England and Wales

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A. Background of criminal laws on sexual conduct

The law governing consent to sexual relations in England and Wales has changed in response to social mores and to new behaviours. Such determinations are made for 'reasons of political pragmatism rather than a considered societal response.'[1] The first age of consent was effectively set in 1275[2] by a law that made it a misdemeanour to 'ravish a maiden within age' with or without her consent. Blackstone contended that this meant the age of marriage for girls, which was then set at 12. In 1576, sex with girls under the age of 10 was made a felony but sex with girls aged 10–12 remained a misdemeanour.[3] The felony age was raised to 13 in 1875.[4] The Criminal Law (Amendment) Act 1885 raised the age of consent for heterosexuals, from 13 to 16, in response to concerns about child prostitution.[5] The Buggery Act of 1533 moved the issue of sodomy from the ecclesiastical to the criminal courts. Section 11 of the Criminal Law (Amendment) Act 1885 made all homosexual acts of 'gross indecency' illegal (legislation that is still in force in many Commonwealth countries; lesbian sexual acts have never been subject to the criminal law). Male homosexuality was decriminalised in 1967 for men over 21 (then the age of majority). The homosexual age of consent was lowered to 18 in 1994 and equalised at 16 with heterosexuals in 2000. A higher age of consent of 18 was created for those in a position of trust (heterosexual or homosexual). This was later extended to other forms of exploitation, including prostitution and the taking, making or distribution of an indecent photograph of a child. Successive governments

1 A. A. Gillespie, & S. Ost, 'The "higher" age of consent and the concept of sexual exploitation' in: A. Reed, M. Bohlander, N. Wake, N. & E. Smith (eds), *Consent: domestic and comparative perspectives*, London Routledge 2016, 161–176.
2 Statute of Westminster I, Chapter XIII.
3 Benefit of the Clergy Act 1575.
4 Offences Against the Person Act 1875.
5 Sex with a girl between 13 and 16 years was defined as a misdemeanour, whereas sex with a girl under 13 was a felony.

have resisted proposals to lower the age of consent further, largely on child protection grounds.

Sexual offences were a mix of statute and common law, consolidated in the Sexual Offences Act 1956. The Sexual Offences Act 2003 was a wholesale reform of the law of sexual offences in England and Wales. It replaced previous legislation and created new criminal offences (discussed below). Some changes are relatively recent. Marital rape was only criminalised (by judicial decision) in 1991.[6] Male rape was recognised as a specific crime in the Criminal Justice and Public Order Act 1994.[7] Offences have been enacted in response to new types of sexual misconduct such as 'upskirting' (taking a photograph of another's genitals, buttocks or underwear without their consent) and 'revenge porn' (sharing intimate private images of another).[8] A recently enacted offence of 'controlling and coercive behaviour'[9] – a domestic abuse offence of violence, not a sexual offence – has brought the issue of coercion in relationships to the fore. Further, sexual offences committed abroad can now be prosecuted in England and Wales (in response to 'sex tourism' cases whereby men were travelling to developing countries to sexually exploit children).[10] Bigamy remains a crime and it is now a criminal offence to force someone to marry.[11] There is no statute of limitations on the prosecution of serious sexual offences.

The criminal law has reflected the debate between H.L.A. Hart and Lord Devlin – broadly speaking Hart's philosophy that the law should intervene only to prevent harm to others; Devlin's thesis that when, in the collective judgment of a society, a behaviour reaches the limits of "intolerance, indignation and disgust," legislation against it is necessary. Some of the older cases took a more Devlin-esque approach. In *Shaw* v *DPP*,[12] the appellant argued that his conviction for conspiracy to corrupt public morals had no basis in law (he created magazines containing adverts for and photographs of prostitutes). The court held that it had a duty to protect the public's morals and accordingly that it had the ability to create offences. The courts appear to be criminalising the practice of 'stealthing', (removing a condom during intercourse without the other

6 *R. v R* [1991] UKHL 12.
7 Criminal Justice and Public Order Act 1994 s.143. Previously it was dealt with under the 'unnatural offence' of buggery (Sexual Offences Act 1956, s.12).
8 Sexual Offences Act 2003 s.67A and Criminal Justice and Courts Act 2015 s.33.
9 Serious Crime Act 2015, s.76.
10 Sexual Offences Act 2003, s.72.
11 Anti-social Behaviour, Crime and Policing Act 2014, part 10.
12 *Shaw v DPP* [1962] AC 220.

person's knowledge or consent). Rather than creating a separate offence, it has been held that doing so vitiates consent, and can, therefore, amount to rape.[13]

In *R.* v *Brown*,[14] the House of Lords held that it was not legally possible for individuals to consent to sado-masochistic assaults. They had been convicted under the Offences against the Person Act 1861, but the sexual nature of their behaviour was significant to the decision. It held that public policy required that society be protected by criminal sanctions against a cult of violence which contained the danger of the proselytisation and corruption of young men and the potential for the infliction of serious injury. The decision has become of significance again recently with the so called 'rough sex defence' (in which women have been fatally strangled by partners who claimed that the death was an accident resulting from consensual sexual activity).

The role of prosecutorial discretion in relation to charging decisions is important and has changed recently. Generally, if there is sufficient evidence to provide 'a realistic prospect of conviction' a prosecution will follow unless there 'are public interest factors tending against prosecution which clearly outweigh those tending in favour.'[15] Most frequently, perhaps, the exercise of this discretion is seen in cases of 'consensual' sexual activity between children under the age of consent. The Crown Prosecution Service (CPS) Legal Guidance states: "prosecutors should bear in mind the overriding purpose of the legislation was to protect children and it was not Parliament's intention to punish children unnecessarily or for the criminal law to intervene where it was wholly inappropriate."[16] Conversely, the police and prosecution have taken an increasingly purposive approach to investigating and prosecuting elderly defendants on charges of historical sex abuse.

The greatest attrition rate occurs with offences not being reported to the police (84 %). The number of complaints regarding sexual offences is higher than previously, however in the year to March 2020, just 1.4 % of rape cases recorded by the police resulted in a suspect being charged. The Victims' Commissioner has said that this amounts to 'the de-criminalisation

13 See *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin).

14 *R. v Brown* [1993] UKHL 19.

15 Crown Prosecution Service (CPS), Principles, www.cps.gov.uk/principles-we-follow (accessed August 24, 2022).

16 CPS, Rape and Sexual Offences: Sexual Offences and Youths, 21 May 2021, https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-12-sexual-offences-and-youths (accessed August 24, 2022).

of rape'.[17] Undoubtedly action could be taken to improve this figure – for example, investment in technology and officer numbers so that cases could be investigated more quickly. Yet the nature of the offence means that these are often difficult cases to prosecute due to a lack of independent evidence and the partially subjective test of mens rea (discussed below). In 2019–2020, a prosecution for the offence of rape was authorised in 58.7 % of cases received by the prosecuting authority from the police; of those prosecutions, 68.5 % resulted in a conviction, which is comparable to or better than many other types of offence.[18]

Evidential requirements and obstacles have been reduced regarding investigations and trials for sexual offences in repeated attempts to 'improve' the conviction rate. The CPS has a Violence Against Women and Girls Strategy[19] and now takes a more proactive stance in pursuing prosecutions involving sexual offences. The judge no longer has to warn the jury about the danger of convicting the accused on the uncorroborated evidence of the complainant,[20] and similar fact, bad character and hearsay evidence are now easier for the prosecution to adduce.[21] Complainants can give pre-recorded evidence[22] and they may appear behind a screen or by video link. There can be no evidence, including cross examination, about a complainant's sexual experience with a person other than the accused,[23] without the leave of the judge. This is given in very limited circumstances.

17 *2019/20 Annual Report*, Dame Vera Baird QC Victims' Commissioner for England and Wales HC 625.
18 CPS, Rape Annual Data Tables Year Ending March 2020 (Excel spreadsheet), AR15, tables 2 and 3, https://www.cps.gov.uk/publication/cps-data-summary-quarter-4-2019-2020 (accessed August 24, 2022).
19 CPS, Violence Against Women and Girls, https://www.cps.gov.uk/publication/violence-against-women-and-girls (accessed August 24, 2022).
20 See e.g., The Crown Court Compendium, Part I, § 10–2, https://www.judiciary.uk/wp-content/uploads/2021/08/Crown-Court-Compendium-Part-I.pdf (accessed August 24, 2022).
21 Criminal Justice Act 2003.
22 Youth Justice and Criminal Evidence Act 1999, s.28.
23 Youth Justice and Criminal Evidence Act 1999, s.41.

B. General attitude in society toward sexual relations

I. Is there an emphasis on traditional rules of decency and morals or on autonomy?

Social attitudes have changed significantly since the Wolfenden Report 1957 recommended that homosexual acts between two consenting adults should no longer be a criminal offence on the basis that there 'must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business'.[24] A review of the British Social Attitudes (BSA) data in the thirty years since it began in 1983 concluded that there was an increasing sense of 'live and let live' when it comes to prevailing views on other people's relationships and lifestyles. Three-quarters see nothing wrong with sex outside marriage compared with 42 % when the BSA began. Two-thirds now say that sex between two adults of the same sex is "not wrong at all", an increase of almost 50 percentage points since the question was first asked in 1983.[25] Changes in other areas of law may have had an influence on this. Heterosexual and homosexual couples now have an equal right to marry or to have a civil partnership. Adoption and fertility treatment is not restricted to married heterosexuals. Adultery is, however, still grounds for divorce, as is one spouse obtaining a gender recognition certificate.

There has been concern for some time about the perpetuation of so-called 'rape myths' and their possible influence in sexual offences trials. A 2005 Amnesty International Report (Sexual Assault Research) found that more than a quarter (26 %) of those asked said that they thought a woman was partially or totally responsible for being raped if she was wearing 'sexy or revealing' clothing, and more than one in five (22 %) held the same view if a woman had had many sexual partners. More than a quarter of people (30 %) said that a woman was partially or totally responsible for being raped if she was drunk, and more than a third (37 %) held the same view if the woman had failed to clearly say no to the man. There are other, perhaps more subtle, misperceptions regarding delays in making a complaint, demeanour in giving evidence or inconsistency in complaint. Views may have changed since the Amnesty survey with campaigns such as the

24 *Report of Committee on Homosexual Offences and Prostitution* (Cmnd 247), para. 14.

25 Park et al (2013), 'Key Findings: How and Why Britain's Attitudes and Values are Changing' in: Park, A., Bryson, C., Clery, E., Curtice, J. and Phillips, M. (eds), British Social Attitudes: the 30th Report, London: Nat Cen Social Research, 19 (2013).

#MeToo movement. Nevertheless, such is the recognition of this risk that the Court of Appeal (Criminal Division) and the editors of the Crown Court Compendium (a guide for judges on their direction to juries) have given guidance on this topic and suggested matters to be addressed to avoid injustice to the complainant.

II. Sex equality

There has been legislation against sex-based discrimination since 1975.[26] Women and girls (whether married or not) now have access to contraception. Abortion is not a right but is relatively straightforward to access. Almost all jobs are open to those of both sexes but, overall, men still occupy the most senior positions and earn 15.5 % more.[27] The UK is ranked 13 on the UN Gender Inequality Index.[28] In terms of societal attitudes to sex equality, there remains much work to be done. One need only look to media coverage of celebrity to see that objectification of women remains prevalent, for example.

There are parts of the law that remain different as between the sexes; most notably, that "rape" can only be committed by penile penetration (there is an equivalent offence of assault by penetration for acts not involving a penis). Women are much more likely than men to be victims of sexual violence and are less likely to perpetrate sexual or violent crimes. 71 % of women of all ages in the UK have experienced some form of sexual harassment in a public space – this number rises to 86 % among 18–24-year-olds.[29] For the year ending March 2020, the Crime Survey for England and Wales (CSEW) estimated that 3.8 % of adults aged 16 to 74 years (1.6 million people) had experienced sexual assault by rape or penetration (including attempts) since the age of 16 years (7.1 % for women and 0.5 % for men).[30]

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26 Sex Discrimination Act 1975.

27 Office for National Statistics, *Gender pay gap in the UK 2020*, November 3, 2020, https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/bulletins/genderpaygapintheuk/2020 (accessed August 24, 2022).

28 Human Development Reports, *Gender Inequality Index (GII)*, http://hdr.undp.org/en/content/gender-inequality-index-gii (accessed August 24, 2022).

29 APPG, *Report on prevalence and reporting of sexual harassment in UK public spaces*, March 2021, APPG-UN-Women_Sexual-Harassment-Report_2021.pdf (unwomenuk.org) (accessed August 24, 2022).

30 Office for National Statistics, *Sexual offences prevalence and trends, England and Wales*, March 18, 2021, https://www.ons.gov.uk/peoplepopulationandcommunity

C. Structure of the Sexual Offences Act 2003 and the interests to be protected

Part 1 of the Sexual Offences Act 2003 defines the non-consensual offences of rape, assault by penetration, sexual assault, and causing a person to engage in sexual activity without consent. Another group of offences is based, not on the absence of consent, but rather (1) the age of the complainant at the time of the incident (offences committed against a child under the age of 13 are distinguished from those committed against a child aged 13–15); (2) the status of the defendant; offences involving an abuse of a position of trust (e.g. a teacher or a sports coach) are distinct from offences involving family members (often referred to as 'incest'). It also covers offences relating to prostitution, indecent photographs of children and trafficking, preparatory offences, such as administering a substance with intent to commit a sexual offence, and a number of miscellaneous offences, such as voyeurism and intercourse with an animal. It defines "consent" and "sexual" and sets out evidential and conclusive presumptions about consent.[31]

D. Consent

Lack of consent is an element of the offence so, where the absence of consent (and/or the absence of reasonable belief of consent) is not proved by the prosecution, the defendant should be acquitted. This requirement means that (a) the complainant did not in fact consent and (b) that the defendant did not reasonably believe that the complainant was consenting. Thus, a complainant and a defendant can simultaneously – each correctly – have opposing views of the issue of consent, and non-consensual intercourse does not necessarily amount to an offence of rape.

Section 74 simply provides: "For the purposes of this Part, a person consents if he agrees by choice, and has the freedom and capacity to make that choice." Each non-consent offence relies on a definition of consent in s.74 (supplemented by conclusive and rebuttable presumptions about consent). Section 75 provides certain presumptions that can be displaced, for instance, if the defendant used violence immediately prior to the sexual

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/crimeandjustice/articles/sexualoffencesprevalenceandtrendsenglandandwales/yearendingmarch2020 (accessed August 24, 2022).

31 Part 2 contains measures for protecting the public from sexual harm through notification requirements, sexual harm prevention orders and risk of sexual harm orders. Part 3 contains general provisions relating to the Act, including minor and consequential amendments and commencement provisions.

act in question, the complainant is taken to have not consented unless evidence is produced to "raise an issue" as to whether the defendant reasonably believed the complainant was consenting. Similar provisions apply if the complainant was, and the defendant was not, unlawfully detained at the time of the relevant act; the complainant was asleep or otherwise unconscious at the time of the relevant act; due to 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; 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. Section 76 provides conclusive presumptions that cannot be displaced, for example, where the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act, it is to be presumed that the defendant did not reasonably believe in the complainant's consent and that the complainant did not in fact consent.

I. General capacity to give consent

Thus, factors such as consciousness, mental health, lack of intoxication and other factors including any element of knowledge or deception can be used to address the issue of whether the complainant was capable of giving consent. In some offences, they will be factors on which the prosecution can draw as evidence of an absence of consent, such as if the jury find that the complainant was so intoxicated she was not capable of providing consent. With other offences, the position regarding consent is conclusive; offences committed against children under the age of 13 (or persons with a mental disorder impeding their choice) do not require the prosecution to prove an absence of consent.

In outline, the age of consent in England and Wales is 16, notwithstanding the fact that the law largely defines a child as a person under the age of 18. Children aged 13–15 are taken to be able to consent (factually if not lawfully) to sexual activity and thus, there are three sets of offences capable of being committed against a child: (a) non-consensual offences committed against those aged 16–17 (which are indicted as the same offences as for adult complainants); (b) offences where the complainant is aged 13–15 and where the prosecution do not have to prove an absence of consent; and (c) offences where factual consent is not an element of the offence by virtue of the age of the complainant, namely under 13. Where factual

consent is an element of the offence, the prosecution must always prove that the defendant did not hold a reasonable belief that the complainant was consenting.

II. Methods of giving valid consent

The law in England and Wales is not prescriptive as to how consent is to be given. Regarding rape it provides "(2) 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."[32] There is no affirmative consent provision as in some Australian states.[33]

III. Grounds for negating the validity of formal consent

With regard to deception, the courts have taken a mixed approach. Broadly speaking, the distinction has been whether the deception goes to 'the nature and purpose of the act'. For example, a patient's consent to a breast examination is not valid if, unbeknownst to her, the procedure is medically unnecessary and merely for the doctor's sexual gratification. Deception as to the sex of the defendant vitiates consent[34] whereas deception as to general identity (other than impersonating someone known to the victim) does not vitiate consent. False representations as to factors such as marital status, wealth, occupation or HIV status do not vitiate consent[35] but, as described above, removing a condom may.

IV. Withdrawal of consent

In theory – *ceteris paribus* – the point at which a complainant for example communicated a withdrawal of consent, there would be both (a) an ab-

32 Sexual Offences Act 2003, s. 1(2).

33 Caitlin Cassidy, 'What do the affirmative sexual consent law reforms passed in NSW and proposed in Victoria mean for each state?', The Guardian, November 24, 2021, https://www.theguardian.com/global/2021/nov/24/what-do-the-affirmative-sexual-consent-law-reforms-passed-in-nsw-and-proposed-in-victoria-mean-for-each-state (accessed August 24, 2022).

34 *R. v McNally* [2013] EWCA Crim 1051.

35 *R. v EB* [2006] EWCA Crim 2945; [2007] 1 W.L.R. 1567.

sence of consent and (b) an absence of the defendant reasonably believing the complainant was consenting, and thus the elements of a non-consent offence may be present. An offence will only be committed if the relevant activity continues where (a) the complainant no longer consents AND (b) the defendant does not reasonably believe that the complainant consents.

V. Scope of consent

Consent need not be explicit and need not be specific as to the nature and scope of each act. Consent can be implied and can change as a sexual act continues. As described above, the non-consent offences require (a) the absence of consent and (b) that the defendant did not reasonably believe the complainant consented.

VI. If a person gives general consent to sexual relations, what does it include?

There is no longer a general consent to sexual relations. 'The idea that a wife by marriage consents in advance to her husband having sexual intercourse with her whatever her state of health or however proper her objections… is no longer acceptable. It can never have been other than a fiction, and fiction is a poor basis for the criminal law.'[36] Where a person consents to some sexual activity, to what extent that consent extends will depend upon all the circumstances. For example, the complainant may say they consented to sexual touching but not penetration, the defendant may seek to rely on the general consent to bolster the claim that they reasonably believed the complainant consented to penetrative activity. There can therefore be a difference between (a) the complainant's consent (b) what the defendant genuinely believed as regards the complainant's consent and (c) what the defendant reasonably believed as regards the complainant's consent.

36 *R. v R* [1992] 1 A.C. 599.

VII. *Can a person actively perform a sexual act and still claim that s/he did not consent to this act?*

A person may perform a sexual act for many reasons. The critical question as per section 74 SOA is whether the person "agrees by choice, and has the freedom and capacity to make that choice." As to whether a person can actively perform a sexual act and later make a complaint that they did not consent, there is a difference between submission and consent. There are examples of cases where the complainant has been starved or otherwise coerced into performing an act, ostensibly consensually but where in fact the circumstances reveal that the consent was not freely given and thus was not consent at all. Ormerod and Laird have questioned the perceived difference between a threat ('if you do not have sex with me I will sack you') and a promise ('if you have sex with me I will give you a pay rise')[37] Juries are generally directed that:

> "A person consents if they agree to something when they are capable of making a choice about it and are free to do so. Consent can be given enthusiastically or with reluctance, but it is still consent. But when a person gives in to something against his/her free will, that is not consent but submission. They may submit due to threats, out of fear or by persistent psychological coercion."

The position is therefore that there are specific circumstances where there is an evidential presumption against consent that can apply where the complainant has performed the relevant sexual activity. This is underpinned again by the approach to consent in the 2003 Act, namely the emphasis on autonomy.

Additionally, there are offences (formerly under the Sexual Offences Act 2003, ss.57 – 59A, now under the Modern Slavery Act 2015) concerning trafficking for exploitation which includes the intention that the victim be sexually exploited by the commission of a Sexual Offences Act 2003 offence.

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37 D.C. Ormerod and K. Laird, *Smith & Hogan's Criminal Law*, 16th Edn, 2021, Oxford), 791.

VIII. If a person says "no", is it still possible for the other person to obtain his/her valid consent?

Just as consent can be withdrawn, it can be re-instated. Thus, a person may consent, change their mind and withdraw consent, then re-instate their consent. They may do so as many times as they wish. These are all circumstances which, evidentially, may make a conviction more or less likely. But in law, they do not alter the fact of consent; whether a person consents to a sexual act is entirely a matter for them and it is dynamic.