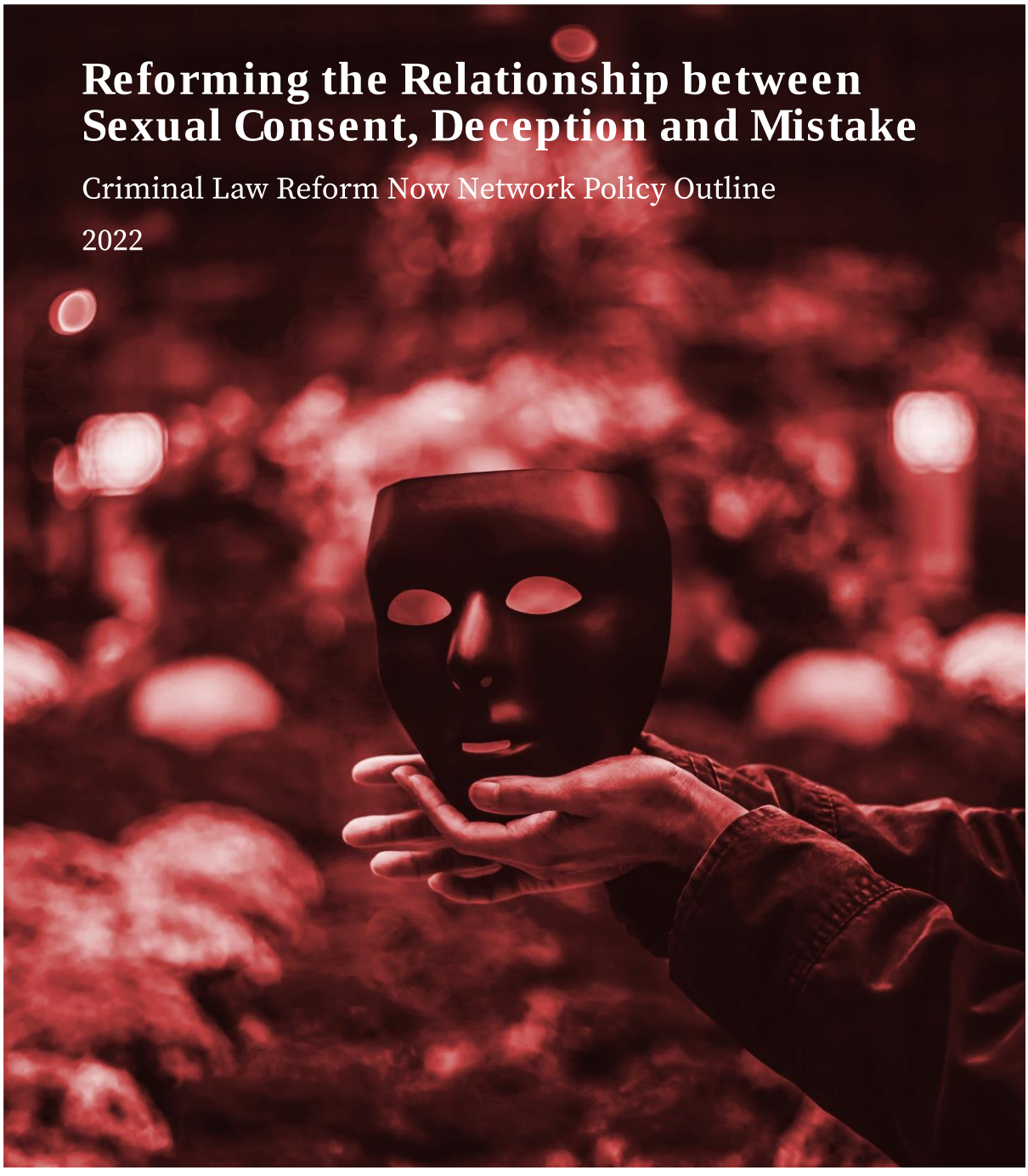
Criminal Law Reform Now Network

Reforming the Relationship between Sexual Consent, Deception and Mistake

Criminal Law Reform Now Network Policy Outline

2022



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This *Policy Outline* document sets out the current position of the CLRNN Committee following our *Reforming the Relationship between Sexual Consent, Deception and Mistake Consultation Report* (10 leading experts providing alternative approaches to reform) and the range of consultation responses that followed. Our aim here – ahead of our final Report in 2023 – is to set out our preferred approach to reform; to seek targeted feedback on this approach; and to begin building the broad consensus necessary for achieving substantive legal change. More information on the CLRNN, including our other projects, can be found on our website; by following us @CLRNNetwork; and on our YouTube Channel.

The current legal field regulating sexual consent and deception is a natural quagmire, which has seen the Court of Appeal develop and abandon a series of unsuccessful common law fixes. At one stage, for example, by virtue of the case of *B* (as explained in *Assange*) it seemed there was an important distinction between active deception and mere non-disclosure; and later by virtue of *McNally*, it seemed that consent could be vitiated by deception concerning an indeterminate range of factors. The current leading authority, *Lawrance*, concerned A deceiving B about having had a vasectomy. The Court of Appeal began by disapplying the distinction between active and passive deception, and distancing itself from the approach in *McNally*, before preferring a test that distinguishes deceptions that go to the physical nature of the sexual act from deceptions relating to mere circumstances known to be of importance to the other person. This seems unlikely to be the final word. Critical commentary has exposed the lack of clarity in the central distinction relied upon, including in its application to the facts of *Lawrance* itself,[1] as well as the apparent absence of a normative moral foundation upon which to justify that distinction.[2] It is therefore little surprise that our consultation authors, as well as our consultees in their responses, have been unanimous in criticising the current law as unsatisfactory. But no one regards the matter as soluble by judicial reinterpretation. The Sexual Offences Act 2003 provides only a narrow range of circumstances under which consent can be vitiated, and it offers no possibility for a court to find that consent was present but acquired through deception in a way which properly attracts condemnation. If the law is to capture conduct which ought to be criminalised, including that which occurred in *Lawrance*, then legislative change is needed.

[1] See generally, the discussion of *Lawrance* in the chapters of our Consultation Report. The facts of *Lawrance* are particularly problematic because, *contra* cases where A deceives B about the use of a condom or an intention to ejaculate, the Court of Appeal found that deception concerning a vasectomy was circumstantial and did not go to the physical act. But this is difficult to sustain. Certainly there is a physical difference between ejaculate that does and does not contain sperm.

[2] Especially when identifying the threshold for such serious and stigmatic offences, points of distinction must be normatively justifiable. Discussed across several chapters in our Consultation Report, the test in *Lawrance* appears to lack such justification.

Part 1. CLRNN Recommendation

Having reviewed the consultation proposals and the responses of consultees, the CLRNN Committee has decided not to endorse any single proposal in full. Rather, as was also common among several consultees, we have constructed an approach that borrows from and/or is influenced by many of the consultation proposals. In doing so, we hope to do appropriate justice to the exceptional work and insights provided by our consultation authors whilst recommending a scheme that we believe has the best chance (in principle and in practice) to make a positive change to the law.

We recommend the creation of a new offence – causing a person to engage in sexual activity by deception – to be added as section 4A to the Sexual Offences Act 2003. We do not recommend any further changes to the Sexual Offences Act 2003, including to the provisions defining consent in sections 74-76. Below, in this first Part of this Policy Outline paper, we set out the recommended new offence as it might appear in statute; in Part 2, we provide some explanation for various aspects of the new offence; and finally, in Part 3, we illustrate how that new offence would apply to the facts of several controversial cases involving deception and sexual activity.

4A. Causing a person to engage in sexual activity by deception

(1) A person (A) commits an offence if—

(a) he intentionally deceives another person (B) in order to influence B to engage in sexual activity;

(b) B engages in sexual activity;

(c) B's decision to engage in sexual activity is influenced by A's deception; and

(d) A has no reasonable excuse for deceiving B.

(2) Deception means either:

(a) Making a false representation to B about a matter that—

(i) A knows is important to B's decision whether to engage in the sexual activity; or

(ii) A believes would be important to B's decision whether to engage in the sexual activity if B was to consider that matter.

or

(b) Failing to disclose to B information that—

(i) A knows is important to B's decision whether to engage in the sexual activity; or

(ii) A believes would be important to B's decision whether to engage in the sexual activity if B was aware of that information.

(3) Where evidence is provided of a reasonable excuse for A's deception, it will be for the prosecution to prove that there was no reasonable excuse.

(4) A person guilty of an offence under this section, where the sexual activity engaged in consists of, or includes, penetration of B's vagina, anus or mouth with A's or another's penis, is liable on conviction on indictment to imprisonment for life.

(5) A person guilty of an offence under this section, where the sexual activity engaged in consists of, or includes, penetration of B's vagina or anus with a part of A's or another's body or anything else, is liable on conviction on indictment to imprisonment for life.

(6) A person guilty of an offence under this section, where the sexual activity engaged in consists of, or includes, the touching of B by A or another is liable—

(a) on summary conviction to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum or both; or

(b) on conviction on indictment to imprisonment for a term not exceeding 10 years.

Part 2. Understanding the CLRNN Recommendation

In this Part we anticipate and answer a series of questions in order to explain and justify the major policy choices underlying the CLRNN recommendation.

Why do we need a new deception-based sexual offence? The need for reform in this area is a point of consensus among our consultation authors and consultees. So to, the principled basis for that reform: focusing on the need for greater legal clarity (for courts, as well as prospectively for the public), greater protection of individual autonomy in choices to engage in sexual activity, and greater normative justification for the thresholds of criminalisation. There are different mechanisms available for reform, and various options were canvassed in the Consultation Report, including the redefinition of consent provisions and even abandoning consent as our basis for understanding the criminal wrong within sexual violations.

In line with a majority of our consultation authors, and consultees, however, we have opted to recommend a new offence of causing engagement in sexual activity by deception. There are advantages to this in both principle and in terms of practicality. On the level of principle, we are convinced by consultation authors who present sex (and sexual touchings, etc) by deception as a separate and distinct wrong from that of sex without consent: both represent an attack on B's sexual autonomy, but those attacks are of a different kind (i.e. as we recognise in other areas of the criminal law, such as property offences). Having accepted this difference, a new offence allows that distinction to be marked in the labelling of the crime, and most importantly, allows us greater flexibility in defining the elements (physical and mental) that best capture the

conduct we wish to criminalise. It will be noted, for example, that we have defined the new offence without reference to B's non-consent.

Does the new offence cover both active and passive forms of deception? Yes. Although we do not employ the language of active or passive deception in the draft Bill, such conduct is captured within our definition of "deception" outlined in section 4A(2) – extending *both* to the making of false representations as well as failing to disclose information. We were convinced by consultation authors warning that distinguishing these forms of deception can lead to practical difficulties, and that the separation provides little (if any) basis for distinctions in blame.

What impact must A's deception have on B? Section 4A(1)(c) requires that "B's decision to engage in sexual activity is influenced by A's deception". The use of "influence" here is an intentional step back from the causal requirement advocated by some of our consultation authors. This is partly in recognition of the practical difficulty of proving deception-based causation (a point raised by consultees); but also, we believe, better captures the reality of a decision to engage in sexual activity that is likely to be driven by a range of factors. As long as the prosecution can prove that A's deception was one of the factors influencing B's decision (i.e. more than trivial) then this element of the offence will be satisfied.[3]

What if A deceives B as to sexual contact with a third party? Typical cases will involve A deceiving B in order to influence B's decision to engage in sexual activity with A himself. However, the section 4A offence is not limited to that situation. It will also apply, for example, where A deceives B to engage in sexual activity with a third party. In such a case, it should be noted, the third party is also likely to commit the section 4A offence (by failure to disclose) if they are aware of A's deception. The offence also covers deception aimed at procuring solo sexual activity where, for example, A deceives B into sexual activity on a webcam.

Why do we require subjective mental fault? There was a range of fault elements recommended by our consultation authors, but most who advocated for a new offence (i.e. taking the situation outside the terms of present non-consent offences) conditioned liability on A's subjective willingness to deceive B. We agree that for an offence focused on A's deception, it should be necessary for A to intend his manipulation (section 1(1)(a)) and to know or believe that the subject of that manipulation is important to B's decision to engage in the sexual activity (section

[3] Note that, although A's deception only has to influence B's decision in general terms, A only commits the offence if he believes that the deception is "important to B's decision". More on this below.

4A(2)). The result is that various boasts from A, including representations of wealth etc, will not be caught by the new offence where A does not know that they will play a significant part in influencing B's decision.

What is the role of "reasonable excuse"? We agree with the majority of our consultation authors, and consultees, that the unconditioned criminalisation of all forms of deception has the potential to result in inappropriate liability. From here, we examined proposals that sought to distinguish categories of deception, either for inclusion or exclusion from liability. However, we are not convinced by such an approach. Although it provides an opportunity for certain categories to be clarified on either side of the line, the consultation proposals themselves demonstrate the breadth of the grey area typically left behind; and there is a secondary concern, highlighted by other consultation authors and consultees, that listing exercises almost inevitably require problematic value judgements about what we deem B may or may not value in his or her decision to have sex. Rather than focusing on B's "right" or "wrong" reasons to engage in sexual activity, we want the focus to remain on A and why he or she practised a deception which was known by them to be influential.

The new section 4A offence will therefore apply to any form or topic of deception, as long as it influences B's decision and A knows or believes that it is important to B's decision. The only exemption applies where A has a reasonable excuse for deceiving B (section 4A(1)(d)). There are several examples, taken from our consultation exercise, where we would expect this exemption to apply: this includes, for example, cases where A was reasonably unaware of the falsity of his statement; circumstances where A is the victim of abuse and deceives B (e.g. about the use of birth control) as a form of self-protection; and cases where A is HIV positive, but has been assured that his viral load represents no danger to his sexual partner. There are also more difficult cases where the reasonable excuse exemption does not provide a certain answer, but, we believe, provides the appropriate focus for discussion in court. Cases of deception regarding gender reassignment provide a prominent example here, although there are several others.[4] Where A engages in sexual activity with B without informing B of their gender transition, it should be open to A to explain why this was the case – simply fearing that B would not consent to the sexual activity should not be sufficient as reasonable excuse, but a greater understanding of the relationship with B, and A's potential concerns about wider knowledge of their previous gender, should be taken into account.

How was the decision made on sentencing? The new section 4A offence is intended to stand apart from sections 1-4 as a distinct criminal wrong, but we do not believe that it is in all cases a less serious wrong than activity where non-consent is proven. On this basis, depending on the form of sexual activity (section 4A(4)-(6)), the

[4] See Part 3 below.

maximum sentence tracks the same maximum sentence available for the non-consent offences. Tracking the maximum sentence also helps avoid the problem, highlighted by consultation authors and consultees, of any new deception offence creating a tiering of more and less serious forms of deception (i.e. forms of deception capable of vitiating consent being perceived as most serious).

How will the new offence work alongside existing sexual offences? As stated in response to the previous question – on sentencing – the new section 4A offence is intended to work alongside existing offences, more accurately capturing and criminalising the separate wrong of deception induced sexual activity. Unlike some of our consultation authors, we do not recommend changes to the existing offences alongside the new offence (e.g. to ensure that deception cases are *only* prosecuted under the new offence). Certain deception cases may still be prosecuted under the non-consent offences, where A deceives B as to the nature of the conduct consented to or their identity (i.e. those satisfying the section 76 conclusive presumption of non-consent). However, for the majority of deception cases, those currently focused on the general definition of consent, we believe that the more appropriate terms of the new offence will be sufficient to encourage prosecutors to employ section 4A. Our recommendation here is very much in line with the current structure of the Sexual Offences Act 2003, that supplements the non-consent offences with various other categories of distinct but overlapping forms of sexual offending.

Part 3. Applying the CLRNN Recommendation

In order to illustrate the likely future application of our recommended scheme, here we briefly sketch how that scheme would apply to previous deception cases. Our aim is not to demonstrate that there is a simple answer to every case. Rather, our aim is to show how the greater clarity provided by our scheme can produce straightforward answers to several cases, whilst allowing any remaining 'hard cases' to be contested on a fairer legal basis than is currently available.

***Linekar* [1995] 2 Cr App R 49** (pre-SOA 2003): The case was put to the jury *inter alia* on the basis that they might convict if A had sexual intercourse with B, a sex worker, having promised to pay her. A never intended to pay.

Crown Court: guilty of rape.

Court of Appeal: appeal allowed, consent was not undermined by A's deception. B was not deceived as to the nature of the act (she knew he was going to penetrate her vagina with his penis) or the purpose of A doing so (for him to derive sexual gratification).

CLRNN Recommendation: A would not be guilty of a section 1 rape offence, for the reasons given by the Court of Appeal. However, A would have committed the new section 4A

deception offence, if he had intentionally and falsely represented his intention to pay B with no (apparent) reasonable excuse.

***Dica* [2004] EWCA Crim 1103**: A, knowing he was HIV-positive, had unprotected sexual intercourse with two victims, infecting both with the disease. It was clear that neither of the victims would have consented to intercourse if they had known about A's infected status.

Crown Court: guilty of an offence against the person (not charged with rape).

Court of Appeal: appeal allowed against the non-fatal offence, and a retrial ordered. However, the position at trial that B was not deceived as to the 'nature' of the sexual act was confirmed; there was no rape.

CLRNN Recommendation: A would not be guilty of a section 1 rape offence, for the reasons given by both courts. However, A would have committed the new section 4A deception offence, having intentionally failed to disclose important information to B. Non-disclosure cases of this kind may sometimes give rise to a reasonable excuse exception (e.g. where A has a undetectable viral load or takes other precautions in belief that there is no threat of harm to B), but this would not be relevant on the facts of *Dica*.

***Jheeta* [2007] EWCA Crim 1699**: A sent B anonymous text messages over several years, purporting to be from the police, telling her to continue having a sexual relationship with him in order to avoid fines for causing distress. A was charged with rape.

Crown Court: guilty of rape—A's deception undermined B's apparent consent within the terms of section 76.

Court of Appeal: conviction upheld on appeal, but held that section 76 was not properly applicable. Instead, in the circumstances, V was not "free" to make her own decision and thus did not consent within the terms of section 74.

CLRNN Recommendation: A's potential liability for the section 1 rape offence is formally unaffected. However, it is clear that A would also commit the new section 4A deception offence, intentionally deceiving B by false representation, which would be the more appropriate charge on these facts.

***Assange* [2011] EWHC 2849**: Court was asked to assume that B agreed to sex with A on the basis that he would wear a condom throughout the encounter; and that A subsequently, and without B's knowledge, removed the condom before sex. The question – relevant to a European Arrest Warrant – was whether such conduct would amount to a criminal offence in England (i.e. would A's conduct satisfy the elements of a section 1 rape offence)?

Divisional Court: A's conduct would satisfy the elements of a section 1 rape offence if it had taken place in England. But, again, section 76 was inapplicable. (NB. Assange later appealed, unsuccessfully, to the Supreme Court, but the grounds of that appeal were not concerned with this part of the Divisional Court's decision).

CLRNN Recommendation: A's potential liability for the section 1 rape offence is formally unaffected. However, it is clear that A would also commit the new section 4A deception

offence, intentionally deceiving B by false representation, which would be the more appropriate charge on these facts.

***F v DPP* [2013] EWHC 945**: B agreed to sex with A on the condition that he would not ejaculate inside her vagina. A subsequently and intentionally ejaculated inside B's vagina. In the case, B was applying for judicial review of the CPS decision not to prosecute A for a sexual offence, focusing on the realistic prospect of conviction on the facts.

Divisional Court: entertained a judicial review and quashed the decision not to prosecute. In light of the decision in *Assange*, A's conduct fell within the definition of section 1 rape.

CLRNN Recommendation: A's potential liability for the section 1 rape offence is formally unaffected. However, it is clear that A would also commit the new section 4A deception offence, intentionally deceiving B by false representation, which would be the more appropriate charge on these facts.

***McNally* [2013] EWCA Crim 1051**: A was born a female, but identified and presented as a young man to B at the time of the offence. B, a young woman, engaged in sexual activity with A (including oral sex and digital penetration). B maintained that she would not have consented to the sexual activities with A had she known the "truth", as the court put it, that A was a woman.

Crown Court: guilty of section 2 offences of assault by penetration.

Court of Appeal: conviction upheld on appeal. A's "deception as to gender" vitiated B's consent.

CLRNN Recommendation: A's potential for section 2 liability is not formally impacted by our recommendations, though a Court might find such liability to be inconsistent with the later case of *Lawrance.* It is likely (and we believe appropriate) that future such cases would focus on the new section 4A deception offence. Even here, cases like *McNally* remain difficult, but the focus would now be on A's reasons for deceiving B. The case would likely turn on A's claim of reasonable excuse, focusing on A's identification as a man. This assessment will be highly fact specific, informed by the precise relationship and expectations between the parties.

***R (Monica) v DPP* [2018] EWHC 3508**: An undercover police officer (A) had, under his assumed identity, conducted a sexual relationship with someone from a campaign group (B). B later discovered A's true identity, and complained of rape on the basis that she would not have consented to sexual contact with A if she had known he was a police officer. In the case, B was applying for judicial review of the CPS decision not to prosecute A for a sexual offence.

Divisional Court: held that the CPS was justified in its decision not to prosecute A, as A's deception was insufficiently connected to the nature or purpose of the sexual activity.

CLRNN Recommendation: The current law struggles to identify salient points of distinction between this case and *McNally*, exposed by regular appeals to "common sense". As with

McNally, we contend that the new section 4A deception offence is a better fit for the facts of a case of this kind. Since it would be clear that A has deceived B in a relevant manner for the section 4A offence, the question is whether A's professional role and the circumstances surrounding that role provided him with a reasonable excuse.

***Lawrance* [2020] EWCA Crim 971**: D knowingly and falsely assured V that he had had a vasectomy, and therefore no condom was required to prevent the risk of pregnancy. On this basis, and following reassurance from D, V consented to sex. D was charged with rape.

Crown Court: guilty of rape. V's consent was not free and informed, and was therefore invalid.

Court of Appeal: appeal allowed. V was not deceived as to the 'sexual intercourse itself' but only as to the 'broad circumstances' surrounding it. The latter category of deception does not undermine consent.

CLRNN Recommendation: A's non-liability for a section 1 rape offence is not directly impacted by our recommendations. However, given the problems associated with the test developed in *Lawrance*, including in its application to the facts of that case, we would anticipate and encourage cases of this kind to be charged using the new section 4A deception offence. There is clear evidence of deception on the facts of the case, and without an obvious reasonable excuse, the elements of the new offence are likely to be satisfied.