The Sexual Offences Act 2003: (1) Rape, sexual assaults and the problems of consent [1]

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***Crim. L.R. 328** **Summary:** *the article analyses the major new offences introduced by ss 1-4 of the Sexual Offences Act 2003, examining their reach and their likely impact.*

The aim of this article is to explore and assess what may be seen as the four main offences in the Sexual Offences Act 2003--rape (s.1), assault by penetration (s.2), sexual assault (s.3), and causing a person to engage in sexual activity without consent (s.4). The essence of these offences is that they involve non-consensual sexual activity. Sections 5-8 create the same four offences in respect of child victims under 13, to which consent or its absence is irrelevant.

The origins of the 2003 Act lie in the recommendations of a review carried out for the Home Office, *Setting the Boundaries* (2000).[2] The Government accepted most of those recommendations in its White Paper of 2002.[3] During its passage through Parliament some parts of the Bill were extensively criticised,[4] and several of its provisions changed considerably before the Royal Assent on November 20, 2003. Behind the recommendations that led to the 2003 Act lay several principles and policies. The Government considered that the existing law on sexual offences was "archaic, incoherent and discriminatory," and that it failed to reflect "changes in society and social attitudes".[5] One aim, therefore, was that the law should set out clearly what was unacceptable behaviour and provide penalties that reflected the ***Crim. L.R. 329** seriousness of the crimes committed.[6] Clarification of the law on consent was regarded as particularly important.[7] Another aspect of the modernisation of the law was to make the offences gender-neutral, so far as possible. A further objective was to assist victims and encourage them to report rape offences. It was also intended that the law should play its part in improving conviction rates.[8] This was to be achieved by providing "a clearer legal framework for juries as they decide on the facts in each case".[9]

1. Rape

The offence of rape was extended by the Criminal Justice and Public Order Act 1994 to include non-consensual anal intercourse with a woman or man. Section 1 of the 2003 Act further extends the definition. Vagina includes vulva and references to parts of the body throughout the Act include those which have been surgically constructed.[10] The crime of rape, therefore, now applies to transsexuals. More controversially, it has also been reformulated to cover oral penetration of a woman or man by a penis. The Report recommended this on the basis that "forced oral sex is as horrible, as demeaning and as traumatising as other forms of forced penile penetration."[11] It also carries similar risks of disease transmission. Doubts about thus broadening the offence were expressed inside and outside Parliament, largely because oral sex could easily be brought within the offence of assault

by penetration (maximum, life imprisonment) and there was thought to be a risk that classifying forced oral sex as rape might devalue the offence or make juries reluctant to return rape verdicts in such cases. The Home Affairs Committee rejected such doubts, regarding the change as right in principle and adding that there was no reason to think that juries would be reluctant to convict on the new definition. [12]

The full definition of rape is as follows:

"(1) A person (A) commits an offence if--

(a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,

(b) B does not consent to the penetration, and

(c) A does not reasonably believe that B consents."

The new definition therefore requires the prosecution to prove three things-- intentional penetration, absence of consent, and absence of reasonable belief in consent. Sub-section (2) makes further provisions on mistaken belief in consent, and sub-s.(3) confirms the application of ss.75 and 76 to this offence. These issues will be dealt with in Parts 6 and 7 of this article. It is important to note here that the concept of recklessness has disappeared entirely from the offence of rape. The previous law required proof that A either knew or was reckless as to the fact that B ***Crim. L.R. 330*** was not consenting. Whereas the Report recommended the retention of the "couldn't care less" test on the basis that it was widely thought to operate satisfactorily, [13] the Act sweeps it away and replaces it with the requirement to prove the absence of a reasonable belief. We discuss in Part 7 below whether this is a lower or higher hurdle.

2. Assault by penetration

This offence, like all others in the Act except rape, may be committed by a man or woman as principal. There are essentially four elements:

-- The defendant (A) intentionally penetrates the vagina or anus of another person (B) with a part of his body or anything else: this would include penetration by finger or, for example, a bottle. It would also include penetration by the penis, thus overlapping with rape. This is to cover, for example, cases where a person is not sure whether penetration has taken place with the penis or with some other instrument or part of the body.

-- The penetration must be sexual. There is a complex definition of "sexual" in s.78, which is discussed in Part 5 below. However, in most cases this requirement is unlikely to cause difficulty to the prosecution.

-- "B does not consent to the penetration."

-- "A does not reasonably believe that B consents."

The last two requirements parallel those for the offence of rape, and are discussed in Parts 6 and 7 below. The offence of assault by penetration carries a maximum of life imprisonment, which is intended to cater for serious cases, for example, penetration with sharp objects. [14]

3. Sexual assault

Under the Sexual Offences Act 1956 indecent assault had to cover a wide range of activities. The effect of the 2003 Act is to reclassify forced oral sex as rape, and to reclassify other penetration of the vagina or anus as assault by penetration. The new offence of sexual assault is triable either way and carries a maximum sentence of 10 years on indictment. Sexual assault has four elements:

-- The defendant (A) intentionally touches another person (B). According to s.79(8), "touching includes touching with any part of the body, and with anything else, or through anything." Thus, rubbing or stroking parts of someone's body through their clothes (*e.g.* on the London Underground) [15] would amount to a touching for this purpose.

-- The touching must be sexual, as defined in s.78 (see Part 5 below).

-- "B does not consent to the touching."

-- "A does not reasonably believe that B consents."

Most forms of this offence will probably be dealt with in the magistrates' courts, especially when their sentencing limit is raised to 12 months for one offence.

***Crim. L.R. 331** **4. Causing sexual activity**

Section 4 creates a new offence of causing a person to engage in sexual activity without consent. The defendant (A) commits the offence if he intentionally causes another person (B) to engage in an activity which is "sexual", to which B does not consent, and if A does not reasonably believe that B consents. The offence was recommended in the Report [16] and is intended to make a clear statement that compelling others to do sexual acts against their will is an offence. The Report provides examples of forced masturbation of the compellor, and cases where the compellor forces the victim to masturbate in front of him or to perform acts with third parties or with animals. It was also intended to deal with women who compel men to penetrate them. [17]

If the sexual activity involves penetration of B's anus or vagina or penetration of B's mouth with a person's penis, or involves penetration of a person's anus or vagina with a part of B's body or by B with anything else, or penetration of a person's mouth with B's penis, then the offence is indictable only and carries a maximum of life imprisonment. If the sexual activity is of any other kind, notably touching without penetration, the offence is triable either way and carries a maximum of 10 years on indictment. Some of this conduct would also amount to aiding, abetting, counselling or procuring rape or sexual assault, but the new offence will ensure that A remains liable if, for example, he compels B to perform sexual acts in circumstances where B or some other party might have a defence to criminal liability, such as duress or mistake. [18] Non-age is covered by the separate offence of causing or inciting a child under 13 to engage in sexual activity. [19]

5. The meaning of "sexual"

The term "sexual", as used to describe penetration, touching or any other activity mentioned in the Act, is explained in s.78. This section cannot be said to provide a definition of the term, rather it sets out an approach for determining whether the activity in question is sexual where this may be in doubt. This approach appears closely to mirror the decision in *Court,* [20] in which the House of Lords distinguished three types of case in order to decide when an activity could be designated indecent for the purposes of the offence of indecent assault. Under s.78 (a) the first step is to consider whether the conduct concerned would be regarded as sexual by the reasonable person because of its "sexual nature". This is an objective test which is based upon whether the conduct is transparently sexual, irrespective of the surrounding circumstances or purposes of the accused. Secondly, where the conduct is ambiguous and because of its nature might possibly be sexual, then, under s.78(b), the circumstances or purpose of the accused or both are to be considered in assessing whether the conduct is sexual or not. If it were to be argued that a medical procedure involving vaginal penetration was clinically unnecessary, it is not clear whether it would fall within (a) or (b). Thus, if C goes to see the doctor complaining of a headache, and he then performs a vaginal examination, would this ***Crim. L.R. 332** fall within (a), or would it be ambiguous and therefore within (b)? If it falls within (a), do all vaginal examinations (however clinically necessary) fall within (a)? If both situations fall within (b), it would be necessary to establish in what circumstances they took place, and what the "purpose" of the medical practitioner was; but if both fall within (a), only a general defence such as necessity would enable an acquittal in the case of clinical necessity. [21] Thirdly, as under the *Court* test, conduct, which on the face of it is not sexual, cannot be brought within that description by pointing to its circumstances and/or purpose. [22] The *Court* test and its application have been criticised as "vague" and unclear, [23] but a superior alternative remains to be found. In practice, in most cases, it will not be difficult to apply the test in s.78(a). It will be in unusual cases only that s.78(b) will be brought into play. Whilst s.78 might require some fine-tuning, it was wise to have included a provision of

this kind. In Canada a decision to exclude any such provision from the legislation has led to a costly proliferation of cases in which courts have been called upon to rule in what circumstances a particular assault may be described as sexual. [24]

(a) The Report and the Bill

The issues of consent and belief in consent, and related problems of proof, were hotly contested in the parliamentary debates on the Sexual Offences Bill. The background to the consent provisions, now contained in ss.74-76 of the Act, lies in the Report *Setting the Boundaries* [25] and in the deliberations of the Sex Offences Review which preceded it. [26] The Report rejected the *Olugboja* [27] approach to consent, which was to leave consent undefined and to direct the jury to consider the difference between consent and mere submission. [28] Instead, it decided to follow the example of some other jurisdictions in the common law world, [29] and to recommend a statutory definition of consent. [30] This would be accompanied by a non-exhaustive list of non-consent situations which was intended to illuminate the definition. [31] The idea was to clarify and explain the law, "setting clear boundaries for society as to ***Crim. L.R. 333*** what is acceptable and unacceptable behaviour". [32] The objectives were to encourage victims to come forward and bring cases to court, [33] and to educate police and prosecutors towards a better understanding of the ambit of the term. [34]

Once the principle of a list was accepted, the challenge was how to frame this in legislation and, in particular, to determine the precise balance between prosecution and defence in cases falling within the non-consent situations. There were at least two possible approaches. The first was to follow the model suggested by the Report which set out a list of seven situations, in five of which a causal link was required between the circumstance and the ensuing sexual activity. [35] Thus, for example, the Report proposed that consent should be regarded as absent where the complainant, C, "submits or is unable to resist *because* of force or fear of force or *because* of threats or fear of serious harm or *because* they are abducted or unlawfully detained." [36] This would permit the defence to argue that there was no causal link between the force or the abduction and the sexual activity and that C had nevertheless consented. Although the Report did not specifically discuss the burden of proof, it was plain that on this model the prosecution would ultimately face the burden of proving the causal connection. This might be described as the "internal" approach in that the opportunity to argue consent is contained within the listed circumstance itself. The second model, which might be described as the "external" approach, was to exclude causal and consent issues from the listed situations but to give the defence the opportunity to raise them. This could be achieved by framing the list in terms of a set of rebuttable presumptions. The advantage of this alternative is that it clearly demarcates prosecution and defence roles. It sets out clearly what the prosecution has initially to prove and then gives the defence free rein to raise any arguments it wishes on the consent issue.

The Government White Paper *Protecting the Public* [37] followed *Setting the Boundaries* and provided the Government's blueprint for legislation. On the issue of consent, it stated: "We intend to make statutory provision that is clear and unambiguous". [38] It declared that a list of circumstances would be set out in the legislation and that these would be framed as presumptions. Once the prosecution had proved one of the listed circumstances, non-consent would be presumed but the defence would still be able to argue consent. [39] The Government thus decided to opt for the "external" approach in the case of most of the circumstances listed in the Report. [40] The choice of the "external" approach then required a decision as to the precise nature of the burden of proof on the defence in those situations. It was decided that, once the prosecution had established beyond reasonable doubt that one of the listed circumstances existed, the burden of proof would then lie on the defence to prove consent on the balance of probabilities. [41]

The blueprint set out in *Protecting the Public* would have provided a robust response to the problem of sexual violence, but concerns about the compatibility of ***Crim. L.R. 334*** such reverse onus provisions with the presumption of innocence in Art.6 of the Convention, as interpreted by the House of Lords in *Lambert,* [42] led ultimately to its abandonment. The Report does not appear to have contemplated such reverse onus provisions [43] and when the Bill was first introduced into Parliament it contained a reverse onus provision on belief in consent but not on the consent issue. As the Bill went through Parliament the reverse onus provision on mistaken belief in consent was attacked as inconsistent with the presumption of innocence and eventually abandoned in favour of an evidential burden. [44] The implications of this are discussed in Part 8 below.

(b) The provisions in the Act

It will be recalled that the new definition of rape requires that "B does not consent to the penetration" and "A does not reasonably believe that B consents", and that the definitions of assault by penetration, sexual assault and causing sexual activity all follow the same pattern. In order to prove the absence of consent, the prosecution may proceed by one or more of the three separate routes set out in the Act. The first route, and that generally most favourable to the prosecution, would be to bring the circumstances within one of the conclusive (irrebuttable) presumptions in s.76. The second route would be to bring the circumstances within one (or more) of the rebuttable presumptions in s.75. The third route is to rely on the general definition of consent in s.74. The irrebuttable and rebuttable presumptions apply equally to the issue of mistaken belief in consent, as we shall see.

Conclusive presumptions. Section 76(2) sets out two situations where the presumptions are irrebuttable. Once it is proved that D did the relevant act and that either of the specified circumstances existed, then both consent and belief in consent are *conclusively* established. D will be unable to claim consent or belief in consent. These circumstances are that: "(a) the defendant intentionally deceived the complainant as to the nature [45] or purpose [46] of the relevant act; (b) the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant." [47] Presumption (a) re-states and slightly extends the common law. Presumption (b) extends the old law beyond cases of impersonating spouses or partners, but it is limited in two respects. First, the person impersonated must be someone known personally to the complainant, and not, say, a film star or sports star whom the complainant has not met. Secondly, the wording leaves it open to the defence to argue that C was not in fact induced by the ***Crim. L.R. 335*** impersonation to consent but consented irrespective of it. [48] The presumption will not apply unless the prosecution establishes the causal link.

Rebuttable presumptions. Section 75 is headed "Evidential Presumptions about Consent," and subs.(1) provides that if the prosecution can prove that D did the relevant act in any of the circumstances specified and that he knew of these circumstances, then it will be presumed both that consent and belief in consent were lacking. The defence will then bear the evidential burden of adducing sufficient evidence to raise the issue of consent or reasonable belief in consent. If this evidential burden is discharged, the prosecution will have to establish the absence of consent or reasonable belief in consent beyond reasonable doubt.

The list of circumstances in which the presumptions arise is not quite the same as the lists that appeared in *Setting the Boundaries,* or in *Protecting the Public,* or in the original version of the Bill. [49] Although based on common law propositions, it alters them in certain ways. The circumstances are set out in s.75(2) as follows:

"(a) any person was, at the time of the relevant act or immediately before it began, using violence against the complainant or causing the complainant to fear that immediate violence would be used against him [50] ;

(b) any person was, at the time of the relevant act or immediately before it began, causing the complainant to fear that violence was being used, or that immediate violence would be used, against another person [51] ;

(c) the complainant was, and the defendant was not, unlawfully detained at the time of the relevant act [52] ;

(d) the complainant was asleep or otherwise unconscious at the time of the relevant act [53] ;

(e) because of the complainant's physical disability, the complainant would not have been able at the time of the relevant act to communicate to the defendant whether the complainant consented [54] ;

(f) any person had administered to or caused to be taken by the complainant, without the complainant's consent, a substance which, having regard to when it was administered or taken, was capable of causing or enabling the complainant to be stupefied or overpowered at the time of the relevant act." [55] 能夠在相關行為發生時導致或使投訴人感到呆滯或被壓倒。”

Crim. L.R. 336 As we shall argue in the paragraphs that follow, there are grounds for doubting whether these presumptions include or exclude all the matters they should.

General definition of consent. The Act provides a general definition of consent in s.74: "A person consents if he agrees by choice, and has the freedom and capacity to make that choice." Where the facts of a case do not fall squarely within any of the irrebuttable or rebuttable presumptions, the arguments will focus on the application of this definition. It might be thought that

"freedom" and "choice" are ideas which raise philosophical issues of such complexity as to be ill-suited to the needs of criminal justice--clearly those words do not refer to total freedom or choice, so all the questions about how much liberty of action satisfies the "definition" remain at large. [56] What the philosopher J.L. Austin said of the term "freedom" applies equally to "choice":

"While it has been the tradition to present this as the "positive' term requiring elucidation, there is little doubt that to say we acted "freely' … is to say only that we acted *not* un-freely, in one or another of the heterogeneous ways of so acting (under duress, or what not). Like "real', "free' is only used to rule out the suggestion of some or all of its recognized antitheses." [57]

Perhaps in anticipation of these difficulties, the Report recommended that there should be a standard direction on the meaning of consent: depending on the circumstances of the case, juries should be told not to assume that C did freely agree just because C did not say or do anything, protest or resist or was not physically injured. [58] Since juries will have their own basic understanding of "freedom" and "choice", the value of a direction along these lines would be to challenge stereotypical thinking. The government rejected the option of embodying such a direction in legislation, and so it will be for the Judicial Studies Board (and then the Court of Appeal) to develop a standard direction on consent which can be suitably tailored to the circumstances of each case. It seems unpromising that a pivotal element of the reform strategy--a new autonomy-based approach to determining consent--will effectively be left in the hands of the Judicial Studies Board.

(a) Some criticisms of the new scheme

By introducing a three-track approach to matters of consent and belief in consent--irrebuttable presumptions, rebuttable presumptions, and a general definition of consent--the Act raises a number of questions. Are the three categories intended to reflect some kind of moral hierarchy, so that the most serious cases of non-consent give rise to irrebuttable presumptions and the next most serious to rebuttable presumptions, with the remainder falling within the general definition? Or is the organising principle one of clarity and certainty, so that it is the clearest cases (not necessarily the worst) that give rise to irrebuttable presumptions and the next clearest to rebuttable presumptions, with the remainder falling within the general definition? Or is it a mixture of the two, with an added element of common law history? One would have thought that consideration ought to be given to ***Crim. L.R. 337*** marking out the worst cases of non-consent by means of irrebuttable presumptions, but that appears not to have happened. Various criticisms may be advanced.

(i) Are the types of fraud that give rise to the conclusive presumptions in s.76(2) the worst cases of non-consent?

A preliminary question here is whether the types of fraud singled out by s.76(2) are necessarily the worst types of deception, compared with deception as to intentions, powers and other matters (see Part 9 below). A more pressing question, however, is whether obtaining compliance by fraud or deception is worse than other ways of avoiding true consent, such as using threats or violence, administering drugs, or taking advantage of a sleeping or unconscious person. Obtaining compliance by using violence or threats of immediate violence seems no less heinous than doing so by deception, and yet the Act creates a conclusive presumption in the latter case and only a rebuttable presumption in the former.

There is also a case to be made for a conclusive presumption in the situation set out in s.75(2)(f), where it is proved beyond doubt that C had a substance [59] administered to her without her consent which was capable of stupefying or overpowering her at the time of the relevant act and D knew this. Of course D must have, as he does under this provision, the opportunity to argue that the presumption does not apply because the substance administered was incapable of causing C to be stupefied or overpowered. But if the stupefying effect is established, it is questionable whether D should be able to argue that C nevertheless consented to the subsequent sexual act and that the drug or alcohol did not in fact prevent her from consenting. Can freedom and capacity to make a choice really exist in any meaningful sense in this situation? The present terms of s.75(2)(f) leave it open to the defence to enter into an impossible area of speculation about the precise effect of the substance on C, a matter which can only confuse the jury and cannot satisfactorily be resolved. [60]

Is there any good reason why it should be the case that, if D deceives C by means of impersonation or as to the nature of the act, non-consent is conclusively proved under s.76, but if D has sex with C when C is asleep or unconscious this supports only a rebuttable presumption? The common law drew no such distinction between these situations. The Home Office Minister, Beverley Hughes, asserted that "one of the principles behind the proposal [in respect of the presumptions] is that we should take steps to clarify existing case law and incorporate it into statute." [61] However, it has always been the law that consent must be present at the time of the sexual act. This means that consent is necessarily regarded as absent once it is proved beyond doubt that C was asleep or unconscious at the time sexual intercourse took place. If absence of consent is not conclusively presumed

in these situations, as it was at common law, [62] then the law is being taken backwards rather than forwards. This new departure reflects the more far reaching and entirely unfortunate proposal of the Law Commission that consent should be defined as a *subsisting,* free and ***Crim. L.R. 338*** genuine agreement, [63] which would have invited the defence to argue that a consent given previously had not been withdrawn. [64]

Those who are uncomfortable with the full implications of sexual autonomy may not share the view that a conclusive presumption of absence of consent should apply where D has sex with C who is asleep at the time. The provisions of the Act on consent apply not only to rape and assault by penetration but also to touching which falls within sexual assault or causing sexual activity. A conclusive presumption of absence of consent and absence of reasonable belief in consent, if applied to all situations where C was asleep at the time, would render D liable for sexual assault if he sexually touched his partner C while C was asleep even though D was in the habit of doing so and C had not objected to this in the past. Even though complaints are unlikely to be made in such cases, this may be regarded as casting the law's net too wide. However, there was another solution, recommended by the Report: that the list of non-consent situations should apply only to rape and assault by penetration, [65] with other cases being left to the general definition of consent. Whilst the interests of consistency and coherence argue in favour of the list of rebuttable presumptions applying to all four offences, it might have been preferable to follow the common law in cases where C was asleep at the time and to enact an irrebuttable presumption of absence of consent applying only to penetrative acts.

(ii) Should the list of circumstances in s.75 be more extensive and non-exhaustive?

In Canada and the Australian jurisdictions which have a statutory list of nonconsent situations, the list is non-exhaustive. [66] The exhaustive list in s.75 leaves no scope for further situations to be added through the common law. Only Parliament will be able to make additions to the list. The Report, on the other hand, considered that the list simply reflected obvious situations where consent was likely to be absent, including those already recognised at common law. It was just a starting point from which "the courts will continue to develop the common law as they consider cases where different circumstances apply." [67] The Minister's justification for the list was that there was "real value in making a statement in the legislation about circumstances in which sexual activity is not acceptable." [68] Elsewhere the Government has claimed that "it will provide juries with a clear framework within which to make fair and just decisions. It should also serve as a clear statement to the public more widely." [69] If those are among its primary purposes, the brevity of the list might be thought to be troubling, as might its potential to undermine the definition of consent in s.74. For example, it omits threats other than of immediate violence, no matter how serious such threats might be. In both the Report and *Protecting the Public* the list included threats or fear of serious harm or serious detriment to the complainant or to others. [70] The Government rejected amendments that would have added other serious threats to the list, arguing that terms such as ***Crim. L.R. 339*** serious harm and serious detriment were too imprecise and would give rise to too much uncertainty. [71] This gesture towards the principle of maximum certainty is laudable but unconvincing. The definition of consent itself positively sprouts uncertainties. [72] Moreover, by restricting the fear of violence in the presumption to fear of *immediate* violence, the Act imposes a limitation which is not present in existing law [73] and not required in defences such as duress and self-defence.

During the passage of the Bill through Parliament, one presumption was added to the list in s.75 (administering a stupefying substance) but another disappeared entirely. In the Report and in *Protecting the Public,* cases where the complainant's willingness to engage in sexual activity with the defendant was indicated only by a third party were included in the list of circumstances. The Report expressed the matter cogently as follows: "Free agreement is an issue between sexual partners and cannot be given by others, whether husbands, partners or those in authority over the complainant". [74] In Canada the law provides that "no consent is obtained where the agreement is expressed by the words or conduct of a person other than the complainant". [75] The Government was so persuaded by the force of these arguments that the original Bill provided that, where absence of consent was proved, belief in consent based only on evidence of anything said or done by a third party should lead to a conclusive presumption of absence of reasonable belief in consent. [76] However, this provision was opposed on two main grounds. [77] Some argued that it tipped the scales too far against defendants, in cases where it was simply one person's word against another's: the cogency of this argument depends on whether people have been put on notice that they should never accept a third party's word in matters of sexual autonomy. The other objection was that people with a learning disability or mental disorder could not be expected to know that they were being deceived: insofar as this has substance, it is an argument against almost all objective tests in the criminal law, and might best be dealt with by way of exception or defence. In the end these

two objections led the government to abandon the presumption, not only as a conclusive presumption but also as a rebuttable presumption. Cases of this kind now fall to be dealt with on general principles.

The Report further recommended that the list should include the situation where C was "too affected by alcohol or drugs to give free agreement". [78] This proposal was not adopted in *Protecting the Public* and s.75(2)(f) is considerably narrower, since it relates only to situations where C's intoxication is patently blameless. Whilst contributory negligence has no place in the criminal law, it is apparent that such ideas had an influence on the Government's thinking. Those who take alcohol or drugs voluntarily are placed in a different moral category from those who have had alcohol or drugs "administered" to them by the defendant. Thus, the list of presumptions, which the Government has invested with great moral symbolism, is there to protect those who can be constructed as the "innocent" victims of sexual ***Crim. L.R. 340*** assault. The many women who get raped when they are drunk and whose inebriation is more or less voluntary [79] will have to take their chances in the legal process without the benefit of evidential presumptions. Where the intoxicant had the effect of rendering C unconscious, the presumption under s.75(2)(d) will apply.

7. The absence of reasonable belief in consent

As stated above, under the new Act the *mens rea* of rape and the accompanying sexual assault offences has radically changed. The requirement of knowledge or reckless knowledge of the absence of consent, supported by the "couldn't care less" test, has been replaced by the need to prove that "A does not reasonably believe that B consents" (s.1(1)(c)). Should this be seen as an improvement in the law? To answer this, we need to consider several other questions.

Why was the *Morgan* approach thought unsatisfactory? This landmark decision [80] was widely applauded by subjectivists for its general effects on the criminal law, since it emphasised that people ought to be judged on the facts as they believed them to be, and not on facts to which they had not given thought. If an offence requires proof of intention or recklessness in respect of a consequence or circumstance, then it is a matter of "inexorable logic" that a mistaken belief in that respect should negative liability. [81] Whatever the justifications for this as a general approach in the criminal law, it seemed to many that those justifications were outweighed in the case of sexual offences, where the two parties are necessarily in close proximity and where intercourse without consent would be a fundamental violation of the victim. Surely, out of respect for the autonomy and sexual choice of B, A should take the opportunity to be clear that B does consent. In most situations this is an easy thing to do, and there is a strong reason for doing it. This is not to suggest strict liability as to the absence of consent: [82] it is to suggest a requirement that A acted as a reasonable person should have done in the situation in respect of ascertaining consent.

Why was the Bill changed during its parliamentary progress? The Government departed from *Setting the Boundaries* by opting for a reasonableness standard rather than the "couldn't care less" test, but the clause as originally drafted was unduly complex. Moreover, its formulation turned on whether the defendant had acted as a reasonable person would, and this was attacked on the ground that a defendant with, for example, a learning disability would be judged by standards he could not attain. The Bill was then amended, so that s.1(2) now states:

"Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents."

Crim. L.R. 341 This wording discards the "reasonable person" in favour of a general test of what is reasonable in the circumstances. The Home Affairs Committee applauded the change as avoiding the "potential injustice" of a test that would operate regardless of individual characteristics: "by focussing on the individual defendant's belief, the new test will allow the jury to look at characteristics--such as learning disability or mental disorder--and take them into account." [83] A different approach would have been to retain the reasonable person standard but to add a defence for those mentally incapable of attaining it. The difficulty with s.1(2) is that it could empty the reasonableness test of most of its content, and justify the kind of direction laid down in the self-defence case of *United States v King*:

"In determining whether it is founded on reasonable grounds, the jury are not to conceive of some ideally reasonable person, but they are to put themselves in the position of the assailed person, with his physical and mental equipment, surrounded with the circumstances and exposed to the influences with which he was surrounded and to which he was exposed at the time." [84]

Has Parliament replaced the "couldn't care less" test with one that is more demanding on the prosecution and more favourable to the defence? Much depends on how the phrase "all the circumstances" comes to be interpreted. The Government's view was that "it is for the jury to decide whether any of the attributes of the defendant are relevant to their deliberations, subject to directions from the judge where necessary." [85] Beverley Hughes expressed the matter slightly differently, stating that it would be for the judge "to decide whether it is necessary to introduce consideration of a defendant's characteristics and which characteristics are relevant …. The judge or jury can take into account all or any characteristics and circumstances that they wish to, and it is best that we leave that decision to the judge and jury for each case." [86] By what standards is it to be decided which characteristics are "relevant"? [87] Much will depend on the Specimen Directions and the approach of the Court of Appeal. But, as L'Heureux-Dubé J. famously stated in *Seaboyer*: "The content of any relevancy decision will be filled by the particular judge's experience, common sense and /or logic …. This area of the law has been particularly prone to the utilisation of stereotype in the determination of relevance." [88]

In *Protecting the Public* the Government expressed its concern that the *Morgan* test "leads many victims who feel that the system will not give them justice, not to report incidents or press for them to be brought to trial." [89] Accordingly, it decided to alter the test "to include one of reasonableness under the law". [90] But the present formulation is unlikely to provide the incentive to report or pursue the case that the ***Crim. L.R. 342*** Government is seeking. The broad reference to "all the circumstances" is an invitation to the jury to scrutinise the complainant's behaviour to determine whether there was anything about it which could have induced a reasonable belief in consent. In this respect the Act contains no real challenge to society's norms and stereotypes about either the relationship between men and women or other sexual situations, and leaves open the possibility that those stereotypes will determine assessments of reasonableness. Is B's sexual history to be taken to be a relevant part of the circumstances? In answer to a question raised in Committee, the Minister agreed that the section "should focus the court's attention on what is happening at the time of the offence" and "should make the previous sexual history of the complainant far less relevant." [91] But this does not seem to reflect the natural meaning of the words "*all* the circumstances," which contain no limitation to circumstances existing at the time of the event in question. Further, it is true that s.1(2) requires consideration of "any steps A has taken to ascertain whether B consents," [92] however, if A enquires about consent; B says no, but A concludes that B's "no" is tantamount to "yes," is his culturally engendered belief to be regarded as reasonable or not? In deciding what it is "relevant" to consider, what is to prevent the influence of stereotypes about B's dress, B's frequenting of a particular place, an invitation to have a drink, and so forth?

It therefore seems possible that the new element of absence of reasonable belief in consent, which forms part of the four major offences in the Act, may not impose greater duties on defendants than does the present law. Of course, the prosecution may take advantage of the various presumptions in ss.76 (conclusive) and 75 (rebuttable), as we saw in Part 6 above, but there will be many cases that fall outside that list of circumstances. The Act requires the prosecution to establish beyond reasonable doubt that A did not reasonably believe that B consented. Was the Government right to abandon its proposal for placing the onus of proof on the defence, once the basis for one of the rebuttable presumptions has been established?

8. The question of the burden of proof

In 1972 the Criminal Law Revision Committee stated that it was "strongly of opinion that, both on principle and for the sake of clarity and convenience in practice, burdens on the defence should be evidential only." [93] The main reason of principle was that, if the defendant raises a defence (such as innocent possession of an offensive weapon) under a statute that imposes a persuasive burden on the accused,

"it seems to us repugnant to principle that the jury or magistrates' court should be under a legal duty, if they are left in doubt whether or not the accused had the guilty intent, to convict him. For this is what the law requires …" [94]

Crim. L.R. 343 This recommendation did not alter the legislative tendency to impose persuasive burdens on the defence, but the Human Rights Act 1998 has done so. Although the Strasbourg case law is weak, [95] the House of Lords took a strong line in *Lambert,* [96] following Commonwealth decisions in holding that reverse onus provisions require special justification, which will rarely be found when the matter to be proved is essential to the offence or where the maximum penalty is high. Since then the courts have been more ambivalent about the presumption of innocence: thus, in *Johnstone* [97] Lord Nicholls declaimed that in order to justify a reverse onus "there must be compelling reason why it is fair and reasonable to deny the accused person the

protection normally guaranteed to everyone by the presumption of innocence," and went on to find two practical reasons why the reverse onus in s.92 of the Trade Marks Act 1994 (maximum, 10 years) should be allowed to stand.

A similar ambivalence was reflected in the Sexual Offences Bill as originally drafted. When the prosecution established the factual basis of one of the rebuttable presumptions as to consent, the defence would bear an evidential burden of rebuttal, leaving the prosecution to prove consent ultimately. [98] But when the prosecution established the factual basis of one of the rebuttable presumptions as to reasonable belief in consent, the defence would bear a persuasive burden of rebuttal. We have seen that the latter provision came under attack in Parliament on the ground that it imposed too great a burden on the defendant, not least in view of the complex test of reasonableness, [99] and the government abandoned it. Has the law arrived at a fair formulation? Much depends on how courts interpret and apply the evidential burden. Let us deal with "no consent" arguments first. If D's case is that C did consent despite the threat, the alcohol, the detention or whatever, presumably this mere assertion will not amount to "sufficient evidence … to raise an issue as to whether [C] consents" (s.75(1)). Some supporting explanation of why the presumption ought not to apply in this case must be presented. The Bill [100] originally contained a provision that evidence resulting from the cross-examination of C was not acceptable for these purposes unless it amounted to an admission of consent. That was dropped, leaving open the possibility that statements by C may be used to discharge the evidential burden. The possibility of harassing cross-examination of C to try and extract such evidence therefore reappears. There will be little to prevent this unless it happens to take the form of an attempt to adduce sexual history evidence which is (somewhat) regulated by s.41 of the Youth Justice and Criminal Evidence Act 1999. Turning specifically to cases where reasonable belief in consent is argued, a defendant who wishes to rebut one of the presumptions can surely satisfy the evidential burden only by adducing sufficient evidence of both the belief and its reasonableness. That means that an explanation for the belief will have to be advanced.

The Government was keen to assert that the reduction of the burden on the defence in reasonable belief cases, from a persuasive to an evidential burden, did not undermine the thrust of the Act. Baroness Scotland stated that "in order for these ***Crim. L.R. 344*** presumptions not to apply, the defendant will need to satisfy the judge from the evidence that there is a real issue about consent [or belief in consent] that is worth putting to the jury." [101] In effect, it comes down to how this is translated into practice. If the evidential burden comes to be applied as Baroness Scotland wishes, this would require defendants to go some way towards establishing consent or reasonable belief: it should be borne in mind that the imposition of an evidential burden in respect of an essential element (consent, reasonable belief in consent) of offences that carry a maximum of life imprisonment (rape, assault by penetration) already places an onus on the defence. If, on the other hand, little more than the defendant's say-so were held sufficient, this would be a purer instantiation of the presumption of innocence but would undermine the government's purpose of "sending out a very clear message that does shift the balance in favour of the complainant." [102]

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Some would argue that the Government has not shifted the balance in favour of the complainant but has, overall, made the prosecution's task harder. The presumptions will assist only in a restricted range of situations and to take advantage of them the prosecution will have to prove both the existence of a given circumstance and the defendant's knowledge of it. Where the defence satisfies the evidential burden, the prosecution will then bear the full burden of proof. In all other non-listed cases, instead of being able to establish liability through the former test of recklessness, the prosecution will now have to prove absence of belief in consent or that a belief was not reasonable, with all the attendant difficulties which that entails.

9. Consent, deception and threats

We have explained above that s.76 creates two conclusive presumptions of the absence of consent and of belief as to consent where there is deception as to the nature and purpose of the act or the identity of the defendant. But this leaves other cases of deception to be dealt with under the broad definition of consent as agreement by choice (s.74). What if D deceives C into thinking that he will pay her £25 for sex when in fact he has no intention of doing so, and does not? In *Linekar* [103] the Court of Appeal held that this deception was not sufficiently fundamental to negative apparent consent. But the jury had originally convicted and, if left with the words of s.74, might they not conclude that she did not agree "by choice"? What if D deceives C into thinking that he is not HIV positive when he is? [104] If there is a prosecution for rape, how should the jury be directed on consent? Does the judge simply ask the jury to consider whether C agreed by choice? The defence might argue that C was obviously content to have sex with D and was merely deceived as to one of his attributes. The prosecution might argue that any distinction between essence and attributes is unconvincing in this situation, since plainly C was not content to have sex with D in the actual circumstances and the deception deprived her of true choice. Should the judge rule on this, and, if so, in what way? What if D deceives C as to his qualifications, and then carries out a medical procedure to which C would not have consented

if she had known the true facts? The pre-Act *Crim. L.R. 345* position was unclear,[105] and it is uncertain whether a judge, in a prosecution for assault by penetration or sexual assault, should direct the jury on whether this may amount to agreement "by choice" and, if so, which approach the judge should then take. Indeed, in many of these situations a deception by D may not be required: it is arguable that, if C gives her agreement in ignorance of a key fact, and if D knows of that ignorance and takes advantage of it, it may be concluded that C did not agree by choice.[106]

Similar difficulties arise in relation to threats. Section 75(2)(a) and (b) create rebuttable presumptions of the absence of consent where there are threats of immediate violence against the complainant or another person. This leaves all other cases of threats to be dealt with under the broad definition in s.74. What if there are threats of non-immediate violence (*e.g.* "we will come and get you and your family, I have some very nasty friends")? The question is whether the jury thinks that these threats mean that the complainant did not agree by choice. What if D tells his employee C, who has committed a disciplinary offence, that, unless she allows him to cane her, he will terminate her employment?[107] If she agrees, would that amount to agreement by choice if D was charged with sexual assault? Might the phrase "agree by choice" apply differently if D's demand was for full sex, and the charge was rape? What if a police officer stops a woman motorist for an offence, and offers not to report her if she has sex with him?[108] If she agrees, does she do so "by choice"? That question will always have to be answered in the circumstances of the case and in relation to the particular complainant, notably the latter's "freedom and capacity to make that choice." This is the implication of protecting sexual autonomy: "a threat which had a devastating effect on one victim might appear trivial to another, and if both had intercourse the latter might be held to have consented when the former did not."[109]

The difficulties with this aspect of the 2003 Act go further. It is not simply that the statutory definition of consent is vague. There is also the problem that the Act repeals the two previous offences of procuring sex by threats or intimidation and procuring sex by false representations,[110] and does not replace them. This ignores the Report's recommendation that a new offence of obtaining sexual penetration by threats or deception in any part of the world should be created[111]; all that appears in the Act is a new provision confined to protecting mentally disordered persons where inducements, threats or deceptions are used.[112] Apart from that it appears that, when a court is deciding whether a particular deception or threat is sufficient to negative ostensible consent, it is effectively deciding between conviction of a serious offence and a complete acquittal. There is no lesser offence, no middle way. Admittedly, *Crim. L.R. 346* convictions under ss.2 and 3 of the 1956 Act were rare; but, in the unusual case where this issue occurs, the vague terms of s.74 now assume a heightened importance.

10. Conclusions

It has been said that "legal reform is a work in progress." Feminists have been urged not to write off legislation dealing with sexual assault where its failures are evident, but to recognise that success and failure exist side by side when it comes to inevitably controversial reforms of this kind.[113] However, some of the failures of this legislation are likely to fuel criticism from feminists and non-feminists alike. There is no doubt that the law on sexual offences needed modernising, but the Act in its final form does not seem designed to achieve the objectives set out by the government. The main charges against the previous law were that it lacked clarity and coherence and failed to reflect changing social attitudes. Some incoherence necessarily remains, in the sense that some forms of behaviour that are "sexual" according to s.78 are excluded from these reforms, *i.e.* the conduct in *Brown*.[114] Insofar as the definition of "consent" is a pivotal element in the new law on adult sex offences, we have seen that s.74 is vague in its terms and that a large part of the new law is left to the interpretation of juries, under the guidance of model directions prepared by the Judicial Studies Board. Even as a residual definition, s.74 leaves too much uncertainty in the application of the law to a whole range of familiar situations. On the other hand, whilst the contents of the presumptions in s.75 were criticised in Part 6(b) above, even in their present form they make important statements about sexual behaviour and respect for individual autonomy which should be given wide publicity. The alleged changes in social attitudes towards sex are not universal: changes in the law on driving whilst using a mobile phone were publicised in order to influence behaviour, and the same should be done here. As for the aim of increasing the reporting of sex offences and improving conviction rates, changes in the substantive criminal law can only have a modest effect on this (compared with changes in social attitudes, in police practices, and in procedural and evidential rules), and this well-intentioned but heavily compromised legislation is most unlikely to succeed in this respect.

The article is based on papers presented by the authors at the International Association of Penal Law's conference on "Sexual Offences" in November 2003. We are indebted to those who attended for their comments.

Footnotes

1 For a detailed discussion of consent in sexual offences, see *ibid.,* pp.90-116, 166-177.
2 Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences, Vol.1* (chair: Betty Moxon), Home Office (2000), hereinafter referred to as "the Report"; see N. Lacey, "Beset by Boundaries: the Home Office Review of Sex Offences" [2001] Crim.L.R. 3 and P. Rumney, "The Review of Sex Offences and Rape Law" (2001) 64 M.L.R. 890.
3 Home Office, *Protecting the Public* (Cm.5668, 2002).
4 It was also the subject of a scrutiny and report by the House of Commons Home Affairs Committee: see Home Affairs Committee, *Sexual Offences Bill* (Fifth Report of Session 2002-03, HC 639, 2003); see also *The Government Reply to the Fifth Report from the Home Affairs Committee Session 2002-2003* HC639*: Sexual Offences Bill* (Cm.5986, 2003).
5 *Protecting the Public,* para.4
6 *ibid.,* para.5.
7 Lord Falconer, House of Lords Deb., Vol.644, col.772, February 13, 2003.
8 *ibid.* See also, *Protecting the Public,* para.10.
9 Lord Falconer, House of Lords Deb., Vol.644, col.771, February 13, 2003.
10 s.79.
11 Report, para.2.8.5. In *Ragusa* (1993) 14 Cr.App.R.(S.) 118, the Court of Appeal in effect upheld a sentence of 10 years' imprisonment for indecent assault by means of forced oral sex, in a particularly bad case.
12 Home Affairs Committee (above, n.4), paras 10-14.
13 Report, paras 2.12.5-6.
14 s.2(4). For draft sentencing guidelines on this and other offences, see the Consultation Paper at *www.sentencing-guidelines.gov.uk.*
15 *e.g. Townsend* (1995) 16 Cr.App.R.(S.) 553; *Osman* [2000] 2 Cr.App.R.(S.) 112.
16 para.2.20.
17 para.2.20.1
18 *e.g. Cogan and Leak* [1976] Q.B. 217; *DPP v K and B* [1997] 1 Cr.App.R. 36.
19 s.8.
20 [1989] A.C. 28.
21 Compare Lord Ackner in *Court* [1989] A.C. 28 at 44, on inherent indecency. Section 73 of the Act (which applies to offences against children) only provides an exemption for secondary parties with clinically justifiable motives, not principals.
22 This reflects the decision in *George* [1956] Crim.L.R 52.
23 See Andrew Ashworth, *Principles of Criminal Law* (4th ed., 2003), p.354.
24 See Jennifer Temkin, *Rape and the Legal Process* (Oxford University Press, 2002), p.161.
25 Report (above, n.2).
26 See Jennifer Temkin, "Literature Review: Rape and Sexual Assault" in *Setting the Boundaries: Reforming the Law on Sex Offences,* Vol.2 *Supporting Evidence,* App.D1, Home Office (2000). See also The Law Commission, *Consent in Sex Offences--A Policy Paper* (2000), App.C.
27 [1981] 3 All E.R. 1382.
28 Report, para.2.10.2.
29 *e.g.* Canadian Criminal Code, s.273.1; The Crimes (Rape) Act 1991, s.36, Victoria, Australia.
30 Report, para.2.10.5.
31 *ibid.,* para.2.10.6.
32 *ibid.*
33 See *Protecting the Public,* para.16.
34 See Temkin (2002), pp.94-95.
35 Report, para.2.10.9.
36 *ibid.*
37 Above, n.2.

38 *Protecting the Public,* para.30.
39 para.32.
40 But for the "internal" approach in the case of impersonation, see discussion below.
41 *Protecting the Public,* para.32.
42 [2002] 2 A.C. 545.
43 The Report did not discuss the issue of burden of proof, but in relation to the idea of judges' directions it said: "we did not want to establish any presumption of lack of consent" (para.2.11.4).
44 For discussion, see the Home Affairs Committee (above, n.4), para.29.
45 This reflects the common law, see *Flattery* (1877) 2 Q.B.D. 410 *and Williams* [1923] 1 K.B. 340.
46 This provision ensures that there is liability where D, for example, deceives C into thinking that a vaginal examination is required for medical reasons. See also *Tabassum* [2000] Crim.L.R. 686.
47 s.76(2). For a case of partner impersonation, see *Elbekkay* [1995] Crim.L.R. 163.
48 This possibility was clearly not appreciated by the Solicitor General who appears to have considered that such argument was precluded simply because the presumptions in s.76 were conclusive: House of Commons Standing Committee B, col.60, October 15, 2003.
49 See discussion below, pp.337-340.
50 This provision reflects the common law but introduces an immediacy requirement.
51 This provision clarifies the common law regarding fear of violence to third parties.
52 This provision clarifies the common law and reflects the recommendation of the Law Commission: see Law Commission, Consultation Paper No.139, *Consent in the Criminal Law* (HMSO, 1995), para.6.36 and the law in several Australian states: see Temkin (2002), p.107.
53 At common law consent was conclusively presumed where sexual intercourse took place in these circumstances: see discussion below.
54 This clarifies existing law and reflects increasing concern about the sexual abuse of those with disabilities: see on this, *e.g. Speaking Up for Justice* (Home Office, 1998).
55 This circumstance did not feature in the original Bill but was added by the government at a later stage after it accepted a suggestion made by Lord Lucas during debate. It was intended to deal with "drug rape": see Beverley Hughes, House of Commons Standing Committee B, col.053, October 14, 2003.
56 See, further, Pt 8 below.
57 J.L. Austin, "A Plea for Excuses", in H. Morris (ed.), *Freedom and Responsibility* (1961), at p.8.
58 para.2.11.5.
59 This is intended to include alcohol: see Beverley Hughes, House of Commons Standing Committee B col.054, October 14, 2003.
60 For further discussion, see Emily Finch and Vanessa E. Munro, "Intoxicated Consent and the Boundaries of Drug-assisted Rape" [2003] Crim.L.R. 773.
61 House of Commons Standing Committee B, col.26, October 15, 2003.
62 *Mayers* (1872) 12 Cox C.C. 311.
63 Law Commission (2000), (above, n.27), paras.2.5-2.12.
64 See discussion in Temkin (2002), pp.98-99.
65 para.2.10.9.
66 See Literature Review (above, n.27), p.87. In Canada, the list which was originally exhaustive is now non-exhaustive: for further discussion see Temkin (2002), p.174.
67 Report, para.2.10.7.
68 Beverley Hughes, House of Commons Standing Committee B, col.26, October 15, 2003.
69 See *The Government Reply to the Fifth Report* (above, n.4), para.5.
70 See Report, para.2.10.9; *Protecting the Public,* para.31.
71 Beverley Hughes, House of Commons Standing Committee B, col.053, October 14, 2003.
72 See discussion, above, p.336.
73 Amendments were unsuccessfully tabled by Baroness Noakes and Lord Astor to remove this requirement.
74 para.2.10.9.
75 Canadian Criminal Code, s.273.1(2).
76 cl.78(5).
77 Home Affairs Committee (above, n.4), para.33.
78 para.2.10.9.
79 This includes situations where D has deliberately plied C with drink in order to have sexual intercourse with her.

80 *DPP v Morgan* [1976] A.C. 182.
81 The words of Lord Hailsham, *ibid.,* p.214.
82 *Cf.* the decisions in *B v DPP* [2000] 2 A.C. 428 and in *K* [2002] 1 Cr.App.R. 121, which strongly favoured proof of *mens rea* as to age over the previous strict liability interpretation of statutory sexual offences against children under a specified age.
83 Home Affairs Committee (above, n.4), para.23.
84 34 F.302, 309 (C.C.E.D.N.Y.1888) quoted by Victoria Nourse in "The "Normal' Successes and Failures of Feminism and the Criminal Law" (2000) 75 Chi-Kent L.Rev. 951, n.92.
85 Government Reply to the Fifth Report (above, n.4), para.3.
86 Sexual Offences Bill [Lords], House of Commons Standing Committee B, col.21, September 9, 2003.
87 *cf.* the courts' approaches to this question in other areas of the criminal law, in *Bowen* [1996] 2 Cr.App.R. 157 and *Morgan Smith* [2001] 1 A.C. 146.
88 (1991) 83 D.L.R. (4th) 193 at 228.
89 para.32.
90 para.34.
91 Sexual Offences Bill [Lords], House of Commons Standing Committee B, col.21, September 9, 2003.
92 s.1(2).
93 Eleventh Report, *Evidence (General*) (Cmnd 4991, 1972), para.140; for further analysis, see I.H. Dennis, *The Law of Evidence* (2nd ed., 2002), pp.374-390.
94 *ibid.,* para.140(i).
95 *e.g. Salabiaku v France* (1988) 13 E.H.R.R. 379.
96 [2002] 2 A.C. 545.
97 [2003] UKHL 28 at [49]; see [2004] Crim.L.R. 244.
98 *Cf. Protecting the Public,* para.32, which proposed a persuasive burden on the defence.
99 The complexity of the original formulation is mentioned above, p.340, and discussed by the Home Affairs Committee (above, n.4), at paras 18-23.
100 Sexual Offences Bill cl.78(2) as introduced in the House of Lords on January 28, 2003.
101 Quoted and slightly amended by the Home Affairs Committee (above, n.4), para.29.
102 The words of Hilary Benn, then Home Office Minister, quoted by the Home Affairs Committee (above, n.4), at para.30.
103 [1995] Q.B. 250.
104 See Temkin (2002), p.106, for proposals on this issue.
105 Compare *Tabassum* [2000] Crim.L.R. 686 (no true consent) with *Richardson* [1998] 2 Cr.App.R. 200 (effective consent).
106 A rough parallel with the (controversial) principle in *Metropolitan Police Commissioner v Charles* [1977] A.C. 177 that there is a deception if D knows that C would not have acted as she did, if she had known the true facts. This might apply if D concealed the fact that he was HIV positive and the issue was not mentioned before C agreed to sex.
107 *McCoy* [1953] 2 S.A. 4.
108 *cf. Wellard* (1978) 67 Cr.App.R. 364 at 368.
109 S. Gardner, "Appreciating *Olugboja*" (1996) 16 L.S. 275 at p.287.
110 ss.2 and 3, respectively, of the Sexual Offences Act 1956.
111 Report, para.2.18.7.
112 See ss.34-37. For the definition of mental disorder, see s.79(6). For reasons of space this article does not deal with ss.30-44 which cover sexual acts with the mentally disordered.
113 See Victoria Nourse (above, n.85), p.962.
114 [1994] 1 A.C. 212; see N. Bamforth, "Sado-masochism and consent" [1994] Crim.L.R. 661.

