

Appendix C
The Law Commission

**CONSENT IN SEX
OFFENCES**

A Policy Paper

February 2000



CONTENTS

	Pages
PART I: INTRODUCTION	15
PART II: THE ROLE OF CONSENT IN SEXUAL OFFENCES	16
Non-consensual sexual offences	16
Rape	16
Indecent assault	16
The meaning of consent	17
The burden of proof	18
PART III: CAPACITY TO CONSENT: MINORS	20
Capacity to consent: general	20
Age limits	20
Capacity to consent in minors: the second consultation paper	21
Our proposals	21
Responses to our proposals	21
Recommendations	22
An additional proposal: a conclusive low age limit for rape	23
PART IV: CAPACITY TO CONSENT: MENTAL INCAPACITY	25
Statute law	25
Common law principles	26
The appropriate balance between paternalism and the right to respect for private life	26
The role of the law	26
United Nations Declaration on the Rights of Mentally Retarded Persons, Articles 1, 6 and 7	29
European Convention on Human Rights, Articles 1, 3, 7 and 8, and the Human Rights Act 1998	29
Impact of the European Convention on Human Rights and the Human Rights Act 1998	30
The Home Office Sex Offences Review	31
The second consultation paper	32
Definition of “persons without capacity” (Proposal 13)	32
Definition of “unable by reason of mental disability to make a decision” (Proposal 17)	32
Capacity to understand in broad terms (Proposal 18)	33



Law Commission Report No 231: Mental Incapacity (1995)	33
Notable features of clause 2	34
Making Decisions (1999): The Government response	35
Analysis of responses to the proposals in the second consultation paper, and our recommendations	35
Definition of persons without capacity (Proposal 13)	35
Capacity and the mentally disabled (Proposal 17)	36
Capacity to understand in broad terms (Proposal 18)	44
PART V: DECEPTION AND MISTAKE	46
The common law	46
The nature of the act	47
The identity of the actor	48
The issues	49
Should a consent procured by deception be wholly disregarded?	50
Professional qualifications	51
HIV and other sexually transmissible diseases	52
Transsexuals	53
Our recommendation	54
A lesser offence of procuring consent by deception?	54
Mistake without deception	56
PART VI: THREATS	58
The present law	58
Threats of force	59
Other threats	60
Option 1: threats of force only	60
Option 2: all threats	61
Option 3: threats of certain kinds	61
Option 4: the effect of the threat	61
A further requirement that the threat be illegitimate?	62
Our recommendation	63
A lesser offence of procuring consent by threats?	63
The meaning of “threats”	64

PART VII: BELIEF IN CONSENT: THE MENTAL ELEMENT	65
The present law	65
The Law Commission Consultation Papers	66
The fate of Morgan in common law jurisdictions	67
The arguments for and against a subjective test	68
Arguments in support of an objective element	68
Arguments in favour of retention of the subjective test	69
Our view on this issue	69
Our views on the arguments for an objective element	69
Our views on the arguments for a subjective test	70
Our reasoning	70
Conclusions	71
PART VIII: SUMMARY OF RECOMMENDATIONS	73



ABBREVIATIONS

In this paper we use the following abbreviations:

ACPO: the Association of Chief Police Officers

CLRC: Criminal Law Revision Committee

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

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

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

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

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

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

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

CPS: Crown Prosecution Service

DPP: Director of Public Prosecutions

ECHR: European Convention on Human Rights

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

HIV: human immunodeficiency virus

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

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

MCCOC: Model Criminal Code Officers Committee (Australia)

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

SPTL: Society of Public Teachers of Law

Strasbourg Commission: European Commission of Human Rights

Strasbourg Court: European Court of Human Rights

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

PART I: INTRODUCTION

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

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

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

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

1.5 In separating off this element of our work for the purpose of this particular review, we have been aware of the requirement for the law to develop in a systematic and consistent manner. Thus, we have sought to address the question whether any of our proposals would, or may, result in different principles applying in sex offences and in other offences such as offences against the person. Our view is that, save as may specifically be mentioned, our proposals would not be likely to lead to any such inconsistency.

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

¹ (1993) Law Com No 218.

² (1995) Consultation Paper No 139.



PART II: THE ROLE OF CONSENT IN SEXUAL OFFENCES

2.1 This part

- (1) describes the existing sexual offences in which liability is conditional on the absence of consent;
- (2) proposes a definition of consent, for the purpose of these offences or any further offences of non-consensual sexual behaviour which may be created; and
- (3) considers the rules on the burden of proof where consent is in issue for the purpose of any such offences.

Non-consensual sexual offences

Rape

2.2 Section 1 of the Sexual Offences Act 1956¹ makes rape an offence, and states that a man commits rape if, *inter alia*,² he:

has sexual intercourse with a person (whether vaginal or anal) who at the time of the intercourse does not consent to it (section 1(2)(a)); or

induces a married woman to have sexual intercourse with him by impersonating her husband (section 1(3)).

Indecent assault

2.3 It is an offence for a person to commit an indecent assault on a woman,³ and a separate offence to commit an indecent assault on a man.⁴ The phrase “indecent assault is not accompanied by a statutory definition. “Assault” consists of an act which involves the violation of another’s person, however minor;⁵ and an indecent assault is one which involves conduct which “right-minded persons” would consider to be indecent according to contemporary standards of modesty and privacy.⁶

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

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

² In what follows we confine our discussion to the “conduct element” of rape.

³ Sexual Offences Act 1956, s 14(1).

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

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

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

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

The meaning of consent

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

“consent” should mean a valid subsisting consent ... and consent may be express or implied ...

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

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

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

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

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

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

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

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



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

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

- (1) **“consent” should be defined as a subsisting, free and genuine agreement to the act in question; but**
- (2) **the definition should make it clear that such agreement may be**
 - (a) **express or implied, and**
 - (b) **evidenced by words or conduct, whether present or past.**

The burden of proof

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

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

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

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

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

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

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

You may be convicted of a serious criminal offence which attracts a substantial maximum sentence unless you can prove on the balance of probabilities that you did something that was not wrong. If, having heard all the evidence, we remain unsure whether you committed the offence or not, we will convict you anyway.

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

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

¹⁵ [1999] 3 WLR 972.



PART III: CAPACITY TO CONSENT: MINORS

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

Capacity to consent: general

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

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

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

Age limits

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

3.5 Two criminal law policy objectives operate in this area. The first is that of forbidding sexual activity with children, whether consensual or not.³ The second is forbidding non-consensual sexual activity with anyone. The first objective is achieved in two ways. One is directly to criminalise the activity with children. The other is to use the general offence relating to non-consensual sexual activity, and deem children to be incapable of giving consent. The first approach is used in relation to vaginal and anal intercourse, in the form of the offences of unlawful sexual intercourse⁴ and buggery, which prohibit these acts with a person under 16 or 18 respectively. On the other hand, in relation to any other form of sexual activity, the second approach is used. For example, the offence covering adult, non-consensual activity – indecent assault – is used to criminalise consensual activity with a child by means of a provision deeming children under 16 incapable of giving consent. This does not truly address the child's capacity to consent. It is merely a device to accomplish the distinct objective of criminalising consensual sexual activity with children.⁵

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

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

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

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

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

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

Capacity to consent in minors: the second consultation paper

Our proposals

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

- (2) A person should be regarded as being without capacity if when he or she gives what is alleged to be his or her consent –
 - (a) he or she is under the age of 18 and is unable by reason of age or immaturity to make a decision for himself or herself on the matter in question; ...
- (3) In relation to those matters in which a person under the age of 18 may give a valid consent under our proposals, such a person should be regarded as being unable to make a decision by reason of age or immaturity if at the time the decision needs to be made he or she does not have sufficient understanding and intelligence to understand the information relevant to the decision, including information about the reasonably foreseeable consequences of deciding one way or another or of failing to make the decision.
- (4) In determining whether a person under the age of 18 has sufficient understanding and intelligence for these purposes, a court should take into account his or her age and maturity as well as the seriousness and implications of the matter to which the decision relates.⁷

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

Responses to our proposals

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

⁶ *Malone* [1998] 2 Cr App R 447.

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

⁸ Consultation Paper No 139 para 5.20.

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



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

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

3.12 The Justices' Clerks' Society feared, moreover, that our proposal might result in the *minor's* being “on trial” on the issue of capacity, replicating the problematic situation in which rape victims, currently, often find themselves placed. ACPO shared this concern, and was worried that the law as we conceived it would offer little protection to those young people who need it most, such as teenage prostitutes. Another respondent remarked in a similar vein that a young person might very well fulfil the *Gillick*-style criteria of capacity that we had put forward, and yet have been driven to consent to the activity in question by cultural factors, bullying, a wish to conform, or some other motivation which, arguably, prevented him or her from exercising a genuinely free choice. Finally, the Magistrates' Association appeared to concur with our proposal that the law should take a flexible approach to the issue of consent, but to regard the definition of “capacity” which we put forward as superfluous; for, in their view, “Magistrates are well able to determine whether a particular minor ... lacked capacity to consent” without such a definition.

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

Recommendations

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

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

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

- (1) the nature and reasonably foreseeable consequences of the act, and**
- (2) the implications of the act and of its reasonably foreseeable consequences.**

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

An additional proposal: a conclusive low age limit for rape

3.18 As we said above, the current structure of age limits in respect of sexual offences is a means of achieving criminalisation, rather than a way of addressing capacity to consent. It is, however, possible to use an age limit as a way of dealing with the real, factual issue of capacity. A principal justification for the current requirement in rape for actual consent is that non-consensual sexual intercourse with a child is more serious than consensual sexual intercourse, and so should be both marked by a more serious offence-label, and sentenced more severely. However, below a certain age, capacity to consent to sexual conduct cannot possibly arise as a live issue. Below this age, there is really no difference, in either labelling or sentencing terms, between sexual intercourse with and without some apparent but ineffective consent. There is, therefore, an argument for a provision stating that, below such an age, the prosecution need not prove lack of consent or incapacity to consent. There should be an irrebuttable presumption that the child did not have the capacity to consent. What that age should be is a matter for those expert in child development and those with a wider social policy remit. We note that the Sexual Offences Act 1956 recognises, for various purposes, a watershed at the age of 13.¹⁰ We suspect that, given the changes over time in rates of child development, 13 would now be too old. The aim would be for an age at which no or virtually no individual is likely, as a matter of fact, to be able to give an effective consent to sexual intercourse.¹¹ We are aware, for instance, of recent notorious cases in which 12-year-old girls have given birth to the offspring of child fathers, in, or after, what would appear to be consensual relationships.

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

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

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



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

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

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

PART IV: CAPACITY TO CONSENT: MENTAL INCAPACITY

4.1 The law presumes that persons who have attained the age of 18¹ have sufficient intelligence and maturity to make their own decisions; but such a person cannot give a valid consent to an act if he or she is incapable of understanding the nature of the act. In this part we examine the position relating to the capacity of the mentally disabled to consent to sexual activity. We begin by setting out the present law, both in our own jurisdiction and in certain others. We outline the relevant proposals in our second consultation paper² – proposals that were strongly influenced by our report on Mental Incapacity,³ and in particular by clause 2 of the draft Mental Incapacity Bill. We briefly consider the recommendations of the earlier report, and the Government’s response to them, before examining the responses received to our second consultation paper, and making recommendations.

Statute law

4.2 Section 7 of the Sexual Offences Act 1956⁴ provides that it is an offence for a man to have unlawful sexual intercourse⁵ with a woman who is a “defective”, except in the case where he does not know and has no reason to suspect that she is a defective. Section 45⁶ defines a defective” as “a person suffering from a state of arrested or incomplete development of mind which includes severe impairment of intelligence and social functioning”.⁷ Section 14(4) prevents a woman who is a defective from being capable in law of giving a consent to an act which, in the absence of consent, constitutes an indecent assault; and section 15(3) makes the same provision in respect of defective men. Section 9 makes it an offence for a person to procure a woman who is a defective to have sexual intercourse in any part of the world, unless he does not know and has no reason to suspect her to be a defective.

4.3 The Sexual Offences Act 1967 provides that a man who is suffering from a “severe mental handicap” cannot in law give a consent to a *homosexual* act which would have the effect of preventing such an act from being an offence,⁸ and defines “severe mental handicap” in the same way as “defective” in the 1956 Act.⁹

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

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

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

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

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

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

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

⁸ Sexual Offences Act 1967, s 1(3).

⁹ Sexual Offences Act 1967, s 1(3A).



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

Common law principles

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

The appropriate balance between paternalism and the right to respect for private life

The role of the law

4.6 There are competing goals in need of reconciliation when issues of mental capacity and consent are considered: the need to respect choices made by those who are mentally disabled, and the need to ensure that such people are protected from abuse and exploitation.¹⁴ These principles are recognised in Article 7 of the United Nations Declaration on the Rights of Mentally

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

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

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

¹³ *Malone* [1998] 2 Cr App R 447.

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

Retarded Persons.¹⁵ In our 1995 report on mental incapacity in the *civil* law¹⁶ we noted an increasing emphasis on the rights of mentally incapacitated people, marking a shift away from a purely paternalistic approach to vulnerable populations.

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

... they may cover people who are in fact capable of giving a real consent to intercourse or other sexual activity, but have a statutory incapacity imposed upon them by the criminal law. The men involved in these cases may often be handicapped themselves, and it seems unfair that they should automatically be at risk of prosecution if there has been no exploitation involved.¹⁷ In some circumstances, these provisions of the criminal law could be seen as imposing an unwarranted fetter upon the freedom of mentally incapacitated people.¹⁸ They can also pose problems for staff who may fear, even if they do not risk, prosecution for aiding and abetting.¹⁹

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

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

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

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

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

¹⁶ Law Com No 231.

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

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

¹⁹ Consultation Paper No 119, para 2.27.

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

²¹ “Sexual Offences against the Mentally Handicapped” (1990) paras 29–30.



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

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

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

This was not however included in subsequent legislation.²⁵

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

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

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

²² *Ibid.*

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

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

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

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

²⁷ May 1999, at p 177.

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

²⁹ Section 5.2.3(2)(d).

consent would not necessarily be lacking if a person has sufficient knowledge or ability to comprehend the physical nature of the sexual act, and to understand the difference between that act and an act of another character, such as bathing of the body or a medical examination.

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

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

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

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

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

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

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

4.18 Article 3 provides:

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

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

confirms the general principle that legal provisions which interfere with individual rights must be adequately accessible, and formulated with sufficient precision to enable the citizen to regulate his conduct.³¹

4.20 Article 8 of the Convention provides, in part:

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

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

³¹ *G v Germany* (1989) 60 DR 252, 262. The Court elaborated in *SW v UK*, A 335-B (1995) para 35: “an offence must be clearly defined in the law. ... This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts’ interpretation of it, what acts and omissions will make him criminally liable”.



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

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

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

4.23 Current legislative provision denies “defective”³⁵ people any capacity *at all* to consent to sexual intercourse or to other sexual activity that would, in the absence of consent, constitute an indecent assault.³⁶ In determining questions of proportionality, the Strasbourg jurisdiction allows a margin of appreciation for the domestic law of the State under consideration. In recent cases involving the United Kingdom, although a wide margin of appreciation has been conferred on the state where physical harm is in issue,³⁷ the *Commission* has held³⁸ that the margin of appreciation must be relatively narrow in relation to sexual activity. It is not yet known whether the Court will agree with this.³⁹

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

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

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

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

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

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

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

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

4.24 It remains an open question what approach British courts will take to the concept of the margin of appreciation when interpreting the Human Rights Act 1998. Under section 2, the courts must take into account any relevant Strasbourg jurisprudence. The doctrine of the margin of appreciation was developed for the purpose of an international court dealing with cases from widely varying jurisdictions. That factor will not exist when domestic courts exercise powers under the Human Rights Act. The function currently served by the margin of appreciation might remain to some extent, and be served by the giving of a margin of deference to the decision-making authority – Parliament, in this instance. It is hard (if not impossible) to see how this could be *wider* than any existing approach taken with the margin of appreciation.⁴⁰

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

The Home Office Sex Offences Review

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

provide coherent and clear sex offences which protect individuals, especially children and the more vulnerable, from abuse and exploitation;

enable abusers to be appropriately punished; and

be fair and non-discriminatory in accordance with the ECHR and Human Rights Act.⁴²

4.27 Any protective criminal legislation aimed at discharging the responsibilities of the state under Articles 1 and 3 will need to recognise the right to private life under Article 8, and to limit any interference with this right to that which is “necessary in a democratic society ... for the protection of health or morals, or for the protection of the rights and freedoms of others”. This raises the question of what it is that this vulnerable category of people needs to be protected from. A sexual relationship between a person of full mental capability and one with severe learning disabilities may well involve an element of abuse that the criminal law should proscribe, particularly where there is a “care” relationship.⁴³ A sexual relationship between two people, *both* of whom have such disabilities, may not intrinsically involve any abuse – although, depending upon the circumstances, a particular relationship might be abusive.⁴⁴

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

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

⁴² We note also the announcement in the Lord Chancellor’s Department consultation paper, “Who decides” (Dec 1997) Cm 3803 (relating to mental incapacity and the civil law), at para 1.15, that
Once responses to the Green Paper have been considered and the issues have been taken further forward, detailed consideration will be given to the interrelationship with the criminal law [of the Law Commission’s recommended statutory decision-making processes on behalf of mentally incapacitated adults]. The Government’s conclusions will be set out as part of a more general policy statement at that stage.

⁴³ See n 14 above.

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



The second consultation paper

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

Definition of “persons without capacity” (Proposal 13)

4.29 Our proposed definition read as follows:

... a person should be regarded as being without capacity if when he or she gives what is alleged to be his or her consent –

- (1) [relates to minors and is dealt with in Part III above];
- (2) he or she is unable by reason of mental disability to make a decision for himself or herself on the matter in question; or
- (3) he or she is unable to communicate his or her decision on that matter because he or she is unconscious or for any other reason.⁴⁹

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

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

- (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

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

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

⁴⁷ See paras 4.32 – 4.38 below.

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

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

⁵⁰ See paras 4.45 – 4.49 below.

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

Capacity to understand in broad terms (Proposal 18)

4.31 Finally we proposed that

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

Law Commission Report No 231: Mental Incapacity (1995)

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

4.33 Clause 2 provides, in part:

- (1) ... a person is without capacity if at the material time –
 - (a) he is unable by reason of mental disability to make a decision for himself on the matter in question; or
 - (b) he is unable to communicate a decision on the matter because he is unconscious or for any other reason ...
- (2) ... a person is at the material time unable to make a decision by reason of mental disability if the disability is such that at the time when the decision needs to be made –
 - (a) he is unable to understand or retain the information relevant to the decision, including information about the reasonably 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.

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

⁵² Adopted from Law Com No 231, recommendation 10.



Notable features of clause 2

“At the material time”

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

“Unable ... to make a decision”

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

“By reason of mental disability”: a diagnostic threshold

4.36 Except in cases of inability to communicate, we recommended a diagnostic threshold of *mental disability* as part of the test for incapacity.⁵⁵ On consultation the expression we used was “mental disorder”. While most respondents favoured a diagnostic hurdle to ensure that the test would not catch large numbers of people who make unusual or unwise decisions,⁵⁶ there were misgivings about use of the expression “mental disorder”,⁵⁷ as defined in the Mental Health Act 1983.⁵⁸ To avoid difficulties with that expression, we recommended “mental disability” instead.

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

4.37 This residual category was included as a fall-back⁵⁹ for cases where an assessor cannot say whether or not any decision has been made, but is able to say that the person concerned could not communicate any such decision.

Ability to understand in broad terms

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

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

⁵⁴ [1994] 1 WLR 290; see n 46 above.

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

⁵⁶ Law Com No 231, para 3.8.

⁵⁷ Equated by many with psychiatric illness. Many respondents to Consultation Paper No 128 considered that *all* conditions which could result in incapacity to take medical decisions should be included, some of which (eg confusional states arising from drugs, alcohol or other toxins, and neurological disorders) had little in common with those addressed in the 1983 Act and might not qualify as disorders “of mind” at all: Law Com No 231, para 3.11. See also B M Hoggett, *Mental Health Law* (4th ed 1996) p 27:

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

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

⁵⁹ See para 3.20 of the report.

⁶⁰ See para 3.18 of the report.

Making decisions (1999): the government response

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

Analysis of responses to the proposals in the second consultation paper,⁶⁴ and our recommendations

Definition of persons without capacity (Proposal 13)⁶⁵

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

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

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

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

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

Recommendation

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

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

⁶¹ (Oct 1999) Cm 4465.

⁶² “Who Decides?” (Dec 1997) Cm 3803.

⁶³ Cm 4465, para 1.6.

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

⁶⁵ This is set out above at para 4.29.

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

⁶⁷ [1998] 2 Cr App R 447.

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



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

Capacity and the mentally disabled (Proposal 17)⁶⁹

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

Dissentients

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

4.47 On the other hand, a provision that deems certain people to lack the capacity to consent should *reduce* the scope of evidential issues, particularly for example in respect of rape where a lack of capacity to consent removes any issue about consent. In addition, some of the practical problems for those with learning disabilities or a mental illness in giving evidence have been addressed in the Youth Justice and Criminal Evidence Act 1999. Vulnerable witnesses⁷² will be permitted to give unsworn evidence,⁷³ provided that they are able to give intelligible testimony.⁷⁴ Special measures⁷⁵ may be authorised by the court to assist such witnesses if the court considers that the quality of evidence given is likely to be diminished by reason of their mental impairment or other significant impairment of intelligence and social functioning.⁷⁶

⁶⁹ This is set out above at para 4.30.

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

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

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

⁷³ Section 50.

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

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

⁷⁶ Sections 16 and 19.

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

Other concerns

4.49 These fall under the following four sub-heads:

Short-term memory problems

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

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

Intoxication

4.52 The CPS and ACPO asked whether the proposal was intended to extend to voluntary intoxication through drink or drugs. It is. That is one of the reasons why we used “mental disability”, not mental disorder, as the diagnostic threshold.⁷⁸

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

4.54 There is a possible difficulty where consent is given but then overtaken by incapacity through drink or drugs. For example, at 8 pm P makes it clear that she is looking forward to having intercourse with D that night. By 11 pm she is too drunk to know what she is doing, but D has intercourse with her anyway. Can it be said that she does not (because she cannot) consent to the intercourse at the material time, namely the time of the intercourse? In our view it cannot.

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

⁷⁸ See para 4.36 above.

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



Consent is not a *state of mind* which must invariably exist at the time of the act consented to, but an expression of *agreement* to that act – the *granting of permission* for it.⁸⁰ In the ordinary course of events, consent to the doing of an act at some future time remains effective unless it is withdrawn. There is therefore no *conceptual* problem with P giving consent well in advance of the act to which she consents, at a time when she has capacity to do so. It would be for the jury to consider in a particular case whether, in all the circumstances, as a matter of fact the consent had been withdrawn.

Mental states such as depression, stress, battered women syndrome or pre-menstrual tension

4.55 The CPS asked what was to be the effect of such mental states as depression, stress, battered women syndrome⁸¹ or pre-menstrual tension.⁸² Our views about this are similar to those regarding intoxication. If the condition renders a person truly *incapable* of giving a valid consent, and the fact-finding tribunal is sure that the defendant was aware of this (or was reckless as to the matter) at the relevant time, then there is no reason why the criminal law should not extend its protection to that person. Again, it is crucial that the criteria for assessing capacity should not operate too widely, so that one who does have the capacity to consent is not classified otherwise. The position of battered women might, more typically, be a point of concern when looking at the *validity* of any consent given, and, in particular, the effect of *threats* upon the validity of consent.⁸³

Lack of comprehension of foreseeable consequences

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

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

⁸⁰ See para 2.11 above.

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

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

⁸³ See Part VI below.

⁸⁴ See paras 4.17 – 4.25 above.

Reconsideration of proposal 17

4.58 We do not believe that it is possible simply to transfer the existing tests, recommended for the assessment of mental incapacity for the purpose of substitute decision-making in the civil law, without change, into the criminal law. First, the civil law is not administered, so far as the fact-finding process is concerned, largely by lay people – juries and lay magistrates, for whose benefit the relevant tests need to be made clear and simple. Second, in the civil law, some of the issues which a person requires the capacity to understand may be very complicated,⁸⁵ and we were anxious to protect those who might appear to understand but could not retain the necessary information for long enough to make a proper decision.⁸⁶ Third, the obligations under the European Convention on Human Rights associated with sexual autonomy⁸⁷ have an impact on our recommendation.

Terminology

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

Retention of information – reconsidered

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

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

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

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

⁸⁷ See paras 4.17 – 4.25 above.

⁸⁸ See Part III above.

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



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

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

Understanding the reasonably foreseeable consequences – reconsidered

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

Problem created by this criterion

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

4.65 *F v West Berkshire Health Authority (Mental Health Act Commission intervening)*,⁹³ in the House of Lords, concerned the appropriate procedure to be adopted when sterilisation of a woman with a serious mental disability was proposed. The sexually active woman, aged 36, had the verbal capacity of a child aged two and the general mental capacity of a child aged four or five. Since the age of 14 she had been a voluntary in-patient at a mental hospital where she had formed a sexual relationship with a male patient. In these proceedings the woman’s capacity to consent to the sexual intercourse that she chose to engage in was not questioned, although “she was disabled by her mental capacity from giving her consent to the operation”. Hence, to a degree, her sexual autonomy was recognised.

4.66 On the other hand, *Jenkins*⁹⁴ concerned a young woman with a verbal mental age of two or three who did not understand sexual relationships, pregnancy or sexually transmitted diseases. She became pregnant. She was deemed unable to understand what had happened to her, to care for a child or to give consent to an abortion. That decision was made for her. A DNA test of the aborted foetus showed the identity of the father to be a male member of her residential

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

⁹¹ See paras 4.50 – 4.51 above.

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

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

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

staff. He was charged with rape. The trial judge⁹⁵ ruled that this young woman with severe learning disabilities had properly consented to the sexual relationship, as she simply had to submit to her animal instincts to be deemed to have consented.⁹⁶

An option rejected

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

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

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

- (a) an inability to remove themselves from the risk;
- (b) an inability to conceptualise or verbalise the abuse;
- (c) lack of sex education, without which they may not have sufficient knowledge or understanding about sex and sexual relationships to make an informed choice; or
- (d) low self-esteem, which results in a lack of belief that they have the right to refuse sex or a particular sexual partner.⁹⁸

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

Solution

4.71 The difficulties that arise from the inability of some mentally disabled persons to understand pregnancy, and the need to respect their rights under Article 8 of the European Convention on Human Rights,⁹⁹ can be addressed in a way that does not involve manipulating the meaning of *capacity* and thus removing important protection for the vulnerable. The concern

⁹⁵ His Hon Judge Coltart.

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

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

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

⁹⁹ See paras 4.17 – 4.25 above.



is that, under our proposal, a lack of understanding of pregnancy would render a person unable to consent to sexual intercourse at all, so that any sexual intercourse engaged in would necessarily be non-consensual – irrespective of the relationship between the parties, their respective mental capacities and the absence of any circumstances of exploitation.

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

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

Apparently consensual sexual activity between two people with want of capacity

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

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

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

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

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

¹⁰⁰ At present labelled “defectives” in the Sexual Offences Act 1956.

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

Non-exploitative circumstances

4.78 The views of experts will be of great importance in the choice of the criteria for determining whether activity is “non-consensual”, in these circumstances. It is our view that the criteria should make it clear that where a defendant takes deliberate advantage either of a complainant’s weakness or of the complainant’s dependence on the defendant, the activity should be regarded as non-consensual. An example of conduct that we would regard as taking deliberate advantage of the weakness of a person under a mental disability would be where one of full capacity persuades a person who lacks capacity to have sexual intercourse by giving her a cigarette and telling her that this is what boyfriends and girlfriends do, or saying that otherwise they will not be friends.¹⁰²

Reverse burdens of proof

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

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

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

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

¹⁰³ [1999] 3 WLR 972, 992.

¹⁰⁴ *Ibid*, 992f-993c.



Adequacy of functional test

4.82 The advantages of a functional approach to the assessment of capacity have been recognised by respondents, but this approach is not without its problems. The test may be criticised both for being over-protective¹⁰⁵ and under-protective.¹⁰⁶ We have suggested that the former difficulty can be overcome by provision in the substantive law restricting the operation of material sexual offences in certain circumstances.¹⁰⁷ Similarly, the “under-protective” criticism may be met by substantive criminal law providing that certain sexual activity will constitute an offence *irrespective* of consent.¹⁰⁸

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

Recommendation

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

- (1) a person should be regarded as being unable to make a decision on whether to consent to an act if
 - (a) he or she is unable to understand
 - (i) the nature and reasonably foreseeable consequences of the act, and
 - (ii) the implications of the act and its reasonably foreseeable consequences;or
 - (b) being able so to understand, he or she is nonetheless unable to make such a decision; and
- (2) “mental disability” should mean a disability or disorder of the mind or brain, whether permanent or temporary, which results in an impairment or disturbance of mental functioning.

Capacity to understand in broad terms (Proposal 18)¹⁰⁹

4.85 Most respondents agreed that “a person should not be regarded as being unable to understand the information referred to ... if he or she is able to understand an explanation of that information in broad terms and simple language”, but one respondent found this proposal superfluous. We now agree. The source of this, clause 2(3) of the Draft Mental Incapacity Bill in Law Com No 231,¹¹⁰ was designed to address the possibility that a person might be wrongly

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

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

¹⁰⁷ See para 4.71 above.

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

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

¹¹⁰ Para 4.18.

classified as incapable of understanding some complexity involved in a civil law decision when, if someone had taken the trouble to explain the matter appropriately, an understanding of the issues would have been achieved.

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