the context of a fast-moving sporting encounter, where the safety of the participants is given a lower priority than in ordinary life.

Unreasonable risk and consent

4.15 There is indeed a difficulty in applying a requirement of recklessness to a case where the victim consents to the risk, but it does not arise from any rule that the

[8] *Ibid*, at pp 67–68.

[9] (1967) 116 CLR 383.

[10] *Ibid*, at p 389 (emphasis added).

[11] [1985] 1 WLR 866.

court must disregard the particular *circumstances* in which the risk was taken: it lies rather in the *concept* of unreasonable risk. This is a somewhat technical point, and it may perhaps be best approached by considering the possible ways in which the law might respond where injury is inflicted on a person who willingly accepted the risk of such injury.

CONSENT A COMPLETE DEFENCE?

4.16 First, the law might regard the victim's consent to the risk as a complete defence. Since we propose that the consensual infliction of injury that falls short of seriously disabling injury should in general be lawful even if intentional, it follows a fortiori that in our view it should also be lawful to inflict such injury *unintentionally* through an act consented to by the victim.

4.17 However, we do not suggest that the same should apply to seriously disabling injury. In accordance with the fourth principle in our suggested law reform strategy[12] we envisage that the consensual and intentional infliction of seriously disabling injury should in general continue to be criminal; and, although it does not follow that the *unintentional* infliction of seriously disabling injury should necessarily be criminal too, our provisional view is that the arguments against making it lawful to inflict seriously disabling injury with consent apply with equal force whether the injury is intentional or reckless. If the person inflicting the injury is aware of the risk *and* it is unreasonable for him or her to take that risk, we do not think that the victim's consent ought in general to be a complete defence however serious the injury sustained.

CONSENT WHOLLY IMMATERIAL?

4.18 At the other extreme, the law might say that the victim's consent is wholly immaterial – in other words, that it cannot be relied upon as a defence in any way whatsoever. This is the rule that we provisionally propose (subject to certain exceptions) in the case of seriously disabling injury *intentionally* inflicted, and it would be possible to apply it to such injury *recklessly* inflicted as well.

4.19 This would involve not only excluding the defence of consent *as such*, but also ensuring that it did not reappear in the form of an argument that if an act has the consent of the only person endangered by it then the risk involved in that act cannot be an unreasonable risk to take. This could not be done merely by *dispensing* with the requirement of unreasonableness: since knowingly exposing another to the risk of seriously disabling injury is not necessarily a reckless thing to do even if it is done *without* the other's consent, a fortiori it is not necessarily reckless if done *with* that consent. It would be necessary to provide, in effect, that on a charge of recklessly causing seriously disabling injury the risk should be regarded as an unreasonable one for the defendant to take, notwithstanding the consent of the person injured, if it *would* have been an unreasonable risk to take had that person not consented.

[12] We refer to the principle that if seriously disabling injury results, we will take the view that a person who consents to it has made a mistake and that to be seriously disabled is against his or her interests. See para 2.18 above.

4.20 Our provisional view is that such a rule would go too far. The facts of *McLeod*[13] illustrate the point we wish to make. In the course of a "Wild West Show", a marksman demonstrated his skill by firing a rifle at a cigarette being smoked by a volunteer, and accidentally shot him in the cheek. The infliction of the injury would undoubtedly have been reckless had the victim not consented to take part in the demonstration, however expert the marksman and however tiny the risk, because there would be no justification for subjecting an *unwilling* victim to any risk at all. It does not follow, in our view, that it should necessarily be regarded as reckless although the victim was a volunteer. That fact ought not to be a defence in itself, but it cannot in our view be wholly disregarded. The law must recognise the existence of risks which are reasonable if those endangered are willing to take them, but not if they are not.

CONSENT RELEVANT TO REASONABLENESS OF RISK

4.21 For these reasons we believe that the law must compromise between treating the victim's consent as a complete defence and regarding it as wholly immaterial: consent must be *a relevant factor* in determining whether it was unreasonable for the defendant to take the risk in question. Other things being equal, a risk to which the endangered person consents is *more likely* to be one that it is reasonable to take than a risk to which that person does not consent.

4.22 This may indeed be the present law, and it might be the effect of the relevant clauses of the Criminal Law Bill as they stand. Clause 3 requires the reckless causing of serious injury, and clause 1 provides that a person acts "recklessly" with respect to a result only if it is unreasonable, *having regard to the circumstances known to him*, to take that risk. At first sight it seems clear that the consent of the person endangered must be one of the circumstances to be taken into account. But there is a difficulty in applying to this situation the concept of an unreasonable risk.

4.23 The requirement that it should have been unreasonable for the defendant to have taken the risk in question is in effect a requirement of negligence; and in the civil law it is conventional to analyse the concept of negligence in terms of a type of cost-benefit analysis. If a defendant's conduct involves a risk of injury to a plaintiff, a court determines whether it was negligent of the defendant to take that risk by assessing (a) the extent of the risk[14] and (b) the cost, both economic and social, of eliminating the risk (for example, by refraining from the conduct creating it) or of reducing its extent (for example, by taking additional precautions). If (a) outweighs (b), the conduct is negligent; otherwise it is not.

4.24 In carrying out this sort of analysis it is normally assumed that the plaintiff does not want to be injured, or even to be subjected to the risk of injury. *Any* risk of injury is assumed to be prima facie undesirable. Determining whether the defendant was negligent will normally involve weighing the plaintiff's interest in not being injured against society's interest in permitting the sort of conduct on

[13] (1915) 34 NZLR 430. See Appendix B, para B.54 below.

[14] Ie the probability of the risk materialising, and the extent of the injury that would be likely to occur if the risk did materialise.

which the defendant is engaged (or in avoiding disproportionate costs). There is no need for the "risk" side of the equation to reflect any interest other than those of the plaintiff (and any others subjected to the same risk), and the interests of the plaintiff are precisely what he or she considers his or her interests to be.

4.25 If, however, the person endangered is willing to undergo the risk, this conventional analysis is no longer entirely adequate. If any balancing exercise is to be carried out, it must involve weighing, on the one hand, the interests of society (and the defendant) in the conduct in question; and on the other, the victim's interest in not being injured, *as assessed not by him or her but by a paternalistic state.*[15] If such an exercise is carried out, and it is concluded that the latter interest outweighs the former, does it follow that the risk is an unreasonable one for the defendant to take? The answer must depend on whether the concept of an "unreasonable" risk is understood in the conventional sense – that is, a risk which is unreasonable *from the victim's point of view*, one which the victim cannot reasonably be expected to put up with – or in a wider sense that reflects the victim's best interests as, *in the view of society*, they actually are – even if the victim does not so perceive them; and our suggested law reform strategy would adopt the second of these approaches.

4.26 This is not just a matter of terminology. The concept of recklessness enshrined in the Criminal Law Bill presupposes that the person endangered is unwilling, and its adaptation to the case of a willing victim involves a degree of strain. Arguably this is symptomatic of the deeper problem that the Bill is concerned with offences against the person, whereas the infliction of consensual injury is more properly classified as an offence against public morality or society as a whole. We see force in this argument, but we consider that it would be unrealistic to envisage the creation of a whole new category of offences for this situation alone. Moreover, there would then be practical difficulties in deciding which offence to charge if it was not clear whether the injury was consensual or non-consensual. Our provisional view is that if the unintentional infliction of seriously disabling injury on a consenting victim is to continue to be an offence at all, it should continue to be an offence of recklessness under the general law of offences against the person. Even so, our doubts as to the aptitude for this purpose of the concept of "unreasonable" risk would make it unwise to assume that the Criminal Law Bill, as currently worded, could be relied upon to achieve the desired result. We will therefore be provisionally proposing[16] that when assessing whether the unintentional causing of seriously disabling injury, to a person who consents to the act causing the injury, should be regarded as reckless (and, therefore, as amounting to the offence under clause 3) the requirement that it should have been unreasonable to take the risk in question should be construed as meaning that it must have been contrary to the best interests of the "victim" to take that risk, having regard to all the circumstances known to the accused person, including (if known to him or her) the fact that the "victim" so consented.

[15] In accordance with the philosophy that in certain circumstances the state is entitled to take the view that it is in fact in the victim's interests not to be injured, *even if he or she thinks otherwise*. See paras 2.13 – 2.18 above.

[16] See para 4.48 below.

4.27 It may be objected that the concept of determining what is in a person's best interests is excessively vague; but it is only this wider consideration that justifies punishing consensually-inflicted injury at all, and it would in our view be wrong to attempt to disguise the true nature of the issue to be decided. The relative weight to be attached to the victim's various interests must inevitably be a matter for the tribunal of fact. But we consider that the legislation should make it clear that, in those cases where it can reasonably be said that the victim consented to the activity in which he or she was injured, a defendant should not be liable to be convicted of recklessly causing injury unless there is some special extra element, indicating society's view of the true interests at stake, over and above the considerations that would normally be taken into account when determining whether the defendant acted unreasonably in taking the risk that he or she did. This societal view may take into account the scale of the injuries in fact inflicted or risked, or the value to the parties of the activity in which they were participating when the injury occurred. It will be an important part of this consultation exercise to ascertain what interests might specifically be mentioned in a provision of this type.

4.28 We should add, in the interests of completeness, that we suggested in the first Consultation Paper that if the defence of consent was to be extended, it should be formulated in terms of likelihood rather than risk.[17] We have been persuaded by the responses on consultation[18] that this would not be the right approach. In the context of intentionally inflicted injury, the central question is whether the complainant consented to the infliction of injury of that type. In the context of recklessly inflicted injury, nothing is gained, and the test is made unnecessarily complicated, if the difficult concept of likelihood is introduced: the central question should be whether the complainant consented expressly or impliedly to what the defendant did. We suggested in the first Consultation Paper[19] that a girl who has her ears pierced is willing to accept the risks inherent in piercing of this type only on the basis that the piercing is competently performed. For the reasons we have given above,[20] we do not now consider that this is the correct approach, and so long as what is done was within the four corners of the broad consent that she gave, any non-fatal injuries she may suffer should be left to the civil law to remedy.

THE DEFINITION OF SERIOUSLY DISABLING INJURY

4.29 The Criminal Law Bill in Law Com No 218 defines "injury" as meaning "physical injury, including pain, unconsciousness, or any other impairment of a person's physical condition or (b) impairment of a person's mental health".[21] No additional definition of "serious injury" was included in that Bill.[22] In the first Consultation

[17] Consultation Paper No 134, paras 18.2 – 18.3 and p 70, Question III.1.

[18] Particularly by the Criminal Bar Association.

[19] Consultation Paper No 134, para 18.2.

[20] See para 4.6 above.

[21] Clause 18.

[22] See Law Com No 218, para 15.8. The response during the consultation which led to that report supported, with near unanimity, the Commission's provisional agreement with the

Paper we provisionally proposed that the general threshold of consent to injury should be raised, but we did not suggest that any further definition was needed.[23] For the reasons we give in paragraphs 4.30 – 4.40 below, it is now our provisional view that if the law on consent and offences against the person is to be codified along the lines suggested in this Part, there will have to be a statutory definition of a particular category of serious injury which we will call "seriously disabling injury". The reason for this is that our suggested law reform strategy dictates[24] that, in general, consent should provide no defence to the causation of injury that can be classified as seriously disabling, but that it should provide a defence in respect of the causation of injuries that fall short of that level. It follows that, while we do not propose that any further definition of "serious injury" is necessary for the purposes of the offences contained in clauses 2 and 3 of the Criminal Law Bill contained in Law Com No 218, we *do* think it necessary to consider the adoption of a definition of that type of serious injury that can properly be classified as "seriously disabling" in respect of which consent shall not, under our proposals, provide a defence.

4.30 This provisional approach is consistent with the very strong views that were expressed from all sides on consultation. We were told that if the law was to be reformed along the lines we suggested in the first Consultation Paper, then there must be a statutory definition of what constitutes the level of injury to which a valid consent might not lawfully be given, so that people would know where they stand. This response was not limited to those who wished to see the law relating to sado-masochistic sexual activity liberalised. The Metropolitan Stipendiary Bench,[25] the Criminal Bar Association,[26] the CPS and the Institute of Legal Executives all considered that a statutory definition was essential. While the present vagueness might be acceptable when it is for the prosecution to prove that grievous bodily harm (or really serious injury) has been inflicted, the position was said to be quite different if a certain level of injury could be lawfully inflicted by consent, and the inflicter needed to know how far he could go.[27] Respondents expressed concern that the prejudices of magistrates or juries would come into play if there were no definition of the level of injury to which consent would provide no defence.[28]

CLRC in its 14th Report that it should be left to the jury in each case to decide whether a particular harm is serious.

[23] Consultation Paper No 134, para 17.3.

[24] See para 2.18 above.

[25] "Leaving the question of what serious injury is to the jury makes the magistrates' job difficult ... It is no help to magistrates to be told to ask themselves what a putative jury would decide as to whether particular harm amounted to serious injury or not."

[26] "We think that to leave 'serious injury' as it is is inviting inconsistency of interpretation – in particular when it marks the threshold of what may/may not be consented to."

[27] "All I see is a legal minefield that many will disregard on the grounds that it is impossible to know if they are breaking the law, so that they will do as they wish and hope for the best."

[28] "The distinction between common assault and ABH [actual bodily harm] is reasonably clear. The distinction between injury and serious injury is not. Therefore the Commission's proposal would lead to a disturbingly tight vicious circle and an unworkable law: sado-masochistic activity is legal if a jury thinks it legal. A sado-masochistic practitioner would have to second-

4.31 It was also pointed out by one respondent that unless the degree of injury was obviously serious, or obviously not serious, it would be impossible to say in advance of trial whether the defence of consent would be considered seriously by a jury, and a workable definition would lead to there being far fewer cases in which the answer was uncertain before trial.

4.32 The idea of "permanence" or "irreversibility" featured in a number of the suggestions made by respondents for what we are now provisionally calling "seriously disabling injury". These included:

- permanent loss of faculty
- permanent impairment of function
- permanent physical impairment
- permanent injury
- permanent disability
- permanent damage or disfigurement or mutilation

4.33 Other suggestions included:

- irreversible physical damage
- removal of limbs, organs or significant parts of the body
- damage to bones or internal organs
- major injury
- serious impairment of health or faculties
- injury which seriously endangers health
- injury causing incapacity

4.34 Our attention was also drawn to the definition contained in an article written by Professor Glanville Williams in 1990:[29]

> An injury is serious if it (a) causes serious distress, and (b) involves loss of a bodily member or organ, or permanent bodily injury or permanent functional impairment, or serious or permanent disfigurement, or severe and prolonged pain, or serious impairment of mental health, or prolonged unconsciousness; and an effect is permanent whether or not it is remediable by surgery.

guess how a jury would view his or her activities. Therefore there would be a wide legal wilderness."

[29] G Williams, "Force, injury and serious injury" (1990) 140 NLJ 1227, 1229.

4.35 Other respondents referred to the provisions of Criminal Codes in other countries, a number of which are set out in Appendix B to this Paper. The new French Penal Code explicitly categorizes the severity of injuries in terms of the resulting relative incapacity of the injured person to work: injuries which result in a total incapacity for a period exceeding eight days;[30] those which result in such an incapacity of not more than eight days' duration;[31] and those which do not result in any such incapacity.[32] The Italian Penal Code, for its part, defines "personal injury" as injury "which results in physical or mental illness."[33] If the illness in question lasts no longer than ten days, and the injuries are neither "serious" nor "very serious" as defined by the Code, the crime is only punishable on the complaint of the victim.[34] Personal injury is treated as serious if, inter alia, the act in question results in an illness or incapacity which prevents the victim attending to his ordinary occupations for a period in excess of forty days.[35]

4.36 Another respondent suggested that we should follow the approach adopted in regulations made under the Health and Safety at Work etc Act 1974. The Reporting of Injuries, Diseases and Dangerous Occurrences Regulations[36] provide that an injury that results in the incapacitation of a person "for work of a kind which he might reasonably be expected to do, either under his contract of employment or ... in the normal course of his work, for more than 3 consecutive days" must be reported.[37] It was suggested that an approach that determined the seriousness of the injury on the basis of its consequences in objective medical terms would provide a more precise, reliable and practical indicator as to where the line should be drawn between injuries to which a valid consent could be given and those to which such a consent could not be given. A number of other respondents, however, expressed anxiety that people should not be prevented from seeking medical advice, when necessary, for non-serious injuries to which they had consented, for fear that this might criminalise the actions which led to the injuries.

4.37 It is our provisional view that the introduction of a statutory definition of seriously disabling injury would mitigate some of the difficulties to which we have referred. If, in general, consent were to be a defence to the causation of injury but not to seriously disabling injury[38] we consider that the formulation of a workable definition of what constitutes seriously disabling injury is essential to the pursuit

[30] Article 222-1. See Appendix B, para B.8 below.

[31] Article R 625-1.

[32] Article R 624-1. See also Article 456 of the Turkish Penal Code, referred to in Appendix B, para B.21 below.

[33] Italian Penal Code, Article 582. See Appendix B, paras B.14 – B.15 below.

[34] *Ibid.*

[35] Italian Penal Code, Article 583. This Article also provides that personal injury shall also be serious if the act produces the permanent impairment of a sense or organ, or if the victim was a pregnant woman and the act resulted in an acceleration of birth.

[36] SI 1985, No 2023.

[37] *Ibid*, reg 3(3).

[38] See para 2.18 above.

of clarity in the criminal law. We are particularly concerned that criminal offences should be drafted so that they describe, so far as possible, the *essence* of the proscribed wrongdoing in such a way that they can be clearly understood by the public. If, as we provisionally propose, the causation of seriously disabling injury should usually be an offence, independent of any consent by the "victim", it is important that the meaning of such injury is not left to the discretion of a jury or lay bench. In this context it is particularly important that people should be given guidance as to where the line of criminal liability is drawn.

4.38 The leading options for a definition of seriously disabling injury would appear to be:

(1) to define it as injury which results in a total incapacity to work or to perform ordinary occupations for a definite period of time – perhaps, three days; or

(2) to adopt the definition suggested by Professor Glanville Williams, or variants of it.

4.39 Our provisional preference is for option (2). Although it was first put forward as a general definition of "serious injury" for the purposes of the new statutory scheme of offences against the person that has been carried forward into the Criminal Law Bill, we consider that it might usefully be adopted for use in the present context, since it provides a standard all-purpose definition that will not be dependent on the effect of the particular injuries on a person's capacity to work, if indeed he or she is in employment. If we were to choose option (1) it would be necessary for us to seek views on at least two further sub-options which might unnecessarily complicate matters and prevent us from achieving our aim of clarifying the law. In particular, choosing option (1) would require us to seek views on whether serious injury should be defined in terms of a total incapacity to do *any* work at all of any kind or whether the definition should be couched in terms of a failure to perform an ordinary occupation for a set period of time. The first of these "sub-options" would, we feel, lead to a definition of serious injury that sets the threshold for lawful consensual injury at too high a level: there cannot be many injuries that leave the victim incapable of doing any work at all. The second "sub-option" is, we feel, also flawed in that it would require a decision to be taken as to what constitutes an "ordinary occupation". In respect of both sub-options we would need to seek views as to the duration of the resultant incapacity to work. It is our view that the complexity attendant upon choosing option (1) is such that it would be likely to obscure, rather than clarify, the definition of seriously disabling injury which, as stated above, is central to our pursuit of a clear and comprehensible framework for the law of consent in this area. In any event, it is our provisional view that most of these difficulties can be avoided if option (2) is chosen as the definition.

4.40 Professor Williams did not intend his suggested definition to abrogate the right of the tribunal of fact to decide whether serious injury had been caused, but to give further guidance on this question. He described the effect of his proposal in the following terms:

> Let me hasten to add that the proposal does not entirely get rid of the necessity for gut-reaction [on the part of the jury], but it would largely

> do so. The fact that an injury comes within the definition would not compel the prosecution to charge it as serious, because other considerations may point in favour of the lesser charge. The definition is so wide that it would still leave a range of injury for the consideration of the judge in sentencing for serious injury; but at least it would concretise the task of the jury, and also that of a medical expert, who can testify more readily, and more conformably with his professional training, to questions of impairment and the permanence of injury etc than to the general question of seriousness.[39]

If the purpose of the proposed definition is to give more guidance to tribunals of fact, then careful thought has to be given to the content of this guidance. Professor Williams's own suggested option (albeit put forward in a slightly different context) is set out in paragraph 4.34 above. The importance of this definition to the rest of our proposals is such that, while this is the option that we would provisionally recommend, we seek the views of respondents on any modifications that we should make to this definition as it currently stands.

CONSENT AND THE LEGAL BURDEN OF PROOF

4.41 In this Paper we have described consent as a defence to liability. At present a defendant bears only an *evidential* burden in respect of this defence. If he or she wishes to raise the consent defence it is necessary for him or her to adduce evidence sufficient to "pass the judge". There is then a *legal* burden on the prosecution to *dis*prove the defendant's claims to the satisfaction of the higher, criminal, standard of proof. In this section we will set out some of the arguments in support of the orthodox position and we will then put forward the case for a break with orthodoxy in this area. We should make it clear at the outset that we have not yet formed any *firm* view on what we regard as a very difficult question.

4.42 The arguments against a reversal in the incidence of the legal burden will be familiar to any student of the law of evidence.[40] It is a legitimate concern that a change in the law of this nature may undermine the principle that the prosecution must prove its case and that it may ultimately have the effect of stretching Lord Sankey's "golden thread" to breaking point.[41] In addition, a reversal of the

[39] G Williams, "Force, Injury and Serious Injury" (1990) 140 NLJ 1227, 1229.

[40] In considering these matters respondents may find it helpful to take note of the academic debate which has taken place on certain related issues. In particular, a large number of learned articles were published in the wake of the House of Lords case of *Hunt* [1987] AC 352 in which *implied* statutory reversals of the legal burden of proof fell to be considered. Despite the fact that our section discusses the possibility of an *express* reversal of the legal burden the arguments of principle discussed in the academic literature are equally relevant in this context: see J C Smith, "The Presumption of Innocence" [1987] 38 NILQ 223; P Mirfield, "The Legacy of *Hunt*" [1988] Crim LR 19; F Bennion, "Statutory Exceptions: A Third Knot in the Golden Thread" [1988] Crim LR 31; D Birch, "Hunting the Snark: the Elusive Statutory Exception" [1988] Crim LR 221; P Healy, "Proof and Policy: No Golden Threads" [1988] Crim LR 355. See also a recent article by Mr Paul Roberts which draws out the legal and political principles that relate to the incidence of the burden of proof in criminal trials: "Taking the Burden of Proof Seriously" [1995] Crim LR 783.

[41] *Woolmington* [1935] AC 462, 481, *per* Viscount Sankey LC: "Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to ... the defence of insanity and subject also

incidence of the legal burden in respect of the non-fatal offences against the person with which this Paper is primarily concerned would create the anomaly that the defence would face a legal burden in respect of consent in assault cases, whilst in cases that also involve allegations of sexual offences[42] the prosecution would continue to bear the legal burden of proving the absence of consent. In addition to this anomaly respondents may take the view that there are no special factors peculiar to the consent defence that can justify a reversal of the legal burden and a departure from the approach taken in respect of other equally well-established common law defences such as self-defence.

4.43 Conversely, it may be that a reversal in the incidence of the legal burden would reflect the concern, articulated by a number of respondents to the first Consultation Paper, that the consent defence should only be available in situations where a jury can be confident that it is more probable than not that the victim of the assault truly consented. A change in the law in this area could, perhaps, focus attention upon the plausibility of the defendant's defence and may work in tandem with the proposals we set out in Parts V and VI below by ensuring a much more thorough investigation into the genuineness of the "victim's" consent than is possible under the present law. Additionally, it may also encourage those who are minded to cause consensual injury to satisfy themselves that their "victims" do consent to the proposed act or omission. A reform along these lines could also, perhaps, afford better protection to vulnerable potential victims, whose interests were highlighted by a number of respondents to the first Consultation Paper.[43] There is the further, pragmatic, consideration, that the availability of a consent defence which it is for the prosecution to disprove may lead the vicious assailants of battered partners to take up a lot of court time in putting forward unmeritorious defences in the hope of an acquittal where at present they would have no defence at all. In the context of our report on Binding Over,[44] we have mentioned the reluctance of victims of domestic violence to testify for the prosecution in court, and the retention of the orthodox approach to the burden of proof might increase this reluctance.

4.44 In Law Com No 218, when we recommended that the defendant should bear the legal burden of establishing the defence of duress, we said that there were factors unique to that defence which distinguished it from all other defences and, in particular, from self-defence.[45] In that report we recorded our belief that duress was particularly difficult for the prosecution to *dis*prove, in that it concerned

to any statutory exception." See also *Chan Kau* [1955] AC 206 where, at p 211, Lord Tucker described the application of the golden thread principle in the context of the *defence* of self-defence: "... in cases where the evidence discloses a possible defence of self-defence the onus remains throughout on the prosecution to establish that the accused is guilty of the crime ... and the onus is never upon the accused to establish his defence any more than it is for him to establish provocation or any other defence apart from that of insanity."

[42] Relevant provisions of the present law are set out in the second section of Appendix A below. See also para 1.12 above.

[43] See paras 2.5 – 2.9 above.

[44] See Binding Over (1994) Law Com No 222, paras 6.10 – 6.12 and n 15.

[45] Law Com No 218, paras 33.1 – 33.8.

matters peculiarly within the defendant's own knowledge, and that it was generally founded on evidence of circumstances separated, temporally and (possibly) geographically, from the crime in issue. It was these factors, taken together with our proposal to extend the defence of duress to charges of murder, that, we felt, justified a reversal in the incidence of the legal burden. We do not think that these arguments have any force in the present context, but we would be interested to hear whether the arguments we have suggested, or any others we have not mentioned, are thought to provide convincing reasons for placing the legal burden on the defendant. In particular, we seek views on the relevance, in this context, of the view expressed in Law Com No 218 that in circumstances where the evidence on which the defence is founded forms "part and parcel" of the incident during which the offence is committed then the prosecution, which has to prove the commission of the offence, should also have to disprove the "existence of the circumstances on which the defence might be founded."[46]

4.45 As we said in paragraph 4.41 above, we are not, at present, making any recommendations on this very difficult topic. We invite respondents to reflect on the competing concerns we have described in this section and their relevance to all the issues with which this Paper deals, when they come to express their views on the central issue: whether the burden resting on the defendant should be legal or, as at present, merely evidential.

LAW REFORM PROPOSALS

4.46 For the reasons set out in this Part, we have formulated a set of provisional proposals for respondents to consider. In formulating these rules we have taken into account the third, fourth and sixth principles in our suggested law reform strategy.[47]

Intentional causing of seriously disabling injury

4.47 **We provisionally propose that the intentional causing of seriously disabling injury (as defined in paragraph 4.51 below) to another person should continue to be criminal, even if the person injured consents to such injury or to the risk of such injury.**

Reckless causing of seriously disabling injury

4.48 **We provisionally propose that –**

(1) the reckless causing of seriously disabling injury (as defined in paragraph 4.51 below) should continue to be criminal, even if the injured person consents to such injury or to the risk of injury; but

[46] Law Com No 218, para 33.6.

[47] See para 2.18 above. We refer to the interests about which we are particularly concerned in the context of this project: to the principle that being seriously disabled is against a person's best interests, and to the principle that in the absence of effective regulation we cannot be sure that any consent will be entirely voluntary.

(2) a person causing seriously disabling injury to another person should not be regarded as having caused it recklessly unless –

(a) he or she was, at the time of the act or omission causing it, aware of a risk that such injury would result, and

(b) it was at that time contrary to the best interests of the other person, having regard to the circumstances known to the person causing the injury (including, if known to him or her, the fact that the other person consented to such injury or to the risk of it), to take that risk.

Intentional causing of other injuries

4.49 **We provisionally propose that the intentional causing of any injury to another person other than seriously disabling injury as defined in paragraph 4.51 below (whether or not amounting to "grievous bodily harm" within the meaning of the Offences Against the Person Act 1861 or to "serious injury" within the meaning of the Criminal Law Bill) should not be criminal if, at the time of the act or omission causing the injury, the other person consented to injury of the type caused.**

Reckless causing of other injuries

4.50 **We provisionally propose that the reckless causing of any injury to another person other than seriously disabling injury as defined at paragraph 4.51 below (whether or not amounting to "grievous bodily harm" within the meaning of the Offences Against the Person Act 1861 or to "serious injury" within the meaning of the Criminal Law Bill) should not be criminal if, at the time of the act or omission causing the injury, the other person consented to injury of the type caused, to the risk of such injury or to the act or omission causing the injury.**

Definition of seriously disabling injury

4.51 **We provisionally propose that for the purpose of paragraphs 4.47 – 4.50 above "seriously disabling injury" should be taken to refer to an injury or injuries which –**

(1) cause serious distress, and

(2) involve the loss of a bodily member or organ or permanent bodily injury or permanent functional impairment, or serious or permanent disfigurement, or severe and prolonged pain, or serious impairment of mental health, or prolonged unconsciousness;

and in determining whether an effect is permanent, no account should be taken of the fact that it may be remediable by surgery.

Meaning of consent

4.52 **We provisionally propose that for the purposes of the above proposals:**

(1) **"consent" should mean a valid subsisting consent to an injury or to the risk of an injury of the type caused, and consent may be express or implied;**

(2) **a person should be regarded as consenting to an injury of the type caused if he or she consents to an act or omission which he or she knows or believes to be intended to cause injury to him or her of the type caused; and**

(3) **a person should be regarded as consenting to the risk of an injury of the type caused if he or she consents to an act or omission which he or she knows or believes to involve a risk of injury to him or her of the type caused.**

Burden of proof on the issue of consent

4.53 **We invite views on whether, if the proposals in paragraphs 4.49 – 4.50 were accepted –**

(a) **it should be for the defence to prove, on the balance of probabilities, that the person injured consented to injury of the type caused, or (in the case of injury recklessly caused) to the risk of such injury or to the act or omission causing the injury; or**

(b) **it should be for the prosecution to prove, beyond reasonable doubt, that that person did not so consent.**[48]

[48] For further questions relating to the burden of proof, see para 7.33 below.

PART V

CAPACITY TO CONSENT

INTRODUCTORY

5.1 In recent years there has been an increasing amount of discussion in this country, mainly in the context of the civil law, about the different elements that are required to make a consent that the law should recognise as valid.[1] In the context of medical and surgical treatment there is now fairly general agreement that there are three central elements: capacity (or, as it is sometimes called, competence), information and voluntariness.[2] Different legal systems place the emphasis in different places when they identify what are the minimum requirements for a valid consent: in the context of medical and surgical treatment English law, for instance, is less demanding in its requirement for information than the law in some other jurisdictions where more emphasis has been traditionally placed on patients' individual rights. For the purposes of the criminal law, different considerations may be relevant, and it may also be that the criminal law should set different requirements in relation to consent in different contexts – sexual intercourse, surgery by a qualified surgeon, and consensual sado-masochistic beatings, for instance. This was one of the main reasons why we considered it essential to enlarge the scope of this project and to go out to consultation again.

CAPACITY TO CONSENT

5.2 English law has now fixed 18 as the age of majority,[3] and when people reach this age the law presumes that they have sufficient intelligence and maturity to take decisions for themselves. Attention needs to be focused, therefore, on two groups of people: children and young persons under the age of 18 (minors), and adults who for whatever reason lack whatever the law may identify as the necessary capacity to take their own decisions. In relation to the second of these groups, this Commission has just completed a five-year study of the civil law as it affects mentally incapacitated adults,[4] and the Government is now considering our recommendations. In the context of the present project it will be necessary to consider what relevance, if any, our recent recommendations ought to have in relation to the criminal law.

[1] A large number of texts, drawn from cases and articles both in this country and elsewhere are conveniently collected together in I Kennedy and A Grubb, *Medical Law* (2nd ed 1994) ch 3.

[2] See T Beauchamp and J Childress, *Principles of Bio-Medical Ethics* (3rd ed 1989) pp 79–85; I Kennedy and A Grubb, *Medical Law* (2nd ed 1994) p 104; M Jones, *Medical Negligence* (1991) p 209.

[3] Family Law Reform Act 1969, s 1(1).

[4] Mental Incapacity (1995) Law Com No 231.

CAPACITY TO CONSENT: MINORS

Introductory

5.3 If a minor is capable of understanding the nature of the act that is to be done, he or she is capable of giving a valid consent to it, unless statute provides otherwise.[5] In certain cases Parliament has set an age below which a valid consent cannot lawfully be given, or below which an offence will nevertheless be committed notwithstanding that an apparently valid consent has been given.[6] Sometimes, but not always, the defendant is given a defence if he or she reasonably believed the minor to be over the relevant age.[7] The law combines a respect for the autonomy of those who are growing up with the need to protect them from the consequences of certain decisions until they have reached an age at which Parliament decides they really are old enough to take decisions for themselves without Parliamentary protection.[8]

Offences against the person

5.4 There are statutory provisions prohibiting the tattooing of anyone under 18 years of age, notwithstanding their consent.[9] Before these controls came into force the courts had been applying the common law rule that if a child of the age of understanding is unable to appreciate the nature of an act, then an apparent consent to that act is no consent at all.[10] There are no comparable statutory controls existing in relation to piercing, branding, scarification or flagellation.[11] In general, if the consent of a minor is relied upon, the tribunal of fact must consider whether the child concerned had sufficient understanding and intelligence to give his or her consent.

5.5 For all purposes, and most obviously in cases involving surgical, medical and dental treatment, a person with parental responsibility for a child may give a valid consent on behalf of a child under the age of 18, provided that the proposed invasion of the child's body is in the child's best interests. As to the child's own capacity to give a valid consent, the position is governed by the common law in relation to those under the age of 16, and by statute thereafter.

[5] See *Lock* (1872) LR 2 CCR 10 (indecent assault); *Howard* [1966] 1 WLR 13 (rape); *Burrell v Harmer* [1967] Crim LR 169 (tattooing).

[6] Indecent assault (16) falls into the first category: see Sexual Offences Act 1956, ss 14(2), 15(2). The second category includes heterosexual sexual intercourse (16): see Sexual Offences Act 1956, s 6(1); anal intercourse (18): see Sexual Offences Act 1956, s 12(1) and (1A) as inserted by the Criminal Justice and Public Order Act 1994, s 143(3); and tattooing (18): Tattooing of Minors Act 1969, s 1.

[7] See Sexual Offences Act 1956, s 6(3): Tattooing of Minors Act 1969, s 1.

[8] It is interesting to note the analysis in 1 Bl Comm 463–464, of the different ages at which for different purposes a child came of sufficient age to make his own decisions.

[9] Tattooing of Minors Act 1969, s 1. See para 9.4 below.

[10] *Burrell v Harmer* [1967] Crim LR 169. See para 9.4 n 8 below.

[11] Although such activities will amount to indecent assaults (see n 6 above) if carried out for the purposes of sexual gratification.

5.6 So far as the common law is concerned, in *Gillick v West Norfolk Area Health Authority*[12] the majority of the House of Lords held that questions relating to the capacity of a child under the age of 16 to consent are to be answered by asking whether the child had sufficient understanding and intelligence to comprehend the proposed medical treatment, a matter that would depend both on the age and maturity of the child as well as on the seriousness and implications of the acts in question.[13]

5.7 As to those aged 16 or 17, the Family Law Reform Act 1969[14] provides that the consent of a minor who has attained 16 years of age "to any surgical, medical or dental treatment which, in the absence of consent would constitute a trespass, shall be as effective as it would be if he were of full age". We have already observed[15] that in the case of those under 18, a proxy consent may lawfully be given by someone in whom parental responsibility is for the time being vested, but it will not be necessary in the present context to elaborate the principles on which such consent may be given.[16]

Sexual offences

5.8 As we have already seen,[17] Parliament has appointed 16 as the age below which vaginal intercourse will remain unlawful notwithstanding that an apparently valid consent has been given by an intelligent, mature girl,[18] and 18 is now the age below which anal intercourse will remain unlawful, notwithstanding the apparently valid consent of the intelligent, mature young person who is taking part in it.[19] In relation to indecent assaults, which include sexual acts that stop short of vaginal or anal penetration, no valid consent can be given by a boy or girl under the age of 16.[20] The CLRC recommended that there should be a defence if the

[12] [1986] AC 112.

[13] We suggested this test in the context of this project as a general test of the capacity of a child to give consent : see Consultation Paper No 134, para 30.4.

[14] Family Law Reform Act 1969, s 8(1). The subsection goes on to provide that where a minor has by virtue of this section given an effective consent to any treatment it shall not be necessary to obtain any consent from his parents or guardian.

[15] See para 5.5 above.

[16] See, for example, *In re W (A Minor) (Medical Treatment: Court's Jurisdiction)* [1993] Fam 64, where the Court of Appeal held that a girl of 16 could be treated for her eating disorder notwithstanding her refusal to consent. See also *Re R* [1992] Fam 11 (anti-psychiatric medication for a girl of 15, notwithstanding that on a good day she was "Gillick competent" and refused to consent).

[17] See para 5.3, n 6 above.

[18] Unless the man in question is under the age of 24 and has not previously been charged with a like offence, and he believes her to be of the age of 16 or over and has reasonable cause for the belief: Sexual Offences Act 1956, s 6(1) and (3).

[19] See n 6 above.

[20] Sexual Offences Act 1956, ss 14(1) and (2), and 15(1) and (2). In this case there is no proviso similar to that referred to in para 5.3, n 7 above.

accused genuinely believed that the person in question was over the relevant age,[21] but Parliament has not implemented this recommendation.

The responses on consultation

5.9 In the first Consultation Paper,[22] which was of course concerned only with offences against the person, our provisional approach was to assume that 16 was the age above which no special rules should apply. Below that age we suggested a two-pronged test. First, whether the child was capable of giving consent, to which the answer would depend not only on the age and maturity of the child but also on the seriousness and implications of the act in question. Secondly, whether the child did in fact give consent. We also proposed that a defendant would only be able to rely on a child's consent as a defence if he or she honestly believed that the child was capable and was in fact consenting to the proposed actions, and honestly believed that the child was over 16.[23]

5.10 The approach in the Draft Criminal Code[24] was to use the simple expression "a man is guilty of an offence if he ... with a [girl under the age of 16] unless he believes her to be aged [16] or above".[25]

5.11 Because we did not clearly state in the first Consultation Paper that what we were proposing was, in essence, the codification of the present law, and then go on to ask whether certain activities should be subject to a rigid age-limit below which a lawful consent could not be given, the response on consultation was not as clear as it might otherwise have been. There was a fairly clear view that there should be an age limit in any circumstances where it was proposed that the present law should be liberalised,[26] but there were those who considered that the cut-off age should be 18, not 16.[27] The Criminal Bar Association saw no need for a separate class of case relating to children. It argued that if genuineness of consent is a test of general application, this test will of course apply to children as well as adults, and the child's capacity to consent will be part of the evidence of the genuineness of that consent.

[21] CLRC, 15th Report, paras 5.17, 6.10, 6.14. Under its proposals the evidential burden of proof is placed on the defendant. These proposals were codified in our Draft Criminal Code, ss 93, 94, 96–101.

[22] Consultation Paper No 134, paras 30.4 – 30.6.

[23] The defendant's honest belief need not have been arrived at on reasonable grounds: see generally Part VII below.

[24] In which the recommendations of the CLRC were codified: see para 5.8, n 21 above.

[25] See the Draft Criminal Code, ss 93, 94, 96, 97, 98, 100, 101, etc.

[26] Garland J, Otton J, SPTL, Bar Council, Magistrates' Association, Metropolitan Stipendiary Bench and Roger Leng.

[27] Magistrates' Association, Metropolitan Stipendiary Bench, Richard Davies (for body piercing), Council of LEAs (for religious flagellation). ACPO, who did not wish to see the law liberalised at all, considered that the Commission's proposals, including an age limit of 16, were broadly acceptable as a means of placing the present rules on a more formal basis.

MENTAL INCAPACITY

The present law

5.12 At common law a person cannot give a valid consent if he or she is incapable of understanding the nature of the act to which the apparent consent is given.[28] Statutory provision has already been made in relation to certain sexual offences. Statute, for instance, provides that it is an offence for a man to have unlawful sexual intercourse with a woman who is a defective,[29] and that the consent of a woman who is a defective is to be disregarded when considering the liability of a defendant for an indecent assault.[30] It is also an offence for a man who is an officer on the staff of or is one of the managers of, a hospital or mental nursing home to have "unlawful sexual intercourse" with a woman receiving treatment for a mental disorder at the hospital or home.[31]

5.13 The protection which the criminal law should afford to people whose mental capacity is impaired has been considered from time to time in recent years. The role of the law in this area is to reconcile the competing goals of respecting the choices made by those who are mentally disabled while at the same time ensuring that such people are protected from exploitation and abuse.[32] These principles are expressed in the United Nations Declaration on the Rights of Mentally Retarded Persons:[33]

> Where mentally retarded persons are unable, because of the severity of their handicap, to exercise all their rights in a meaningful way or it should become necessary to restrict or deny some or all of these rights, the procedure used for that restriction or denial of rights must contain proper legal safeguards against every form of abuse. This procedure must be based on an evaluation of the social capability of the mentally

[28] See *Fletcher* (1859) Bell CC 63; 169 ER 1168 (a conviction for rape was upheld after the jury had said that they considered that a girl of weak intellect was incapable of giving consent from defect of reasoning): *Lang* (1975) 62 Cr App R 50 *per* Scarman LJ: "the critical question is ... whether she understood her situation and was capable of making up her mind."

[29] Sexual Offences Act 1956, s 7(1) as substituted by the Mental Health Act 1959, s 127(1)(a). Section 45 of the 1956 Act (as substituted by the 1959 Act, s 127(1)(b)) defines "defective" as a "person suffering from a *state of arrested or incomplete development of mind which includes severe impairment of intelligence and social functioning* (italicised words substituted by the Mental Health (Amendment) Act 1982, s 65(1), Sched 3, Pt I, para 29). By s 7(2) of the 1956 Act a man is not guilty of an offence under that section if he does not know and has no reason to suspect the woman to be a defective.

[30] Sexual Offences Act 1956, s 14(4). See *Hall* (1987) 86 Cr App R 159.

[31] Mental Health Act 1956, s 7. Proceedings under the 1959 Act can only be initiated by or with the consent of the Director of Public Prosecutions.

[32] See New South Wales Law Reform Commission, People with an Intellectual Disability and the Criminal Justice System (1994) Discussion Paper 35. That Commission lists the factors that accentuate the vulnerability of mentally incompetent crime victims: trust; isolation and ostracism from normal social intercourse, support and services; lack of understanding of the criminal law; lack of knowledge about where to report crime or what can be done about it; poverty; powerlessness.

[33] Declaration on the Rights of Mentally Retarded Persons, 1971 UN General Assembly 26th Session, Resolution 2856, Article 7.

retarded person by qualified experts and must be subject to periodic review and to the right of appeal to higher authorities.

5.14 When the CLRC considered the law on sexual offences it recommended that a man should be guilty of an offence if he had sexual intercourse with a woman suffering from a severe mental handicap because "the probabilities are that many such women would be incapable of consenting in the sense of knowing what they were consenting to and appreciating the consequences of consenting".[34] In the Draft Code this Commission adopted the same statutory definition of "severe mental handicap" as is used for the word "defective" in the present legislation.[35]

5.15 This approach to the criminal law treats a person suffering from a state of arrested or incomplete development of mind which includes severe impairment of intelligence and social functioning as incapable of giving a valid consent for any purpose, but it otherwise dictates that issues of consent should be approached on a case by case basis, dependent on whether the person in question understood the nature of the act to which he or she was supposedly giving consent. In South Australia an authoritative committee has argued that a person suffering from a mental disease or defect should not, by law, be inhibited from having sexual intercourse unless such defect or disease renders him or her incapable of giving a true consent to sexual intercourse.[36] An opposite view has recently been adopted in Ireland, where section 54 of the Criminal Law (Sexual Offences) Act 1993 contains an unqualified prohibition against sexual intercourse with a person who is "mentally impaired".[37]

Legal competence

5.16 Issues of legal competence, or capacity to consent, were explored in great depth during our recent law reform project on mental incapacity, during which one

[34] CLRC, 15th Report, para 9.5. The CLRC also recommended that buggery and indecent conduct with a severely mentally handicapped man or woman should be a criminal offence: *ibid*, para 9.6. These recommendations were carried forward into ss 106(1), 107 and 108 of the Draft Code, which also incorporates the CLRC's recommendations that there should be a defence if the defendant is himself mentally handicapped or if he believes that the other person is not suffering from *any* mental handicap.

[35] See the Code Report, vol 2, para 15.39. For this definition see n 29 above. The Law Reform Commission of Ireland has also been reluctant to advocate a "tight" definition for the degree of mental disability sufficient to negative consent to sexual intercourse. See its recent report, Sexual Offences Against the Mentally Handicapped (1990), para 32, in which the Commission recommends "that it shall be an indictable offence to have sexual intercourse with any person who is at the time of the offence a person with mental handicap or suffering from mental illness, which is of such a nature or degree that the person is incapable of guarding himself or herself against exploitation".

[36] Criminal Law and Penal Methods Reform Committee of South Australia, Special Report on Rape and Other Sexual Offences (1976), para 10.1.

[37] This legislation followed the 1990 report of the Law Reform Commission of Ireland which stated in paras 29–30 that in cases where a competent man had sexual intercourse with an incompetent person there had been "an intrusion on the dignity of the human personality in circumstances of gross inequality which, we are satisfied, the law should condemn." The Commission also said in this report that an alleged victim's "mental handicap" may make it difficult for the prosecution to prove the absence of consent in rape cases and that this consideration provided a further "pragmatic" justification for interference.

consultation exercise was given over to issues relating to medical treatment and research.[38] The relevant provisions of Clause 2 of the draft Bill contained in our report are in these terms:

> (1) [A] person is without capacity if at the material time –
>
> (a) he is unable by reason of mental disability to make a decision for himself on the matter in question; or
>
> (b) he is unable to communicate his decision on that matter because he is unconscious or for any other reason.
>
> (2) [A] person is at the material time unable to make a decision by reason of mental disability if the disability is such that at the time when the decision needs to be made –
>
> (a) he is unable to understand or retain the information relevant to the decision, including information about the reasonably foreseeable consequences of deciding one way or another or of failing to make the decision; or
>
> (b) he is unable to make a decision based on that information,
>
> and in this Act "mental disability" means a disability or disorder of the mind or brain, whether permanent or temporary, which results in an impairment or disturbance of mental functioning.
>
> (3) A person shall not be regarded as unable to understand the information referred to in subsection (2)(a) above if he is able to understand an explanation of that information in broad terms and in simple language.[39]

5.17 So far as recent case-law is concerned, in *Re C*[40] Thorpe J held that the test for capacity turned on whether the patient sufficiently understood the nature, purpose and effects of the proposed treatment. The answer to this question was affected by his capacity to comprehend and retain the treatment information; to believe this information, and to weigh it up and balance risks and needs in order to arrive at a choice. If his belief in the necessity of treatment was not affected by his mental disorder then the test of capacity was satisfied.

The responses on consultation

5.18 In the first Consultation Paper we merely asked whether there were other vulnerable groups (in addition to children) who should receive special consideration, and a large number of respondents referred to adults who did not

[38] Mentally Incapacitated Adults and Decision-Making: Medical Treatment and Research, (1993) Consultation Paper No 129. See, in particular, *ibid*, paras 2.1 – 2.24.

[39] Mental Incapacity (1995) Law Com No 231, draft Bill, cl 2 (1)–(3). See also *ibid*, paras 3.2 – 3.21. The provisions in clause 2(b) relating to the standard of proof will be inapposite in criminal proceedings, in which the Crown would have to prove to the criminal standard of proof that the complainant lacked capacity to consent if this kind of approach was adopted.

[40] *Re C (Adult: Refusal of Treatment)* [1994] 1 WLR 290, 292, 295.

have sufficient understanding and intelligence to be capable of consenting. We did not at that time seek explore this issue any further.

LAW REFORM PROPOSALS

5.19 We consider that the appropriate approach to questions of capacity is to start by codifying the present common law, so far as minors are concerned, and by adapting our recent recommendations for the mentally disabled to fit the requirements of the criminal law. This approach takes into account the second principle in our suggested law reform strategy.[41] We see no reason why there should not be the same basic requirements for capacity in relation to both sexual offences and offences against the person, or indeed in relation to any other part of the criminal law in which questions of capacity are in issue.

5.20 In the case of certain sexual offences, as we have seen, Parliament has already set an age below which a valid consent cannot lawfully be given, or below which an offence will be committed notwithstanding that an apparently valid consent has been given.[42] We do not propose any alteration in those ages. In later parts of this Paper we will consider whether there are any other circumstances in which there should be an age below which a minor may not give a valid consent, even if he or she is otherwise competent to consent, and if so, what that age limit should be in relation to the activity or activities in question.[43]

5.21 **We therefore make the following provisional proposals:**

Persons without capacity

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

Definition of persons without capacity

(2) A person should be regarded as being without capacity if when he or she gives what is alleged to be his or her consent –

(a) he or she is under the age of 18 and is unable by reason of age or immaturity to make a decision for himself or herself on the matter in question;

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

[41] See para 2.18 above. We are referring to the need to make special rules for the young and the disabled.

[42] See para 5.8 above.

[43] These comments relate to activities like piercing, branding or scarification (Part IX), the infliction of injury for spiritual or sexual purposes (Part X) and, possibly, dangerous exhibitions and some martial arts activities (Part XII).

(c) **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.**

Capacity and minors

(3) **In relation to those matters in which a person under the age of 18 may give a valid consent under our proposals, such a person should be regarded as being unable to make a decision by reason of age or immaturity if at the time the decision needs to be made he or she does not have sufficient understanding and intelligence to understand the information relevant to the decision, including information about the reasonably foreseeable consequences of deciding one way or another or of failing to make the decision.**

(4) **In determining whether a person under the age of 18 has sufficient understanding and intelligence for these purposes, a court should take into account his or her age and maturity as well as the seriousness and implications of the matter to which the decision relates.**

Capacity and the mentally disabled

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

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

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

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

Capacity to understand in broad terms

(6) **A person should not be regarded as being unable to understand the information referred to in (3) and (5) above if he or she is able to understand an explanation of that information in broad terms and simple language.**

5.22 We are particularly anxious to hear the views of those who have practical experience of the criminal law in the courts as to whether they foresee any difficulty if an approach along these lines is adopted. We also wish to hear from

those who have experience of the care of those with mental disabilities, since we want to ensure that our final proposals afford appropriate protection to those who are beyond any doubt incapable of giving a valid consent and also that respect is given to the rights of those with mental disabilities to take their own decisions, so far as they are capable of appreciating both the benefits and the risks involved.

PART VI

FRAUD, MISTAKE, FORCE, THREATS, ABUSE OF POWER AND OTHER PRESSURES

INTRODUCTORY

6.1 In the first Consultation Paper we were only concerned with consent as a defence in the context of non-sexual offences against the person, and we made it clear that we were not seeking to follow the law of rape in producing a single formula to cover the many diverse cases with which we were then concerned.[1] The responses to consultation persuaded us, however, that we had to undertake a more comprehensive survey and to start by seeing how issues of consent are handled in the context of sexual offences, where questions relating to the reality of consent, and the possibility of fraud and threats being factors nullifying consent, have received much fuller treatment from the courts[2] and from law reform bodies. Another reason for this approach is that we do not now believe that it would be practical to have two different regimes for consent co-existing side by side without at any rate examining whether they would be compatible with each other.

6.2 In the field of sexual offences, it is now clear as a matter of English law that in cases of rape it is sufficient for the prosecution to prove that the act of intercourse was without the complainant's consent.[3] Once this central issue has been proved to the satisfaction of the requisite standard of proof the prosecution does not also have to go on to show that the complainant's submission was induced by fear, force or fraud.

6.3 Following a number of inconsistent judgments in the nineteenth century,[4] Parliament intervened in 1885.[5] The statutory rules which were introduced then were re-enacted, with minor amendments, in 1956 and, subject to a further minor

[1] Consultation Paper No 134, para 24.3.

[2] Although a leading English case, *Clarence* (1888) 22 QBD 23, was a case of assault, the alleged assault consisted of sexual intercourse.

[3] *Olugboja* [1982] QB 320. The Court of Appeal held that whatever the law may have been before the enactment of the Sexual Offences (Amendment) Act 1976, Parliament adopted and incorporated in that Act the recommendation in the Heilbron Report that legislation should contain a comprehensive definition of the offence which would emphasise that lack of consent (and not violence) is the crux of the matter.

[4] 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*.

[5] See the Criminal Law Amendment Act 1885, the long title of which was "an Act to make further provision for the Protection of Women and Girls, the suppression of brothels, and other purposes."

modification in 1994, are still on the statute book. Their present effect is as follows:

(1) A man who induces a married woman to have sexual intercourse with him by impersonating her husband commits rape.[6]

(2) It is an offence for a person to procure a woman, by threats or intimidation, to have sexual intercourse in any part of the world.

(3) It is an offence for a person to procure a woman, by false pretences or false representations, to have sexual intercourse in any part of the world.[7]

6.4 Part of the background to the introduction of these statutory provisions in 1885 was the uncertainty created by recent decisions of the English courts and the Irish courts about the effects of fraud involving the impersonation of a husband. They also reflected Parliament's wish to ensure that a defendant was punished even if the threats or the fraud for which he was responsible were not such as to nullify the consent given by the complainant to the act of intercourse itself.[8] Their effect, however, is somewhat limited. The statutory rule about the impersonation of a woman's husband applies to vaginal or anal intercourse but not to any other act which, in the absence of consent, would be an indecent assault – although a similar rule, not expressly stated in the legislation, almost certainly applies. The offences of procuring intercourse by threats or intimidation, and by false pretences or false representations, however, may not extend even to anal intercourse.[9] The buggery of a consenting adult in private is not an offence[10] even if his or her consent is procured by threats or fraud – provided that the threats or fraud are not such as to invalidate the consent altogether, in which case the act will now be rape.[11]

[6] This is the effect of the Sexual Offences Act 1956, s 1(2), as substituted by the Criminal Justice and Public Order Act 1994, s 142 (3).

[7] Sexual Offences Act 1956, ss 2(1) and 3(1), as amended by the Criminal Justice and Public Order Act 1994, s 168(1) and (3) and Sched 9 para 2 and Sched 11.

[8] Three years later, in *Clarence* (1888) 22 QBD 23, Willis J distinguished the type of fraud that would afford no basis for treating the woman's consent as a nullity and continued, at p 34: "The essence of rape is, to my mind, the penetration of the woman's person without her consent. In other words it is, roughly speaking, where the woman does not intend that the sexual act should be done upon her either at all, or, what is pretty much the same thing, by the particular individual doing it."

[9] Section 44 of the Sexual Offences Act 1956 provides that proof of penetration is sufficient where, on the trial of any offence under the Act, it is necessary to prove sexual intercourse, *whether natural or unnatural.* Unnatural intercourse means buggery: *Gaston* (1981) 73 Cr App R 164. It is arguable that, in the light of s 44, the words "sexual intercourse" in ss 2 and 3 include buggery – as they do in the new s 1, substituted by Criminal Justice and Public Order Act 1994, s 142. But if the offences extended to buggery there would be no reason to confine them to the case where the victim is female.

[10] Sexual Offences Act 1956, s 12, as amended by Criminal Justice and Public Order Act 1994, s 143.

[11] Sexual Offences Act 1956, s 1, as substituted by Criminal Justice and Public Order Act 1994, s 142.

THE CLRC REVIEW AND THE DRAFT CRIMINAL CODE

6.5 In the early 1980s the CLRC carried out a very thorough review of this area of the law.[12] The CLRC's recommendations were subsequently embodied in this Commission's Draft Criminal Code.[13] Section 89 of the Draft Code provides:

> (1) A man is guilty of rape if he has sexual intercourse with a woman[14] without her consent and –
>
> (a) he knows she is not consenting; or
>
> (b) he is aware that she may not be, or does not believe that she is, consenting.
>
> (2) For the purposes of this section a woman shall be treated as not consenting to sexual intercourse if she consents to it –
>
> (a) because a threat, express or implied, has been made to use force against her or another if she does not consent and she believes that, if she does not consent, the threat will be carried out immediately, or before she can free herself from it, or
>
> (b) because she has been deceived as to –
>
> (i) the nature of the act; or
>
> (ii) the identity of the man.

6.6 Section 90 provides:

> A person is guilty of an offence if he procures a woman by threats or intimidation to have sexual intercourse in any part of the world.

6.7 Section 91 provides:

> A person is guilty of an offence if he procures a woman by deception to have sexual intercourse in any part of the world.

The word "deception" is not defined in this part of the Code but in the part of the Code that deals with the deception offences now contained in the Theft Acts,[15] and for the purposes of that part only, it is defined, in section 155, to mean "any deception (whether deliberate or reckless) by words or conduct as to fact or as to

[12] CLRC, 15th Report.

[13] In accordance with our policy of incorporating recent recommendations by the CLRC in the Draft Code without amendment.

[14] By the recent amendments that are contained in s 142 of the Criminal Justice and Public Order Act 1994, a man now commits rape if (a) he has sexual intercourse with a person (whether vaginal or anal) who at the time of the intercourse does not consent to it; and (b) 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. See also para 1.12, n 18 above.

[15] Draft Criminal Code, chapter III (Theft, Fraud and Related Offences).

law, including a deception as to the present intentions of the person using the deception or any other person."[16]

CONSULTATION ON THE MEANING OF CONSENT

6.8 In the first Consultation Paper we suggested[17] that consent should be given its "normal" meaning and that the question whether a victim[18] had actually consented should be considered in its particular context. The question to be asked would not be whether the victim had consented as such, but whether he or she had consented to the *particular act or risk* in issue. We went on to say[19] that this question was just a preliminary to what might be a more substantial investigation into the "reality" or genuineness of the alleged consent.

6.9 We made no proposals in relation to the guidance that might be provided to courts when they had to determine whether the victim did actually consent to the risk or act in question.

6.10 Most respondents agreed with our approach.[20] The SPTL said that in the interests of consistency the normal meaning of consent for the purposes of offences against the person should be the same as for sexual offences. Those who did not favour our approach appeared to be favouring something similar to the provisions of a recent statute in the Australian State of Victoria,[21] where statute defines the circumstances in which consent is free or genuine or voluntary or, conversely, the circumstances in which it is not. The timing of the consent was regarded as important. Can a consent given some time ago be regarded as valid in changed circumstances? Can consent, once given, be withdrawn? One respondent distinguished between the potential victim's willingness to consent (of which we can have no certain knowledge) and his or her acts (including speech or an omission) which would be regarded by a detached observer as signifying consent. He wanted the distinction between "consent" and "submission" to be clearly spelt out.[22]

FRAUD AND MISTAKE

6.11 It will have been seen in paragraphs 6.3 – 6.4 above that in the law of rape a distinction is made between a mistaken belief, induced by fraud, as to the *nature* of the act of intercourse or the *identity* of the other person,[23] and fraud of a type

[16] The definition is taken from s 15(4) of the Theft Act 1968.

[17] Consultation Paper No 134, para 25.1.

[18] The word "victim" is used throughout this Part without prejudice to the argument which was urged on us by many respondents that it is an inappropriate word to use in relation to people who consent to what is being done to them. See paras 1.20 – 1.23. above.

[19] Consultation Paper No 134, para 25.2.

[20] The Circuit Judges at Birmingham, Forbes J, SPTL, the CPS, the Law Society, and the Criminal Bar Association, among others.

[21] Crimes (Rape) Act 1991, s 36. See also Appendix B, para B.88 below.

[22] As it is in the Victorian statute.

[23] In the past there has been a great deal of uncertainty about the precise nature of this rule: see J C Smith and B Hogan, *Criminal Law* (7th ed 1992) pp 456–457. Some of this uncertainty

that does not affect a person's understanding of these two matters. In its original Working Paper[24] the CLRC suggested dispensing altogether with fraud in rape, but in the end it decided to make the clear distinction that has now found its way into sections 89(2)(b) and 90 of the Draft Code. The difficulties caused by the Government's failure to modernise the law in accordance with the CLRC's recommendations can be seen in two very recent cases.

6.12 In *Linekar*[25] a prostitute agreed to provide her services for an agreed sum of £25, which her customer had no intention of paying. The Court of Appeal held that the fraud did not nullify her consent to intercourse. If the CLRC's recommendations had been implemented,[26] there would have been no question of a very experienced Old Bailey judge[27] directing the jury that it might convict the defendant of rape on this basis even if it was not willing to accept the complainant's story that he forced himself violently upon her.[28]

6.13 In *Elbekkay*,[29] on the other hand, the Court of Appeal considered that it was still at liberty to decide, as a matter of common law, notwithstanding the interventions of statute in 1885, 1956 and 1976,[30] that when a woman consented to sexual intercourse in the belief that it was her regular male partner who had got into bed with her, her consent was nullified by this impersonation, notwithstanding that section 7(3) of the Sexual Offences Act 1956 makes no reference to impersonation of anyone other than a husband. Once again, the implementation of the CLRC's recommendations[31] would have avoided all this difficulty.

6.14 In recommending that consent obtained by the impersonation of a man other than a husband should constitute rape the CLRC said quite briefly that it could see no reason to distinguish between different types of impersonation.[32] More recently, one commentator has suggested that an analogy might usefully be drawn from the civil law, where a fundamental mistake that relates to the material identity of the other party to a contract or to the nature of the subject matter of

may have been resolved by the recent case of *Elbekkay* [1995] Crim LR 163: see para 6.13 below.

[24] CLRC, Working Paper on Sexual Offences (1980), paras 20–25.

[25] [1995] QB 250.

[26] These are now set out in ss 89(2) and 91 of the Draft Code. See paras 6.5 and 6.7 above.

[27] Judge Michael Coombe.

[28] The jury, in effect, returned a special verdict at the judge's request.

[29] [1995] Crim LR 163.

[30] The Court of Appeal did not fully explain why it considered itself at liberty to go back beyond the 1956 consolidation Act to examine the history that led to the enactment of s 4 of the Criminal Law Amendment Act 1885. For the relevant principles of statutory construction, see *Farrell v Alexander* [1977] AC 59, 84E *per* Lord Simon of Glaisdale, and F Bennion, *Statutory Interpretation* (2nd ed 1992) pp 442–443. And see now N Padfield, "A Tiger by the Tail: Sexual Offences in the CJPOA 1994" (1995) 2 Archbold News 5, where a further problem caused by the subsequent amendments to the statute law contained in s 142 of the Criminal Justice and Public Order Act 1994 is discussed.

[31] These are now set out in s 89(2)(b)(ii) of the Draft Code. See para 6.5 above.

[32] CLRC, 15th Report, para 2.25.

the contract will render the contract void, but this will not be the case where the mistake relates merely to an attribute of the other party or to a motive for contracting, for example, a mistake relating to the character or social position of the other party.[33] For this reason he has suggested that a distinction ought to be made between the impersonation of a fiancé or boyfriend, where a relationship already exists which fundamentally depends on the intimacy of sex, and the impersonation of a famous pop star or sports personality where there is no existing relationship.[34] However, the problem with drawing too close an analogy with the civil law, especially as a means by which to narrow the circumstances in which a victim's consent will be nullified for the purposes of the criminal law, is that the law of contract does not itself provide a wholly clear and satisfactory answer to problems of identity and (fraudulently induced) mistake. In particular, the grounds upon which a contract will be rendered *void* by reason of an operative unilateral mistake at common law are based, in part, upon a difficult assessment of the importance of the identity of the other party to the contracting party at the time of contracting. In these circumstances, we are reluctant to rely on the civil law to provide satisfactory answers to the questions of criminal law discussed in this Part.

6.15 In the first Consultation Paper we suggested that *any* fraud by the defendant which induces consent should deprive the defendant of a defence based on consent. 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.[35] We expressed dissatisfaction with a decision of the Supreme Court in Canada[36] in which a doctor had fraudulently obtained a woman's consent to a vaginal examination at which another person was present by falsely pretending he was a medical student, and the woman's consent was held to be valid.

6.16 If this suggestion were to be adopted it would mark a radical shift in the effect of fraud in this class of case. It would abolish the distinction between the offence of

[33] G Virgo, "When is consent not consent?"(1995) 6 Archbold News 6, 7. Cf the last sentence in the extract from the judgment of the High Court of Australia in *Papadimitropoulos* (1957) 98 CLR 249, 261, cited in para 6.24 below.

[34] In *Elbekkay* [1995] Crim LR 163 this question did not arise in this form, although McCowan LJ asked rhetorically: "How could we conscientiously hold that it is rape to impersonate a husband in the act of sexual intercourse, but not if the person impersonated is, merely, say, the long-term, live-in lover, or in the even more modern idiom, the 'partner' of the woman concerned?" (see transcript).

[35] See the Canadian case of *Harms* [1944] 2 DLR 61, where the court upheld the conviction for rape of a native Canadian girl whose consent to intercourse had been obtained by the defendant posing as a doctor and falsely representing that sexual intercourse was in the nature of a medical treatment necessitated by a condition which he said he had diagnosed. The court held that consent had been obtained by false and fraudulent representations as to the nature and quality of the act. In *Papadimitropoulos* (1957) 98 CLR 249 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". Thus a woman who had been tricked into a bogus marriage ceremony was not raped when she had intercourse willingly with the man she thought was her lawful husband. See also paras 6.3 – 6.4 above.

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

fraudulently procuring consent to sexual intercourse and the offence of rape (in which there is no valid consent). In the nineteenth century a judge 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."[37] Our original proposals would mean that 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.

6.17 On consultation most of those who responded accepted our proposals without explaining their reasons at any great length.[38] Three academic respondents, however, counselled caution. The SPTL thought that the proposal would widen the scope of the criminal law in a wholly unacceptable way, and a Leeds University group favoured the retention of the present rules.[39] Discussion centred round the case of the client who pays a prostitute with a forged banknote, and the difficulty of stigmatising the act of intercourse (or, in the context of one aspect of the present project, perhaps, the act of spanking) as itself a non-consensual assault in these circumstances. Professor Feinberg has drawn[40] a qualitative distinction between this type of case (where he said that the prostitute is not harmed by the act itself) and the other familiar type of case, the woman submitting to a vaginal examination by an impostor doctor (where he suggests that she may well have been harmed by the very act of examination). We consider, however, that it would be illegitimate to embody any such distinction in the criminal law, quite apart from any drafting difficulties that might be involved.

6.18 In spite of the support on consultation, we consider that it would be wrong to recommend the fundamental change that was suggested in the first Consultation Paper in the absence of any major new fundamental review of the law relating to sexual offences.[41] Although there is a powerful argument that the law should protect people who are ignorant or naively trusting,[42] in our view, this protection should be achieved through the criminal law of deception. Our present view is that permitting fraud to nullify consent (except in the comparatively narrow range of cases in which it already has this effect, and possibly another kind of case we

[37] *Case* (1850) 1 Den 580, 582; 169 ER 381, *per* Wilde CJ.

[38] They included Garland and Forbes JJ, the Circuit Judges at Birmingham, the CPS, the Law Society, and the Institute of Legal Executives. Garland J said that fraud as to any aspect of the transaction, if it was the basis for the consent, should render the consent inoperative.

[39] For a thoughtful expression of anxiety about the breadth of the Commission's proposals, see D C Ormerod, "Consent and Offences against the Person" (1994) 57 MLR 928, 935–936.

[40] J Feinberg, MLCL vol 3, p 296.

[41] We received at least one very powerful submission that the law relating to rape ought to be changed, because "rape by pretence" ought to be treated just as seriously as "rape by physical force". It would be wrong, however, to recommend such a substantial change to the law of rape in the absence of a full law reform study on the subject. Although we are now embarking on a further round of consultation, we do not at present envisage recommending that the law relating to consent and sexual offences should be reformed in this way. For our general approach, see paras 1.7 – 1.8 above.

[42] See J Feinberg, MLCL vol 3, p 296.

refer to in paragraph 6.19 below) would be disproportionate.[43] We will therefore be provisionally proposing[44] 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; that the penalty for this offence should be, say, a maximum of five years' imprisonment; 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.

6.19 We are, however, very concerned about one specific class of case, and we acknowledge that there may be other particular types of fraud on which we should also be concentrating our attention. We are referring here to the case where a person agrees to allow another to have sexual intercourse with him or her after that other person has untruthfully said that he has been tested for HIV or other sexually transmitted diseases and that the findings were negative. It seems to us that this type of fraudulent misrepresentation is morally different from a fraudulent promise to pay for sexual services, and that it comes close to affecting the nature of the act itself in that it deals with matters that can have a physical consequence. We will be asking, therefore,[45] whether a fraudulent misrepresentation that a person has had a test for HIV and/or other sexually transmitted diseases should form an exception to the general rule that fraud should nullify consent only where it goes to the nature of the act or the identity of the other person or persons involved in the act, and if so, in what terms this new class of misrepresentation should be formulated, and whether there are any other specific types of misrepresentation that also call for extraordinary treatment.

6.20 In this connection we are also concerned about an analogous problem which is not easily dealt with through the law of consent alone. The device of treating an apparent consent as invalid, and that of making it an offence to procure a valid consent by deception, are effective only where the defendant does an act to another (or to another's property) which requires the other's consent if it is not to be criminal. These devices have no direct application where, instead of doing such an act with a consent procured by deception, the defendant by deception induces *another* person to perform an act *upon the defendant.* Suppose, for example, that a woman persuades a man to have unprotected sexual intercourse with her by falsely telling him that she has been tested and found to be HIV-negative. It would clearly be unsatisfactory that her liability should depend on proof that the man actually contracted HIV as a result of that intercourse, or that she *intended* that he should contract it (thus incurring liability for *attempting* to injure him) as distinct from merely being *reckless* whether he did, or on the assumption that the

[43] The approach of the new Victorian statute to this issue should be noted here. See Crimes (Rape) Act 1991, s 36(g): "Circumstances in which a person does not freely agree to an act include the following: (g) the person mistakenly believes that the act is for medical or hygienic purposes."

[44] See paras 6.81 – 6.82 below.

[45] See para 6.80 below.

intercourse must have involved acts on her part which, in the absence of the man's consent, would have amounted to assaults by her upon him.[46]

6.21 We consider that the woman in this example should be guilty of an offence; but we invite views as to the exact form that her liability ought to take, and how far (if at all) beyond this particular situation any proposed solution ought to extend. We ask whether it should be a specific offence for a person to induce a man by deception to have sexual intercourse with him or her; if so, whether the offence should be confined to deceptions as to a particular kind of circumstance, and if so what; and whether it should include inducing another person to perform any acts other than sexual intercourse, and if so what.

The requirement for information to be given

6.22 Although this is a matter for continuing discussion in academic circles, the House of Lords has held[47] that the amount of information a patient should receive if medical or surgical treatment is not to be regarded as an unlawful battery is comparatively small. In *Chatterton v Gerson*[48] Bristow J held that once the patient is informed in broad terms of the nature of the procedure which is intended and gives her consent, that consent is real, and this has been accepted as a correct statement of the law in subsequent decisions.[49] How much more a doctor should tell his or her patient in order to avoid a successful action in negligence will turn on what is recognised as appropriate practice by contemporary standards of care.[50]

6.23 In the following parts of this Paper reference will be made from time to time to the need for the person whose consent is required to understand some, at least, of the implications of the act to which consent is being given. The new regulatory code for authorising the transplantation of human organs between people who are not genetically related sets out specific rules by which information about the risks of organ donation must be given before an operation can be authorised.[51] Historically, English criminal law has not paid much attention to a duty to communicate information to someone about the risks of an activity before his or her consent can be treated as valid, and we will be interested to hear from respondents whether they consider that in any particular circumstances any such duty should be imposed.

[46] Cf *Mason* (1968) 53 Cr App R 12, where it was held that it is not in itself an indecent assault for a woman to have sexual intercourse with a boy of 14.

[47] In *Sidaway v Board of Governors of the Bethlem Royal Hospital* [1985] AC 871.

[48] [1981] QB 432, 442.

[49] These are conveniently set out in I Kennedy and A Grubb, *Medical Law* (2nd ed 1994) pp 151–153. In *Sidaway* (see n 47 above) this principle was adopted by two of the members of the Court of Appeal (Sir John Donaldson MR and Dunn LJ), and in his dissenting speech in the House of Lords Lord Scarman said that "it would be deplorable to base the law in medical cases of this kind on the torts of assault and battery." For a different view on what the law should be, see M A Somerville, "Structuring the Issues in Informed Consent" (1981) 26 McGill LJ 740, 776–779.

[50] For which the test set out by McNair J in his charge to the jury in *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 still contains the governing principles.

[51] See paras 8.36 – 8.37 below.

Self-induced mistake and non-disclosure

6.24 In the first Consultation Paper we considered the need to clarify the law relating to "self-induced" or spontaneous mistake. English jurisprudence on this topic was summarised comprehensively in 1956 by the High Court of Australia in *Papadimitropoulos*:[52]

> It must be noted that in considering whether an apparent consent is unreal 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 ... [The stress on the fraud] tends to distract the attention from the essential inquiry, namely whether the consent is no consent because it is not directed to the nature and character of the act. The identity of the man and the character of the physical act that is done or proposed seem now clearly to be regarded as forming part of the nature and character of the act to which the woman's consent is directed. That accords with the principles governing mistake vitiating apparent manifestations of will in other chapters of the law.[53]

In addition to the nineteenth century English cases, the High Court of Australia also cited the Australian case of *Lambert*[54] and the Canadian case of *Harms*.[55]

6.25 We suggested in the first Consultation Paper[56] that, in order to balance fairness to the defendant with reasonable protection for the victim, the rule should be that:

(1) no mistake on the part of the victim should be operative unless it caused the victim to consent to the risk or impact when otherwise he would not have done so;

(2) if, but only if, the defendant knows that such a mistake has been made he will be prevented from relying on the victim's consent as a defence.

6.26 This suggestion received widespread support on consultation. We consider that the second part of this rule should be extended to cover the situation in which a reckless defendant is aware that a mistake may have been made but carries on regardless.[57] A new sub-section (c) to section 89(2) of the draft Code could read:

> (c) because of a mistake as to the nature of the act or the identity of the man if the defendant knows that such a mistake has been made or is aware that such a mistake may have been made.

[52] (1957) 98 CLR 249.

[53] *Ibid*, at p 260.

[54] [1919] VLR 205, 212, *per* Cussen J: "Now, carnal knowledge is merely the physical fact of penetration, though, of course, there cannot be consent even to that without some perception of what is about to take place."

[55] [1944] 2 DLR 61; see n 35 above.

[56] Consultation Paper No 134, para 27.2.

[57] See also G Virgo, "When is consent not consent?" (1995) 6 Archbold News 7, where this approach is also adopted.

6.27 The wording of this proposal takes account of our new proposal in relation to *fraud* – namely that consent should not in general be *nullified* by deception as to any circumstance other than the nature of the act and the identity of the person doing it, but that deception as to other circumstances should give rise to liability for a lesser offence than that of non-consensual conduct. Where the defendant is aware that the other person is or may be mistaken about the nature of the act or the defendant's identity, we think that the other person's consent should be nullified as if the mistake were induced by fraud. Moreover, a mistaken belief in certain kinds of fact, such as the defendant's freedom from sexually transmissible disease, may arguably be tantamount to a mistake as to the nature of the act.[58] Clearly, however, the liability of a person who takes advantage of a self-induced mistake cannot be greater than that of a person who induces such a mistake by a *deception* as to the same circumstances. If a deception as to the circumstance in question would give rise to liability *only* for our proposed offence of obtaining consent by deception, as distinct from the more serious offence of acting without any consent at all, liability for taking advantage of a self-induced mistake as to that circumstance could *at most* be for that lesser offence.

6.28 Whether liability for even the lesser offence would be justified is debatable. In some cases it probably would be, for example where the other person was known to be positively mistaken in the sense of harbouring a conscious belief which the defendant knew to be false. It would be difficult to justify a distinction between such a case and one of positive deception.

6.29 A more difficult case, however, is where the other person is known to be making some *unconscious assumption* which the defendant knows to be ill-founded. For example, a man knows he is HIV-positive, but persuades a woman to consent to unprotected sexual intercourse. If he told her that he was HIV-negative, it would be a case of deception;[59] if he knew that a mutual friend had assured her that he was, it would be a case of exploiting a mistaken belief.[60] Should there be any difference between these cases and the (perhaps more likely) case where the risk of HIV has not crossed her mind? Should the defendant be under a duty not only to correct positive mistakes on the other person's part but also to disclose facts whose possible existence the other person has not even considered?[61]

6.30 If such a duty were to be imposed, it would be necessary to define exactly *what* must be disclosed. The fact of being HIV-positive would seem one of the strongest cases for such a duty of disclosure, particularly in the context of consent to sexual intercourse. But should a man be required to disclose anything *else* to a woman before taking advantage of her consent to intercourse? Should *any* sexually

[58] See para 6.19 above.

[59] *Ibid.*

[60] See para 6.27 above.

[61] It has been held in the criminal law of deception that it is possible to *deceive* another by taking advantage of his or her unconscious assumption that everything is as it should be, for example by tendering a credit card which one has no authority to use: *Metropolitan Police Commissioner v Charles* [1977] AC 177; *Lambie* [1982] AC 449. The analogy suggests that the non-disclosure of clearly material facts might be regarded as deception, and not as self-induced mistake at all.

transmissible disease qualify for this purpose? Or any disease, or any illness? What if the man suspects that he *may* have a disease, but does not know for sure?

6.31 Moreover, it would be necessary to identify not only the kinds of *fact* that a person might be required to disclose, but also the *circumstances* in which he or she might be required to disclose them. A person who knows that he or she is HIV-positive might be required to disclose that fact before having unprotected sexual intercourse; but would it make a difference if the intercourse were not unprotected? Or if the other party were believed to be HIV-positive too? And would such a requirement extend to activities other than sexual intercourse which also carry a risk of the transmission of HIV? Would a surgeon be required to disclose her HIV status to her patients before operating on them? Would a rugby player, or a boxer, be required to disclose it to his team-mates or opponents? Apart from the obvious problems of definition, there are difficult issues of policy here. For the surgeon or the boxer, the realistic choice is between non-disclosure on the one hand and giving up their career or their sport on the other. If the former option became criminal, the effect might be simply to discourage people from agreeing to be tested for HIV.

6.32 Finally, if any such duty of disclosure were to be imposed, it would be necessary to determine whether the effect of non-disclosure would be simply to invalidate a consent thereby obtained, or to give rise to liability for doing (with the consent thereby obtained) an act which would be an offence if done without consent; or whether it should also be an offence for one person to induce another, by failing to disclose a material fact, to perform certain kinds of act upon him or her – for example, what form of liability (if any) a woman should incur by having unprotected sexual intercourse with a man whom she has not told that she is HIV-positive.[62]

6.33 We invite views on how the law should deal with the obtaining of consent by the non-disclosure of material facts; whether (if it is thought that any such non-disclosure should be criminal) the law should set out, in respect of each class of offence, the facts that must be disclosed; if so, what those facts should be in each case; and whether it should be an offence to induce a person by non-disclosure of such a fact to perform an act *upon* the defendant.

FORCE AND THREATS OF FORCE

6.34 The majority of the CLRC, agreeing with the Home Secretary's Policy Advisory Committee, said:[63]

> The offence of rape should arise where consent to sexual intercourse is obtained by threats of force, explicit or implicit, against the woman or another person, for example, her child; but ... it should not be rape if, taking a reasonable view, the threats were not capable of being carried out immediately. If, for example, a woman is confined by a man for

[62] See para 6.19 above.

[63] CLRC, 15th Report, para 2.29. The effect of their views is now to be seen in ss 89(2)(a) and 90 of the Draft Code. See paras 6.5 – 6.6 above.

> the purpose of sexual intercourse, there may well be an express or implied threat of force to be used against her should she try to escape. If so, the man should be open to conviction for rape should sexual intercourse occur under such duress. In other cases the threats may be capable of being carried out only at some time in the future and that should not lead to liability for rape ... All other cases of sexual intercourse obtained by threats not amounting to rape will fall to be dealt with under section 2 of the Sexual Offences Act 1956.

6.35 When we carried forward the CLRC's proposals into the Draft Code we mentioned that some Commissioners felt very strongly that it was wrong to confine the threats that could nullify consent in rape not only to those which the woman believed would be carried out "immediately or before she can free herself" but also to threats to use *force*. The test, they said, seemed to be stricter than that applying in the case of the defence of duress by threats and might be stricter than the present law relating to rape. Moreover, they said, it was not difficult to think of examples of equally potent threats that would destroy any real consent (probably under the present law) such as a threat to abduct a woman's baby without the use of force.[64]

6.36 In the first Consultation Paper[65] we proposed that consent should be nullified if it is caused by force or the threat of force – whether directed at the complainant or at any other person, and whether or not the circumstances are such as would have enabled the victim to plead the defence of duress in answer to a criminal charge. This proposal was based on the CLRC's recommendations and also on the Canadian Criminal Code.[66] It received universal support, although some academic respondents thought that on a true analysis there was no real consent in those circumstances. We envisage that "force" should for this purpose be construed widely, so as to include not only violence but any unlawful act or omission (such as detention or abduction) in relation to the person of another. In the CLRC's example[67] of a woman imprisoned for the purpose of sexual intercourse, we think that her consent ought to be nullified by the express or implied threat that if she does not consent then the imprisonment will continue; there should be no need to rely on an additional threat to use physical force *if she tries to escape*.

6.37 On the other hand, a bolder proposal received little support, and we do not now recommend that it should be adopted. Under this proposal consent would be nullified in any case where the defendant's *motive* in such behaviour was to obtain the victim's consent, irrespective of whether the force or threat of force was *causally effective* in obtaining the victim's consent. One respondent observed that the proposal effectively reversed the burden of proof on the key issue of whether the injury was experienced by the victim as a harm.

[64] Code Report, vol 2, para 15.14. See, however, J C Smith and B Hogan, *Criminal Law* (7th ed 1992) p 461, where the authors suggest that the threat must, perhaps, be one that a person of the age and with the other characteristics of the woman could not reasonably be expected, in the circumstances, to resist.

[65] Consultation Paper No 134, para 28.2.

[66] Canadian Criminal Code, s 265(3). See Appendix B, para B.41 below.

OTHER THREATS AND INTIMIDATION

6.38 The discussion in the previous paragraphs centred on the effect of force or the threat of force on a victim's consent. In this section attention is focused on the effect of threats or intimidation *other* than threats of force. Should such threats or intimidation nullify an apparent consent altogether, so as to render the actor liable for rape, causing injury, or some other offence to which a valid consent would be a defence? If not, should they render the actor liable for some lesser offence, analogous to that of procuring intercourse by threats or intimidation under section 2 of the Sexual Offences Act 1956? And in that case, how should such an offence be defined?

6.39 So far as the present law of rape is concerned, the Court of Appeal in *Olugboja*[68] gave the following guidance on the way juries should be directed:

> In the less common type of case where intercourse takes place after threats not involving violence or the fear of it, ... [the jury] should be directed to concentrate on the state of mind of the victim immediately before the act of sexual intercourse, having regard to all the relevant circumstances; and in particular, the events leading up to the act and her reaction to them showing their impact on her mind.[69]

A little later Dunn LJ spoke of the wide spectrum of states of mind between real consent on the one hand and mere submission on the other. The court appeared to envisage that a conviction of rape might be justified even if the threat that procured the victim's consent was not a threat of force, even in the wide sense that we propose.[70]

6.40 In the context of sexual offences there has been a marked inability to agree about what the rule should be. The CLRC's solution[71] is set out in sections 89 and 90 of the Draft Criminal Code.[72] This distinguishes between one type of threat of force which will nullify consent altogether, and all other threats or intimidation which should be punishable with up to 5 years imprisonment. In this second respect, it simply replicates the present law, although the maximum sentence is still only 2 years.[73]

[67] See para 6.34 above.

[68] [1982] QB 320. See further para 6.2 and n 3 above. This decision marked a departure from the law as previously understood. Courts and writers had, at any rate up to 1976, continued to cite the traditional seventeenth century definition of rape as having intercourse without consent "by force, fear or fraud." See for example, *Morgan* [1976] AC 182, 210, *per* Lord Hailsham of St Marylebone, and, at p 225, *per* Lord Edmund-Davies, citing the then current (38th) edition of *Archbold*, at para 28-71: "Rape consists in having unlawful sexual intercourse with a woman without her consent by force, fear or fraud."

[69] *Ibid*, at p 332, *per* Dunn LJ.

[70] See para 6.87 below.

[71] CLRC, 15th Report, paras 2.26 – 2.29, 2.111.

[72] See paras 6.5 – 6.6 above.

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

6.41 Section 36 of the recent statute in the Australian State of Victoria, on the other hand, provides[74] that a person is not to be regarded as freely agreeing if he submits because of the fear of harm of any type to that person or to someone else: in this context "harm" is intended to include non-physical harm, such as blackmail or substantial economic harm.

6.42 Our provisional proposal in the first Consultation Paper was that a consent obtained by anything that can be described as a threat should not be a defence in law. We recognised that the meaning of the word "threat" has been treated as a question of law in other areas of the law,[75] but we commented that there has been little difficulty in treating the existence of a threat as simply a question of fact where the question has been treated only as a factual element in a legal concept,[76] for instance that of making a demand with menaces in the law of blackmail.[77]

6.43 Most respondents who commented on this proposal agreed with it.[78] One academic respondent said that it could be supported on the basis that bodily autonomy (perhaps like sexual autonomy) has an intrinsic moral value beyond that which each individual would place on it, and which justified its protection even in circumstances in which the individual was prepared to trade it for some other interest: in that context, any threat, even a threat to do something lawful, which influenced freedom of choice in relation to bodily autonomy should be considered to negative consent.

6.44 Notwithstanding the support received on consultation, however, we continue to find this issue a difficult one. At present we are inclined to think that, so long as the procuring of consent by threats or intimidation does not escape criminal liability altogether, there is no need to reconsider the CLRC's views on where the borderline should lie between those threats that *nullify* consent and those that do not.[79] The distinction between threats of force (including non-violent force) and other threats seems to us to be the simplest and most appropriate place to draw the line.

[74] Crimes (Rape) Act 1991, s 36(b). See Appendix B, paras B.88 – B.89 below. Under this statutory scheme there is no consent if there is no free agreement.

[75] In particular, as to whether it is a "threat" to intimate that one is going to do what one lawfully may do: see Atkin LJ in *Ware and De Freville Ltd v Motor Trade Association* [1921] 3 KB 40, 87.

[76] See, eg, Lord Atkin in *Thorne v Motor Trade Association* [1937] AC 797, 806.

[77] See s 21(1) of the Theft Act 1968, which provides the statutory definition of blackmail and introduces the concept of an unwarranted demand, which is itself defined: "a demand ... is unwarranted unless the person making it does so in the belief that he has reasonable grounds for making the demand and that the use of the menaces is a proper means of reinforcing the demand". The pre-1968 case law is also called in aid to explain the word "menaces" in this Act: see *Garwood* [1987] 1 WLR 319; *Clear* [1968] 1 QB 670, where many earlier cases are cited.

[78] But see n 108 below.

[79] For two academic views that the CLRC has marked the border in more or less the right place, see E Griew (1992) 11 Archbold News 5 and G Williams, *Textbook of Criminal Law* (2nd ed 1983) p 554.

6.45 Moreover, a person who gives in to a threat (other than one of force) is not literally *compelled* to submit: he or she *could* refuse. A reluctant consent is still a consent. We recognise that if this view were taken to its logical conclusion it would mean that consent could never be nullified, even by a threat of extreme violence, because it is always *possible* for the victim to resist the threat and take the consequences. But it must be exceptional for a threat of force not to have great coercive effect, since a person subjected to such a threat can rarely be sure that the force threatened is small. We therefore think it reasonable, in the interests of simplicity, to assume that such a threat is *always* so coercive as to prevent the victim's apparent consent from being a real consent at all.

6.46 Our present view, therefore, is that it would be wrong to exclude from the legal concept of consent the kind of consent procured by coercion which, in the context of vaginal intercourse, justifies a conviction for procuring intercourse by threats or intimidation but not for rape under the present law.[80] For example, it would in our view be wrong to hold an employer guilty of *rape* if he induces an employee to sleep with him by threatening to fire her. Such conduct appears to us to be different in kind from that of the rapist whose victim is physically overpowered or submits to the threat of violence; and to describe it as rape would, in our view, risk devaluing that offence.

6.47 On the other hand we think that it is strongly arguable that such coercion ought to give rise to *some* form of criminal liability – if not for the offence to which consent is a complete defence, then (as at present in the case of sexual intercourse) for a less serious offence of procuring consent by threats. For example, we propose that the causing of minor injury should in general be an offence if, but only if, the person injured does not consent to it. Where that person does consent, but his or her consent is procured by threats (other than threats of force, which would nullify the consent altogether), we consider that there is a good case for convicting the assailant of an offence on that basis. Such an offence would presumably be less serious than that of causing injury to a victim who does not consent at all, although we think it should still be a serious offence – punishable, perhaps, with five years' imprisonment.

6.48 If it is agreed that such an offence would be desirable, the next question is how it ought to be defined. One possibility would be a rule that, where it would be an offence to do a particular act *without* the consent of another person, it is also an offence (although not the same offence) to do that act *with* that person's consent if that consent is procured by threats or intimidation. This approach would follow closely that of section 2 of the Sexual Offences Act, and would have the great advantage of simplicity. It would scarcely be right, however, to impose liability for every conceivable threat which has the effect of inducing another person to consent to something that would otherwise be an offence. This point has been made in relation to the offence under section 2 of the Sexual Offences Act.

> Suppose that, for example, D threatens that, if P does not consent, he will (i) tell the police of a theft she has committed; (ii) tell her father of her previous immorality; (iii) dismiss her from her present

[80] See para 6.3 above.

employment; (iv) not give her a rise in salary; (v) never take her to the pictures again. Clearly, a line must be drawn somewhere before we reach the last case.[81]

6.49 It is arguable that the drawing of this line can safely be, and should be, left to the common sense of a jury; and we accept that it is probably unrealistic to hope to draw it with any degree of clarity in the legislation creating the offence. We believe, however, that the legislation ought at least to set out some *criteria* for drawing it. If, for example, it is agreed that there ought not to be criminal liability in the fifth of these cases, it ought to be possible for a judge to explain to a jury the *basis* on which the law permits them to acquit, rather than inviting them (in effect) to disregard the wording of the Act. We must therefore consider what sort of criteria might be appropriate for the purpose of defining the lower limits of the offence.

Whether the act threatened is lawful

6.50 In the first place we might try to draw a distinction based on the nature of the threat. This would involve defining those acts that one can and cannot threaten to do without fear of incurring criminal liability. This is the approach that we advocate when we identify the threats that ought to *nullify* consent, and in that context we propose a distinction between threats of force and threats of other acts. For the present purpose, however, we cannot see how any such distinction could sensibly be drawn. Clearly it should *sometimes* be an offence to procure another's consent to injury, or to indecency other than sexual intercourse, by threatening to do something which one is legally entitled, and possibly even morally obliged, to do – eg to inform the police of a crime the other person has committed. Such a threat would undoubtedly amount to the crime of blackmail if it were made with a view to gain or with intent to cause loss,[82] and we consider that it should equally be an offence if it induces the other person to submit to injury or to what would otherwise be an indecent assault. For this reason we must look for some other way to distinguish between those threats that ought to have this effect and those that ought not.

Whether the consent is voluntary

6.51 It might be said that the prospect of *any* threatened loss, whether of property, reputation, security or affection, *can* be coercive; and that there is no injustice to a defendant in recognising this fact, because in principle there could be no liability unless the threat actually *was* coercive and the defendant *knew* that it was (or at least realised that it might be). It might be argued, for example, that if a woman really did consent to sexual intercourse or injury for fear that the defendant might otherwise never take her to the pictures again, and he knew that that was the only reason for her doing so, he would have knowingly procured her consent by coercion and ought therefore to be guilty of an offence. We see the force of this reasoning. On the other hand we suspect that many would say that, if it is already a criminal offence under section 2 of the Sexual Offences Act for a man to induce

[81] J C Smith and B Hogan, *Criminal Law* (7th ed 1992) p 461.

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

his partner to consent to sexual intercourse by threatening not to take her to the pictures again, then the offence is too wide. We think that there are probably *some* threats which are so trivial as not to justify the imposition of criminal liability at all – though this may depend on the nature of the act consented to. A threat would need to be very trivial indeed before it became justifiable if the consent obtained by it were consent to *injury*.

6.52 This consideration, that some threats are more effective than others, suggests the possibility of drawing a distinction between criminal and non-criminal coercion in terms of how effective is the threat – or, which comes to much the same thing, how voluntary is the consent thereby obtained. Threatening to report another person to the police for a serious crime is likely to be more effective than threatening not to take her or him to the pictures, and a consent thereby obtained is likely to be less voluntary.

6.53 A criterion of voluntariness has sometimes been suggested in the cases where a plaintiff seeks restitution of a payment on the ground that it was extorted by economic duress. Thus Lord Scarman has said:

> ... in a contractual situation commercial pressure is not enough. There must be some factor "which could in law be regarded as a coercion of his will so as to vitiate his consent"[83] ... In determining whether there was a coercion of will and that there was no true consent, it is material to inquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it. All these matters are ... relevant in determining whether he acted voluntarily or not.[84]

6.54 One commentator has pointed out that this test of "voluntariness" cannot be taken at face value.

> ... the effect of duress is not to overbear the will in the mistake sense of the plaintiff not meaning the defendant to have the money. In the circumstances the plaintiff does intend the defendant to have the money in order to avert the threatened evil. The objection is rather that the plaintiff does not reach that decision freely but rather under illegitimate pressure.[85]

6.55 In later cases the courts have interpreted the test of voluntariness in terms of determining whether the plaintiff had any *reasonable alternative* to giving in to the threat.

> ... a threat to break a contract when money is paid by the other party can, but by no means always will, constitute duress. It appears from

[83] *The Siboen and the Sibotre* [1976] 1 Lloyd's Rep 293, 336, *per* Kerr J.

[84] *Pao On v Lau Yiu Long* [1980] AC 614, 635.

[85] A Burrows, *The Law of Restitution* (1993) p 162.

> the authorities that it will only constitute duress if the consequences of a refusal would be serious and immediate so that there is no reasonable alternative open ... .[86]

6.56 Unfortunately the notion of voluntariness is not a simple one, either in business or in personal relationships. Life involves a succession of choices from a range of options, some less attractive than others; and sometimes it is the acts of other people that render the most attractive options unavailable.

> As social animals we are systematically committed to the use of pressure. At the worst it comes to bombs and bullets; when they have done their work we expect the treaty which follows to be respected: *pacta sunt servanda.* Within the community the same exploitation of pressures goes on all the time, though so familiarly as to become almost unobtrusive. The market works in this way. If your need is great, you will have to pay more. In a power strike a man with a large store of candles exploits the need for light. He withholds his candles from those who will not pay ten times their normal price. In politics the same happens. One withholds till another gives some *quid pro quo.* The same between men and women, sexually. And all without discredit. It is part of life.[87]

6.57 The problem is to determine what it is that makes some of these choices less "voluntary" than others; and the concept of voluntariness, on examination, proves to be at best ambiguous and at worst little more than metaphorical. Suppose, for example, that an employer induces an employee to sleep with him by threatening that if she does not do so he will give her the sack. He intends her to believe that he will carry out this threat if she does not consent, and she does believe it. How are we to determine how voluntary her consent is? There are several possible criteria:[88] in particular,

(1) how anxious she is to avert the threat (ie to keep her job);[89]

(2) how hard it is for her to *decide* whether to give in to the threat,[90] which will depend not only on how anxious she is to keep her job but also on how much she likes or dislikes her employer;[91]

(3) how unattractive are *all* the options still on offer (viz sleeping with her employer *and* losing her job), taken in combination;[92] or

[86] *B & S Contracts and Design Ltd v Victor Green Publications Ltd* [1984] ICR 419, 428, *per* Kerr LJ; see also *Universe Tankships Inc of Monrovia v International Transport Workers' Federation, The Universe Sentinel* [1983] 1 AC 366, 400, *per* Lord Scarman.

[87] P Birks, *An Introduction to the Law of Restitution* (1985) p 173.

[88] J Feinberg, MLCL vol 3, ch 23.

[89] Feinberg refers to this criterion as "coercive force": MLCL vol 3, pp 204–205.

[90] Feinberg refers to this criterion as that of "differential coercive pressure": MLCL vol 3, pp 199–203.

[91] And how much importance she attaches to her own autonomy.

[92] Feinberg refers to this criterion as the "total coercive burden": MLCL vol 3, p 205.

(4) how unattractive is the *least* unattractive of those options (which may be *either* sleeping with her employer *or* losing her job, depending on her preferences).[93]

6.58 The possibility of incorporating any of these criteria into the criminal law does not appeal to us, for three reasons. In the first place we see no prospect of reaching a consensus as to which criterion is the most appropriate. Secondly, even if such a consensus could be reached, we doubt that it could be formulated in terms that would be accessible to a jury or to lay magistrates. Thirdly, and most fundamentally, we doubt that *any* criterion framed in terms of the attractiveness or otherwise, to the victim, of the various options on offer would be justifiable in principle. Many would say that the conduct of our hypothetical employer is equally wrong irrespective of how much the employee dislikes him or needs her job. It is the abuse of power that makes it wrong, not its actual effect on the employee. For these reasons we provisionally reject the possibility of a criterion framed in terms of the voluntariness of the consent.

Whether the threat is legitimate

6.59 In the civil law, when a plaintiff claims the recovery of money paid under economic duress, the court applies two tests: first, whether the payment that the plaintiff seeks to recover was "voluntary", and secondly, whether the defendant's threat was in the circumstances a legitimate one to make.[94] To some extent, and sometimes to a large extent, the legitimacy of a threat depends on the nature of what is threatened. As we have already seen, however, it is impossible to draw a rigid line according to whether the act threatened would be *criminal*, or even according to whether it would be *lawful*. Some threats to act lawfully (eg to reveal a secret) are clearly illegitimate, while a threat to act unlawfully is not invariably illegitimate.[95]

6.60 In the criminal law the test of "legitimacy" finds a parallel in the offence of blackmail, where the law requires that the combination of the menaces and the demand must have been "unwarranted". This means that the defendant will not be found guilty if he or she 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.[96] We believe that a suitably adapted version of this approach may well be the best way to exclude those threats that, considered in combination with the act consented to by the person threatened, do not justify

[93] Feinberg refers to this criterion as the "coercive minimum": MLCL vol 3, p 205.

[94] *Universe Tankships Inc of Monrovia v International Transport Workers' Federation, The Universe Sentinel* [1983] 1 AC 366; *Dimskal Shipping Co SA v International Transport Workers' Federation, The Evia Luck* [1992] 2 AC 152.

[95] Goff and Jones, *The Law of Restitution* (4th ed 1993) pp 251–253.

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

liability even for our suggested lesser offence[97] – although we do not envisage that the offence should make any reference to a *demand* for consent.[98]

6.61 It should be noted, however, that the test applicable to blackmail is a subjective one. The question is not whether the grounds *are* reasonable, or the use of the menaces proper, but whether the defendant *believes* this to be so. If it were thought appropriate to frame our criterion in terms of the legitimacy of the threat, it would be necessary to decide whether it is the defendant's *personal* perception of its legitimacy that is crucial, or its *objective* legitimacy as a reasonable person would see it. We see force in the latter view. There is no question here of the defendant being held liable on the basis of a mistaken view of the *facts*.[99] The question is whether he or she should be able to escape liability on the ground that, while other people might think the threat illegitimate, he or she does not agree with their *judgment*. Perhaps there is room here for a hybrid criterion resembling the test of dishonesty in the law of theft.[100] It might be sufficient for liability if most people would think the threat illegitimate *and the defendant knows that they would*, whether or not he or she would personally disagree with them. We shall be inviting views on this point.

6.62 Even if the defendant's own perception were crucial, we think it is unlikely that he or she could escape liability on the basis that the threat was believed to be legitimate if it were a threat to do something *unlawful*.[101] A threat to do an unlawful act is normally, even if not invariably, an illegitimate threat. In general it is only where the threat consists of a threat to do a lawful act that it is necessary to examine the nature of the demand.[102] In the case of the employer who threatens his employee with dismissal, it might therefore be arguable that the legitimacy of the threat would depend, at least in part, on determining whether the threatened dismissal would be wrongful (or "unfair") as a matter of employment law.

6.63 We emphasise, however, that we are not suggesting a test that would concentrate on the nature of the threat to the exclusion of the nature of the act consented to. Indeed, it may well be hard to envisage circumstances in which anyone could suppose it was proper to obtain consent to *injury* by a threat, and the test we suggest might in practice be tantamount to a rule that it is *always* an offence to do certain things to other people if their consent is obtained by threats. It would of course be possible to create an *exception*, to the effect that the supposed legitimacy of the threat is immaterial if the consent is to injury; but this point would seem to be catered for by the flexibility inherent in the test we suggest.

[97] Assuming that there *are* any such threats: see para 6.89 below for our lesser offence.

[98] Indeed it must be doubtful how much the requirement of a demand adds to that of menaces.

[99] Cf Part VII below.

[100] *Ghosh* [1982] QB 1053.

[101] In *Harvey* (1980) 72 Cr App R 139, a blackmail case, it was said that if the appellants knew that what they were threatening was unlawful they could not claim that they believed it was proper to threaten it.

[102] *Universe Tankships Inc of Monrovia v International Transport Workers' Federation; The Universe Sentinel* [1983] AC 366, 400–401, *per* Lord Scarman.

6.64 We will be seeking views, therefore, on the suggestion[103] that any new offence of obtaining consent by threats should not be committed if the use of the threat is in all the circumstances a proper means of procuring the other person's consent to the particular act in question; or, perhaps, if the defendant *believes* that it is.

Threats, offers and abuse of power

6.65 However, we think it arguable that even this limitation on the scope of the offence would not go far enough. Sometimes the alternative option, to which consent to the defendant's act is seen as preferable, is not something that the defendant is *threatening to bring about*, but something that he or she is merely *offering to prevent*, perhaps by improperly exploiting a position of authority over the other person. It is not hard to imagine a "threat" which is thoroughly improper on any view but which, properly analysed, is not really a *threat* at all. Under our proposals, for example, it would continue to be an offence (though not rape) for a man to induce a woman to sleep with him by threatening to fire her from her job. What difference should it make, if any, if the decision to fire her has been properly taken, and he offers to revoke it on condition that she sleeps with him? Similarly, one of the range of threats posed in the quotation at paragraph 6.48 above is a "threat" not to give the employee a rise in salary if she does not consent; but, depending on the circumstances (eg whether she has *earned* a rise), this might in truth be no more than an offer to give her a rise if she does.

6.66 The 1953 Rhodesian case of *McCoy*[104] provides an illustration that has actually come to a court. An airline manager was convicted of assault on an air hostess who had agreed to accept a caning as an alternative to disciplinary action involving loss of pay. The caning was inflicted in humiliating circumstances and the court held that the complainant's consent was not real in that she did not give it freely and voluntarily.[105] On consultation one academic respondent said of this case that it was arguable that a decision by a person to submit to a spanking in order to avoid a threat of lawful disciplinary proceedings involved an exercise of autonomy by the individual concerned which the law should respect.

6.67 In the first Consultation Paper we proposed that consent should be *nullified* if obtained by threats – which is not our present view[106] – but for this purpose we distinguished threats from promises,[107] blandishments and other inducements. On the other hand we assumed that *McCoy* was a case of a threat rather than an inducement, an assumption which may not be justified. We also put forward a proposal, based on a provision of the Canadian Criminal Code, that consent

[103] See the formulation of this proposal in para 6.89(2) below.

[104] 1953 (2) SA 4.

[105] *Ibid*, at p 10H.

[106] See paras 6.36 – 6.37 above.

[107] Procuring consent by means of a promise might of course amount to an unlawful deception if there was no intention to keep the promise.

should be nullified if caused by misuse of power. Most respondents who commented on this proposal agreed with it.[108]

6.68 The cases with which we are here concerned are commonly referred to in the philosophical literature as "coercive offers",[109] on the basis that they do not involve *threats to worsen* the position of the person to whom the proposal is made, but only *offers to improve* it. If that person chooses to turn down the proposal, he or she is no worse off than before. Whether it is strictly correct to call such an offer *coercive*, as distinct from merely *exploitative*, is a question which perhaps need not concern us. What we must consider is

(1) whether our proposed offence of procuring consent by threats ought to extend to this sort of exploitation (or coercion); and

(2) if not, how the line is to be drawn between this sort of exploitation (or coercion) and threats.

6.69 The argument against holding such exploitation to be criminal is based on what is said to be a fundamental distinction between a threat to harm someone's interests and an offer to confer a benefit on them. It is obviously wrong to try to procure their consent by threatening to harm them (at any rate in an unlawful or otherwise "improper" way); and it may in certain circumstances be wrong to try to procure it by taking advantage of their urgent need for something that one is in a position to provide. But it is not wrong in quite the same sense. The former is not just morally wrong in the abstract: it is a wrong *against the other person*, an infringement of his or her autonomy. The latter may be wrong but it is arguable that it does not wrong *the other person*: it cannot, because that person's position is either unaffected (because he or she declines the offer, in which case no harm is done) or improved (because he or she regards the offer as more attractive than what was hitherto the best available option). The offer *extends* the options available instead of restricting them. We think there is force in this argument, and we provisionally reject the suggestion that an offer to prevent harm (on condition that the "beneficiary" of the offer submits to some act by the offeror) should in itself be capable of incurring liability for our proposed offence of procuring consent by threats.

6.70 This conclusion requires us to consider how we can distinguish a threat (which is a wrong against the other person) from an offer (which is not). One possibility would be to enquire whether the apprehended disadvantage, to which the act consented to is preferred, would itself be unlawful, on the basis that one is entitled to do anything that is not unlawful, and that a "threat" to do something lawful ought properly to be regarded as an offer not to insist on enforcing one's right to do it; but we have already rejected the possibility of confining the "threats" offence to threats of unlawful conduct.[110] A threat to sack an employee might be sufficient

[108] A number of respondents were not willing to accept that consent resulting from "exercise of authority" (see Consultation Paper No 134, paras 29.4, 31.1) should be nullified for that reason. Roger Leng observed that the Commission ought not to recommend law reform along these lines without knowing how the Canadian rule worked in practice.

[109] Eg J Feinberg, MLCL vol 3, chap 24.

[110] See para 6.50 above.

even if the sacking would be entirely lawful and indeed justified. The problem is therefore to distinguish between (in this case) a threat to sack the employee if she does not consent, and an offer to retain her services if she does. Similarly it is not (and we do not suggest it should be) an offence for a man to pay a woman for sexual services; does it follow that it should not be an offence for a man to induce his partner to have sexual intercourse with him by threatening not to maintain her (where he has no duty to do so) or to revoke her licence to inhabit his home?

6.71 This is yet another question on which we hesitate to express a view;[111] but it seems to us at present that the crucial distinction ought to lie in the *reasonable expectations* of the person forced to choose from among unattractive alternatives. If it is reasonable in all the circumstances for that person to *expect* to receive a benefit (to keep her job, for example, or to be paid next week's housekeeping, or to have a roof over her head tonight) then a threat to withhold that benefit should be capable of incurring criminal liability. If, however, the benefit is one that that person might hope for but cannot reasonably expect, we believe that it is strongly arguable that a jury should be precluded from treating an offer of such a benefit as a threat to withhold it, and we will be seeking views on this suggestion.[112]

6.72 There is a further theoretical difficulty which is perhaps unlikely to arise in practice: what if an apparent consent is procured by an offer to avert a consequence of such a kind that, if the apparent consent were procured by the offeror's threat to bring it about, that threat would nullify the consent altogether so as to incur liability for the more serious offence to which consent is a defence? Suppose Claudio has been lawfully condemned to death. Angelo, who has the power to pardon him, offers to do so on condition that Claudio's sister Isabella submits to him. She does so. Should this be rape? On the whole we are inclined to think that a lesser offence (eg, perhaps, our proposed offence of procuring consent by threats) might be more appropriate; but we will be inviting comments, not only on *how* this issue should be resolved but also on whether it is necessary to resolve it at all.[113]

OTHER PRESSURES

6.73 In practice a person's consent may be constrained by all manner of pressures more subtle than definite threats and offers. Considerations were urged on us which show the difficulty and delicacy of these issues, both in the content of consent to intercourse and just as sharply in the context of consent to injury. One respondent, for instance, warned us that we should focus our attention on the safeguards needed to ensure that as far as possible consent is real. He said that among the elements that are combined in the idea of autonomy are a capacity for reflective decision-making and the existence of social conditions which make it possible to attempt to implement one's decision – particularly, but not exclusively, the absence of external constraints on one's freedom of action. This concern that

[111] See, eg, J Feinberg, MLCL vol 3, pp 216–228.

[112] For the formulation of this provisional proposal, see para 6.89(2)(b) below.

[113] See para 6.90 below.

consent might be coerced was also expressed eloquently by another academic commentator:[114]

> In the abstract sense only the truly equal can consent ... Consent implies an agreement and yet where there appears to be consent, that agreement is often between unequals. How does inequality affect the nature of consent, how does it dilute the authority of consent, and at what point can it render consent negated? All these questions are imponderables. They are not amenable to legal rules but they are nevertheless part of the circumstances of each individual case and considerations important in the formulation of policy. What appears at first hand to be a case of consent may instead involve assent on the part of one of the parties; compliance may be the result of duress through fear, psychological entrapment, economic or social dependency and so on. Acquiescence is not the same as consent.

6.74 The majority of the members of the Standing Legal Committee of the Metropolitan Stipendiary Bench also had strong feelings on this issue. They cited Professor Hart in this context:[115]

> Choices may be made or consent given without adequate reflection or appreciation of the consequences; or in pursuit of merely transitory desires; or in various predicaments when the judgement is clouded; or under pressure by others of a kind too subtle to be susceptible of proof in a law court.

6.75 In two recent cases the Court of Appeal was concerned with issues relating to the extent to which a person's ability to give a "real" consent may have been overborne by extraneous circumstances. In *Freeman v Home Office (No 2)*[116] a life prisoner contended unsuccessfully that in the institutional setting of a prison he did not give a true consent to the administration of drugs to him by the prison medical officer and other prison officers. In *Re T*,[117] on the other hand, the 20-year old daughter of a Jehovah's witness had refused to consent to a blood transfusion in connection with the delivery of her baby by Caesarean section, and the Court of Appeal held on the facts that her decision was nullified by the undue influence of her mother. Lord Donaldson MR said:[118]

> The real question in each such case is "Does the patient really mean what he says or is he merely saying it for a quiet life, to satisfy someone else or because the advice and persuasion to which he has

[114] Susan Edwards, who is a lecturer in law at the University of Buckingham. She is also a member of the Pornography and Violence Research Trust and European Co-ordinator of the Coalition Against Trafficking in Women.

[115] H L A Hart, *Law, Liberty and Morality* (1st ed 1963) p 33.

[116] [1984] QB 524. The Court of Appeal upheld the trial judge's approach that in a prison setting a court must be alive to the risk that what may appear on the face of it to be a real consent is not in fact so, and said that the question whether a consent had been given was essentially a matter of fact. See also *Kaimowitz v Michigan Department of Medical Health* 42 USLW 2063 (1973) (detained mental patient's consent to psycho-surgery in issue).

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

[118] *Ibid*, at p 113.

been subjected is such that he can no longer think and decide for himself?" In other words "Is it a decision expressed in form only, not in reality?"

When considering the effect of outside influences, two aspects can be of crucial importance. First, the strength of will of the patient. One who is very tired, in pain or depressed will be much less able to resist having his will overborne than one who is rested, free from pain and cheerful. Second, the relationship of the "persuader" to the patient may be of crucial importance. The influence of parents on their children or of one spouse on the other can be, but is by no means necessarily, much stronger than would be the case in other relationships. Persuasion based on religious beliefs can also be much more compelling and the fact that arguments based on religious beliefs are being deployed by someone in a very close relationship with the patient will give them added force and should alert the doctors to the possibility – no more – that the patient's capacity or will to decide has been overborne. In other words the patient *may not mean what he says*.[119]

6.76 English criminal law has never concerned itself with subtle analyses of the extent to which consent was voluntary or free in situations in which there is no question of threats or intimidation. Some of the complexities were illustrated by Professor Griew in 1992:

> 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*,[120] 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".[121]

6.77 We share the concern of some of our respondents in relation to this kind of situation, where (*Olugboja* aside) a person's consent is clearly valid although reluctantly given. Our provisional view, however, is that the criminal law is not an appropriate way of regulating pressures of this kind, and that they ought not to give rise to criminal liability except in the clearest cases. We believe that an

[119] Emphasis added.

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

[121] E Griew (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, for which see para 6.3 above.

offence defined in terms of "threats" would be construed as excluding all but the clearest case.

LAW REFORM PROPOSALS

6.78 Taking into account the considerations set out in this Part we provisionally propose that the rules relating to offences against the person and sexual offences should be the same.[122] Where we set out provisional proposals below, these are based on the first principle in our suggested law reform strategy.[123]

Types of deception that may nullify consent

6.79 **We provisionally propose that a person should not be treated as having given a valid consent, for the purposes of any offence of doing an act without such consent, if he or she gives such consent because he or she has been deceived as to –**

(1) the nature of the act; or

(2) the identity of the other person or persons involved in the act.[124]

Other types of fraudulent misrepresentation that may nullify consent

6.80 **We ask –**

(1) whether a fraudulent misrepresentation that a person has been found to be free from HIV and/or other sexually transmitted diseases should form an exception to the general rule that fraud should nullify consent only where it goes to the nature of the act or the identity of the other person or persons involved in the act;

(2) if so, in what terms this new class of misrepresentation should be formulated; and

(3) whether there are any other specific types of misrepresentation that also call for extraordinary treatment.[125]

An offence of procuring consent by deception

6.81 **We provisionally propose 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**

[122] And that the same rules should apply in relation to every other criminal offence in which the consent of a person other than the defendant is or may be a defence to criminal liability. See paras 1.24 – 1.27 above.

[123] See para 2.18 above. We are referring to the principle that rules will be needed to ensure, as far as practicable, that non-voluntary consents are not treated as effective.

[124] See para 6.18 above.

[125] See para 6.19 above.

be an offence so punishable, and he or she has procured that other's consent by deception.[126]

A definition of "deception"

6.82 **We provisionally propose that for the purposes of this offence "deception" should mean any deception (whether deliberate or reckless) by words or conduct as to fact or as to law, including a deception as to the present intentions of the person using the deception or any other person.**[127]

Inducing another person to perform an act on oneself by deception

6.83 **We ask –**

(1) **whether it should be a specific offence for a person to induce a man by deception to have sexual intercourse (vaginal or anal) with him or her;**

(2) **if so, whether the offence should be confined to deceptions as to a particular kind of circumstance, and if so what; and**

(3) **whether it should include inducing another person by deception to perform any acts other than sexual intercourse, and if so what.**[128]

The duty to communicate information

6.84 **We ask whether there are any particular circumstances in which the criminal law should impose an express duty to communicate information upon a person who wishes to rely on a consent to the causation of injury or to the risk of injury caused by him or her.**[129]

Self-induced mistake

6.85 **We provisionally propose that a person should not be treated as having given a valid consent to an act if he or she gives consent because of a mistake as to –**

(1) **the nature of the act,**

(2) **the identity of the other person or persons involved in the act, or**

(3) **any other circumstance such that, had the consent been obtained by a deception as to that circumstance, it would not have been treated as valid,**

[126] See para 6.18 above.

[127] Cf para 6.7 above.

[128] See paras 6.20 – 6.21 above.

[129] See paras 6.22 – 6.23 above.

if the defendant knows that such a mistake has been made or is aware that such a mistake may have been made.[130]

Non-disclosure

6.86 **We invite views on –**

(1) **how the law should deal with the obtaining of consent by the non-disclosure of material facts;**

(2) **whether (if it is thought that any such non-disclosure should be criminal) the law should set out, in respect of each class of offence, the facts that must be disclosed;**

(3) **if so, what those facts should be in each case; and**

(4) **whether it should be a specific offence for one person to induce another, by non-disclosure of such a fact, to perform an act (and if so what kinds of act) upon him or her.**[131]

Inducement by threats of non-consensual force

6.87 **We provisionally propose that a person should not be treated as having given a valid consent, for the purposes of any offence to which consent is or may be a defence, if he or she gives such consent because a threat, express or implied, has been made to use non-consensual force (including detention or abduction) against him or her or another if he or she does not consent, and he or she believes that, if he or she does not consent, the threat will be carried out immediately or before he or she can free himself or herself from it.**[132]

The effect of other threats on the validity of consent

6.88 **We ask for views on whether a person should be treated as having given a valid consent where he or she gives consent because of a threat other than a threat falling within paragraph 6.87 above.**[133]

An offence of procuring consent by threats

6.89 **If a person is to be treated as having given a valid consent in such circumstances, we ask for views on our suggestion that –**

(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**

[130] See paras 6.24 – 6.27 above.

[131] See paras 6.29 – 6.33 above.

[132] See paras 6.34 – 6.37 above.

[133] See paras 6.38 – 6.72 above.

without the consent of another, would be an offence so punishable, having procured that other's consent by threats;[134] 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;[135] or

(b) the threat is to withhold a benefit which the other person could not reasonably expect to receive.[136]

Special consideration for a particular class of threat

6.90 **We invite comments on what the law should be in relation to a case where an apparent consent is procured by an offer to avert a consequence of such a kind that, if the apparent consent were procured by the offeror's threat to bring that consequence about, that threat would nullify the consent altogether so as to incur for the offeror liability for the more serious offence to which consent is a defence.[137]**

[134] See para 6.47 above.

[135] See para 6.64 above.

[136] See para 6.71 above.

[137] See para 6.72 above.

PART VII

THE DEFENDANT'S MENS REA

7.1 So far as the mens rea of the defendant is concerned, we provisionally proposed in the first Consultation Paper that the defence of consent should be subject to the normal rule that the defendant's liability should be judged on the facts as he or she believed them to be. The defendant would therefore have the benefit of the defence where he or she believed the victim to be consenting, even if in fact the victim was not consenting.

7.2 This proposal was greeted with strong support on consultation, and it equates not only with present English law in relation to consent in rape, but also to the formulation of the defence of justifiable use of force in Clause 27 of the Criminal Law Bill attached to Law Com No 218.

7.3 Three academic respondents opposed the proposal. They re-opened the issue, which was extensively canvassed – and ultimately rejected – by the Victorian Law Reform Commission in their 1985-91 reviews of the law of rape, that the defendant's belief in consent should have been arrived at on reasonable grounds. One of them suggested that this rule would strike a proper balance between respecting personal autonomy and preventing injury that was not manifestly consented to. Another group considered that since this was not an emergency situation, unlike cases of self-defence or duress, it was not inappropriate for the law to require care to be exercised by a defendant to ensure the existence of consent before he inflicted injury.

7.4 We have conducted a thorough review of the different approaches to this issue in different jurisdictions[1] since the House of Lords decision in *Morgan*[2] and the Heilbron Report 20 years ago. In New Zealand the rule in *Morgan* has been reversed by statute,[3] and in Canada statute now provides that there must be evidence from sources other than the defendant which lends the defence of apprehended consent an air of reality. In England, the CLRC reviewed the issues in its Fifteenth Report in 1984, when it reaffirmed the rule in *Morgan* but advised that the law should be reformulated in the way in which it is now set out in the Draft Criminal Code:

[1] See, for example, Law Reform Commission of Victoria, Discussion Paper No 2 (August 1986) and Report No 7 (June 1987) Rape and Allied Offences: Substantive Aspects; Law Reform Commission of Victoria, Interim Report No 42 (July 1991) and Report No 43 (September 1991) Rape: Reform of Law and Procedure. Ireland Law Reform Commission, Consultation Paper – Rape (October 1987) LRC 24 – and Report (1988) Rape and Allied Offences. See also T Pickard, "Culpable Mistakes and Rape: Relating Mens Rea to the Crime" (1980) 30 University of Toronto LJ 75; C Wells, "Swatting the Subjectivist Bug" [1982] Crim LR 209; R A Duff, *Intention, Agency and Criminal Liability – Philosophy of Action and the Criminal Law* (1990).

[2] [1976] AC 182.

[3] Crimes Amendment Act (No 3) 1985.

A man is guilty of rape if he has sexual intercourse with a woman without her consent and –

(a) he knows that she is not consenting; or

(b) he is aware that she may not be, or does not believe that she is consenting.

7.5 The CLRC was guided by the principle that "the law must do all it can to protect women from rape, whilst at the same time avoiding injustice to defendants".[4] It concluded:

> If ... the defendant was mistaken in his belief that the woman was consenting, he should not be liable to conviction for rape, even if he had no reasonable grounds for his belief. None of us would wish to extend the offence of rape to such a case. This would in effect turn rape into a crime of negligence, an approach which was rejected by the majority of their Lordships in *Morgan*, a decision endorsed by Parliament in 1976. Section 1(2) of the 1976 Act (jury to have regard to presence or absence of reasonable grounds in assessing genuineness of defendant's belief) makes it clear to the jury how they are to approach such a case. Indeed, we see no reason why section 1(2) should not apply to all sexual offences in which a defendant's belief on a particular matter is relevant to his guilt or innocence, whether tried summarily or on indictment, and we so recommend.[5]

7.6 In adopting the CLRC's recommendation for the purposes of the Draft Code, this Commission made no attempt to reconsider the merits of that recommendation: like other recommendations for the reform of the law, it was incorporated into the Draft Code simply because we took the view that "where the law has been scrutinised, found to be defective and reforms recommended, it would be wrong to recommend the perpetuation of the existing law".[6]

7.7 In spite of the general support on consultation for the approach proposed in the first Consultation Paper, the objections that were raised to it deserve very careful examination. It is, for instance, arguable that the dichotomy between crimes of mens rea and crimes of negligence is something of an over-simplification, and that there may in certain circumstances be a good case for holding a man guilty of an offence if he has sexual intercourse with a person who obviously does not consent, *without* the need for proof that he was actually aware of that fact. The same may be said of the case for holding a person guilty of an offence if he or she *injures* another person without that person's consent, without proof that he or she was aware of the absence of consent. We have not yet reached even a provisional conclusion on these very difficult issues, and in what follows we set out the rival views, on which we are very anxious to receive further assistance during the next round of consultation.

[4] CLRC, 15th Report, para 2.31.

[5] *Ibid*, para 2.40.

[6] Code Report, vol 1, para 3.34.

7.8 In *Morgan*[7] Lord Simon, dissenting, gave two reasons why in his view the law required that a belief in a state of affairs whereby "the actus would not be reus" must be held on reasonable grounds. Having cited Bridge J's suggestion in the Court of Appeal that:

> a bald assertion of belief for which the accused can indicate no reasonable ground is evidence of insufficient substance to raise any issue requiring the jury's consideration,[8]

he went on:

> I agree; but I think there is also another reason. The policy of the law in this regard could well derive from its concern to hold a fair balance between victim and accused. It would hardly seem just to fob off a victim of a savage assault with such comfort as he could derive from knowing that his injury was caused by a belief, however absurd, that he was about to attack the accused. A respectable woman who has been ravished would hardly feel that she was vindicated by being told that her assailant must go unpunished because he believed, quite unreasonably, that she was consenting to sexual intercourse with him.[9]

7.9 We do not (with respect) find the first reason convincing. In the great majority of cases the absence of any reasonable basis for the defendant's alleged belief will suggest, rightly, that he did not in fact hold that belief. But in our view this does not in itself justify a rule of law that in the absence of such a basis the jury *cannot* reasonably be left in doubt whether the belief was in fact held.

7.10 Lord Simon's second reason seems to us more cogent. It is not obvious that the balance between the protection of women[10] and the rights of the accused must necessarily be struck exactly where it now is. Professor Temkin has identified four situations in which, under the present law, the defendant is entitled to an acquittal because his belief in the woman's consent is honest, though unreasonable.[11]

(1) The defendant has sexual intercourse with a woman at the invitation of another man. The woman struggles and protests, but the other man explains that this is mere play-acting and the defendant believes him.

(2) The victim explicitly states that she does not consent, and attempts to resist. The defendant, because of his superior strength, is able without much force to overcome her. He, believing that women always behave in this way, interprets her "no" as "yes" and her resistance as token resistance.

[7] [1976] AC 182.

[8] *Ibid*, at p 191.

[9] *Ibid*, at pp 220–221.

[10] And, now that rape includes non-consensual buggery of a male, of men; but since this is a very recent development, the cases and literature to which we refer speak only of the rape of females. For the sake of simplicity we follow suit, but this should not be taken to imply that any of the arguments we suggest are any less valid in the case of male victims than female ones.

(3) The defendant has so terrified the victim by his conduct that she dare not register her non-consent. He may, for example, have broken into her home, or violently assaulted her before attempting to have sexual intercourse. He interprets her lack of protest as consent.[12]

(4) The victim is a child, or mentally disabled.

7.11 One argument in favour of convicting the defendant in some or all of these cases is a practical one: more rapists would be convicted, and fewer rapes would be committed. It is probably most uncommon for a man to have sexual intercourse with a woman who does not consent without realising that she does not; and if the jury are satisfied that she did not, they are likely to reject the suggestion that the defendant did not know it. Even so, it seems reasonable to suppose that some defendants who *did* know it are at present acquitted because the jury are not satisfied beyond reasonable doubt that they knew it; and that some of those defendants would be convicted if the jury were directed that something less than actual knowledge or awareness would suffice.

7.12 This does not, we think, necessarily amount to what the Heilbron Committee referred to as a "pessimistic ... view of the common sense and inbuilt reasonableness of the average British jury, properly directed by the judge, when the relevant evidence has been adduced before them".[13] The difficulty is that, in a case where there is little dispute about what actually happened,[14] and it is not quite inconceivable that a man in that situation might have failed to realise that the victim did not consent, even the most sensible jury may have difficulty in concluding that they are satisfied *beyond reasonable doubt* that the defendant did realise it. The *Morgan* rule thus makes it possible for a rapist who in fact knew exactly what he was doing to escape conviction because the jury are left with a lingering doubt as to whether he knew it. The Heilbron Committee conceded that

> even if the decision in *Morgan* formed part of a logical and rational development of fundamental legal principles, nevertheless, if it appeared to us that it would be likely to weaken or cloud the real issues in rape trials or encourage juries to accept bogus defences, then it would be necessary to recommend some alteration in the law, which would result in a reversal of that decision.[15]

We think it would be remarkable if the *Morgan* rule did *not* sometimes have the effect of encouraging a jury to accept a bogus defence.

7.13 The difficulty is that the end cannot justify the means. There *might* be fewer rapes if the crime were easier to prove, but this cannot justify making it so much easier

[11] J Temkin, *Rape and the Legal Process* (1987) p 81.

[12] A variation of this is the case where the defendant is in a position of authority, and the victim is too vulnerable to register her non-consent.

[13] Heilbron Report, para 71.

[14] In *Morgan* the defendants gave evidence that the victim had behaved in a manner clearly indicating that she *had* consented.

[15] Heilbron Report, para 47.

to prove that there is a risk of convicting men who in fairness do not deserve to be convicted. A serious criminal offence must always be so defined as to ensure that it can be committed only by a person who is seriously culpable. This is the consideration that led the Heilbron Committee and the CLRC to reject calls for an extension of the offence, and we accept it without question. However, both those bodies appear to have assumed that serious moral culpability *cannot* exist in the absence of conscious awareness of the quality of what is done. Thus the Heilbron Committee referred to

> the principle that a man must be morally blameworthy before he can be found guilty of a crime – *that is to say* that he must have meant to do what the law forbids or been reckless in not caring whether he did it or not.[16]

We are not at present convinced that they are the same thing. In our view the central question is whether it *is* (or can be) morally blameworthy for a man to subject a woman to what would be rape if it were not for his wholly unreasonable failure to realise that she does not consent.

7.14 There is a substantial and reputable school of thought that holds that such conduct *can* be morally culpable.[17] The House of Lords adopted this view in *Caldwell*,[18] ruling that a person is "reckless" within the meaning of the Criminal Damage Act 1971 if there is an obvious risk and *either* the defendant is actually aware of that risk *or* he or she has given no thought to the possibility of there being such a risk. Lord Diplock said:

> Neither state of mind seems to me to be less blameworthy than the other; but if the difference between the two constituted the distinction between what does and what does not in legal theory amount to a guilty state of mind for the purposes of a statutory offence of damage to property, it would not be a practicable distinction for use in a trial by jury. The only person who knows what the accused's mental processes were is the accused himself – and probably not even he can recall them accurately when the rage or excitement under which he acted has passed, or he has sobered up if he were under the influence of drink at the relevant time. If the accused gives evidence that because of his rage, excitement or drunkenness the risk of particular harmful consequences of his acts simply did not occur to him, a jury would find it hard to be satisfied beyond reasonable doubt that his true mental process was not that, but was the slightly different mental process required if one applies the restricted meaning of "being reckless as to whether" something would happen, adopted by the Court of Appeal in *Reg v Cunningham*.[19]

[16] Heilbron Report, para 49 (italics supplied).

[17] Eg H L A Hart, *Punishment and Responsibility* (1968); R A Duff, *Intention, Agency and Criminal Liability* (1990).

[18] [1982] AC 341.

[19] [1957] 2 QB 396, where it was held that a person does not act "maliciously" within the meaning of the Offences Against the Person Act 1861 unless he or she is actually aware that bodily harm may result (footnote supplied).

> My Lords, I can see no reason why Parliament when it decided to revise the law as to offences of damage to property should go out of its way to perpetuate fine and impracticable distinctions such as these, between one mental state and another. One would think that the sooner they were got rid of, the better.[20]

7.15 In view of the emphasis in *Caldwell* on the moral equivalence of the deliberate taking of a risk on the one hand and the failure to advert to an obvious risk on the other, some might find it surprising that in *Elliott v C (a minor)*[21] the Divisional Court felt itself driven to the conclusion that the defendant had been reckless in failing to appreciate a risk even if she would not have appreciated the risk had she thought about it. We have no hesitation in rejecting this view for present purposes: there could be no question of holding a man liable for rape where he was intellectually incapable of understanding that the woman did not consent. (We are not here concerned with the man whose intellectual capacity is temporarily dulled by intoxication, to which special considerations apply.)[22]

7.16 The *Caldwell* interpretation of the word "reckless" was applied to the crime of rape in *Pigg*.[23] The Court of Appeal pointed out that, although *Morgan* had recognised a defence of honest but unreasonable mistake, there could be no such defence if the defendant held no belief one way or the other; and the court saw no reason to suppose that the Sexual Offences (Amendment) Act 1976, which defined rape, had been intended to make the offence harder to prove.[24] In *Bashir*[25] the court followed *Pigg*: it was sufficient that it would have been obvious to the defendant that the woman might not be consenting if he had given any thought to the matter, but he was indifferent and gave no thought to that possibility. It was said that this was a subjective approach to the defendant's state of mind. This, too, was in accordance with Lord Diplock's view: although Lord Diplock had not approved of the terms "subjective" and "objective", he clearly regarded a failure to consider an obvious risk as not just culpable but as evidencing a culpable *state of mind*.

7.17 In *Satnam*[26] the Court of Appeal took the view that *Morgan* and the 1976 Act were unaffected by *Caldwell*. The defendant would be entitled to an acquittal if he honestly (albeit unreasonably) *believed* that the woman consented; but he should be convicted if he "could not care less" whether she did or not. This is not very

[20] [1982] AC 341, 352.

[21] [1983] 1 WLR 939.

[22] See Legislating the Criminal Code: Intoxication and Criminal Liability (1995) Law Com No 229.

[23] (1982) 74 Cr App R 352; see also *Thomas* (1983) 77 Cr App R 63n.

[24] *Ibid*, at p 359.

[25] (1983) 77 Cr App R 59.

[26] (1984) 78 Cr App R 149.

far from the *Caldwell* approach, which includes the defendant who has failed to give thought to the possibility but excludes the defendant who *has* given thought to it and has reached a conclusion which is obviously wrong. There seem to be two issues here:

(1) whether it should be sufficient that the defendant has *given no thought* to the possibility that the woman may not consent; and

(2) whether it should be sufficient that he *positively believes* that she does consent, but there are obviously no grounds for that belief.

Most, if not all, of the situations referred to in paragraph 7.10 above would appear to be cases of the latter rather than the former.

7.18 On the first of these issues, we think that it is arguable that (as long as he has the *capacity* to realise that the woman does not consent) a defendant cannot fairly claim to be immune from criminal liability merely because he fails to make such minimal enquiry as would have revealed that fact to him. If in all the circumstances a person ought to address his mind to a particular issue, it follows that it is reprehensible of him not to do so; the question is whether a man *ought* to address his mind to the question whether a woman consents before engaging in sexual intercourse with her. We consider that there is a respectable case for holding that he should. Failure to do so is a violation of her rights, in that it fails to give proper value to her existence as a human being and thereby to accord her full human status. The misunderstanding that results is

> an easily avoided and self-serving mistake produced by the actor's indifference to the separate existence of another.[27]

7.19 Similarly, on the second issue we consider that there is a respectable case for considering that even a positive *belief* in the woman's consent should not necessarily be a defence in every case. Arguably this should depend on the nature of the defendant's *reasons* (if any) for believing that she does consent when she obviously does not. If, for example, he thinks so merely because he has been told by a third party that he can expect her to resist, we consider that it is arguable that such a basis for his conduct should be regarded as simply illegitimate – that, if he chooses to ignore the woman's actual response in favour of what someone else has told him, he must take the consequences, because his conduct involves a denial of her autonomy and a lack of respect for her status as an individual with a will of her own. Similarly, if he thinks that she consents because he thinks that when a woman says "no" she means "yes", it is equally arguable that he is relying on an attitude towards other people (female or male) which is no longer acceptable. The question is whether society should state clearly that a man who ignores a woman's express refusal will not be permitted to claim that he did not think she meant it.

7.20 We need to stress that *mere* negligence, in the sense of failing to realise what a reasonable man would have realised, could not possibly suffice to found criminal

[27] T Pickard, "Culpable Mistakes and Rape: Relating Mens Rea to the Crime" (1980) 30 U of Tor LJ 75, 83.

liability. At the very least it would have to be proved that the woman's lack of consent was not just perceptible to a reasonable man but *obvious*, and that the defendant himself was *capable* of understanding that she did not consent.

7.21 Furthermore, reference to "negligence" involves connotations which in the present context may be misleading. In the present context we are not concerned with acts of carelessness, done without thought for their possible effect on anyone else. In our report on offences against the person[28] we did not suggest that a person should be criminally liable for injuring someone else by (say) rashly firing a gun without realising that someone may get hurt.[29] But there is a difference between, on the one hand, doing something which one foolishly does not realise may affect anyone else at all, and, on the other, *deliberately* doing *to another person* something which, if they did not consent to it, would be a gross invasion of their personal autonomy – such as having sexual intercourse with them. In these circumstances we think there is a respectable case for requiring such a person to take some elementary steps to ensure that that consent *does* exist. A failure to take such steps involves a wanton disregard for the autonomy of the other person involved, and we do not think that such an attitude is adequately described as one of "negligence".

7.22 The contrary argument, that insists on actual awareness of the victim's lack of consent, is essentially based on the proposition that to relax that requirement would be to turn the crime of rape into one of negligence; and that negligence may be culpable, but it is not *sufficiently* culpable to justify the imposition of liability for a serious crime.[30] This argument has a thoroughly respectable pedigree, and it is the one that has hitherto commanded favour in this country. Underpinning it is the concern that to move away from advertence as a foundation for criminal responsibility would dilute the element of individual culpability which justifies the public condemnatory element in a criminal conviction, as distinct from a judgment of damages in tort or contract.[31] There are also legitimate grounds for concern that if the crime of rape can be committed with a lesser element of mens rea than exists at present, juries may be much more willing to acquit.

7.23 Some of those who favour the first line of argument might go on to say that it is not just *reprehensible* to fail to consider whether the woman is consenting, or to form a wholly unreasonable belief that she is, but that it is *as* reprehensible as deliberately overriding her lack of consent. We disagree: such conduct seems to us to represent a lower level of culpability which, if it is to be made criminal at all, ought to be marked by a lower sentence. Ideally it would be desirable that the jury's verdict should indicate whether they are satisfied that the defendant *knew* that the woman did not consent (or was aware that she might not) or only that he

[28] Law Com No 218 (1993).

[29] Whether there should be criminal liability for *killing* someone through such an act of carelessness is a matter for consideration in our forthcoming report on involuntary manslaughter.

[30] See, eg, the quotation from the CLRC's 15th Report at para 7.5 above.

[31] For a discussion of the rival approaches in a wider context, see A Ashworth, *Principles of Criminal Law* (2nd ed 1995) pp 189–193.

ought to have known; and we therefore have some sympathy with the suggestion that a man found guilty on this basis ought to be convicted not of rape but of a lesser offence, perhaps called something like "gross sexual invasion".[32] But there would be a danger that

> juries might well be tempted to convict of the lesser offence as a compromise solution, or as an act of misguided kindness, with the result that convictions for rape would become more difficult to achieve and the result would be to weaken not strengthen the law.[33]

We agree that this is a real danger, and our provisional view is that, if the law were to be extended, it would have to be done by extending the offence of rape and not by creating a new one. As we have already said,[34] we have not yet formed a provisional view, one way or another, on the points we have been discussing in paragraphs 7.7 to 7.22 above, which we find just as difficult as did the other bodies and individuals[35] who have addressed them in the 20 years that have elapsed since the publication of the Heilbron report.

7.24 We will therefore be inviting respondents' views, both

(1) on whether it is right to hold a man criminally liable for having sexual intercourse with a person who does not consent, where he does not realise that the other person does not consent but that fact should be obvious to him and he was capable of appreciating that fact; and

(2) (if so) on our provisional view that any such liability should be for rape and not for some lesser offence.

7.25 We have started this discussion by reference to the crime of rape, which has given rise to most of the contributions to the debate; but we must next consider whether the new rule that we have suggested, if it were applied to rape, should extend also to other offences to which consent is a defence. In the first place we do not think it would be right to differentiate between rape and indecent assault, or between either or them and offences of inflicting personal injury. Some indecent assaults are relatively minor; others are as bad as rape, if not worse.[36] Some forms of personal injury may be an even more serious invasion than non-consensual sexual intercourse; others certainly are not. But our present view is that all forms of personal injury should for the present purpose be classified with rape: it does not seem unreasonable to expect a person, before subjecting another to what will be a serious invasion of his or her bodily integrity if he or she does not consent to it, to make sure that he or she *does* consent to it.

[32] Celia Wells attributes this term to Andrew Ashworth: [1982] Crim LR 209, 213.

[33] Heilbron Report, para 79.

[34] See para 7.7 above.

[35] Some of whom are mentioned in n 1 above.

[36] Eg penetration of the vagina or anus with an inanimate object, or a part of the body other than the penis.

7.26 It might perhaps be argued that these cases are distinguishable and that the rule we suggest is *more* justifiable in the case of personal injury than in that of sexual invasion. Consensual sexual intercourse is an everyday occurrence (it may be said), and a man is entitled to assume that what would otherwise be a sexual assault is consensual unless the alternative possibility actually presents itself to his conscious mind; whereas consensual *injury* is so unusual that a person proposing to inflict it ought to be *sure* that the other person consents. One answer to this argument is that consensual sexual intercourse cannot and should not be assumed to be more "normal" than the non-consensual variety; there is no *presumption* of consent.

7.27 But in any event we do not think it is the normality or abnormality of the act that should be crucial: rather, we think it arguable that in certain situations the potential harm to the other person may be so great as to justify the imposition of a positive duty to take minimal precautions to avoid it.

> ... not only is rape a serious matter for the victim, but the ascertainment of one vital fact – consent – is a relatively easy matter for the man. There is a clear contrast here between cases of the use of serious force in self-defence, where there may be a need to act instantaneously on a hastily-formed view of the situation, and sexual intercourse with another, where consent or non-consent is the essence of the crime and can be ascertained by asking a plain question of the victim. Thus the argument is that the victim's right to autonomy and freedom of sexual choice does not need to yield to the principle that a defendant should be judged on the facts as he believes them to be; it would be so simple (because of the inevitable physical proximity of the man and woman) for the man to ascertain the facts here.[37]

We think that it is arguable that both unwanted sexual invasion *and* personal injury are sufficiently serious, and the task of ensuring that consent exists in each case sufficiently easy, to justify imposing liability on a person who fails to take that elementary precaution.

7.28 On the other hand we certainly do not envisage that the rule we suggest might apply to *every* offence to which consent is a defence. We do not suggest that, before damaging property belonging to another on the assumption that the owner consents to that damage, a person should be obliged to address his or her mind to the question whether that assumption is well-founded. The difference between personal injury and unwanted sexual invasion on the one hand, and offences against property on the other, is that the former constitute far more serious violations of a person's rights. Where the harm is personal injury or sexual invasion, we think that such a duty to make enquiry may be justified; where the harm is damage to (or deprivation of) property, we think not. "Bodies deserve better protection than goods."[38] At present, under *Caldwell*, goods are better protected than bodies.

[37] A Ashworth, *Principles of Criminal Law* (2nd ed 1995) p 341.

[38] A M Honoré, *Sex Law* (1978) p 78.

7.29 For the reasons we have given, we consider that there should be the same rules, with the necessary changes, in relation to both offences against the person and sexual offences, but that these rules should not be extended to other criminal offences to which the consent defence is applied. We will be inviting comments on this issue.

7.30 For similar reasons we wish to reopen the recommendation of the CLRC that in those cases where the law imposes an age limit below which no valid consent may be given (which we are calling in this Paper "a Class III exception"[39]) allowance must be made for the defendant who honestly *believes* that the child or young person was above the relevant age.[40] We expressed concern at this proposal in the Code Report, on the ground that it might diminish the protection afforded by the law to under-age girls.[41] We now believe that if the victim is *obviously* under the relevant age, and the defendant was capable of appreciating that fact had he given it any thought, his failure to give it any thought is morally culpable and that it may justify the imposition of criminal liability in the interests of protecting the young. It would of course be rare for a 15-year old to be *obviously* under 16, whereas a 12-year old might well be. We would envisage that the rule we suggest would make a difference only in the clearest cases of selfish indifference to the age of the other person involved. We will therefore be seeking the views of respondents on these issues, and at the same time we will be asking whether it is necessary to retain the special defence to the offence of unlawful sexual intercourse provided by section 6(3) of the Sexual Offences Act 1956 that is set out in paragraph 5(2) of the second section of Appendix A below.

Mistaken belief in consent: offences against the person

7.31 **We ask:**

(1) whether it should in itself be a defence to an offence of causing injury to another person that –

(a) at the time of the act or omission causing the injury, the defendant believed that the other person consented to injury or to the risk of injury of the type caused, or to that act or omission, and

(b) he or she would have had a defence under our proposals in paragraphs 4.49 and 4.50 above if the facts had been as he or she then believed them to be; or

(2) whether such a belief should be a defence *only* if, in addition, *either* –

[39] See para 2.19 above.

[40] The relevant considerations, in relation to sexual offences, are set out in CLRC, 15th Report paras 5.12 – 5.14.

[41] Code Report, vol 2, para 15.20.

(a) it would not have been obvious to a reasonable person in his or her position that the other person did not so consent, or

(b) he or she was not capable of appreciating that that person did not so consent.

Mistaken belief in consent: sexual offences

7.32 **We provisionally propose that, if (but only if) the defence of mistaken belief in consent to injury, or to the risk of injury, or to an act or omission causing injury, were to be available in relation to offences against the person only where one of the conditions set out in paragraph 7.31(2) above is satisfied, it should similarly be no defence to a charge of rape or indecent assault that the defendant mistakenly believed that the other person consented to sexual intercourse or to the alleged assault unless one of those conditions is satisfied.**

Burden of proof on the issue of mistaken belief in consent: offences against the person

7.33 **In paragraph 4.53 above we have sought views on where the burden of proof on the issue of consent should lie in relation to offences against the person.[42] In the present context we ask whether, if the proposals in paragraphs 4.49 and 4.50 above were accepted, it should be for the defence to prove, on the balance of probabilities, that the defendant believed that the person injured consented to injury of the type caused or (in the case of injury recklessly caused) to the risk of such injury or to the act or omission causing the injury (and, if such a belief were to be a defence only where one of the conditions set out in paragraph 7.31(2) above is satisfied, that one of those conditions is satisfied); or whether it should be for the prosecution to prove, beyond reasonable doubt, that the defendant did not so believe (or, if such a belief were to be a defence only where one of the conditions set out in paragraph 7.31(2) above is satisfied, that neither of those conditions is satisfied).**

Mistaken belief in consent: statutory age-limits

7.34 **Where there is a statutory age-limit below which no valid consent can be given, we ask –**

(1) whether it should in itself be a defence that –

(a) at the time of the alleged offence, the defendant believed that the other person's age was above that limit, and

(b) he or she would have had a defence if the other person's age had been above that limit; or

[42] We are not suggesting any change in the burden of proof in relation to sexual offences: see paras 4.41 – 4.45 above for a discussion of the issues relating to the burden of proof and consent to injury or the risk of injury.

(2) **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 or her position that the other person's age was or might be under that limit, or**

(b) **he or she was not capable of appreciating that the other person's age was or might be under that limit; or whether such a belief should be irrelevant to liability.**

Mistaken belief in consent: section 6(3) of the Sexual Offences Act 1956

7.35 **We ask whether the special defence to the offence of unlawful sexual intercourse provided by section 6(3) of the Sexual Offences Act 1956 should be retained or should be replaced by whatever general rule is thought appropriate in respect of mistaken belief as to another person's age.**

PART VIII

MEDICAL AND SURGICAL TREATMENT

INTRODUCTORY

8.1 The law relating to offences against the person has impinged very little in the field of medical and surgical treatment in England and Wales during the last century.[1] It has occasionally been invoked when death has resulted from grossly negligent treatment, and before the Abortion Act 1967 doctors who performed abortions were prosecuted from time to time. In the last thirty years there have been very rapid developments in the way our civil law has approached issues of consent in a medical context, but the unreformed Offences Against the Person Act 1861, coupled with the uncodified common law defences of consent and necessity, have continued to represent the criminal law's way of controlling unlawful activity in the field of surgical and medical treatment. If neither defence is available, then the doctor's administration of treatment and the surgeon's operative treatment will be prima facie an unlawful criminal battery, at the very least.

8.2 In the first Consultation Paper we quoted that part of Lord Lane's judgment in *Attorney-General's Reference (No 6 of 1980)*[2] in which he referred to "the accepted legality" of "reasonable surgical interference" and said that this apparent exception to the general rule could be justified "as being needed in the public interest".[3] We suggested that this exception did not turn in any real sense on the consent of the victim:

> [W]hile doctors are undoubtedly exempt from criminal liability for acts done in the course of lawful medical or surgical treatment that would otherwise be serious assaults, for instance the amputation of a limb, the consent of the patient to the injury may usually be a necessary, but it is certainly not a sufficient, condition of that exception.[4]

8.3 In *Brown* Lord Mustill said that special rules, different to those employed in relation to general assault, apply to medical intervention:

> Many of the acts done by surgeons would be very serious crimes if done by anyone else, and yet the surgeons incur no liability. Actual

[1] G Williams, *Textbook of Criminal Law* (2nd ed 1983) where it is said, at p 612, that it is highly improbable that a prosecution would be brought against a doctor who had transgressed in good faith in the interests of his patient. In a decision of the High Court of New Zealand criminal liability for a physician administering medical treatment was treated as an exceptional sanction: it was listed after both professional disciplinary sanctions and civil liability: see *Re X* [1991] 2 NZLR 365, 373, *per* Hillyer J.

[2] [1981] QB 715.

[3] Consultation Paper No 134, para 1.3, citing *ibid*, at p 719D–E, *per* Lord Lane CJ.

[4] Consultation Paper No 134, para 2.4, referring to *Brown* [1994] 1 AC 212, 266F–G, *per* Lord Mustill.

> consent, or the substitute for consent deemed by the law to exist where an emergency creates a need for action, is an essential element in this immunity; but it cannot be a direct explanation for it, since much of the bodily invasion involved in surgery lies well above any point at which consent could even arguably be regarded as furnishing a defence. Why is this so? The answer must in my opinion be that proper medical treatment, for which actual or deemed consent is a prerequisite, is in a category of its own.[5]

8.4 In the earlier case of *Airedale NHS Trust v Bland*[6] Lord Mustill referred to the general law relating to offences against the person, saying that if one person cuts off the hand of another it is no answer to say that the amputee consented to it. He continued:

> Proper medical treatment. How is it that, consistently with the proposition just stated, a doctor can with immunity perform on a consenting patient an act which would be a very serious crime if done by someone else? The answer must be that bodily invasions in the course of proper medical treatment stand completely outside the criminal law. The reason why the consent of the patient is so important is not that it furnishes a defence in itself, but because it is usually essential to the propriety of medical treatment. Thus, if the consent is absent, and is not dispensed with in special circumstances by operation of law, the acts of the doctor lose their immunity.[7]

8.5 The reasons we gave in the first Consultation Paper for not examining issues related to "proper medical treatment" were that it did not depend on consent and that it raised complex issues of policy that went very far beyond the issues addressed in our first Paper.[8] Our failure to explore these issues was criticised by four academic respondents. The Criminal Bar Association also thought it was a pity that these issues had been excluded from consideration, and the Home Office commented[9] that it might appear odd to consider issues relating to "lawful sport" in great depth, but not to give similar consideration to "lawful medical treatment". The criticism was based on what, we believe, is the well-founded complaint that, except in emergencies, the common law has never granted the medical profession the unqualified *legal right* to perform medical or surgical procedures irrespective of the patient's consent even when the procedures are in the patient's best interests. Although the exemption for lawful medical treatment also turns on other matters unrelated to consent, and, in particular, the identification of the purpose for which the "treatment" is administered, there are important consent issues involved that ought to have been fully canvassed in the first Consultation Paper.

[5] [1994] 1 AC 212, 266F–G, *per* Lord Mustill.

[6] [1993] AC 789.

[7] *Ibid*, at p 891F–G.

[8] Consultation Paper No 134, para 2.7. A similar reason was given for the exclusion of issues relating to lawful correction, for which see Part XI below.

[9] At a meeting at the Home Office on 29 March 1995.

8.6 In this Part we have endeavoured to rectify this omission. It must be stressed that none of what follows was raised in the first Consultation Paper, and no comments were sought from respondents on these issues during that consultation. Its relevance to this project is, of course, that if a defence of consent in the context of "proper medical treatment" is not available, then a practitioner will potentially be liable to be charged with one or other of the new offences set out in clauses 2–6 of the Criminal Law Bill contained in Law Com No 218.[10]

THE APPROACH ADOPTED IN OTHER CRIMINAL CODES

8.7 We believe that it would be helpful to begin this analysis by referring to the issues that have been identified as relevant by two other Commonwealth jurisdictions which possess a Criminal Code, even though it seems likely that the provisions set out in paragraphs 8.8 and 8.10 below are mainly concerned with legitimising surgical treatment carried out on a patient who lacks the capacity to consent, rather than with creating a general medical exemption from criminal liability for an offence against the person.

8.8 In New Zealand section 61 of the Criminal Code contained in the Crimes Act 1961, which is headed "Surgical Operations", provides:

> Everyone is protected from criminal responsibility for performing with reasonable care and skill any surgical operation upon any person for his benefit, if the performance of the operation was reasonable, having regard to the patient's state at the time and to all the circumstances of the case.[11]

8.9 A new section 61A was added to the Code in 1977:[12]

> Everyone is protected from criminal responsibility for performing with reasonable care and skill any surgical operation upon any person if the operation is performed with the consent of that person, or of any person lawfully entitled to consent on his behalf to the operation, and for a lawful purpose.

8.10 The Canadian Criminal Code contains two relevant provisions. Section 45 provides:

> A person performing a surgical treatment[13] for the benefit of the patient is protected from criminal liability if it is performed with

[10] Viz intentional or reckless serious injury, intentional or reckless injury, administering a substance without consent, or assault. See Law Com No 218, pp 90, 92.

[11] Crimes Act 1961, s 61.

[12] By the Crimes (Amendment) Act 1977, s 2.

[13] It should be noted that this section does not cover other kinds of therapeutic treatment; nor surgical treatment, such as organ donation, for the benefit of another; nor operations for the sake of medical research. See Law Reform Commission of Canada, Recodifying Criminal Law, Report 31 (1987) p 63.

reasonable skill and care and it is reasonable to perform the operation.[14]

Section 216 provides:

> Everyone who undertakes to administer surgical or medical treatment to another person or to do any other lawful act that may endanger the life of another person is, except in cases of necessity, under a legal duty to have and to use reasonable knowledge, skill and care in so doing.

8.11 In 1987 the Law Reform Commission of Canada recommended that two of the provisions that created its proposed new offence of assault by harming[15] should not apply to the administration of treatment[16] with the patient's informed consent for therapeutic purposes, or for purposes of medical research, involving risk of harm not disproportionate to the expected benefits.

THE RELEVANT ISSUES

8.12 These different formulations of a codified law cast a useful spotlight on issues which ought to be considered in the context of English law today:

(i) The nature and scope of the doctrine of necessity.

(ii) Who may lawfully administer treatment that may have the benefit of a "medical exemption".

(iii) That the relevant treatment is performed with reasonable skill and care.

(iv) That it is reasonable to perform the operation or administer the treatment.

(v) That the treatment is for a therapeutic purpose, for the purposes of medical research or for another lawful purpose.

(vi) That, if the person in question is capable, he or she has given consent.

(vii) That if the person in question is not capable, or is under 18, a lawful consent has otherwise been given.

[14] In *Nancy B v Hotel-Dieu de Quebec* (1992) 69 CCC (3d) 450 it was held that the conduct of a physician in stopping the respiratory support of his patient at the patient's request, freely given and informed, in order that nature might take its course was not unreasonable within the meaning of s 45 of the Criminal Code and, therefore, did not give rise to criminal liability. Lord Goff of Chieveley mentioned this decision in his speech in *Airedale NHS Trust v Bland* [1993] AC 789, 846E.

[15] Ie if the harming was caused purposely or recklessly: see Law Reform Commission of Canada, Recodifying Criminal Law, Report 31 (1987) cl 7(3)(a). This exception was not to apply if the harming was caused negligently, for which see cl 7(2)(c).

[16] *Ibid.* The report recommended that "medical treatment" should be read in a broad sense and cover "not only surgical and dental treatment but also other procedures taken for the purpose of diagnosis, prevention of disease, prevention of pregnancy or as ancillary to treatment."

(viii) That the treatment is for the patient's benefit.

(ix) That the treatment, or medical research, involves a risk of harm that is not disproportionate to the expected benefits.

The nature and scope of the defence of necessity

8.13 We have referred to this doctrine in paragraphs 1.18 – 1.19 above. We do not intend to explore the ramifications of this common law defence any further in the context of this project.

Who may lawfully administer medical treatment

8.14 English law does not forbid, in general terms, the practice of medicine or surgery by unqualified persons, but statute provides for the registration of those who possess certain medical qualifications, and a person who practises medicine or surgery without being so registered is under considerable disabilities as compared with a registered practitioner.[17] There are statutory provisions whereby a person can only become a registered practitioner by acquiring a recognised qualification,[18] and once registered he or she is subject to a strict disciplinary system in regard to his or her professional conduct.[19] Similar statutory controls cover the practice of other professions which are also relevant in the present context. The provisions of the Dentists Act 1984 and the regulations made thereunder, for example, control the profession of dentistry and dental practice.

8.15 Professor Dworkin suggested in 1970 that one of the four conditions that should be satisfied before a surgical operation should be regarded as lawful is that, generally, the operation must be performed by a person with appropriate medical skills.[20] The defence of necessity will provide protection in the case of an operation performed in an emergency by someone without appropriate medical expertise, but subject to this proviso we see no reason at present why unqualified persons should have the benefit of any medical exemption, at least so far as surgery is concerned.

[17] *Halsbury's Laws* (4th ed Reissue 1992) vol 30, para 2. He or she is forbidden to use titles or descriptions implying that he or she is a registered practitioner or is recognised by law as a physician or surgeon or apothecary (Medical Act 1983, s 49): he or she is not entitled to recover his or her charges for medical attendance or advice in a court of law (*ibid*, s 46(1)): he or she may not hold appointments which are closed except to medical practitioners (*ibid*, s 47(1)): and he or she is not entitled to possess or supply controlled drugs (see generally the Misuse of Drugs Act 1971 and the regulations made thereunder).

[18] See, for example only, the Medical Act 1983, s 3(a).

[19] See the Medical Act 1983 and regulations made thereunder. Their effect is set out in *Halsbury's Laws* (4th ed Reissue 1992) vol 30, paras 126–159.

[20] G Dworkin, "The Law Relating to Organ Transplantation in England" (1970) 33 MLR 353. The other three conditions were that: (i) the patient must give a full, free and informed consent; (ii) the operation must be therapeutic: it must be expressly for the patient's benefit; and (iii) there must be lawful justification. Professor Dworkin described condition (iii) as a relatively unexplored and open-ended requirement, and it seems clear that he regarded it as an alternative to condition (ii) in some circumstances.

That the treatment is performed with reasonable skill and care

8.16 A provision of this kind appears in both the New Zealand and the Canadian Codes. It appears strange to an English lawyer because simple negligence forms no part of the mens rea for criminal liability, and issues relating to gross negligence only arise in relation to manslaughter. In our view this requirement should be disregarded so far as the formulation of a medical exemption is concerned: it may, of course, be relevant in the case of an unqualified person invoking the defence of necessity.

That it is reasonable to administer the treatment

8.17 A provision of this type would, once again, appear to be inappropriate, except in relation to the defence of necessity.

That the treatment is for a therapeutic purpose, for the purposes of medical research, or for another lawful purpose

8.18 The formulation of the appropriate language for any medical exemption is at the heart of the issues to be discussed in this Part, and we will revert to these issues when we have completed the present analysis.

That if the person in question is capable, he or she has given consent

8.19 These issues have already been discussed in Part V above. The basic principle is set out in the well-known judgment of Cardozo J:

> Every human being of adult years and sound mind has a right to determine what should be done with his body, and a surgeon who performs an operation without his patient's consent commits an assault for which he is liable in damages.[21]

8.20 Issues relating to the validity of consent have been throughly discussed in Parts V–VI above. Some of the leading cases are concerned with medical treatment, or what was represented to be medical treatment, but there are no special considerations peculiar to medical treatment.[22]

8.21 It should be noted that Part VI of the Mental Health Act 1983 contains a statutory scheme whereby patients who are compulsorily detained in hospital may, in certain circumstances, be treated for their mental disorder without their consent, and no issues of voluntariness, information or legal capacity will arise in those cases.

[21] *Schloendorff v Society of New York Hospital* 105 NE 92, 93 (1914).

[22] See *De May v Roberts* 9 NW 146 (1881) (an unprofessional, unmarried, young man assisted at childbirth when the complainant believed him to be a physician); *Maurantonio* (1967) 65 DLR (2d) 674 (defendant conducted intimate physical examinations of female patients pretending to be a qualified doctor).

That if the person in question is not capable or is under 18 a lawful consent has otherwise been given

8.22 It is extremely unlikely that any questions will arise in a criminal court as to the validity of a decision taken by a proxy decision-maker, provided that the activity to which consent is given is otherwise lawful.

That the treatment is for the patient's benefit

8.23 This is a requirement that needs very careful consideration in an English context. It is understandable that the exemption should not apply, for example, in the case of a surgeon who with an adult patient's consent amputates the patient's arm or leg when there is no conceivable benefit to be derived from doing so, and a professionally qualified surgeon would not be permitted to do this by the professional standards by which he or she is bound. It will be seen that in *Bravery v Bravery*[23] Denning LJ, as he then was, considered that the exemption did not apply to surgery conducted *with consent but without just cause and excuse* and it will be necessary to ensure that any codification should not legitimise surgical (or medical) treatment that should still properly be castigated as "unlawful". Some writers have wondered whether a solution to this problem can be found by reference to the old common law crime of "mayhem" (maim).[24] Although, in *Brown,* Lord Mustill said that this crime is now obsolete,[25] and it did not figure in any of the speeches in that case as casting any light on the present state of English criminal law, it is useful to bear the past existence of this offence in mind in any analysis of the limits of the ability to consent to treatment that has no apparent justification.

That the treatment, or research, involves a risk of harm that is not disproportionate to the expected benefits

8.24 It seems to us that considerations of this type could be embraced by concepts like "proper medical treatment" or "properly approved medical research." In *Sidaway v Board of Governors of the Bethlem Royal Hospital*[26] Lord Bridge said[27] that if an operation involved a serious risk of grave adverse consequences, as for example a 10% risk of a stroke, a doctor could hardly fail to appreciate the necessity for an appropriate warning in the absence of some cogent clinical reason why the operation should not be performed. But the doctor's potential liability would lie in the field of negligence, not battery, if he or she failed to disclose the risk and

[23] [1954] 1 WLR 1169. See para 8.26 below.

[24] See 1 East PC 393: "A maim at common law is such a bodily hurt as renders a man less able to fight to defend himself or annoy his adversary: but if the injury be such as disfigures him only, without diminishing his corporal abilities, it does not fall within the crime of mayhem." See also P D G Skegg *Law, Ethics and Medicine* (1984) pp 43–46, citing, inter alia, *Wright's case,* recorded by Lord Coke in 1603 (1 Co Inst 127a-b), in which "a strong and lustie rogue" directed his companion to cut off the rogue's left hand so that he might get out of work and beg more effectively. Both were convicted of mayhem, and consent was held to be no defence.

[25] [1994] 1 AC 212, 262.

[26] [1985] AC 871.

[27] *Ibid,* at p 900.

proceeded to operate, and we know of no principle of English law that would render treatment unlawful on this count if in all other respects it was properly carried out by a qualified practitioner.

THE FORMULATION OF A MEDICAL EXEMPTION

8.25 Conventional medical and surgical treatment for a therapeutic purpose by qualified practitioners gives rise to no particular difficulties and it should be expressly protected by an appropriate Class I exception.[28] In this Part we will be concentrating on what have been perceived to be problem areas. In the last thirty years the treatments that have given rise to most discussion and argument have been in the field of sterilisation, abortion, sexual reassignment operations and organ transplants; cosmetic surgery often falls outside what can be strictly identified as a therapeutic purpose, and medical research gives rise to its own set of problems. No treatment may lawfully be given to a mentally competent patient in relation to any of these activities, except in an emergency, without a valid consent.

Sterilisation

8.26 Attitudes to sterilisation have changed radically since Denning LJ suggested in 1954 that a sterilisation performed to enable a man to have the pleasure of sexual intercourse without shouldering the responsibilities attaching to it was unlawful.[29] It appears to us that "today there can be no doubt that such operations are lawful and cannot be said to be contrary to public policy since sterilisation for contraceptive purposes is recognised as "just cause".[30] If the law is to be codified, it seems desirable to give express protection for sterilisation operations.[31] In the United States, case-law on voluntary non-therapeutic sterilisation provides that such operations will be lawful if a competent consent is given.[32]

Abortion

8.27 Sections 58 and 59 of the Offences Against the Person Act 1861 created specific offences relating to abortion. These were derived from earlier nineteenth century

[28] See para 2.19 above.

[29] In *Bravery v Bravery* [1954] 1 WLR 1169, in a passage, at p 1180, with which the two other members of the court did not agree, Denning LJ said that a surgical operation is unlawful if there is no just cause or excuse for it.

[30] I Kennedy and A Grubb, *Medical Law* (2nd ed 1994) p 709. They cite the parliamentary sanction given to vasectomy operations to be carried out within the National Health Service (National Health Service Act 1977, s 5(1)(b)) as confirmation for their view. See also G Williams, *Textbook of Criminal Law* (2nd ed 1983) p 590. For sterilisation operations performed for an improper purpose, see para 8.52 below.

[31] See, in New Zealand, the Crimes Act 1961, s 61A(2): "Without limiting the term 'lawful purpose' in subsection (1) of this section, a surgical operation that is performed for the purpose of rendering the patient sterile is performed for a lawful purpose." See also para 8.9 above.

[32] *Custodio v Bauer* 59 Cal Rptr 463 (1967); *Jessin v County of Shasta* 79 Cal Rptr 359 (1969).

statutes and, ultimately, from the common law.[33] These provisions, as amended, remain unaffected by our proposals in Law Com No 218,[34] but their effect has been considerably reduced by recent statutes.[35] Since this project is concerned only with the defence of consent, it would seem to be unnecessary to consider the antique language of the 1861 Act, and since Parliament has recently decided which abortions should be treated as lawful, it would be inappropriate for us to recommend any further change.

Sexual reassignment operations

8.28 In *Corbett v Corbett*,[36] a case concerned with the validity of a marriage between a transsexual and another man, Ormrod J commented:

> There is obviously room for differences of opinion on the ethical aspects of such operations but, if they are undertaken for genuine therapeutic reasons, it is a matter for the decision of the patients and the doctors concerned in his case.[37]

8.29 At that time there was a good deal of discussion about the legality of such operations,[38] but they may now be funded by the National Health Service and, since *Corbett*, the legality of the operation itself has never really been questioned.[39] Again, it would seem to be desirable to make express provision for such operations in any legislation.

Cosmetic surgery

8.30 We have been unable to identify any English case in which the lawfulness of cosmetic surgery carried out by consent has been called into question.[40] It would

[33] See B Dickens, *Abortion and the Law* (1966) pp 20–28, cited in I Kennedy and A Grubb, *Medical Law* (2nd ed 1994) pp 860–864, for details of the earlier history of the offences.

[34] See Law Com No 218, p 143.

[35] Abortion Act 1967, s 1, as substituted, where relevant, by the Human Fertilisation and Embryology Act 1990, s 37.

[36] [1971] P 83.

[37] *Ibid*, at p 99B.

[38] See D W Meyers, *The Human Body and the Law* (1st ed 1970) p 66, where the author discussed the ways in which the operation might be justified on therapeutic grounds. In the latest edition of his textbook Mr Meyers brings the law in this area up to date: see D W Meyers, *The Human Body and the Law* (2nd ed 1990) p 223.

[39] See *Tan* [1983] QB 1053 and *Cossey v United Kingdom* (1990) 13 EHRR 622. This may be because some therapeutic benefit was present in each of these cases. G Williams, *Textbook of Criminal Law* (2nd ed 1983) says that the male-female sex change is performed openly by reputable surgeons. "If the issue were raised, the operation could be supported as conducive to the patient's mental health ... ." *Ibid*, pp 589–591. I Kennedy, *Treat Me Right* (1988) refers, at p 262 n 21, to the gender dysfunction clinic at the Charing Cross Hospital where a Dr Randall requires his patients to live in a new sex role for 6 months prior to the operation and to demonstrate unequivocally that they were better adjusted in their new sex role.

[40] In *Lacey v Laird* 139 NE 2d 25 (1956) the court acknowledged that cosmetic plastic surgery on the plaintiff's nose was relatively harmless even if it was not performed for any obvious therapeutic benefit. It held that it was lawful and that the plaintiff, although under 18, had capacity to consent to it herself. Different considerations are involved when a parent

not be possible to identify a therapeutic benefit in every case, and it may be that this is a field in which English law unconsciously recognises that the criminal law has no acceptable place in controlling operations performed by qualified practitioners upon adults of sound mind with their consent.[41]

Organ transplants

8.31 Although the practice of taking kidneys and other tissue material from live donors has been an established therapeutic procedure for decades,[42] the principles that make it lawful to remove organs from living donors have never been set out clearly in any English case.[43] In 1969 Lord Justice Edmund Davies said, extra-judicially,[44] that "he would be surprised" if any liability, civil or criminal, attached to the surgeon who performed a transplant operation on a competent donor who freely consented to the operation, provided that it did not present an unreasonable risk to the donor's life or health. The existence of risk to the donor has led to a distinction being drawn[45] between the use of regenerative tissue (such as blood or bone marrow), non-regenerative tissue that is essential for life (such as the heart or the liver)[46] and other non-regenerative tissue.[47]

8.32 There are no special principles relating to the nature of the consent that must be obtained, although where the donor is closely related to the potential donee, the doctor performing the operation needs to be conscious of the psychological pressure on the donor and to ensure that the consent is indeed freely given.[48] What is more difficult is to identify the principles on which English law sanctions these operations, since they do not confer any therapeutic benefit on the donors.[49]

purports to give a valid consent to such surgery on behalf of a child. See M Brazier, *Medicine, Patients and the Law* (2nd ed 1992) p 350: the consent must be in the child's best interests.

41 See G Williams, *Textbook of Criminal Law* (2nd ed 1983) pp 589–91. He writes: "Therapy also gives moral support to some cosmetic surgery, but not all. The justification for padding bosoms, chiselling noses, and restoring hymens lost in premarital encounters, is that the patient is pleased and may be socially or maritally advantaged, rather than that the operation is a psychiatric necessity".

42 The first kidney transplant was performed at the Peter Bent Brigham Hospital in Boston (USA) in 1954.

43 See Law Reform Commission of Australia, Human Tissue Transplants, Report No 7 (1977), where it was said, at para 51, that the common law of England offered no rule or principle dealing with human tissue transplants as such, nor, for that matter, with surgery as such.

44 See "A Legal Look at Transplants" (1969) 62 Proc Roy Soc Med 633.

45 See I Kennedy and A Grubb, *Medical Law* (2nd ed 1994) p 1085; M Brazier, *Medicine, Patients and the Law* (2nd ed 1992) p 395.

46 If a surgeon removed a heart or a liver, then "any consent would be invalid since the surgeon would commit murder": see Kennedy and Grubb, *ibid*, p 1085. Aliter if a replacement heart has already been put in place.

47 See M Brazier, *Medicine, Patients and the Law* (2nd ed 1992) where it is observed, at p 395, that the major non-regenerative organ that is a candidate for live donation is the kidney.

48 *Ibid.* See also G Dworkin, "The Law Relating to Organ Transplantation in England" (1970) MLR 353.

49 *Ibid*, at p 357.

Professor Dworkin has suggested that legal justification might be derived from treating a volunteer donor as favourably as the courts have traditionally treated rescuers.[50] Professor Skegg has argued that the shortage of organs available for transplantation means that the courts may be expected to accept that there is a just cause or good reason for transplant operations on living donors.[51] Whatever the true legal analysis, there can be no doubt that, once a valid consent has been forthcoming, English law now treats as lawful[52] operative procedures designed to remove regenerative tissue, and also non-regenerative tissue that is not essential for life.

8.33 It is interesting to note that in some United States jurisdictions courts have considered whether it is possible to identify an emotional or psychological benefit to the living donor. In *Strunk v Strunk*[53] the Kentucky Court of Appeals, exercising a *parens patriae* jurisdiction not available to the English courts, authorised an operation to remove a kidney from a mentally incapacitated adult for transplantation into his twin brother. The court relied on expert evidence to the effect that the welfare of the prospective donor would suffer if his brother, on whom he had come to depend emotionally and psychologically, were to die. While the court discussed a "substituted judgment" test it seems that the decision was actually based on an assessment of where the "best interests" of the donor lay.[54]

8.34 In *Little v Little*[55] the Texas Court of Civil Appeals granted authority for the removal of a kidney from a mentally incapacitated minor so that it could be transplanted into her brother. The court used the same reasoning as in the *Strunk* case,[56] and it also made some general observations about the psychological benefits which organ donors may derive from the (successful) performance of the operation:

> Studies of persons who have donated kidneys reveal resulting positive benefits such as heightened self-esteem, enhanced status in the family, renewed meaning in life, and other positive feelings including

[50] *Ibid,* at p 358.

[51] P D G Skegg, *Law, Ethics and Medicine* (1984) at p 43. See also M Brazier, *Medicine, Patients and the Law* (2nd ed 1992) p 396 where the author argues that, notwithstanding the absence of any physical therapeutic benefit, there are public policy reasons which justify altruistic donation.

[52] In the sense that they do not constitute unlawful batteries in civil or criminal law.

[53] 35 ALR (3d) 683 (1969).

[54] This was the view taken by Cadena CJ in the later case of *Little v Little* 576 SW (2d) 493, 498 (1979): see para 8.34 below. Professor Margaret Brazier, however, has asserted that in the *Strunk* case the court applied a doctrine of "substituted judgment": see *Medicine, Patients and the Law* (2nd ed 1992) p 399. In our recent report on Mental Incapacity, this Commission recommended that "any treatment or procedure to facilitate the donation of non-regenerative tissue or bone marrow should require court authorisation." We believed that this recommendation struck the right balance between protecting the donor from potentially invasive surgical procedures and enabling authorisation where a transplant was required to save the life of a close family member. Mental Incapacity (1995) Law Com No 231, para 6.5.

[55] 576 SW (2d) 493 (1979).

[56] See para 8.33 above.

transcendental or peak experiences flowing from their gift of life to another.[57]

8.35 While there are some similarities between these observations and the reasoning which has led to an acceptance of the existence of a *psychological* therapeutic benefit in sexual reassignment and cosmetic surgery cases it would be wrong to take this comparison too far. The sole aim of organ transplantation is to benefit the donee: any positive benefits that the "altruistic donor" may derive are entirely incidental.

8.36 In one context the legality of live organ donation is now governed by statute. The Human Organ Transplants Act 1989 was passed in the wake of the controversy that was aroused by a medical disciplinary case in which four doctors were found guilty of serious professional misconduct following incidents in which Turkish citizens had been paid money in return for their agreement to come to London to have their kidneys removed for transplantation into private patients.[58]

8.37 The 1989 Act sets restrictions on the transplants of organs between persons who are not genetically related.[59] Regulations made pursuant to the Act have created a body known as the Unrelated Live Transplant Regulatory Authority ("ULTRA") which has the duty of determining applications for authority to conduct transplants between non-genetically related persons.[60] Approval will only be given if ULTRA is satisfied that no payment has been, or is to be, made for the supply of the organ, and that a consent has been given that satisfies five express requirements:

(a) that a registered medical practitioner has given the donor an explanation of the nature of the medical procedure for, and the risk involved in, the removal of the organ in question;

(b) that the donor understands the nature of the medical procedure and the risks, as explained by the registered medical practitioner, and consents to the removal of the organ in question;

(c) that the doctor's consent to the removal of the organ in question was not obtained by coercion or the offer of an inducement;

(d) that the donor understands that he is entitled to withdraw his consent if he wishes, but has not done so;

[57] 576 SW (2d) 493, 499 (1979) *per* Cadena CJ. See also W J Curran, "A Problem of Consent: Kidney Transplantation in Minors" (1959) 34 NY Univ L Rev 891, 897–898. The author suggests that this is based more on the prevention of detriment than deriving a positive (psychological) benefit.

[58] One of the Turkish patients alleged that he had not consented to the removal of his kidney and that he had believed that the operation was for his own benefit.

[59] Human Organ Transplants Act 1989, s 2. For a discussion of the meaning of the words "organ" and "genetically related" in this context, see I Kennedy and A Grubb, *Medical Law* (2nd ed 1994) pp 1087–1090.

[60] SI 1989 No 2480.

(e) that the donor and the recipient have both been interviewed by a person who appears to [ULTRA] to have been suitably qualified to conduct such interviews and who has reported to [ULTRA] on the conditions contained in sub-paragraphs (a) to (d) above and has included in his report an account of any difficulties of communication with the donor or the recipient and an explanation of how those difficulties were overcome.[61]

Medical research

8.38 Therapeutic and non-therapeutic research must be distinguished. In therapeutic research, medical treatment is often combined with some form of research task.[62] This can give rise to legal, ethical and political controversy. One of the reasons why controversy arose in the recent case of *Re B*[63] was because the Health Authority decided to refuse funding for *experimental* treatment. More recently, there has been publicity over the death of Arthur Cornhill, the first Briton to be fitted with a mechanical "heart".[64] Mr John Wallwork, the surgeon who fitted Mr Cornhill with the mechanical device, commented:

> We have learnt an enormous amount. The whole issue of trials means you cannot come to any conclusions until you have results, and you have to have reasonable numbers of patients to be able to do that.

8.39 *Therapeutic* research may well be in the patient's own "best interests" in that it may prolong his or her life, as in the case of the mechanical heart patient, or at least hold out the prospect of a better quality of life. The same cannot be said of the patient who volunteers for *non-therapeutic* research. It is necessary to determine whether this difference should have any significance in relation to the law's approach to these two different types of research.[65]

8.40 In the field of non-therapeutic research randomised controlled experimentation has, since the 1960s, become a major source of information on which to base the therapeutic decisions of the future. Randomised controlled experiments are a

[61] *Ibid*, reg 3(2).

[62] See M Brazier, *Medicine, Patients and the Law* (2nd ed 1992) p 420. The author asks: "For example, if a doctor caring for patients with AIDS attempts as a last resort a novel treatment, knowing that there is no conventional treatment which will prolong the patient's life, has he crossed that line and made the patient a research subject?"

[63] [1995] 2 All ER 129.

[64] "First Briton with mechanical heart dies after 9 months", *The Times* 11 May 1995.

[65] M Brazier, *Medicine, Patients and the Law* (2nd ed 1992) pp 413–416 describes how the law has struggled to provide solutions for the ethical problems that have arisen from the pace of innovation in this field. Since 1975 Department of Health policy for the National Health Service has required each district health authority to appoint a local research ethics committee to supervise and approve of research proposed by physicians within its boundaries. The current policy document (Department of Health, *Local Research Ethics Committees* (1991)) requires each ethics committee to consider, inter alia, whether the subject's health may benefit from, or be affected by: the research; the degree of discomfort and distress to the subject; whether the investigator is adequately qualified and experienced; the need to ensure that an adequate consent has been obtained from the subject; and whether an appropriate information sheet for the subject has been prepared.

method of "blind-testing". They have been described as "clinical trials to compare treatments in which the division of patients into groups is done by some method independent of human choice – that is, by the use of random numbers, without regard to the particular characteristics of the patient."[66] This form of research will be most effective if it is totally "blind" and random.

8.41 Consent is, of course, crucially important to the legality of medical research.[67] The participant's consent must be informed by the disclosure of a certain amount of information before it can be treated as a real consent. The principle set out by Bristow J in *Chatterton v Gerson*[68] requires that a physician should disclose in broad terms the nature of the proposed research. Two leading English commentators argue, however, that when a physician intends to conduct medical research the law requires him or her to inform the patient both of that intention and the possible consequences of the research, and that any failure to disclose this information will leave the physician open to liability for battery. They say:

> To put it another way, research adds a further component to the quality of the consent that the law requires.[69]

8.42 The information that must be given to a patient will vary depending upon the type of research that is proposed. These writers, however, identify two specific matters of which the research subject must be informed, where relevant, if the researcher is to avoid liability for an unlawful battery:[70]

(1) that he or she may refuse to take part in the research project or may at any time withdraw from the research and that in either case no adverse consequences will be suffered in terms of the treatment he or she will then receive;

(2) that the nature of the research may be such that he or she is a member of a control group in a trial which is intended to evaluate the efficiency of a new therapy.

8.43 *Halushka v University of Saskatchewan*,[71] a decision of the Saskatchewan Court of Appeal, provides a practical illustration of some of these principles. The respondent had volunteered for paid drug testing at the medical school of his

[66] I Kennedy, *Treat me Right* (1988) p 213.

[67] Cf the New Zealand Bill of Rights Act 1990, s 10, which provides that "Every person has the right not to be subjected to medical or scientific experimentation without that person's consent." However, this right is subject to the limitation that it can be reasonably limited by law where this can demonstrably be justified in a free and democratic society (s 5).

[68] [1981] QB 432, 442–443. See para 6.22 above.

[69] I Kennedy and A Grubb, *Medical Law* (2nd ed 1994) p 1045. The same authors suggest that a failure to inform the patient of the intention to carry out research may also constitute a fraud sufficient to nullify the consent under general common law principles: for which see *Clarence* (1888) 22 QBD 23, *Bolduc and Bird* (1967) DLR (2d) 82 and *Linekar* [1995] QB 250.

[70] I Kennedy and A Grubb, *Medical Law* (2nd ed 1994) p 1045.

[71] (1965) 53 DLR (2d) 436.

university. He was told that a new drug was being tested (but not that it was an untried anaesthetic); that electrodes would be placed in his arms, legs and head; that he would be "perfectly safe"; and that an incision would be made in his left arm through which a catheter would be inserted. He consented to these procedures and signed a consent form that contained a clause exempting the appellants from any liability arising, "directly or indirectly", from the testing.

8.44 The testing was conducted in accordance with the description given to him except that the catheter, after being inserted into his arm, was advanced down a vein, pushed through the chambers of his heart and secured in the pulmonary artery. He suffered a complete cardiac arrest and had to be resuscitated. He sued the appellants for battery and negligence and succeeded at first instance.

8.45 Hall JA, dismissing the hospital's appeal, said that the responsible physician, seeking to rely on a patient's consent to avoid liability for battery, must give the patient a "fair and reasonable explanation" of the proposed research, its probable effects and any special or unusual risks.[72] He found that the failure to inform the respondent that the new drug was an untested anaesthetic and of the proposed use and route of the catheter provided justifiable grounds for finding that the doctor had been guilty of an unlawful battery.

8.46 He went on to say that a subject of medical experimentation is entitled to full and frank disclosure of all the facts, probabilities and opinions that a *reasonable man* may be expected to consider before consenting to treatment. This goes significantly further than the standard set by *Chatterton v Gerson*, although Hall JA did not expressly confine his judgment in this regard to negligence. The procedure in *Halushka* also involved non-therapeutic research for which a higher standard of disclosure may be required.

8.47 This interpretation, at any rate, has been suggested by the two commentators to whom we have referred, who argue that when it is proposed to conduct non-therapeutic research on a competent patient then the standard of disclosure that is required if a valid informed consent is to be present is *subjective* and, therefore, as a matter of English law a patient must be told everything he or she wants to know.[73]

8.48 Randomised controlled experimentation creates further demands in the context of consent. One commentator has suggested that "consent on the strength of a proper explanation of the trial and free acceptance by the patient of its random basis would appear both sufficient and necessary."[74]

[72] *Ibid*, at p 443.

[73] I Kennedy and A Grubb, *Medical Law* (2nd ed 1994) p 1060.

[74] M Brazier, *Medicine, Patients and the Law* (2nd ed 1992) p 425. This view is shared by Professors Kennedy and Grubb who argue that a patient can validly consent to a randomised controlled trial only if he is aware that it is random and knows what this means. See *Medical Law* (2nd ed 1994) p 1045.

LAW REFORM PROPOSALS

8.49 For the reasons we have given, we believe that there should be a Class I exception[75] in relation to proper medical treatment etc, so that if an activity falls within the exception, there will be a complete defence to all the offences in the Criminal Law Bill.[76] We make this proposal in accordance with the fifth principle in our suggested law reform strategy.[77]

8.50 **We therefore provisionally propose that –**

(1) a person should not be guilty of an offence, notwithstanding that he or she causes injury to another, of whatever degree of seriousness, if such injury is caused during the course of proper medical treatment or care administered with the consent of that other person;

(2) in this context "medical treatment or care" –

(a) should mean medical treatment or care administered by or under the direction of a duly qualified medical practitioner;

(b) should include not only surgical and dental treatment or care, but also procedures taken for the purposes of diagnosis, the prevention of disease, the prevention of pregnancy or as ancillary to treatment; and

(c) without limiting the meaning of the term, should also include the following:

(i) surgical operations performed for the purposes of rendering a patient sterile;

(ii) surgical operations performed for the purposes of enabling a person to change his or her sex;

(iii) lawful abortions;

(iv) surgical operations performed for cosmetic purposes; and

(v) any treatment or procedure to facilitate the donation of regenerative tissue, or the donation of non-regenerative tissue not essential for life.

[75] See para 2.19 above.

[76] It should be noted that the Criminal Law Bill is only concerned with non-fatal offences. We will be making proposals in relation to cases in which death has occurred in our forthcoming report on Involuntary Manslaughter, which we hope to publish in the first part of 1996.

[77] See para 2.18 above. We are referring to the principle that we should not take the view that to be seriously disabled is against a person's best interests (sc in the context of a surgical amputation) if the activity in question is widely regarded as beneficial and where the state is satisfied that the risks are properly controllable and containable.

8.51 **We also provisionally propose that –**

(1) a person should not be guilty of an offence, notwithstanding that he or she causes injury to another, of whatever degree of seriousness, if such injury is caused during the course of properly approved medical research and with the consent of that other person; and

(2) in this context the term "properly approved medical research" should mean medical research approved by a local research ethics committee or other body charged with the supervision and approval of medical research falling within its jurisdiction.

8.52 Since these are original proposals, which have not previously been submitted to consultation, we are very anxious to learn from anyone who has knowledge of medicine and surgery, whether these proposals are sufficiently comprehensive and give sufficiently wide protection to those who practise in these fields, comparable to the width of protection afforded by the present vagueness of the criminal law, while not being so wide as to legitimise, for instance, surgical operations carried out for improper purposes, for example, castration in the interests of eugenics, as practised in Nazi Germany, or cutting a man's fingers off in order to assist him in making a dishonest claim against an insurance company.[78] In our view such treatment could never be described as "proper".

[78] This example was taken from a case discussed in an article written by Jesse Dukeminier, "Supplying Organs for Transplantation" (1970) 68 Michigan Law Review 811, which appears in I Kennedy and A Grubb, *Medical Law* (2nd ed 1994) p 1081.

PART IX

CIRCUMCISION, TATTOOING, COSMETIC PIERCING, BRANDING AND SCARIFICATION

INTRODUCTORY

9.1 In this Part we consider the law relating to other activities in which injury is inflicted deliberately by consent. It will become readily apparent that English law has developed very unsystematically in this area. The leading cases refer only to tattooing, ear-piercing and ritual circumcision as exceptions to the general rule whereby it is not lawful to inflict injury amounting to actual bodily harm even if by consent, and because the law in those areas is clear, statute has now introduced some controls designed to ensure that most of these practices are carried out safely and hygienically. In relation to cosmetic piercing it is clear to us that the unreported ruling of Judge Rant QC in the case of *Oversby*[1] has been quite widely treated as giving authoritative judicial guidance that the piercing of parts of the anatomy other than the ears is lawful provided that the piercing is carried out for decorative or cosmetic purposes, and not for sexual gratification. Except in London, however, no form of statutory control has been introduced in relation to cosmetic piercing generally. The less common minority practices of branding and scarification, which carry considerable risks if not carried out by skilled people in proper safe and hygienic conditions, fall into a grey area which the common law and statute have hardly touched.[2]

CIRCUMCISION

Male circumcision

9.2 Male circumcision is lawful under English common law. Male circumcision is insisted on by Islamic and Jewish law.[3] It is generally accepted that the removal of the foreskin of the penis has little, if any, effect on a man's ability to enjoy sexual intercourse, and this act is not, therefore, regarded as mutilation. The traditional reason for male circumcision appears to have been a hygienic one. Several respondents supported the continuing legality of ritual circumcision in general terms, and ACPO said that it would be desirable to make the position entirely clear by formulating rules as to the nature of the consent given by the victim and the limits and the circumstances in which consent is legally effective. Since ritual circumcision is customarily carried out by someone who is not a qualified doctor,

[1] See para 9.7 below.

[2] See, however, the case of *Adesanya,* which is mentioned in para 9.14 and n 40 below.

[3] Muslim boys are circumcised at any time after the seventh day following their birth. Jewish boys are circumcised when they are eight days old. The ceremony is called the Brit Mila, and it is carried out by a trained circumciser (Mohel), usually in the home with family and friends present.

the practice of male circumcision would not be protected by a purely medical exemption.

Female circumcision

9.3 The circumcision of females has been prohibited by a modern statute,[4] subject to specified exceptions for necessary surgical operations.[5] This was a customary practice carried out traditionally in large parts of Africa and sporadically in other parts of the world.[6] We received no suggestions from any respondent that this practice should be decriminalised.[7]

TATTOOING

9.4 Tattooing has always been treated as a lawful activity. In the 1960s the case of *Burrell v Harmer*[8] and public concern about the tattooing of young people led to the enactment of the Tattooing of Minors Act 1969. The main concerns about tattooing as a practice centred on the possibility of viral infection by dirty needles, the permanent nature of tattoo marks and the psychological problems that might afflict those with unwanted tattoos. Tattooing is defined in that Act as "the insertion into the skin of any colouring mark designed to leave a permanent mark", and the Act, which bans tattooing of anyone under the age of 18, provides an exception for tattooing performed for medical reasons.[9] A defence is available if the person charged can show that at the time the tattoo was performed he had reasonable cause to believe that the person tattooed was 18 or older and did in fact believe so.[10] A number of states in the USA have similar legislation.[11]

4 The Prohibition of Female Circumcision Act 1985. By s 1 it is an offence for any person (a) to excise, infibulate or otherwise mutilate the whole of or any part of the labia majora or labia minora or clitoris of another person; or (b) to aid, abet, counsel or procure the performance by another person of any of those acts on that other person's own body. The Cardiff Crime Study Group suggested that some amendment to this Act may be necessary if certain forms of genital piercing are to be decriminalised, because of the wide meaning which may be given to the word "mutilate".

5 *Ibid*, s 2.

6 See the debates in the House of Lords on the Second Readings of this Bill in two different sessions of Parliament, *Hansard* (HL) 21 April 1983, vol 441, cols 673–697 and *Hansard* (HL) 15 May 1985, vol 463, cols 1223–1245. On the first occasion the Lord Chancellor, Lord Hailsham of St Marylebone, said that the practice was in any event prohibited by the Offences Against the Person Act 1861 and no valid consent could be given on behalf of a minor.

7 See Geraldine Brooks, "Against the Verses", *The Guardian*, Weekend, 11 March 1995, for a recent article which supports the contention that there is nothing in the Koran to justify the circumcision of Muslim women. There is a brief overview of the arguments for and against criminalisation in Morayo Atoki, "Should Female Circumcision Continue to be Banned?" (1995) 3 Feminist Legal Studies, 223. See also Appendix C, para C.89 below.

8 [1967] Crim LR 169. The defendant had tattooed the arms of two boys aged 12 and 13 respectively. The marks became inflamed, and he was convicted of assault occasioning actual bodily harm. On appeal it was held that if a child of the age of understanding is unable to appreciate the nature of an act then an apparent consent to that act is no consent at all.

9 If performed by a duly qualified medical practitioner or by a person working under his direction: Tattooing of Minors Act 1969, s 1. The statutory definition of "tattooing " is contained in *ibid*, s 3.

10 *Ibid*, s 1.

9.5 It is noticeable that because tattooing is unequivocally a lawful activity, statutory and other controls are in place which are designed to ensure that it is practised in a hygienic manner. The British Tattoo Artists' Federation ("BTAF")[12] has furnished us with helpful information on the safety procedures and tattooing practices now commonly in use in tattoo surgeries. One very serious disease that may be caused by infected tattoo needles is hepatitis B,[13] although there has only been one confirmed case of a death resulting from hepatitis so contracted.[14] In Florida the Supreme Court has upheld the constitutional validity of a statute prohibiting the tattooing of a human body on public health grounds.[15] In 1964 the New York Supreme Court found that serum hepatitis occurred seven times more frequently in people with tattoos than in people without.[16] While nobody is known to have become infected with HIV as a result of a tattoo needle, and the risk of infection is remote, the Government was sufficiently concerned in 1987 to publish a leaflet on this topic advocating hygienic safety procedures for tattooists.[17]

9.6 Statutory controls are now to be found in the Local Government (Miscellaneous Provisions) Act 1982. This Act gives a local authority power to resolve that no person within its area shall carry on the business of a tattooist unless that person, and the premises he works from, is registered with the local authority.[18] The Act also gives local authorities power to make bye-laws to secure that clean and hygienic practices are adopted by registered persons and within registered premises.[19] The BTAF has observed that the wording of the Act does not cover those who practise tattooing as a hobby, rather than as a business, and suggests that it should be reworded to refer to "the practice of tattooing" rather than the "business of a tattooist". The BTAF has itself developed a "Be Sure Code" for its clients.[20] It has also published "A Model Method for Hygienic Tattooing" for use by its members.[21] A representative of the BTAF[22] has told us that he refuses to tattoo anyone who is under the influence of alcohol or drugs, or who is with a group of people who appear to be pushing them into being tattooed. He would

[11] See, for example, New York State Penal Law, s 260.20(3).

[12] The BTAF was formed in 1975 by a group of leading tattoo artists. It has drawn up a code of practice and seeks to promote safe hygienic procedures among tattoo artists and their clients.

[13] They may also cause hepatitis non-B non-A, but this is much more rare.

[14] Professor N D Noah (Public Health Laboratory Service, Communicable Disease Surveillance), *A Guide to Hygienic Skin Piercing.*

[15] *Golden v McCarty* 337 So 2d 388 (1976).

[16] *Grossman v Baumgartner* NYS 2d 335, 337 (1964) *per* Steuer J.

[17] Department of Health and Social Security, AIDS Guidelines for Tattooists (1987).

[18] Local Government (Miscellaneous Provisions) Act 1982, ss 13(2)–(4), 15(1).

[19] *Ibid*, s 15(7).

[20] Be sure – (1) you want a tattoo for life; (2) the tattoo artist is registered; (3) their studio is clean; (4) they change their needles; (5) they use fresh colour; (6) they use an autoclave steriliser.

[21] This publication was produced by the BTAF in consultation with Professor N D Noah (consultant epidemiologist) with the help and advice of Dr D S Dare, Dr T H Flewett, Dr M E Thomas, Dr E M Vandervelde and Professor A J Zuckerman.

[22] See para 9.5, n 12 above.

not personally tattoo the hands, face or neck since he did not want to be held responsible for making anyone unemployable.

PIERCING, BRANDING AND SCARIFICATION

Decorative practices

9.7 It has been accepted in the higher courts that ear-piercing is not a criminal offence.[23] In the unreported case of *Oversby*[24] Judge Rant QC ruled at first instance that piercing of other parts of the body for decorative or cosmetic purposes could in the public interest be lawfully carried out.[25] Body-piercing for sexual gratification, which he ruled to be unlawful,[26] will be covered in the discussion in Part X below.

9.8 We have received a good deal of interesting evidence about different contemporary aspects of body-piercing, scarification and branding for cosmetic or other allied purposes. One respondent, a law graduate, said that body-piercing was becoming increasingly popular, as could be seen by anyone attending any gathering of a large number of young people to-day. He said he had had three body-piercings which had given no trouble, and that although the appearance of people with pierced lips, eyebrows, nostrils, septums, tongues, navels, nipples and, more rarely, genitals might shock, the practice, if properly executed, was relatively painless and at least as safe as ear-piercing or tattooing. Another respondent told us that the ingenuity of people in finding parts of the anatomy other than the ears to have pierced so that jewellery might be worn on them was unlimited, and he could not imagine a court would wish to get involved in ruling on which parts of the body might lawfully be pierced and which might not.

9.9 We have seen copies of contemporary publications, such as the book *Modern Primitives* by ReSearch Publications, and the journals "Body Art" and "Body Play", which give a very good idea of what is currently being practised. It appears that Judge Rant's rulings in *Oversby*[27] are being treated by aficionados as laying down clear guidelines as to what the law does and does not now permit. However, in contrast to tattooing, where the law is clear and statutory controls are in place, in this field, where the law is unclear, there are no such controls.[28]

[23] See Consultation Paper No 134, paras 11.21 – 11.22.

[24] Mr Oversby, otherwise known as Mr Sebastian, was one of the defendants at the trial at the Old Bailey in the case that ultimately reached the House of Lords as *Brown* [1994] 1 AC 212. After the judge's ruling, in December 1990, this defendant pleaded guilty to some of the counts on the indictment, for which he received a suspended sentence. He did not appeal. He was at the time the leading body piercing practitioner in the United Kingdom.

[25] He based his ruling on that part of the judgment of Lord Lane CJ in *Attorney-General's Reference (No 6 of 1980)* [1981] QB 715, 718, in which it was said that the courts are willing to make exceptions to the ordinary principle where the public interest requires.

[26] His ruling was upheld when other convicted defendants in the same case appealed to the House of Lords: see *Brown* [1994] 1 AC 212.

[27] See para 9.7 and n 24 above.

[28] Other than those created by Part II of the London Local Authorities Act 1991 which includes premises used, intended to be used or represented as being used for the treatment of persons

9.10 Mrs Pauline Clarke, of the Piercing Association UK, told us about the work of this association. It was founded as a club for piercing enthusiasts to gain information, knowledge and awareness of correct procedures. It offers advice to people seeking the services of a body piercer through its quarterly magazine "Piercing World": this advice will enable them to find the most hygienic establishments and the most proficient operators available. Mrs Clarke has drafted[29] and circulated provisional guidelines for body piercers, and these guidelines are also reproduced in her book "The Eye of a Needle", which we have seen.[30] She has also told us about a recent meeting at local health authority level to discuss the subject of body piercing in "a move to setting down official guidelines with a change in the by-laws".

9.11 More recently a new organisation called the European Professional Piercers Association ("EPPA") has been formed. Its chairman, Mr Phil Barry, is a tattooist as well as being a professional body piercer. At present most body piercers are registered tattooists working in registered premises, but some jewellers and hairdressers are now offering body piercing services. The registration arrangements for ear-piercing[31] do not embrace other forms of piercing, and both Mrs Clarke and Mr Barry have told us how concerned they are about the absence of any proper licensing controls. Mrs Clarke is aware of piercers who work badly, and she points out correctly that at present there is nothing to stop an unscrupulous individual setting up in practice without any controls. The EPPA runs its own voluntary imposed certification scheme to promote safe practices and has drawn up its own guidelines to safe practice.[32] Mr Barry has told us he would like to see a minimum age introduced for body piercing, particularly in relation to genital piercing, although if such piercing was performed on somebody under the age of 16 it might well be regarded as an indecent assault.[33]

9.12 We have also been told about two other very rare practices, branding and scarification. In branding, a third degree burn is inflicted in a pattern on the skin by either a white hot steel "strike" or a medical cauteriser. Scarification involves cutting the skin into a pattern (and often rubbing a powder or ink into the cut) to cause a pattern of scars when healed. This practice was said to have developed from African tribal scarring.[34] We were told by another respondent that

requiring cosmetic piercing among the establishments for which a special treatment licence may be required by the local London borough council.

29 With advice from Professor Noah: see n 14 above.

30 We have also seen the advice that is now being given about body-piercing practices worldwide over the Internet.

31 The registration provisions contained in the Local Government (Miscellaneous Provisions) Act 1982, ss 13–17 are limited to the practice of acupuncture and the business of tattooing, ear-piercing and electrolysis.

32 These guidelines were drawn up by the EPPA in association with Helen Wheeler, a representative of the Oxford Environmental Health Department.

33 To which consent is no defence: see para 5.8 and n 20 above.

34 See para 9.13 below.

scarification and piercing are nearly always carried out for decorative purposes, but that the process was also found enjoyable by many who practised it.[35]

Religious and cultural practices

9.13 We received a limited amount of evidence about piercing and similar practices performed on religious or cultural grounds. In Tamil communities, there is a traditional Hindu religious function known as Cavedee.[36] This is held twice a year, normally in January and April. On one day of the festival, after ten days of fasting, the devotees ask that their tongues may be pierced with a thin 5-inch needle, and that they may be pierced with smaller needles in other parts of the body such as the chest, back and arm. Another respondent said that some Hindu people wear the equivalent of a wedding ring in their noses. The Federation of Black Housing Organisations told us that tribal markings on people's faces which involved cutting the skin should be exempted from the general rules forbidding consensual injury.[37] An expert in Islamic law[38] said that any act allowed under Islamic law should be permitted, but the only example he identified was male circumcision.[39]

9.14 Only one decided English case in this field has come to our attention. In *Adesanya*[40] a Nigerian member of the Yoruba people, resident in Tottenham, north London, was convicted at the Central Criminal Court in July 1974 of assault occasioning actual bodily harm for having made incisions with a razor in the cheeks of her two sons, aged 14 and 9 respectively, in accordance with the ritualistic customs of her tribe. Judge King-Hamilton QC ruled that the existence of tribal custom was no defence. He considered that the potential for serious injury – in that the slightest movement of the child's head might have led to injury to his eye – was a good reason for distinguishing scarification of this kind from the accepted practices of ear-piercing and ritual circumcision.

9.15 In a contemporary commentary on this case[41] four substantive reasons were given for the correctness of this conviction. The first was the judge's own reason. The second was the reason that impelled Parliament to enact the Tattooing of Minors

[35] Articles published in *The Independent* on 11 May 1994 and in *The Observer* on 22 January 1995 suggest that in Britain only about 100 people have undergone branding and the same number have ornamental scars. A Leytonstone lorry driver is reported as wanting his wife's name "Patricia of Leytonstone" branded down his back, one letter every birthday. Branding is frowned upon by the editors of Britain's fetish-lifestyle magazine "Skin Two", who believe it will not catch on here. Recently, a circuit judge has ruled (in *Wilson*, 16 May 1995, Leeds Crown Court, unreported) that when a man branded two initials on his wife's buttocks with her consent he had no defence to a charge of assault occasioning actual bodily harm. Judge Crabtree's ruling is now under appeal.

[36] This evidence was kindly furnished by Mauritius Tamil Maha Sangam (UK).

[37] So far as people in this country are concerned, this is a practice mainly carried on among people from countries in West Africa. For the present law, see paras 9.14 – 9.15 below.

[38] Dr S M Darsh.

[39] For which see para 9.2 above.

[40] *The Times* 16–17 July 1974. The defendant was given an absolute discharge.

[41] S Poulter, "Foreign Customs and the English Criminal Law" (1975) 24 ICLQ 136, 139.

Act 1969.[42] The third was that the increasing inobservance of the ritual in Nigeria itself made its tolerance as a special case in England less defensible. And the fourth was that earlier case-law had established that the same system of criminal law should be applied to everyone:[43]

> [T]he essence of the criminal law is that it imposes a minimum standard of behaviour upon all who live here. If there are to be any special exceptions for foreigners these must be decided upon by the legislature and not by the courts.

9.16 Twelve years later the same commentator, Mr Sebastian Poulter, suggested[44] that legal recognition should be accorded to ethnic minority customs insofar as they are *reasonable* and not *repugnant*, and that the necessary assessment should be based on public policy considerations. He acknowledged that the "notoriously imprecise" ambit and application of public policy creates problems for the thesis he advanced but suggested that these can be overcome if "permanent values" are extracted from the international human rights treaties to which Britain is a signatory.[45]

9.17 The first of these permanent values was what he termed "formal equality", which requires that action must be taken against arbitrary and unreasonable discrimination. He said that to achieve real equality a member of a minority group may require special treatment in order that he is treated as an equal and is accorded the right to be "treated with the same respect and concern as anyone else."[46] Mr Poulter called this "normative equality". He argued that this special treatment principle is already evident in several human rights treaties, and he used Article 27 of the International Covenant on Civil and Political Rights as an example.[47]

9.18 Mr Poulter says that moves towards equality, both formal and normative, may lead to conflict with the interests or values of the majority community, which it is the duty of the courts to resolve. He suggested that a number of principles have been developed in the human rights jurisprudence to provide guidelines to assist the outcome of disputes. In particular, a custom will not be recognised if it violates

[42] That a minor who consents to such an act at the time may come to regret it in later adult life.

[43] S Poulter, "Foreign Customs and the English Criminal Law" (1975) 24 ICLQ 136, 140.

[44] S Poulter, "Ethnic Minority Customs, English Law and Human Rights" (1987) 36 ICLQ 589.

[45] Mr Poulter suggests that reference be made to the European Convention on Human Rights (and protocols); the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention on Consent to Marriage; the Convention on the Elimination of All Forms of Discrimination against Women; and the European Social Charter.

[46] This quotation is taken from R Dworkin, *Taking Rights Seriously* (1977) p 227.

[47] Mr Poulter states that while there is no provision in the European Convention on Human Rights which is of equivalent effect to article 27, the jurisprudence of the Strasbourg Court demonstrates that the special treatment principle does apply. He cited *Marcx v Belgium* [1979] 2 EHRR 330 in this context.

the fundamental rights and freedoms of others,[48] and a claim for the recognition of a religious or customary practice may be rejected on the basis of derogations contained in the treaty provisions themselves.[49]

9.19 We have also considered the approach of the courts in other jurisdictions. In South Africa "assaults" in conformity with ritualistic tribal practices are lawful only if they are of " a relatively minor nature and do not conflict with generally accepted concepts of morality."[50] In Australia the courts have refused to sanction violent tribal customs that lie outside the State's criminal law.[51] In New South Wales it has been held that the criminal law would not accommodate a separate body of law operating alongside it, and it was a necessary result that different criminal sanctions should not be applicable to different people for the same criminal offence.[52]

Piercing etc: a general comment

9.20 There was very little commentary on these practices from respondents on consultation. The CPS was willing to countenance permission for any form of "culturally acceptable" bodily decoration involving the infliction of non-serious harm provided that it was not a covert form of sado-masochism. One academic group believed that tattooing, along with piercing and other forms of body decoration, should be lawful whenever there was a good consent. A former civil servant justified the legitimisation of tattooing and ear-piercing on the basis that they, like other exempted activities, did not entail taking pleasure in the infliction of pain or violence for its own sake.

9.21 Much more concern was expressed about the need to bring the practice of all these activities under appropriate statutory control. One respondent said that if Parliament does not lay down safety rules and if the legality of body decoration

[48] Mr Poulter argues that the prohibition of female circumcision can be justified because it involves cruel, inhuman or degrading treatment.

[49] Reference is made to article 9 of the European Convention on Human Rights (see para 3.22 above). Mr Poulter also argues that the similar qualification contained in article 18(3) of the International Covenant on Civil and Political Rights applies to the "normative equality provision" in article 27.

[50] C R Snyman, *Criminal Law* (2nd ed 1989) p 124. In 1961 the convictions of four appellants charged with intent to cause grievous bodily harm when they had exposed the complainant to a witchdoctor's treatment involving the inhalation of medicine fumes sprinkled over live coals, which caused him to be badly burnt, were upheld: *Sikunyana* 1961 (3) SA 549(E). O'Hagan J said, at p 552A, that "a highly dangerous practice superstitiously designed to secure the exorcism of an evil spirit cannot be rendered lawful by the consent of the afflicted person". Contrast the earlier decision in *Njeklana* 1925 EDL 204: minor injury as part of a religious ceremony may be validly consented to. See further Appendix B, para B.72 below.

[51] In *Watson* [1987] 1 Qd R 440, a woman died from a knife wound in her abdomen, and the defendant, who had enjoyed a relationship with her, said that he had intended to "cut" her on her arm or across her ribs as a form of customary domestic discipline among the Palm Island community. McPherson J held, at p 444, that the provisions of the Queensland Criminal Code prevailed over any custom that was to the contrary effect.

[52] *Walker* (1994) 69 ALJR 111. The court held that even if it was assumed that aboriginal customary criminal law survived British settlement it was in any event extinguished by the passage of criminal statutes of general application.

remains uncertain, these practices will be driven underground (or into people's kitchens) where dangerous practices and amateurism will thrive. There is apparently a wealth of evidence of instruments like stud guns and low grade metal jewellery being used by amateurs to pierce tongues and navels with horrendous results. Another respondent said that the practice of scarification is high risk for HIV transmission and that if it is made illegal it may well be carried out in less hygienic circumstances and will certainly be far harder to monitor. Mr Barry[53] told us that very many people ask him to rectify piercings that have seemingly been performed by piercers with little regard or insight into proper practice.

LAW REFORM PROPOSALS

9.22 At the end of Part IV we have provisionally proposed that it should be lawful to cause intentional consensual injury to another with his or her consent up to a level we have described as "seriously disabling injury",[54] and at the end of Part V we have proposed that the present law relating to capacity to consent should be codified. If a person has capacity to consent, and the injuries do not reach the forbidden level, then we see no reason why the act of causing them should be criminalised, and this approach accords with our suggested law reform strategy.[55] We have not got the slightest doubt that effective statutory controls should be put in place to ensure that these activities are properly and hygienically carried out by licensed practitioners in appropriately licensed premises, but this is a matter for the Department of Health, with whom we have had some preliminary discussions, and not for us. That department's task will be a great deal easier if the basic provisions of the criminal law are clear.

9.23 We wish to know, however, whether in the context of piercing, branding and scarification, being carried out for cosmetic or cultural reasons by licensed practitioners in appropriately licensed premises, our proposed definition of "seriously disabling injury"[56] would criminalise any such activity that ought to be outside the ambit of the criminal law if the general thrust of our suggested law reform strategy were to be accepted.

9.24 What also requires consideration is whether, as in the case of tattooing, statute should provide some age below which it will not be possible to give a valid consent, in accordance with the second principle in our suggested law reform strategy.[57] This age may vary from activity to activity, and in Part X below we will be giving particular attention to piercing and similar practices for the purposes of sexual gratification.[58] In this Part we are concerned with tattooing, piercing,

[53] See para 9.11 above.

[54] See para 4.51 above.

[55] See para 2.18 above.

[56] See para 4.51 above. For the moral conservative's approach to some of these practices, see Appendix C, para C.89 below.

[57] See para 2.18 above. We are referring to the principle that in certain circumstances, identified on a case by case basis, the state should be entitled to dictate that there is an age below which no consent shall be valid.

[58] See paras 10.53 – 10.55 below.

branding or scarification for cosmetic or cultural reasons. If no age limit is introduced, a person under the age of 18 will be unable to give a valid consent only if he or she does not have sufficient understanding and intelligence to understand requisite information relevant to the decision in question: for this purpose account must be taken of his or her age and maturity, as well as the seriousness and implications of the matter to which the decision relates.[59] It was the irreversibility of tattooing that led Parliament to introduce the age limit of 18 in 1969 in order to protect the young from irreversible decisions they might later come to regret, and we are interested to know whether it is thought that a reason of this kind should continue to prevail over respect for a young person's autonomy. **We ask whether the age-limit of 18 should be retained for tattooing, and whether any similar (and if so, what) age limit should be introduced in relation to a young person's ability to give a valid consent to (a) piercing below the neck;[60] (b) branding; or (c) scarification, when performed for cosmetic or cultural purposes.**

9.25 We have seen that there is a statutory definition of "tattooing".[61] **We ask whether the present statutory definition of tattooing is regarded as satisfactory, and whether it is thought that there ought to be a statutory definition (and if so what) of piercing, branding or scarification for the purposes of the criminal law.**

9.26 We consider that the same defence should be available in relation to the defendant's mens rea as we discussed in Part VII above. **We provisionally propose that the special provision relating to mens rea in section 1 of the Tattooing of Minors Act 1969[62] should be repealed and replaced by whatever rule is thought appropriate in relation to the issue of mistaken belief as to a person's age in the context of statutory age-limits in general (see paragraphs 7.30 and 7.34 above).**

9.27 We consider that it would be useful to put the lawfulness of ritual male circumcision beyond any doubt. **We therefore provisionally propose that the circumcision of male children, performed with their parents' consent in accordance with the rites of the Jewish or Muslim religions, should continue to be lawful.**

9.28 We also envisage that the defence of "proper medical treatment" would be available, so that the express protection for tattooing by doctors provided by section 1 of the 1969 Act[63] could be safely repealed.

[59] See para 5.21 above.

[60] We envisage that issues relating to piercing above the neck for decorative purposes (in the ear or the nose, for instance) can safely be left to the general law described in Part V above, although we would be interested to hear from any respondent who disagrees.

[61] See para 9.4 and n 9 above.

[62] See para 9.4 and n 10 above.

[63] See para 9.4 and n 9 above.

9.29 We envisage that in due course the provisions of the Prohibition of Female Circumcision Act 1985 will be consolidated with the legislation we will eventually propose. **We seek the views of our respondents as to whether any pre-consolidation reform is required to that Act.**[64]

[64] Although the issues perhaps belong more properly to Part X below, we include in this inquiry the issues relating to genital piercing that were raised by the Cardiff Crime Study Group in n 4 above.

PART X

THE INFLICTION OF INJURY BY CONSENT FOR THE PURPOSE OF CAUSING PAIN

THE CAUSING OF PAIN FOR RELIGIOUS OR SPIRITUAL PURPOSES

10.1 The courts have treated the practice of flagellation in the Christian church as a lawful activity. In the first Consultation Paper[1] we quoted this dictum of Lord MacKenzie, a Scottish judge, in 1847:[2]

> In some cases, a beating may be consented to as in the case of a father confessor ordering flagellation; but this is not violence or assault, because there is consent.

10.2 In the very early Christian church flagellation was used as a punishment for disobedient clergy.[3] From the fourth century AD, flagellation was practised by both clergy and laity as the most efficacious means of penance. In the early Middle Ages the laity became especially attracted by this devotional exercise. For a hundred years groups of flagellant brotherhoods and processions of flagellants were organised in Italy, Germany and the Low Countries. In the 14th century these people came to be seeking by their own efforts to mitigate the divine judgment for the moral corruption of the church which was felt to be impending through the plague. In 1349 Pope Clement VI condemned flagellation, as did the Council of Constance.[4] In Germany flagellants became a target of the Inquisition.

10.3 The practice gradually subsided, but in the 16th century the Jesuits revived lay interest in self-inflicted flagellation, particularly in the countries of southern Europe. Under their guidance flagellant brotherhoods were introduced into Latin America.

10.4 The purpose of flagellation is to mortify the body in order to subordinate the passions to the spirit. It is an activity now mainly associated with countries like Mexico and some of the southwestern states of the United States which have a strongly Hispanic Roman Christian tradition. The practice exists in Britain in the religious group known as Opus Dei, and it is also sometimes used among the Cistercians. The penitentials describe practices like mortification and flagellation and specify the permissible limits. It is accepted by some Christians that pain may be accepted as penance for one's own sins and also for the sins of others. Flagellation is sometimes practised only in Lent. One respondent told us that he

[1] Consultation Paper No 134, paras 11.21 – 11.22.

[2] In *William Fraser* (1847) Ark 280, 302.

[3] See the New Encyclopaedia Britannica, Vol 4, Micropaedia, p 813.

[4] The Council was held between 1414 and 1418.

was educated at Catholic schools by nuns and lay-brothers who practised flagellation for spiritual motives.

10.5 We received moving evidence from a woman in one of the learned professions. She is on the liberal edge of the Roman Catholic church and was catechised in the pre-Vatican II church. She takes her religion seriously. It forms an integral part of her life and goes to the core of who she is as a person. It is deeply ingrained in her to examine her conduct against the ideals she is trying to live up to, and to think in terms of doing penance for sin when she finds her conduct wanting.

10.6 For many years she has occasionally found self-mortification the appropriate penance, if she has behaved in a way that falls gravely short of what a committed Christian faith involves. She makes a measured calculation as to what is appropriate, in terms of a limited number of strokes, and applies a very ordinary leather belt to her back. Now that she is married, her husband helps her. He inflicts an adequate level of pain to ensure that the punishment is full and effective. As she put it, the threshold for "actual bodily harm" is clearly exceeded. There is no hostility, anger or animus involved and no serious or permanent injury is done. Her husband's attitude is that what he is doing is something morally positive – "digging you out of a hole" – which, he believes, cannot surely be contrary to the criminal law.

10.7 We have also been told about practitioners of other faiths who indulge in pain in furtherance of their beliefs. In Hinduism, some ascetics believe that the acceptance of pain, which is often extreme and caused by serious injury, is one of the ways to obtain the desired union with the absolute. In certain branches of Zen Buddhism activities like running marathons of extreme length or standing under icy waterfalls are considered to be acceptable ways of meditation. In some Amerind faiths it is believed that by accepting extreme pain and discomfort (and sometimes hideous torture) it is possible to obtain supernatural powers. People other than the receiver of pain are needed to assist the receiver in almost all these different cases.

10.8 This evidence was given in the context of a very thoughtful submission we received from one respondent about the infliction of pain. He suggested that five reasons are commonly given for a person to desire pain: bravado; acceptance as an adult or as a spiritual member of a community; the heightening of sexual pleasure; the removal of feelings of guilt; and, if used correctly, assisting the receiver either to travel a path to salvation or to obtain a transcendental experience of the type for which descriptions like spiritual joy, ecstasy, mental calm and peace have been used. He said that these could be described compendiously as "spiritual joy". He felt that genuine and wholehearted consent should be permitted as a valid defence to a charge of intentionally or recklessly causing injury, not only in cases of flagellation and religious mortification in a traditional Christian context, but in all cases where the purpose of the injury is to give pain that will enable the victim to do one or more of the following things: obtaining relief from feelings of guilt and/or anxiety; mortifying the body in order to subordinate the passions to the spirit or to obtain union with the absolute; and/or obtaining, by a process akin to meditation, a transcendental religious experience of the type described above as spiritual joy.

10.9 He compared the practice of meditation, as conventionally practised, with the practice of sado-masochistic meditation. A modern definition of sado-masochism, he said, covers activities between consenting, caring participants who are involved in the giving and receiving of pleasure by playing the roles of dominant and/or submissive, possibly with the involvement of one or more of the additional features of stimulation, pain or bondage.

10.10 In meditation, the meditator finds a teacher or guru to whom he or she willingly submits, and a location where he or she will not be disturbed and may sit in a position that can be held for a long period of time. If sitting, the meditator concentrates his or her mind on a single subject which may, for example, be breath, a candle flame, a word or a physical object. When the mind has been concentrated long enough, a trance state may ensue during which he or she obtains spiritual joy. On waking these benefits remain.

10.11 In sado-masochistic meditation and other related practices, the practitioner will willingly submit to a master in order to avoid the dangerous, and sometimes fatal, practice of self-inflicted pain. This submission is, however, mental rather than practical because the practitioner usually keeps full control over the location, form and duration of what happens, even when this involves pain. He or she may be restricted as to movement and thought, and the effect of the ritual and the pain, if pain is involved, will be to concentrate the mind on a single subject. The effect is the same as is described above: the development of a trance state, and the obtaining of spiritual joy, and on waking these benefits will remain.

10.12 He said that the reasons why anybody should wish to or be willing to give pain to another include altruism, giving a victim what he or she desires, obtaining vicarious pleasure from the pain obtained by the victim, and the wish to pass on an art which has given the giver pleasure in the past. In his opinion, the suggestion made by some judges that a person who enjoys giving pleasure to a consenting partner is a sadist who enjoys seeing other people in pain is scarcely sustainable. A sadist, in old-fashioned parlance, is unlikely to find satisfaction with a victim who enjoys pain or discomfort. He or she is more likely to use other outlets for his or her sadism.

10.13 This respondent submitted that the similarities between meditation and sado-masochistic meditation were so great that it would be illogical to deny that receiving pain for the purpose of obtaining spiritual joy is in effect a way of meditating. It should therefore be considered to be a valid religious activity, and not against the public interest, when its benefits are taken into account. Such injury as may be needed to cause the requisite pain is seldom serious, since the aim is not to cause injury but to produce spiritual joy or to remove guilt.

10.14 His evidence provides a link between the types of activity involving the deliberate infliction of pain on a consensual basis which have been treated as non-criminal by English law and those types of activity, now treated as criminal, which formed a substantial part of the evidence we received. He said that it was quite possible, in the context of sado-masochistic meditation, that either the victim or the person giving pain might feel sexual excitement. He said that this was scarcely surprising. Sexual congress, under strict and formal conditions, has been used as a form of meditation in the Tantric school of Hinduism, and unsought sexual excitement is

also known to be associated with some of the common forms of meditation, as well as with such mundane activities as eating, drinking, wearing certain clothes and taking exercise. He added that it has also been claimed that sexual excitement accompanied the visions of certain Christian saints, including St Teresa.

10.15 Similar evidence was given by the respondent who had been taught at schools by those who practised flagellation from spiritual motives.[5] He said that he personally had a psychological preference for masochism, and that his own activity produced similar feelings, although his sexuality is involved in a vague emotional way. He had no inclination towards sadism in any way.

THE CAUSING OF PAIN TO ENHANCE SEXUAL PLEASURE

10.16 If the primary motivation for inflicting pain, by consent, is not religious but sexual, English law treats the person who inflicts that pain as a criminal if any resulting injury is more than "transient or trifling".[6] The majority of the House of Lords in *Brown* held that it was not in the public interest that a person should wound or cause actual bodily harm to another for no good reason, that in the absence of such a reason, the victim's consent afforded no defence to a charge under sections 20 or 47 of the Offences Against the Person Act 1861, and that the satisfaction of sado-masochistic desires did not constitute such a good reason.[7] Lord Templeman said in his speech in *Brown* that the question whether the defence of consent should be extended to the consequences of sado-masochistic encounters could only be decided by consideration of policy and public interest. He contrasted the position of Parliament, which could call on the advice of doctors, psychiatrists, criminologists, sociologists and other experts, and also take into account public opinion, with the position of the House of Lords in its judicial capacity which was being called upon to decide a point of law without recourse to such materials.[8]

10.17 We received a wealth of evidence on consultation from people of both sexes who indulged in sado-masochistic activities to enhance sexual pleasure. We were told that "consensual sado-masochistic sex is not a recent phenomenon: throughout history a percentage of the population has made love in this manner"; "it is not everywhere appreciated that sado-masochistic sexual acts are engaged in by large numbers of people, many of whom are utterly respectable"; "sado-masochistic acts are practised by not just the small minority of visible sado-masochists but by many people in the privacy of their bedrooms"; and "there are many more heterosexual people quietly having SM sex in the suburbs than there are gay

[5] See para 10.4 above.

[6] *Donovan* [1934] 2 KB 498; *Brown* [1994] 1 AC 212. In *Boyea* (1992) 156 JP 442; [1992] Crim LR 574 Glidewell LJ said that an assault intended or which is likely to cause bodily harm, accompanied by indecency, is an offence irrespective of consent, provided that the injury is not "transient or trifling", but that having regard to the change in social attitudes towards sexual relations the expression "transient or trifling" must be understood in the light of conditions prevailing in 1992 rather than in 1934.

[7] *Brown* [1994] 1 AC 212, 236, *per* Lord Templeman; at p 246, *per* Lord Jauncey of Tullichettle; and at pp 255–256, *per* Lord Lowry.

[8] *Ibid*, at pp 234–235.

leather men in London clubs". Some of the evidence of the activities of the defendants in the leading case of *Brown* clearly shocked some respondents, but they were equally shocked to learn that the sexual activities in which they had participated voluntarily for years without, as they thought, harming anybody, were regarded by the law as criminal.

10.18 We were told that sado-masochistic sex is practised by many people of all sexualities. The number of those who engage in varying forms of sado-masochism is unknown. One respondent suggested that the popularity of sado-masochistic pornography, both "soft" and "hard", in books and magazines read by men and women alike, the results of certain sex surveys, the popularity of the Skin 2 magazine and the various sado-masochist and fetish clubs throughout the country, and the extensive supplying of such services by prostitutes, would indicate that the number is very large. This respondent asserted that many celebrities, writers, film stars, artists, entrepreneurs – and even a considerable number of politicians, lawyers and judges – were known to participate in sado-masochism. Another respondent said that more extreme practices are naturally rarer than milder games, but a look at the hundreds of businesses providing bondage and sado-masochistic equipment and the enormous number of professional dominatrices offering their services is sufficient to show that there are many thousands of practising sado-masochists in Britain, and that this is not a tiny minority interest.

10.19 We were told by one respondent that despite misperceptions and fears the sado-masochistic community, both in Britain and in the world generally, has grown very rapidly over the last 10–15 years, although this is not to say that the total incidence of sado-masochistic sex has grown. The way that those who are interested in sado-masochism now communicate with each other was reflected in the evidence given by three different representative groups.

10.20 The first of these groups[9] represented the collective views and experience of a selection of predominantly heterosexual practising sado-masochists. They said that all sado-masochists would accept their contention that their sexual practices did not involve violence: the apparently contradictory nature of their activities can be resolved when it is recognised that it derives from the fact that they *like* certain forms of pain.

10.21 They said that the acts that make sexual behaviour specifically sado-masochistic may include beating the body, the use of constraints, endurance tests, role play, verbal abuse, micturition, the application of extreme heat or cold, scarification and piercing. They said that this list does not pretend to be exhaustive, and many of these activities are also engaged in by people who do not consider themselves to be sado-masochists. The parts of the body most involved in the physical aspects of sado-masochistic sex are the buttocks, breasts or nipples, thighs, back, feet and genitals. Many sado-masochists may swap the active or passive roles within a single encounter, and encounters may frequently be initiated by the passive partner. The group stressed that a person would consent only to the particular forms of touch which give rise to a pain which he or she enjoys. They felt that

[9] They called themselves The Lives of the Secular Saints.

their activity was no more intrinsically psychologically harmful to a participant than other forms of sexual behaviour: indeed, they considered that because they felt more sexually fulfilled this activity was beneficial to the people who wished to enjoy it.

10.22 The instruments used for beating might be various types of whip, crop, cane, tawse, belt or leather paddle, or even bare hands. Because participants are doing it for pleasure, a self-limiting factor is introduced, and this calls a halt to the activity long before serious injury is likely to arise.

10.23 The subjective effects of beating the body might differ greatly between different individuals, and the group felt that there was likely to be a considerable overlap with the subjective responses to religious mortification.[10] For the passive party, beating on the buttocks is likely to be sexually stimulating and associated with heightened arousal and responsiveness. Beating on the back, on the other hand, perhaps involving a whip on the shoulders, has commonly been described as giving rise to feelings of exaltation, rapture, spiritual release or profound gratitude. After the body has been beaten, a state of emotional well-being and uplift may persist for several days. Very commonly the passive party will feel a strong bond with the person giving the beating, and also a great sense of having been given both care and attention. The physiological basis for such subjective responses has frequently been referred to as an "endorphin high": it has been suggested that it may have parallels with other physically stressful activities, such as long distance running and sky-diving, where similar elation is reportedly expressed.

10.24 The group also gave evidence about other forms of sado-masochistic activity which only become unlawful, as the law now stands, if they lead to bruises, welts or breaks in the skin. Older sado-masochists practise a long-established endurance test whereby the passive partner is required to kneel on dried peas, without movement, for half an hour or longer: the pain is described as excruciating after as little as 20 minutes. In other types of voluntary degradation the passive partners may be restrained, verbally abused, admonished or required to act out a humiliating fantasy (such as being petticoated, if male), lap up their own urine, or experience pain which may take them to the limit of their endurance.

10.25 The restraints most frequently used are ropes, hand-cuffs, leather or rubber cuffs, blindfolds, gags or suspension apparatus. Members of the group reported that the use of restraints enhanced their sexual experience because they found it aesthetically pleasing to see their bodies in bonds, and because being bound made them feel highly introspective and capable of concentrating on their own pleasure without the distraction of responding to their active partner. They pointed out that the practice of bondage does not offend against the criminal law if it does not lead to bruising etc. On the other hand, it is potentially more dangerous than any form of beating, particularly if it involves airway restriction, and there has been a steady number of deaths involving people practising auto-erotic asphyxiation on their own without any form of supervision.[11] They said that it is essential that the

[10] Cf paras 10.9 and 10.11 – 10.15 above.

[11] The recent death of Mr Stephen Milligan MP was mentioned in this context.

use of restraints takes place safely and is carried out responsibly. There are considerable efforts made by the sado-masochistic community to provide education regarding safe sado-masochistic sex, but these efforts are hampered by criminalisation.[12]

10.26 For those who enjoy extremes of heat and cold, the group said that the first choice of many of those who contributed to their evidence was ice, not candle-wax. The use of naked flame was very rarely reported. The effect of hot wax is intense, but short-lived, and nobody reported unwanted scarring, or any other significant injury, as a result.

10.27 They said that, paradoxically, sado-masochism has enjoyed something of a boom in interest precisely because it can offer an exciting expansion of sexual horizons that do not run the dangers associated with some forms of penetrative sex. They maintained that sado-masochism is not a significant factor in transmission of HIV, and they were aware of no medical literature which suggested that a single cause of death had been recorded as being a result of sado-masochistic sex.

10.28 Finally, they submitted that sado-masochism was part of the spectrum of human sexual response, and that it should not be treated as analogous to activities like killing or mutilation. Like many other respondents, they took strong issue with the views of Professor Fletcher which were quoted in the last Consultation Paper.[13] The subjective experience of the active party who is engaged, for example, in flagellation, can, they said, combine pride in the exercise of skill, a sense of care and service towards the passive partner, and sexual excitement at the exercise of power over that person. Active and passive roles are commonly exchanged, and many contributors in their evidence made it clear that the power they enjoy exercising is the power to give the submissive what they want and so excite them that they achieve the maximum pleasure of which they are capable.

10.29 The evidence of this particular group has been quoted at some length because it gives a valuable factual explanation of many of the practices mentioned in other evidence and expresses views which were regularly repeated by others who participated in the consultation.

10.30 Of the two other groups who gave evidence to us, "Countdown on Spanner"[14] is a mixed sexuality campaign group which was formed in September 1992 at a meeting in Conway Hall attended by about 200 people determined to support the defendants in the case of *Brown* in their appeal to the House of Lords.[15] They told

[12] See also on this topic para 10.38 below.

[13] Consultation Paper No 134, para 12.2, citing G P Fletcher, *Rethinking Criminal Law* (1978) p 770: "The self-destructive individual who induces another person to kill or mutilate him implicates the latter in the violation of a significant social taboo. The person carrying out the killing or mutilation crosses the threshold into a realm of conduct that, the second time, might be more easily carried out. And the second time, it might not be particularly significant whether the victim consents or not". See also Appendix C, para C.91 below.

[14] The police operation which led to the convictions of the defendants in *Brown* was known as Operation Spanner.

[15] In a few months the group organised a 1,000 signature petition, organised a demonstration of over 700 men, women and children, and gained international support and funding from

us that their campaign had produced the following working definition of sado-masochistic sex:

> SM sex is obtaining pleasure from an exchange of power and/or pain in consensual sex play or sexual fantasy.
>
> SM sex is, by definition, consensual. Non-consensual sex is an abuse of power and is therefore sexual violence, not SM sex.
>
> There are no pre-determined roles in SM sex. Power relations are determined by choice.

10.31 These three points figured frequently in the evidence received from individual respondents. An academic respondent who has made a study of the subject[16] said that SM sex is essentially a theatrical activity in which the sadists and masochists act out roles of symbolic dominance and submission, of shaming and being shamed. Their aim is not pain *per se,* which they fear as much as anyone else, but pleasurable excitation which is linked, or becomes switched to, sexual pleasure. They may suffer some degree of injury, but they view this much as a sports player views the risk of injury which is inevitably found in most games. Another respondent said that SM sex is essentially a matter of role-playing. One person is the giver of "punishment", and the other is the receiver. They may frequently reverse roles. They may be both of the same sex or of different sexes. It greatly enhances the enjoyment for the receiver if he or she feels completely under the domination of the giver. Hence, temporarily, the giver is granted complete control. A third respondent said that SM games often involve fantasies of domination and submission,[17] and that the different roles are freely entered into and do not necessarily reflect the participants' roles in real life.

10.32 These second and third factors, that SM sex is consensual and that roles may readily be reversed, were repeatedly stressed by respondents who had personal experience of the practice. There follows a number of typical extracts from the evidence we received:

> In SM sex there is no such thing as a victim and consent is everything. Just as in straight sex, the only difference between a loving act and a violent act is consent, and to ignore consent is completely ridiculous. All sexual acts of every sexuality are acts of violence if undertaken without consent, and not violent if consent is given. Consenting sexual acts have absolutely nothing to do with violence.
>
> In my own experience as a gay man who prefers SM relationships (and in the experience of others to whom I have talked) SM encounters between consenting adults involve a process of negotiation within the context of sexual pleasure. These negotiations, which are expressed as a mixture of prior agreement and the more spontaneous/improvised

civil liberties groups, gay, lesbian, bisexual and heterosexual clubs, trade unions, many parts of the Press and many individuals.

[16] Professor Christie Davies.

[17] Dominance and submission (D & S) is an alternative form of description of these activities.

situations that arise during a sexual encounter, are the means by which the participating individuals attempt to arrive at a correct "balance" in their relationships.

SM activity is typically an activity which requires extensive negotiation and planning. When negotiation and planning are absent, then the activity becomes rape or abuse and there are already laws against such acts. Sado-masochism is only violence by metaphor: a closer metaphor would be to view sado-masochism as theatre.

[We] use terms such as "top and bottom" or "D & S", not "victim and assailant", which emphasises the fact that both partners are active in the encounter, albeit in different roles. Indeed many people "switch", that is take different roles at different times. One of the most important rules ... is that the bottom sets the limits to the encounter.

In all the years I have been a modest SM practitioner, I have never seen unacceptable individual risk. The contrary is invariably the case. Sado-masochism is essentially a ritual, there are ritualised stop words, even the most tyro practitioner knows where not to hit hard and knows more about anatomy in general than the average Joe. The bottoms outnumber the tops at least 10 to 1, and the bottoms in reality dominate the ritual. It is in reality the top's duty to serve the bottom by giving just enough of what the bottom wants. An overly aggressive top does not get to top, because word gets around.

A strong relationship of trust and understanding develops and exists between sado-masochists. It was acknowledged in Spanner that the participants had known one another for years, and strong friendships had built up established by mutual trust and understanding. It is the victim who dictates what he wants and how much of it he is prepared to submit to. Rules definitely exist in SM activities.

A SM scene is normally preceded by a period of negotiation. Consent has to be explicit in SM sex because there are no fixed conventions.

SM sex is extremely varied. It should be fully consensual in much the same way as legal non-SM sex is, and for this consent to be present prior negotiation is essential to ensure that all the acts which a lover instigates are genuinely consented to.

I do not believe you can make any sense of SM sex unless you consider the sexual motives of the participants. In a typical SM encounter *top* = *dominant* and *bottom* = *submissive.* It will be agreed that *Top* is in charge. The feeling of power met with obedience adds to the sexual excitement of both partners. The common use of bondage often serves to amplify the sense of domination and subservience. In a physical sense it appears that the Top is in control. But in practice the Top has to stay within the limit set by the desires of the Bottom. It is a very common saying by those involved with SM sex that the Bottom is the one who is actually in charge.

10.33 Countdown on Spanner said that SM sex should be legally recognised as an expression of sexuality and not as an assault. They maintained that it is integral to many people's sexuality, being vital and fulfilling for them; that there are no

victims in SM sex because just as in all sexualities, when consent is given, a sexual act is a thing of love, and not of violence; and that practitioners of SM sex are as likely to be as responsible and careful as those in the other categories recognised by the law as exceptions to the general rule relating to offences in which injury is inflicted.[18]

10.34 This contention, too, was supported by the evidence of many individual respondents. There follows a sample of this evidence:

> The violence that is involved in SM activity, and specifically, in my case, in corporal punishment activity, is not violence as such, but essentially is sexual in nature, and sexuality of great subtlety and complexity in which the superficial bifurcation between the dominant and submissive partners is often much less easily disentangled than may appear to the lay person at first sight. It is most certainly not a case of the exploitation of one party by another.
>
> It is probably impossible to describe the beauty of sado-masochism to those who do not share these desires. To me sado-masochism is about power far more than it is about pain. Pain is just one tool in the exercise of power. But power has to be freely given with informed consent or I could not enjoy exercising it. Real coercion would turn beauty to ugliness – not only morally wrong and illegal, but for me not erotic.
>
> I am a very active and independent woman. But I have also enjoyed taking a very submissive role during sex. To me an essential part of taking a submissive role is that my partner punishes me. This punishment would typically involve him spanking me very hard or using a cane or a whip on my behind. It is often likely that this punishment would leave more than transient and trifling marks. This is an activity from which I derive immense sexual satisfaction. Not only that, I also find the effect of giving up control and taking a submissive role to be a very relaxing experience. It has always been very clear in my mind that I have willingly sought these punishments for my own sexual and emotional satisfaction.
>
> Dominants do not necessarily hurt anyone. A sensation is caused which in another context could be classified as painful. It is not something I would consider violent, as it damages no one emotionally or physically. I can only describe the attraction of such sex play as constituting an aesthetic awareness and intensity as well as providing variety, intellectual stimulation and an element of humour. There is a spectrum in the SM world, and what many enjoy constitutes far more a philosophical and psychological activity. The more common, paradoxical truth is that it is frequently the submissive party who controls what is done to them, and much of what appears to be pressure by the top is for the submissive's benefit.

[18] For an alternative view, cf Ros Coward, "Liberty, Perversity and Freedom for All", *The Guardian* 16 October 1995.

> Sado-masochism provides myself and my friends with an intense form of erotic gratification which by its very nature involves levels of trust and compassion rarely found in other walks of life. In addition, my personal experiences in coming to terms with my own sexuality have, I believe, led me to a deeper understanding of the complexities of human nature. We are not violent monsters.
>
> SM sex should be legally recognised as an expression of sexuality and not as an assault. SM sex is integral to many people's sexuality. It is vital and fulfilling for many people. There are no victims in SM sex because, just as in all sexualities, when consent is given, a sexual act is a thing of love and not violence.
>
> SM experiences can, like vanilla (non-SM) sex mean a lot of things. It can be light hearted but exhilarating fun between two people who barely know each other. But it can be far more than that. The giving and sharing of pain between two people who know the pleasure it can bring is as deeply moving as is any act between those bound by love.

10.35 The third group, SM Gays, was founded 13 years ago as a social and support group for gay men interested in consensual SM sex at a time when this was very much frowned upon, and when there was very little available in the way of positive images, safe places to meet, or education and advice on safe SM techniques. Between 150 and 200 gay men attend its monthly meetings in Central London,[19] and the group has published a number of Resource Books, and literature on SM health and safety.

10.36 They told us that human sexuality does not fall easily into compartments. It is a spectrum along which people travel from day to day or from one relationship or sexual encounter to another. For some people, role playing games of domination and submission may be the key to the success of their relationships. For others, physical control by holding their partner down or mild spanking may be common elements of their sexual activities. Yet none of these people would consider themselves to be sado-masochists, and their activities may or may not cause injury.

10.37 The evidence of this group touched on the physical injuries that may be sustained during SM activities. They said that such injuries usually take the form of marks, bruises, weals and sometimes cuts. They are very rarely serious enough to need medical attention, and they nearly always disappear after a few hours, or at most a couple of days. These injuries are caused by the use of whips, canes and other instruments of corporal punishment, by sharp implements such as abrasive materials or steak needles, or by hands or teeth. They occasionally take the form of superficial burns from hot candle wax. Some SM activities cause a breaking of the skin. This can be accidental or incidental to the activity (since whipping or branding may break the skin) or it may be intentional (as in temporary piercing, scarification or branding). Another way an accident may happen is if in a

[19] Lesbians, bisexuals and heterosexuals are also welcome at the meetings of the group, although these do not form part of the target audience.

suspension scene a rope breaks and the suspended person falls and breaks a leg. In such a case the police may prosecute if they can prove recklessness.

10.38 The importance of proper attention to safety and the need for dissemination of advice about safety measures was stressed not only by this group but by other respondents. The evidence we received was along these lines:

> If the current law was enforced strictly, it would hamper educational and campaign work on SM issues. While I and my friends jointly enjoy sado-masochism we are not blind to the need for skill and consideration. We run workshops in safer sex (avoiding HIV transmission), negotiation, CP techniques, physiology and safe bondage etc. Such workshops help to educate people to avoid accidents. Are we aiding and abetting assaults if we discuss safe methods of causing pain in consensual sex play?
>
> The gay community has been at the forefront of the movement to build a responsible and safe SM culture since the founding of SM Gays over ten years ago. All the major SM organisations have a commitment to promoting "safe, sane and consensual" sado-masochism.
>
> The vast majority of law abiding and conscientious sado-masochists keep their activities secret. Many sado-masochists were and are isolated and unhappy, fearing to admit the nature of their sexual desires lest they be branded as a dangerous pervert. Most SM sex undoubtedly takes place secretly between married couples who have complementary sexual fantasies, or between professional dominant women and their clients. This causes some very serious problems, since a climate of secrecy is not conducive to the dissemination of sound information regarding safety.
>
> I am the co-author of a booklet which is designed to promote safe practice in SM sex. If we are forced to carry on our activities furtively, underground, illegally, we will be unable to keep people informed about "Tops" who are not safe. Sado-masochists who will be unable to meet openly and obtain recommendations about responsible partners will be at much greater risk from such atypical violence.
>
> Many SM activities are quite safe if carried out properly but dangerous if practitioners do not know what they are doing ... Some activities are simply not safe to do alone. At least one person has died as a direct result of the *Brown* verdict. He was into breath restriction (cf Milligan). Following *Brown* he feared involving his partner in his activities and reverted to doing them alone. He was found dead. The current law endangers people rather than protects them. The best protection is sound safety information. We wish to have safe, sane and consensual sado-masochistic sex, and to be able to prevent accidents and minimise risks by disseminating accurate information regarding safe practices.
>
> I am purely a masochist ... I have researched my psychological preference in many academic text books, and I keep on finding myself misrepresented. In effect one has to join a secret society to practise such activities and only the most adventurous researcher can obtain

genuine information. Being an intellectual chap I can understand my own psychology. Other people are not so lucky. When such practices are illegal they get driven underground. Then everybody is deprived of information, including the practitioners themselves. Nobody knows what goes on and exploitative characters can get away with conduct which everybody regards as unacceptable.

To the extent that prosecution by the state forces sado-masochists underground it weakens the rules by which sado-masochists regulate their own activities and prevents the younger ones learning what is safe and appropriate from older sado-masochists.

For private sado-masochists, Spanner has had a very negative effect. There is a clamp-down on sado-masochism. Sado-masochists have no ready access to safe sex literature or safe practice literature. It has also discouraged people from coming to our clubs and social spaces – the network of safety advice.

I am involved in running two different support organisations for practitioners and supporters of SM sex. I would like to make three points about the effect of the new(ish) legal issues:

(1) It has made SM sex less safe – people are afraid to ask for information on safe SM sex (both in HIV transmission terms and safety of cuts/bruises). They are also too scared to visit a GP or hospital if they have had problems.

(2) People do not understand the law and are therefore very scared (an increasing problem!). I dare you to define "transient and trifling". A link between suppressing sexual desires and dysfunctional behaviour which is very much against the public interest is very well documented, so that scaring people away from safe, consensual activities towards this cannot be a good step.

(3) This case has caused prejudice and enforced existing prejudice. A law like this gives an open ticket for harassing our community. This includes cheap journalists and some members of the police.

10.39 Another point that was made by a number of respondents was that the effect of the publicity given to the *Brown* case was that people who practised SM sex were very frightened about giving evidence to the police when they were investigating serious crime. They were afraid that this might lead to their own prosecution for taking part in illegal activities. Formally the organisations representing the police opposed any alteration in the present state of the law:[20] they were particularly concerned about the risks to vulnerable people which would be posed by any liberalisation of the law on SM sex. We received evidence, however, that in

[20] The Police Superintendents' Association and ACPO. The Police Federation was non-committal in its very brief response. For the danger that the criminal law will be brought into disrepute if it is not enforced, see Appendix C, paras C.103 – C.104 below.

practice prosecutions are very rare. A practising solicitor of 12 years standing who had considerable experience as a criminal advocate told us:

> The tenor of *Brown* fits uneasily with contemporary opinion. Wolfenden adequately set out the arguments, but prosecution policy indicates that society has to a large degree come to accept that the law should stay out of the bedroom. It would be inconceivable to imagine *Knuller*[21] being decided in the same way today, let alone a prosecution being undertaken. An unofficial age of consent for gay men has operated for many years, and prosecutions have been rare where both parties are over 16. Similarly the laws prohibiting anal intercourse by heterosexuals and sex between men in private where a third party is present, are in practice dead letters.
>
> Following *Brown* a number of police forces were canvassed, and in private indicated that enforcement of the decision was a "low priority". Sado-masochistic advertising, albeit coded, clubs and publications have continued to flourish. From discussion with SM groups, it appears that there has been no change in behaviour. The law in this area is akin to the prohibition on homosexual acts before 1967: widely disregarded and regarded as grossly unjust and intrusive.

10.40 However this may be, the fear of prosecution and harassment undoubtedly exists. This was reflected in evidence along the following lines:

> Last year the gay community was very loath to give the police any advice at all in the serial murder case. It was only when information was given via the GALOP group that the heterosexual murderer was identified. The Head of Community Affairs made it very clear at New Scotland Yard that those with the responsibility to enforce the law were very unhappy at the position in which they had been placed.
>
> Illegality drives a wedge between the minority community and the police making people less willing to give information regarding the genuinely dangerous in case they are prosecuted themselves.
>
> Sado-masochists have become very distrustful of the police, laying themselves open to blackmail and worse. Consider the *Colin Ireland* case. The gay community and the sado-masochist community would not come forward to the police because of fear of incriminating themselves as sado-masochists. The lack of freely available safety advice has led to several deaths. It is the general public, not the sado-masochist community that is the target of current legislation.
>
> Illegality could cause grudge informing to the police. This has already happened. A man who was not invited to a party told the police who raided a house in great numbers.

[21] [1973] AC 435. In this case a company which published a magazine which contained advertisements inviting readers to meet the advertisers for the purpose of homosexual practices was convicted on counts of conspiracy to corrupt public morals, and its conviction was upheld by the House of Lords.

> Police investigating the serial killer of gay men associated with the sado-masochist social scene found difficulties. Detective Inspector Finnigan led the inquiry into the murder of Peter Walker in 1993. He could give no undertaking that innocent gay men helping police in their inquiries would not be referred to the Obscene Publications Squad. He said (*Pink Paper* 4.4.93): "We are irritated by this; it is going to be an obstacle to our inquiries".

10.41 The final point made by SM Gays in their evidence was that the wide diversity of SM activities which might cause any degree of injury posed problems for those who might attempt a legal definition. No list of such activities would ever be complete, and no definition which concentrated on the physical activities separated from issues of consent and the personal power dynamics of domination and submission could be guaranteed to separate a sexual SM scene from a real assault.

THE BORDERLINE BETWEEN SEX AND VIOLENCE

10.42 Professor David Feldman provided us with a thoughtful analysis of society's differing responses to activities which are regarded as sexual as opposed to those which are regarded as violent. If an activity is classified as sexual, pleasure from it is not regarded as evil, even if it is accompanied by pain, and it is therefore, he considers, permissible to allow consent to be a defence. Interests at stake include the satisfaction of natural cravings, the expression of one's sexual identity, and the right not to be exploited as an unwilling means to someone else's end. The need for consent allows those who do not want to participate to say "no", and the greater freedom to consent allows people to enjoy sexual encounters to which they feel drawn. These rules spring from an assumption that sex is, in general, not a bad thing.

10.43 If, on the other hand, an activity is classified as violent, pleasure from it is regarded as evil, and the act of inflicting it is treated as cruel and uncivilised. It is for moral reasons, in order to protect standards of public decency, that courts will not permit people to take part in such acts of cruelty, unless no significant bodily harm results to the victim. Violence is not in itself usually seen as a good thing, although there may be contexts in which physical violence is regarded as socially acceptable (for example, in rugby football, boxing, rough play among children, or the lawful correction of children).

10.44 Most people, he suggested, instinctively share Lord Templeman's view in *Brown* that society is entitled and bound to protect itself against a cult of violence. Pleasure derived from the infliction of pain is seen as an evil thing and cruelty is uncivilised.

10.45 Whether consent should be permitted depends, therefore, on whether an activity is classified as sex or violence. This classification will affect the relative weight to be given to the competing considerations of public policy and individual rights.

The speeches of Lord Templeman[22] and Lord Mustill[23] in *Brown* illustrate the importance of the difference in approach.

10.46 Professor Feldman expressed the opinion that to classify sado-masochism as being about violence, and therefore as having no redeeming social value, but to accept that boxing or rough and undisciplined play do have social value, is to turn reality on its head. In his view the interest (whether public or private) in allowing people to express their sexuality, which forms a fundamental part of a person's personality, is no less important than the interest in allowing people to pursue sports. Sport is fun, but sex for many people is more than fun: it is a form of self-expression.

10.47 For many people, he said, violence and sex are not separate. There are overwhelming reasons for preventing people from making others the unwilling vehicles of their sexual gratification, but there is no more – and arguably, in his opinion, less – reason for preventing people from consenting to bodily harm in the pursuit of sexual pleasure than there is for preventing people from consenting to it in the pursuit of sporting pleasure.

10.48 Another academic respondent[24] said that equating sado-masochism with violence loses sight of the activity's social meaning for those who participate in it. Although sado-masochism necessarily involves the commission of violence towards, or the humiliation of, the party assuming a masochist role, this is as a necessary element in the participants' sexual experience. Although to the outsider what is going on may appear to be no different from casual or malevolent violence, for sado-masochists it is a meaningful part of sexual activity. Social meanings should normally be assessed from the standpoint of the participants in an activity, particularly within the field of sexual activity, given the social sensitivity surrounding the area and the sheer range of activities which possess sexual meanings for different people. It follows, in his opinion, that the policy criteria covering the law's approach to sado-masochism should be those relating to sex rather than those relating to violence.

10.49 We were reminded that Professor Hart, in his defence of the Wolfenden Committee's proposals, observed that laws restricting (consenting) sexual behaviour "may create misery of quite special degree. For both the difficulties involved in the repression of sexual impulses and the consequences of repression are quite different from 'ordinary' crime." Sexual impulses, Professor Hart observed, form a strong part of each person's day to day life, so that their

[22] [1994] 1 AC 212, 235: "In my opinion sado-masochism is not concerned with sex. Sado-masochism is also concerned with violence." Cf Lord Lowry, who said that any sexual desire involved in the case was perverted or depraved. *Ibid*, at p 225.

[23] [1994] 1 AC 212, 256. "In my opinion [this case] should be a case about the criminal law of private sexual relations, if about anything at all."

[24] N Bamforth. His main response, "Sado-Masochism and Consent", was published in [1994] Crim LR 661.

suppression can affect "the development or balance of the individual's emotional life, happiness and personality."[25]

10.50 Another academic respondent, who was among those who persuaded us to extend our study to embrace sexual offences, gave as one of her two reasons the consideration that it is sometimes difficult to divorce sexual from non-sexual violence.[26] She said that rape is not necessarily to do with sex, but to do with violence. It is not what most would recognise as part of a normal sexual relationship (whether hetero- or homo-sexual): instead, it is an act in the exercise of power, and therefore an act of violence. She added that we should not lose sight of the possibility that, in spite of the majority decision in *Brown*, private sexual acts might have a perfectly legitimate violent element. In other words, there may be situations where an act, although including elements of both sex and violence, can be thought of as predominantly violent or predominantly sexual, and if it is the latter it should not be assumed that it is a situation which comes automatically into the ambit of the criminal law.

10.51 The SPTL, more briefly, submitted that the divide between sexual offences and offences of violence was not clear, and it was essential that there should be consistency in the meaning of consent in each area. "Assault merges into indecent assault, which merges into attempted rape and rape." A number of women's organisations stressed that the issue of consent was central. Feminists against Censorship[27] and the English Collective of Prostitutes[28] both emphasised this in their responses, and another women's group, without referring to sado-masochistic sex, said that "consenting sex should not be the business of the law", while urging us most strongly to review the law of consent in the context of sexual offences.

LAW REFORM PROPOSALS

10.52 We envisage that appropriate protection will be given to the activities described in this Part, insofar as they would otherwise amount to offences against the person, by the terms of the provisional proposals we have made at the end of Part IV above. The circumstances in which such acts should be permitted is a matter for legislation relating to public morality and decency,[29] and not for the present project, which is concerned solely with the question whether such acts should in themselves constitute criminal offences even if a valid consent is given to them. In other words, nobody may give a valid consent to seriously disabling injury, but subject to this limitation the law ought not to prevent people from consenting to injuries caused for religious or sexual purposes. We see no value in circumscribing

[25] H L A Hart, *Law, Liberty and Morality* (1963) p 22.

[26] Her other reason was that at least one of the statutory sexual offences includes lack of consent as part of the offence, and it might therefore afford guidance in considering the defence in situations of non-sexual violence involving more than trivial harm.

[27] "Consensual acts are no business of the state."

[28] "Consent must always be the issue regardless of the extent of the injury."

[29] See Part XV below.

the law by reference to any specific limitation of purpose.[30] This proposed policy is consistent with the third, fourth and sixth principles in our suggested law reform strategy.[31]

10.53 In paragraph 9.24 above we asked whether the age-limit of 18 should be retained for tattooing, and whether any similar (and if so, what) age limit should be introduced in relation to a young person's ability to give a valid consent to (a) piercing below the neck, (b) branding or (c) scarification, when performed for cosmetic or cultural purposes. What falls for consideration in the present context is whether statute should set some minimum age below which the causing of injury for sexual, religious or spiritual purposes should remain unlawful even if a consent is given by a young person who would otherwise be treated as having the capacity to give a valid consent.[32] Parliament has very recently decided that at the present time 18 is the appropriate age below which participation in anal intercourse should not be lawful, even with consent, and as a law reform body we provisionally consider that we should be guided by Parliament's very recent judgment on the appropriate age for consent when deciding whether to recommend decriminalising activities performed for purposes of sexual gratification which were previously proscribed by the criminal law.

10.54 For the present consultation process we propose that the same age limit should apply to activities involving the infliction of pain-creating injury for the purposes of religious mortification or for spiritual motives as to similar activities for the purposes of sexual gratification, and we would be interested to hear from any respondent who believes that a different age limit should apply in these cases, and if so why. In making these two proposals we are giving effect to the second principle contained in our suggested law reform strategy.[33]

[30] Such a limitation would lead to an investigation of the type of issues discussed in paras 10.42 – 10.51 above, which criminal courts are not well qualified to conduct, and to consequent uncertainty about how the law would be applied in practice.

[31] See para 2.18 above. Our strategy recognises people's entitlement to make choice for themselves but also (i) takes into account the interests identified in para 2.18(3) above: (ii) takes the view that to be seriously disabled is against a person's interests so that someone who consents to seriously disabling injury has made a mistake; and (iii) acknowledges that in the absence of effective regulation we cannot be sure that consent to seriously disabling injury will be entirely voluntary.

[32] See para 5.21 above.

[33] See para 2.18 below. We are referring to the principle that in certain circumstances, to be determined on a case by case basis, the state should be entitled to determine that there is an age below which no consent should be valid.

Injuries intentionally caused for sexual, religious or spiritual purposes

10.55 **We therefore provisionally propose that for the purpose of the proposals contained in paragraph 4.49 and 4.50 of this Paper any consent given by a person under 18 to injuries intentionally caused for sexual, religious or spiritual purposes[34] should not be treated as a valid consent.[35]**

[34] We will be interested to know whether it would be necessary to make an exception in relation to the causing of injury for such purposes in the course of proper medical treatment (Part VIII).

[35] Subject always to the possibility of a defence being available if any of our suggestions in para 7.34 above are eventually adopted.

PART XI

LAWFUL CORRECTION

11.1 The English common law provided that while a child remained in the custody of a parent the latter was entitled to administer reasonable chastisement both in respect of past misconduct or, it seems, threatened future misconduct.[1] The right to chastise existed only for the benefit of the child and the maintenance of domestic discipline, so that a parent had no right to punish arbitrarily or for disobedience to unlawful commands. The force used had to be reasonable in the circumstances, the age and strength of the child being most important considerations. A guardian had the same right to chastise as a parent, as did anyone who had the lawful control of a child, provided that he or she was acting in loco parentis. The authority of a schoolmaster, where it existed, was the same as that of a parent. When a parent left a child with a schoolmaster, all his or her parental authority was delegated to the schoolmaster, so far as was necessary for the welfare of the child.[2]

11.2 This category of conduct was mentioned among the special exceptions to the general law of assault in *Donovan*.[3] In the later case of *Attorney-General's Reference (No 6 of 1980)*[4] Lord Lane CJ also included "lawful chastisement or correction" among a summary of the special exceptions to the law of assault. In *Brown*[5] Lord Mustill mentioned this exception, but added that it had nothing to do with consent, and was useful as a demonstration that specially exempt situations could exist and that they could involve an upper limit of tolerable harm.

11.3 In the first Consultation Paper[6] we considered it to be inappropriate in the context of the present project to explore issues of contemporary social, educational and political concern which were only very tenuously linked, if at all, to the law of consent as a defence to offences against the person. The lawfulness of lawful correction did not depend on consent and raised very complex issues of policy that went very far beyond the issues we were then addressing.[7]

[1] 1 Bl Comm 452.

[2] *Per* Cockburn CJ in *FitzGerald v Northcote* (1865) 4 F & F 656, 689; 176 ER 734. See also *Ryan v Fildes* [1938] 3 All ER 517, 520.

[3] [1934] 2 KB 498, 509. The appellant was convicted of indecent assault and common assault after caning a girl of seventeen for the purposes of his own sexual gratification. The Court of Appeal said that the reasonable chastisement of a child was a situation "wholly remote" from the facts of that case.

[4] [1981] QB 715, 719D–E.

[5] [1994] 1 AC 212, 266–267.

[6] Consultation Paper No 134, para 2.7.

[7] The recent careful study by the Scottish Law Commission (see para 11.15 below) shows how such a review should more appropriately be carried out, and there is no indication in its report that in the law of Scotland questions about consent to chastisement are regarded as live issues.

11.4 A number of respondents criticised us for failing to include this topic in our study. Feminists Against Censorship were concerned about the uncomfortably casual way in which non-consensual beating was treated in the case of discipline to children. They said that all too many adults treat this as a licence to batter their children, who do not consent, and that it was a mistake to ignore this issue. One academic respondent said that although the issue of consent was buried where the parent administered the harm, because it was the parent who is entitled to consent, this should not obscure the consent basis of the defence.[8] Another, on the other hand, suggested that consent is irrelevant in the case of lawful correction because the defence derives from the *legal right* to use reasonable chastisement and not from the acquiescence of the victim.[9] Others[10] also regretted that we had not considered this topic, while accepting that the right to chastise did not derive from the acquiescence of the person punished. A respondent who was a practising sado-masochist commented that from a sado-masochistic perspective the caning of children can only be regarded as rape.

11.5 Shortly after the first Consultation Paper was published we received and turned down a request from the NSPCC and other bodies concerned with the welfare and protection of children[11] that we should expand the scope of this project by reviewing the law relating to "reasonable chastisement". They told us that professional and public attitudes to the physical punishment of children had substantially changed over the last few years, and they also referred to the rapid progress towards protecting children from physical punishment outside the home, under the Education (No 2) Act 1986, the Education Act 1993, and the Children Act regulations and guidance.[12]

11.6 We remain of the view that these matters have very little to do with the present law reform project. In view of the responses and comments we received, however, we believe that it would be helpful to summarise briefly the present law and describe

[8] He accepted that it was unclear whether the power to consent originated in the status of the parent or whether it is exercised on behalf of the child.

[9] But see, in this context, the recent Australian case of *Ferguson* (1994) 75 A Crim 31 in which the Queensland Court of Appeal held that a school child can be said to give an implied consent to tactile encouragement from a schoolteacher. The existence of this implied consent then prevents such encouragement from constituting a common assault. For a more detailed analysis of this case see A West, "What is an Unlawful Assault?" (1995) 16 Qld Lawyer 13.

[10] There is considerable contemporary interest in this topic. See C Barton, "It's OK to Belt your Kids" (1992) 142 NLJ 1262; C Barton, "When Hitting Children is Unlawful" (1993) Fam Law Practr 21; and C Barton and K Moss, "Who can Smack Children Now?" (1994) J Child Law 32.

[11] The letter was signed by the Director of the NSPCC, the director of the National Children's Bureau and Mr Peter Newell, the Co-ordinator of the movement known as End Physical Punishment of Children, as spokesmen of a large number of organisations which support the aim of ending all physical punishment by education and legal reform.

[12] Reference was also made to a recommendation of the Committee of Ministers of the Council of Europe proposing a review of the law on the punishment of children and consideration of the prohibition of all physical punishment (R 85/4, para 12). In particular, the Committee recommended that the governments of member states "review their legislation on the power to punish children in order to limit or indeed prohibit corporal punishment, even if violation of such a prohibition does not necessarily entail a criminal penalty."

some of the contemporary concerns, in case any respondent believes that there are any issues relating to consent that have escaped our notice.

11.7 The leading nineteenth century case on the parental[13] "right"[14] of reasonable chastisement is *Hopley*,[15] in which Cockburn CJ said that "moderate and reasonable"[16] parental chastisement administered "for the purpose of correcting what is evil in the child"[17] will not attract the attention of the criminal law. If, however, force is administered for reasons of "gratification of passion or of rage" or if it is "immoderate and excessive in its nature and degree" then it will be unlawful.[18]

11.8 These common law rules were protected in the Children and Young Persons Act 1933. While making it clear that a child or young person under the age of 16 can be the victim of an assault at the hands of a person over that age who has responsibility for him or her,[19] the Act also provides that the "right of any parent, teacher, or other person having the lawful control or charge of a child or young person to administer punishment to him" is not affected by its provisions.[20]

11.9 While the reasonableness of the chastisement is a question of fact, a commentator in New Zealand has recently summarised the law helpfully by saying[21] that this will

[13] The right is probably confined to those with "parental responsibility" under the Children Act 1989, eg the mother and father of the marital child and the mother of the non-marital child (s 2(1) and 2(2)(a)); and those to whom such parents have delegated parental responsibility (s 2(9)) ("Parental responsibility" is defined in Children Act 1989, s 3). That it is not unlawful for a childminder, whether registered or unregistered, to smack a minded child as long as the parent consents was recently confirmed (obiter) in *Sutton London Borough Council v Davis* [1994] 2 WLR 721, 724E–F, *per* Wilson J.

[14] It has been questioned whether this can be referred to as a *right* since a strict Hohfeldian analysis would require that the parent's "claim-right" to chastise his or her child be accompanied by the child's corresponding duty to submit to the chastisement. It is more likely that the parent has a legal "privilege" to discipline his or her child. See J L Caldwell, "Parental Physical Punishment and the Law" (1989) 13 NZ Universities LR 370. Blackstone, however, said that children owe duties of "subjection and obedience" to those who give them existence. See 1 Bl Comm 453.

[15] (1860) 2 F & F 202; 175 ER 1024. A father had given permission to a school teacher to chastise his son severely and, if necessary, to do so "again and again". The "thirteen or fourteen year" old son was flogged over the course of two hours with a large stick and died from his injuries. The school teacher was convicted of manslaughter and Lord Cockburn CJ held that the parental authority granted to the teacher, while reasonable in itself, did not authorise the excessive chastisement actually given.

[16] Blackstone commented that a parent "may lawfully correct his child, being under age, in a reasonable manner; for this is for the benefit of his education." See 1 Bl Comm 452.

[17] (1860) 2 F & F 202, 206; 175 ER 1024.

[18] *Ibid.*

[19] See Children and Young Persons Act 1933, s 1(1) which provides that a person who "wilfully assaults" a child or "causes or procures him to be assaulted ... in a manner likely to cause him unnecessary suffering or injury to health" shall be liable for an offence triable either summarily or on indictment.

[20] *Ibid*, s 1(7).

[21] See J L Caldwell, "Parental Physical Punishment and the Law" (1989) 13 NZ Universities LR 370.

be affected by the maturity, understanding and intelligence of the child;[22] his or her physique and strength;[23] his or her misbehaviour; the type of punishment and the circumstances in which it occurs;[24] and the cultural practices of the parents.[25]

11.10 A number of these factors were referred to by the Scottish Court of Session in *Harris*.[26] In that case a mother had used a belt to administer one blow to the thigh of her nine year old daughter after that child had herself slapped another child and sworn at her mother. The Court of Session held that because the Sheriff at first instance had found that the mother had neither lost control nor used excessive force, and that the child had "richly deserved" the punishment, the case should be remitted with a direction to dismiss.[27] In later Scottish cases slapping a two year old on the face as a prelude to knocking him over led to a conviction for assault, as did striking a naked child on the buttocks with extreme force.[28]

11.11 The right of reasonable chastisement that school teachers had over their charges at common law,[29] which was protected by the Children and Young Persons Act 1933, was severely restricted by section 47(1) of the Education (No 2) Act 1986.[30] This subsection provides that:

[22] See *Gillick v West Norfolk and Wisbech Health Authority* [1986] AC 112. In his *Textbook of Criminal Law* (2nd ed 1983) Professor Glanville Williams suggests, at p 484, that a parent's right to use reasonable disciplinary measures against his or her children "lasts up to an age that is not altogether clear but is perhaps 16 and is certainly no higher than 18."

[23] See *Hopley* (1860) 2 F & F 202, 206; 175 ER 1024 where Lord Cockburn CJ said that if chastisement is "protracted beyond the child's powers of endurance" then it may be unlawful.

[24] In the Australian case of *White v Weller, ex p White* [1959] Qd R 192 Hanger J said, at p 200, that "in some circumstances, though the punishment itself cannot be described as severe, the means used may make it unreasonable and therefore unlawful." The use of an unusual instrument in the administration of the punishment may lead to a finding that the punishment is unreasonable and, therefore, unlawful. See also *Hopley* (1860) 2 F & F 202, 206; 175 ER 1024 where Lord Cockburn CJ said that chastisement may be unlawful if it is administered "with an instrument unfitted for the purpose."

[25] This has some relevance to the religious and cultural practices discussed in paras 9.13 – 9.19 above and Appendix B, para B.72 below. See *Adesanya, The Times* 16–17 July 1974; *Sikunyana* 1961 (3) SA 549(E); and *Watson* [1987] 1 Qd R 440. See also *X and Y v Sweden* (1982) 29 DR 104 (European Commission of Human Rights), for which see para 3.20 above.

[26] 1990 SLT 208.

[27] An important issue in the case was the need for the Crown to prove mens rea. In Scotland the crime of assault cannot be committed negligently or recklessly and the Court of Session in *Harris* observed, *ibid*, at p 210: "the mere fact that a parent is angry when punishing a child, using moderate force, cannot by itself demonstrate the existence of the evil intent which is an ingredient of the crime of assault."

[28] See *Peebles v MacPhail* 1990 SLT 245 and *Byrd v Wither* 1991 SLT 206 respectively.

[29] See para 11.1 and n 2 above.

[30] As amended by s 293 of the Education Act 1993. This legislation was first introduced as a response to the decision of the Strasbourg Court in *Campbell and Cosans v UK* (1982) 4 EHRR 293 (see para 3.15 above) in which it was held that a state must take account of, and respect, a parent's views on corporal punishment in order to comply with Article 2 of Protocol 1 of the European Convention on Human Rights ("the Convention"). See B Phillips, "The Case for Corporal Punishment in the United Kingdom. Beaten into

> Where in any proceedings, it is shown that corporal punishment has been given to a pupil to whom this subsection applies by or on the authority of a member of the staff, giving the punishment cannot be justified on the ground that it was done in pursuance of a right exercisable by the member of staff by virtue of his position as such.

This provision applies to pupils at publicly funded schools[31] and also to pupils at independent schools whose fees are paid in full or in part out of public funds.[32]

11.12 The 1986 Act also provides that no offence is committed "by reason of any conduct ... which would, apart from this section, be justified on the ground that it is done in pursuance of a right exercisable by a member of staff by virtue of his position as such."[33] It appears that this can be reconciled with subsection 47(1) of the 1986 Act in that while the latter provision removes the *justification* for the administration of corporal punishment it does not *of itself* render such punishment criminal; it will still be necessary to prove that the punishment went beyond the bounds of what is reasonable.[34]

11.13 The prevalence of the practice of chastisement by parents was illustrated by a long term survey of child-rearing practices, conducted over 20 years ago, which revealed that over 60 per cent of parents said that they hit their one year olds, that children aged four were very likely to be hit between one and six times a week, and that by the age of seven 91 per cent of boys and 59 per cent of girls had been hit or threatened with an implement.[35]

Submission in Europe?" (1994) 43 ICLQ 153. The impact of the Convention in this area is discussed in paras 3.12 – 3.21 above.

[31] Education (No 2) Act 1986, s 47(5). This subsection, as amended (see n 30 above), lists schools maintained by local education authorities, special schools not so maintained, grant maintained schools, and independent schools maintained or assisted out of public funds.

[32] *Ibid*, s 47(6). The provisions of the Act have been extended, by statutory instrument, to direct grant independent schools, Ministry of Defence schools, city technology colleges and pupils at independent schools whose fees are paid by a local authority, a Scottish education authority or the Northern Ireland Education and Library Board. See SI 1987 No 1183; SI 1989 No 1233; SI 1989 No 1825. The use of corporal punishment has also been outlawed in children's homes: see SI 1991 No 1506, reg 8(2)(a).

[33] Education (No 2) Act 1986, s 47(4). The Act also provides an exception where the corporal punishment is administered for "reasons that include averting an immediate danger of personal injury to, or an immediate danger to the property of, any person (including the pupil concerned)" (s 47(3)). Corporal punishment shall not be justified under any circumstances if the punishment was "inhuman or degrading" (s 47(1A)). This issue is to be judged according to the reason for giving the punishment, how soon after the event the punishment is given, the nature of the punishment, the manner and circumstances in which it is given and its mental and physical effects (s 47(1B)).

[34] This is the interpretation suggested by A F Phillips in "Teachers, Corporal Punishment and the Criminal Law" (1992) JR 3, 10: "Whereas the excision of the justification removes an obvious defence to a charge of assault brought in respect of physical punishment, it might nevertheless be possible to argue that this change did not of itself criminalise conduct previously outwith the scope of the criminal law." See also E Ness, "Assault and Reasonable Chastisement" 1995 SLT 185, 186 where a similar view is expressed.

[35] P Newell, *Children are People Too* (1986) pp 53–66. The book records that John and Elizabeth Newson, the authors of the study, said that from more recent investigations there was no reason for them to suppose that the extent of physical punishment had decreased

11.14 In a more recent study commissioned by the Department of Health,[36] which was based on interviews with 400 mothers of children aged 1, 4, 7, and 11,[37] 91 per cent of the mothers interviewed said that they had hit their children,[38] with 77 per cent having been hit in the year prior to the study. More strikingly, 16 per cent of children were said by respondents to have been punished severely[39] with 88 per cent of the sample having been hit severely. The team of researchers responsible for this study drew the following conclusions:

- The large majority of children experience some form of physical punishment in the home.
- For most children the punishment takes the form of hitting, but substantial numbers of children also experience some form of physical restraint and punishment by example.[40]
- The frequency of hitting declines with age.[41]
- There are differences in the "quality" and rated severity of types of punishment at different ages.
- Families which took part in frequent or severe punishment were identified more readily by family relationship and social variables than by demographic variables.

11.15 This area of the criminal law has received consideration recently from both the Scottish Law Commission and the Law Reform Commission of Ireland. In 1992 the Scottish Law Commission recommended that legislative provision should be made to the following effect:

across the board and that in a new study, completed in 1985, a random sample of 344 mothers revealed that 63 per cent reported smacking their one years olds. These findings were also published by the Association for the Protection of All Children Ltd in *The Extent of Parental Physical Punishment in the UK* (1989).

[36] M A Smith, *A Community Study of Physical Violence to Children in the Home, and Associated Variables* (1995).

[37] The research sample was randomly drawn from child health registers in 2 different areas of the United Kingdom and was balanced by child age group and gender.

[38] "Hitting" included the following specific terms: "hit, cuff, tap, smack, slap, spank, thump, punch, beat, kick, throwing objects." The other physical control strategies, about which interviewees were questioned, were physical restraints/ shaking; punishment by example (eg pulling hair, scratching, pinching, biting/nipping/chewing, Chinese burns, pulling nails out); and ingestion (eg force-feeding/drinking, washing mouth out with soap).

[39] Severe punishments were defined as those administered with the "intention or potential to cause injury or psychological damage, use of implements, repeated actions or over a long period of time".

[40] Physical restraint/shaking and punishment by example were experienced by 42.2 per cent and 41.6 per cent of children respectively. Only 12 per cent of children were said by their mothers to have experienced ingestion as a form of punishment.

[41] According to their mothers, only 3 per cent of 11-year old children were hit more than once a week.

In any proceedings (whether criminal or civil) against a person for striking a child, it should not be a defence that the person struck the child in the purported exercise of any parental right if he or she struck the child

(i) with a stick, belt or other object; or

(ii) in such a way as to cause, or to risk causing, injury; or

(iii) in such a way as to cause, or to risk causing, pain or discomfort lasting more than a very short time.[42]

11.16 This recommendation has not been accepted by Parliament. It was referred to in a recent House of Lords debate on the Children (Scotland) Bill,[43] when Lord Henderson of Brompton moved an amendment designed to make it unlawful to subject a child to violence "whether or not in the exercise of any parental right, and whether or not by way of punishment."[44] The amendment was stated by its sponsors to have been introduced to deal with a prevalent social ill;[45] to clear up the "confusion" resulting from the use of the "vague concept" of reasonable chastisement;[46] to serve an "educational" purpose in sending out a signal "that it is not on to hit children with implements or in ways that risk causing injury or prolonged pain";[47] and to meet the United Kingdom's obligations under the European Convention on Human Rights and the United Nations Convention on the Rights of the Child.[48] Although the amendment received cross-party support, it was rejected in a division.[49]

[42] Report on Family Law, Scot Law Com No 135 (1992), para 2.105. The Commission commented that a reform of this kind would clarify the law by drawing the line for the intervention of the law at a point which could be easily explained and understood and "would provide increased protection for children without interfering unduly with parental rights." *Ibid*, para 2.99. See also C Barton, "It's OK to Belt your Kids" (1992) 142 NLJ 1262.

[43] *Hansard* (HL) 5 July 1995, vol 565, cols 1109–1121. The Bill has now been enacted as the Children (Scotland) Act 1995.

[44] *Ibid*, col 1109. The changes made in this amendment to the original Scottish Law Commission draft clause were designed to accommodate front bench criticism of the Commission's proposal and to secure a wide constituency of support. The amendment went on to provide that, in determining whether the punishment amounted to violence, regard should be had to whether the child was struck with a "stick, belt or other object" or was struck or shaken so as to cause or risk causing injury or "more than momentary pain or discomfort."

[45] *Ibid*, col 1109, where Lord Henderson of Brompton refers to the Department of Health sponsored study, the results of which are set out in para 11.14 above.

[46] *Ibid*, col 1112, Baroness David.

[47] *Ibid*, col 1113.

[48] *Ibid*, col 1111, Lord Henderson of Brompton. The European Convention on Human Rights receives more attention in Part III above. In considering a report submitted by the United Kingdom relating to compliance with the Convention on the Rights of the Child the United Nations Committee of Experts said that it was concerned that: "the imprecise nature of the expression of reasonable chastisement ... may pave the way for it to be interpreted in a subjective and arbitrary manner. Thus, the Committee is concerned that legislative and other measures relating to the physical integrity of children do not appear to be compatible with

11.17 In 1994 the Law Reform Commission of Ireland, for its part,[50] recommended that parents should be re-educated to practise other forms of discipline as a first step towards the abolition of the parental right to administer reasonable chastisement.[51] It also recommended that any existing immunity of teachers from prosecution for assaults on children should be removed.[52]

11.18 We would like to be told by respondents if the present statutory language causes any difficulties in practice. If no such difficulties are identified, we are likely to recommend that the present statutory provisions should be left undisturbed, and that the parameters of what constitutes reasonable and, therefore, lawful chastisement should be left to the common law until such time as international pressure or any increase in domestic political concern impels the Government to reconsider the need for law reform in this area.

11.19 Clause 20 of the Criminal Law Bill provides that "the provisions of [Part I of the Bill] have effect subject to any enactment or rule of law providing a defence, or lawful authority, justification or excuse for an act or omission." The defence of "lawful chastisement or correction" was one of the defences we had in mind when we included this saving provision,[53] and unless any particular technical difficulty is brought to our notice in relation to this common law defence as it now stands, we are likely to have no recommendations for law reform to make in this regard. As we have said, this defence has virtually nothing to do with consent, which is the subject of our present project.

11.20 **We therefore ask: (1) whether there are any issues relating to consent that have escaped our notice in relation to the defence of lawful correction; (2) whether the statutory language of section 1 of the Children and Young Persons Act 1933 and of section 47 of the Education Act 1986, as amended, creates any difficulties in practice in relation to the defence of lawful correction.**

the provisions and principles of the Convention." The Committee added that it was concerned that corporal punishment could still be administered in British public schools and recommended "that physical punishment of children in families be prohibited in the light of the provisions set out in ... the Convention." See UN Doc CRC/C/15/Add 34 paras 16 and 31. The United Nations Human Rights Committee itself shared the concern relating to schools in its own comments on the United Kingdom's report, in which it recommended that corporal punishment administered to privately funded pupils in independent schools should be abolished. See UN Doc CCPR/C/79/Add.55, 27 July 1995, para 27.

[49] Lord Hope of Craighead, the Lord Justice-General, had argued (*ibid*, col 1117) that the width and flexibility of the Scottish common law of assault was adequate for protecting children against violence. See also the Earl of Lindsay: *ibid*, cols 1118–1119.

[50] Law Reform Commission of Ireland Report No 45 (1994).

[51] *Ibid*, at para 9.214.

[52] *Ibid*, at para 9.205. However, the Law Reform Commission said that the abolition of the immunity would not affect the use of force that is otherwise permissible under the law.

[53] See Law Com No 218, para 27.6, n 267.

PART XII

SPORTS, GAMES, MARTIAL ARTS AND DANGEROUS EXHIBITIONS

INTRODUCTORY

12.1 The law relating to offences against the person has always been willing to accord special treatment to those who take part in lawful sporting activities. The reason for this treatment was explained 200 years ago by Sir Michael Foster when he explained that a special status was accorded to sporting activity because it was a "manly diversion" which tends "to give strength, skill and activity, and may fit people for defence, public as well as personal, in times of need".[1] Moreover, as Lord Mustill has pointed out more recently,[2] some sports have deliberate bodily contact as an essential element, and the courts' approach to sport also reflects a pragmatic realisation that some degree of injury is accepted as inevitable in the course of activities that are regarded as socially beneficial, if properly conducted.[3]

12.2 The attitude of most respondents to the first Consultation Paper reflected the attitude of the Government spokesperson for the Department of National Heritage[4] in a recent debate in the House of Lords when that House declined to give a second reading to a Bill designed to make boxing illegal. She said that the Government considered that it would be a gross infringement of civil liberties to deprive individuals from participating in a properly constituted sport of their choice. On the other hand the Government believed strongly that the utmost attention must be paid to safety, not only in boxing, but in all sports where risk is a factor. What is paramount, she said, was that the element of risk was controllable and containable.

[1] Sir Michael Foster, *Crown Law* (3rd ed 1792) p 260.

[2] In *Brown* [1994] 1 AC 212, 265.

[3] In a recent research study a random sample of 28,000 people between the ages of 16 and 45 were asked about their sporting activities and injuries during a set 4-week period. Rugby football was the sport in which most injuries were caused (100 per 1000 occasions of participation: in association football the comparable figure was 64 per 1000). The medical officer to the Welsh Rugby Football Union has said that currently 50% of all injuries in that sport still occur as a result of legitimate tackling, despite intensive training in the right and the wrong way to do it. Recent rule changes have, however, made a difference. In the 1970s 30% of injuries were due to foul play, but this figure has now been reduced to 8%. See *The Sunday Times*, Style Section, 28 May 1995, p 23.

[4] Baroness Trumpington. See *Hansard* (HL) 5 April 1995, vol 563, col 306. Following the death of James Murray as a consequence of injuries received in a boxing match in Glasgow in October 1995, Iain Sproat MP, Parliamentary Under-Secretary of State at the Department of National Heritage, told the House of Commons that boxing was a terrific sport and that it would be a great shame if this tragic death weighed too heavily. See *Hansard* (HC) 16 October 1995, vol 264, col 9.

12.3 In the first Consultation Paper we considered the present relationship between sport and the criminal law at some length,[5] and we do not propose to repeat that analysis, particularly as our law reform proposals will be made in the context of the provisions of our new Criminal Law Bill. In this area the criminal law should certainly not adopt an unduly protective approach. On the other hand it should signal the state's entitlement to guard against the dangers of uncontrolled brutality and excessive violence. In a rather different context, it has been said:

> What distinguishes sport as a setting for the application of the principles of ... liability is that to a great degree it consists of purposive risk-taking for its own sake. The combination of unpredictable individual behaviour and vigorous physical activity leads to a continually unstable situation in which mishap may easily occur.[6]

12.4 In the first Consultation Paper[7] we discussed the difficulties that arise if too much reliance is placed on a simple concept of "consent" as an explanation of the techniques the criminal law should use in providing protection from brutality and excessive violence in sport. Those who take part in sport will rarely have expressly consented to the intentional infliction of injury upon them. The most that can be said is that by taking part they have impliedly consented to other participants doing acts which are known by everyone to carry *some* risk of unintended injury.

12.5 A draft Bill attached to a recent report of the Law Reform Commission of British Columbia[8] deployed the concept of the "inherent risks" of a sport in the context of proposed occupiers' liability legislation. It defined such risks as the "possibility of physical injury to a user, spectator, or other person, incidental to and inseparable from a recreational activity, that cannot be eliminated by the exercise of reasonable care without fundamentally changing the nature of the recreational activity." It is legitimate to take the view that those who participate in sport impliedly consent to run such "inherent risks" of injury, and that this provides the rationale for any special exemption accorded to the infliction of injury in sport. There remains a need, however, for the law to exercise some degree of supervision over the sporting or recreational activities to which the special exemption may apply. To state in simple terms that the special exemption will apply whenever someone participates in a "recreational activity" does not provide sufficiently stringent safeguards for the purposes of the criminal law.[9]

12.6 In this Part we will describe the responses we received on consultation to the ideas we put forward in the first Consultation Paper[10] for rationalising the law in the

[5] Consultation Paper No 134, paras 10.1 – 10.23.

[6] Law Reform Commission of British Columbia, Report on Recreational Injuries: liability and waivers in commercial activities (1994) p 7.

[7] Consultation Paper No 134, paras 10.1 – 10.18.

[8] Law Reform Commission of British Columbia, Report on Recreational Injuries: liability and waivers in commercial leisure activities (1994).

[9] The British Columbia draft legislation defines "recreational" as "anything relating to recreation": *ibid*, p 63.

[10] See Consultation Paper No 134, paras 41.1 – 47.1.

context of the two different types of offence we proposed in our Criminal Law Bill – intentional injury and reckless injury. We will then review the evidence we received in relation to two types of sporting activity that are at an extreme end of a spectrum, so far as the risk of serious injury is concerned: boxing and some of the modern martial arts. We will conclude this Part by referring to some of our ancillary proposals which were broadly accepted on consultation. In Part XIII below we will put forward a set of proposals for a recognition body for sport which are designed to accommodate some of the worries which some respondents, particularly sports administrators, expressed to us in relation to some of the ideas put forward in the first Paper, and to remove the vaguenesses at present inherent in the undefined concept of "lawful sport".

THE INTENTIONAL INFLICTION OF INJURY

12.7 The proposal in the first Consultation Paper[11] that the intentional infliction of injury should be criminal, provided that appropriate exceptions were made for boxing and certain of the martial arts, met with general acceptance.[12] Some respondents, however, pointed out that it was unsatisfactory to recommend a general rule which then necessitated the creation of an exception for boxing and martial arts.

12.8 One respondent, for example, doubted the value of a general proposition that the intentional infliction of injury in sport should be unlawful if it was then hedged about with rules. He said that any general proposition should have regard to the extent of the consent which reasonably follows from taking part in a particular sport with knowledge of its rules, subject, he thought, to the overriding power of the law to examine the legality of those rules.[13] A similar approach was adopted by an academic respondent who pointed out that the reason for excluding intentionally inflicted injury from the special exemption was that the rules (except in boxing, martial arts etc) do not permit it. We accept these criticisms of our original proposal, and we have taken them into account in drawing up our new proposals.[14]

THE RECKLESS INFLICTION OF INJURY

12.9 In the leading case of *Bradshaw*[15] Bramwell LJ made it clear that reckless conduct, even if within the rules of a game, could lead to criminal liability:

[11] Consultation Paper No 134, para 10.18.

[12] Those in favour of it included the CCPR and the TCCB.

[13] On this issue, see further paras 12.17 – 12.23 below.

[14] See para 12.68 below.

[15] (1878) 14 Cox CC 83. The charge of manslaughter arose out of an incident in a friendly football match on a football field. See also the direction to the jury by Hawkins J in *Moore* (1898) 14 TLR 229, quoted in E Grayson, *Sport and the Law* (2nd ed 1994) pp 155–156. In the first Consultation Paper we said it was difficult to formulate any distinct rules, or indeed to lay one's hand on any clear authority since *Bradshaw,* once one passes outside the area of *intentional* injury. See Consultation Paper No 134, para 10.14.

> [I]f the prisoner intended to cause serious hurt to the deceased, or if he knew that, in charging as he did, he might produce serious injury and was indifferent and reckless as to whether he would produce serious injury or not, then the act would be unlawful.[16]

12.10 Consultation demonstrated that there is some confusion among those concerned with injuries in sport as to the precise meaning of recklessness in this context. The three factors we identified as guidelines[17] to assist the court in deciding whether conduct was reckless had reflected the fact that the definition of what is commonly known as *subjective* recklessness is made up of complex objective and subjective elements. According to the definition in our new Criminal Law Bill,[18] the player must be aware that a risk of injury exists (subjective) and it must be unreasonable for him to take that risk (objective) in the circumstances known to him (subjective). Our suggestions amounted to no more than an explanation of how this definition of recklessness might be applied on the sportsfield.

12.11 We have already discussed our new approach to these issues in Part IV above. In what follows we will set out the responses we received to the suggestions we made in the first Consultation Paper, and then go on to discuss how our new proposals have been designed to meet the main concerns advanced by respondents with expert knowledge of sport.

12.12 The Association of Premier League and Football League Referees and Linesmen told us, for example, that while football players consent to run the risk of accidental injury but not intentionally inflicted injury, there is a third category of injury which it is far more difficult to define and which may cause particular problems with regard to recklessness. It cited as an example the situation where a defender commits a foul by holding back the opposing attacking player. The referee does not stop the match but plays the advantage rule. In that split-second, the attacking player, in an effort to break free, and without looking back, throws out an arm which strikes the defender and breaks his nose.[19]

12.13 In the first Consultation Paper[20] we suggested that it should continue to be an offence to cause injury, while playing sport, by an act of recklessness.[21] Any

[16] In *Venna* [1976] QB 421, 428, James LJ confirmed the correctness of this direction in a non-sporting context. He said "*Bradshaw* ... can be read as supporting the view that unlawful physical force applied recklessly constitutes a physical assault".

[17] Consultation Paper No 134, para 46.1. See para 12.13 below.

[18] See n 21 below for this definition.

[19] We were told that a conviction under section 47 of the Offences against the Person Act 1861 was quashed on appeal. On these facts, the injury was not intentionally inflicted, and unless it resulted in seriously disabling injury (see para 4.51 above), *and* the attacking player was aware of the risk of serious injury, *and* it was contrary to the best interests of the "victim" for the attacking player to take that risk having regard to all the circumstances known to him, there would be no question of a criminal conviction on our proposals. See para 12.31 below.

[20] Consultation Paper No 134, paras 10.15 – 10.18.

[21] In this context we cited the definition in cl 1(b)(ii) of the Criminal Law Bill included in Law Com No 218: "A person acts recklessly with respect to a result when he is aware of a risk that it will occur, and it is unreasonable, having regard to the circumstances known to him, to take that risk."

decision on the reasonableness of the defendant's conduct would be very much a jury matter, we said, and their decision would be influenced by the fact that the injury occurred during a sporting activity. We also suggested that it would be influenced by three other matters: whether the injuries were inflicted outside the course of play; whether the risk, if taken during the course of play, was an unreasonable one bearing in mind three policy considerations;[22] and the conformity of the defendant's conduct to the rules of the game.[23]

12.14 The Bar Council accepted our general approach, as did the Criminal Bar Association. The CPS and the Justices' Clerks' Society, on the other hand, considered that injury caused by a subjectively reckless act in the course of a lawful sport should only be criminal where the injury inflicted was serious and where it was inflicted by an act that constitutes a foul. Among the other respondents there was almost unanimous acceptance of the proposition that injuries inflicted outside the course of play should not benefit from any special exemption.

The test of "reasonableness"

12.15 Considerable anxiety, however, was expressed about the objective test of reasonableness which we suggested. The CCPR said that this test did not take into account any element of subjective decision-making in the heat of the moment and that allowance had to be made for this. The Rugby Football League said that within that game's confrontational philosophy players and coaches are accustomed to indulge in the practice of "psyching out" the opposition by means of running in or tackling somewhat harder than is entirely necessary in order to intimidate and therefore to give themselves a psychological advantage. An academic respondent considered that the potential difficulty in our approach, which he otherwise favoured, was that in the heat of the moment in a sports match it might be asking too much of a player to expect a rational assessment of risk.[24]

12.16 Mr Simon Gardiner, an academic commentator who has interested himself in the relationship between sport and the law, was similarly concerned[25] that inconsistent and oppressive decisions would be created if criminal liability for all bodily contact on the sports field were to be determined by a set of objective criteria. Players would have constantly to evaluate the dangerousness of an act before undertaking it, and this would drastically alter the manner in which games were played. He wrote that the "appeal of contact sports comes from their unrestrained qualities, unpredictability and exploitation of human error, and sheer physicalness.

[22] Viz the requirements of the game, the general expectations of the persons playing it, and the ease with which the player could have achieved his aim within the game by other means. See Consultation Paper No 134, para 46.1.

[23] We suggested that if the court judges those rules to be reasonable, the player's conformity with them will be persuasive, but not conclusive, evidence as to the reasonableness of his conduct. *Ibid*, para 46.1.

[24] However, he felt that as the issue would be one for the jury, the problem would probably not give rise to much practical difficulty.

[25] See S Gardiner, "The Law and the Sportsfield" [1994] Crim LR 513.

Regulation by the criminal law ... for challenges in on-the-ball situations runs the risk of adversely and irreversibly changing the nature and dynamics of organised sports." ACPO said that the difficulty comes in determining what, in the various contexts and rules under which sports and games are played, will constitute unreasonable risk-taking.

The court's power to determine whether the rules are reasonable

12.17 Great anxiety was also expressed by sporting bodies about our suggestion that even if a player's conduct conformed to the rules of the particular sport in question, it might nevertheless be open to a court to regard his or her conduct as having been unreasonable. The CCPR felt that this suggestion ignored the fact that almost all sports are international in character. Sport played at international level is governed by a set of rules which are internationally recognised, and the national federations will normally be constrained to apply the international rules. If a court in this country held that an international rule permitted unreasonably dangerous conduct this would have serious implications for international sporting events in this country.

12.18 The CCPR also felt that if the criminal law imposed its own views on the reasonableness of the rules of a sport without detailed knowledge of a particular sport, then rule changes might have to follow which would not be in the best interests of that sport. "For example, rugby may have to provide that only reasonable and appropriate force was used in a tackle. This could create uncertainty and may even result in more injuries were players to hesitate before deciding how hard a tackle was appropriate. This goes to the root of the consent issue, namely that if a player does not want to be tackled hard, then perhaps he should not be playing rugby."[26]

12.19 The SPTL considered that where there is foresight of injury but no intent to injure, the rules of the game should, where appropriate, provide the justification for what takes place. They thought it was difficult to sustain the proposition that the taking of a risk which was within the rules of the sport would be unreasonable, and subjecting conduct within the rules to a subjective recklessness standard would produce great uncertainty for players. There was, however, in their view, something to be said for the proposition that, notwithstanding literal conformity to the rules of the sport, a player should stop if he or she foresees that serious injury may result unless in the circumstances his or her conduct is non-reckless according to the criteria we had suggested.

12.20 Mr Gardiner considered that an approach pegged to the rules and working culture of the particular sport was more appropriate. He has written:

> Consent to bodily contact and to violence is inferred from participation in play subject to the rules and the working culture within the game. Penalties exist within the rules of the game to penalise infringement. Players expect that in the heat of the action some contact will take place, in on-the-ball incidents, which is

[26] We will refer in Part XIII below to the CCPR's view that the creation of a recognition body for sports would go a long way to resolving these difficulties.

> dangerous and will therefore occasionally cause injury, even severe injury. There is invariably no intent or recklessness towards resultant injury. This conduct may well call for a penalty, but not criminal charges, for it is such an integral part of the game that a player cannot expect to avoid it and therefore must be deemed to have given his consent.[27]

12.21 To be contrasted to this, he suggested, was conduct, perhaps motivated by retaliation, and in any event intended to do bodily harm.[28] He said that the criminal law has a legitimate role to play in intervening, but ideally only after internal regulatory mechanisms have failed effectively to control and penalise such acts.[29] There was a strong argument that sporting supervisory bodies should improve their internal disciplinary procedures.

12.22 In Part IV of this paper we have devoted much more attention to the point repeatedly urged on us by respondents, which is that in activities of this nature those who participate impliedly consent to the risk of injury, and the existence of this consent *must* be taken into account when defining the criteria by which causing injury should be treated as criminally reckless in a sporting context. In the revised proposals we are making in this paper, criminal liability for recklessness will not attach unless three conditions are satisfied:

(1) that the player in question was aware of a risk of seriously disabling injury;

(2) that the risk was not a reasonable risk for him or her to take, having regard to all the circumstances known to him or her (including the consent of the other participants to the risk inherent in playing according to the rules of the sport in question);

(3) the injury resulted in permanent bodily injury, permanent disfigurement etc.

12.23 If these conditions are not satisfied, the matter should not be one for the criminal courts but for the sporting bodies themselves to discipline. If their disciplinary arrangements are satisfactory, then in the last resort their status as a recognised "lawful sport", with all that this involves, may be in jeopardy.

How our proposals would work in practice

12.24 The practical effect of our proposals may be demonstrated by an example taken from the first Consultation Paper: fast bowling in cricket.[30] We will describe the effect of the responses we received, and then show how our new proposals in relation to recklessly inflicted serious injury, coupled with a court's ability to refer

[27] S Gardiner, "The Law and the Sportsfield" [1994] Crim LR 513, 515. See para 12.16.

[28] He gave as an instance of a clear act of retaliation the conviction of Scott McMillan for assault after chasing an opponent and head-butting him during a Scottish rugby match, *The Times*, 4 May 1994.

[29] See the dissenting judgment of Wakeling JA in *Cey* (1989) 48 CCC (3d) 480, 483.

[30] Consultation Paper No 134, para 46.4.

to the rules of a *recognised* lawful sport, will assist it in determining any issue of criminal liability that may be brought before it.

12.25 The TCCB accepted that fast bowling in modern professional cricket is potentially extremely dangerous. On the other hand, it said, fast bowling is an intrinsic part of the sport of cricket, and always has been. It drew our attention to the way its use is regulated. Note 8 to Law 42 of the Laws of Cricket reads:

> The bowling of fast short pitched balls is unfair if, in the opinion of the umpire at the bowler's end, it constitutes an attempt to intimidate the striker. Umpires should consider intimidation to be the deliberate bowling of fast short pitched balls which by their length, height and direction are intended or likely to inflict physical injury on the striker. The relative skill of the striker shall also be taken into consideration.[31]

12.26 An experienced sports administrator confirmed to us that the cricketing authorities were aware of the dangers of irresponsible fast bowling and had taken steps to restrain dangerous play. He did not know whether there were any more severe penalties in the sport than those available to the umpire: he felt that it is within the sport itself that a sound disciplinary framework is needed. Exceptional cases would have to be dealt with by the criminal courts.

12.27 The CCPR's attitude was that if a fast bowler stays within the rules, then there should be no question of a criminal charge even if the batsman he hit was not wearing a helmet and, therefore, suffered a serious injury. The Administrator of the Council of Local Education Authorities gave us the perspective of amateur cricketers. He felt that amateur cricket, with less protective apparel, poorer-quality wickets, and a lower skill level on the part of both batsmen and very fast bowlers, provided a vivid example of the problems. He said that the cricketing authorities had not addressed problems other than in the most general terms and in ways that are designed for the first-class game and, for these reasons, he believed that players should not be at risk of criminal liability; the rules of the game give the umpire the power to control dangerous bowling.[32]

12.28 The National Cricket Association accepted that criminal sanctions ought to be available to deal with those occasions on which the fast bowler has been so reckless that his actions should attract liability. However, it, too, asked what the position would be in respect of amateur cricket, where it is not always possible to rely on an umpire's knowledge of the rules of the game, let alone his ability to enforce them, and the cost of protective equipment is such that it would be unrealistic to make it compulsory.

[31] In 1994 the world governing body for cricket tightened up this rule, for the purposes of Test cricket only, by replacing the words from "unfair if ..." to "on the striker" with the words "unfair if the umpire at the bowler's end considers that by their repetition, and taking into account their length, height and direction, they are likely to inflict physical injury on the striker, irrespective of protective equipment he may be wearing." The reworded note ends: "In short, it will be the umpire's duty to step in quickly if the batsman looks like getting hurt."

[32] As a fast bowler himself, he sought to distinguish between an intention to cause discomfort, an intention to cause pain, and an intention to inflict injury, and he admitted that he could not deny that he had the first two of these intentions from time to time.

12.29 The TCCB thought that an approach testing the lawfulness of a bowler's actions by whether a batsman chose to wear protective equipment would be quite unworkable. Some world class batsmen of the distinction of Viv Richards and Richie Richardson decline to wear helmets, although fully aware of the risks, and a professional tail-ender who chooses not to wear protective equipment is also aware of the risks.

12.30 The Criminal Bar Association noted that trends in games may change, and instanced the different attitude to bodyline bowling in 1933 and today. It said that fast bowlers in professional cricket certainly intend to frighten the batsman, and the batsman is surely consenting at least to the risk of injury, if not serious injury.

12.31 Under our present proposals, provided that the recognition body is satisfied with the rules of cricket, the fast bowler will only be at risk of criminal prosecution if his conduct is clearly outside the rules of the game. If, despite warnings by the umpire, he persists in bowling dangerously and the batsman is injured, then there is no reason why he should not be convicted of a criminal offence if the court is sure that he intended to inflict injury. Even if this intention could not be proved, he would nevertheless be convicted if he inflicted seriously disabling injury on the batsman, if a jury or magistrates were sure that he was aware of the risk that he might inflict such injury on the batsman and the risk was not a reasonable one for him to take. In those circumstances we believe that he would be rightly regarded as culpably reckless and deserve punishment.

BOXING

12.32 Although we made it clear that we regarded the continuing legality of boxing as a matter for Parliament to decide, we received a few submissions to the effect that we should recommend that boxing should be made illegal. It was argued that "just as duelling became unacceptable to the point of being made unlawful, it cannot remain acceptable to spend large sums of public money on treatment for head injuries caused by boxing"; and that "since there is overwhelming medical evidence that professional boxers suffer severe brain and neurological damage, perhaps even impairing their capacity to give valid consent, the Commission must re-evaluate the social value of a sport which allows men to intentionally cause brain damage to each other in the name of a 'tough, virile contact sport'." The Criminal Bar Association referred to the renewed impetus for boxing to be rendered unlawful following the death of the professional boxer, Bradley Stone. There has recently been increased controversy following the world title defence by Nigel Benn in which the challenger, Gerald McClellan, suffered extensive injuries.[33]

12.33 An experienced sports administrator commented that boxing is treated separately by the criminal law because, by its very nature, a high level of consent is required. Because of this, the rules, refereeing and general conduct of a bout must be very strictly controlled. He added that any failure to do everything possible to prevent

[33] See Julian Critchley MP, "How to Regulate the Ring", *The Times*, 1 March 1995 and "Boxing is on Trial for its Life", *Evening Standard*, 28 February 1995.

serious injury to participants would ultimately mean that the future of boxing could be put at risk by legislation.

12.34 The British Boxing Board of Control ("BBBC") told us that there are probably greater safeguards in professional boxing than in any other contact sport. Nobody can take part who is not licensed, and all who wish to box are warned of the risks of the sport and are given thorough medical examination and tests. There are at least two medical officials present at each promotion who are conversant with sports medicine and boxing. There is a referee in the ring who has had considerable training to enable him to identify the circumstances in which to stop a contest to avoid injury. There is also an ambulance present at each promotion which is staffed by paramedics with instructions to go to a named hospital which has already been informed of the promotion. It asserted that statistically there are fewer serious injuries or deaths in boxing than in any other contact sport per hours participated. Other evidence to support these claims was given by members of the House of Lords with great experience of boxing during a recent debate.[34]

12.35 The BBBC also told us that the essence of boxing is not the ultimate infliction of serious injury, as we had asserted in the first Consultation Paper. Nor is it, as we had also asserted, the ultimate objective of every boxer to knock his opponent out.[35] The objective is to win by accumulating a greater number of points than one's opponent, and points are given for both aggression and defence. It accepted, however, that once an opponent is knocked out, he can no longer accumulate points.

12.36 There was no challenge on consultation to our view that boxing originally appears to have been regarded as lawful not through any application of principle, or by reference to the legal rules applying to other sports, but simply because it was not the prize-fighting that was declared unlawful, on grounds as much related to public order as to the law of offences against the person, in *Coney*.[36]

12.37 During the recent debate, the House of Lords heard that a body of neurological surgeons had set up a working party to examine the Board's requirements relating to head injuries, and that the Board had now extended the scheme which aims to minimise acute brain injury by the compulsory attendance of an anaesthetist with the necessary equipment at the ringside. Three peers who supported boxing, however, expressed sympathy for the view that even more might be done to tighten up the rules on safety and to protect those who participated in the sport. Lord Donoughue, for instance, after speaking highly of the Board's requirements and procedures for reducing the risk of serious injury – he instanced the annual medical examinations of licensed boxers, including brain scans, the medical examinations before and after a fight, and the presence of fully equipped ambulances at the scene of fights – discussed the possibility that referees might be

[34] *Hansard* (HL) 5 April 1995, vol 563, cols 288–310.

[35] Consultation Paper No 134, paras 10.19 and 10.20.

[36] (1882) 8 QBD 534. We see that this view is shared by Michael Gunn and David Ormerod in "The Legality of Boxing" (1995) 15 Legal Studies 181, 183, in an article which discusses some of the present issues at much greater length.

instructed to stop fights sooner, and the need to provide more generous insurance compensation for damaged boxers.

12.38 In general, however, there appeared to be a striking difference between the scale of the provision made for safety on an organised basis in the sport of professional boxing, and what we have so far been told about the provision for safety in some of the equally dangerous full-contact, unrecognised martial arts which are also believed to enjoy the benefit of the sporting exemption today. So far as amateur boxing is concerned, we received no evidence to suggest that inadequate controls exist there, and while this second Consultation Paper was in the course of preparation a representative of the Amateur Boxing Association of England told us that that his Association possessed reliable and unambiguous evidence that amateur boxing did not cause chronic brain damage and was, in fact, no more dangerous than football. We continue to take the view, which is reinforced by the outcome of the recent debate in the House of Lords, that the continuing legality of boxing, amateur or professional, is a matter for Parliament to decide.

MARTIAL ARTS

12.39 The phrase "martial arts" originally denoted the ancient fighting systems which originated in the Far East, notably in Japan and China. Most are defensive but some were, and possibly still are, taught in various armies for the purposes of attack. Some systems include the use of swords (Kendo) or other items designed as weapons, or even traditional farm implements as weapons, but we have been told that weapons teachers are rare in the United Kingdom.

12.40 Today, the description "martial arts" is also claimed by fighting systems which incorporate hybrid boxing and unarmed combat techniques, but have little history or moral philosophy. Martial arts can therefore be divided into two streams: those claiming adherence to a (usually Far Eastern) moral philosophy, often of considerable antiquity, and modern forms based on boxing and unarmed combat which have developed over the last 40 years or so, usually with no significant moral philosophy.

12.41 As martial arts became popular in this country their organisation and control became increasingly fragmented, with a plethora of purported governing bodies and a succession of dissident and disparate associations involved in continuing disagreements over the development of these activities. By the end of the 1980s the Sports Council was receiving an increasing amount of information which suggested poor administration of martial arts activities, and confusion over the multiplicity of organisations claiming to be governing bodies for the different activities. There were also allegations of malpractice by individuals who claimed to be qualified instructors.

12.42 In 1990, therefore, the Council conducted a review of martial arts in order to consider which activities warranted recognition.[37] One of the aims of this review was to attempt to secure a single governing body for each recognised activity. During the review the Council conducted an extensive series of meetings, which

[37] For the Sports Council's recognition processes, see paras 13.6 – 13.10 below.

covered such issues as the nature of the activity under discussion, the safety and coaching standards employed, the insurance standards offered to participants, and the democracy of the bodies themselves.

12.43 At the end of the review the Council concluded that the martial arts disciplines could be classified into three broad categories. In the first, there was such a degree of confidence that recognition might safely be accorded both to the activity and to the governing body. In the second, recognition of the activity might be appropriate but there remained competing claims for recognition in respect of a governing body. And in the third were placed those activities where there were doubts about the extent to which the activity itself fulfilled the criteria for recognition. Thai Boxing and Kickboxing fell into this category, and the Council's current list of unrecognised activities also includes Budo/Kobudo, Korean Martial Arts/Sulkido and Shoringi Kempo.

12.44 Following the review, the Sports Council extended recognition to the British Aikido Board; the British Council of Chinese Martial Arts; the British Kendo Association; the British Taekwondo Council; the UK Tang Soo Do Federation; the British Ju Jitsu Association; and the British Karate Federation; and also to the English Karate Governing Body and the Welsh Karate Federation. In particular, the Sports Council recognises Karate as an activity, and the British Karate Federation ("BKF") and the English Karate Governing Board ("EKGB") as its governing bodies. Governing Bodies in Scotland and Northern Ireland are also recognised for some of these activities. Appendix D includes a description of some of the activities for which recognition has been accorded both to the activity and the governing body.

12.45 Martial arts activities fall into five separate but related divisions: light or touch contact; semi-contact; knockdown and grappling with no full-contact strikes to the head; knockdown with full-contact strikes to the head; and full-contact. Appendix D also includes description of activities in the last four of these divisions. A large majority of participants in the martial arts are involved in light contact or semi-contact and do not engage in anything which is potentially life-threatening. The chances of repeated heavy concussive blows being received by a participant are low, although accidents do happen, particularly in light continuous sparring if the refereeing is slack. Heavy blows can be landed, but the level of risk is generally within acceptable boundaries, and one respondent, who gave us a great deal of valuable information, considers it safer in general terms than the type of contact received in amateur boxing. He did not believe there was any need for special regulation in this area since participants are consenting only to a reasonable amount of force being executed against them.

12.46 So far as more dangerous activities are concerned, a number of different Kickboxing and Thai boxing groups applied individually to the Sports Council following its review of martial arts[38] both for recognition of their activity and for the recognition of themselves as the governing body for their activity. In view of the Council's wish to see one governing body for each activity, these different

[38] For this review, see paras 12.42 – 12.44 above.

groups were all invited to a meeting at the Sports Council in July 1992 to discuss how things might be taken further. The meeting was attended by representatives of 11 different organisations,[39] who considered that they represented 98% of those who took part in these two activities in this country. They were unable, however, to give any assurance that the united front which they displayed at that meeting would continue. At this meeting Mr Phil Mayo, of the British Kickboxing Organisation, who was the appointed spokesman for the various groups, said that under 18-year olds were never allowed to take part in heavy contact competitions, in which kicks to the head are permitted. He also said that only 12-year olds and over are allowed to participate in light contact bouts.

12.47 The meeting ended with the participants agreeing to consider making a unified submission to the Sports Council for the assessment of kick boxing and Thai boxing for the purposes of recognition. The Council told them that it was prepared to consider an application for recognition of the activity provided that the application represented the agreed view of the vast majority of those involved in the activity: it also made it clear that the recognition of a governing body for the activity was not at present on its agenda. Following that meeting a new federation, known as the British Thai Boxing and Kickboxing Federation, was formed, and in May 1994 it submitted its Official Rules to the Sports Council. Rule 1.01 provides that the official rules must cover all British Thai boxing and Kickboxing Federation sanctioned events where competitors compete under full contact, Kickboxing or Thai boxing rules.

12.48 The Council also made it clear in July 1992 that it would need to receive a full programme of forthcoming events and competitions from each of the groups involved in the submission, to enable its representatives, accompanied by medical advisers, to visit events at random for the purposes of assessment. To date only one such visit has been made, by prior appointment.

12.49 This visit took place in September 1994 when two senior representatives of the Sports Council attended a Kickboxing tournament which was held at the York Hall in Bethnal Green. They were accompanied by medical officers from the Amateur Boxing Association and the Jockey Club. The tournament was said to be poorly organised, with one young fighter being confused as to the number of rounds in his bout. The Sports Council's representatives also observed mismatched opponents (in terms of weight and ability). A number of kicks went to the opponent's groin, whether intentionally or not,[40] and the flailing punch technique resulted in some elbow blows to the face; differences were observed in the extent to which protective padding and headguards were worn. A particularly

[39] The RAMA Thai Boxing Group, the British Thai and Kickboxing Council, the Amateur Martial Association/WAKO, the Amateur Thai Boxing and Kickboxing Association, the British Kickboxing Union, the United Thai and Kickboxing Federation, the British Kickboxing Organisation, the Sitnarong International Muay Thai Association, the British Muay Thai Association, the World Kickboxing Association and the British Kickboxing Board of Control.

[40] A respondent who has watched Thai boxing on many occasions has told us that competitors are highly at risk in this sport, and that professional Thai boxers have told him that they expect to be made impotent very quickly by fight injuries.

disturbing aspect of the tournament was that some of the competitors were minors.

12.50 Because of the Class II exception we propose in relation to fighting,[41] our proposals in this paper will provide no protection from the criminal law in relation to those who cause injuries to those who consent to injury or the risk of injury in the course of unrecognised activities of the type we have described, because they will not have the protection afforded to lawful sport. We see no reason why there should be any such protection under any new regime for the recognition of sports and martial arts unless those who are involved in the activity are willing to submit it to the discipline of a recognition procedure and to achieve the designation of a "recognised sport". From what we have described in this section, serious attention needs to be given to ensuring that the element of risk in some of these activities is both controllable and containable,[42] and until this is done those who cause injuries intentionally or recklessly while participating in them will and should have no defence[43] if a criminal prosecution is brought against them because they are not participating in a "recognised sport".

AMATEUR PLAY AND PRACTICE

12.51 In the first Consultation Paper we proposed[44] that although the root idea of a sport is that it is engaged in for healthy recreation, any sport-based exemption should not be lost just because professionals are playing the sport for reward or because the setting is informal, and any activity that is reasonably to be regarded as ancillary to the playing of a recognised game, such as practising it, should be included in the exemption. On consultation, these propositions tended to be taken for granted and there was no adverse comment on them.

SECONDARY LIABILITY

12.52 The violent sportsman or sportswoman[45] who inflicts injury on another player may not be the only person to incur criminal liability. It is possible that those who "aid, abet, counsel or procure the commission" of the offence[46] may also face liability as "secondary parties". In its response to the first Consultation Paper the Sports Council invited us to clarify the position, and to explain, in particular, whether sports officials and/or the governing bodies of sport could be held criminally liable for injuries caused by intentional or reckless behaviour on the field of play.

12.53 The relevant law is still to be found in the antique language of the Accessories and Abettors Act 1861: "Whosoever shall aid, abet, counsel or procure the commission of any [offence] ... shall be liable to be tried, indicted and punished

[41] See para 14.16 below.

[42] For this test, see para 12.2 above.

[43] For the possible implications for organisers, managers and spectators under the laws relating to complicity in crime, see paras 12.52 – 12.59 below.

[44] Consultation Paper No 134, para 44.4.

[45] The "principal".

[46] Accessories and Abetttors Act 1861, s 8.

as a principal offender." In 1975 the Court of Appeal said that it was probable that each word carried a separate meaning and that the words should be given their ordinary meaning, if possible.[47] This requirement caused "manifold difficulties",[48] and it has been suggested that there has been a retreat to the status quo ante with the readoption of a flexible interpretation that sees the words being used interchangeably.[49]

12.54 Questions of secondary liability are most likely to arise in a sporting context in the following situations:

(i) presence, of spectators and others, at the scene of the sports event where the offence is committed;

(ii) failure by coaches and sports administrators to exercise control over violent players.

Presence at the scene

12.55 The leading case is *Coney*.[50] There the court held that proof of mere voluntary presence at the fight, without more, was prima facie but not conclusive evidence of aiding and abetting the battery of which the principals were guilty. The secondary liability of the spectator will depend first on proof that his or her presence *did* encourage the commission of a violent offence and, secondly, that he or she *intended* his or her presence to encourage the principal(s). Hawkins J said:

> Encouragement does not of necessity amount to aiding and abetting, it may be intentional or unintentional, a man may unwittingly encourage another in fact by his presence, by misinterpreted words, or gestures, or by his silence, or non-interference, or he may encourage intentionally by expressions, gestures, or actions intended to signify approval. In the latter case he aids and abets, in the former he does not.[51]

12.56 In the later case of *Wilcox v Jeffrey*[52] it was decided, albeit in a non-sporting context, that the defendant's enthusiastic presence at a concert performance by a saxophonist who was an illegal alien was sufficient to amount to the aiding and abetting of the alien in his contravention of the Aliens Order 1920. While mere

[47] *Attorney-General's Reference (No 1 of 1975)* [1975] QB 773.

[48] See Assisting and Encouraging Crime (1993) Consultation Paper No 131, para 2.11. This paper contains a much fuller description of the present law than it is possible to give here.

[49] See C M Clarkson and H M Keating, *Criminal Law: Text and Materials* (3rd ed 1994) p 514: "it is almost certain that no real conceptual distinctions can be drawn between the terms." See also *Attorney-General v Able* [1984] QB 795 where the relevant four words were used as synonyms for "helping". And see, generally, Consultation Paper No 131, paras 2.12 – 2.13.

[50] (1882) 8 QBD 534. This case was concerned with the criminal liability of spectators at an unlawful prize fight.

[51] *Ibid*, at p 557. See also *Tait* [1993] Crim LR 538.

[52] [1951] 1 All ER 464. See Assisting and Encouraging Crime, Consultation Paper No 131, para 2.25.

presence at an "unlawful prize fight"[53] will not, without more, give rise to secondary liability, under our present proposals the organisation of an unrecognised event in which the intentional or reckless infliction of injury is likely to occur, will represent a positive act of encouragement to unlawful activity and is likely to lead to the organisers personally incurring secondary liability in respect of any offences that may be committed by the participants.

12.57 Mr Edward Grayson, who is a member of the Bar with great experience of the law relating to sport, has suggested[54] that the selection by coaches and team managers of players known to be violent on the sports field may provide evidence of encouragement by them in relation to any offences committed by those players in the course of a match.[55] The situation that he identifies may, however, give rise to difficulties in establishing the requisite mens rea. While it may be possible to fix the team manager with secondary liability if he or she is present when a player who is widely known to be violent commits an offence, this will be more problematical in relation to the manager who selects such a player in advance but is not present when he or she subsequently commits an offence. In the latter case, proof of the manager's intention to encourage will be dependent on his or her degree of knowledge[56] that an offence *may* be committed.[57] We have pointed out elsewhere that:

> [I]f the accessory is not present at the scene, but merely assists in advance, a requirement of knowledge of a particular offence in the future may be not only logically unsound, since one cannot "know" the future, but also unduly limiting from the point of view of law enforcement.[58]

Failure to exercise control

12.58 The team manager who fails to withdraw from the field a player who is known to be violent may face secondary liability for a failure to control the actions of that

[53] The dangerous unrecognised martial arts activities discussed in this Part are unlikely to constitute unlawful prize fights, because there is no evidence that they tend to cause a breach of public order (see *Attorney-General's Reference (No 6 of 1980)* [1981] QB 715, 719), but so long as they remain unrecognised, they will be unlawful, if the recommendations in this paper are implemented.

[54] E Grayson, *Sport and the Law* (2nd ed 1994) p 166.

[55] He acknowledges, however, that the matter has not been tested in court.

[56] See *Rook* [1993] 1 WLR 1005. The appellant had taken a leading part in planning a murder. He foresaw the possibility that the plan might be executed and, although he was absent on the day the offence was committed, he did not communicate his withdrawal from the scheme nor stop the others going ahead. It was held that assistance in advance could, even without intention, lead to secondary liability if the accused foresaw the occurrence of the event as a real and substantial risk (*per* Lloyd LJ at 1009F) and did nothing to express his unequivocal withdrawal from a joint enterprise.

[57] It is immaterial that the team manager acts without a motive to further unlawful activity or encourage the criminal. See *NCB v Gamble* [1959] 1 QB 11.

[58] Consultation Paper No 131, para 2.53.

player, if the latter commits a violent offence during the course of a match.[59] In Consultation Paper No 131 we suggested that a failure to exercise control is merely one aspect of the rule that the encouragement or assistance of the principal in the commission of the actus reus can give rise to secondary liability if accompanied by the requisite mens rea.[60]

12.59 We do not consider that any of the issues discussed here raise any particularly unusual questions which cannot be resolved by the general law on secondary liability, but it is as well for sporting authorities to be aware of them.[61]

SCHOOL GAMES AND COMPULSORY SPORTS ACTIVITIES

12.60 So far in this Part we have assumed that those who participate in sports and games do so voluntarily, and in the first Consultation Paper our provisional proposals in relation to the reality of consent spelt out the need for consent to be voluntary or freely given.[62] In that Paper, however, we suggested that the rules on reality of consent do not apply in the context of sports and games.[63] In particular, we said that the proposals we were making about the capacity of minors to consent to violent conduct would not affect the solution we proposed for the playing of compulsory games in schools.[64] We said that in cases involving compulsory games, the defendant is likely to be "as non-voluntary" a participant as his or her "victim" and that he or she should not, therefore, be deprived of the protection that might be afforded by any special exemption for sport.

12.61 In its response the Sports Council invited us to consider the possibility of offering special advice to schools on this topic. The Council said that this issue is likely to become more prominent as a result of the introduction of the new National Curriculum for Physical Education which will soon place increased emphasis on compulsory games.

12.62 The National Council for Schools' Sports referred to the "persuasive element" involved in school sports and the possibility that a teacher, or responsible adult, may encourage a timid child to take part in an activity in which there is an element of risk "but which is done by other children in the normal course of

[59] See *Tuck v Robson* [1970] 1 WLR 741, 746–747. A publican was convicted of aiding and abetting an offence of after hours drinking that had been committed by his customers. Although he had called "time", asked the customers to leave and switched off some of the lights in the bar he had not taken any steps to eject them or to revoke their licence to be on the premises. His conviction was upheld on the basis that he had failed to exercise control over the actions of his customers, the principal offenders.

[60] Consultation Paper No 131, para 2.29.

[61] The consultation period on Consultation Paper No 131 has now closed, but we have deferred work on this project for the time being, due to other priorities, and we would be happy to hear from anyone who wishes to make any further observations to us about how the provisional proposals in that paper might affect the world of sport, particularly in the light of the proposals we are making in the present Paper.

[62] Consultation Paper No 134, paras 24.1 – 31.1.

[63] *Ibid*, para 47.1.

[64] *Ibid*, para 47.1 n 273.

events." The Council doubted whether this could be characterised as undue coercion, although there is clearly a compulsory element involved. It was concerned at the possibility that an intrusive criminal law may affect the ability of young people to obtain the advantages that participation in school sports provides.

12.63 It appeared that our provisional proposals on this topic[65] were broadly supported and raised little adverse comment.

DANGEROUS EXHIBITIONS

12.64 In the first Consultation Paper we observed[66] that although "dangerous exhibitions" was one of the special categories identified as forming an exception to the general rule that consent does not constitute an offence to a charge of inflicting actual bodily harm[67] no decided English case had turned on the existence of this exception. We suggested that the law might properly draw a distinction between situations in which people voluntarily take a risk of injury from some activity engaged in on their own[68] and those in which they run a risk of someone else injuring them. We cited the New Zealand case of *McLeod* in support of the proposition that a context of entertainment does not permit the taking of a risk of serious injury in such circumstances.[69]

12.65 Although we sought views on this topic, we did not elicit much response on consultation. Members of the Association of Circus Proprietors of Great Britain felt that there should be an exclusion in respect of injury which arises out of voluntary participation in live entertainment. They had grave doubts whether any injury would occur from a knife-thrower performing his act. More danger, they thought, came sometimes from volunteers trying to ride a horse or a kicking mule bareback, but they considered that the participants would have had an opportunity of assessing the risks before volunteering to take part. Risky activities of that kind do not, however, fall within the scope of the present project.

12.66 The only academic respondent to confront this issue[70] suggested that a member of the public should not be treated as consenting to the risk of serious injury so much as consenting to take part in the entertainment.

12.67 It appears to us that the new proposals we are making in Part IV of this Paper should provide the appropriate balance and that there is no need to continue to

[65] See para 12.60 above.

[66] Consultation Paper No 134, para 11.16.

[67] See *Attorney-General's Reference (No 6 of 1980)* [1981] QB 715, 719, *per* Lord Lane CJ.

[68] Cinema stunt men, tightrope walkers etc.

[69] *McLeod* (1915) 34 NZLR 430. A skilled marksman shot at a cigarette held in the mouth of a volunteer member of the audience, with the purpose of removing the cigarette ash, but the member of the audience moved his head and the bullet entered his cheek. The defendant was convicted of the statutory offence of causing actual bodily harm under such circumstances that if death had ensued he would have been guilty of manslaughter, on the basis that a lethal weapon was used in risky circumstances and consent would not have operated as a defence. See also Appendix B, para B.54 below.

[70] Charlotte Walsh.

make any special provision for dangerous exhibitions. **We ask whether it would be appropriate, in relation to any particular type of dangerous exhibition, to set an age-limit below which a consent to a risk of injury would not be valid.**

LAW REFORM PROPOSALS

12.68 The wide defence we have provisionally proposed at the end of Part IV of this Paper would provide most of the protection which is needed for sporting activities. The evidence we have received concerning some of the more dangerous modern martial arts suggests to us, however, that it would be valuable to create a regulatory power to set an age limit for consent in certain circumstances. In Part XIII below we will be discussing the need for a recognition body in relation to sport, and provided that such a recognition system is brought into existence, as we recommend at the end of that Part, and the recognition procedures include a careful study of the need for appropriate age-limits to be introduced in relation to certain activities, **we provisionally propose that a person should not be guilty of an offence of causing injury if he or she caused the relevant injury in the course of playing or practising a recognised sport in accordance with its rules.**

12.69 This wide formulation, which broadly follows the approach preferred by Sir John Donaldson MR in *Condon v Basi,*[71] will obviate any need for argument about the nature of the consent that was given. Anyone participating in a lawful sport impliedly consents to the risk of injury, but not to intentionally inflicted injury, unless the rules of the sport permit that, but we do not consider that concepts like "deemed consent"[72] are necessarily very helpful. Those who are playing a lawful sport in accordance with its rules are taking part in an activity which is deemed to be lawful, irrespective of consent.[73] The new formulation we have suggested in relation to recklessly inflicted serious injury should, we believe, set at rest the concerns of sports administrators about some of the ideas we canvassed in the first Consultation Paper. If a serious injury of the type we have expressly defined occurs in the course of a sporting activity, then the player who inflicted it will not be guilty of recklessly inflicting seriously disabling injury unless at the material time he or she was aware that a risk of such injury would occur, and the risk was not a reasonable risk for him or her to take. In making this proposal we are giving effect to the fifth principle in our suggested law reform strategy.[74] **We are**

[71] [1985] 1 WLR 866. See para 4.13 above.

[72] See para 12.20 above.

[73] The reason why the Government can take our property at source is not because we consent but because the law says it can.

[74] See para 2.18 above. We refer to the principle that we will not take the view that a person who participates in an activity that involves the risk of seriously disabling injury, has made a mistake in the context of lawful sports because they are widely regarded as beneficial, provided that the state is satisfied that the risks are properly controllable and containable.

anxious, however, to receive views on the precise formulation of the rule we suggest, since we do not wish a player to lose its protection, for example, merely because he or she happened to be offside on the football field.

PART XIII

A RECOGNITION SCHEME FOR SPORTS AND MARTIAL ARTS

INTRODUCTORY

13.1 The responses on consultation disclosed a need to define more precisely what is meant by the expression "lawful sport". The evidence before us discloses that at present there exists a grey area of the law in which participants in certain "sporting" activities, which the Sports Council is unwilling to recognise, submit themselves to the risk of very severe injuries. There is a particular difficulty in that it is quite common, in the case of these activities, to find no procedures that resemble the controls now being exercised by the British Boxing Board of Control,[1] and it is not at all clear whether those who cause injuries in the course of such activities fall within the protection afforded for "lawful sport".

13.2 There is no accepted definition of "sport", let alone "lawful sport", in this country.[2] The 1993 European Sports Charter contains this definition:

> "Sport" means all forms of physical activity which through casual or organised participation aim at expressing and improving physical fitness and mental well-being, forming social relationships or obtaining results in competition levels.

13.3 It appears to us that if formal machinery were to be brought into existence to examine the rules and organisation of all those sports and martial arts activities in the course of which there is a risk of physical injury at the hands of another, this would go a long way towards resolving some of the difficulties that we identified in Part XII of this paper. It would also serve to meet the desirable policy aim that people ought to be free to participate in whatever sporting activities they choose, provided that the risks involved in those activities are properly controllable and containable.[3] If the rules of a recognised lawful sport permit the intentional infliction of injury, or even of serious injury, then the infliction of such injury should be sanctioned by the criminal law, and it should be for the expert recognition body to ensure that such risks are appropriately controlled. Similarly, if a criminal court is faced with an allegation that seriously disabling injury was caused by reckless conduct on a sportsfield, it will be very much easier for it to

[1] For these controls see para 12.34 above.

[2] The lack of a statutory, or any other, definition has also created uncertainty in other areas of the law. The Commons Registration Act 1965 provides for the registration of town and village greens and defines these, at s 22(1), as, inter alia, land on which the inhabitants of any locality have a customary right to indulge in *lawful sports and pastimes*. However, the same Act does not define what constitutes a "lawful sport or pastime." Some suggestions were made in a recent article: see A Samuels, "Getting Greens Registered" (1995) 139 SJ 948.

[3] For a statement of the policy aims of the present Government, see para 12.2 above.

determine whether the risk of causing such injury was a reasonable one for the defendant to take if it has access to the rules of the sport which have been approved by the appropriate recognition body.

13.4 This approach to the problem has been developed from the submission we received from the CCPR.[4] We have also had discussions with representatives of the Sports Council and with officials of the two departments of state most directly concerned with these issues[5] which suggest that proposals along these lines would be likely to find favour with all those bodies.

13.5 The CCPR had suggested to us in its initial response that a person consents to the risk of injury, and perhaps even serious injury, in an organised sport provided that the rules are complied with. It proposed that "the line should be drawn at the lawfulness of the action in question within the rules of a recognised sport and not a distinction between serious injury and death." In the vast majority of sports, it said, the intentional infliction of serious injury will not escape punishment for the reason that the rules do not allow it. Equally, where intentional infliction of harm up to the level of serious injury is permitted by the rules of a lawful sport it will be encompassed within the ambit of the protection provided for participants in that sport.[6]

RECOGNITION MACHINERY

13.6 The attitude of the Sports Council was that a recognised sporting activity, with a reasonably responsible attitude to minimising risks of harm, should be treated as lawful unless Parliament takes the view that it is so dangerous that it should be outlawed.[7] It is our firm view, however, that if recognised sports are to enjoy the benefit of a partial exemption from the ordinary rules of the criminal law then appropriate recognition machinery will have to be created to satisfy the courts and Parliament that the governing bodies of recognised lawful sports can be trusted to regulate their sports effectively.

13.7 The CCPR suggested that "lawful" in this context ought to mean "recognised" in accordance with a system of recognition which would have to identify criteria for the recognition of less well known sports and, in particular, of the newly emerging martial arts activities.

13.8 The Sports Council[8] already has a system of recognition of sports in place for its

[4] Peter Lawson (CCPR), "The Law Commission Consultation Paper No 134: A response on the issues for sports and games by the Central Council of Physical Recreation" (1994) Vol 2 Issue 3 Sport and the Law Journal 1, 5.

[5] The Home Office and the Department of National Heritage.

[6] See also the suggestions to a similar effect which we have summarised in para 12.8 above.

[7] This is consistent with the views we expressed in the first Consultation Paper about boxing: see Consultation Paper No 134, paras 10.21 – 10.22. See now para 12.38 above.

[8] The Sports Council was incorporated by Royal Charter in 1971. Its power to distribute Government funds to sports organisations is derived from paragraph 2(e) of that Charter.

own purposes.[9] It operates a two-stage process of recognition. A sporting activity itself is recognised first, and then the organisation responsible for that activity may be recognised as the governing body of the sport. The reason why the Council carries out a thorough-going and separate examination of the governing body is because this body may be entrusted with the Government funds that the Council may direct towards it. The Council's assessment criteria contain a requirement that the governing body "must maintain and demonstrate an agreed level of management and financial accountability."[10] They also make reference to the safety standards adopted by a governing body seeking recognition:

> Does the organisation actively encourage an awareness and observance of safety standards and rules for participants, spectators and in respect of equipment and facilities?
>
> Does the organisation provide insurance cover for its members? If so, what type?[11]

13.9 Criteria for the recognition of a lawful sport for the purposes of the criminal law might usefully be developed along the lines of those currently being used by the Sports Council, although they would focus primarily on safety and the steps that are necessary to contain the risk of avoidable injury.

13.10 The Sports Council has also published a set of "key points" to form the basis for discussing whether an activity should be recognised:

- *Physical Skills*: does the activity involve physical skills? are physical skills important for successful participation? can they be developed or are they inherent in the individual?
- *Physical Effort*: does the activity involve physical effort? is it important for successful participation? how important are any mechanical or other aids in comparison to skills and physical effort?
- *Accessibility*: is participation available to all sections of the community and not overly restricted for reasons of cost, gender or on any other grounds?
- *Rules and Organisation*: is there an established structure to the activity with rules and, where appropriate, organised competitions nationally and/or internationally?

[9] These purposes are: to identify those sporting activities with which to be associated and which should be developed; to be able to react to requests for advice from local authorities and others on which activities they should promote; to be able to make comments on the attributes, particularly in relation to safety, of these activities; to be able to make a judgment about the competence of the organisation claiming to be the governing body for an activity; to be able to make a judgment about the financial and other support to be provided by the Council.

[10] Sports Council, Recognition of Activities and Governing Bodies, Sports Council Paper SC (93) 68, para 4.3.

[11] *Ibid*, paras 5.24 – 5.25.

- *Strategy and Tactics*: are there strategies and tactics within the framework of the rules? is developing and employing an awareness of them important for successful participation?

- *Essential Purpose*: what is the essential purpose of the activity? is it some form of physical recreation or is physical recreation a means to another, more basic purpose?

- *Physical Challenge*: does the activity present a physical and/or mental challenge to the participant whether against himself/ herself, others or the environment?

- *Risk*: does the activity involve any degree of risk? is this level acceptable? what safeguards are employed by those taking part to minimise any risk?

- *Uniqueness*: is this a unique activity or is it a variation of another, more similar activity that is already recognised?

- *Other Considerations*: are there any other political, moral or other ethical considerations which might prohibit the Sports Council from recognising the activity?[12]

13.11 Some of these key points would have to be adapted if they were to be deployed as the basis for recognition criteria for the purposes of the criminal law. A number of them are geared towards determining whether an activity is a physical sport rather than a pastime or hobby,[13] or whether the activity is run along accessible, democratic lines. The sort of recognition criteria we have in mind would be principally concerned with safety, with controlling the risk of avoidable injury, and with the procedures for handling injuries when they do occur. To this extent, the eighth and tenth of the Sports Council's key points, coupled with its criteria for recognising the governing body of a sport,[14] are the ones that are the most relevant for our present purposes.

13.12 In addition to identifying the criteria that should be used for the purposes of recognising a lawful sport for the purposes of the criminal law, it will also be necessary to consider the type of body that should be entrusted with the task of recognition.

13.13 The obvious choice would be the Sports Council. This is a well-established body, incorporated by Royal Charter, which already has in place sophisticated machinery for the recognition of sports activities. The present Council is to be replaced by an English Sports Council and a UK Sports Council, both of which will be incorporated under new Royal Charters. These new Councils will,

[12] *Ibid,* paras 1.1 – 1.10.

[13] The Sports Council, for example, recognises game angling and is debating whether to recognise camping as a sporting activity. See Sports Council, List of Recognised Governing Bodies of Sport (5 January 1995).

[14] See para 13.10 above.

presumably, continue to make use of criteria similar to those being used at present for the recognition of sporting activities and of their governing bodies.

13.14 We are aware that there are other sporting interest groups and representative bodies which might feel they ought to form part of any recognition body. The CCPR, for example, told us:

> [P]reference would be for recognition to be determined by a possible future independent representative confederation of various sporting interests and providers. Such a confederation might and probably should include the proposed new UK Sports Council as a constituent member along with the governing body representative organisations and local authorities.[15]

13.15 Senior officials of the Department of National Heritage have, however, made it clear to us that its ministers would be unlikely to be willing to contemplate the creation of yet another public body in this field. We held a meeting in June 1995 which was attended by representatives of the CCPR, the Sports Council and the Department of National Heritage,[16] from which a consensus emerged that it would be desirable if the responsibility for performing recognition duties in this field could be recognised in the Royal Charter for the new UK Sports Council,[17] and that the council should be obliged to consult widely among those with expertise in the relevant sporting activities before reaching decisions on recognition in any particular field. It was also recognised that its responsibilities would have to be underpinned by statute if its decisions on recognition were to be taken into account by the criminal courts.

13.16 Particular attention needs to be given to the treatment of activities that involve the risk that participants may intentionally inflict extremely serious injuries on each other. As we have already said,[18] we continue to take the view that boxing should be treated as a "lawful sport" for the purposes of the criminal law unless and until Parliament decides otherwise. If the recognition body considered for any reason that boxing should have recognition withdrawn from it, then its duties would be limited to making a recommendation to the minister to that effect.

13.17 As to the martial arts activities that are not at present recognised by the Sports Council, the intentional infliction of injury in the course of such activities would be prima facie unlawful if our present proposals[19] were to be implemented unless the activity and a recognisable governing body qualified for recognition. The

[15] Peter Lawson (CCPR), "The Law Commission Consultation Paper No 134: A Response on the issues for sports and games by the Central Council of Physical Recreation" (1994) vol 2 Issue 3 Sport and the Law Journal 1, 3–4.

[16] We have kept the Home Office informed of these discussions, since this is the department with primary responsibility for the criminal law.

[17] It was regarded as inevitable that recognition should take effect throughout the United Kingdom, although this Commission is only concerned with the law of England and Wales.

[18] See para 12.38 above.

[19] Including the Class II exception for fighting otherwise in the course of a recognised sport: see para 14.16 below. For Class II exceptions, see para 2.19 above.

CCPR told us that there was no reason why such activities should not qualify for recognition if those who are responsible for them made an effort to comply with such requirements as were laid down by the recognition body. It considered it would be wrong to set out a list of "recognised" types of activity in a schedule to an Act of Parliament.[20] The recognition body would be able to look at developing rules and practices and to recognise or, if necessary, de-recognise an activity depending on whether its rules and its performances measured up to its criteria for recognition. This is also the way we envisage that the recognition body will proceed.[21]

13.18 The effect of our provisional proposals would be, to put it bluntly, that if people wished to continue to organise and take part in sporting or martial arts activities to which the proposed recognition body is not willing to give the accolade of recognition, then the criminal law would not extend any exemption to those who inflicted injuries on others during the course of such activities, and those who were responsible for organising them might be found guilty as accomplices in any offences that were committed. Even if it is now the case that such activities no longer qualify as unlawful prize fights in themselves,[22] the intentional or reckless infliction of injury in the course of them would constitute a criminal offence, and the present obscurity and consequential unenforceability of the criminal law in this area would be removed.

LAW REFORM PROPOSALS

13.19 In this Part we have set out the reasons why we consider that new machinery for the recognition of sports should be created in support of the criminal law's willingness to afford special treatment to "lawful sports". The creation of this machinery would be consistent with the fifth principle in our suggested law reform strategy.[23] **We therefore provisionally propose that in the context of our other proposals:**

(1) the expression "recognised sport" should mean all such sports, martial arts activities and other activities of a recreational nature as

[20] We received helpful information from the Solicitor to HM Customs and Excise, who took part in drawing up a list of VAT exempt sports for the purposes of what is now Group 10 in Schedule 9 to the Value Added Tax Act 1994. This list was published in VAT Notice 701/45/94. Whilst HM Customs and Excise was assisted by the list of Sports Council recognised activities, that list was not accepted in its entirety because of the statutory definition of the items in that Group. It was decided that an exemption from VAT should only apply to activities that entail a significant element of physical activity. As a result chess and pigeon racing were excluded, although the latter is the subject of a Tribunal appeal.

[21] Except that any proposal to de-recognise a sport once it had been recognised, so that it would in effect become unlawful to take part in it, would ultimately be for Parliament to decide.

[22] In *Attorney-General's Reference (No 1)* [1981] QB 715 Lord Lane CJ considered that with regular policing activities like these are no longer a source of civil disturbance and can effectively be regulated by other sanctions now available in the criminal law.

[23] See para 2.18 above. We are referring to the principle that provided that the state is satisfied that the risks involved are properly controllable and containable, we should not take the view that participating in an activity that is widely regarded as beneficial should be regarded as being against a person's interests.

may be set out from time to time in a list to be kept and published by the UK Sports Council[24] in accordance with a scheme approved by the appropriate minister for the recognition of sports, and the rules of a recognised sport should mean the rules of that sport as approved in accordance with the provisions of such a scheme;

(2) when carrying out its duties in relation to the recognition of any such activity the UK Sports Council should consult such organisations as appear to it to have expert knowledge in relation to that activity.

13.20 **We would welcome views not only in relation to the desirability of the recognition scheme we propose, but also on any points of detail we ought to bear in mind when formulating our final recommendations.**

[24] Or such other body as the responsible minister may from time to time appoint for this purpose.

PART XIV

FIGHTING, HORSEPLAY AND PUBLIC ORDER

INTRODUCTORY

14.1 The criminal law at present possesses two different mechanisms for controlling the incidence of casual fighting. The law relating to offences against the person is concerned with the effect of the assailant's conduct on the other person or persons involved in the fight. The law relating to public order, on the other hand, is concerned with the effect of this conduct on other people in the neighbourhood of the fight. We will consider the relevant provisions of each of these laws in turn.

THE LAW RELATING TO OFFENCES AGAINST THE PERSON

14.2 The law relating to offences against the person at present exonerates those involved in consensual "minor struggles" in which no injury is caused.[1] On the other hand, it is prima facie an offence under the present law if injury is inflicted on a person in the course of casual fighting, and consent affords no defence.[2] This part of the law is based on the principle that it is not in the public interest that people should cause, or should try to cause, each other actual bodily harm for no good reason. It is therefore immaterial whether the act occurred in private or in public. This means that most fights in which heavy blows are struck will be unlawful regardless of consent.[3]

14.3 The common law, however, does afford a defence of consent in relation to rough, undisciplined consensual horseplay where there is no anger and no intention to cause bodily harm.[4] In *Terence Jones*[5] the possibility of this defence was canvassed when teenage boys at a youth club were throwing other boys up in the air in what they called "play fighting", and one of them, who was thrown on three separate occasions, sustained a ruptured spleen. In the even more serious and controversial case of *Aitken*[6] an officer in the RAF suffered severe burns[7] when drunken colleagues poured white spirit over him and lit a match to it at the end of an evening's celebrations. The Court of Appeal said that in the absence of any intent to cause injury, if the victim consented to take part in rough and undisciplined

[1] In the sense of "actual bodily harm" (Offences against the Person Act 1861, s 47) or, as defined in cl 18 of the Criminal Law Bill, "physical injury, including pain, unconsciousness, or any impairment of a person's physical condition, or impairment of a person's mental health".

[2] *Attorney-General's Reference (No 6 of 1980)* [1981] QB 715.

[3] *Ibid*, at p 719.

[4] *Donovan* [1934] 2 KB 498, 508, *per* Swift J, citing *Bruce* (1847) 2 Cox CC 262.

[5] (1986) 83 Cr App R 375.

[6] [1992] 1 WLR 1006.

[7] 35% of his body sustained superficial burns of a life-threatening character: *ibid*, at p 1010.

mess games involving the use of force towards those involved, no offence was committed by any defendant whose participation extended only to taking part in such an activity.[8]

THE LAW RELATING TO THE PRESERVATION OF PUBLIC ORDER

14.4 By section 3(1) of the Public Order Act 1986 a person is guilty of the offence of affray if he uses or threatens "unlawful violence" towards another and his conduct is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety.[9]

14.5 In the report on which most of Part I of the 1986 Act was based we said that we were using the concept of "unlawful violence" to make it clear that not only would any general defence apply according to the circumstances of the case, but that other defences might in appropriate cases exonerate the defendant.[10] The defence of "consensual horseplay" might therefore constitute a defence to a charge of affray.[11] We made it clear that the offence of affray was necessary for cases where there had been a fight but it was difficult to prove causation of injury and the requisite mens rea in relation to a particular person.[12]

14.6 We left open the possibility that consent could furnish a defence to affray when we observed:[13]

> [W]hether or not the participants might be guilty of some other offence, not every fight will be penalised by affray: it seems unlikely, for example, that a personal quarrel between two people involving mutual assaults without the danger of the involvement of others ... would fall within the offence with the limitations which we recommend.[14]

[8] *Ibid,* at p 1021, *per* Cazalet J.

[9] Public Order Act 1986, s 3(1). "Violence" means any violent conduct (s 8). A person is guilty of affray only if he intends to use or threaten violence or is aware that his conduct may be violent or threaten violence (s 6(2)). No person of reasonable firmness need actually be, or be likely to be, present at the scene (s 3(4)). Affray may be committed in private as well as in public places (s 3(5)).

[10] Criminal Law: Offences Relating to Public Order (1983) Law Com No 123, para 3.40.

[11] The reason why this proposition is made cautiously is because, as the Criminal Bar Association pointed out in its response, the offences under the Public Order Act are aimed at the protection of the bystander in relation to whom the consent of the other parties is irrelevant. If the situation gets out of hand during horseplay in the officers' mess, and the staff are terrified, there seems to be no reason in principle why the offence of affray should not be being committed, even if the participants are regarded by the common law to be consenting vis-à-vis each other.

[12] Law Com No 123, para 3.5.

[13] *Ibid,* para 3.38.

[14] This view seems to have been confirmed in *Cotcher and Cotcher* [1993] COD 181 where the Divisional Court upheld the decision of magistrates who had dismissed informations alleging affray when the respondents' fight in a public house had been witnessed by the manager and other customers who simply carried on with what they were doing and did not report the incident to the police. The case was dismissed on the grounds that there was insufficient evidence that a person of reasonable firmness on the scene would fear for his safety.

14.7 We acknowledged that the formulation of the new statutory offence might lead to "mere backyard fights" constituting the offence of affray. We argued, however, that this danger already existed under the common law and that the same considerations applied to the law of assault. We also argued that the requirement that a person of reasonable firmness should be in fear provided a reasonable safeguard against unmeritorious prosecutions and that, in any event, the courts would look unfavourably on prosecutions being brought for trivial fights.

THE RESPONSES ON CONSULTATION

14.8 Professor Christie Davies gave us a very clear exposition of the reasons why, in his view, the state considers it legitimate for it to act to prevent its citizens from using violence against each other:

> At the most abstract level the answer lies in the state's claim to a monopoly of the use of legitimate force. Private armies are illegal and there are strict restrictions on the ownership of lethal weapons, especially guns. The use of violence by one citizen against another infringes this monopoly, disturbs the Queen's peace, and could result in a breakdown of law and order. Also as part of an implicit contract between the state and its unarmed and thus vulnerable citizens, the state guarantees their personal safety from violent attack by others.
>
> The general principles suggested above may be seen as operating in the case of *Coney* where it was held that prize-fights were illegal "disorderly exhibitions" with a "direct tendency to create a breach of the peace."[15] As the Lord Chief Justice Lord Coleridge noted: "An individual cannot by such consent destroy the right of the Crown to protect the public and keep the peace."[16]
>
> Were a defence of consent generally available it would undermine this perfectly proper aim. This would even be the case where two individuals decided to settle a dispute between themselves by means of a duel or fight held in a private and secluded place since (a) such activities become known and provide a set of moral excuses for others minded to use violence in a more public and disorderly way and (b) potential losers ought to be protected against social pressures forcing them to become victims of wounding, GBH or even murder.
>
> Because it is in consequence easier to convict those who inflict violence on others, there is presumably less violence, harm and suffering in our society than there would be if the settling of disputes by consensual violence were legal, as it is in other morally inferior societies to our own, including that of our ancestors. Also to allow private violence by consent is to undermine the restraints on the use of violence generally.[17]

[15] (1882) 8 QBD 534, 549 and 553. See Consultation Paper No 134, paras 5.2 – 5.4.

[16] *Ibid*, at p 567. See Consultation Paper No 134, para 5.3.

[17] In his response Professor Davies went on to explain why in his opinion sport (except boxing and kindred contests which required a different approach), religious mortification and sado-

14.9 Another respondent said that in a civilised society the resolution of conflicts between individuals or groups by physical violence is not acceptable. He went on to say that society provides alternative acceptable outlets, such as dangerous sports, to enable people to exercise in a safe environment their natural human instinct for violence. On the other hand, the view was also put to us that the present state of the criminal law, where a defendant will only escape liability where his or her conduct fell within a *well-established* exception, has the effect of ossifying the law and placing some culturally acceptable forms of dangerous behaviour beyond the criminal law.[18]

14.10 There was no discernible pressure from respondents to relax the criminal law's embargo on the use of violence as a means of settling disputes,[19] although some respondents correctly observed that this would to some extent be the result of implementing our provisional view that people should be allowed, in an unrestricted way, to consent to the risk of injury (as opposed to serious injury). The Justices' Clerks' Society remarked that, generally speaking, levels of violence had increased:

> At one time it was rare to find that once a person had been knocked down he was still attacked. Nowadays a knockdown will frequently be a prelude to a session eg of kicking.

14.11 It follows that if attention is duly paid to the purpose of the criminal law to protect people from the risks of unregulated violence, there should be no relaxation of the law's prohibition of the use of violence as a means of advancing a cause or resolving a dispute, even if this prohibition does represent a restriction on individual autonomy. More attention should be given to the "rough horseplay" exemption than to any question of relaxing the criminal law any further in this area. The Council of Circuit Judges said in its response that the purpose of the criminal law is "to further order and prevent the undermining of society and the values it espouses at a particular time".[20] So far as the first of these aims is concerned, nobody suggested that it was not a proper function of the criminal law to act in furtherance of public order, and the responses on consultation were overwhelmingly to the effect that uncontrolled fighting ought still to be prohibited by the law.

masochistic acts clearly fall outside this model of how and why the state acts to restrain interpersonal violence.

[18] "Such as playground thuggery which is legally dignified as 'rough horseplay'". This respondent added: "The origins of horseplay can be traced to the degrading and pervasive violence of English public schools in the 18th and 19th centuries. The legally sanctioned violence between masters and pupils (reasonable chastisement) and between pupils themselves (rough horseplay) not infrequently resulted in death or serious injury ...": see generally J Chandos, *Boys Together: English Public Schools 1800–1864* (1984).

[19] One very senior judge admitted to being a bit wistful about consensual fighting: "If a couple of men 'step outside' into the pub car park, out of sight of the general public and causing no fright to anybody, is it really the business of the criminal law to intervene?"

[20] This response is, perhaps unconsciously, an echo of a sentence in the Wolfenden Committee's Report in 1957, which stated that "the function of the criminal law is to preserve public order and decency". See the Report of the Committee on Homosexual Offences and Prostitution (1957) Cmnd 247, para 13.

14.12 In the first Consultation Paper we expressed concern about the recent decision in *Aitken*.[21] As we have seen,[22] it was held in that case that the defence of consensual horseplay was potentially applicable to dangerous activities which created a clear risk of bodily harm. We suggested that the present special category of horseplay should be abolished even if a special list of exceptions was retained in an unreformed criminal law.

14.13 On consultation both the Judge Advocate-General and the Director of Legal Services, RAF, were of the clear view that the sooner this special category is abolished the better. The former told us that the defence causes great difficulty in dealing with cases arising in an Armed Service context, and there have been a number of circumstances – usually arising in the context of bullying or abuse of rank – in which drunken behaviour is sought to be excused on the grounds of "horseplay". The latter said that it was difficult to perceive how it is in the public interest for consent to amount to a defence in horseplay cases where there is a risk of serious injury. ACPO agreed that the general defence of horseplay should go: genuine childish horseplay and minor struggles should remain as exceptions. Similar views were expressed by the Criminal Law Committee of the Law Society, the Justices' Clerks' Society, and a large number of other respondents.

14.14 The CPS on the other hand was concerned that if this defence was abolished almost all levels of horseplay, including rough playground games, would become illegal and far too much discretion would be left in the hands of prosecutors. It thought that the limitation that the exception covered only the reckless, not the intentional, infliction of injury, and the need for consent, should provide sufficient protection.

14.15 Two academic respondents felt that if two people willingly engage in an activity knowing that it carries a risk of injury, but not intending serious injury, one of them should not be held liable for recklessly causing non-serious injury to the other. If a risk of accidental injury can be accepted in the interests of entertainment on a football field, one of them asked, why not in a college dining room or officers' mess? Another academic respondent, however, shared our view that it was inappropriate to try to accommodate the dangerous activity that took place in *Aitken* within the existing framework by stretching an analogy with organised sport, since the rules of horseplay are rarely settled in advance or clearly understood by the participants.

LAW REFORM PROPOSALS

14.16 We are impressed by the arguments set out in paragraphs 14.8 to 14.11 above. In principle we consider that the criminal law should continue to afford no protection to those who cause injuries in the course of fights, even if the injured party agreed to take part in the fight, except in the context of recognised sports. Accordingly, such injuries should form a Class II exception[23] to the general rule we

[21] [1992] 1 WLR 1006.

[22] See para 14.3 above.

[23] For this expression, see para 2.19 above.

have suggested in Part IV above. We are making this proposal in accordance with the seventh principle in our suggested law reform strategy.[24]

14.17 When we turn to the troublesome issue of undisciplined horseplay, it is legitimate to point out that under our provisional proposals it will be an issue for the court to decide whether in any particular case a victim consented to the injuries, or to the risk of the injuries, inflicted on him or her. If a codified law of consent were to be introduced along the lines suggested in this Paper, it seems to us to be in the highest degree unlikely that in a case such as *Aitken* any such consent could be successfully identified. Moreover, we consider that the CPS[25] may have underestimated the effect of the principled new law on offences against the person which we have proposed in the Criminal Law Bill, under which liability will only arise in relation to the new offence of intentionally causing injury if it can be shown that the assailant intended to cause injury.[26]

14.18 In spite of these considerations, however, we remain concerned about the appropriate treatment of a residual class of conduct which the common law has consistently refused to criminalise. This conduct may take a number of different forms, but it consists essentially of "larking about", "horseplay", or "mock fights". The pillow-fight that goes a bit too far and ends up in bruises; the playground tussles that end up with cut knees or bruised shoulders; the mock battle between two workmates larking about with sticks and pretending to be swordsmen; the mock pitched battle between Roundheads and Cavaliers in a replay of the battles of the Civil War.

14.19 We consider that if this type of consensual conduct results in a seriously disabling injury, a "horseplay" exception should not be effective to avoid criminal liability, and this new rule may allay a lot of the concerns that have been expressed to us.[27] On the other hand, we share the concern of the CPS that too much would be left to the discretion of prosecutors if some form of "horseplay" exception did not remain in being. We are anxious, however, to receive views on the precise form it should take.

14.20 **We therefore provisionally propose that:**

(1) the intentional or reckless causing of all types of injury in the course of fighting, otherwise than in the course of a recognised sport, should continue to be criminal, even if the person injured consented to injury or to the risk of injury of the type caused; but

[24] See para 2.18 above. We are referring to the principle that in certain cases we will not permit the causing of injury to others, even with a completely voluntary consent, because we are concerned to prevent the increased likelihood of harm to others.

[25] See para 14.14 above.

[26] See the first section of Appendix A below.

[27] See para 14.13 above, for example.

(2) **an exception to this rule should continue to be available where any injury, other than seriously disabling injury, is caused in the course of undisciplined consensual horseplay.**

14.21 **We wish to receive views as to possible definitions of "fighting" and "undisciplined horseplay" that would achieve an acceptable degree of clarity and certainty.**

PART XV

OFFENCES CONCERNED WITH PUBLIC MORALITY AND PUBLIC DECENCY

INTRODUCTORY

15.1 In this Part we consider the legislative controls that are now in place to protect public morality and public decency and some recent proposals that have been made to reform these controls. We will then consider the relationship of these controls to the issues considered in this Paper. We refer, primarily, to the common-law offences of keeping a disorderly house and of committing acts which outrage public decency and the statutory offences relating to brothel-keeping and the performance of homosexual activities in private.

KEEPING A DISORDERLY HOUSE

15.2 In *Tan*[1] the Court of Appeal summarised the principal elements of this offence in these terms:[2]

(a) There must be some element of keeping open house, albeit the premises need not be open to the public at large;

(b) the house must not be regulated by the restraints of morality, or must be unchaste or of bad repute; and

(c) it must be so conducted as to violate law and good order.

15.3 In *Tan* a female prostitute had inflicted "humiliating and perverted sexual treatment" on a man who paid for the treatment. The landlord also used other premises for a similar purpose, and both landlord and tenant were charged with keeping a disorderly house. A submission that no offence was committed when a single prostitute provided sexual services to a single client in private was rejected by both the trial judge and the Court of Appeal, which observed that her services were open to those members of the public who wished to partake of them and held that the offence was committed if they were of such a character and were conducted in such a manner that their provision amounted "to an outrage of public decency" or was "otherwise calculated to injure the public interest to such an extent as to call for condemnation and punishment".[3]

[1] [1983] QB 1053, 1060.

[2] This is a common law offence to which limited statutory attention was given in the Disorderly Houses Act 1751: see *Tan* [1983] QB 1053, 1059.

[3] *Tan* [1983] QB 1053, 1062. The Court of Appeal applied the earlier decisions in *Berg* (1927) 20 Cr App R 38 and *Quinn* [1962] 2 QB 245. In his commentary on *Tan* (1983) Crim LR 404, 405 Professor Sir John Smith said that this test seems to leave it to the jury (or magistrates) to make the law, and to offend against the principle that the criminal law

15.4 The offence is therefore to a considerable extent defined by reference to the elusive criterion of the public interest. It is committed regardless of the fact that no indecency or disorderly conduct is perceptible from outside the house, and there is no requirement that there should be any breach of public order.[4] When representatives of the Metropolitan Police gave evidence to the CLRC in the early 1980s they said that the police only acted against "disorderly houses" in response to complaints from members of the public. These complaints related to three types of premises: "peep shows", or nude encounter parlours offering some sort of display; male saunas frequented by homosexuals; and premises where services of a sado-masochistic nature were offered, usually by one woman.[5] More recently the Divisional Court has held that "the essence of the mischief is the continuity which exists where the use of the premises for a given unlawful purpose becomes notorious".[6]

BROTHEL-KEEPING

15.5 By section 33 of the Sexual Offences Act 1956 it is a summary offence "for a person to keep a brothel, or to manage, or act or assist in the management of, a brothel".[7] It is a question of fact and degree whether premises constitute a brothel within the meaning of this Act.[8] There is no requirement that the brothel should constitute any form of public nuisance,[9] and it is not an essential element of the offence that full sexual intercourse is offered on the premises, or that payment should be proffered for the sexual services.[10] It is possible that a massage parlour where acts of indecency take place could constitute a brothel,[11] and it is equally possible that premises where sado-masochistic activities occur could also be regarded as a brothel for the purposes of this legislation.

should be reasonably definite and certain. For the importance of this principle see Binding Over (1994) Law Com No 222, paras 4.10 – 4.12 and 5.5.

4 In *Brown* (1992) 94 Cr App R 302, 310 those convicted of this offence received the heaviest penalties from the Court of Appeal. The defendants Laskey and Cadman "recruited new participants: they jointly organised proceedings at the house where much of the activity took place: where much of the pain inflicting equipment were stored". Cadman received a 30-month sentence, and Laskey, who had taken no direct part in the corruption of a youth, an 18-month sentence.

5 In order to avoid a prosecution for brothel-keeping. See CLRC, 17th Report, para 3.8. The nuisance to the public involved men being seen leaving the premises showing obvious signs of injury or distress, behaving indecently, vomiting in the vicinity and depositing offensive litter (such as soiled and bloodstained linen) in nearby litter bins.

6 *Moores v DPP* [1992] QB 125, 132, *per* Bingham LJ. The Court of Appeal held that a defendant cannot be convicted if he or she has no knowledge of the facts giving rise to the commission of the offence. *Ibid*, at p 133.

7 The offence was extended, in 1967, to places to which people resort for lewd homosexual practices: see Sexual Offences Act 1967, s 6.

8 *Stevens v Christy* (1987) 85 Cr App R 249.

9 *R v Justices for Port of Holland, Lincolnshire* (1882) 46 JP 312 *per* Grove J.

10 *Kelly v Purvis* [1983] QB 663, 670 and 671.

11 *Webb* [1964] 1 QB 357, when Lord Parker CJ held that the old principle of English law that prostitution is proved if it be shown that a woman offers her body commonly for lewdness

PREVIOUS LAW REFORM PROPOSALS

15.6 In 1976 this Commission recommended that in the light of the other recommendations which were then being made for the reform of the law of conspiracy the common law offence of keeping a disorderly house should be abolished. We referred to the circumstances in which the offence had been used in recent years and concluded that these were or would be satisfactorily dealt with in clear terms in statute law if our other suggestions were accepted.[12] This recommendation, along with others we made at the same time, has not been implemented. In 1985 the CLRC reconsidered the matter, with the benefit of the advice of the Home Secretary's Policy Advisory Committee on Sexual Offences. In addition to recommending the restatement of the brothel-keeping offences in clear modern language, the CLRC recommended that there should be a specific new offence for a person to provide, occupy or manage or assist in the management of premises equipped for the purpose of prostitution involving the infliction of pain or injury. It adopted, approvingly, the law as stated in the leading cases which provides that for reasons of public policy it is no defence to an offence of causing injury to the person that the "victim" consented.[13]

15.7 We codified the CLRC's recommendations in sections 126–130 of the Draft Criminal Code:[14]

> 126 In sections 127 to 130 "premises" includes, where parts of a building are separately occupied, any two or more of such parts as are occupied by prostitutes (whether one or more in each part) carrying on prostitution under common direction or control.
>
> 127 A person is guilty of an offence if he manages, or assists in the management of, premises in connection with their use, in whole or in part, for the purpose of prostitution by more than one prostitute.
>
> 128 A person is guilty of an offence if –
>
> (a) he lets premises knowing that it is intended to use them, in whole or in part, for the purpose of prostitution by more than one prostitute; or

for payment in return includes cases where a woman offers herself as a participant in physical acts of indecency for the sexual gratification of men.

[12] Criminal Law: Report on Conspiracy and Criminal Law Reform (1976) Law Com No 76, paras 3.29 – 3.30, 3.139, 3.143 and Draft Conspiracy and Criminal Law Reform Bill, cl 22(2)(d).

[13] CLRC, 17th Report, paras 3.7 – 3.11. The CLRC said that it was mindful of the importance of preventing people from inflicting pain or receiving pain or injury for sexual purposes, and cited *Donovan* [1934] 2 KB 498 and *Attorney-General's Reference (No 6 of 1980)* [1981] QB 715.

[14] Draft Criminal Code, ss 126–130. We noted that the CLRC proposed that the new offence which is codified in s 130 would replace the aspect of the law on disorderly houses applied in *Tan* [1983] QB 1053, on the assumption that the common law offence of keeping a disorderly house would be abolished as we had recommended in 1976 (see para 15.6 and n 12 above); see the Code Report, vol 2, para 15.65.

(b) being the lessor of premises, he knowingly permits such use to continue.

129 A person is guilty of an offence if, being the tenant or occupier or person in charge of any premises, he knowingly permits their use, in whole or in part, for the purpose of prostitution by more than one prostitute.

130 A person is guilty of an offence if he provides, occupies, manages or assists in the management of, premises which he knows to be equipped for the purpose of prostitution including the infliction of personal harm.

15.8 These recommendations have not been implemented, and the law in this area remains as stated in paragraphs 15.2 to 15.4 above. It has not yet been tested in the European Court of Human Rights. In our report on Binding Over[15] we described how that court had formulated two broad principles to illuminate the requirement of the Convention that coercive obligations can only be imposed on citizens through legal rules which are expressed with reasonable certainty. First, the law must be "accessible": the citizen must have an adequate indication of the legal rules which are to be applied in any given case. Secondly, "a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct".[16] In the present law reform project we are not concerned with the precise formulation of these offences, but it seems reasonable to assume that English law cannot remain indefinitely in its present state and that a tighter formulation, along the lines of that suggested by the CLRC, is likely to come into force sooner or later.

OFFENCES AGAINST PUBLIC DECENCY

15.9 Under the present law it is an offence for men to commit buggery or gross indecency otherwise than in private.[17] There is no corresponding statutory provision in the case of heterosexual acts, but the common law offence of committing acts outraging public decency still survives. The Court of Appeal has recently held that this offence consists of the deliberate commission of an act which is per se lewd, obscene or disgusting.[18] In so doing it applied the approach of Lord Simon of Glaisdale in *Knuller*:[19]

> It should be emphasised that "outrage" like "corrupt" is a very strong word. "Outraging public decency" goes considerably beyond offending the susceptibilities of, or even shocking, reasonable people. Moreover

[15] Binding Over (1994) Law Com No 222, paras 5.4 – 5.5.

[16] *Sunday Times v UK* (1979) 2 EHRR 245, 271.

[17] Sexual Offences Act 1967, s 1(1). The section goes on to provide that an act that would otherwise be treated for the purposes of this Act as being done in private shall not be so treated if done (a) where more than two persons take part or are present; or (b) in a lavatory to which the public have or are permitted to have access, whether on payment or otherwise. *Ibid*, s 1(2).

[18] *Rowley* [1991] 1 WLR 1020.

[19] [1973] AC 435, 495.

the offence is, in my view, concerned with recognised minimum standards of decency, which are likely to vary from time to time.

15.10 When the CLRC reported on these matters in 1984,[20] it said that in its opinion and in the opinion of the Home Secretary's Policy Advisory Committee the law, in spite of its liberalisation in 1967, still represented an unjustified interference with the privacy of homosexuals in their own homes.[21] On the other hand, in some areas, modern statute law did not go far enough. It therefore made four recommendations designed to clarify and simplify the law, while at the same time extending the control of the criminal law explicitly to cover heterosexual acts of sexual intercourse and acts of gross indecency performed in public places, including clubs and other places of common resort.[22] These proposals were also designed in part, to furnish a statutory alternative to the common law offence of keeping a disorderly house.

15.11 These recommendations by the CLRC, as carried forward into the Draft Criminal Code, proscribe the commission of certain sexual acts[23] with another person (a) in a public place; or (b) in a place visible from a public place or from premises other than that place; or (c) in the premises of a club or other place of common resort, in such circumstances that the act is likely to be seen by members of the public and the person who performs it knows that the act is likely to be seen by them.[24] They have not been implemented.

CONCLUSIONS

15.12 We are not concerned in this project with this part of the law, which was reviewed only ten years ago by the CLRC with the assistance of the Home Secretary's Policy Advisory Committee on Sexual Offences. If, however, the infliction of injury on a consenting adult were to be decriminalised along the lines suggested in this Paper, there would be continuing uncertainty about the effect of the decision in *Tan* which it would be desirable to remove by statute. In the light of some of the evidence we have set out in Part X above, it may be thought preferable to

[20] CLRC, 15th Report, Part X.

[21] *Ibid*, para 10.16. See, now, the view expressed by one respondent at para 10.39 above that the law prohibiting sex between men in private where a third party is present is in practice a dead letter. The Australian Federal Parliament has recently legislated on issues related to those discussed in this Part. Section 4(1) of the Human Rights (Sexual Conduct) Act 1994 provides: "Sexual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth, a State or a Territory, to any arbitrary interference with privacy ... ." The legislation was actually prompted by frustration at the reluctance of certain States (notably Tasmania) to decriminalise consensual adult homosexual sexual activity. It is unclear whether the privacy right contained in subsection 4(1) would extend to protect the *Brown* appellants from criminal liability. These issues are more fully explored in a recent article: S Bronitt, "Legislation Comment: Protecting Sexual Privacy under the Criminal Law – Human Rights (Sexual Conduct) Act 1994 (Cth)" (1995) 19 Criminal Law Journal 222.

[22] *Ibid*, para 10.27.

[23] Sexual intercourse or acts of buggery or gross indecency.

[24] Draft Criminal Code, s 120(2). Section 121 of the Draft Code, which is also based on CLRC recommendations in the same report, provides that a man is guilty of an offence if he performs an act of buggery or gross indecency with another man in a lavatory to which the public have or are permitted to have access, whether on payment or otherwise.

acknowledge that since this type of activity would no longer constitute a criminal offence in itself, regulatory control should be concentrated on the need to put in place licensing arrangements comparable to those we describe in Part IX above,[25] which are aimed at ensuring and promoting safe and hygienic practices. There would seem to be little merit in trying to preserve a law banning the provision of sado-masochistic services by a single prostitute operating on her own, particularly as the present law, on the evidence before us, is far more honoured in its breach than in its observance.[26]

[25] In relation to piercing, etc.

[26] For the relevance of this consideration, see Appendix C, paras C.103 – C.104 below.

PART XVI

SUMMARY OF PROVISIONAL PROPOSALS AND ISSUES FOR CONSULTATION

In this second, extended, Consultation Paper we have raised a large number of issues, and have made provisional proposals on many of them. We summarise here our provisional proposals and the other issues on which we are seeking respondents' views. It will be very helpful, wherever possible, if respondents use the same numbered headings in relation to issues on which they are proffering their views in this new round of consultation. We will also welcome views on any other issues respondents wish us to consider, whether they are mentioned elsewhere in this paper or otherwise fall within the scope of this project.

The need for the same principles to be adopted in relation to consent in other criminal offences in which consent is an issue

1. We provisionally propose that the proposals contained in paragraphs 12–30 below should apply not only to offences against the person and sexual offences but also to every other criminal offence in which the consent of a person other than the defendant is or may be a defence to criminal liability.

(Paragraphs 1.24 – 1.27)

Intentional causing of seriously disabling injury

2. We provisionally propose that the intentional causing of seriously disabling injury (as defined at paragraph 7 below) to another person should continue to be criminal, even if the person injured consents to such injury or to the risk of such injury.

(Paragraphs 4.3 – 4.6 and 4.47)

Reckless causing of seriously disabling injury

3. We provisionally propose that –

   (1) the reckless causing of seriously disabling injury (as defined at paragraph 7 below) should continue to be criminal, even if the injured person consents to such injury or to the risk of such injury; but

   (2) a person causing seriously disabling injury to another person should not be regarded as having caused it recklessly unless –

      (a) he or she was, at the time of the act or omission causing it, aware of a risk that such injury would result, and

      (b) it was at that time contrary to the best interests of the other person, having regard to the circumstances known to the person causing the

injury (including, if known to him or her, the fact that the other person consented to such injury or to the risk of it), to take that risk.

(Paragraphs 4.7 – 4.28 and 4.48)

Secondary liability for consenting to seriously disabling injury

4. We provisionally propose that, where a person causes seriously disabling injury to another person who consented to injury or to the risk of injury of the type caused, and the person causing the injury is guilty of an offence under the proposals in paragraphs 2 and 3 above, the ordinary principles of secondary liability should apply for the purpose of determining whether the person injured is a party to that offence.

(Paragraphs 1.20 – 1.23)

Intentional causing of other injuries

5. We provisionally propose that the intentional causing of any injury to another person other than seriously disabling injury as defined at paragraph 7 below (whether or not amounting to "grievous bodily harm" within the meaning of the Offences Against the Person Act 1861 or to "serious injury" within the meaning of the Criminal Law Bill) should not be criminal if, at the time of the act or omission causing the injury, the other person consented to injury of the type caused.

(Paragraphs 4.29 and 4.49)

Reckless causing of other injuries

6. We provisionally propose that the reckless causing of any injury to another person other than seriously disabling injury as defined at paragraph 7 below (whether or not amounting to "grievous bodily harm" within the meaning of the Offences Against the Person Act 1861 or to "serious injury" within the meaning of the Criminal Law Bill) should not be criminal if, at the time of the act or omission causing the injury, the other person consented to injury of the type caused, to the risk of such injury or to the act or omission causing the injury.

(Paragraphs 4.29 and 4.50)

Definition of seriously disabling injury

7. We provisionally propose that for the purpose of paragraphs 2–6 above "seriously disabling injury" should be taken to refer to an injury or injuries which –

   (1) cause serious distress, and

   (2) involve the loss of a bodily member or organ or permanent bodily injury or permanent functional impairment, or serious or permanent disfigurement, or severe and prolonged pain, or serious impairment of mental health, or prolonged unconsciousness;

and, in determining whether an effect is permanent, no account should be taken of the fact that it may be remediable by surgery.

(Paragraphs 4.29 – 4.40 and 4.51)

Meaning of consent

8. We provisionally propose that for the purposes of the above proposals –

   (1) "consent" should mean a valid subsisting consent to an injury or to the risk of an injury of the type caused, and consent may be express or implied;

   (2) a person should be regarded as consenting to an injury of the type caused if he or she consents to an act or omission which he or she knows or believes to be intended to cause injury to him or her of the type caused; and

   (3) a person should be regarded as consenting to the risk of an injury of the type caused if he or she consents to an act or omission which he or she knows or believes to involve a risk of injury to him or her of the type caused.

(Paragraphs 4.3 – 4.28 and 4.52)

Mistaken belief in consent: offences against the person

9. We ask –

   (1) whether it should in itself be a defence to an offence of causing injury to another person that –

      (a) at the time of the act or omission causing the injury, the defendant believed that the other person consented to injury or to the risk of injury of the type caused, or to that act or omission, and

      (b) he or she would have had a defence under our proposals in paragraphs 5 and 6 above if the facts had been as he or she then believed them to be; or

   (2) 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 or her position that the other person did not so consent, or

      (b) he or she was not capable of appreciating that that person did not so consent.

(Paragraphs 7.1 – 7.28 and 7.31)

Mistaken belief in consent: sexual offences

10. We provisionally propose that, if (but only if) the defence of mistaken belief in consent to injury, or to the risk of injury, or to an act or omission causing injury, were to be available in relation to offences against the person only where one of the conditions set out in paragraph 9(2) is satisfied, it should similarly be no

defence to a charge of rape or indecent assault that the defendant mistakenly believed that the other person consented to sexual intercourse or to the alleged assault unless one of those conditions is satisfied.

(Paragraphs 7.29 and 7.32)

Burden of proof on the issue of consent or mistaken belief in consent in relation to offences against the person

11. If the proposals in paragraphs 5 and 6 above were accepted, we ask –

(1) whether it should be for the defence to prove, on the balance of probabilities,

(a) that the person injured consented to injury of the type caused, or (in the case of injury recklessly caused) to the risk of such injury or to the act or omission causing the injury, or

(b) that the defendant believed that that person so consented (and, if such a belief were to be a defence only where one of the conditions set out in paragraph 9(2) is satisfied, that one of those conditions is satisfied); or

(2) whether it should be for the prosecution to prove, beyond reasonable doubt,

(a) that that person did not so consent, and

(b) that the defendant did not so believe (or, if such a belief were to be a defence only where one of the conditions set out in paragraph 9(2) is satisfied, that neither of those conditions is satisfied).

(Paragraphs 4.41 – 4.45, 4.53 and 7.33)

Persons without capacity

12. We provisionally propose that, for the purposes of any offence to which consent is or may be a defence, a valid consent may not be given by a person without capacity.

(Paragraphs 5.19 – 5.21)

Definition of persons without capacity

13. We provisionally propose that a person should be regarded as being without capacity if when he or she gives what is alleged to be his or her consent –

(1) he or she is under the age of 18 and is unable by reason of age or immaturity to make a decision for himself or herself on the matter in question;

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

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

(Paragraphs 5.19 – 5.21)

Capacity and minors

14. We provisionally propose that –

(1) in relation to those matters in which a person under the age of 18 may give a valid consent under our proposals, such a person should be regarded as unable to make a decision by reason of age or immaturity if at the time the decision needs to be made he or she does not have sufficient understanding and intelligence to understand the information relevant to the decision, including information about the reasonably foreseeable consequences of deciding one way or another or of failing to make the decision; and

(2) in determining whether a person under the age of 18 has sufficient understanding and intelligence for the above purposes, a court should take into account his or her age and maturity as well as the seriousness and implications of the matter to which the decision relates.

(Paragraphs 5.1 – 5.11 and 5.21 – 5.22)

Mistaken belief in consent: statutory age-limits

15. Where there is a statutory age-limit below which no valid consent can be given, we ask –

(1) whether it should in itself be a defence that –

(a) at the time of the alleged offence, the defendant believed that the other person's age was above that limit, and

(b) he or she would have had a defence if the other person's age had been above that limit; or

(2) 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 or her position that the other person's age was or might be under that limit, or

(b) he or she was not capable of appreciating that the other person's age was or might be under that limit; or

(3) whether such a belief should be irrelevant to liability.

(Paragraphs 7.30 and 7.34)

Mistaken belief in consent: section 6(3) of the Sexual Offences Act 1956

16. We ask whether the special defence to the offence of unlawful sexual intercourse provided by section 6(3) of the Sexual Offences Act 1956 should be retained or should be replaced by whatever general rule is thought appropriate in respect of mistaken belief as to another person's age.

(Paragraphs 7.30 and 7.35)

Capacity and the mentally disabled

17. We provisionally propose that –

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

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

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

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

(Paragraphs 5.1 – 5.2, 5.12 – 5.17 and 5.21 – 5.22)

Capacity to understand in broad terms

18. We provisionally propose that a person should not be regarded as being unable to understand the information referred to in paragraphs 14(1) and 17(1) above if he or she is able to understand an explanation of that information in broad terms and simple language.

(Paragraphs 5.16 – 5.17 and 5.19 – 5.22)

Types of deception that may nullify consent

19. We provisionally propose that a person should not be treated as having given a valid consent, for the purposes of any offence of doing an act without such consent, if he or she gives such consent because he or she has been deceived as to –

(1) the nature of the act; or

(2) the identity of the other person or persons involved in the act.

(Paragraphs 6.11 – 6.18 and 6.79)

Other types of fraudulent misrepresentation that may nullify consent

20. We ask –

(1) whether a fraudulent misrepresentation that a person has been found to be free from HIV and/or other sexually transmitted diseases should form an exception to the general rule that fraud should nullify consent only where it goes to the nature of the act or the identity of the other person or persons involved in the act;

(2) if so, in what terms this new class of misrepresentation should be formulated; and

(3) whether there are any other specific types of misrepresentation that also call for extraordinary treatment.

(Paragraphs 6.19 and 6.80)

An offence of procuring consent by deception

21. We provisionally propose 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.

(Paragraphs 6.18 and 6.81)

A definition of "deception"

22. We provisionally propose that for the purposes of this offence "deception" should mean any deception (whether deliberate or reckless) by words or conduct as to fact or as to law, including a deception as to the present intentions of the person using the deception or any other person.

(Paragraphs 6.7 and 6.82)

Inducing another person to perform an act on oneself by deception

23. We ask –

(1) whether it should be a specific offence for a person to induce a man by deception to have sexual intercourse (vaginal or anal) with him or her;

(2) if so, whether the offence should be confined to deceptions as to a particular kind of circumstance, and if so what; and

(3) whether it should include inducing another person by deception to perform any acts other than sexual intercourse, and if so what.

(Paragraph 6.20 – 6.21 and 6.83)

The duty to communicate information

24. We ask whether there are any particular circumstances in which the criminal law should impose an express duty to communicate information upon a person who wishes to rely on a consent to the causation of injury or to the risk of injury caused by him or her.

(Paragraphs 6.22 – 6.23 and 6.84)

Self-induced mistake

25. We provisionally propose that a person should not be treated as having given a valid consent to an act if he or she gives consent because of a mistake as to –

(1) the nature of the act,

(2) the identity of the other person or persons involved in the act, or

(3) any other circumstance such that, had the consent been obtained by a deception as to that circumstance, it would not have been treated as valid,

if the defendant knows that such a mistake has been made or is aware that such a mistake may have been made.

(Paragraphs 6.24 – 6.27 and 6.85)

Non-disclosure

26. We invite views on –

(1) how the law should deal with the obtaining of consent by the non-disclosure of material facts;

(2) whether (if it is thought that any such non-disclosure should be criminal) the law should set out, in respect of each class of offence, the facts that must be disclosed;

(3) if so, what those facts should be in each case; and

(4) whether it should be a specific offence for one person to induce another, by non-disclosure of such a fact, to perform an act (and if so what kinds of act) upon him or her.

(Paragraphs 6.29 – 6.33 and 6.86)

Inducement by threats of non-consensual force

27. We provisionally propose that a person should not be treated as having given a valid consent, for the purposes of any offence to which consent is or may be a defence, if he or she gives such consent because a threat, express or implied, has been made to use non-consensual force (including detention or abduction) against him or her or another if he or she does not consent, and he or she believes that, if he or she does not consent, the threat will be carried out immediately or before he or she can free himself or herself from it.

(Paragraphs 6.34 – 6.37 and 6.87)

The effect of other threats on the validity of consent

28. We ask for views on whether a person should be treated as having given a valid consent where he or she gives consent because of a threat other than one falling within paragraph 27 above.

(Paragraphs 6.38 – 6.72 and 6.88)

An offence of procuring consent by threats

29. If a person is to be treated as having given a valid consent in such circumstances, we ask for views on our suggestion that –

(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 that 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.

(Paragraphs 6.47, 6.64, 6.71 and 6.89)

Special consideration for a particular class of threat

30. We invite comments on what the law should be in relation to a case where an apparent consent is procured by an offer to avert a consequence of such a kind that, if the apparent consent were procured by the offeror's threat to bring that consequence about, that threat would nullify the consent altogether so as to incur for the offeror liability for the more serious offence to which consent is a defence.

(Paragraphs 6.72 and 6.90)

Exception for proper medical treatment and care

31. We provisionally propose that –

(1) a person should not be guilty of an offence, notwithstanding that he or she causes injury to another, of whatever degree of seriousness, if such injury is caused during the course of proper medical treatment or care administered with the consent of that other person;

(2) in this context "medical treatment or care"

(a) should mean medical treatment or care administered by or under the direction of a duly qualified medical practitioner;

(b) should include not only surgical and dental treatment or care, but also procedures taken for the purposes of diagnosis, the prevention of disease, the prevention of pregnancy or as ancillary to treatment; and

(c) without limiting the meaning of the term, should also include the following:

(i) surgical operations performed for the purposes of rendering a patient sterile;

(ii) surgical operations performed for the purposes of enabling a person to change his or her sex;

(iii) lawful abortions;

(iv) surgical operations performed for cosmetic purposes; and

(v) any treatment or procedure to facilitate the donation of regenerative tissue, or the donation of non-regenerative tissue not essential for life.

(Paragraphs 8.1 – 8.37, 8.49 and 8.50)

Exception for properly approved medical research

32. We provisionally propose that –

(1) a person should not be guilty of an offence, notwithstanding that he or she causes injury to another, of whatever degree of seriousness, if such injury is caused during the course of properly approved medical research and with the consent of that other person; and

(2) in this context the term "properly approved medical research" should mean medical research approved by a local research ethics committee or other body charged with the supervision and approval of medical research falling within its jurisdiction.

(Paragraphs 8.38 – 8.49 and 8.51)

Cosmetic piercing etc

33. We ask whether the age-limit of 18 should be retained for tattooing, and whether any similar (and if so, what) age limit should be introduced in relation to a young person's ability to give a valid consent to (a) piercing below the neck[1] (b) branding; or (c) scarification, when performed for cosmetic or cultural purposes.

(Paragraph 9.24)

34. We ask whether the present statutory definition of tattooing is regarded as satisfactory, and whether it is thought that there ought to be a statutory definition (and if so, what) of piercing, branding or scarification for the purposes of the criminal law.

(Paragraph 9.25)

35. We provisionally propose that the special provision relating to mens rea in section 1 of the Tattooing of Minors Act 1969[2] should be repealed and replaced by whatever rule is thought appropriate in relation to the issue of mistaken belief as to a person's age in the context of statutory age-limits in general (see paragraph 15 above).

(Paragraph 9.26)

36. We provisionally propose that the circumcision of male children, performed with their parents' consent in accordance with the rites of the Jewish or Muslim religions, should continue to be lawful.

(Paragraph 9.27)

37. We seek the views of our respondents as to whether any pre-consolidation reform is required to the Prohibition of Female Circumcision Act 1985.

(Paragraph 9.29)

[1] We envisage that issues relating to piercing above the neck for decorative purposes (in the ear or the nose, for instance) can safely be left to the general rules in relation to offences against the person that are proposed above, although we would be interested to hear from any respondent who disagrees.

[2] See para 9.4 and n 10 above.

Injuries intentionally caused for sexual, religious or spiritual purposes

38. We provisionally propose that for the purpose of the proposals contained in paragraphs 5 and 6 above any consent given by a person under 18 to injuries intentionally caused for sexual, religious or spiritual purposes[3] should not be treated as a valid consent.[4]

(Paragraphs 10.52 – 10.55)

Lawful correction

39. We ask –

(1) whether there are any issues relating to consent that have escaped our notice in relation to the defence of lawful correction;

(2) whether the statutory language of section 1 of the Children and Young Persons Act 1933 and of section 47 of the Education Act 1986, as amended, creates any difficulties in practice in relation to the defence of lawful correction.

(Paragraphs 11.1 – 11.20)

Exception for recognised sport

40. We provisionally propose that a person should not be guilty of an offence of causing injury if he or she caused the relevant injury in the course of playing or practising a recognised sport in accordance with its rules.

(Paragraphs 12.1 – 12.63 and 12.68)

41. We wish to receive views on the precise formulation of the rule we suggest, since we do not wish a player to lose its protection, for example, merely because he or she happened to be offside on the football field.

(Paragraphs 12.1 – 12.63 and 12.69)

42. We provisionally propose that in the context of these proposals:

(1) the expression "recognised sport" should mean all such sports, martial arts activities and other activities of a recreational nature as may be set out from time to time in a list to be kept and published by the UK Sports Council[5] in accordance with a scheme approved by the appropriate minister for the recognition of sports, and the rules of a recognised sport should mean the

[3] We will be interested to know whether it would be necessary to make an exception in relation to the causing of injury for such purposes in the course of proper medical treatment (Part VIII above).

[4] Subject always to the possibility of a defence being available if any of our suggestions in para 15 above are eventually adopted.

[5] Or such other body as the responsible minister may from time to time appoint for this purpose.

rules of that sport as approved in accordance with the provisions of such a scheme;

(2) when carrying out its duties in relation to the recognition of any such activity the UK Sports Council should consult such organisations as appear to it to have expert knowledge in relation to that activity.

(Paragraphs 13.1 – 13.19)

43. We would welcome views not only in relation to the desirability of the recognition scheme we propose, but also on any points of detail we ought to bear in mind when formulating our final recommendations.

(Paragraph 13.20)

Dangerous exhibitions

44. We ask whether it would be appropriate, in relation to any particular type of dangerous exhibition, to set an age-limit below which a consent to a risk of injury would not be valid.

(Paragraphs 12.64 – 12.67)

Fighting and horseplay

45. We provisionally propose that:

(1) the intentional or reckless causing of all types of injury in the course of fighting, otherwise than in the course of a recognised sport, should continue to be criminal, even if the person injured consented to injury or to the risk of injury of the type caused; but

(2) an exception to this rule should continue to be available where any injury, other than seriously disabling injury, is caused in the course of undisciplined consensual horseplay.

(Paragraphs 14.1 – 14.20)

46. We wish to receive views as to possible definitions of "fighting" and "undisciplined horseplay" that would achieve an acceptable degree of clarity and certainty.

(Paragraph 14.21)

APPENDIX A

RELEVANT PROVISIONS IN THE PRESENT LAW, THE CRIMINAL LAW BILL, AND THE DRAFT CRIMINAL CODE

1. Offences against the person

Relevant extracts from the 1993 Criminal Law Bill

1 For the purposes of this Part a person acts –

(a) "intentionally" with respect to a result when

(i) it is his purpose to cause it ...

(b) "recklessly" with respect to –

(ii) a result when he is aware of a risk that it will occur,

and it is unreasonable, having regard to the circumstances known to him, to take that risk.

2(1) A person is guilty of an offence if he intentionally causes serious injury to another.

3(1) A person is guilty of an offence if he recklessly causes serious injury to another.

4 A person is guilty of an offence if he intentionally or recklessly causes injury to another.

5(1) A person is guilty of an offence if, knowing that the other does not consent to what is done, he intentionally or recklessly administers to or causes to be taken by another a substance which he knows to be capable of interfering substantially with the other's bodily functions.

6(1) A person is guilty of the offence of assault if –

(a) he intentionally or recklessly applies force to the body of another –

(i) without the consent of the other, or

(ii) where the act is intended or likely to cause injury, with or without the consent of the other; or

(b) he intentionally or recklessly, without the consent of the other, causes the other to believe that any such impact is imminent.

The absence of consent is a necessary ingredient of the offences of unlawful detention (cl 11), kidnapping (cl 12), and abduction of a child by a parent (cl 14): see also, in relation to these offences, the interpretation clause (cl 17).

2. Sexual offences

(i) Some relevant provisions of the present law

Code:

CJPOA	Criminal Justice and Public Order Act 1994
MHA	Mental Health Act 1959
MH(A)A	Mental Health (Amendment) Act 1982
SOA	Sexual Offences Act 1956
SOA 1967	Sexual Offences Act 1967
SO(A)A 1976	Sexual Offences (Amendment) Act 1976

1 (1) It is an offence for a man to rape a woman or another man.

(2) A man commits rape if –

(a) he has sexual intercourse with a person (whether vaginal or anal) who at the time of the intercourse does not consent to it; and

(b) 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.

(3) A man also commits rape if he induces a married woman to have sexual intercourse with him by impersonating her husband. (SOA s 1(1) as substituted by CJPOA s 142)

2 It is an offence for a person to procure a woman, by threats or intimidation, to have sexual intercourse in any part of the world. (SOA s 2(1), CJPOA s 168(1), (3), Sched 9, para 2 and Sched 11)

3 It is an offence for a person to procure a woman, by false pretences or false representations, to have sexual intercourse in any part of the world. (SOA s 3(1), CJPOA s 168 (1), (3), Sched 9, para 2 and Sched 11).

4 It is [an offence] for a man to have unlawful sexual intercourse with a girl under the age of thirteen. (SOA s 5)

5 It is an offence, subject to the exceptions mentioned in this section, for a man to have unlawful sexual intercourse with a girl ... under the age of sixteen.

A man is not guilty of an offence under this section because he has unlawful sexual intercourse with a girl under the age of sixteen, if he is under the age of twenty-four and has not previously been charged with a like offence, and he believes her to be of the age of sixteen or over and has reasonable cause for the belief. (SOA s 6(1) and (3))

6 It is an offence, subject to the exception mentioned in this section, for a man to have unlawful sexual intercourse with a woman who is a defective.

A man is not guilty of an offence under this section because he has unlawful sexual intercourse with a woman if he does not know and has no reason to suspect her to be a defective. (SOA s 7 (1) and (2))

7 Notwithstanding any statutory or common law provision ... a homosexual act in private shall not be an offence provided that the parties consent thereto and have attained the age of eighteen. (SOA 1967 s 1(1), CJPOA s 145(1))

8(1) It is [an offence] for a person to commit buggery with another person otherwise than in the circumstances described in subsection (1A) below.

(1A) The circumstances referred to in subsection (1) are that an act of buggery takes place in private and both parties have attained the age of eighteen.

(1B) An act of buggery by one man with another shall not be treated as taking place in private if it takes place –

(a) when more than two persons take part or are present; or

(b) in a lavatory to which the public have or are permitted to have access, whether on payment or otherwise.

(1C) In any proceedings against a person for buggery with another person it shall be for the prosecutor to prove that the act of buggery took place otherwise than in private or that one of the parties to it had not attained the age of eighteen. (SOA s 12(1), CJPOA s 143)

9 It is an offence ... for a person to make an indecent assault on a woman [man].

A girl [boy] under the age of sixteen cannot in law give any consent which would prevent an act being an assault for the purposes of this section.

A woman [man] who is a defective cannot in law give any consent which would prevent an act being an assault for the purposes of this section, but a person is only to be treated as guilty of an indecent assault on a defective by reason of that incapacity to consent, if that person knew or had reason to suspect her [him] to be a defective. (SOA s 14(1), (2) and (4); [s 15(1)–(3)])

10 In this Act "defective" means a person suffering from a state of arrested or incomplete development of mind which includes severe impairment of intelligence and social functioning. (SOA s 45, as substituted by MHA s 127(1)(b), and amended by MH(A)A 1982 s 65(1) Sch 3, Pt I para 29)

11 It is hereby declared that if at a trial for a rape offence the jury has to consider whether a man believed that a woman was consenting to sexual intercourse, the presence of 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. (SO(A)A 1976 s 1(2))

(ii) Some sample extracts from the 1989 Draft Criminal Code

89(1) A man is guilty of rape if he has sexual intercourse with a woman without her consent and –

(a) he knows that she is not consenting; or

(b) he is aware that she may not be, or does not believe that she is, consenting.

(2) For the purposes of this section a woman shall not be treated as consenting to sexual intercourse if she consents to it –

(a) because a threat, express or implied, has been made to use force against her or another if she does not consent and she believes that, if she does not consent, the threat will be carried out immediately or before she can free herself from it; or

(b) because she has been deceived as to –

(i) the nature of the act; or

(ii) the identity of the man.

90 A person is guilty of an offence if he procures a woman by threats or intimidation to have sexual intercourse in any part of the world.

91 A person is guilty of an offence if he procures a woman by deception to have sexual intercourse in any part of the world.

94(1) A man is guilty of an offence if he has sexual intercourse with a girl under the age of sixteen unless –

(a) he believes her to be his wife; or

(b) he believes her to be aged sixteen or over.

95 [Buggery in same terms as s 89 [rape], mutatis mutandis]

106(1)A man is guilty of an offence if he has sexual intercourse with a woman who is severely mentally handicapped unless –

(a) he is severely mentally handicapped; or

(b) he believes that the woman is not suffering from any mental handicap.

111 A person is guilty of an indecent assault if he assaults another in such a manner, of which he is aware, or in such circumstances, of which he is aware, as are –

(a) indecent, whatever the purpose with which the act is done; or

(b) indecent only if the act is done with an indecent purpose and he acts with such a purpose.

APPENDIX B

COMPARATIVE LAW

EUROPEAN PENAL CODE JURISDICTIONS[1]

Introduction

B.1 Most European penal codes provide that no public prosecution may be brought for less serious assaults in the absence of a complaint by the aggrieved person. These codes appear to recognise that in certain circumstances it is the wishes of the victim that ought to determine whether or not a prosecution should be brought. This represents an acknowledgement that at certain levels of injury *harm* should be judged in terms of the harm to the victim, as opposed to harm to wider public interests which, in other jurisdictions, including our own,[2] have been called in aid to justify prosecutions for assault even where the victim has consented to some degree of injury.

B.2 In addition to this procedural mechanism by which criminal prosecutions for assault may not be brought at all, the penal codes of some other European States provide that an act which might otherwise constitute an assault may be "justified" if the victim has consented.

Denmark

B.3 Section 244(5) of the Danish Penal Code provides that a public prosecution for the offence of committing violence, or otherwise attacking the person of others,[3] shall "take place only where required by considerations of public policy." The reference to public policy considerations gives the prosecuting authorities a potentially wide discretion.

B.4 The limitation on public prosecution provided by section 244(5) does not cover the more serious offences of assault on a pregnant woman (section 244(2)) or violence resulting in "damage to the person or health of the injured party" (section 244(3)).

B.5 The Code also provides[4] that where the injured party has given his consent to an assault covered by section 244(1) then an act that would otherwise constitute an

[1] The material set out in paragraphs B.1 – B.22 below is based upon the most up-to-date Penal Code translations that we have been able to locate. It is possible that at least some of these Codes have been amended or up-dated since the translations available to us were published. We should, therefore, make it clear that the material in paragraphs B.1 – B.22 is intended to be used only as a *guide* to alternative approaches rather than as an entirely accurate presentation of the criminal law of the relevant European countries. We hope that any errors may be brought to our attention.

[2] See *Attorney-General's Reference (No 6 of 1980)* [1981] QB 715, 719A.

[3] This offence is created by s 244(1) of the Code.

[4] *Ibid*, s 248(1).

assault is not punishable, and also that in the event of consent "the penalty may be reduced" for assault offences other than that contained in section 244(1). Section 248(2) provides that "where blows have been inflicted in a brawl or where the person attacked has returned such blows, the penalty may be reduced or may, in the circumstances dealt with in section 244(1) of the Act, be remitted."

Finland

B.6 Offences against life and health are set out in chapter 21 of the Finnish Penal Code. Section 14 of the Code provides that the public prosecutor shall not institute charges for assault or petty assault[5] unless the complainant reports the offence for the institution of charges. No immunity from prosecution is provided for the more serious offence of aggravated assault.[6]

B.7 The procedural immunity contained in section 14 will be lost if the assault "takes place on a public road, square or another public place or in a public function or meeting or in the presence of an authority ... or if a weapon or other mortally dangerous instrument is used in the assault." It appears, therefore, that in this Code there is an attempt to define the situations in which the accused may lose the immunity from prosecution that might otherwise be available under section 14.

France

B.8 The new French Penal Code categorises degrees of harm or injury in terms of the resultant incapacity of the victim. This incapacity is measured by the period of time for which the victim is unable to work.[7]

Federal Republic of Germany

B.9 Offences against the person are set out in section 17 of the German Penal Code. The offence of "physically abusing another or causing impairment to the health of another" appears in section 223. The Penal Code defines "dangerous bodily harm" in section 223a in terms of the causation of bodily harm by means of a weapon and, in particular, "a knife or other dangerous instrumentality." Section 224 defines "aggravated bodily harm" in terms of the loss of an "important part" of the victim's body which might include "sight in one or both eyes, hearing, speech or ... procreative capacity, or ... a serious permanent deformity ..." or deterioration into invalidity, paralysis or mental illness. Section 225 imposes a higher tariff for sentences of imprisonment if the results described in section 224 were intended. Section 226 creates a separate offence of bodily harm where this is followed by death.

[5] These offences are set out in ss 5 and 7 of the Code.

[6] This offence is defined, in s 6 of the Code, as the intentional causation of serious bodily injury, a serious illness or mortal danger, or if the "... offence is committed in a manner manifesting exceptional brutality or cruelty or if a weapon or another mortally dangerous instrument is used ..., and the assault in the cases mentioned above or in other cases, with due consideration to the totality of circumstances ... is to be regarded as aggravated."

[7] See Articles 222-1, 624-1 and 625-1. See also paras 4.29 – 4.40 above.

B.10 The German approach to issues of consent is to provide that "whoever commits bodily harm with the consent of the victim acts unlawfully only if his conduct, despite the existence of consent, is *contrary to good morals.*"[8] While it is therefore possible, at least in theory, to give a legally effective consent to a wide degree of bodily harm, the prosecuting authorities retain a potentially wide discretion since conduct causing bodily harm may still be unlawful if such conduct is contrary to "good morals".

B.11 Section 232(1) provides that intentional bodily harm, under section 223, shall be prosecuted only "upon formal complaint[9] unless, because of a special public interest in the criminal prosecution, the law enforcement authorities deem it advisable to officially intervene." By this means some procedural limitation is placed upon the bringing of prosecutions for assault-type offences. However, in common with the approach adopted in other European Code jurisdictions, this limitation is qualified by the possibility of prosecution, in the absence of complaint, where there is an overriding public interest.

Greece

B.12 Chapter 16 of the Greek Penal Code contains the offences against the person. In particular, article 308(1) of the Penal Code creates the offence of intentionally causing another to suffer bodily ill-treatment or injuring the health of another. Article 308(2) provides that bodily injury, as described in article 308(1), "shall be justified if caused with the consent of the victim and it is not *contra bonos mores.*" Greek law therefore provides that the causation of bodily injury shall not be an offence or, rather, that there will be a justificatory defence if the victim has consented. The conduct in question must not, however, be *contra bonos mores.* Uncertain policy factors, based on grounds of public benefit or good morals, may still be used to nullify the effect of any consent which has been given.

B.13 Article 315(1) of the Code provides that a prosecution under article 308 shall only be brought if a complaint has been made. This provision, therefore, creates a procedural limitation on criminal liability for assault. It appears that this limitation will still apply regardless of any extraneous public policy considerations.

Italy

B.14 Article 581 of the Italian Penal Code defines assault as striking another where the act does not result in physical or mental illness. This offence is punishable *only after complaint by the victim.*[10] The offence of "personal injury" is defined, in article 582, as the causation of personal injury to another "which results in physical or mental illness." This article goes on to provide that "if the illness lasts no longer than ten days, and none of the aggravating circumstances designated in Articles 583 and 585 is present ... the crime shall be punishable on complaint of the

[8] Penal Code, s 226a.

[9] If the victim of the assaultive conduct dies, the right to file a formal complaint and, thereby, to initiate a prosecution passes to the surviving relatives of the deceased (s 231(1)).

[10] It is stated, however, that this "... provision shall not apply when the law deems the violence to be a constituent element or an aggravating circumstance of another offence."

victim." Article 583 includes "serious personal injury" among "aggravating circumstances" according to the following definition:

> Personal injury shall be serious ... :
>
> (1) if the act results in an illness which endangers the life of the victim, or an illness or incapacity which prevents his attending to his ordinary occupations for a period in excess of forty days;
>
> (2) if the act produces the permanent impairment of a sense or organ; or
>
> (3) if the victim was a pregnant woman and the act resulted in an acceleration of birth.[11]

B.15 The Code sets limits on procedural immunity from prosecution for offences of assault by a strict definition of the categories and species of harm for which the immunity will not be available. In other words, the availability of the procedural immunity is controlled by the level of harm which has been caused rather than by any extraneous moral or public policy considerations.

Norway

B.16 Chapter 22 of the Norwegian Penal Code sets out the felonies against another's person, life and health. The offence of assault is contained in section 228 of the Code. It is defined as the "commission of violence against another or the bodily violation of another." A higher tariff of sentence is provided if the assault has caused injury to body or health or considerable pain. This section of the Code also provides that "if an assault is retaliated with another assault or provoked by a previous assault or offence against honour, punishment may be omitted." Section 229 provides a penalty for "anybody who injures another in body or health, or puts another in a state of feebleness, unconsciousness or similar condition."

B.17 The Norwegian Penal Code adopts an approach similar to that taken by other European Code states in that sections 228 and 229 both provide that a public prosecution "shall not be initiated without the request of the victim unless the felony has resulted in somebody's death or prosecution is required in the public interest." The effect of this provision is that in Norway no prosecution may be initiated for any non-fatal assault, however serious, in the absence of a request from the victim, subject to the wide discretion given to prosecutors to initiate a prosecution where the public interest requires it.

B.18 In addition to this procedural limitation on prosecution, the Penal Code also provides, in section 235, for substantive relief from punishment for assault "when the act is committed against someone who has consented thereto." Section 235

[11] The article also provides that personal injury shall be *very serious* "if the act results in: (1) an illness which is certainly or probably incurable; (2) the loss of a sense; (3) the loss of a limb, or mutilation which renders the limb useless, or the loss of the use of an organ or of ability to procreate, or a permanent and serious speech impediment; (4) a deformity or permanent disfigurement of the face; or (5) a miscarriage by the victim."

provides that "If somebody is killed or seriously injured in body or health with his own consent or if anybody kills a hopelessly sick person out of mercy, or is accessory thereto, the punishment may be reduced below the minimum provided, and to a milder form of punishment." Under section 236, however, anyone who assists another to commit suicide or to inflict upon himself serious injury to body or health, is to be punished for complicity to homicide or the infliction of serious bodily injury upon the person who consented. Punishment is not to be imposed where death or serious injury do not in fact occur.

Sweden

B.19 Crimes against life and health are set out in Part 2, Chapter 3 of the Swedish Penal Code. In section 5 of the Code the offence of assault is defined as the infliction of bodily injury, illness or pain upon another or rendering "him unconscious or otherwise similarly helpless." Aggravated assault is defined separately in section 6, which provides that gravity is to be judged by paying special attention to "whether the deed involved a mortal danger or whether the offender had inflicted grievous bodily injury or severe illness or had otherwise shown great ruthlessness or brutality."

B.20 Section 11 of the Code provides that causing bodily injury or illness may "if the crime is not grave" be subject to public prosecution only if the aggrieved person reports the crime for prosecution. This Code contains no public policy qualification, subject to the express provision in section 11 that a public prosecution *will* be brought if the injury or illness was suffered in the capacity of employee and prosecution is called for in the public interest. The Code does not provide for any limitation on prosecution or for any justificatory defence in circumstances where the "victim" has consented. Instead, reliance is placed on the liberally drafted procedural immunity from prosecution which we have mentioned above.

Turkey

B.21 The Turkish Penal Code also contains a procedural immunity from prosecution in the case of non-serious battery. The fourth paragraph of article 456 provides that "if the battery did not cause any sickness or non-attendance at the victim's usual occupation or such results did not continue more than ten days ... legal proceedings may be commenced only upon the victim's complaint."

B.22 A variety of aggravating factors are used as a means of limiting the availability of this procedural immunity. The fifth paragraph of article 456 provides that if the offence of battery is committed by use of the means specified in paragraph 457,[12] then "the commencement of legal proceedings is not contingent upon the filing of a complaint."[13]

[12] Viz if the battery is committed against "... one's wife, husband, brother, sister, adopted parents, adopted child, step-mother, step-father, step-son or daughter, father-in-law, mother-in-law, son-in-law, or daughter-in-law, or, ... by means of poisoning ... ."

[13] The immunity is also lost if the offence is committed by use "of a hidden or manifest weapon or a corrosive chemical", or if the battery is committed: "(1) against an ascendant or descendant;

COMMON LAW JURISDICTIONS

Australia

THE DEGREE OF HARM OR INJURY TO WHICH IT IS POSSIBLE TO GIVE A VALID CONSENT

The common law jurisdictions

B.23 The victim's consent will, in general, provide an effective means by which to avoid liability for what would otherwise amount to a common assault. There is uncertainty, however, about the degree of harm, over and above that inflicted in the commission of a common assault, to which it is possible for a victim to give a valid consent. In the civil case of *Pallante v Stadiums Pty Ltd (No 1)*[14] a boxer sought damages for negligence in respect of injuries he had sustained in the course of a properly regulated boxing contest. He brought an action against the parties responsible for the conduct and organisation of the fight and the defendants sought to strike out the statement of claim on the ground that the fight was unlawful. McInerney J decided that the boundary of consent should be fixed at the level of grievous bodily harm. Any consent to "bodily harm" which exceeded this level would be ignored.

B.24 A leading textbook writer has argued,[15] however, that this decision was based on the rather confused use of the expression "bodily harm" in the English case of *Donovan*.[16] He suggests that the interpretation of bodily harm given in the *Pallante* case will need to be revised in the light of the more recent English decision in *Attorney-General's Reference (No 6 of 1980)*,[17] which is to the effect that bodily harm means "actual bodily harm." If this is correct, the Australian common law rules as to the degree of harm to which a victim can validly consent are the same as in England.

The Criminal Code jurisdictions

B.25 In Queensland section 245 of the Criminal Code defines assault as the application of force, or the threat of the application of force, of any kind to the person of another without consent, or with consent if that consent is obtained by fraud. The Code also provides that the application of force may be unlawful even though it is done with the consent of the victim.[18] This section of the Code has been

(2) against a member of the Grand National assembly; (3) under a brutal feeling or with torture; (4) with premeditation; (6) through ... means such as fire, flood and shipwreck; (7) in order to prepare, facilitate or commit a separate crime even if it cannot be consummated; (8) in order to get the fruits of a crime or to conceal the preparation made for that purpose or in the heat of anger resulting from failure to achieve the goal of a crime; (9) in order to conceal a crime or to destroy the evidence and traces thereof, or to enable himself or someone to run away from punishment; (10) with the motive of blood feud."

[14] [1976] VR 331.

[15] P Gillies, *Criminal Law* (3rd ed 1993) p 325, n 97.

[16] [1934] 2 KB 498.

[17] [1981] QB 715, 719D.

[18] Criminal Code, s 246(2).

interpreted as merely making it clear "that those offences involving the application of force to a person where the absence of consent is not made an element, eg murder or grievous bodily harm, are indifferent to consent and remain unlawful despite its presence and the absolving effects of that presence in the case of assault."[19] The offences of common assault and assault occasioning actual bodily harm are to be found in sections 335 and 339 of the Code.

B.26 In *Lergesner v Carroll*[20] the court was concerned with a charge of assault occasioning actual bodily harm arising out of a fist fight between two men. The complainant had invited the accused to fight him after a heated discussion about mangoes at a social club, and the accused raised the defence of consent. The court held that consent could, in certain circumstances, be used as a means to avoid liability under section 339 of the Code. Shepherdson J emphasised that it was a question of fact whether the degree of violence used in the assault exceeded that to which consent had been given. Cooper J employed a novel distinction, based upon the categorisation of offences as they appear in the Code, as a means of setting the boundaries for a valid consent. He said that Part V of the Code (which deals with offences against the person) established two types of offence: those involving assaults, with or without circumstances of aggression, and those more serious offences where assault was *not* an element of the offence.

B.27 Cooper J argued that the Queensland legislature had already determined the areas where consent was immaterial by making them non-assault offences. Because Section 339 of the Code incorporated assault as an element of the offence, this indicated that the legislature intended consent to be a potential defence to a charge under that section. Section 246 of the Code, on the other hand, merely preserved the position that consent would be immaterial to the more serious, non-assault, offences like murder. He went on to say that in assault cases the consent would be set by the person giving it; the law would not impose any limitations and the jury would decide whether there had been a valid consent to the application of force. It was for Parliament rather than the courts, he said, to impose policy-based limitations on the scope of consent. Despite the welcome that *Lergesner v Carroll* received in some quarters[21] it has also been the subject of some criticism.[22]

B.28 In 1992 the Queensland Criminal Code Review Committee considered the proper role of consent to harmful assaults.[23] It proposed that a person should be able to consent to the application of force causing bodily harm but not to the doing of

[19] *Raabe* [1985] 1 Qd R 115, 126, *per* Derrington J.

[20] [1991] 1 Qd R 206. This was a decision of the Queensland Court of Criminal Appeal.

[21] See J Devereux, "The More Things Change, the More they Stay the Same: Consent to Serious Assaults in Queensland" (1991) 16 UQLJ 282.

[22] See, for example, D Kell, "Consent to Harmful Assaults Under the Queensland Criminal Code: Time for a Reappraisal?" (1994) 68 ALJ 363, where it is argued that on a proper interpretation of the Queensland Code the distinction drawn by Cooper J between assault element offences and more serious, non-assault, offences is unsustainable.

[23] Final Report of the Queensland Criminal Code Review Committee (1992), pp 199–200.

serious bodily harm or the causation of serious disfigurement.[24] It also suggested the repeal of the Criminal Code provisions dealing with assault occasioning bodily harm and wounding and their replacement with a new offence of "doing bodily harm" which would expressly incorporate the absence of consent as a constituent element. There would also be a new offence of "doing serious bodily harm" or "causing serious disfigurement", for which any consent would be irrelevant.

B.29 The Tasmanian Criminal Code defines assault as the "act of intentionally applying force to the person of another, directly or indirectly, or attempting or threatening by any gesture to apply such force to the person of another."[25] The Code provides that an assault is not unlawful if "committed with the consent of the person assaulted unless the act is otherwise unlawful, and the injury is of such a nature, or is done under such circumstances, as to be injurious to the public, as well as to the person assaulted, and to involve a breach of the peace."[26] The recent case of *Holmes*[27] involved a fight between the accused and his wife. The accused was charged with assault and raised a defence of consent. The Tasmanian Supreme Court held that there can be no valid consent to force which is likely or intended to cause and does cause bodily harm.

THE VALIDITY OF CONSENT

B.30 A leading textbook writer has said that to "threaten V with a worse alternative unless V submits to violence will involve, of course, that V does not consent to this violence."[28] He also argued that fraud will vitiate any consent obtained as a result of it. In *Papadimitropoulos*[29] the defendant in a rape case had induced the victim to have intercourse with him by fraudulently making her believe that they were married. The High Court of Australia held that her consent was effective. The fraud did not go to the nature of the act. Rape is the "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 a 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."[30]

B.31 *Papadimitropoulos* was considered by the Supreme Court of Tasmania in *Woolley v Fitzgerald*.[31] The defendant had entered a patient's ward while pretending to be a doctor, and, in the course of what must have appeared to be a medical

[24] It would, therefore, be possible to consent to injury up to, but not including, serious bodily harm, which would be defined as "any bodily injury of such a nature as to endanger or be likely to endanger life, or to cause permanent injury to health", being the definition for "grievous bodily harm" in s 1 of the present Code. "Serious disfigurement" is not defined in the report.

[25] Criminal Code Act 1924, s 182(1).

[26] *Ibid*, s 182(4).

[27] (1993) 2 Tas R 232.

[28] P Gillies, *Criminal Law* (3rd ed 1993) p 327.

[29] (1957) 98 CLR 249.

[30] *Ibid*, at p 261.

[31] [1969] Tas SR 65.

examination, undid the patient's pyjamas, placed his hand on the patient's chest and partly undid a bandage. The court held that *Papadimitropoulos* was capable of being applied to assault as well as to rape. The patient had only consented to submit to a medical examination by a member of the hospital staff. The fraud of the defendant went to the identification of himself as a doctor and this had induced in the patient a belief that he was being medically examined. In this way the defendant's fraud went to the "character" of the act so as to nullify any consent.

B.32 *Papadimitropoulos* was more recently applied in *Mobilio.*[32] The applicant, a qualified radiographer, had introduced an ultrasound probe into the vaginas of three young women in the course of examining them after referrals by their doctors. The referring doctors had not in fact asked for a vaginal examination to be conducted and the applicant was charged with rape as defined in State legislation. The court held, applying *Papadimitropolis*, that "the woman's consent to the proposed act which she knew to be of the nature and character of the act which was done, was not deprived of reality if she believed the applicant proposed to do the act solely for a medical diagnostic purpose and if he actually did it solely for his own sexual gratification."[33] In other words, the fraud did not go to identity or to the nature and character of the act in question.

A MISTAKEN BELIEF IN THE VICTIM'S CONSENT

B.33 It is unclear whether the accused's belief in the victim's consent must be reasonable in the objective sense. Australian law imposes an objective test of reasonableness in the context of self-defence.[34] It may be that a similar objective test would be applied in the context of testing the defendant's belief in consent in a charge of assault. However, such an approach would be contrary to the position adopted in most comparative common law jurisdictions and, indeed, would contradict the Australian treatment of the defence of consent to a charge of rape where an honest mistake will release the accused from liability.[35]

Canada

INTRODUCTION

B.34 The Canadian Criminal Code provides that a person commits an assault when, without the consent of another person, he applies force intentionally to that other person, directly or indirectly.[36] The absence of consent is thus expressly made a part of the actus reus of the offence of assault and, as such, the burden of proving

[32] [1991] 1 VR 339. This was a decision of the Court of Appeal in Victoria.

[33] *Ibid*, at p 352.

[34] *Zecevic* (1987) 162 CLR 645.

[35] See P Gillies, *Criminal Law* (3rd ed 1993) p 329 where it is argued that this uncertainty results from confusion as to whether consent in this context is to be treated as an issue of mens rea or as a defence. The author suggests that an honest but mistaken belief will prevent the accused forming the necessary mens rea to ground criminal liability, but if consent is offered as a defence than it must, using the analogy of self-defence, be based on reasonable grounds: see, generally, Part VII above.

[36] Criminal Code, s 265(1)(a).

lack of consent, whether express or implied, rests on the Crown. Despite the clarity of this general rule the Code does not provide any guidance about the "*situations or forms of conduct or eventual consequences* which the law will recognise as being valid objects of consent." (Emphasis provided by Gonthier J)[37]

B.35 The Code also provides that this requirement that there should be no consent is applicable to all forms of assault, including the causing of bodily harm.[38] The Code defines "bodily harm" as "any hurt or injury to the complainant that interferes with the health or comfort of the complainant and ... is more than merely transient or trifling in nature."[39] It does not make clear, however, the precise level of harm or injury to which it is possible to consent and the types of conduct for which consent will be an effective defence. In these circumstances, the Supreme Court of Canada has recently said that case law will continue to supplement the provisions on consent that are contained within the Code.[40]

THE DEGREE OF HARM OR INJURY TO WHICH IT IS POSSIBLE TO GIVE A VALID CONSENT

B.36 In *Abraham*[41] the Quebec Court of Appeal held that the English authorities on the effect of consent were to be treated with caution. The assault in that case involved slapping with an open hand, kicking and hair pulling, but there was no evidence that the victim had sustained any permanent injury. The court decided that it was preferable to investigate the scope of the consent, whether express or implied, that was actually given by the victim rather than to treat the infliction of all injury or harm above a certain level as unlawful. This approach was justified by the presiding judge, Gagnon JA, on the ground that the relevant provision of the Code[42] makes absence of consent an essential ingredient of assault. The *Abraham* approach has been cited with approval by a leading textbook writer in Canada who has criticised the "arbitrary distinction between the gravity of assaults on the basis of the harm actually caused."[43]

B.37 In *Abraham* the court faced the difficulty that the victim had not given any express consent to being treated in that way and it was therefore necessary to investigate whether there was any evidence of an implied consent. The court concluded that the victim "could not have consented to him [the accused] treating her as he did,"[44] a finding that seems to have been based on the seriousness of the brutality involved.

[37] *Jobidon* (1991) 66 CCC (3d) 454, 472a, *per* Gonthier J.

[38] Criminal Code, s 265(2).

[39] *Ibid*, s 267(2).

[40] *Jobidon* (1991) 66 CCC (3d) 454, 472h–473a.

[41] (1974) 30 CCC (2d) 332, 334.

[42] Now s 265(1)(a).

[43] D Stuart, *Canadian Criminal Law* (2nd ed 1987) p 472.

[44] (1974) 30 CCC (2d) 332, 335.

B.38 In *Jobidon*,[45] however, the Supreme Court of Canada rejected the *Abraham* approach when considering questions of consent in the context of a bar room fist fight. The court said that consent is not nullified in respect of intentional applications of force that cause "only minor hurt or trivial bodily harm,"[46] and the determination whether the harm caused is at this level of seriousness was, the court said, a question of fact. This ruling was based on the definition of bodily harm provided by the Code itself.[47] The court was reluctant to make any more general pronouncement as to the level of injury or harm above which any consent has no effect. It was stated that the "limitation demanded by section 265, as it applies to the circumstances of this appeal, is one which *vitiates consent between adults intentionally to apply force causing serious hurt or non-trivial bodily harm to each other in the course of a fist fight or brawl.*" (Emphasis provided by Gonthier J)[48] It therefore appears that consent has no effect where bodily harm is both intended and caused.

B.39 In *Jobidon* Gonthier J implied that because the Code refers to the intentional application of force causing harm the unintentional application of force which inadvertently causes harm will not vitiate any consent that the victim has given.[49]

B.40 In 1987 the Law Reform Commission of Canada proposed that a distinction should be drawn between touching or hurting, for which it should be possible to give a valid consent, and harming, for which any consent should be disregarded.[50] The Report defines "to hurt" as "to inflict physical pain", whereas to harm is "to impair the body or its functions."[51]

THE VALIDITY OF CONSENT

B.41 The Code provides that no consent will be valid if it is obtained by reason of: (a) the application of force to the complainant or to a person other than the complainant; (b) threats or the fear of the application of force to the complainant or to a person other than the complainant; (c) fraud; or (d) the exercise of authority.[52] The threats referred to in (b) must be threats to use force; a threat, for example, to publish embarrassing photographs will not suffice.[53]

B.42 In *Petrozzi*[54] the British Columbia Court of Appeal considered the meaning of fraud in (what is now) section 265(3)(c) of the Code in the context of a charge of

[45] (1991) 66 CCC (3d) 454.

[46] *Ibid*, at p 495f–g.

[47] Criminal Code, s 267(2).

[48] (1991) 66 CCC (3d) 454, 494g.

[49] *Ibid*, at p 490f–g.

[50] Law Reform Commission of Canada, Recodifying Criminal Law (1987) Report No 31, cl 7(1), 7(2).

[51] *Ibid*, cl 1(2).

[52] Criminal Code, s 265(3).

[53] *Guerrero* (1988) 64 CR (3d) 65.

[54] (1987) 35 CCC (3d) 528; cf also *Linekar* [1995] QB 250, for which see para 6.12 above.

sexual assault. The complainant had agreed to have sexual intercourse with the accused on condition that he paid her $100. The accused refused to pay her, became violent and forced her to participate in various sexual acts. The court ruled that because the accused's fraud, as to payment, did not relate to either his identity or to the nature and quality of the act it did not vitiate the complainant's consent.

B.43 The Law Reform Commission of Canada has suggested that consent, to be valid, should be "given by a competent person and not obtained by force, threat or deceit."[55]

A MISTAKEN BELIEF IN THE VICTIM'S CONSENT

B.44 The Code provides that where an accused says that he believed the complainant consented, then if a judge is satisfied that there is sufficient evidence which, if believed by the jury, would constitute a defence, he should instruct the jury to consider the presence or absence of reasonable grounds for that belief.[56] The authors of *Martin's Criminal Code* say that a subjectivist approach will be taken to determine questions of mistaken belief,[57] being the approach adopted by the Supreme Court of Canada in *Pappajohn*.[58] The court there held that an honest but mistaken belief by the accused that the victim is consenting is a defence to the charge, and that there is no requirement in Canadian law that the belief should be based on reasonable grounds. The reasonableness of the belief is merely a factor when considering whether the belief is really held. This was recently re-emphasised in *Ciccarelli*.[59]

THE SPECIAL CATEGORIES

B.45 In *Cey*[60] it was decided that the scope of implied consent, in the context of team sports, should be determined by reference to five objective criteria.[61] The first of these criteria is the nature of the game played and whether the game in which the incident occurred was at amateur or professional level. In *St Croix*,[62] a case concerned with an amateur ice hockey match, Stortini DCJ said that professional hockey players "consent to more assaultive type behaviour than in a purely amateur ... friendly neighbourhood hockey game ... where no protective

[55] Law Reform Commission of Canada, Recodifying Criminal Law (1987) Report No 31, cl 1(2).

[56] Criminal Code, s 265(4).

[57] *Martin's Criminal Code* (1995) p 446. This view should be read next to section 273.2 of the Code which, in sexual assault cases, requires the accused to take reasonable steps, in the circumstances known to him, to ascertain whether the other party has consented.

[58] (1980) 52 CCC (2d) 481. This was a case of rape.

[59] (1989) 54 CCC (3d) 121, 128g, *per* Corbett DCJ, a case concerned with assault (see s 265 of the Code).

[60] (1989) 48 CCC (3d) 480.

[61] This approach was later approved by the Ontario District Court in *Ciccarelli* (1989) 54 CCC (3d) 121.

[62] (1979) 47 CCC (2d) 122, 124.

equipment is worn, no officials are present and the puck is not to be raised off the ice."

B.46 The other four criteria identified in *Cey* relate to the nature of the particular act and its surrounding circumstances, the degree of force employed, the degree of the risk of injury, and the state of mind of the accused. It is unclear whether conduct contrary to the rules of the game being played will have any decisive, or even any significant, effect. In *Leclerc*,[63] however, Lacourciere JA said that the *Cey* criteria were not meant to be exhaustive and that he would add to them the test "whether the rules of the game contemplate contact or ... non-contact."[64]

B.47 The Code expressly prohibits prize-fighting, which is defined as "an encounter or fight with fists or hands between two persons who have met for that purpose by previous arrangement made by or for them."[65] This prohibition is not, however, to extend to a "boxing contest between amateur sportsmen."[66]

B.48 In *Jobidon* Gonthier J referred to "stuntmen who agree in advance to perform risky sparring or daredevil activities in the creation of a socially valuable cultural product."[67] He said that such activities would constitute a special category in which any consent that was given would be valid; this was justified on the same policy grounds that were used for the sports exemption. What the Supreme Court would consider to be "socially valuable" is left to be decided on a case by case basis.

B.49 In its 1987 report the Law Reform Commission of Canada suggested two exceptions to the two new offences of harming on purpose or through recklessness that are contained in clause 7(2) of its report.[68] The first covers medical treatment: the "administration of treatment with the patient's informed consent for therapeutic purposes, or for purposes of medical research, involving risk of harm not disproportionate to the expected benefits." The other covers "sporting activities", and provides that "injuries inflicted during the course of, and in accordance with, the rules of a lawful sporting activity" will be exempt from the proposed new provisions. The report contemplates that "lawful sports" may be identified by reference to those sporting activities already specifically authorised and regulated by provincial statutes.

New Zealand

B.50 In New Zealand the criminal law is codified in the Crimes Act 1961. This Act, however, makes no reference to consent either in its general definition of assault or in the specific assault offences, which include assault with intent to injure and

[63] (1991) 67 CCC (3d) 563, 571.

[64] See Consultation Paper No 134, paras 10.7 – 10.9, for a discussion of some of these cases.

[65] Criminal Code, s 83(1), (2).

[66] *Ibid*, s 83(2).

[67] (1991) 66 CCC (3d) 454, 495d.

[68] Law Reform Commission of Canada, Recodifying Criminal Law (1987) Report No 31, cl 7(3)(a), (b).

common assault. In *Nazif*,[69] the New Zealand Court of Appeal had to consider consent in the context of an indecent assault. It said that despite the fact that lack of consent had not been expressly included as a constituent element of the offence of assault in the Crimes Act it was "not in doubt, however, that such consent is a defence."[70] The use of consent as a defence is sanctioned by the pre-existing common law, which is expressly preserved by section 20 of the Crimes Act 1961.

B.51 In *Nazif* the court did not discuss the limits of the consent defence that is preserved by common law. It did refer, however, to what is described as the "public interest" exception found in the English case of *Attorney-General's Reference (No 6 of 1980)*.[71] It may, therefore, be that the limitations on consent, in the sense of the degree of harm to which it is possible to give a valid consent and the types of conduct to which consent may be given, are the same in England and New Zealand.

B.52 The circumstances in which consent is nullified by fraud appear to be the same in New Zealand as in England.[72] In *Nazif* consideration was given to the question of the accused's mistaken belief in consent. Somers J said that "save in cases where it is otherwise provided by statute or where there are other more dominant public interest features, it would be contrary to principle that a person who believes the victim of an assault consented to it should be found guilty of that assault. Where there is evidence of such belief it will be for the Crown to negative it. The reasonableness or otherwise of the grounds of such belief will be material to the question of whether the accused in fact held it."[73]

B.53 The same textbook writer says that the participant in a lawful sport impliedly consents to "undergo the reasonable risks associated with the particular sport or activity."[74] In *Tevaga*[75] the Court of Appeal was concerned with an assault in an under 21 rugby union match in which the defendant had come to the aid of a team mate he thought was being attacked by a member of the opposing team. He struck the attacker with a single blow which broke his jaw; this was described by the court as a "quite serious injury." Cooke P did not directly consider questions of consent. After pointing out that no New Zealand precedent could be found, he said that it was "necessary to emphasise ... that assaults in the course of sporting

[69] [1987] 2 NZLR 122.

[70] *Ibid*, at p 128. It cited for this proposition a statement to the same effect in a leading textbook, Adams, *Criminal Law and Practice in New Zealand* (2nd ed 1971) paras 39 and 612.

[71] [1981] QB 715.

[72] Adams, *Criminal Law and Practice in New Zealand* (2nd ed 1971) para 619. The old English case of *Clarence* (1888) 22 QBD 23 is referred to as authority in the area of fraud and consent.

[73] *Nazif* [1987] 2 NZLR 122, 128.

[74] Adams, *Criminal Law and Practice in New Zealand* (2nd ed 1971) para 615. The author suggests a general test for what constitutes a "lawful sport": a sport becomes unlawful when it is essentially dangerous and when it is more probable than not that serious injury may occur. The definition of what is "essentially dangerous" would be left to the public opinion of the time.

[75] [1991] 1 NZLR 296.

contests, such as the various codes of football, cannot be tolerated by the community or the courts."[76]

B.54 In *McLeod*[77] the appellant was a skilled marksman who ran a "wild west show." He had attempted to shoot the ash off a cigarette being smoked by a member of the public. The bullet, however, entered the volunteer's cheek, causing serious but not dangerous injury. The appellant was charged with common assault; assault causing actual bodily harm; and actual bodily harm under such circumstances that if death had ensued then the appellant would be guilty of manslaughter. The Court of Appeal rejected the defence of consent on the grounds that a lethal weapon was used in circumstances which were intrinsically risky.[78]

Scotland

THE DEGREE OF HARM OR INJURY TO WHICH IT IS POSSIBLE TO GIVE A VALID CONSENT

B.55 The most obvious difference between the law of assault in Scotland and in England and Wales is to be found in the mens rea element of the offence. In Scotland assault is a crime of intent;[79] it cannot be committed by a person who is merely reckless or negligent.[80] The reckless causation of harm to others can be prosecuted as culpable and reckless conduct and it is possible to charge a defendant with both assault and, in the alternative, with reckless conduct on the same set of facts.[81]

B.56 The leading modern authority on consent and assault is *Smart.*[82] The defendant who had been convicted of assault, argued that the victim had accepted a challenge to fight and had, therefore, consented to the injuries he had received. The High Court referred to *Donovan,*[83] but held that a consent by the victim does

[76] *Ibid*, at p 297.

[77] [1915] 34 NZLR 430.

[78] See Adams, *Criminal Law and Practice in New Zealand* (2nd ed 1971) paras 614, 616 and 617, where it is suggested that the reason why dangerous exhibitions or side-shows will not fall within the public interest special category, which exempts lawful sports from the general provisions in respect of consent and assaults, is because dangerous exhibitions fulfil "no useful purpose at all", whereas sports serve the public interest in tending to "give strength, activity and skill". See also, Consultation Paper No 134, paras 11.16 – 11.20.

[79] J Walker and D J Stevenson, *Macdonald's Practical Treatise on the Criminal Law of Scotland* (5th ed 1948) p 115: "Evil intention being of the essence of assault."

[80] This proposition was confirmed in the recent case of *Harris* 1993 SLT 963, 966G, *per* Lord Justice-Clerk (Ross). In *Roberts v Hamilton* 1989 SLT 399 the defendant, A, who intended to strike B, was convicted of an assault on C who was standing nearby. The result in this case has been justified on the basis that it is only necessary to intend to assault a person, rather than a specific individual. Thus, A could be convicted of assault according to a doctrine of "transferred malice." The general academic view appears to be that this case has not altered the general rule that assault is a crime of intent: see G H Gordon, *The Criminal Law of Scotland* (2nd ed (2nd cum supp 1992) 1978) para 29-30 and T H Jones, "Assault and Intention" 1990 SLT 63, 64.

[81] See *Harris* 1993 SLT 963.

[82] 1975 SLT 65.

[83] [1934] 2 KB 498.

not negative liability for assault, provided that all the formal elements of the offence, and in particular intent to do bodily harm, are present.[84] The court went on to say that, having reached this general conclusion, it would not draw distinctions between various *levels* of injury and, further, that there was no justification for treating the victim's consent as a good defence in cases of minor assault, while disregarding it in cases of serious assault.[85]

B.57 The court did refer, however, to two specific circumstances in which consent will negative the "evil intent" of the defendant and will, therefore, provide a defence to liability for assault. The first of these is a "touching" in a sexual context.[86] The second consists of the violence that can arise on the sports field where "there is no assault because the intention is to engage in the sporting activity and not evilly to do harm to the opponent."[87] In this respect, the approach taken in *Smart* bears some similarity to the English authorities in this area of the law, with reliance upon special categories that, to some extent, operate outside the ambit of the general criminal law of assault.[88]

B.58 A leading textbook writer, referring to these two special circumstances, has argued that, since *Smart*, consent will provide an answer to a charge of assault, provided that the defendant acted without intention to cause *any* bodily harm.[89] A contrary view has also been expressed: in *Smart* the High Court's understanding of "evil intent", the mens rea for assault, was not confined to intention to do bodily harm. On the basis of this wider understanding of the mental element of assault it has

[84] 1975 SLT 65, 66: "If there is an attack on the other person and it is done with evil intent that is, intent to injure and do bodily harm, then, in our view, the fact that the person attacked was willing to undergo the risk of that attack does not prevent it from being the crime of assault." This dictum was quoted and approved by the High Court in *Sutherland* 1994 SLT 634, 639I, an appeal against a conviction for culpable homicide. In this appeal the High Court also referred to the relevant English authorities, including *Brown*, although it stated, at p 639J, that the position in the English jurisdiction is complicated "by differences of approach to various statutory charges and between various types of assault." The *Smart* dictum was again approved, obiter, in *Lord Advocate's Reference No 1 of 1994* 1995 SLT 248, 252F, which arose out of an acquittal for culpable homicide.

[85] 1975 SLT 65, 66. The High Court referred to the rule that consent does not provide a defence in cases of murder or culpable homicide: see *Rutherford* 1947 SLT 3.

[86] Provided that there are no other factors that could make the touching criminal, eg a victim without the capacity to consent.

[87] 1975 SLT 65, 66. The High Court was keen to emphasise that this concession did not apply to situations in which the "whole purpose of the exercise is to inflict physical damage on the opponent in pursuance of a quarrel." The consent defence will not, therefore, be available in the context of fighting or duelling where the evil intent element of the offence is not displaced by the victim's consent. See also A M Duff, "A Hooligan's Game – Played by Gentlemen" 1994 SLT 277 where the author asserts that the special status accorded to sporting violence in *Smart* will not be available in cases where the sports player acts in flagrant disregard of the rules of his sport and commits assault and other offences. Mr Duff also criticises the failure of the Scottish prosecuting authorities to institute criminal proceedings in respect of violence on the sports field.

[88] Although only two special categories were expressly referred to in *Smart*.

[89] G H Gordon, *The Criminal Law of Scotland* (2nd ed 1978) para 29-39.

been suggested that "consent is not a defence to any type of assault."[90] It remains to be seen which approach will ultimately prevail.

THE MEANING OF CONSENT

B.59 The ingredients of the Scottish law of rape fall outside the purview of this Paper. In 1983, however, in its report on evidence in rape, and other sexual offence, cases the Scottish Law Commission said that however the crime of rape is defined, "there can be no doubt that in many cases the issue of consent will be central to the determination of a trial."[91] A number of the cases in which courts consider the meaning of consent in the context of rape may shed light on consent and offences against the person.

B.60 In *Barbour*[92] the victim submitted, without resistance, after the defendant made a number of threats to use force against her.[93] It is clear that in Scotland, as well as England and Wales, threats to cause serious bodily harm to the victim will suffice to overcome her will and will lead to liability for rape. It is less clear whether threats not involving the causation of serious harm will be dealt with in the same way. It is possible that threats of this sort, while not capable of overcoming the will of the victim for the purposes of rape, will lead to liability under section 2(1)(a) of the Sexual Offences (Scotland) Act 1976.[94]

B.61 The relevance of fraud to the overcoming of the victim's will was considered in the nineteenth century case of *Fraser*.[95] The defendant had sexual intercourse with a married woman by fraudulently pretending to be her husband. He was charged with rape and with "Fraudulently and Deceitfully obtaining Access to and having Carnal Knowledge of a Married Woman, by pretending to be her husband, or otherwise conducting himself, and behaving towards her so as to deceive her into the belief that he was her husband." The court agreed that the latter charge was an offence that existed as a type of fraud. It was held, however, that a fraud of this kind did not amount to rape on the ground that the woman had fully comprehended the nature of the act to be performed and that the defendant's fraud as to his identity was not sufficient to overcome her will or nullify her consent. While section 4 of the Criminal Law Amendment Act 1885 declared that the defendant who has intercourse with a married woman by impersonating her

[90] P W Ferguson, *Crimes against the Person* (1990) para 1.18.

[91] Scot Law Com No 78 (1983), para 2.2.

[92] 1982 SCCR 195.

[93] In *Barbour* threats were made to break the complainer's legs, to take a knife to her and to batter her head against a wall.

[94] This contains an offence that is committed by any person who, by threats or intimidation, procures or attempts to procure any woman or girl to have unlawful sexual intercourse.

[95] (1847) Ark 280.

husband commits rape,[96] this has not displaced the general rule in *Fraser* that a fraud as to identity will not nullify the consent obtained thereby.[97]

B.62 Rape can also be committed by someone who administers drink or drugs to a woman so that her will can, more easily, be overcome. In *Sweeney v X*[98] the following jury direction on this question was approved:

> Where a woman is not insensible but is drunk, that is to say is under the influence of alcohol ... what you must determine is whether intercourse took place forcibly and against her will. The fact that a woman is drunk may mean that a lesser degree of violence is necessary to overcome her resistance than in the case of a sober woman. On the other hand, if a woman is drunk it may mean that she is less inclined to withhold consent, and of course if she was capable of withholding consent and did not in fact withhold consent, there is no rape.[99]

A MISTAKEN BELIEF IN THE VICTIM'S CONSENT

B.63 As in England, the defendant's belief in the existence of the victim's consent will provide a defence to liability for rape. In *Meek*[100] the court indicated, obiter, that the English House of Lords authority of *Morgan* would be followed and that, therefore, an honest but mistaken belief in the existence of consent would provide a defence to liability for rape.[101]

South Africa

INTRODUCTION

B.64 In *Collett*[102] a farm labourer committed an offence and the appellant farm manager had him "arrested". He offered the labourer a beating as an alternative to reporting him to the police. The labourer accepted the offer and was given six "cuts" to his buttocks. The court rejected the appellant's defence of consent to the assault charge on the basis that it would be contrary to public policy to allow a "master" to inflict what effectively amounted to corporal punishment on his "servant." The court went on to hold that even if the beating had not been found

[96] Now Sexual Offences (Scotland) Act 1976, s 2(2).

[97] The enduring authority of this rule has received a good deal of academic criticism. See P W Ferguson, "A Note on Fraud and Rape" 1984 SLT 230, 231 where the author argues that in the highly personal area of sexual relations the identity of a person is often of crucial importance and a fraud as to identity should be interpreted as affecting the nature of the act.

[98] 1982 SCCR 509.

[99] *Ibid*, at p 511, *per* Lord Ross. This passage was cited by the High Court in *W* 1995 SLT 685.

[100] 1982 SCCR 613.

[101] The existence or otherwise of reasonable grounds for the defendant's belief in the existence of consent will just be evidence as to the honesty of his belief. See also, *Jamieson* 1994 SLT 537, 541D: "... it will be open to the jury to accept ... [the defendant's] evidence on this point [belief in consent] even if he cannot give grounds for it which they consider to be reasonable ... . This is because the question is whether he genuinely or honestly believed that the woman was consenting to intercourse."

[102] 1978 (3) SA 206.

to be contrary to public policy the assault would still have been unlawful since a victim could not give a valid consent to the infliction of bodily harm; the English case of *Donovan*[103] was cited.

B.65 This decision can be explained on any one of three different grounds. The express basis on which the case was decided was that it is contrary to public policy to allow a master to administer corporal punishment to his servant. The decision may also be justified on the ground that the appellant coerced the labourer into consenting to the beating and that this threat vitiated the consent. Finally, it may be explained on the basis that the injury exceeded the level of harm to which a valid consent can be given. It is therefore difficult to identify any clear rules with regard to the courts' treatment of consent in South Africa.

THE DEGREE OF HARM OR INJURY TO WHICH IT IS POSSIBLE TO GIVE A VALID CONSENT

B.66 In *Matomana*[104] the defendant was charged with culpable homicide and raised the defence of consent. The court decided that a victim could not consent to the infliction upon him of what was described as a "dangerous hurt." The evidence showed that it was customary for those attending dances to engage in "play-fights" using sticks. At one such dance the deceased got a blow at the calf of the accused who responded by striking the deceased low down and, later, on the head. The deceased died from the blow to his head. Lansdown JP said that "if two people agree to a contest with stout sticks, and either they intend hurt or even if they do not intend hurt, if one, taking advantage of the situation, gives the other one a blow which is likely to cause grievous bodily harm or death and death results, that is culpable homicide."[105] It therefore appears that no effective consent can be given where grievous bodily harm or death are intended, or even where they are not intended but result from the conduct of a defendant.

B.67 The *Donovan* approach, which concentrates on the harm caused rather than the consent itself, was applied in *McCoy*.[106] The appellant was the general manager of an airline who inflicted a caning on an air hostess employed by the airline for the "misdemeanour" of failing to fasten her safety belt while an aircraft was landing. The defence raised was consent. The defendant had suggested that the air hostess should accept a caning as an alternative to being dismissed, and she had given a written consent to the caning. The six strokes of the cane caused no serious or permanent injury, although one of them had drawn some "pin points of blood."

B.68 Thomas ACJ rejected the appellant's arguments on the basis that the strokes he had administered were likely or intended to cause bodily harm. They had in fact caused bodily harm and the "only reasonable inference that can be drawn from the facts is that [the] appellant intended that she [the air hostess] should suffer." In these circumstances the defence of consent was not available.

[103] [1934] 2 KB 498.

[104] 1938 EDL 128.

[105] *Ibid*, at p 130.

[106] 1953 (2) SA 4. See Consultation Paper No 134, para 29.2.

THE VALIDITY OF CONSENT

B.69 A consent extracted by force will be ineffective as a defence in that the law "may treat the vitiated will as if it were non-existent."[107] It appears that a threat will also operate to nullify consent. In *McCoy* the court held in the alternative that the consent was unavailable as a defence since it had been obtained by a threat of dismissal from employment. It therefore appears that any threat, and not merely a threat to use force, will operate to nullify any resulting consent.

B.70 In South Africa, as in other jurisdictions, a distinction is drawn between fraud which induces an *error in negotio* (an error as to the nature of the conduct involved) and fraud inducing an *error personae* (an error as to the identity of the party). It is unclear whether fraud other than that inducing an *error in negotio* will work to nullify consent to what might otherwise be an assault. Thus far, it appears that all the cases involving the nullification of consent by *error personae* have been concerned with rape. The authors of a leading textbook have suggested, however, that "in crimes other than rape ... to vitiate consent it is not necessary for fraud to induce *error in negotio*. As long as it can be said that as a result of the fraud the complainant did not really consent to the harm done, [then] ... liability should follow."[108] They used as an example a case in which X consents to be struck by Y with a pillow which Y represents to be filled with feathers but which to his knowledge contains a brick as well. In those circumstances, they said, there is no effective consent to the injury caused.[109]

A MISTAKEN BELIEF IN THE VICTIM'S CONSENT

B.71 In *Mosago*[110] the court discussed, obiter, issues relating to consent and mens rea. Beyers JA and De Villiers JA spoke of the need for the accused's belief as to consent to be a reasonable one, whereas Wessels CJ preferred to take a more subjective approach, whereby an honest belief in consent would still operate to release the defendant from liability. This subjective approach has been adopted in more recent appellate court decisions, most of these involving the offence of rape. In *S*[111] Miller AJA said: "Despite the fact that [the] appellant had intercourse with [the] complainant without her consent he is not guilty of rape if he bona fide believed that she had consented." It is likely that the same subjective approach would be taken with regard to the offence of assault.

THE SPECIAL CATEGORIES

B.72 The South African courts have had the opportunity of examining the use of consent as a means of avoiding liability for assaults inflicted in the course of religious ceremonies. It has been held that a valid consent may only be given to

[107] *Ex p Minister of Justice: In re Gesa; De Jongh* 1959 (1) SA 234, 240D, *per* Schreiner ACJ.

[108] E M Burchell, J R L Milton, J M Burchell, *South African Criminal Law and Procedure* vol 1 (2nd ed 1983) p 377.

[109] This suggestion that there should be a wider role for fraud to play is similar to the proposal contained in the first Consultation Paper that fraud "as to *any* aspect of the transaction" should vitiate the consent obtained thereby. See Consultation Paper No 134, para 26.2.

[110] 1935 AD 32.

[111] 1971 (2) SA 591, 597.

such assaults if they are of "a relatively minor nature and do not conflict with generally accepted concepts of morality."[112] This approach once again appears to reflect the combination of degree of harm on the one hand and public policy on the other operating to set the limits on the availability of consent as a defence to assault. In *Sikunyana*[113] the four appellants were charged with intent to cause grievous bodily harm. The complainant had undergone a "treatment" for the exorcism of an evil spirit by a witchdoctor. The treatment involved the inhalation of medicine fumes sprinkled over live coals. As a result of doing this the complainant had been badly burned. The evidence was that the complainant had consented to the treatment and this was advanced as a defence. O'Hagan J decided that "[a] highly dangerous practice superstitiously designed to secure the exorcism of an evil spirit cannot be rendered lawful by the consent of the afflicted person."[114] His decision was based on the fact that the appellants knew or must have known that their conduct involved the risk of serious bodily injury, and that such serious bodily injury did result. In these circumstances, he held that public policy intervened to render the conduct unlawful notwithstanding the consent. He appeared to leave open the possibility that the infliction of only minor injury as part of a religious ceremony might be validly consented to. This would accord with the earlier decision in *Njkelana*.[115]

B.73 A leading textbook writer argues that:

> Voluntary participation in a particular type of sport may also imply that the participant consents to injuries sustained as a result of acts which contravene the rules of the game, such as a late tackle in rugby, but only if such incidents are normally to be expected in that particular game. Serious injuries which are forbidden by the rules of the game and which are not normally to be expected cannot, however, be justified by consent.[116]

B.74 It has been suggested that the sports exception should also apply to exhibitions involving public entertainment on the basis that:

> [I]njuries caused to Y by X in the course of public entertainment such as the making of a film, or a play, or circus, it is a question of degree. Minor injuries normally incidental to participation would clearly be lawful and liability would be purged by Y's consent. On the other hand, entertainment does not legalise harmful bodily injuries, and consent to such aggressions will be invalid.[117]

[112] C R Snyman, *Criminal Law* (2nd ed 1989) p 124.

[113] 1961 (3) SA 549 (E).

[114] *Ibid,* at p 552A.

[115] 1925 EDL 204. See, generally, para 9.19, n 50 above.

[116] C R Snyman, *Criminal Law* (2nd ed 1989) p 123. See also *Mandelbaum v Bekker* 1927 CPD 375. But see also *Boshoff v Boshoff* 1987 (2) SA 694 (O), where the court upheld a plea of *volenti non fit injuria* in relation to an accident in a squash court.

[117] E M Burchell, J R L Milton, J M Burchell, *South African Criminal Law and Procedure* vol 1 (2nd ed 1983) p 374.

It may be that entertainments are treated in the same way as "innocent horseplay" and that a consent will, therefore, be valid if nothing more serious than minor injury is caused.

United States of America

INTRODUCTION

B.75 Section 211.1 of the Model Penal Code defines "simple assault" as an attempt to cause bodily injury to another or to purposely, knowingly or recklessly cause bodily injury to another. It is also defined as an attempt by physical menace to put another in fear of imminent serious bodily injury. "Aggravated assault" is defined as an attempt to cause serious bodily injury or the causation of such bodily injury "purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life."[118]

B.76 The Code also provides, in the sections dealing with general principles of liability, that the consent of the victim is a defence only when it "negatives an element of the offense or precludes infliction of the harm or evil sought to be prevented by the law defining the offense."[119] The Code provides for the consent of the victim to be a defence to offences involving causation or threatened causation of "bodily injury" as long as either the "bodily harm" in question is not "serious" or if the conduct and the harm are "reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport."[120]

B.77 Although the Californian Penal Code makes no reference to lack of consent in its definition of either assault or battery it does, nevertheless, appear that the requirement that the act should be unlawful may not be fulfilled if the victim has consented.[121] In *Sanchez*[122] it was held that the defendant had the burden of proving his bona fide and reasonable belief that the victim impliedly consented to the assault. The requisite standard of proof is to raise a reasonable doubt.

THE DEGREE OF HARM OR INJURY TO WHICH IT IS POSSIBLE TO GIVE A VALID CONSENT

B.78 Courts in the United States have taken a restrictive view of the degree of harm or injury to which it is possible to give a valid consent. In *Gray*[123] it was held that "it is no defense to assert that the victim consented to an assault upon her by force likely to produce great bodily harm." In *Samuels*,[124] a case involving allegedly consensual sado-masochistic behaviour in private, the California Court of Appeal

[118] American Law Institute, *Model Penal Code, Official Draft and Explanatory Notes* (1985).

[119] *Ibid*, s 2.11(1).

[120] *Ibid*, s 2.11(2).

[121] California Penal Code, ss 240 and 242.

[122] 147 Cal Rptr 850 (1978) .

[123] 36 Cal Rptr 263 (1964) .

[124] 58 Cal Rptr 439 (1967).

held in 1967 that consent to an assault was generally no defence except in cases involving ordinary physical contact.

B.79 In common with the position in most other common law jurisdictions the decision in *Samuels* appears to be based on the philosophy that assaults involving aberrant behaviour or conduct lacking social utility should be regarded as unlawful because they are injurious to a wider public benefit. In a number of state jurisdictions a similar approach has been taken, based upon the belief that assaults, even if consensual, constitute a wrong against the *public* peace.[125] In 1988 Justice Eagleson said in the California Superior Court that "voluntary mutual combat outside the rules of sport is a breach of the peace, mutual consent is no justification, and both participants are guilty of criminal assault."[126]

B.80 The Texas Penal Code expressly identifies consent as a defence to conduct which would otherwise constitute an assault. It provides that "the victim's effective consent or the actor's reasonable belief that the victim consented to the actor's conduct is a defence."[127] However, the defence will only be available where "the conduct did not threaten or inflict serious bodily harm."[128] The Code defines "serious bodily harm" as bodily injury that creates a substantial risk of death or that causes serious permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ.[129]

THE VALIDITY OF CONSENT

B.81 The Model Penal Code provides that any consent that may be obtained will be ineffective if it "is induced by force, duress or deception of a kind sought to be prevented by the offense."[130] Questions relating to the nullification of consent by fraud or threat of physical harm arise most frequently in rape cases. Some commentators, however, envisage that the same approach would be adopted in relation to other offences where consent can constitute a defence; this is, as we have seen, the approach adopted by the Model Penal Code.[131]

B.82 American courts have repeatedly held that consent obtained by fraud is no defence. In *Burke v Steinberg*,[132] the defendant was charged with assault after she had injected a number of people with a bogus vaccine during an epidemic, claiming that she could inoculate them against smallpox. Because the voluntary submission of those injected had been induced by fraud, this gave her no defence. Leading textbook writers have pointed out that so far as the offence of rape is

[125] See, for example, *Burke v Steinberg* 73 NYS 2d 475 (1947).

[126] *Lucky* 247 Cal Rptr 1, 29 (1988).

[127] Texas Penal Code, s 22.06.

[128] *Ibid*, s 22.06(1).

[129] *Ibid*, s 1.07(a)(46).

[130] American Law Institute, *Model Penal Code, Official Draft and Explanatory Notes* (1985), s 2.11(3)(d).

[131] W La Fave and A Scott, *Criminal Law* (2nd ed 1986) p 478.

[132] 73 NYS 2d 475 (1947).

concerned the courts have drawn a distinction between fraud that induces a misunderstanding as to the very nature of the defendant's conduct and fraud that involves deception as to some collateral matter. Fraud as to the former, it is suggested, will nullify consent whereas fraud as to the latter will not.[133] They suggest, however, that for the offence of assault, where consent is only a defence in certain circumstances, any form of deception with some causative effect will nullify consent.

THE SPECIAL CATEGORIES

B.83 The Model Penal Code provides that in an offence that involves causing or threatening to cause bodily harm liability will not follow if the victim consents provided that the conduct and the harm caused are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport.

B.84 In *Samuels* an express exception was made to the general limitations on the availability of consent as a defence to assault. It was said that "blows incident to sports such as football, boxing or wrestling" will not attract criminal liability in that the victim can be taken to have consented to the infliction of such injuries.[134] The first prosecution of a professional athlete for an act committed during a sporting event in a United States jurisdiction occurred in the Minnesotan case of *Forbes*.[135] The defendant was a professional hockey player who had allegedly assaulted a member of the opposing team by striking him with his hockey stick as the two players left the penalty box. The defendant was charged with the offence of aggravated assault. The case resulted in a hung jury and the District Attorney decided not to reprosecute.

B.85 In *Freer*[136] an amateur player of American football was charged with third degree assault. The defendant had been punched in the throat during a tackle in a football game, and after the game was over he punched the player that he believed to be responsible for the earlier blow. The complainant received a serious injury to his eye which required plastic surgery. In considering the availability of a defence of consent Judge Newmark remarked in a brief ruling that the first punch, thrown by the complainant, was impliedly consented to by the defendant in that it was thrown in a tackle during the course of the football game. The punch thrown by the defendant, however, came after the play had ended and was clearly intended to do harm to the complainant. Consent was not, therefore, available as a defence. No appellate court has yet had an opportunity to clarify the law relating to sports violence and (implied) consent, but the *Forbes* case did provoke a number of academic comments.[137]

[133] W La Fave and A Scott, *Criminal Law* (2nd ed 1986) p 479.

[134] *Samuels* 58 Cal Rptr 439, 477 (1967).

[135] No 63280 (Minn Dist Ct 4th Dist 12 August 1975).

[136] 381 NYS 2d 976 (1976).

[137] See L Hallowell and R I Meshbesher, "Sports Violence and the Criminal Law" (1977) 13 Trial 27; and R DiNicola and S Mendeloff, "Controlling Violence in Professional Sports: Rule Reform and the Professional Sports Violence Commission" (1983) 21 Duq L Rev 843.

B.86 In particular, one academic commentator has criticised "the past approach of the judiciary, permitting the [consent] defense to be raised if the defendant's behavior did not create a risk of serious injury."[138] In his view this approach fails to protect the participants in "properly conducted sports" or to purge sport of violent practices. His solution would be to set "serious injury" at the level of maiming or death. He hopes that this would "provide athletes with notice of what type of behavior will cause the intervention of the criminal law, reduce the likelihood that prosecutorial discretion will be influenced by extraneous factors, and allow behavior common to a sport to be protected although it may pose a threat of minor injury."

CONSENT AND SEXUAL OFFENCES IN SELECTED COMMON LAW JURISDICTIONS

Australia

NEW SOUTH WALES

B.87 Section 61R(2) of the Crimes Act 1900 (as amended) contains a non-exhaustive list of factors that will "vitiate" the victim's consent in the context of sexual offences:

> (a) a person who consents to sexual intercourse with another person:
>
> (i) under a mistaken belief as to the identity of the other person; or
>
> (ii) under a mistaken belief that the other person is married to the person,
>
> is to be taken not to consent to the sexual intercourse; and
>
> (a1) a person who consents to sexual intercourse with another person under a mistaken belief that the sexual intercourse is for medical or hygienic purposes is to be taken not to consent to the sexual intercourse; and
>
> (b) a person who knows that another person consents to sexual intercourse under a mistaken belief referred to in paragraph (a) or (a1) is to be taken to know that the other person does not consent to the sexual intercourse; and
>
> (c) a person who submits to sexual intercourse with another person as a result of threats or terror, whether the threats are against, or the terror is instilled in, the person who submits to the sexual intercourse or any other person, is to be regarded as not consenting to the sexual intercourse; and

[138] R L Binder, "The Consent Defense: Sports, Violence and the Criminal Law" (1975) 13 American Criminal Law Review 235, 247.

(d) a person who does not offer actual physical resistance to sexual intercourse is not, by reason only of that fact, to be regarded as consenting to sexual intercourse.

VICTORIA

B.88 The Crimes (Rape) Act 1991, contains a section[139] which provides that for the purposes of certain subdivisions of the Act "consent" means "free agreement." Circumstances in which a person does not freely agree to an act include the following:

(a) the person submits because of force or the fear of force to that person or someone else;

(b) the person submits because of the fear of harm of any type to that person or someone else;

(c) the person submits because she or he is unlawfully detained;

(d) the person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing;

(e) the person is incapable of understanding the sexual nature of the act;

(f) the person is mistaken about the sexual nature of the act or the identity of the person;

(g) the person mistakenly believes that the act is for medical or hygienic purposes.

B.89 In the Report that led up to the enactment of this legislation, the Victoria Law Reform Commission explained that the list of "vitiating circumstances" is broadly the same as that recognised by the common law or existing legislation.[140] It pointed out, however, that:

- the list of factors is not intended to be exhaustive.
- "harm" is intended to include non-physical harms – such as blackmail or substantial economic harm.
- in determining whether a person submitted because of the fear of force or some other harm, it is the situation *as it was perceived by that person* which is the crucial issue. There is no requirement to show that a reasonable person would have reacted similarly in similar circumstances.
- consistent with present law, a fraud as to marital status does not vitiate consent for the purposes of rape. Such cases would continue to come

[139] Crimes (Rape) Act 1991, s 36.

[140] Law Reform Commission of Victoria, Rape: Reform of Law and Procedures (1991) Report No 43 p 7.

under section 57 of the Crimes Act ("procuring sexual penetration by threats or fraud").[141]

B.90 The 1991 Act also requires that the judge must, "in a relevant case", direct the jury that: "the fact that a person did not say or do anything to indicate free agreement to a sexual act is normally enough to show that the act took place without that person's free agreement."[142] The jury should also, in appropriate cases, be directed that a person is not to be regarded as having freely agreed to a sexual act just because "she or he did not protest or physically resist; or ... she or he did not sustain physical injury; or ... on that or an earlier occasion, she or he freely agreed to engage in another sexual act (whether or not of the same type) with that person, or a sexual act with another person."[143] The jury should also be directed, in appropriate cases, that in considering the defendant's alleged belief that the complainant was consenting to the sexual act, it must "take into account whether that belief was reasonable in all the relevant circumstances."[144]

AUSTRALIAN CAPITAL TERRITORY

B.91 The Crimes Act 1900, as amended, contains a non-exhaustive list of "the grounds upon which it may be established that consent is negated" and these include the following:

(a) by the infliction of violence or force on the person, or on a third person who is present or nearby;

(b) by a threat to inflict violence or force on the person, or on a third person who is present or nearby;

(c) by a threat to inflict violence or force on, or to use extortion against, the person or another person;

(d) by a threat to publicly humiliate or disgrace, or to physically or mentally harass, the person or another person;

(e) by the effect of intoxicating liquor, a drug or an anaesthetic;

(f) by a mistaken belief as to the identity of that other person;

(g) by a fraudulent misrepresentation of any fact made by the other person, or by a third person to the knowledge of the other person;

(h) by the abuse by the other person of his position of authority over, or professional or other trust in relation to, the person;

(i) by the person's physical helplessness or mental incapacity to understand the nature of the act in relation to which the consent is given; or

[141] See also para 6.10 and n 21 above.

[142] Crimes (Rape) Act 1991, s 37.

[143] *Ibid.*

[144] *Ibid.*

(j) by the unlawful detention of the person.[145]

B.92 The Act also provides that a person "who does not offer actual physical resistance to sexual intercourse" shall not be regarded, "by reason only of that fact", as consenting to the sexual intercourse.[146]

QUEENSLAND

B.93 Section 347(1) of the Criminal Code provides that the offence of rape is committed by:

> (1) Any person who has carnal knowledge of a female without her consent or with her consent if it is obtained by force, or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false and fraudulent representations as to the nature of the act, or, in the case of a married woman, by personating her husband.

B.94 The Criminal Code also contains specific protection for minors[147] and for intellectually impaired persons in that sexual offences can be committed against them, regardless of any consent by the victim.[148]

Canada

B.95 The Canadian Criminal Code defines consent, in the context of sexual acts, as "the voluntary agreement of the complainant to engage in the sexual activity in question."[149] The Code contains a negative definition of consent, for the purposes of the sexual assault offences, which is expressed in the terms that no consent is obtained where:

> (a) the agreement is expressed by the words or conduct of a person other than the complainant;
>
> (b) the complainant is incapable of consenting to the activity;
>
> (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
>
> (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
>
> (e) the complainant, having consented to engage in sexual activity, expresses by words or conduct, a lack of agreement to continue to engage in the activity.[150]

[145] Crimes Act 1900, s 92P.

[146] *Ibid.*

[147] Criminal Code Act 1899, ss 208 and 215.

[148] *Ibid*, s 216.

[149] Canadian Criminal Code, s 273.1(1).

[150] *Ibid*, 273.1(2).

B.96 The Criminal Code provides, in relation to the specific offences designed to protect minors,[151] that "it is not a defence that the complainant consented to the activity that forms the subject-matter of the charge."[152]

B.97 The Code contains a separate offence of anal intercourse for which a defence is available where the intercourse takes place in private between a husband and wife or between any two persons each of whom is 18 years old or more and both parties consent.[153] The Code provides, inter alia, that consent is nullified if it is extracted by force; threats or fear of bodily harm; false and fraudulent misrepresentations in respect of the nature and quality of the act; or if the court is satisfied beyond reasonable doubt that the person did not consent by reason of mental disability.

New Zealand

B.98 The Crimes Act 1961 (as amended) provides that "[t]he fact that a person does not protest or offer physical resistance to sexual connection does not by itself constitute consent to sexual connection ... ."[154] The Act also provides that the following matters do not constitute consent for the purposes of the offence of sexual violation:

> (a) The fact that a person submits to or acquiesces in sexual connection by reason of –
>
> > (i) The actual or threatened application of force to that person or some other person; or
> >
> > (ii) The fear of the application of force to that person or some other person;
>
> (b) The fact that a person consents to sexual connection by reason of –
>
> > (i) A mistake as to the identity of the other person; or
> >
> > (ii) A mistake as to the nature and quality of the act.[155]

B.99 The Act contains separate offences[156] relating to sexual connection in circumstances where the defendant knows that the other party has been induced to consent by: an express or implied threat to commit an offence which is

[151] *Ibid*, ss 151 (sexual interference), 152 (invitation to sexual touching), 153 (sexual exploitation).

[152] In relation to two of the sexual offences that can be committed against minors, however, the consent of the minor complainant will be recognised and will constitute a defence if the complainant is aged 12 years or more but less than 14 years and the accused is: 12 or more but under 16; is less than two years older than the complainant; and is not in a position of trust or authority towards the complainant. Criminal Code, s 150.1(2).

[153] *Ibid*, s 159(3).

[154] Crimes Act 1961, s 128A.

[155] It is expressly provided that this list is not exhaustive and there may be other factors that will nullify consent. *Ibid*, s 128A(3).

[156] *Ibid*, s 129A.

punishable by imprisonment but does not involve the actual or threatened application of force; an express or implied threat to make disclosures about the misconduct of a person (whether true or false) that will seriously damage the reputation of the person about whom the disclosures are made; and an express or implied threat to make improper use, to the detriment of the other person, of any power or authority arising from any occupational, vocational or commercial relationship between that person and the other person.

B.100 The Act also provides that the defence of consent may be available in respect of the offences of indecency with a boy aged between 12 and 16 years,[157] sexual indecency with a girl aged between 12 and 16 years,[158] and anal intercourse.[159] In respect of all these offences the consent defence will only be available where the consent is not obtained by a fraudulent representation as to the nature and quality of the act and where the defendant is of a certain, stated, age.

United States of America

B.101 The Model Penal Code defines the offence of rape in the following terms:

> A man who has sexual intercourse with a female not his wife is guilty of rape if:
>
> (a) he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone; or
>
> (b) he has substantially impaired her power to appraise or control her conduct by administering or employing without her knowledge drugs, intoxicants or other means for the purpose of preventing resistance; or
>
> (c) the female is unconscious; or
>
> (d) the female is less than 10 years old.[160]

B.102 The penal codes of some States also contain very detailed guidance on the circumstances in which the offence of rape is committed. In California, for example, the offence of rape is defined in the following terms:

> Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances:
>
> (1) Where a person is incapable, because of a mental disorder or developmental or physical disability, of giving legal consent, and this is known or reasonably should be known to the person committing the act ... the prosecuting

[157] *Ibid*, s 140A(2), (3).

[158] *Ibid*, s 134(3), (4).

[159] *Ibid*, s 142(1), (6).

[160] American Law Institute, *Model Penal Code, Official Draft and Explanatory Notes* (1985), s 213.1.

attorney shall prove, as an element of the crime, that a mental disorder or developmental or physical disability rendered the alleged victim incapable of giving consent.

(2) Where it is accomplished against a person's will by means of force, violence, or fear of immediate and unlawful bodily injury on the person of another.

(3) Where a person is prevented from resisting by any intoxicating or anaesthetic substance, administered by or with the privity of the accused.

(4) Where a person is at the time unconscious of the nature of the act, and this is known to the accused.

(5) Where a person submits under the belief that the person committing the act is the victim's spouse, and this belief is induced by any artifice, pretence, or concealment practised by the accused, with intent to induce the belief.

(6) Where the act is accomplished against the victim's will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat.[161]

(7) Where the act is accomplished against the victim's will by threatening to use the authority of a public official to incarcerate, arrest, or deport the victim or another, and the victim has a reasonable belief that the perpetrator is a public official ... .[162]

B.103 Texas is another State where the definition of sexual assault in the Penal code contains an extensive description of the circumstances in which the consent of the victim of an offence is nullified.[163]

[161] The Code provides that in this context "threatening to retaliate" means a threat to kidnap or falsely imprison, or to inflict extreme pain, serious bodily injury, or death. California Penal Code, s 261.

[162] California Penal Code, s 261.

[163] Texas Penal Code, s 22.011.

APPENDIX C

CONSENT AND THE CRIMINAL LAW: PHILOSOPHICAL FOUNDATIONS

We have explained the nature of this Appendix in paragraph 2.1 of this Paper. Because respondents to the first Consultation Paper referred us to so many different philosophical approaches to criminalisation, we considered it to be essential to seek expert advice, and this Appendix sets out the general tenor of the advice we received from Mr Paul Roberts, of the University of Nottingham. We believed that it would greatly assist respondents to this second paper if we made this advice available to them, even if, for the reasons we explain in Part II above, we have not been able to adopt the approach Mr Roberts would favour in the law reform strategy we have suggested at the end of that Part. What follows, therefore, is the main thrust of the advice Mr Roberts gave us. Specialists in this field may be pleased to learn that the full original text of the paper he furnished to us is likely to be published in the form of a research paper in the reasonably near future.

INTRODUCTORY

C.1 A substantial part of the first Consultation Paper was devoted to an analysis of the four leading cases[1] on the relationship between consent and criminal liability in an effort to distil from them some general principles of law. These general principles were then used as a basis for preparing law reform proposals that were designed to purge the law of its existing confusion and inconsistency. In the event some academic commentators were very critical of this methodology, and they also criticised the decision to exclude any detailed consideration of some of the more controversial issues that impinge, sometimes fairly tangentially, on the topic of consent in the criminal law, such as surgical treatment, boxing, euthanasia and lawful correction. The general tenor of much of this criticism was that the proposals contained in the first Consultation Paper were derived from a pragmatic and superficial[2] approach to complex problems, and that there was a failure to anchor the discussion on firm philosophical foundations. Mr Roger Leng summarised the general effect of these objections in the following terms:

> The Commission does not set out its philosophical underpinnings in terms of the proper aims of the law (although philosophies are detectable). Neither does the Commission sustain an analysis of the various interests which can claim protection in the criminal law (although some such interests receive attention). Instead, the major

[1] *Coney* (1882) 8 QBD 534; *Donovan* [1934] 2 KB 498 (CCA); *Attorney-General's Reference (No.6 of 1980)* [1981] QB 715 (CA); *Brown* [1994] 1 AC 212 (HL).

[2] Mr David Ormerod wrote that "a major flaw in the Paper appears to be its superficiality. There are many issues which are not considered, and of those that are, there is often insufficient depth of discussion ... .[M]ost crucially, there is no discussion of any underlying rationale in relation to consent." D Ormerod, "Consent and Offences Against the Person: Law Commission Consultation Paper No 134" (1994) 57 MLR 928, 928 and 940.

> part of the paper is taken up with an examination of the existing law and as a result the Commission appears to be trapped by the concepts and categories of the past ... . If readers of this Consultation Paper experience a sense of unreality this is a result of the Commission's assumption that careful dissection of four leading cases will yield not only a reliable statement of the present law but also an indication of problems to be addressed by law reform.[3]

C.2 This Appendix aims to remedy some of these defects. It contains a review of the contributions made by philosophers to the consent debate and suggests criteria by which the competing or alternative approaches should be evaluated.

C.3 In order that the purpose of this Appendix should not be misunderstood, it is important to identify at the outset the limitations of the philosopher's contribution. Philosophical investigation cannot reconcile competing ethical commitments, efface moral dilemmas, reduce the need to work out solutions to moral problems under conditions of uncertainty or put an end to moral argument and debate. In practice, disagreements over values and priorities cannot be resolved by rational argument, still less by the force of logical deduction. This is a commonplace of everyday life, and few philosophers would claim that it is, or even that it ought to be, otherwise. What then does philosophy do?

C.4 What philosophy can do is to bring to the surface what is already implicit in the different arguments or more general positions in a debate. It makes explicit the implications of particular positions and, often just as importantly, it illustrates what those assertions or positions do *not* entail. It demands that any assertion or position should be backed up by arguments, in the form of reasons, for holding the beliefs and commitments which underpin it. And, finally, philosophical investigation can help us to develop criteria for evaluating the arguments that we put forward to substantiate our positions.

THE QUANTITATIVE APPROACH TO INJURY

C.5 The debate about consent and the criminal law often proceeds from the premise that there must be a limit on the degree of injury to which a person can lawfully consent. The central question then becomes quantitative: at what degree or level of harm should the threshold of legally effective consent be set? This quantitative approach is evident in the speeches in the House of Lords in *Brown*[4] and in the methodology adopted in the first Consultation Paper, which contained this passage:

> The main question on which we seek comment is whether that [sc an act or omission intended or likely to cause actual bodily harm or, in the words of the Draft Code, "injury"] should continue to be the limit on effective consent, or whether the line should be drawn at some

[3] R Leng, "Consent and Offences Against the Person: Law Commission Consultation Paper No 134" [1994] Crim LR 480, 480 and 487.

[4] For dicta of Lords Jauncey, Lowry and Slynn to this effect see Consultation Paper No 134, para 7.1.

other place on the spectrum of interference with or injury to other people.[5]

C.6 A quantitative approach, however, contains certain inherent flaws and is apt to mislead because it prejudices the inquiry, and any conclusions that might be drawn from it, from the outset. The following reasons, taken together, provide a *prima facie* case for adopting a fairly cautious stance in relation to the quantitative approach and suggest the need to seek a new starting point.

C.7 (1) Although the severity of harm is a morally significant factor in evaluating its wrongfulness, there is no *a priori* reason for assuming that severity is the only or even the most significant aspect of this judgement. Often it is not. Of course, other things being equal, a minor wound is worse than a mere touching, permanent disfigurement is worse than a minor wound, and death is worst of all. Yet, as a moment's reflection makes plain, other things are not always equal. Arm-twisting to effect a robbery is morally worse than justified killing in self-defence, and a punch in the face causing no lasting damage is morally worse than the amputation of a leg, if the former is inflicted by a mugger on the street and the latter is performed by a surgeon with consent in order to prevent the spread of bone cancer. It is therefore necessary to take care to avoid restricting the scope of the inquiry by placing artificial constraints on the factors that may influence judgments about wrongfulness.

C.8 (2) Adopting a quantitative approach implies that a single, undifferentiated (quantitative) standard can be applied across a whole range of different activities and situations. On this basis it is unnecessary to consider particular fact-situations in detail, since they are all subject to the general rule. This was, broadly, the methodology adopted in the first Consultation Paper. However, this implication, if taken too literally, is unwarranted and any conclusions that are derived from it should be approached with some caution.

C.9 The adoption of a quantitative approach implies that the relationship between harm and consent can be extracted from a wide variety of different social contexts and abstracted to a generalised proposition. In reality, however, the complexity of human social and ethical life does not make this possible. The question of consent or no is intimately bound up with the meaning of different forms of conduct and their moral evaluation: consent is not a pollutant that can be filtered out to allow conduct to be evaluated in its pure, unadulterated form. Human conduct does not resemble a chemical compound; it cannot be broken down into its constituent elements. If we move the metaphor from chemistry to biology, sexual intercourse is not a genus that splits into the species "with consent" and "without consent." Sexual intercourse just *is* sexual congress with consent. Sexual congress without consent is not another type of sexual intercourse, it is rape, something related to but quite different from sexual intercourse. Conversely, there are not two species of rape, "with consent" and "without consent." Rape just *is* sexual congress without consent, both as a matter of linguistic convention and according to moral evaluation.

[5] *Ibid,* para 13.2.

C.10 Point (1) above shows that all morally relevant criteria must be taken into account in order to appraise conduct. Point (2) is simply the obverse side of the coin: no quantitative consent rule can be formulated without doing violence to the complexity of human conduct and the relations between human actors.

C.11 (3) Moral evaluation is affected by linguistic practice, and it may be parasitic upon it in important respects. This makes it difficult even to describe human conduct in meaningful or interesting ways without invoking ethical standards or loading apparently neutral descriptions with ethical bias. Debates about consent and the criminal law are strewn with terms such as "harm," "hurt," "injury," "wrong," "victim," "violence," and so on, and they are therefore constantly at risk of being skewed by concealed moral judgments masquerading as value-free descriptions of the empirical world. The debate must begin at the level of asking questions like these: What, in the particular context, is to count as "harm"? What is "violence"? Who is a "victim"? A rule formulated in terms of the severity of "injury" and which purports to be of general application has a tendency to obscure this level of debate by concealing its own internal value preferences, which then continue to exert their hidden influence across a range of different activities and situations. What purports to be an argument in favour of criminalisation turns out to be mere assertion or, at best, a report of a debate which took place elsewhere.

C.12 (4) At the commonsense level it is plain that the quantitative approach cannot provide a blueprint for criminalisation without substantial modification, for this would entail proscribing many activities which are permitted under existing law and which we would not want to proscribe. Prominent on this list are surgical interference and risky contact sports. The obvious solution to this apparent dilemma is the one chosen by the common law and endorsed as one possible reform strategy by the first Consultation Paper:[6] to make specific derogations from a restrictive general rule in favour of risky or injurious activities we want to remain lawful.

C.13 The practical effect of this strategy is to reintroduce precisely the same evaluative criteria that the quantitative approach discards when it plucks conduct out of its social context in order to subject it to a general rule. This paves the way for argument seeking to establish that the existing list of exceptions should be enlarged by the addition of new categories,[7] or, as the case may be, reduced by the removal of existing ones.[8]

C.14 Although it does not prejudice the outcome in all cases, this "quantitative-rule-plus-exceptions" model is not the most direct or the most sophisticated approach to the issues for the following three reasons. First, it seems unnecessarily elaborate in initially ignoring morally relevant considerations only to reintroduce them at a

[6] Consultation Paper No 134, para 48.1.

[7] For an example of this strategy, see N Bamforth, "Sado-Masochism and Consent" [1994] Crim LR 661.

[8] In the first Consultation Paper it was suggested that if the law remains broadly as it is at present "the special cases should be limited to ritual circumcision, ear-piercing, tattooing and (perhaps) flagellation and religious mortification and dangerous exhibitions." Consultation Paper No 134, para 48.1.

later point in the process. This gratuitous complexity is likely to be productive of error and confusion. Secondly, it leads one to some puzzling conclusions. It suggests that conduct which is widely assumed to be lawful might in fact involve the commission of criminal offences, contrary to everyone's expectation and understanding, because it cannot be squeezed into the existing exceptions to the general prohibition. For example, the purist quantitative approach leads to the strikingly counter-intuitive conclusion that boxing is unlawful, so that the boxers themselves, all the people involved in running and organising the sport (for example, members of the Boxing Board of Control, promoters, trainers and referees, and even all the spectators at ringside) are all guilty of criminal offences, either as principal offenders or as secondary parties.[9] Faced with this prospect, the only available solution appears to be to throw up one's hands and declare that boxing is anomalous and that its legality rests upon some largely unspecified, almost mysterious, "public policy."[10] Thirdly, an approach that presumes conduct unlawful unless there are good reasons to assert otherwise is clearly very different in design and practical effect to an approach which starts with a presumption of legality and requires good argument to support criminalisation. The "quantitative-rule-plus-exceptions" model places the burden of argument on the advocate of freedom, whereas the direct approach assigns the burden to the proponent of criminalisation. In other words, the former approach is authoritarian whilst the latter approach accords with the liberal preference for individual liberty. For these reasons the "quantitative-rule-plus-exceptions" approach is not the equivalent of the direct approach, even though (in the end) they have regard to the same evaluative criteria. Indeed, in terms of their implications for criminalisation policies they can be viewed as polar opposites.

C.15 These arguments, taken together, provide a powerful *prima facie* case against slavishly adopting a quantitative approach. They demonstrate the need to look for a new approach to the problem, which starts from first principles and does not prejudice the inquiry before it has even begun.

A DIFFERENT START: CONSTRUCTING A FRAMEWORK FOR PHILOSOPHICAL INVESTIGATION

C.16 If the quantitative approach is rejected, it will soon become clear that any investigation into the proper role of consent in the criminal law is not in principle severable from the larger topic of criminalisation in general. In order to know when consent should be effective to render lawful what in its absence would be a crime it is necessary to understand what makes *any* conduct criminal. It is necessary to investigate the moral limits of the criminal law.

C.17 What follows is necessarily a summary, which cannot hope to do justice to the range, subtlety and complexity of all the philosophical work in this field. The modest aim is to describe the major themes in the leading philosophical perspectives and to suggest criteria for their evaluation. Debates about the moral

[9] See paras 12.52 – 12.59 above.

[10] This is the decidedly unprincipled position that the House of Lords acknowledged in *Brown*. See Consultation Paper No 134, paras 10.19 – 10.22; M Gunn and D Ormerod, "The Legality of Boxing" (1995) 15 Legal Studies 181.

limits of the criminal law are often marred by the conflation of arguments that are incompatible or even mutually contradictory and by slippage between different levels of analysis which ought to be kept separate. This Appendix tries to bring order and clarity to the philosophical debate by identifying the individual argumentative strands and presenting them for examination. The main arguments are reviewed, in a pristine and unadulterated form, there is an explanation of the terms in which they are justified and their implications are traced.

C.18 In order to determine whether a particular form of conduct should be criminalised it is always necessary to pose two quite separate questions:

(1) Is there a good (moral) reason to justify extending the criminal law to this particular conduct?

(2) Should this conduct be criminalised *all things considered* (with particular reference to other moral principles and the pragmatics of law enforcement)?

C.19 Only if there is an affirmative answer to *both* these questions has a case for criminalisation been made out. Moreover, it is of the first importance that the two questions, and the arguments that are deployed to answer them, are kept quite separate and that they are addressed independently. The two inquiries must never be conflated because they stand in an hierarchical relationship to one another. Only if the answer "yes" can be given to the first Question (1) do we even go on to consider Question (2). On the other hand, no reply to Question (2), no matter how strong or cogent it may be, can ever compensate for a failure to respond adequately to Question (1).

C.20 A simple example will help to illustrate this point. Suppose that a case is made for criminalising a particular form of injury, by putting forward moral arguments to support its prohibition, that is by providing an answer "yes" to Question (1). Suppose also that the prohibition will be virtually impossible to enforce, because the conduct in question is conducted only in private by secretive groups of individuals who never inform on each other. This is the type of argument that might lead one to answer "no" to Question (2), and therefore to oppose criminalisation *all things considered.* But the inverse does not hold. The fact that it would be very easy to prohibit a particular form of conduct is, of itself, *absolutely no reason whatsoever* in favour of its criminalisation. In determining the moral limits of the criminal law, the considerations addressed to Question (2) only make sense against a background of affirmative answers to Question (1). Nobody would try to argue that wearing a hat in public should be criminal simply because it would be an easy prohibition to enforce. Debates about criminalisation are littered with just this sort of category mistake, albeit in forms that seem more plausible at face value, and which are all the more insidious and misleading on precisely that account. The only way to guard against these category mistakes is to adopt a rigorously logical, step by step approach to the investigation.

C.21 In what follows, therefore, these two questions about criminalisation are addressed separately, although it must always be borne in mind that no case for

criminalisation is complete until both questions have been addressed and answered in the affirmative. The next section[11] of this Appendix contains a review of the philosophical arguments which have been advanced in answer to Question (1) and the following section goes on to consider the issues that arise from Question (2).[12] Only arguments that survive the scrutiny of the next section qualify for further scrutiny.

STAGE ONE: PHILOSOPHICAL APPROACHES TO CRIMINALISATION

C.22 Philosophical inquiry into the moral limits of the criminal law can be roughly divided into three competing perspectives, each with its own distinctive theoretical commitments and policy recommendations. These are:

(1) liberalism

(2) paternalism; and

(3) legal moralism.

C.23 These three perspectives are apt to cover, between them, virtually all the arguments that are put forward in debates about the moral limits of the criminal law. Any arguments that fall outside their parameters are likely to be so outlandish that they would command very little support, and they need not therefore trouble the law reform process. Each of these general approaches is considered in turn, and a number of questions are addressed to each:

- Which general principles should govern the scope and limits of the criminal law and guide the policy of the conscientious legislator?
- How can those general principles themselves be justified in terms of some scheme of values and ideals of political morality?
- What, in practical terms, should be the scope and limits of the criminal law in relation to consensual injury and, in consequence, what should be the legal effect of consent to injury?
- To what extent can existing law, and in particular the quantitative approach to injury and the effect of consent, be justified by reference to a coherent, principled and persuasive argument or set of arguments?

C.24 Once we have, for each philosophical approach, an account of its general principle(s) of criminalisation, the political philosophy to which it appeals to justify them, and its practical prescription for criminal legislation, we will then be in a position to evaluate all the arguments, both in their own terms and against the claims of their rivals.

[11] See paras C.22 – C.91 below.

[12] See paras C.92 – C.107 below.

Liberalism

THE HARM PRINCIPLE AND THE OFFENCE PRINCIPLE

C.25 Liberalism, when applied to the question of criminalisation, is the view that only the "harm principle" or the "offence principle" can ever provide a good reason to support criminal legislation. The harm principle is best known in the form given to it by John Stuart Mill:

> [T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any one of their number is self-protection ... . [T]he only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.[13]

C.26 Mill called this his "one very simple principle"[14] but in fact it is neither simple nor only one principle. On further reflection the harm principle can be seen to be indeterminate in certain crucial respects[15] and to require supplementation by other principles. Its most subtle and comprehensive elaboration to date is to be found in Professor Joel Feinberg's four volume work *The Moral Limits of the Criminal Law.*[16] Feinberg restates the harm principle in these terms:

> *The Harm Principle*: It is always a good reason in support of penal legislation that it would probably be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) *and* there is probably no other means that is equally effective at no greater cost to other values.[17]

C.27 The offence principle (which is of subsidiary importance) is structurally similar:

> *The Offense Principle*: It is always a good reason in support of a proposed criminal prohibition that it is probably *necessary*[18] to prevent serious offense to persons other than the actor and would probably be an *effective* means to that end if enacted.[19]

C.28 In Volume One of *The Moral Limits of the Criminal Law* Feinberg concludes that the relevant sense of harm is *a setback to a person's interests that is also a wrong.* A setback to a person's interests is something that is sufficiently momentous to affect his or her well-being. There are some unwelcome or unpleasant occurrences that

[13] John Stuart Mill, *On Liberty.*

[14] *Ibid.*

[15] Most fundamentally, it does not specify what is to count as "harm" in the relevant sense.

[16] J Feinberg, *The Moral Limits of the Criminal Law, Volume One: Harm to Others* (1984), ("MLCL vol 1"); *Volume Two: Offense to Others* (1985), ("MLCL vol 2"); *Volume Three: Harm to Self* (1986), ("MLCL vol 3"); and *Volume Four: Harmless Wrongdoing* (1988), ("MLCL vol 4").

[17] J Feinberg, MLCL vol 1, p 26.

[18] Feinberg defines "necessary" in this context as "there is no other means that is equally effective at no greater cost to other values."

[19] J Feinberg, MLCL vol 1, p 26 (italics supplied).

are too trifling or transient to set back one's interests. Nor is every setback to an interest morally objectionable. When one considers the moral limits of the criminal law one is concerned only with setbacks to interests that are also wrongs. Suppose that Tracey decides to stop being Jason's friend and never to speak to him again. On the assumption that her friendship contributes significantly to Jason's well-being, that would be a very great setback to his interests, but it need not be a moral wrong, much less a criminal offence. If he has greatly offended her she might be morally justified in giving him up. In the same way, if Anne's firm undercuts Daniel's prices so that he is driven out of business and into penury that is a severe blow to his interests but (contract and competition laws aside) she has not wronged him. This is just lawful competition in a free market which is of no concern to the criminal law. The same point applies, *mutatis mutandis,* to serious offence within the meaning of the offence principle: only wrongful offence, that which infringes another persons's rights, is a genuine candidate for criminalisation.[20]

C.29 The harm principle is intuitively plausible and attractive because most people would consider harm to others a good ground for criminal prohibition. The proscription of serious offence also has immediate appeal. Yet even this brief, sketchy treatment of Feinberg's complex and subtle arguments reveals that there is no way in which the harm and offence principles will not be subject to challenge and controversy. The reason for this is that in order to distinguish between harms and non-wrongful injuries and to adjudicate between competing interests the harm principle must pre-suppose a background of moral values and ideals which are themselves inevitably the subject of challenge and controversy. This Feinberg readily concedes:

> Legislators must decide not only *whether* to use the harm principle ... but also *how* to use it in cases of merely minor harms, moderately probable harms, reasonable and unreasonable risks of harm, aggregative harms, harms to some interests preventable only at the cost of harms to other interests irreconcilable with them, structured competitive harms, accumulative harms, imitative harms, and so on. Solutions to these problems cannot be provided by the harm principle in its simply stated form, but absolutely require the help of supplementary principles, some of which represent controversial moral decisions and maxims of justice.[21]

C.30 Professor Raz[22] supports Feinberg's observations:

> Since "causing harm" entails by its very meaning that the action is prima facie wrong, it is a normative concept acquiring its specific meaning from the moral theory within which it is embedded. Without

[20] J Feinberg, MLCL vol 2, pp 1–2.

[21] J Feinberg, MLCL vol 1, p 187.

[22] Professor Joseph Raz is Professor of the Philosophy of Law at Oxford University and a leading exponent of liberalism on this side of the Atlantic.

such a moral theory the harm principle is a formal principle lacking specific concrete content and leading to no policy conclusions.[23]

C.31 The harm principle is not, however, doomed to dissolve into a morass of moral conflict. It can remain a distinctive approach to criminalisation if, as Feinberg tries to do, it is extended to concrete fact-situations with the help of what he calls "mediating maxims."[24] These are some of the more important mediating maxims for which he argues:[25]

> *The magnitude of harm*: People can be assumed to share certain basic interests in continued life, health, sustenance, shelter, procreation, political liberty etc (the "welfare interests"[26]). Without these basic necessities people are precluded from doing whatever else they would like to do. Other things being equal, setbacks to these interests are the most serious. Conversely, it would never be right to invoke the cumbersome machinery of the criminal law in order to address very trivial harms, even if they are capable of setting back interests in extreme cases.
>
> *The probability of harm*: Where a harmful consequence is not certain, risk is the gravity of harm multiplied by the probability of its occurring.[27] Risk has to be balanced against social utility in order to decide whether conduct is *too* risky to be lawful and should therefore be proscribed.
>
> *The relative importance of harm*: Where competitive interests make harm to someone inevitable, the relative importance of harm can be assessed according to:
>
> - the vitality of the interest: how important is the interest to a person's network of interests and projects? how central is it to their life?
> - the extent to which the interest is reinforced by related and overlapping interests, public and private.
> - the moral value of the interest. Some interests are so manifestly morally repugnant (eg the sadist's interest in torturing children) that they should be ascribed no weight at all in calculating the balance of interests.

[23] J Raz, *The Morality of Freedom* (1986) p 414.

[24] J Feinberg, MLCL vol 1, p 187.

[25] For a complete list see J Feinberg, MLCL vol 1, pp 214–217.

[26] These "welfare interests" include "the interests in one's own physical health and vigour, the integrity and normal functioning of one's body, the absence of absorbing pain and suffering or grotesque disfigurement." See *ibid*, vol 1, p 37. Feinberg adds that because these interests represent the minimum conditions necessary for the pursuit of "the good life" they "cry out for protection". *Ibid.*

[27] This can be expressed by the equation (R = p(H)*G).

C.32 In the same way, the offence principle can be made more determinate, and thereby more suitable for practical application, with the help of additional maxims. Feinberg shows that these maxims can be modelled on the law of nuisance and the way the courts decide applications for restraining injunctions: if the nuisance (offence) is minor and transitory, and incidental to activity that has both great value for the actor and important social utility, this all counts in favour of its being permitted to continue; if, on the other hand, it is extreme, widespread, has no social utility and is actuated by malice, the case for criminalisation is much stronger.[28]

C.33 These and other mediating maxims provide the harm and offence principles with their respective content. But why should we subscribe to any such principles at all? The answer is that when these principles are fleshed out in the ways Feinberg suggests, they can themselves be justified as proper principles for determining the moral limits of the criminal law by reference to the doctrines of *political liberalism* and, in particular, the value of *autonomy*.

LIBERAL IDEALS AND VALUES

C.34 Liberalism has as its central value "liberty" or, in its more modern expression, "autonomy."[29] The autonomous life that liberals cherish is the life that can be characterised as (in part) self-determined, self-authored or self-created. The autonomous person is self-possessed, independent, self-reliant and self-disciplined, but not to the extent that these virtues become vices through excess. Autonomy makes a person the sovereign authority over her life. She must choose and develop her own preferences, principles and commitments, live faithfully according to her choices and be responsible for the life she makes for herself. The liberal vision is not of a once-and-for-all career choice compulsively pursued. Instead, life is seen as an on-going project in which a person may defer decision-making ("keep her options open"), rethink her direction or even change course in mid-stream. It is essential to the liberal's conception of the good life that people should be free to choose, follow and revise their own life projects, to have the opportunity to develop their talents and to indulge their tastes, and to be given the chance of living out a good and fulfilling life.[30] For the liberal the act of choosing is not a thing of value in itself; somebody with ten choices is not twice as well off as somebody with only five choices. A choice is only valuable in itself if one chooses well. The liberal values the *opportunity* to choose because this is an essential component of a person's goals, projects and achievements being authentically her own. An important aspect of a good and successful life is that she should freely choose her projects and goals and then pursue them herself. The achievement would be greatly diminished if she were forced by someone else to live out that life against her will. It would also be greatly diminished if another

[28] J Feinberg, MLCL vol 2, chs 7 and 8.

[29] See generally, J Feinberg, MLCL vol 3, ch 18 and pp 206–214; J Raz, *The Morality of Freedom* (1986) chs 13 and 14.

[30] "To form, to revise, and rationally to pursue a conception of the good," in John Rawls' famous formulation. See J Rawls, "Kantian Constructivism in Moral Theory" (1980) 77 Journal of Philosophy 517, 525.

person were to choose her life projects and goals on her behalf, unless and until she came to embrace them as her own.[31]

C.35 Describing the ideal of autonomy in this way might give the impression that it is an obsessively individualistic, atomistic or even selfish ideal, which it is not. Its leading advocates, such as Professor Feinberg and Professor Raz, are at pains to emphasise that human existence is a thoroughly social existence.[32] The autonomous life is fashioned from the cultural materials that provide each of us with our horizons of meaning and value, as well as from individual biology and the exercise of free will. People make their own lives, but not in the conditions of their own choosing.

C.36 For the liberal, autonomy is an essential component of living well. However, since individual choice is integral to an autonomous life there is never any guarantee that any particular person will in fact lead an autonomous life: this is up to each individual to choose for her or himself. Any attempt to compel someone else to live autonomously would by that very act betray the ideal of autonomy. To be presented with the opportunity for genuine success implies the possibility of failure:

> One way of caring for the well-being of others is to allow them the opportunity to fail, for therein lies the opportunity to succeed ... . In a society built on social, occupational, and geographical mobility, failure is regarded as itself potentially rewarding and enriching. It is part of the process of maturation, growing self-awareness and self-control.[33]

C.37 Most conceivable life choices and projects, particularly those that are the most valuable and worthwhile, carry with them the risk of pain, loss and suffering. Yet the risk of being hurt cannot be eliminated without effacing much or all of what is valuable in that feature of life and, as a result, the value of choosing it:

> [A]nguish, frustration, and even suffering are often part and parcel of rewarding activities and experiences, which depend on the suffering, etc, for their meaning, and therefore for their value as well. The same can be said, to a more limited extent, of pain ... . [S]ome contemporary cultures dedicate much effort to the elimination and minimisation of pain and suffering. This has a devastatingly flattening effect on human life, not only eliminating much which is of value in our culture, but also making the generation of deeply rewarding forms of life, relationships, and activities impossible.[34]

[31] Professor Will Kymlicka puts it this way: "no life goes better by being led from the outside according to values the person doesn't endorse. My life only goes better if I'm leading it from the inside, according to my beliefs about value. Praying to God may be a valuable activity, but you have to believe that it's a worthwhile thing to do ... . You can coerce someone into going to church and making the right physical movements, but you won't make someone's life better that way." W Kymlicka, *Liberalism, Community and Culture* (1989) p 12.

[32] J Feinberg, MLCL vol 4, ch 29A; J Raz, The *Morality of Freedom* (1986) pp 307–313.

[33] J Raz, *Ethics in the Public Domain* (1994) pp 14–15.

[34] *Ibid*, p 19.

C.38 Given these elementary features of our lives and the place of value in them, the necessity for genuine choice between an adequate range of valuable options entails that an autonomous person must have the opportunity to choose wisely or badly, to choose between good and evil.

LIBERALISM AND CRIMINALISATION

C.39 The centrality of autonomy in the liberal's scheme of values gives him a preference for minimal state intervention in people's lives. The liberal is particularly hostile to state intervention through the mechanism of criminal prohibition and regulation, for the obvious reason that criminalisation is the state's most coercive form of social control.[35] What could be more invasive of personal autonomy than a system of prohibitions backed by sanctions, including fines, community service and incarceration, administered and enforced by full-time professional investigators, prosecutors, judges and prison officers? As Raz observes:

> [C]oercion by criminal penalties is a global and indiscriminate invasion of autonomy. Imprisoning a person prevents him from almost all autonomous pursuits. Other forms of coercion may be less severe, but they all invade autonomy, and they all, at least in this world, do it in a fairly indiscriminate way. That is, there is no practical way of ensuring that the coercion will restrict the victims' choice of repugnant options but will not interfere with their other choices.[36]

C.40 The criminal law places direct limits on individual freedom which the liberal wants to keep to a minimum. But that there *must be* limits to individual freedom is implicit in the liberal's own position, for the absolute autonomy of one is incompatible with the autonomy of any others. Brown's freedom to punch Green in the face is clearly at odds with Green's freedom to go about his business without suffering violent assault. The liberal does not value absolute liberty ("licence"), but rather the maximum individual liberty that is compatible with similar liberty for all. That is, the liberal supports the harm and offence principles, as elaborated and augmented for example by Feinberg, but she cannot countenance criminalisation on any other basis. For the liberal the harm and offence principles exhaust the moral limits of the criminal law.

C.41 The criminalisation of harm to others has a strong intuitive appeal, as was noted above, but it is necessary to say something more at this point about the criminalisation of offence. Liberals support the offence principle because some forms of offence can be so extreme and protracted that they unacceptably infringe the autonomy of unwilling observers and are therefore, on liberal principles, legitimate candidates for criminalisation.[37] The liberal is, however, extremely

[35] It should not be thought, however, that the liberal is unconcerned about more subtle forms of coercion. Mill, amongst others, recognised the potential for autonomy to be unjustifiably restricted by the "tyranny of public opinion": see J Schonsheck, *On Criminalization: An Essay in the Philosophy of the Criminal Law* (1994) pp 44–46, 56–59.

[36] J Raz, *The Morality of Freedom* (1986) pp 418–419.

[37] Feinberg offers a list containing amusing and repellent examples of serious offence at MLCL vol 2, pp 10–13.

cautious in using the criminal law to this end and will only endorse an offence principle that is properly qualified and carefully circumscribed. The reason is clear: since just about every conceivable activity might give offence to *somebody*, *everybody's* autonomy would be severely and unacceptably curtailed if the criminal law routinely targeted offensive conduct. This point is deployed with particular force in response to the argument that conduct should be criminalised solely on the basis that people are repelled by the mere thought of it going on in private. In most cases, people who use this argument are not really claiming that they are *offended* by the conduct, but rather that it is evil and should be stopped. This is a legal moralist argument,[38] to which no liberal would subscribe. But suppose that someone really was offended by the mere thought of, say, consensual "unnatural sexual intercourse" taking place behind locked doors and closed shutters, to such an extent that his obsession with the thought of it dominated and disrupted his life to a seriously detrimental extent. How would the liberal (or anybody else) deal with this situation? We would surely say that the cause of that person's malady is his own abnormal sensitivity. We might set about helping him to deal with his illness, but we would not pass criminal laws which indiscriminately restrict the freedom of other people with normal sensibilities. The liberal, at any rate, will only countenance criminalising offence which is extreme and unavoidable, and this can never be said of activity which takes place in private.

CONSENT AND THE HARM PRINCIPLE

C.42 It follows from the fact that liberalism will only countenance interference with individual liberty in order to prevent harm or serious offence to others that it is inconsistent with liberal principles to criminalise self-injury. Self-injury may be in the actor's interests and contribute to his well-being overall, as where a man cuts off his finger to prevent the spread of infection, but the liberal will not interfere with his determination to injure himself even where injury is not in his interests. This man chooses, perversely we may think, to set back his own interests, but he does not wrong himself. From the liberal perspective, his conduct is not within the legitimate province of the criminal law. Moreover, a person who genuinely consents to being harmed by another cannot be said to be wronged in the relevant sense either, as Feinberg explains:

> The harm principle will not justify the prohibition of consensual activities even when they are likely to harm the interests of the consenting parties; its aim is to prevent only those harms that are wrongs.[39]

C.43 Feinberg poses the question whether a person can ever be wronged by conduct to which he has fully consented, and then proceeds to answer it:

> There is a principle of law which emphatically answers this question in the negative: *Volenti non fit injuria* ("To one who has consented no wrong is done"). This ancient maxim is found in the Roman Law and has a central place in all modern legal systems. Perhaps the earliest

[38] See paras C.70 – C.91 below.

[39] J Feinberg, MLCL vol 1, pp 35–36.

> arguments for it are found in Aristotle's *Nicomachean Ethics*. One person wrongs another, according to Aristotle, when he inflicts harm on him voluntarily, and a harmful infliction is voluntary when it is not the result of compulsion, and is performed in full awareness of all the relevant circumstances including the fact that the action is contrary to the wish of the person acted upon. Therefore it is impossible for a person to consent to being treated unjustly (wronged) by another, for this would be to consent to being-treated-contrary-to-one's-wishes, which is absurd.[40]

C.44 The liberal position on criminalisation and the effect of consent can be derived directly from the principles contained in the last quotation:

> It follows from these premises that no one can rightly intervene to prevent a responsible adult from voluntarily doing something that will harm only himself (for such a harm is not a "wrong"), and also that one person cannot properly be prevented from doing something that will harm another when the latter has voluntarily assumed the risk of harm himself through his free and informed consent.[41]

> [F]ully valid consent ought to be a defense to all the crimes that are defined in terms of individuals acting on other individuals, including battery, [serious injury] and murder ... . Collaborative behaviour ought never to be criminal when the collaboration is fully voluntary on both sides and no interests other than those of the collaborative parties are directly or substantially affected. (The latter position excludes as proper crimes sodomy, bigamy, adult incest, prostitution, and mutual fighting, among other things.)[42]

CONSENT AND ITS COUNTERFEITS

C.45 There is, however, one thing that needs to be made clear. The liberal position does not entail the assertion that *any* expression of assent on the part of an injured person negates the wrongfulness of the harmful act and thereby precludes the intervention of the criminal law. From the liberal perspective, some real expressions of consent are not legally effective, and some apparent expressions of consent are not real consent at all.

C.46 In particular, some categories of people are not capable of giving valid consent. These include children and young people and those who are mentally or physically disabled. To deny legal effect to the consent of members of these groups (if in fact they are physically capable of indicating their assent) is not incompatible with liberal principles. The liberal ideal of individual autonomy assumes a person who is sufficiently mature and has adequate intellectual capacity to lead an autonomous life.

C.47 Children are thought not to have sufficiently developed characters or to have enough experience of the world to make drastically life-altering choices. Their

[40] *Ibid*, p 115 (footnotes omitted).

[41] *Ibid*, p 116.

[42] J Feinberg, MLCL vol 4, p 165.

parents or other legal guardians may therefore make choices on their behalf, in their child's best interests and even against his or her stated preferences, where these are in conflict. Similar considerations apply to the severely incapacitated. But in every case the nature of the choice and the extent of the incapacity are paramount, since children and those who are severely incapacitated must, like everybody else, enjoy the maximum autonomy that is consistent with their condition. Their consent to matters which promote their interests, or are neutral in their effect, should be respected. On the other hand, they are deemed incapable ("incompetent") of giving an effective consent to serious interferences with their interests.

C.48 Another example is provided by the man who is physically incapable of giving his consent. It is consistent with liberal principles for a surgeon to operate on the comatose patient who requires emergency surgery to treat a life-threatening condition because in this case there is no question of the surgeon overriding the patient's revealed preferences.[43] The patient is in no condition either to consent or to withhold consent to the treatment, so that in the absence of indications to the contrary the surgeon proceeds on the safest assumption: that the patient would consent to what is in his best interests were he able to do so. (This assumption does not *supply* consent. It is an alternative basis, consistent with liberal principles, for justifying interference with personal autonomy.) If there are in fact indications to the contrary the situation is very different. If there is reliable information that the patient refuses to have blood transfusions on religious grounds and would choose to die rather than undergo surgery involving a transfusion, he should be left to die. Most people may think that this is not in his best interests, but it is the only way to respect his autonomy.

C.49 A second important consideration is that the conditions under which an apparent consent is given may invalidate that consent, or at least give rise to the strong suspicion that the consent is not genuine. It is consistent with liberal principles for the criminal law to intervene in these cases, because intervention does not in fact override any genuine, voluntary consent to harm. It therefore does not impinge upon individual autonomy.

C.50 Circumstances which reduce or obliterate voluntariness and may invalidate consent include (literal) compulsion (ie physical force), coercive threats or offers ("duress") and defective beliefs induced by fraud or mistake.[44]

C.51 The "perfectly voluntary choice" is an illusion because in the real world choices are never "perfectly" voluntary. We always choose under a complex of pressures which vary in form and intensity. Of these the irreducible minimum derive from the pressures of personal competence, talents and preferences (which are not the product of our "perfectly" free choice either). The relevant question is therefore always: is the choice *sufficiently* voluntary to be effective, given its context and the purpose of our inquiry. The judgment "*voluntary enough*" is irreducibly context-specific and value-laden, as Feinberg explains:

[43] See para 1.18, n 42 above.

[44] See also generally Part VI above.

> [T]he validity of an expression of assent cannot simply be read off the facts or derived from an analysis of the concepts of voluntariness and coercion. How much voluntariness is required for a valid (legally effective) act of consent is at least partly a matter of policy, to be decided by reference to a rule itself justified by the usual legislative reasons of utility and social justice.[45]

C.52 It follows that the voluntariness of consent cannot be gauged by reference to a general rule of universal application. Fact-situations must be investigated in their own terms in order to arrive at tailor-made solutions for the particular problems to which each gives rise.

C.53 This brief survey shows that liberal arguments to justify criminalisation are not defeated by any and every expression of apparent consent. An expression of consent might be ineffective due to incapacity or invalidated by coercion. Liberals can give endorsement to provisions of the criminal law that are designed to check on the pedigree and authenticity of apparent consent. But once the true status of the consent is established, the liberal cannot give endorsement to coercive interference with the competent adult's voluntary choice, even where he or she chooses to consent to a setback to his interests.

THE HARM PRINCIPLE AND THE QUANTITATIVE APPROACH TO CONSENT

C.54 The harm principle, underpinned by the liberal value of autonomy, does not support the quantitative approach[46] to consent. The liberal position does not place *any* limits at all on the gravity of injury to which consent should in principle be effective.[47] It is entirely in keeping with respect for autonomy that a person should be able to consent to his or her own death; indeed, autonomy demands that such a choice should be respected. For people with excruciatingly painful terminal illnesses it might be argued that the choice of death is actually in their interests and would contribute to their well-being. But to remain faithful to the ideal of autonomy the liberal must respect someone's decision to die even where death would not be in that person's interests, and even where it would deal a severe blow to her well-being. Liberals also make no distinction in principle between a person taking her own life, and her consent to death at the hands of another. Liberalism implies the legality of both suicide and voluntary euthanasia.

C.55 Of course, the ideal of autonomy does not in itself provide even a complete *prima facie* case for the legality of either suicide or voluntary euthanasia.[48] The momentousness and irreversibility of death will prompt the liberal to scrutinise the choice to "end it all" very carefully. Some suicidal people might be found to be too disturbed or unbalanced for their decision to be "voluntary enough," in view of the circumstances and the gravity of their contemplated course of action. State intervention to prevent such people from setting back their interests is entirely in keeping with the harm principle and the ideal of autonomy. In these cases there is

[45] J Feinberg, MLCL vol 3, p 261.

[46] For this principle see paras C.5 – C.15 above.

[47] J Feinberg, MLCL vol 4, pp 165–173.

[48] For an overview of the arguments see J Feinberg, MLCL vol 3, ch 27; vol 4, pp 168–169.

no genuine expression of will to be overridden. Similarly, some potential candidates for voluntary euthanasia might be thought to be unable to give genuine consent to death, in view of the particular pressures under which they are likely to be placed and which might force their hand against their real, unexpressed wishes. Lord Goff has written recently:

> [I]t is easy for us, who are healthy, not all that old, and reasonably intelligent, to talk about euthanasia ... . But what does it mean to the old, the frail and the simple? After a television programme on the BBC devoted to euthanasia, it was reported that some people who watched it became afraid to go into hospital, because they were frightened that somebody might stick a needle into them. Moreover, old people sometimes feel under pressure to ask that their lives should be brought to an end, because they fear that they have become a burden to their relatives, if only because of the cost of being kept in an old people's home, or because they realise that by continuing to stay alive they are depriving their children of the opportunity to enjoy their money, however modest an amount they may have.[49]

C.56 If such pressures were thought sufficiently onerous and pervasive to rule out the possibility of a genuinely voluntary request to die, either generally or with respect to some identifiable group or groups of people, then the criminalisation of voluntary euthanasia (either generally or with respect to those groups) would be consistent with the harm principle. On those assumptions, nobody's autonomy is being compromised because nobody genuinely wants to die.

C.57 The empirical assumptions that the liberal needs to make before she can support the *blanket* prohibition of euthanasia are obviously implausible and it is highly unlikely that they could ever be substantiated in fact. Unfortunately, in the real world of hard choices about the moral limits of the criminal law, no neutral option is available which unequivocally supports the value of autonomy. A blanket prohibition on voluntary euthanasia violates the autonomy of those who genuinely want to die but who are physically or psychologically unable to take their own lives. As Feinberg poignantly observes, "[i]n life's unhappier end games, there can be no 'safe side' to err on."[50] The approach advocated by liberalism is to legislate for adequate safeguards to ensure that a request to die is truly (sufficiently) voluntary before it is acted upon. In that way the genuine choice of death may be respected whilst simultaneously protecting mentally ill people (from themselves), old people (from insensitive or odious relatives), and so on. Potential techniques easily suggest themselves, such as formalities requirements and "cooling off" periods, but the practical details for permitting voluntary euthanasia do not concern us here. This brief survey of the choice of death illustrates that the consistent liberal does not support the criminalisation of *any* level of genuinely consensual injury, up to and including fatal injury. Liberalism provides no support for the quantitative approach to the boundaries of effective consent in the criminal law because, for the liberal, the promotion of a person's well-being is *never* a good

[49] R Goff, "A Matter of Life and Death" (1995) 3 Medical Law Review 1, 17–18.

[50] J Feinberg, MLCL vol 3, p 370.

reason for the state to interfere with her autonomy. That type of argument is the province of paternalism, the second general approach to criminalisation.

Paternalism

C.58 As applied to the proper scope and content of the criminal law, "legal paternalism" may be defined thus:

> *Legal Paternalism*: It is always a good reason in support of a prohibition that it is probably necessary to prevent harm (physical, psychological, or economic) to the actor himself.[51]

C.59 The legal paternalist advocates just what the liberal denies: that the state may be justified in using its most coercive powers to force a person to act or forbear to act against his will in order to promote his own self-interest and well-being.

PATERNALISTIC IDEALS AND VALUES

C.60 Legal paternalism coheres with those philosophies which place a greater value on the attainment of some objective or end-state than on the ideal of autonomy. The defining feature of legal paternalism is that it justifies criminal prohibitions exclusively on the grounds that they promote an actor's own welfare; that is, it endorses state interference with one's freedom of choice and action *for one's own good.* Legal paternalism can find a foothold in the political philosophies of, amongst others, Plato, Aristotle, Rousseau, Hegel and Mill, all of whom specified forms of human excellence the attainment of which was believed to be more important than individual autonomy: that one should actually become the perfect warrior, the perfect citizen, the perfect embodiment of God's creation, or some other paragon, is deemed by adherents of these moral philosophies to be more important than that one should choose these ideals for oneself and attempt to get there through one's own efforts. The legal paternalist may or may not ascribe value to individual autonomy, but at all events she does not accord it that priority which it enjoys in the liberal's universe of value. Legal paternalism may be contrasted on the other hand with those philosophies which specify a *telos*, or end, other than an actor's welfare as a relevant reason for action. Classical Utilitarianism, for example, would make an aggregate of pleasure over pain, rather than individual welfare, the touchstone of criminalisation.[52]

PATERNALISM AND CRIMINALISATION

C.61 The challenge for the legal paternalist in marking out the moral limits of the criminal law is to explain *why* the promotion of an individual's welfare should take precedence over the liberal preference for respecting his or her autonomy. The paternalist faces an up-hill battle because the ideal of liberty/autonomy is greatly treasured by, and deeply ingrained in, the (political) culture of this country. Its

[51] J Feinberg, MLCL vol 1, pp 26–27.

[52] The *locus classicus* of Classical Utilitarianism is Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (J H Burns and H L A Hart eds, Athlone Press, 1970 [1789]) chs 3 and 13–15. For a recent attempt to construct a teleological theory of criminal justice see J Braithwaite and P Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (1990).

effects on public and private thought and action are pervasive and diffuse. Nevertheless, the perfectly familiar notion of a man being mistaken about what is in his own best interests, and consequently acting in a way that is detrimental to his own well-being, lends to the paternalist's argument a degree of plausibility. Suppose a person is about to do something – say, give away all her earthly belongings to a religious sect – which is manifestly against her interests and which she will soon come to regret. Her proposed action will greatly diminish her well-being by effectively closing off most of the valuable options and projects which she might otherwise have used her wealth to pursue. Her decision to divest herself of her property will make her destitute and thoroughly miserable. Is the state impotent in this situation? Is not the liberal's insistence that such people should be left to their fate lofty, detached or even callous? The paternalist seems to have the answer: we should legislate to save people from themselves, to prevent them from doing grave harm to their own welfare. People should therefore be prohibited from assigning all their property to religious sects, and such transactions should be declared null and void for the purposes of the civil law of property.

C.62 The paternalist argument for criminalisation has a certain plausibility when it is applied to this kind of scenario, and over the years it has attracted some illustrious supporters.[53] One of these was J S Mill, who held that nobody was free to sell himself into permanent slavery, since that would be to relinquish irrevocably the very freedom that he saw as each person's inalienable birth-right.[54] On closer inspection, however, the paternalist argument is not as attractive as it may at first appear. When one tries to evaluate paternalistic justifications for criminal prohibitions there are three points that must be borne firmly in mind.

C.63 First, the paternalist argues from a philosophical slippery slope and is at constant risk of taking a tumble. The fact is that many of us make life-style choices which do not promote our immediate or long-term interests. Smoking certainly falls into this category of choices: for the paternalist it should be a clear target for criminalisation. But the point goes much further. If (as seems plausible) a balanced, healthy diet and regular exercise would be in every person's interests, the paternalist has a reason for criminalising fatty foods and sedentary life-styles. Risk-taking without good reason would also be ruled out. Sky-diving, mountaineering and most contact sports would have to be criminalised. In principle,[55] the paternalist seems to be committed to using the criminal law to turn us all into super-fit, clean-living "spartans," whether we like it or not.[56] Paternalism seems less attractive when its implications are made apparent.

[53] H L A Hart once appealed to paternalism to justify the criminalisation of consensual injury; H L A Hart, *Law, Liberty and Morality* (1963) p 33. Feinberg argues that this concession to liberalism's enemies was unnecessary and ill-advised: MLCL vol 4, pp 16–17, 165–173.

[54] Mill's argument and the liberal rejoinder are described in J Feinberg, MLCL vol 3, pp 71–79.

[55] It must be noted that the paternalist case for criminalisation, like the liberal, remains incomplete until the second, *all things considered*, question has been addressed, for which see paras C.18 – C.21 above.

[56] J Feinberg, MLCL vol 3, pp 23–26.

C.64 Secondly, some criminal prohibitions which have intuitive appeal and which are often justified by paternalist arguments are in fact best explained in terms of the harm principle and are therefore perfectly consistent with liberalism. Professor Glanville Williams gave an example of one such prohibition when he explained the rationale behind the criminalisation of duelling.[57] At first sight this appears to be a paternalistic measure: (presumably) men who wanted to defend their honour in the traditional way were prevented from doing so *for their own good.* We are told, however, that many people were in fact hounded into duels against their will because prevailing social expectations effectively robbed them of any say in the matter. Once a man was slighted he was bound to offer a duel and his tormentor was bound to accept the challenge, even if neither wanted to fight. The duelling statute was therefore an exemplar of the harm principle. Far from interfering with people's choices in order to promote their welfare, by "setting men free from the tyranny of custom"[58] the statute gave effect to their authentic desires not to be injured at the hands of another. The liberal can and does support this type of statute without appealing to paternalistic arguments.

C.65 And thirdly, the liberal need not be as austere or uncompassionate as the paternalist paints her, because situations in which people might foolishly impair their own welfare do not present a straight choice between criminalisation and inaction. Modern-day liberals follow Mill in pointing out that the state can do a great deal to assist people to make the right choice without resorting to the coercion of criminal sanctions. The liberal state can educate, inform, remonstrate, persuade and exhort, and provided that it stops short of outright coercion it retains its liberal credentials.[59] If, however, a man should freely and voluntarily consent to placing himself in permanent servitude, the consistent liberal will let him have his head. Although the paternalist's solution is apparently attractive in these extreme circumstances, it is purchased only with the sacrifice of autonomy, and that is too high a price for the liberal to pay.

PATERNALISM AND THE QUANTITATIVE APPROACH TO CONSENT

C.66 Paternalism is barely – but only barely – more hospitable than liberalism to the quantitative approach to consent in the criminal law. Insofar as people might be tempted to consent to grave setbacks to their welfare interests, the paternalist might advocate criminal laws that prevent people from irrevocably altering their position for the worse. For example, since most people's life-projects require for their fulfilment a minimum level of health and physical integrity the paternalist might advocate the criminalisation of consensual serious injury or death on the basis that, as a general rule, people cannot be permitted to allow their welfare to be diminished to such an extent.

C.67 The consistent paternalist would not, however, support the law in its current form. As has been seen,[60] the paternalist has the hard task of explaining why life-

[57] G Williams, "Consent and Public Policy" [1962] Crim LR 74, 77–78.

[58] *Ibid.*

[59] But see the qualification at n 39 above.

[60] See para C.63 above.

choices which manifestly diminish individual welfare – such as smoking – are not much more extensively criminalised. Moreover, there is no paternalist justification for preventing people from consenting to serious injury or death where this would in fact promote their well-being, as in the case of some chronically ill people for whom death would be a merciful release. Nor would the paternalist withhold legal effect from consent to medically necessary surgical interference.

C.68 This last observation goes to the heart of the paternalist case for criminalisation, and it reveals a limitation on its practical implementation. The paternalist does not argue for criminal laws on the basis that *the state believes* intervention to be in the actor's own interests, but on the grounds that intervention *is in fact* in the actor's own interests. It follows that the state must be sufficiently sure of what the actor's interests actually are before the paternalist will countenance legislation designed to protect them. The paternalist case is consequently more persuasive when it focuses on interests which uncontroversially contribute to most people's welfare – continued life, bodily integrity, sustenance and shelter, for instance – than when it seeks to justify criminal prohibition in order to safeguard alleged "interests" which only dubiously contribute to a person's welfare.

C.69 This point is particularly pertinent in relation to the supposed interest in leading a "good and moral life." Does paternalism support the enactment of legislation[61] proscribing such activities as fornication, adultery, homosexual intercourse, pornography and the like, on the grounds that people should be protected from their human weakness in the face of depravity and sin? The answer seems to be no.[62] It is a notorious fact about the world that even evil people can prosper, and it is certainly not the case that one needs to be a saint in order to succeed in one's life-projects. Unless a man or a woman has chosen for themselves the life of a saint or a martyr, being assisted or forced to lead such a life is not in their *own* interests, in the sense of contributing to their *own* welfare for their *own* good. If the argument turns out to be that forcing people to live the lives of saints would make the world a better place, and that this would be intrinsically right and proper because, for example, God has so willed it, the argument is about enforcing morality *per se*, and is not a paternalistic argument about individual welfare. In other words, it is a variant of the legal moralist arguments discussed in paragraphs C.70 – C.91 below. On this issue, therefore, the liberal and the paternalist agree in the conclusion but differ in the arguments they use to support it. The liberal will not use the criminal law to force people to live a moral life because that would be destructive of their autonomy. The paternalist declines to criminalise to this end because living a moral life only contributes to the welfare of those who have chosen that life for themselves.

[61] Sometimes described as "sin statutes".

[62] J Feinberg, MLCL vol 1, pp 65–70 and vol 4, pp 16–17.

Legal moralism

C.70 The final group of arguments can be grouped under the rubric "legal moralism". It will be useful to distinguish two different versions:

(1) *Strict legal moralism*: It can be morally legitimate to prohibit conduct on the ground that it is *inherently immoral*, even though it causes neither harm nor offence to the actor or to others.[63]

(2) *Moral conservatism*: It can be morally legitimate to prohibit conduct on the ground that it will lead to *drastic change in traditional ways of life*, even though it causes neither harm nor offence to the actor or to others.

C.71 Legal moralism provides justifications for criminalising what Feinberg calls "free-floating non-grievance evils". These are evils that do not directly harm or offend anyone. They do not infringe people's rights and therefore do not give any particular individual a legitimate ground for grievance or complaint. Criminal prohibition is aimed directly at what is intrinsically evil, evils that, as it were, "float free" of human interests. Such evils might include:

(1) violation of social or religious taboos;

(2) sexual immorality, such as fornication or adultery;

(3) moral corruption of character (one's own or that of another);

(4) evil or impure thoughts;

(5) false beliefs;

(6) wanton killing of a spider or fly;

(7) extinction of a species of animal;

(8) extinction of cultural identity through assimilation to another culture;

(9) drastic change in the moral or aesthetic climate;

(10) diminishing good manners, etiquette and social grace;

(11) increasing environmental ugliness or drabness;

(12) diminishing standards of architectural good taste.[64]

C.72 As we have seen, liberalism is not the view that morality can never be enforced by means of criminal prohibition, for the injunctions against causing harm or serious offence to others are surely moral rules. The distinction between liberalism and legal moralism is not that the moralist enforces morals whilst the liberal does not,

[63] J Feinberg, MLCL vol 1, p 27.

[64] This list of "free-floating non-grievance evils" is adapted from J Feinberg, MLCL vol 4, pp 20–25 and 40–43.

but that the liberal will only use the criminal law to enforce that part of morality constituted by the harm and offence principles. By contrast, the moralist will in principle use the criminal law to proscribe *any* immorality, even if it causes no harm or offence to anybody.

MORALISTIC VALUES AND IDEALS

C.73 There is an immediate plausibility to the moralistic position: if the criminal law can be used to prevent some forms of immorality (for example, harm to others) why in principle can it not be used to proscribe all immorality? Why should the state tie its hands in dealing with any form of evil? Surely the state is justified in attempting to eradicate all forms of immorality, with any means at its disposal? The liberal reply is, in a word, *autonomy*. The state may interfere with a person's autonomy, using its most coercive and liberty-restricting techniques, just in so far as it does so to protect the autonomy of others. But, for the liberal, mere "free-floating" evils which cause no harm or serious offence to anybody could never justify the global invasions of autonomy which are characteristic of the criminal law. How does the legal moralist reply?

C.74 Before presenting the moralistic case for criminalisation it is worth re-emphasising the importance of distilling an argument into its pure form as a prelude to any attempt to evaluate it. The injunction is particularly apposite here because those arguments that are typically thought of as "moralistic" are often alloyed with other considerations from which they acquire covert and illegitimate support. A good example is provided by Lord Devlin's well-known "social disintegration thesis."[65] Lord Devlin argued that a political state is entitled to criminalise private immorality to the same extent as it may protect itself from treason and sedition, because "private" immorality loosens and, if left unchecked, eventually dissolves the moral consensus on which society is built. For Lord Devlin, private immorality threatens the destruction of society and the descent into anarchy just as surely as the work of terrorists and other political subversives, and the ground for criminalising both is the same: *societal self-protection*. The tone of this argument might be described (pejoratively) as "moralistic," but it is not a moralistic argument, in the sense we are employing that term here. The argument in fact appeals directly to the harm principle and any liberal would support it, *on the assumption that its factual premises are sound.* If, for instance, widespread fornication, adultery and homosexuality would land us in Hobbesian anarchy,[66]

[65] P Devlin, *The Enforcement of Morals* (1965) pp 8–14.

[66] Thomas Hobbes, the celebrated seventeenth century English political philosopher, believed that the civilising bonds of society, comprised of formal legal rules and more informal social conventions, were the first precondition of peaceful human co-existence. If these bonds were loosed or destroyed full vent would be given to man's innate predatory and destructive instincts: "during the time men live without a common Power to keep them all in awe, they are in that condition which is called Warre; and such a warre, as is of every man, against every man ... . In such condition, there is no place for Industry; because the fruit thereof is uncertain; and consequently no Culture of the Earth; no Navigation, nor use of the commodities that may be imported by Sea; no commodious Building; no Instruments of moving, and removing such things as require much force; no Knowledge of the face of the Earth; no account of Time; no arts; no Letters; no Society; and which is worst of all, continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish and short". Thomas Hobbes, *Leviathan* (Richard Tuck, ed 1991) [1651] pp 88–89.

then the harm principle gives us every reason to criminalise immoral sex. But because human experience directly contradicts any such proposition, the liberal will withhold criminal sanctions after all. Those who part company with the liberal at this point by insisting that, harm or no harm, vice should be suppressed, are taking the truly moralistic line, exemplified by the moral conservative and the strict legal moralist.

MORAL CONSERVATISM

C.75 The moral conservative argues that drastic social change is an evil in itself and should be prevented, if necessary by using the criminal law to forestall radical alterations to the social *status quo*. The conservative wants to preserve traditional ways of life, and he is prepared to invade the autonomy of individuals who want to experiment or innovate with unconventional life-styles, lest the new should come to replace the old and sweep tradition aside.

C.76 Conservatism, it hardly needs to be said, is a political philosophy with a long tradition. Indeed the conservative ideal itself qualifies as a cherished bequest of traditional forms of life. In recent times conservative doctrines, in the guise of "communitarianism," have been advanced in order to foster respect for (ethnic) minority practices and values, and have been deployed as the basis for rights claims to protect traditional cultures from destruction by assimilation into "western society."[67]

C.77 There is, however, something deeply perplexing at the heart of the conservative ideal, which points up a fundamental challenge to conservative doctrines. Why should anyone believe that the existing ways of life are so perfect that any change must necessarily be for the worse? The suspicion immediately arises that the conservative's preference for familiarity and longstanding convention is little more than fear of the unknown, possibly tinged with visceral feelings born of prejudice. History tends to suggest that some changes *are* for the worse but that many are for the better, so that there should be no *a priori* reason for thinking that present social arrangements are beyond improvement. Moreover, if the conservative is to avoid appealing to obscure metaphysical doctrines, she must be able to show that the maintenance of traditional ways of life is for the benefit of the people who live them. Although a societal whole can be greater than the sum of its parts, only *people*[68] can have *interests* in the sense that the word is used here. To talk about the welfare of organisations, institutions or political communities is to use a convenient shorthand for referring to the welfare of the (real) people who comprise them.

[67] These issues are addressed in the essays comprising W Kymlicka (ed), *The Rights of Minority Cultures* (1995), especially Parts III & IV.

[68] Many people would argue that the higher animals (at least) also have interests, and perhaps even rights, but this is not a complication that concerns us here.

C.78 An argument now presents itself to the conservative. As MacIntyre,[69] Sandel,[70] Charles Taylor[71] and others have argued, people can only ever prosper in community with their fellows. The commitments, roles and forms of life into which we are all born provide the network of meanings and relationships that are woven into our personal identities and give form and structure to our lives. In this important sense, the community is prior to the individual. Is it not then also the case that any radical change in the existing forms of life will be confusing, disorientating or even debilitating to those who have carved out their lives in the old order and have made it an integral part of their life-projects and personal identity? The conservative can argue that drastic social change exacts a heavy toll on individual lives and that this provides a good reason to prevent such change from occurring, by coercion if need be.

C.79 Understood in these terms, the conservative argument is plausible and it captures an important truth about human nature. It is open, however, to some powerful liberal rejoinders. First, if the empirical case for the conservative argument were strong, it would amount to saying that social change would cause direct harm to identifiable individuals. This is a liberal/harm principle argument, not a moralistic case for criminalisation. In fact, however, the conservative's empirical claims are suspect. First, her exaggerated fear of novelty leads her to assume that any and every innovation threatens to overwhelm the old order, and accordingly she will not brook the slightest dissent. This assumption is counter-intuitive and contradicted by experience, which shows that deeply embedded traditional mores and customs are resilient to change, even where there are strong arguments in favour of abandoning them. If the old order is worth preserving, one may ask, why is it a foregone conclusion that tradition will lose out in a fair contest with alternative new ways of living? Mill argued for the opposite conclusion: free experimentation in new forms of life, circumscribed only by the harm principle, would conduce to the discovery of the good life (or lives).[72] Second, radical social change does not normally occur overnight. Social change is typically gradual and almost imperceptible, the product of a concatenation of events over time; evolution not revolution. People who live through social change are not like the convict who is released after a 20-year gaol sentence and cannot "connect" with a world that has changed out of all recognition from the world he knew. People who live through social change learn to move and adapt with the times. Indeed, the ability to do so is a key aspect of successful existence and prosperity in a world like ours where social change and diverse forms of living are facts of life.[73] Provided that a person has an adequate range of good options to choose from, the

[69] A MacIntyre, *After Virtue: A Study in Moral Theory* (2nd ed 1985).

[70] M J Sandel, *Liberalism and the Limits of Justice* (1982).

[71] C Taylor, "Atomism," in *Philosophy and the Human Sciences: Philosophical Papers 2* (1985).

[72] Mill, *On Liberty*.

[73] There is an on-going debate within liberalism about the social conditions under which successful adaptation can be achieved. Compare W Kymlicka, *Liberalism, Community and Culture* (1989), with Jeremy Waldron, "Minority Cultures and the Cosmopolitan Alternative," (1992) 25 University of Michigan Journal of Law Reform 751 (reprinted in W Kymlicka (ed), *The Rights of Minority Cultures*).

conditions for an autonomous life are satisfied.[74] From the liberal perspective, nobody has a right to demand any particular life-style, whether it is one now current or one long since extinct. The liberal will certainly not place swingeing restrictions on individual autonomy for the sake of preserving social conditions simply because some people have an emotional attachment to them. Individual liberty cannot be restricted purely for the purpose of preserving historical curiosities.[75]

STRICT LEGAL MORALISM

C.80 The strict legal moralist believes that in principle the criminal law may be used to enforce true morality, not just the morality accounted for by the harm and offence principles, but any and every moral rule. Unlike her close confederate, the moral conservative, the strict legal moralist does not seek to maintain existing social conditions with their existing moral norms, since conventional morality might not accord with true, critical morality. Indeed conventional morality might directly contradict true morality; that is, conventional morality might itself be immoral. The strict legal moralist has no interest in preserving the *status quo* simply because it is conventional: she is only interested in enforcing conventional morality to the extent that it faithfully tracks true morality.

C.81 Legal moralism has greater instant appeal than legal conservatism. After all, even the liberal agrees that the criminal law can be used to enforce *some* moral rules, in particular the rule against inflicting harm on others. Why should there not be other moral rules that can properly be enforced by criminal prohibition? Moreover, there are some immoralities which are not covered by either the harm or offence principles for which criminalisation might intuitively seem appropriate. Examples include:

(1) Consensual gladiatorial contests. A gladiatorial battle to the death might be thought to be such a repugnant spectacle that such contests should be illegal even if the combatants and all the spectators were willing participants.

(2) Immoral advantage-taking. There are some forms of advantage-taking that are morally repugnant even though they harm nobody directly and infringe nobody's rights. These include non-coercive exploitation and unjust enrichment. In both cases a person makes a wrongful gain but without causing wrongful loss, so that the harm principle is not activated. The civil law can force people to disgorge their ill-gotten gains, but we may be so repulsed by some types of advantage-taking that criminal prohibition is in order.

C.82 The cogency of the moralist's arguments are inevitably linked to the particular examples which she is able to describe and the candidates for criminalisation which they suggest. Her arguments must therefore be judged on their individual

[74] J Raz, *The Morality of Freedom* (1986) pp 373-374.

[75] J Raz, "Multiculturalism: A Liberal Perspective," in *Ethics in the Public Domain* (1990) ch 7.

merits and no general treatment is possible. However, whatever examples the moralist produces, the liberal response always takes the same general form.

C.83 First, the liberal may deny the moralist's minor premise, ie she may deny that the conduct in question is in fact immoral at all. The legal moralist always has a stronger *prima facie* case when her candidate for criminalisation is unequivocally immoral: for example, exploiting tragic circumstances for personal gain is often considered immoral. Conversely, if the moralist holds controversial views about the scope and content of true morality, her position is much weakened. The liberal does not need to appeal to the harm principle or to the value of autonomy in order to answer Lord Devlin's claim that homosexual intercourse is immoral.[76] He can simply say that it isn't.

C.84 Second, even if the liberal agrees with the moralist about the immorality of particular conduct, he will still deny that the criminal law can be used to proscribe free-floating evils. In some cases he will be able to show that the moralist case relies illegitimately on harm principle considerations. If we are troubled by the prospect of lawful gladiatorial contests, for example, it may be because we fear that they would lead to one or more undesirable consequences: for instance, people being press-ganged into taking part against their true wishes; public disorder erupting at the contests; the subsequent perpetration of violent assaults on innocent victims by the people who are drawn to watch the contests and glory in their gratuitous violence; or the corruption of the young. All these arguments require empirical validation before they could provide a good reason for criminalisation, but they all appeal directly to the harm principle. The liberal is not embarrassed by supporting criminal prohibitions on any of these grounds, provided that the causal links can be established.

C.85 And thirdly, the liberal will not go along with the moralist's criminalisation of genuinely free-floating evils that cannot be brought within the ambit of the harm or offence principles, because the liberal and the moralist disagree fundamentally about the value of autonomy. The liberal can agree with the moralist that the world would be a better place with less of this evil in it, and the liberal might even set about trying to reduce the evil by argument, persuasion, exhortation and/or education of the young. But she will not use the criminal law to this end because she accords primacy to the value of autonomy and the mutually reinforcing ideals of value pluralism and toleration. Given the diversity of human needs, tastes and talents there must be a diversity of eligible life-styles, careers and options to give everybody a fair chance of living a fulfilling, stimulating and enjoyable life. Some of these life-styles will be incompatible or even mutually contradictory, but the liberal will demand that each should extend to the others a degree of tolerance and respect, within the limits set by the harm and offence principles.[77] The liberal asserts that her political theory is the most appropriate for a multicultural and pluralistic society, in which disagreement about morality is pervasive but is not destructive of the social bonds that facilitate communal life: that is, there is an

[76] P Devlin, *The Enforcement of Morals* (1965) pp 8–9, 11.

[77] J Raz, *The Morality of Freedom* (1986) ch 15.

"overlapping consensus"[78] about the core content of morality, but lively and occasionally bitter debate about its precise form and limits. Liberalism is advocated as a political philosophy to bind us together in a society committed to pluralism and diversity.[79] The onus is placed squarely on the moralist to show why the criminal law should be used to enforce one particular version of the good life on us all, why difference and dissent should be proscribed by law even though (by definition) they cause neither harm nor offence to others, and even though to do so will disappoint, frustrate, alienate and embitter those who would prefer to live nonconformist lives.[80]

LEGAL MORALISM AND CONSENT IN THE CRIMINAL LAW

C.86 It follows from the fact that the moralist does not respect individual autonomy to the same extent as the liberal, that she does not accord the same respect to a person's consent, either. The liberal respects a person's consent because it is a manifestation of his personal autonomy. By contrast, the fact that a person consents to immorality is of no particular significance to the moralist. If fornication, adultery and homosexual sex are immoral, they remain immoral even when (especially when?) those who engage in such activities are willing and eager participants.

C.87 The legal moralist argues directly from immorality (or, in the case of the moral conservative, from the *status quo*) to criminalisation. The proper scope of the criminal law, and the extent to which consent should negate criminal liability, therefore turns on the moralist's specification of morality. The moralist might in principle support the existing legal position. This is true by definition of the conservative, although where existing conventions are silent, where there is simply no *status quo* to defend, the conservative will have to look elsewhere for arguments to justify criminal prohibition. The strict legal moralist, on the other hand, will support existing criminal prohibitions only to the extent that they reflect and embody true morality.

MORALISM AND THE QUANTITATIVE APPROACH TO CONSENT

C.88 Of all the general approaches to criminalisation, moralism is perhaps the most sympathetic to the quantitative approach to consent, but the succour it provides is very fragile.

C.89 The conservative might have a reason to support the existing law simply because it expresses and reinforces traditional practices and treasured ways of life. However, in relation to the proper role of consent in the criminal law, she must answer the charge that there is no settled practice to defend because the law in this area has long been uncertain in its scope and application, as was illustrated very clearly in

[78] J Rawls, "The Idea of an Overlapping Consensus" (1987) 7 Oxford Journal of Legal Studies 1.

[79] J Feinberg, MLCL vol 4, pp 108–113; J Rawls, "Justice as Fairness: Political not Metaphysical" (1985) 14 Philosophy and Public Affairs 255.

[80] See, for examples, paras 10.38 – 10.40 above.

the first Consultation Paper.[81] It cannot be seriously contended that in determining the role of consent in *Brown* the majority of the House of Lords *created* a traditional legal approach. Traditions are not created in that way, at least not the sort of tradition conservatives want to defend. Indeed, on just those controversial issues where the quantitative approach[82] points towards criminalisation, the conservative is more likely to argue against criminalisation on the basis that the practices themselves are traditional and should therefore be preserved. Dangerous sports such as boxing and judo, cosmetic activities like ear-piercing, tattooing and scarification,[83] and female circumcision[84] are all traditional cultural practices that can be supported by conservative arguments. In any event, the conservative will adopt a case by case analysis of particular practices rather than the over-generalising quantitative approach. There is no tradition of criminalising fully consensual and medically necessary surgical interference, even if it is life-threatening, and it would be absurd to argue that there ever should be.

C.90 The strict legal moralist will only support the quantitative approach to the limits of consent in the criminal law if it is usually immoral to suffer a given level of injury or to inflict it on another person, even with that person's consent. Such a moral position is possible but it is very implausible, because, as we have seen, there are situations in which it is obviously not immoral to suffer or to inflict any level of injury.[85] Unless the moralist is also an authoritarian, she will not advocate employing the criminal law for any purpose other than the enforcement of true morality. Like the adherents of all the other general approaches to criminalisation considered in this Appendix, she will therefore be driven away from the quantitative approach towards a more discriminating, if piecemeal, evaluation of particular forms of conduct. It follows that if the moralist believes that sado-masochism is immoral and that the criminal law would be a viable way of prohibiting it, she will advocate the criminalisation, not of the infliction of certain levels of consensual injury *per se*, but of *consensual injuries inflicted in the course of a sado-masochistic encounter*. Consent would be deemed ineffective in this context – to inflict injury in the course of a sado-masochistic encounter would be a criminal offence whether or not the other party consented to the injury – but the effect of consent in other contexts would remain an open question to be decided on the merits of particular fact situations. The moralist is distinguished from other general philosophical approaches to criminalisation by the type of argument that she uses to justify criminal prohibitions. Her position no more entails a resort to

[81] Consultation Paper No 134, Part II.

[82] See paras C.5 – C.15 above.

[83] The legal status of these activities is reviewed by L Bibbings and P Alldridge, "Sexual Expression, Body Alteration, and the Defence of Consent" (1993) 20 Journal of Law and Society 356. And see, further, paras 9.4 – 9.21 above.

[84] Currently proscribed by the Prohibition of Female Circumcision Act 1985. For a brief overview of the arguments for and against criminalisation see M Atoki, "Should Female Circumcision Continue to be Banned?" (1995) 3 Feminist Legal Studies 223. And see further para 9.3 above.

[85] Consensual and medically necessary surgical interference is, once again, a good example of this.

untargeted, blunderbuss criminal legislation than that of any of her philosophical adversaries.

C.91 It has been observed that the moralist case is at its strongest when it advocates the criminalisation of conduct that most people agree is immoral. To the extent that conduct is viewed by many people as morally neutral or even desirable, the moralist argument will frequently be resisted on its own terms. One moralist might say to another: "I agree that the criminal law may be used to enforce morality, but your moral beliefs are simply wrong. Since homosexual sex is not in fact immoral, there is no need to use the criminal law – or any other means – to proscribe it." Insofar as moralistic arguments have been advanced in order to support the prohibition of conduct that many see as morally equivocal or justified – prostitution, recreational alcohol and drug use, or "deviant" sexual practices, for example – the controversial nature of true morality may account for their lack of success. The legal moralist, however, does have access to some arguments that will strike many people as quite persuasive. In particular, the moralist may appeal to the immorality of advantage-taking. She may argue, for example, that the evil of sado-masochism lies not in a person suffering injury to which he or she has consented, but in the other person taking advantage of this situation to indulge in injurious and demeaning practices which are immoral in themselves.[86] This argument is subtle and apt to mislead, and it is therefore particularly important that we describe it clearly and precisely. The argument is not that *harm* is done to any another person, either directly to the injured party or indirectly to other people as a consequence of a depraved injurer attacking new victims, having developed a lust to inflict pain by engaging in sado-masochism: these are liberal harm principle arguments. Nor is the argument that by inflicting consensual injury the injurer demeans himself and so diminishes his own welfare: this is a paternalistic argument. The moralist's argument is simply that his behaviour is immoral and should be unlawful *on that account alone.* This is what distinguishes the moralist from the liberal in their approaches to the role of consent in the criminal law as in their approaches to criminalisation generally. The moralist would in principle proscribe conduct, and make consent to it legally ineffective, on the sole ground that it is immoral, even though it harms or offends nobody. The liberal, by contrast, would never permit individual autonomy to be invaded by the highly coercive machinery of the criminal law merely to proscribe free-floating evils.[87] Feinberg summarises the liberal case against criminalisation in these terms

> The free-floating evils do not hurt anybody; they cause no injury, offense, or distress; they are not in any way unfair. At most, they are matters for regret by a sensitive observer. To prevent them with the iron fist of legal coercion would be to impose suffering and injury for

[86] This is the type of argument advanced by G Fletcher, *Rethinking Criminal Law* (1978) p 770, in a passage quoted in the first Consultation Paper at para 12.2. However, the argument requires much closer scrutiny than was accorded to it on that occasion and, as is shown here, the assertion that it undermines the value of autonomy is entirely unwarranted.

[87] A liberal case for the legality of sado-masochistic encounters is made by L H Leigh, "Sado-Masochism, Consent, and the Reform of the Criminal Law" (1976) 39 MLR 130. The passage of 20 years has not dated the argument in the slightest.

the sake of no one else's good at all. For that reason the enforcement of most non-grievance morality strikes many of us as morally perverse.[88]

STAGE TWO: CRIMINAL LEGISLATION AND THE CRIMINAL PROCESS

C.92 The arguments surveyed above are aimed at providing *prima facie* reasons for criminal legislation. Unless a proposed criminal prohibition can be justified by reference to one or more of these principled arguments it cannot be justified at all. If, on the other hand, it passes muster at the level of principle it is necessary to consider whether there is a compelling case for criminalisation *all things considered.* No matter how strong the argument of principle there is no guarantee that it can be followed through in practice. Suppose that Satan's continued defiance of God is the greatest evil in the universe. In that case, the legal moralist has a good reason to criminalise it. Suppose further that Satan's defiance leads to all manner of harm and suffering in our world. The liberal now has a good reason to resort to criminal penalties, too. But suppose that in fact human actions cannot influence Satan in the slightest degree. On this further assumption neither the moralist nor the liberal will pass a new criminal law after all. Although liberals and moralists alike would use any viable means to bring Satan to book, they must regretfully concede that the criminal law cannot help them.[89]

C.93 All criminal prohibitions – even those that are absolutely justified – exact certain costs which must always be factored into any evaluation of their overall merit. A proposal for criminal legislation which is cogent at the level of principle can only succeed in justifying criminalisation *all things considered* if it also satisfies the following further requirements.

Criminal legislation is the least coercive means that will be effective in combatting the conduct in question.

C.94 Although the paternalist and the moralist do not accord the same weight to personal autonomy as the liberal, they are not by definition autonomy-haters. Unlike the authoritarian, neither the paternalist nor the moralist will constrain autonomy without good cause (they differ from the liberal on the question what a "good cause" might be). If some other state action short of criminalisation – such as advertising, licensing, taxation, civil law remedies and so on – might be effective in controlling or eradicating the conduct in question, liberalism, paternalism and moralism are united in advocating that those alternative means be pursued first.

C.95 This argument is particularly pertinent to a strategy that sometimes recommends itself to paternalists and moralists, namely the re-presentation of their case in a way that outwardly conforms with the harm principle in an effort to secure the liberal's support for their favoured prohibitions. Examples of this include the paternalist's justification of compulsory motorcycle helmet laws on the grounds

[88] Feinberg, MLCL vol 4, pp 79–80.

[89] Cf J Schonsheck, *On Criminalization* (1994) p 95: "Some bad things will happen, about which nothing effective may morally be done. This is true of our individual moral lives, and, alas, it is true of our social moral lives. And it is a mark of moral maturity to transcend this frustration, to not allow that frustration to become debilitating."

that the cost of treating injuries sustained by unprotected riders is a (financial) harm to all taxpayers;[90] and the moralist's argument that consensual injury inflicted during sado-masochistic encounters should be criminalised on similar grounds.[91] One answer to both these arguments is that the feared harm can be prevented with far less coercion than criminal penalties by forcing those who sustain such injuries to pay for their own treatment either at the point of delivery or through compulsory insurance schemes.[92] The paternalist and the moralist are then forced back into arguing directly for their proposed statutes on paternalist and moralist grounds respectively.

The new legislation will not produce side-effects that are morally worse than the conduct to be prohibited.

C.96 Legislation is not justified if it will lead to more harm than good. All criminal legislation carries with it an irreducible minimum of undesirable side-effects. These include the subjection of groups of individuals or communities to additional surveillance; the arrest, pre-trial detention, and conviction of some innocent people (because mistakes will in practice always be made, no matter what procedural mechanisms are used to protect the innocent from wrongful conviction); indirect setbacks to the interests of convicted persons and their families, including loss of income through fines or incarceration (which impacts on offenders' families as well as on offenders themselves); and the discrimination faced by ex-prisoners in the job market after they have served their sentences. These undesirable side-effects have to be accepted if *any* penal legislation is warranted. Some criminal prohibitions, however, lead to additional, context-specific evils, and these may be so serious and/or extensive that they more than offset any good that the new statute could produce. Criminalisation is not justified in such circumstances. For example, if the prohibition of abortion would lead women to resort to back-street abortionists, with all the attendant risks, including unnecessary infection, injury and death, criminal penalties may not be an appropriate way of addressing this issue, even if one makes the (controversial) assumption that from the moment of conception foetuses are people with rights

[90] This argument, and the liberal reply to it, are described by J Schonsheck, *On Criminalization* (1994) pp 107–141.

[91] Several respondents to the first Consultation Paper advanced this argument.

[92] This liberal answer would proceed along the following lines: the appropriate form of regulation would depend on the type of activity in question. For bare-headed motorcyclists, a scheme of compulsory insurance might be viable, whereas those who suffer consensual injury could be charged for their treatment at the point of delivery, the model currently adopted for dental treatment. (An incidental benefit of this approach would be to provoke public debate about the proper use of tax revenue in medical treatment: if taxpayers should not have to pay to treat injuries sustained during consensual sado-masochistic encounters, why should they pay to treat injured rock-climbers or rugby players etc?) It is not a valid objection that some people would try to cheat the system by not paying their dues; criminal prohibitions are already very ineffective in detecting and punishing certain types of offenders: ie plenty of people "get off" now, criminal penalties notwithstanding. The proponent of these schemes only has to show that they would be at least *as effective*, although far more respectful of individual liberty, than criminalisation strategies. There are forms of conduct currently subject to criminal prohibition for which this claim could plausibly be advanced, and those who prize individual liberty ought to give these alternatives serious consideration, unless and until the contrary is demonstrated.

that the law should protect. In the same way, if the prohibition of alcohol or narcotics will lead to underground trade, rich pickings for those who are willing to exploit the artificially high prices conferred on these commodities by their illegal status, and much secondary criminality (eg burglary by drug-users to pay for their "fix"), criminalisation may on balance not be justified.[93]

C.97 There is an important moral distinction between the setbacks to interests that the state brings about intentionally (eg legal punishment) and the injuries that are side effects of the state's intentional action. One is not responsible for side effects in the way that one is responsible for the outcomes one intends to bring about.[94] Nevertheless it is not morally permissible simply to ignore those side effects; their assessment and evaluation should form part of one's practical reason. Their cost cannot be ignored in calculating whether criminalisation is justified *all things considered.* If the evil of criminalisation would be greater than the evil sought to be eradicated the state might be justified in deploying some of the other techniques available to it, such as education, persuasion or taxation, but it should not resort to the criminal law.

The new legislation will not impugn cherished process values. In particular, it will not be inconsistent with the Rule of Law, and it will not require for its enforcement investigatory techniques that are morally odious and, on balance, worse than the conduct to be prohibited.

C.98 This Appendix has shown that the moral limits of the criminal law can be determined by reference to general principles such as the harm principle, the offence principle, paternalism, and legal moralism. But these are not the only values which infuse the criminal process. There are also various "process values."[95]

C.99 Some of these values are encapsulated in the Rule of Law ideal which demands that criminal legislation should satisfy certain formal criteria so that it will not be an intolerable restriction on individual freedom: criminal laws should therefore be clear, open, fixed, prospective, determinable, general and consistently applied.[96] A proposed criminal statute must be capable of being drafted in such a way that its precise scope and effect can be determined by any conscientious citizen who wants to conform with the law. And it must not confer large, unregulated tracts of discretion on police or prosecutors, for there is a risk of the law falling hostage to prejudice or caprice.[97] If the harm to be deterred and punished cannot be

[93] The criminalisation of narcotic use is treated extensively by J Schonsheck, *On Criminalization* (1994) Chapter 6.

[94] For an illuminating discussion of this distinction see John Finnis, "Intention and Side Effects" in R G Frey and W Morris (eds), *Liability and Responsibility: Essays in Law and Morals* (1991); and W S Quinn, "Actions, Intentions and Consequences: The Doctrine of Double Effect" (1989) 18 Philosophy and Public Affairs 334.

[95] R S Summers, "Evaluating and Improving Legal Processes – A Plea for 'Process Values'" (1974) Cornell Law Review 1.

[96] J Raz, "The Rule of Law and its Virtue" (1977) 93 LQR 195. See also Code Report, vol 1, paras 2.2 – 2.11.

[97] As has already been observed, these concerns were expressed by the CPS and by the English Collective of Prostitutes in response to the first Consultation Paper. See para 2.10 above.

pinpointed and expressed in fairly precise statutory language the criminal law may not be the right way to combat it.

C.100 Other process values require that investigators should conduct themselves with propriety, that criminal proceedings should be fair and open, that suspects and accused persons should be treated with the dignity and respect that all human beings deserve, and so on.[98] There is inevitably a degree of trade-off between the principles of criminalisation and the process values, but the case for criminalisation *all things considered* is not complete until the potential impact on process values has also been considered. If it were the case that proposed legislation could only be enforced by morally odious means, at great cost to other values that criminal proceedings should respect or promote, then a new statute is not justified. A clear example would be a prohibition that could only be enforced by extracting confessions from suspects by torture. No humane polity that respects fundamental human rights could ever endorse such a statute.

C.101 The practical importance of this point can be seen in connection with those criminal prohibitions for which only a weak case can be made out at the level of principle, for example statutes proscribing free-floating evils that neither harm nor offend anybody. If their enforcement would require a great sacrifice in one or more process values, this may tip the scales against criminalisation. Sanford Kadish makes this point with a vivid example. He postulates circumstances in which:

> [t]o obtain evidence, police are obliged to resort to behaviour that tends to degrade and demean both themselves personally and law enforcement as an institution. However one may deplore homosexual conduct, no one can lightly accept a criminal law that requires for its enforcement that officers of the law sit concealed in ceilings, their eyes fixed to "peepholes," searching for criminal sexuality in the lavatories below; or that they loiter suggestively around public toilets or in corridors hopefully awaiting a sexual advance.[99]

C.102 If the *prima facie* case for criminalisation is much stronger the balance may of course tilt the other way. We might want our police officers to do all this and more to combat serial rape and murder, always assuming that their techniques do not produce unreliable evidence that threatens the conviction of the innocent.

The new legislation will in fact be effective, because its successful operation is consistent with the limitations on criminal justice resources and the priorities of investigators and prosecutors.

C.103 The criminal justice process does not have unlimited resources. Indeed, the police and the other investigatory agencies (such as factory inspectors and the DTI), prosecutors and court administrators are already financially overstretched. On the

[98] Many prominent criminal justice "process values", several of which can be derived from the European Convention on Human Rights, are surveyed by Andrew Ashworth, *The Criminal Process* (1994) chs 2 and 3.

[99] S Kadish, *Blame and Punishment: Essays in the Criminal Law* (1987) p 24.

other hand, criminal justice spending must be balanced against other demands on the Revenue, from defence, education, the health service, social security and so on. Budgetary restrictions on crime control and the punishment of offenders are inevitable and entirely proper in principle.

C.104 The practical point for the advocate of a criminal prohibition is that, given these pragmatic constraints, there must be a realistic prospect of the prohibition being enforced; otherwise its enactment will be an empty gesture. Moreover, the existence of a law which is ignored by the police and openly flouted by the public runs the risk of bringing the law generally into disrepute. Using the criminal law to make empty gestures breeds cynicism and diminishes respect for the law and for the agencies who enforce and administer it. These considerations reinforce the *de minimis* principle. Legislation aimed at very trivial harms or at activities that many thoughtful law-abiding people regard as doing no harm to anyone will not impact on policing priorities or command the allegiance of the public, on whom the police depend for information to solve crimes. It cannot justify the requisite drain on resources, or their diversion from the pursuit of more worthwhile objectives.

The new legislation is consistent with the existing law and with other law reform priorities.

C.105 The discussion has proceeded thus far as though every proposed or existing criminal prohibition can be isolated from the criminal calendar and evaluated purely in its own terms. Lawmakers do not in reality legislate *de novo* onto a blank statute-book. Even root-and-branch reform proposals presuppose an existing framework of substantive and procedural rules that will remain unaltered. This fact gives rise to a demand for what Professor Dworkin calls "consistency in strategy";[100] any new rules must be inserted carefully into the settled framework of law so as not to frustrate the principles and policies which the existing rules are designed to serve. The demand for strategic consistency therefore places an additional constraint on the advocate of new criminal legislation because the criminal law cannot be subjected to a continuous process of radical reconstruction.

C.106 Proponents or opponents of criminalisation may also have to consider pragmatic constraints on the possibilities of law reform, such as those arising from the history of a particular reform proposal. One example that is directly relevant to the present context is the recent report of the House of Lords Select Committee on Medical Ethics[101] which has effectively settled the question of voluntary euthanasia in favour of continued criminalisation. Any law reform proposal we may make in relation to the proper scope of consent to injury in the criminal law will be obliged to accommodate the Committee's recommendations.[102]

C.107 These are the main considerations which need to be addressed at the second stage of the argument for justified criminalisation. The considerable task that still awaits

[100] R Dworkin, *Law's Empire* (1986) pp 132–135.

[101] House of Lords Select Committee on Medical Ethics, *Report*, HL Paper 21-I, Session 1993-1994, pp 48–49, 53–54. See also para 2.1 above.

[102] For similar considerations in relation to the lawfulness of boxing, see para 12.38 above.

the proponent of criminal legislation once a principled *prima facie* case for criminalisation has been established has been helpfully summarised in these terms:

> The proponent of criminalization must ask – and answer – myriad questions about the proposed statute. What "side-effects" will result from criminalization – and will the "costs" of these side-effects be so high that they exceed the expected "benefits" of criminalization? Will criminalization, for example, create a "crime tariff" on a commodity for which there is an inelastic demand, thereby enriching those willing to break the law, and providing funds to corrupt various public officials, and inducing consumers of that commodity to live a life of acquisitive crime in order to secure the money needed to meet the artificially high price of enforcement? What social resources will be devoted to enforcement efforts – and will this be a wise expenditure of scarce criminal-justice dollars? And as regards the behaviour which constitutes a violation of the statute – does it pose so serious a threat to the social order that imprisonment – at the cost of the individual's liberty, and significant resources of the state – is warranted? Could the incidence of the behaviour be reduced to an acceptable level by means less coercive and costly than a criminal statute? And the list goes on. In sum: No argument for morally justified criminalization is sound unless it takes full consideration of the realities of law enforcement.[103]

CONCLUSION

C.108 The task undertaken in this Appendix has been to produce a framework for investigating the philosophical foundations of the moral limits of the criminal law. The three main philosophical approaches to criminalisation, which are each characterised by general principles for determining the legitimate form and content of criminal prohibitions, have been reviewed. Each philosophical position has its own scheme of justificatory arguments that link its principles of criminalisation with broader structures of political morality, and each generates practical recommendations for criminal legislation. By adopting this methodology three distinctive approaches to the role of consent in the criminal law have been derived.

C.109 Much of the exposition has proceeded in the form of a debate between liberalism and its critics. This is not merely coincidental. The liberal values of autonomy, liberty, tolerance and pluralism strike many people as attractive, and their influence on the development of the common law is all-pervasive. The value of autonomy was repeatedly endorsed by the great majority of those who responded to the first Consultation Paper, and many of them accorded it paramount status. Those who would advocate criminalisation from a paternalistic or moralist perspective must overcome powerful and widely-accepted liberal counter-arguments. The presumption in favour of individual autonomy places the burden of persuasion firmly on the shoulders of liberalism's opponents.

C.110 The purpose of this Appendix has been to describe and to clarify the arguments rather than to arrive at substantive conclusions. Clarification of the issues and

[103] J Schonsheck, *On Criminalization*, pp 10–11.

arguments in the debate is an essential first step to their resolution, but philosophy must defer to politics once the ground has been cleared.

C.111 This philosophical investigation has, however, produced one clear conclusion. The quantitative approach to the role of consent in the criminal law is unable to derive substantial support from any of the philosophical traditions that have been surveyed. On the contrary, all three perspectives produce strong arguments to reject it. The conclusion is that there is no intelligible answer to the question (or riddle): to what level of injury should consent be effective in protecting the injurer from criminal liability? Liberalism, paternalism and moralism are united in suggesting that the significance of consent is a function of the context in which it operates. As a consequence the only way for the investigation to proceed is to consider particular fact-situations individually and to evaluate the relevant arguments for and against criminalisation on their merits.

APPENDIX D

MARTIAL ARTS

A DESCRIPTION OF SOME OF THE MARTIAL ARTS WHICH ARE RECOGNISED BY THE SPORTS COUNCIL

Aikido

D.1 We received evidence about Aikido from the British Aikido Board, a Sports Council recognised governing body, and from the British Aikido Association, an organisation affiliated to the British Aikido Board which is not itself recognised by the Sports Council.[1] Aikido is essentially a martial art of self-defence which has been practised in the United Kingdom since 1955. Competition Aikido is only practised by those "Aikidoka" who are trained in the "Tomiki" style which is one of the four styles of Aikido. This type of Aikido derives from the teachings of Professor Kengi Tomiki of Waseda University in Japan.

D.2 There are two distinct forms of Tomiki Aikido competition. The first involves the demonstration of techniques by two competitors and is judged according to points awarded on the quality of the demonstration. Apparently, injuries are "virtually unknown" in this style of Aikido. The second method of *competitive* Tomiki Aikido involves a head to head contest between two competitors, one of whom makes a series of attacking moves with a rubber knife or "tanto", while the other defends himself against the attacks using Aikido techniques. The use of the tanto is equivalent to a thrust with a foil in fencing. Again, full, half and quarter points are awarded for defensive moves. Additionally, quarter points are awarded for a good attack move with the tanto in order to promote attacking play. Concussion, spraining of joints and dislocations have occurred in tanto method contests, but serious injury is very rare: minor sprains are more common. There have been only 15 reported injuries in Aikido during 1994, and these have been mainly self-inflicted.

D.3 The rules of Tomiki Aikido provide for penalty points to be awarded for any infringement of the rules of the tanto competition and these are designed to minimise the risk of injury. More specifically, the rules prohibit a practitioner from dropping on his opponent during a locking move or "performing a sacrifice technique"; these practices result in a ban. Other infringements of the rules result in penalties ranging from simple warnings to instant disqualification. The rules are enforced by a central referee, who controls the competition, supported by two judges, each of whom is charged with responsibility for safe practice on the mat. The British Aikido Association has some 800 members, although the number of regular competitors is less than 100.

[1] See letters from Mr Martin Thorne, Chairman of the British Aikido Association dated 1 February 1995 and Mrs Shirley Timms, Secretary to the British Aikido Board dated 9 February 1995. The British Aikido Association is the only constituent member of the British Aikido Board which organises competitive Aikido.

D.4 So far as the non-competitive styles of Aikido are concerned, all the instructors are qualified coaches and have attended the British Aikido Board's coaching courses. There are about 11,000 people practising non-competitive Aikido throughout the United Kingdom: separate figures for England and Wales are not kept.

Ju Jitsu

D.5 We have received information about Ju Jitsu from a respondent who has contemporary experience of a number of martial arts. The term "Ju Jitsu" means "pliable or gentle science" and it appears to be based upon self-defence techniques. It seems that Ju Jitsu training and events are organised into four different formats. The first is sports Ju Jitsu, which involves four competitors. Two of these competitors are given attack moves by a judge, and the outcome of the event is determined by the efficiency of the self-defence moves that are employed. The second strain of Ju Jitsu consists of a series of rounds. Sports Ju Jitsu techniques are often used in the first round. In the second round sparring, locking and throws are used. The outcome of the bout is determined by three judges and, if they are unable to reach a unanimous decision as to the winner, then the bout proceeds to a further, deciding, round of ground-fighting, which is similar to wrestling. A third Ju Jitsu technique is supervised by the International Ju Jitsu Federation. This involves semi-contact sparring with no straight blows to the head or face being permitted; protective padding in the form of gloves is worn by competitors. The fourth style of Ju Jitsu is run under the auspices of the World Council of Ju Jitsu Organisations and, once again, involves semi-contact sparring.

Karate

D.6 Karate is a self-defence system which originated in mainland China and traces its roots through several hundred years in the Ryuku Islands which are now part of Japan. Traditional styles of Karate emphasise high moral standards, self-control, and positive avoidance of physical confrontation. Indeed, the word "karate" means empty or weaponless hand. Karate clubs teach both sexes and a high proportion of students are children between six and fourteen years of age.

D.7 There are four main types of fighting contact in Karate.[2] In non-contact Karate, only the style of technique is judged, and in semi-contact the style is judged, but only if the technique actually makes contact. Drawing blood, causing bruising or other excessive contact leads to loss of points or disqualification in the non-contact format. The Sports Council recognises Karate and the English Karate Governing Body ("EKGB") as its supervisory organisation, and we received evidence from one respondent which suggested that the EKGB now claims over 115,000 members. We have been told by the National Association of Karate and Martial Art Schools that safety plays an important and integral part of Karate practice.[3]

[2] Full-contact Karate, Knockdown Karate and Semi-contact Karate are considered in paras D.18 – D.20 below.

[3] This Association sent us a copy of their Martial Art Code of Safety which provides useful guidance on safety measures.

Kendo

D.8 Kendo is a style of Japanese fencing using swords ("shinai") which are constructed from four strips of bamboo that are held together with cord and soft leather. The rules of Kendo are based upon scoring points by striking the opponent's body ("do"), head ("men") and wrists ("kote") with the shinai. The strikes must be delivered accurately before points can be scored; in particular, the shinai must be used so that the side of the weapon's blade does not make contact with the opponent. It is a rule of Kendo that the "kendoka" must call out the part of the body that he is aiming at as he executes his attack move. The competitors in a Kendo bout wear a good deal of protective padding or armour. A heavy, dark blue cotton jacket, or "Kendogi", is worn to absorb sweat, as well as blows from the shinai. Kendoka also wear an "hakama" which is a black split skirt, made of many carefully pressed pleats, which goes from waist to ankle and permits complete freedom of leg movement. A helmet is worn which consists of a metal grill with heavily stitched cotton flaps that protect the throat, the shoulders and the back of the head. Kendoka also wear padded gloves to protect the scoring zone of the kote. The waist and hips are protected by the "tare" which is a thick cotton belt, from which long cotton flaps hang. The protective equipment is completed by a breastplate constructed from cotton, bamboo and leather which protects the scoring zone of the do.

Kung Fu

D.9 Kung Fu is a Chinese martial art. "Kung" is "a kind of concentration of an unremitting quality which keeps the student's mind on what he is doing and pushes him on when his body has decided it is time to stop."[4] There are a number of separate Kung Fu styles: examples include monkey style, white crane style, drunken style and praying mantis style. As well as punching and kicking moves, a number of weapons are used in Kung Fu systems, although "empty-hand" techniques are most common. The chief martial arts weapons are the double-edged sword, the big knife or broad sword which is shaped like a scimitar, the spear, the halberd, the long and short staffs, various whips, the hammer and the long lance.

Taekwondo

D.10 Taekwondo has been a demonstration sport in the last two Olympic Games, and its proponents would like to see it accepted as an Olympic sport. It is governed by two sets of rules, one made by the World Taekwondo Federation ("WTF"), which operates out of South Korea, and the other made by the International Taekwondo Federation ("ITF"), which originated in North Korea. The WTF is the international federation for this sport, which the International Olympic Committee recognises. On the other hand, the ITF is the federation to which the national Taekwondo associations recognised by the Sports Council are affiliated. This illustrates the difficulties that can arise over discrepancies in recognition at a national and international level. There is an international dimension present in a large number of the sports that are practised in this country, and any new recognition procedures should take this into account. The Sports Council and the

[4] P Crompton, *The Complete Martial Arts* (1989) p 113.

CCPR are both of the opinion that any scheme for recognition for Taekwondo should embrace both types of Taekwondo: it would be absurd if, whilst the WTF method was not recognised and therefore unlawful in this country, athletes could still participate in the sport for Great Britain at the Olympic Games.

D.11 The Secretary-General of the British Taekwondo Council ("BTC"), has provided us with more details on the two styles of Taekwondo.[5] The BTC supervises training and events under both WTF and ITF methods. Apparently, the two styles identified above train practitioners for "combat." The semi-contact and non-contact methods are run under the auspices of the ITF. The WTF supervises the full-contact method of Taekwondo. Both the ITF and WTF methods of Taekwondo necessitate the wearing of protective equipment by participants. The ITF method requires the wearing of a head protector, gloves for the hands and feet, groin protector for men and women, with the additional item of a breast protector recommended for women. The WTF method of "combat" requires the wearing of a head protector, body armour, groin protectors, forearm and shin protectors.

D.12 The ITF and WTF methods also differ so far as their rules are concerned. In the ITF method points are scored by the targeting of punches, strikes, thrusts and kicks to various regions of the body; the lower section of the body is out of bounds as a target area. More points are scored for standing and flying kicks than for hand thrusts. There is a division between the novice and junior grades, which follow the non-contact rule, and the black belt or proficient grades which follow the semi-contact rule. The non-contact rule requires that the attacking hand or foot is stopped approximately five centimetres short of the opponent. Any accidental contact may result in the offender having points deducted or being disqualified if the contact is considered to be excessive and/or intentional. The semi-contact rule permits contact to the opponent by the hand or foot glove of the attacker, provided that there is no follow through of force. Transgressions are dealt with in the same way as in the junior grades.

D.13 In the WTF method points are scored by the targeting of punches and kicks to the body area covered by the protective equipment; that is, the head, upper torso and forearms. Under this full-contact method the blow must be found to have caused "a trauma" to the opponent prior to points being awarded. The head is out of bounds as a target area as far as blows with the hands are concerned, but it may be attacked with the feet. The knock-out rule, leading to a win, is used, and opponents are matched on grounds of age, weight and grades of proficiency.

D.14 With both grades of Taekwondo, the object of the sport is to protect the participants from injury, whilst also demonstrating the potential ability to inflict injury. Notwithstanding the mandatory protective equipment, it does appear that injuries occur from time to time. The most common injuries are bloodied noses, bruises, pulled muscles and occasional fractures and broken bones.

[5] See the letter to the Commission from Mr Raymond Choy dated 26 January 1995, which contains the information set out in this paragraph and in paras D.12 – D.16 below.

D.15 The rules of Taekwondo are supervised by the separate organisations within the BTC, each of which has rules to cover competitions within their field of training. The BTC also has its own set of mutually agreed rules to cover the bi-annual competitions it hosts. The rules of play are strictly enforced by teams of corner judges and a centre ring referee. There may, on occasions, also be experienced ring supervisors present. The final decision on any alleged rule transgression would lie with the Tournaments Chief Umpire, or a panel of the most senior and experienced persons in the sport. There is the sanction of disqualification for breaches of the rules, and this can also be accompanied by a ban or even expulsion from the organisation.

D.16 The BTC estimates that it has a membership of approximately 23,000, and that another 10,000 people train at clubs and organisations which fall outside BTC recognition.

MARTIAL ARTS ACTIVITIES NOT RECOGNISED BY THE SPORTS COUNCIL

Grappling format: Knockdown Sport Budo

D.17 It is possible for full-contact strikes to the body to occur with this format. Knockdown Sport Budo is not an Olympic sport and it is not recognised by the Sports Council although it is becoming reasonably popular among the martial arts fraternity as a means by which practitioners of different styles can compete against each other on an equal footing. A round is of 5 minutes duration. The players may strike with full force but only to the body and outer thigh: full-contact blows are not allowed to the head. They can win by 5 second knockdown or submission for a legal strangle or lock.

Full-contact Karate

D.18 In full-contact Karate the full force of the blow or technique is allowed, and kicks to the head are usually allowed. On the other hand, punches to the head and strikes with or to elbows and knees are not usually permitted. Light pads are usually worn on the hands, the tops of the feet, and shins. Men wear groin protectors and women wear breast protectors. Point-scoring is usually achieved by successful full-contact techniques, and an outright win is achieved by knocking the opponent down, followed by a symbolic (but restricted) technique on the fallen opponent. We have been told that full-contact Karate has now largely evolved into Kick-boxing and that there are a number of stylistic similarities between both full-contact and knockdown Karate and Kick-boxing. The Sports Council has been advised that full-contact Karate can be a violent and brutal form of Karate. It is not sanctioned by the EKGB or the British Karate Federation ("BKF"). One respondent expressed anxiety to us about the fact that the practice of Knockdown Karate in this country has now been extended to women, and asserted that medical evidence proves that repeated contact to the breast area can be a causative factor for breast cancer.

Knockdown Karate

D.19 Knockdown Karate was developed by adherents of Karate who were dissatisfied with the system run under World Union of Karate Organisations ("WUKO") rules. The principal scoring technique is through knocking the opponent down

with bare fists and/or feet. In this style, the knee can be used as an attacking tool to the opponent's body, and, whilst blows to the head are not allowed, full-contact kicks to the head are permitted. Usually, no protective padding is worn except on the groin, shins and tops of the feet. One of our respondents believes that there are few serious injuries inflicted in the course of knockdown Karate bouts as the competitors stand too close together to cause much real harm.[6] The EKGB considers that knockdown Karate should take place under its auspices with appropriate safety and control mechanisms.

Semi-contact Karate

D.20 In semi-contact Karate the style of attack is judged, but only if the technique actually makes contact with the opponent's body. The aim is to show the potential to hurt the opponent without actually hurting him or her and, consequently, drawing blood, causing bruising or other excessive contact leads to loss of points or disqualification. Despite these sanctions the evidence is that even in ordinary club practice injuries in Karate are common. Cuts and bruises are commonplace, and broken fingers and toes and cracked ribs are frequent occurrences, rather more common than in rugby football. Fractures, major dislocations and internal injuries are less common in club practice, but they do occur. Competition injuries are more serious and frequent, and most competitors suffer more than superficial injuries. In both full-contact and semi-contact Karate the highest scoring technique is the reverse punch which is the equivalent, in boxing terms, of the right-handed punch delivered by an "orthodox" boxer.[7] The EKGB has expressed the view that it would be in the best interests of participants that semi-contact Karate, too, should take place under its auspices with appropriate supervision.

Thai boxing and Kick-boxing

D.21 The Sports Council received a unified submission from the representatives of Thai and Kick-boxing, although this did not provide it with an adequate opportunity to assess the safety and control of the activities. The Council was also provided with a copy of the rules and regulations of the British Thai Boxing and Kick-boxing Federation, an organisation which purports to represent the various groups active in this area of the martial arts. Rule 1.01 provides that the official rules must cover all British Thai boxing and Kick-boxing Federation sanctioned events where competitors compete under full contact, Kick-boxing or Thai boxing rules.

D.22 The number of rounds in each contest is determined by the grading of the competitor. The number of rounds in "C" (junior intermediate) class varies from two to four, in "B" (intermediate) class from five to seven and in "A" (open) class from eight to twelve. The contest will be won by a knock-out which leaves the opponent down for longer than the referee's count of ten. If there is no knock-out,

[6] On the other hand, another respondent has told the Commission that at a recent National Knockdown competition held by the largest British group at the National Sports Centre at Crystal Palace, of the 100 competitors who took part at least five ended up seeking hospital treatment, three of these with fractures. We have been told that the Sports Council hires out this centre regularly to groups which hold National Full-Contact Karate events.

[7] See P Crompton, *The Complete Martial Arts* (1989) p 11.

then the judges of a bout award points on a round by round basis. The rules provide that greater points credit should be given to the contestant who wins a round with "exceptional above-the-belt kicking technique" rather than punching techniques; below-the-belt kicking techniques are to be weighted in the same way as punching techniques. An otherwise even round should be awarded to "the overall most effective above-the-belt kicker."

D.23 Whilst it is possible to kick or "sweep" to the inside or outside of the leg, it is not permissible to aim a kick deliberately to the knee, groin or hip joint and this will constitute a foul leaving the offender liable to a warning, point deduction or disqualification. The rules provide that the following tactics, among others, are also considered to be fouls:

- Spitting, biting or the use of abusive language in the ring.
- Headbutts, knee strikes, elbow strikes, or clubbing blows with the hands and hammer fists.
- Jabbing the eyes with the thumb of the glove.
- Striking the groin, the spine, the throat, the collarbone, women's breasts or that part of the body over the kidneys.
- Deliberate use of any scraping blow, or rabbit blow.
- Hitting with the open glove, or with the wrist.
- Kicking into the knee, or striking below the belt in any unauthorised manner.
- Anti-joint techniques (striking or applying leverage against any joint).
- Holding an opponent with one hand and hitting with the other.
- Grabbing or holding onto an opponent's leg or foot.
- Leg checking the opponent's leg or stepping on the opponent's foot to prevent the opponent from moving or kicking.
- Holding any part of the body or deliberately maintaining a clinch for any purpose.

D.24 The rules provide that the contestants must wear tapes and bandages around their hands, padded protective equipment on their feet and mouthpieces. The men must wear groin protectors and women competitors are required to wear breast protectors. The bout must be supervised by a number of officials with qualifications approved by the Federation. There must be a referee, three judges, a physician, timekeeper, scorekeeper, announcer and a Federation representative present at all sanctioned bouts.

D.25 The CCPR has told us that there are a number of Kick-boxing clubs affiliated to the Amateur Martial Association which practise under the rules of the World

Association of Kickboxing Organisations ("WAKO Kick-boxing") in a well-controlled and regulated way. The CCPR understands that there is an international federation for the sport to which over 60 national federations around the world are affiliated. This activity involves learning a series of moves or sweeps with no intentional infliction of injury and has a detailed system of grading ("belts"). It is often taken up by people for motives of learning self-defence and, according to the CCPR, brings many benefits such as fitness, self-discipline and mental and physical well-being. We have also been provided with some useful information on the "combat" rules of WAKO. Apparently, this is organised into a series of two minute rounds. The rules may require a minimum number of kicks per round in order that the activity does not degenerate into a conventional boxing match. We have been told by one respondent that most Kick-boxing events run under WAKO rules do require a doctor to be in attendance.

D.26 One respondent has described to us the Thai version of Thai boxing, which apparently is more violent than western variants in that knees and elbows can be used to attack the opponent's head. A textbook[8] on this subject states that there are over 100,000 boxers in Thailand.

[8] *Ibid*, at p 182.

ABOUT HMSO'S STANDING ORDER SERVICE

The Standing Order service, open to all HMSO account holders*, allows customers to receive automatically the publications they require in a specified subject area, thereby saving them the time, trouble and expense of placing individual orders.

Customers may choose from over 4,000 classifications arranged in more than 250 sub groups under 30 major subject areas. These classifications enable customers to choose from a wide range of subjects those publications which are of special interest to them. This is a particularly valuable service for the specialist library or research body. All publications will be despatched to arrive immediately after publication date. A special leaflet describing the service in detail and listing the main subject headings available may be obtained on request.

Write to Standing Order Service, HMSO Books, PO Box 276, LONDON SW8 5DT quoting classification reference 18 01 015 to order future titles in this series.

* Details of requirements to open an account can be obtained from Accounts Dept., HMSO Books, PO Box 276, LONDON SW8 5DT.

Published by HMSO and available from:

HMSO Publications Centre
(Mail, fax and telephone orders only)
PO Box 276, London SW8 5DT
Telephone orders 0171 873 9090
General enquiries 0171 873 0011
(queuing system in operation for both numbers)
Fax orders 0171 873 8200

HMSO Bookshops
49 High Holborn, London WC1V 6HB
(counter service only)
0171 873 0011 Fax 0171 831 1326
68–69 Bull Street, Birmingham B4 6AD
0121 236 9696 Fax 0121 236 9699
33 Wine Street, Bristol BS1 2BQ
0117 9264306 Fax 0117 9294515
9–21 Princess Street, Manchester M60 8AS
0161 834 7201 Fax 0161 833 0634
16 Arthur Street, Belfast BT1 4GD
01232 238451 Fax 01232 235401
71 Lothian Road, Edinburgh EH3 9AZ
0131 228 4181 Fax 0131 229 2734
The HMSO Oriel Bookshop
The Friary, Cardiff CF1 4AA
01222 395548 Fax 01222 384347

HMSO's Accredited Agents
(see Yellow Pages)

and through good booksellers

£21

ISSN 1357-9223

ISBN 0-11-730224-4

9 780117 302242