



**Law  
Commission**  
Reforming the law

## Simplification of Criminal Law: Kidnapping and Related Offences



Law Commission

Simplification of Criminal Law: Kidnapping and Related Offences

Law Com No 355



Law Com No 355



# **The Law Commission**

(LAW COM No 355)

## **SIMPLIFICATION OF CRIMINAL LAW: KIDNAPPING AND RELATED OFFENCES**

Presented to Parliament pursuant to section 3(2) of the Law  
Commissions Act 1965

Ordered by the House of Commons to be printed on  
19 November 2014

HC 797



© Crown copyright 2014

You may re-use this information (excluding logos) free of charge in any format or medium, under the terms of the Open Government Licence v.2. To view this licence visit [www.nationalarchives.gov.uk/doc/open-government-licence/version/2/](http://www.nationalarchives.gov.uk/doc/open-government-licence/version/2/) or email [PSI@nationalarchives.gsi.gov.uk](mailto:PSI@nationalarchives.gsi.gov.uk) Where third party material has been identified, permission from the respective copyright holder must be sought.

This publication is available at [www.gov.uk/government/publications](http://www.gov.uk/government/publications)

Print ISBN 9781474112178

Web ISBN 9781474112185

Printed in the UK by the Williams Lea Group on behalf of the Controller of Her Majesty's Stationery Office

ID 13111401 11/14 44612 19585

Printed on paper containing 75% recycled fibre content minimum

# THE LAW COMMISSION

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

The Law Commissioners are:

The Right Honourable Lord Justice Lloyd Jones, *Chairman*  
Professor Elizabeth Cooke  
David Hertzell  
Professor David Ormerod QC  
Nicholas Paines QC

The Chief Executive of the Law Commission is Elaine Lorimer.

The Law Commission is located at 1st Floor, Tower, 52 Queen Anne's Gate, London SW1H 9AG.

The terms of this report were agreed on 10 November 2014.

**The text of this report is available on the Law Commission's website at <http://lawcommission.justice.gov.uk/areas/kidnapping.htm>.**

# THE LAW COMMISSION

## SIMPLIFICATION OF CRIMINAL LAW: KIDNAPPING AND RELATED OFFENCES

### CONTENTS

	<i>Paragraph</i>	<i>Page</i>
<b>CHAPTER 1: INTRODUCTION</b>		<b>1</b>
Background	1.1	1
Issues for consultation	1.4	1
The consultation	1.10	2
Choice of model	1.11	3
Issues in this report	1.14	3
Clarification of kidnapping and false imprisonment	1.14	3
Child abduction	1.19	4
The lack of capacity case	1.21	5
Recommendations	1.25	6
The structure of this report	1.26	6
Acknowledgments	1.27	7
 <b>CHAPTER 2: CURRENT LAW: KIDNAPPING</b>		 <b>8</b>
Deprivation of liberty	2.4	9
How is deprivation of liberty defined?	2.8	9
Type of constraint	2.16	11
Timing	2.23	13
Taking or carrying away	2.29	14
Force or fraud	2.33	15
Meaning of force or fraud	2.34	15
Relationship with lack of consent	2.37	16
Consent	2.43	17
Consent to what?	2.46	17
Meaning of consent	2.49	18
Effect of deception	2.51	19

	<i>Paragraph</i>	<i>Page</i>
Deception as to the nature of the act at common law	2.59	21
Deception as to identity at common law	2.68	23
Other deceptions	2.70	24
Summary of the position at common law on consent	2.71	24
Lawful Excuse	2.73	24
Statutory powers	2.74	25
Police powers	2.74	25
Prison officers	2.75	26
Repatriation	2.77	26
Mental health staff	2.78	26
Mental Capacity Act 2005	2.79	27
General defences	2.85	29
Parental authority	2.86	29
Mistake	2.87	29
Consent	2.89	29
Intention or recklessness	2.90	30
Summary of problems	2.98	32
 <b>CHAPTER 3: CURRENT LAW: OTHER OFFENCES</b>		 <b>34</b>
False imprisonment	3.1	34
The meaning of imprisonment	3.6	34
Consent	3.12	36
Intention or recklessness	3.15	37
Child abduction	3.17	38
The problem in <i>Kayani</i>	3.31	44
The problem in <i>Nicolaou</i>	3.40	46
Summary of problems	3.51	49

	<i>Paragraph</i>	<i>Page</i>
<b>CHAPTER 4: REFORMING KIDNAPPING AND FALSE IMPRISONMENT</b>		<b>50</b>
Recommendation 1: statutory offence of kidnapping	4.3	50
Outline of Recommendation 1	4.3	50
Benefits of our recommendation	4.7	51
Summary of the problems with the present law	4.8	51
Overlap between force or fraud and lack of consent	4.9	51
Further problems with the present law	4.13	52
Should kidnapping be replaced by a statutory offence?	4.14	53
Models on consultation	4.21	54
The mischiefs which underpin the current offences of false imprisonment and kidnapping	4.28	56
Relationship between kidnapping and false imprisonment	4.29	56
The mischief involved in the current law of false imprisonment	4.32	57
The mischief involved in the current law of kidnapping	4.38	58
The distinct mischief confronted by kidnapping	4.48	59
The centrality of force to kidnapping	4.68	63
Elements of the new offence of kidnapping	4.74	63
Moving and accompanying	4.77	64
The means by which D takes or moves V	4.98	69
Lawful authority or reasonable excuse	4.127	74
Elements of the current kidnapping offence which would be removed under our recommendations	4.157	80
Removing lack of consent as an express ingredient of the offence	4.159	80



	<i>Paragraph</i>	<i>Page</i>
Removing fraud as an express ingredient of the offence	4.190	86
Removing deprivation of liberty as an express ingredient of the offence	4.197	87
Mode of trial	4.207	89
Charging practice	4.219	92
Repealing or amending section 5	4.224	93
Amending the charging practice	4.227	93
Summary of Recommendation 1	4.231	94
Recommendation 2: statutory offence of unlawful detention	4.232	94
Outline of Recommendation 2	4.232	94
Should false imprisonment be replaced by a statutory offence?	4.233	94
Should false imprisonment be renamed unlawful detention?	4.239	96
Elements of the new offence of unlawful detention	4.244	97
Charging practice: kidnapping and unlawful detention	4.257	99
Summary of recommendation 2	4.261	100
<b>CHAPTER 5: REFORMING OTHER OFFENCES</b>		<b>101</b>
An offence of abducting persons lacking capacity?	5.3	101
Recommendation 3: increase the maximum sentence for child abduction	5.8	103
Recommendation 4: criminalise parental child retention	5.16	105
Merits of extending child abduction to include retention	5.19	105
Details of the new or extended offence	5.31	108
<b>CHAPTER 6: RECOMMENDATIONS</b>		<b>113</b>
Recommendation 1: statutory offence of kidnapping	6.1	113
Summary of recommended kidnapping offence	6.12	114
Recommendation 2: statutory offence of unlawful detention	6.13	114

	<i>Paragraph</i>	<i>Page</i>
Summary of recommended unlawful detention offence	6.17	115
Recommendation 3: increase sentence for child abduction	6.18	115
Recommendation 4: criminalise parental child retention	6.19	115

# THE LAW COMMISSION

## SIMPLIFICATION OF CRIMINAL LAW: KIDNAPPING AND RELATED OFFENCES

*To the Right Honourable Chris Grayling MP, Lord Chancellor and Secretary of State for Justice*

### CHAPTER 1 INTRODUCTION

#### BACKGROUND

- 1.1 This project forms part of a larger project on the simplification of criminal law.<sup>1</sup> Apart from kidnapping, the larger project has so far included a consideration of the law relating to public nuisance and outraging public decency.<sup>2</sup>
- 1.2 On 27 September 2011 we published *Simplification of Criminal Law: Kidnapping*, Consultation Paper No 200 (“the CP”), which provisionally proposed the replacement of the common law offences of kidnapping and false imprisonment in statute.
- 1.3 In July 2013 the terms of reference for the kidnapping project were extended to include the problems identified in *Nicolaou*<sup>3</sup> and *Kayani*<sup>4</sup> regarding offences under sections 1 and 2 of the Child Abduction Act 1984.

#### ISSUES FOR CONSULTATION

- 1.4 In the present law, kidnapping is defined as:

First, the nature of the offence is an attack on, and infringement of, the personal liberty of an individual.

Secondly, the offence contains four ingredients as follows: (1) the taking or carrying away of one person by another; (2) by force or by fraud; (3) without the consent of the person so taken or carried away; and (4) without lawful excuse.<sup>5</sup>

<sup>1</sup> For the nature and purpose of the simplification project in general, see Consultation Paper paras 1.3 to 1.5.

<sup>2</sup> *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency* (2010) Law Commission Consultation Paper No 193.

<sup>3</sup> [2012] EWHC 1647 (Admin), [2012] 2 Cr App R 23.

<sup>4</sup> [2011] EWCA Crim 2871, [2012] 1 WLR 1927.

<sup>5</sup> *D* [1984] AC 778 at 800.

- 1.5 It is to some extent based on the older offence of false imprisonment, which consists in the unlawful and intentional or reckless restraint of a victim's freedom of movement from a particular place.<sup>6</sup>
- 1.6 In the CP we considered ways of replacing the offences of kidnapping and false imprisonment, either with one offence of deprivation of liberty or with two separate offences.
- 1.7 The CP offered three possible models.<sup>7</sup>
- (1) Model 1: a single offence of deprivation of liberty. This would cover the scope of both false imprisonment and kidnapping.
  - (2) Model 2: two offences, one of unlawful detention and one of unlawful abduction or kidnapping.
  - (3) Model 3:
    - (a) a basic offence of deprivation of liberty, and
    - (b) an aggravated offence of deprivation of liberty coupled with the intention to mistreat the victim in further ways.
- 1.8 In Model 2, we provisionally proposed that, in the new kidnapping offence, there should be no need for the taking to be both by force or fraud *and* without consent.<sup>8</sup>
- 1.9 We also provisionally proposed that any new offences should be triable either way (at present kidnapping and false imprisonment are triable on indictment only).<sup>9</sup>

## THE CONSULTATION

- 1.10 There were fourteen responses to the CP.<sup>10</sup> In the responses there was broad support for our proposals to replace the offences of kidnapping and false imprisonment. In addition, in the autumn of 2013 we engaged in further informal consultation with legal practitioners and representatives of the Crown Prosecution Service, the Missing Persons Bureau and Parents and Abducted Children Together (PACT), as well as representatives of the Ministry of Justice, the Home

<sup>6</sup> *Rahman* (1985) 81 Cr App R 349 at 353; *Collins v Wilcock* [1984] 1 WLR 1172 at 1177. See also *Bird v Jones* (1845) 7 QB 742, 115 ER 668; P Carter and R Harrison, *Carter and Harrison on Offences of Violence* (2nd ed 1997) para 9-002; *Clerk and Lindsell on Torts* (20th ed 2010) ("Clerk and Lindsell on Torts") para 15-23; D Ormerod, *Smith and Hogan's Criminal Law* (13th ed 2011) ("Smith and Hogan"), para 17.11.1.1; CP para 2.152 and following.

<sup>7</sup> CP paras 4.65 to 4.110.

<sup>8</sup> CP para 4.26.

<sup>9</sup> CP para 4.63.

<sup>10</sup> See the analysis of responses published online at [http://lawcommission.justice.gov.uk/docs/cp200\\_kidnapping\\_consultation\\_analysis.pdf](http://lawcommission.justice.gov.uk/docs/cp200_kidnapping_consultation_analysis.pdf).

Office, the Department of Health and the police. We also canvassed the views of a wide range of academics on our final proposals in early 2014.<sup>11</sup>

### **Choice of model**

- 1.11 In response to our choice of models, one favoured Model 1 (single offence), seven favoured Model 2 (separate detention and abduction offences), five favoured Model 3 (basic and aggravated offence) and one expressed no preference. Among other consultees, the weight of judicial opinion and the CPS both came down strongly in favour of Model 2. After further consideration **Model 2 is now our preferred model.**

- 1.12 A key reason advanced in favour of Model 2 was that it retains the powerful label “kidnapping”. The Council of HM Circuit Judges observed:

Kidnapping is a word with a resonance that the ordinary person whether a victim, witness, juror or defendant readily understands. It also makes clear to them that it is rightly regarded as serious crime.

We think that the distinction between kidnapping and false imprisonment should be maintained. We agree that it maintains the distinction in the public mind. This is important in a democratic society where the criminal law must command general respect in order to remain enforceable.

- 1.13 The CPS argued that a single offence encompassing both detention and abduction, as envisaged in Model 1, would be over simplistic. Also, it would leave too many facts to be determined at the sentencing stage after the trial. The CPS went on to observe:

Model 2 would allow for the distinction between the behaviours alleged as it is under the common law. It would also allow for the circumstances where there is detention but no abduction to be accurately and more particularly reflected in the charge.

By separating the two offences, the difficulties experienced with the law of kidnap can be specifically addressed without adversely affecting the offence of false imprisonment.

## **ISSUES IN THIS REPORT**

### **Clarification of kidnapping and false imprisonment**

- 1.14 The broader, and in practical terms most significant, problem with the kidnapping offence at common law is the extent to which its constituent elements, as outlined in *D*,<sup>12</sup> overlap and the uncertainty this creates as to the boundaries of the offence. In this report we recommend a narrower and more certain model for a statutory offence of kidnapping which is based upon the use or threat of force in order to compel movement. Following Model 2, which was favoured on

<sup>11</sup> We would particularly like to thank the Faculty of Law at Cambridge for hosting a roundtable discussion.

<sup>12</sup> [1984] AC 778 at 800.

consultation, this would be a distinct and generally more serious offence than the closely related false imprisonment. We recommend that false imprisonment should be replaced by a statutory offence of unlawful detention, with the same ingredients as the current offence.

- 1.15 The separate treatment of kidnapping and false imprisonment was strongly favoured by consultees, and we agree with this view. The kidnapping offence reflects some wrongs and harms that are distinct from those found in false imprisonment: in particular, the acute attack on the victim's autonomy which is represented by forcing them to move along in the defendant's company, much like a piece of property. There is also additional fear and anxiety which typically accompanies being moved with the defendant by compulsion, over and above that which would typically accompany being imprisoned at a fixed location.
- 1.16 In Chapter 4 we address the nature of these harms and wrongs and this informs our definition of the new offence of kidnapping and the statutory offence to replace false imprisonment: unlawful detention.
- 1.17 The proposed definition of kidnapping is much simpler than that at common law and is restricted to cases in which the person is caused to be moved in the company of the accused by force or threats of force. This definition reflects the harms and wrongs discussed above. It also reflects the practical reality that kidnappings do involve use of violence or threats. Cases in which an individual is tricked into accompanying the accused do not engage the same harms and wrongs: the subject of the movement is labouring under the misapprehension that the movement has a different (legitimate) nature or purpose. In such cases, which in practice are extremely rare,<sup>13</sup> adequate protection will be provided by the new offence of unlawful detention (carrying a maximum sentence of life imprisonment) and, of course, by separate offences related to the ulterior activity which the abductor intends to perform having tricked his victim into accompanying him (sexual offences, violence offences, fraud offences, blackmail and so on).
- 1.18 It is worth emphasising at the outset that it is not our intention, and we are confident that it will not be the effect of our proposals, to take conduct which is currently kidnapping outside the scope of the criminal law altogether. To the extent that our proposals involve a narrowing of the kidnapping offence, we consider that those classes of case which would be excluded (such as the rare case of a taking or moving by fraud) would continue to be covered by more appropriate criminal offences, such as unlawful detention, fraud offences, blackmail and so on. We will make reference to the relationship between our proposed kidnapping offence and other related existing offences throughout the report where relevant.

### **Child abduction**

- 1.19 Since publication of the CP a problem has arisen in relation to child abduction. In *Nicolaou*<sup>14</sup> it was held that the offence of child abduction under section 1 of the

<sup>13</sup> *Wellard* [1978] 1 WLR 921 is the only reported case in which kidnapping was carried out by fraud.

<sup>14</sup> [2012] EWHC 1647 (Admin), [2012] 2 Cr App R 23; discussed at paras 3.40 to 3.50 below.

Child Abduction Act 1984 does not extend to a case where the child was lawfully removed from the UK but retained for longer than the permitted period.

- 1.20 Further, in *Kayani*<sup>15</sup> Lord Judge CJ (as he then was) stated that the sentencing options in relation to child abduction are inadequate. We recommend that these maximum sentences are increased to meet this concern.

### **The lack of capacity case**

- 1.21 In the CP we identified the “lack of capacity case” as a particular problem with the current law of kidnapping.<sup>16</sup> This could arise if a child or other person lacking capacity<sup>17</sup> was abducted through exploitation of their lack of capacity, without need for recourse to force or fraud. Although in the CP we considered possible ways of resolving this issue, we have decided that this problem, to the extent that it truly exists in practice, is not best resolved through reform of the general offences of kidnapping and false imprisonment.
- 1.22 This is, in short, because we now believe kidnapping is better viewed at its core as an offence against the person, involving a forcible taking or movement of a person. On its face such conduct is clearly problematic, whether the subject is a person lacking capacity or not.
- 1.23 To the extent that there is a distinct problem involving persons lacking capacity, we believe this problem arises more from a general need to protect this class of people from being placed in situations of heightened danger. We now consider that the better approach is to tackle any need for greater protection for those lacking capacity with distinct offences designed specifically to accommodate the unique difficulties these cases throw up (as has already been achieved, at least in part, by the specific child abduction offences contained in sections 1 and 2 of the Child Abduction Act 1984).
- 1.24 In this connection we considered recommending the creation of a distinct offence to protect adults lacking capacity as part of this report. However, we have ultimately declined to do so because:
- (1) we consider such a recommendation should follow a consultation on how the law should protect those who may lack capacity; and
  - (2) as part of the Law Commission’s 12th programme of law reform, beginning this year, we will be undertaking a project specifically on the issue of deprivation of liberty of those lacking capacity (and the protections under the Mental Capacity Act 2005).<sup>18</sup>

<sup>15</sup> [2011] EWCA Crim 2871, [2012] 1 WLR 1927 at [16].

<sup>16</sup> CP paras 3.17 to 3.24.

<sup>17</sup> We are conscious that the notion of mental capacity is best considered in the context of specific decisions rather than in the abstract. For the purpose of this report, wherever the term ‘lack of capacity’ is used, we refer to a lack of capacity of a person ‘V’ to decide whether to move in company with another person ‘D’. Similarly wherever we refer to ‘consent’ we mean legally effective consent.

<sup>18</sup> We urge interested parties to keep abreast of developments in that respect, see <http://lawcommission.justice.gov.uk/areas/capacity-and-detention.htm>.

## RECOMMENDATIONS

1.25 In this report we offer the following recommendations for reform:

- (1) **Recommendation 1:** create a statutory offence of kidnapping which is clearer and simpler than the current law.<sup>19</sup> This would resolve the uncertainties with the current offence identified in Chapter 2.
- (2) **Recommendation 2:** replace the offence of false imprisonment with a statutory offence of unlawful detention.<sup>20</sup> This would follow the current common law definition of false imprisonment, but would also provide the opportunity to clarify the relationship between this offence and the reformed offence of kidnapping.
- (3) **Recommendation 3:** increase the maximum sentence for the offences under sections 1 and 2 of the Child Abduction Act 1984 to 14 years' imprisonment.<sup>21</sup> This would meet the concerns expressed by the then Lord Chief Justice in *Kayani*.<sup>22</sup>
- (4) **Recommendation 4:** criminalise child retention by parents or connected persons by amending section 1 of the Child Abduction Act 1984.<sup>23</sup> This would provide a statutory solution to the *Nicolaou*<sup>24</sup> problem. This recommendation is new and the issue was not discussed in the CP. Recommendation 4 could be enacted together with the other recommendations, or separately.

We further recommend that the offences of kidnapping and false imprisonment should continue to be triable on indictment only.<sup>25</sup>

## STRUCTURE OF THIS REPORT

1.26 Chapter 2 describes the offence of kidnapping in existing law and the problems to which it gives rise. Chapter 3 describes the offences of false imprisonment and child abduction, and considers the problems that were raised in *Kayani* and *Nicolaou*. Chapter 4 discusses Recommendations 1 and 2 for the reform of kidnapping and false imprisonment. Chapter 5 discusses Recommendations 3 and 4 concerning child abduction. Chapter 6 summarises the recommendations.

<sup>19</sup> Para 4.20 below.

<sup>20</sup> See paras 4.232 to 4.262 below.

<sup>21</sup> See paras 5.8 to 5.15 below.

<sup>22</sup> [2011] EWCA Crim 2871, [2012] 1 WLR 1927 at [16].

<sup>23</sup> See paras 5.16 to 5.50 below.

<sup>24</sup> [2012] EWHC 1647 (Admin), [2012] 1 Cr App R 23.

<sup>25</sup> See paras 4.207 to 4.218 below. In the CP we proposed that they should be triable either way at CP para 4.63.



## **ACKNOWLEDGMENTS**

- 1.27 We thank all those who responded to our consultation for their contributions, which have informed the final recommendations set out in this report.
- 1.28 We must also record our appreciation to the many who gave up their time to meet with us to discuss specific aspects of the project both in their personal capacity and as representatives of their organisations. They include:
- (1) Academics: Professor Andrew Ashworth QC, Professor Antony Duff, Professor Jonathan Herring and Dr Rebecca Williams.
  - (2) Organisations: Reunite (Alison Shalaby, Henry Setright QC and Jay Watkins) and Parents and Abducted Children Together (“PACT”) (Geoff Newiss).
  - (3) Legal practitioners: Anthony Edwards, Dr Tim Moloney QC, Samantha Riggs and members of 6KBW College Hill.
  - (4) Officials: Ministry of Justice, Department of Health, Crown Prosecution Service, the National Crime Agency and the UK Missing Persons Bureau.
- 1.29 We would also like to thank the Faculty of Law at Cambridge for hosting a round table discussion in the later phases of this project.

## CHAPTER 2

### CURRENT LAW: KIDNAPPING

2.1 Our consultation paper<sup>1</sup> provided a detailed analysis of the law of kidnapping and a much briefer description of the law of false imprisonment. This chapter contains an account of the law of kidnapping. The law of false imprisonment is described in Chapter 3.

2.2 The leading case on kidnapping is *D*<sup>2</sup> where Lord Brandon defined the offence:

First, the nature of the offence is an attack on and infringement of the personal liberty of an individual.

Secondly, the offence contains four ingredients as follows: (1) the taking or carrying away of one person by another; (2) by force or fraud; (3) without the consent of the person so taken and carried away; and (4) without lawful excuse.

2.3 There are several obscurities about the interrelationship of these ingredients under the current law. These are discussed in detail in the CP and more briefly in what follows. They are:

- (1) the role of deprivation of liberty in the offence, and in particular at what time it needs to occur;<sup>3</sup>
- (2) the meaning of “taking or carrying away” (older formulations say “and”);<sup>4</sup>
- (3) the relationship between the requirements of force or fraud and lack of consent;<sup>5</sup> and
- (4) the role of consent in the offence and in particular to what the lack of consent must relate: is it consent to being taken away, consent to deprivation of liberty, or both?<sup>6</sup>

We also discuss:

- (5) the meaning of lawful excuse;<sup>7</sup> and
- (6) the mental element of the offence (intention or recklessness).<sup>8</sup>

<sup>1</sup> Simplification of Criminal Law: Kidnapping (2011) Law Commission Consultation Paper No 200 (“the CP”).

<sup>2</sup> [1984] AC 778 at 800.

<sup>3</sup> Paras 2.4 to 2.28 below.

<sup>4</sup> Paras 2.29 to 2.32 below.

<sup>5</sup> Paras 2.37 to 2.42 below.

<sup>6</sup> Paras 2.43 to 2.72 below.

<sup>7</sup> Paras 2.73 to 2.89 below.

<sup>8</sup> Paras 2.90 to 2.97 below.

## DEPRIVATION OF LIBERTY

- 2.4 In *D*<sup>9</sup> Lord Brandon stated that “the nature of the offence is an attack on and infringement of liberty”. He then went on to list the essential ingredients of the offence. Accordingly, the first question which needs to be answered is whether the concept of an “an attack on and infringement of liberty” –
- (1) constituted a statement of the rationale of the offence, namely that it is an infringement of autonomy; or
  - (2) was meant as a separate essential ingredient of the offence of kidnapping?<sup>10</sup>
- 2.5 There are several reasons for concluding that the former was intended. First, the use of the wording “the *nature* of the offence”. Secondly, the statement was expressed quite separately from the four “*ingredients*” of the offence.
- 2.6 However, subsequently the Court of Appeal in *Hendy-Freegard*<sup>11</sup> held that “deprivation of liberty” is an essential ingredient of the offence of kidnapping over and above the four numbered ingredients listed in *D*, and that Lord Brandon had not intended to change that position. In adopting this approach the courts were following pre-*D* cases such as *Wellard*<sup>12</sup> and cases since *D* including *Nnamdi*.<sup>13</sup>
- 2.7 As an element of the offence, three further questions arise with regard to “deprivation of liberty”:
- (1) How should it be defined?
  - (2) What type or degree of constraint is required?
  - (3) When must the deprivation of liberty occur?

### How is deprivation of liberty defined?

- 2.8 In *D*,<sup>14</sup> Lord Brandon used the phrase “an attack on and *infringement* of liberty”. However, the term “*deprivation* of liberty” has been used in cases<sup>15</sup> before and after *D*, and thus appears to be the preferred term.
- 2.9 The concept of deprivation of liberty has a separate autonomous meaning in the context of article 5 of the European Convention of Human Rights. To date this body of law has developed separately from the consideration of the concept in

<sup>9</sup> [1984] AC 778 at 800.

<sup>10</sup> CP paras 2.113 to 2.117.

<sup>11</sup> [2007] EWCA Crim 1236, [2008] QB 57 at [42]. The facts are given at para 2.17(1) below.

<sup>12</sup> [1978] 1 WLR 921 at 922.

<sup>13</sup> [2005] EWCA Crim 74 at [14].

<sup>14</sup> [1984] AC 778 at 800.

<sup>15</sup> See para 2.6 above.

the criminal context. The European Court of Human Rights in *HL v UK*<sup>16</sup> stated, when reviewing the relevant House of Lords decision,

The House of Lords considered the question from the point of view of the tort of false imprisonment rather than the Convention concept of “deprivation of liberty” in Art.5(1), the criteria for assessing those domestic and Convention issues being different.

We anticipate that this will continue to be the case.

2.10 There is some confusion in the criminal law context in that the offences of false imprisonment and kidnapping have not always been consistent in their treatment of this issue:

(1) They are consistent in that:

- (a) kidnapping is recognised, by various authorities, to be an aggravated form of false imprisonment; and
- (b) both offences currently purport to have an essential ingredient of confinement of the victim.

(2) However, they are divergent in that:

- (a) the term “deprivation of liberty” is used in the offence of kidnapping; and
- (b) the term “restriction of freedom of movement” is used in the offence of false imprisonment.

2.11 Civil cases on the tort of false imprisonment provide a useful clarification, which informs the criminal law, by holding that “nothing short of actual detention and complete loss of freedom would support an action for false imprisonment”.<sup>17</sup>

2.12 Deprivation of liberty in kidnapping has also not been addressed consistently. However, it seems clear from *Hendy-Freegard* that a certain threshold of captivity is required, namely more than sending someone on a journey they would not have otherwise taken.

2.13 Accordingly, this point has not been addressed with any clarity in relation to either of the offences. However what does appear to be clear is that the two concepts are not intended to be different in practice, regardless of terminology. This is consistent with the understanding of kidnapping as an aggravated form of false imprisonment.

<sup>16</sup> (2005) 40 EHRR 32 at [90]. See also *Re A* [2010] EWHC 978 (Fam) at [130].

<sup>17</sup> See *R v Bournemouth Community and Mental Health NHS Trust, Ex parte L* [1999] 1 AC 458 at 486, citing *Syed Mahamad Yusuf-ud-Din v Secretary of State for India in Council* (1903) 19 TLR 496 at 497 and *Meering v Grahame-White Aviation C Ltd* (1919) 122 LT 44 at 54.

2.14 We are left with the question: what does “deprivation of liberty” mean in the context of the criminal offence of kidnapping?<sup>18</sup>

2.15 In terms of a positive definition ambiguity remains.

- (1) On one interpretation, deprivation of liberty simply means that there is some obstacle (physical or psychological) to the victim’s (“V”) escape.<sup>19</sup> In that sense, a passenger in a fast moving train has lost his or her liberty.
- (2) On another interpretation, deprivation of liberty refers to an infringement of the right to go where one chooses. In that sense, passengers do not lose their liberty as they choose to board the train.

Lord Brandon’s formulation of the offence clearly adopts the second meaning: V is taken or carried away without consent, and this amounts to deprivation of liberty.

### **Type of constraint**

2.16 In the related offence of false imprisonment the requirement of “restriction on freedom of movement” has been interpreted to mean that V must be confined within a specified area.<sup>20</sup> This certainly occurs when V is transported in a locked vehicle, and this involves imprisonment in the traditional sense. However, kidnapping under current law appears to extend to at least some cases where V feels unable to escape during the move, although no physical means of confinement have been used and there is no clear demarcation of the area where V must be.<sup>21</sup>

2.17 In the reported case law there is no comprehensive positive definition of deprivation of liberty.<sup>22</sup> Some negative guidance is given by cases in which this requirement of the offence was not satisfied.

- (1) In *Hendy-Freegard*<sup>23</sup> the defendant (“D”) posed as a secret service agent, and over a number of years operated a scheme in which various victims were duped into believing that they were recruited into the secret service and had to live in “safe houses” in remote parts of the country. It was held that this was not kidnapping, for two reasons. D did not compel the victims to travel in his company and there was no element of captivity, either during the journeys to the “safe houses” or at the destination. Accordingly there was no “attack on and infringement of the personal liberty of an

<sup>18</sup> See CP paras 2.134 to 2.137.

<sup>19</sup> That is, either escape is impossible or the means of escape is one which V cannot reasonably be expected to take: compare the position in false imprisonment, see paras 3.6 to 3.11 below.

<sup>20</sup> Paras 3.6 to 3.11 below.

<sup>21</sup> As in *Wellard* [1978] 1 WLR 921, see para 2.35(3) below.

<sup>22</sup> See paras 2.8 to 2.15 above.

<sup>23</sup> [2007] EWCA Crim 1236, [2008] QB 57.

individual” as required in *D*.<sup>24</sup> D’s act was simply one of procuring a journey by deception, and that is not sufficient to constitute kidnapping.

- (2) In an earlier case, *Cort*,<sup>25</sup> D made a practice of approaching women at bus stops, telling them that the bus service had been cancelled and offering them a lift in his car. He was convicted of kidnapping and the conviction was upheld. However, this case was disapproved in *Hendy-Freegard* on the same grounds as described above. There was a transporting of V by deception, but there was no deprivation of liberty: when a woman asked D to stop the car and let her out, he complied.

2.18 It follows from *Hendy-Freegard*<sup>26</sup> that not every case where D’s deception causes V to move or be moved amounts to a deprivation of liberty. For example, there is no deprivation of liberty in the following situations:

- (1) D tells V (falsely) that if V goes to a particular house at a particular time V will receive a prize.
- (2) D is a minicab driver and drives V to V’s chosen destination; V would not have agreed if V had known that D was unlicensed.
- (3) V agrees to marry D and goes to the church for the ceremony; V would not have agreed had she known that the marriage would be bigamous.<sup>27</sup>

In this report, such cases are described as “moving by deception” or “sending by deception”.

2.19 The element of the offence requiring a deprivation of liberty poses a further question: what degree of restraint is required? Does deprivation of liberty require proof that it is a physical impossibility for V to escape? Or is it sufficient that it is impossible by any means that V can reasonably be expected to take? Or is it sufficient that V was simply impeded, for the act of taking or carrying to amount to an infringement of the right to freedom of movement?

2.20 As we explain in Chapter 3, in false imprisonment V must be confined to a given place or area. That is, escape from that place or area must be impossible by any means that V can reasonably be expected to take.<sup>28</sup> False imprisonment is also committed when there is a fraudulent or invalid arrest. At the moment of the arrest V believes that V cannot legally leave the company of the person performing the arrest and that forcible restraint will follow any attempt to do so.

2.21 The position is less clear in kidnapping. In Lord Brandon’s definition the offence must amount to “an attack on and infringement of ... personal liberty”.<sup>29</sup> Taken by

<sup>24</sup> [1984] AC 778 at 800.

<sup>25</sup> [2003] EWCA Crim 2149, [2004] QB 388.

<sup>26</sup> [2007] EWCA Crim 1236, [2008] QB 57. See para 2.51(1).

<sup>27</sup> The second and third examples are given in *Hendy-Freegard* [2007] EWCA Crim 1236, [2008] QB 57 at [55] and [57].

<sup>28</sup> Paras 3.6 to 3.11 below.

<sup>29</sup> *D* [1984] AC 778 at 800.

itself this would suggest that any degree of unjustified restraint, however partial, is sufficient.

- 2.22 In practice the level is set higher than this by the other ingredients of the offence. The deprivation of liberty must result from a taking or carrying “by force or fraud” and “without the consent of the person so taken or carried away”. This implies some degree of compulsion.<sup>30</sup> In practice, there are either two or three possible cases.

- (1) In some cases, V is captured and made to embark on the journey with D.
- (2) In others, V may have embarked on the journey without compulsion but at some point became unable to deviate from it or put an end to it.
- (3) Depending on the answer to the timing question discussed below<sup>31</sup> the offence may or may not also include cases where the journey itself was not compelled but V was confined at the conclusion of the journey.

The overall position seems close to the level set in false imprisonment, though it may not be identical. In short, the position under the current law is less than clear.

### Timing

- 2.23 The question is whether the deprivation of liberty must occur while V is on the move (the narrower test) or can occur subsequently (the broader test).
- 2.24 In the CP we argued for the broader test.<sup>32</sup> On this view, the offence should be interpreted in such a way that deprivation of liberty is a consequence element<sup>33</sup> of the offence which can occur at any time during or after the conduct constituting the commission of the offence. We based this conclusion both on analysis of the authorities and on principle. In the next few paragraphs we give our analysis of the authorities. The question of which test is more desirable as a matter of principle is considered in Chapter 4.
- 2.25 In the most typical kidnapping cases found in the law reports, V is either forcibly seized and taken from one point to another or led to believe that he or she is under arrest. The common feature is that V is unable, or believes that he or she is unable, to escape from D’s company during the journey. It is this loss of control over V’s whereabouts that was held to constitute loss of liberty in *D*<sup>34</sup> and to be absent in *Hendy-Freegard*.<sup>35</sup>

<sup>30</sup> The one arguable exception to this appears to be the false arrest case, of which one reported example has been held to be kidnapping: *Wellard* [1978] 1 WLR 921. We discuss the nature of that deception, and the extent to which it constitutes compulsion, below at para 2.66 and following.

<sup>31</sup> See paras 2.23 to 2.28 below.

<sup>32</sup> CP paras 2.121 to 2.132.

<sup>33</sup> Any element of the offence which is a result which is required to be proved as a condition of liability.

<sup>34</sup> [1984] AC 778.

<sup>35</sup> [2007] EWCA Crim 1236, [2008] QB 57.

- 2.26 However, there is some suggestion in *Hendy-Freegard* that kidnapping also covers a case where the deprivation of liberty occurred at the end of the journey rather than during it. The main reason for the decision in that case was there was *no point* at which the victims suffered a deprivation of liberty, whether during the journeys or after them. If deprivation of liberty at the end of the journey were irrelevant, it would have been sufficient to argue that there was no deprivation of liberty during the journey.
- 2.27 The court in *Hendy-Freegard*<sup>36</sup> found this ambiguity exemplified in the earlier case of *Wellard*.<sup>37</sup> In that case D posed as a police officer searching for drugs and instructed V to accompany him to his car, some 100 yards away. V sat in the car until some friends arrived and she went away with them. It was held that there was sufficient loss of liberty to constitute the offence, but it was not explained whether this occurred during the walk or while she was in the stationary car. The court in *Hendy-Freegard* cited a report of the Criminal Law Revision Committee<sup>38</sup> which supported the second explanation.<sup>39</sup> On this view kidnapping will cover a case where V is lured by deception into a place of captivity.
- 2.28 Apart from the discussion in *Hendy-Freegard* mentioned in the last two paragraphs, there is no clear authority one way or the other on the choice between the broader and narrower tests. There is also no indication in the cases that this ambiguity has caused problems in practice. On balance we consider that, as a matter of authority, the broader test more probably represents the current law. However, there is nonetheless a potential ambiguity in the offence which should be resolved if it is decided to restate the offence in statute.

### **TAKING OR CARRYING AWAY**

- 2.29 In *D*,<sup>40</sup> Lord Brandon's definition speaks of "taking or carrying away". The expression is almost certainly a mistake for "taking and carrying away". All previous cases, including *D* in the Court of Appeal and prosecuting counsel's argument in the House of Lords, referred to "taking *and* carrying away". This may turn on a further ambiguity between "take" in the sense of capture and "take" in the sense of taking a person from one place to another.
- 2.30 Whichever wording is preferred, every reported case of kidnapping has in fact involved the moving of a person from one place to another.<sup>41</sup> Given that fact, there does not appear to be any great practical significance in the difference between "taking" and "carrying", or between Lord Brandon's formulation "taking or carrying away" and the traditional formulation "taking and carrying away". The flavour of "taking" in the sense of capture is preserved by Lord Brandon's requirement of "infringement of liberty".

<sup>36</sup> [2007] EWCA Crim 1236 at [47] to [48].

<sup>37</sup> [1978] 1 WLR 921 at 924.

<sup>38</sup> Fourteenth Report: Offences against the Person (1980) Cmnd 7844.

<sup>39</sup> See D Ormerod, "Kidnapping: elements – deprivation of liberty as a separate element to taking and carrying away" [2007] *Criminal Law Review* 986.

<sup>40</sup> [1984] AC 778 at 800.

<sup>41</sup> See CP paras 2.20 to 2.25.



- 2.31 A further implication of the words “take” and “carry” is that D must accompany V during the move; or rather, must cause V to accompany D. Simply sending V from one place to another is not sufficient.<sup>42</sup> Nor is simply expelling V from a place without taking control of where V goes from there.
- 2.32 It does not follow that there must be a pre-set destination. Kidnapping is equally committed if D forces V into a van and drives aimlessly about until ransom is paid.

### **FORCE OR FRAUD**

- 2.33 The definition in *D* speaks of the taking away of one person by another “by force or fraud”.<sup>43</sup>

#### **Meaning of force or fraud**

- 2.34 From the cases, it appears that the offence extends, at least, to situations where V’s movements are brought about by:

- (1) the physical overpowering of V;
- (2) coercion by the threat of force; or
- (3) deception leading V to believe that he or she is lawfully taken or detained or (possibly) that he or she cannot physically escape.

- 2.35 Examples are as follows.

- (1) In *D*,<sup>44</sup> D pulled his infant daughter out of her mother’s arms and took her away with him.
- (2) In *Greenhalgh*,<sup>45</sup> D broke into V’s house and threatened to burn the house down. V then drove D to another place in his car, with D threatening V with a cross-bow and telling him where to drive. D was convicted of both false imprisonment and kidnapping.
- (3) In *Wellard*,<sup>46</sup> D posed as a police officer searching for drugs and instructed V to accompany him to his car, some 100 yards away. V sat in the car until some friends arrived and she went away with them. It was held that there was sufficient deprivation of liberty to constitute the offence. It was not explained whether this occurred during the walk or while she was in the stationary car (similarly, a false arrest can constitute false imprisonment<sup>47</sup>).

- 2.36 The first category, of physical compulsion, does not necessarily require an assault or other physical contact. Locking V inside a moving vehicle can amount

<sup>42</sup> *Hendy-Freegard* [2007] EWCA Crim 1236, [2008] QB 57 at [58].

<sup>43</sup> [1984] AC 778 at 800.

<sup>44</sup> [1984] AC 778.

<sup>45</sup> [2001] EWCA Crim 1367.

<sup>46</sup> [1978] 1 WLR 921.

<sup>47</sup> See para 3.14(1) below.

to the forcible restraint and moving of V, though D does not touch V in the process.<sup>48</sup> Provided the remaining ingredients of the offence are satisfied, this is sufficient to constitute kidnapping.

### **Relationship with lack of consent**

- 2.37 The definition of kidnapping in *D* requires the taking to be both “by force or fraud” and “without consent”. A consequence of this is that the offence will not always cover a case where the person taken (V) lacks capacity to consent. In such cases D may take or carry V away without using force or fraud because, given V’s vulnerability, there is no need to. We discussed this problem in the CP.<sup>49</sup>
- 2.38 In the case of a child lacking capacity, this lacuna is addressed by the offences in the Child Abduction Act 1984 (considered in more detail in Chapter 3).
- 2.39 The difficulty about force or fraud also exists in connection with the abduction of an adult who lacks capacity. Examples of this are where V is an adult with a learning disability or who suffers from dementia. It is estimated that, in 2012, there were over 900,000 adults with learning disabilities in England.<sup>50</sup> In 2012 Dementia UK estimated that there were around 800,000 people in the UK with dementia and that this is likely to increase to one million by 2021.<sup>51</sup>
- 2.40 Here too, as in the case of the child, there is no valid consent, but it may be impossible to secure a conviction for kidnapping because there is no evidence of force or fraud.
- 2.41 This problem was pointed out in *HM (Vulnerable Adult: Abduction)*.<sup>52</sup> *HM* concerned the abduction of a vulnerable adult by her father, who took her out of the jurisdiction and then concealed her whereabouts from others. In a non-binding statement, Lord Justice Munby (now President of the Family Division) highlighted the deficiency of the criminal law in protecting someone in the victim’s position (an adult lacking capacity) since there would often be no force or fraud involved in the taking of such a person. Lord Justice Munby therefore said that “it might be thought that there is a gap here in the criminal law which ought to be investigated with a view to seeing whether it might not appropriately be stopped up”.<sup>53</sup>
- 2.42 In some such cases kidnapping is not committed, even disregarding the force or fraud problem, because V suffers no deprivation of liberty. If there is a deprivation of liberty, false imprisonment can be charged in some cases.<sup>54</sup> In practice,

<sup>48</sup> See CP paras 2.54 and 2.55.

<sup>49</sup> CP paras 3.17 to 3.24.

<sup>50</sup> “People with Learning Disabilities in England 2012” Improving Health and Lives: Learning Disabilities Observatory p 2, [http://www.improvinghealthandlives.org.uk/publications/1185/People\\_with\\_Learning\\_Disabilities\\_in\\_England\\_2012](http://www.improvinghealthandlives.org.uk/publications/1185/People_with_Learning_Disabilities_in_England_2012) (last visited 24 October 2014).

<sup>51</sup> [http://www.alzheimers.org.uk/site/scripts/documents\\_info.php?documentID=412](http://www.alzheimers.org.uk/site/scripts/documents_info.php?documentID=412) (last visited 24 October 2014).

<sup>52</sup> [2010] EWHC 870 (Fam), [2010] 2 FLR 1057.

<sup>53</sup> [2010] EWHC 870 (Fam), [2010] 2 FLR 1057 at [65].

<sup>54</sup> See paras 4.166 to 4.173 below.

therefore, the potential gap in the law will really only arise in the intermediate case where V is not confined within a precise boundary, but feels psychologically unable to leave D's company during the journey. This might occur, for example, because V feels fear of or dependency on D, or feels unable to find the way home. In such a case there is some infringement of liberty but there is no confinement sufficient to constitute false imprisonment. With an adult lacking capacity, there is no offence equivalent to child abduction that can be charged in such circumstances.

## **CONSENT**

2.43 In *D*, "without consent" is listed as an essential ingredient of the offence of kidnapping. Accordingly, consent is not simply a defence, like duress or self-defence. In this way kidnapping resembles rape and (according to the view preferred in *Smith and Hogan*<sup>55</sup>) assault.

2.44 Consent is a concept which has created difficulties across the criminal law.<sup>56</sup>

2.45 This raises two questions:

- (1) consent to what, and
- (2) what is the meaning of consent?

### **Consent to what?**

2.46 Kidnapping must consist of "taking or carrying away"; and that taking or carrying must amount to deprivation of liberty. However, the taking or carrying is only an offence if done "without the consent of the person so taken or carried". The question is whether the relevant consent needs to relate to:

- (1) the taking or carrying;
- (2) the deprivation of liberty;
- (3) the force or fraud; or
- (4) some combination of the above.

2.47 In the CP, we argued that the consent is simply to the taking or carrying away, that is to say the fact that V is moved.<sup>57</sup> However, in some cases V may consent in principle to being taken away, but not know that D intends to deprive V of liberty. The consent may then be regarded as invalid, because of the deception.<sup>58</sup>

<sup>55</sup> Smith and Hogan, p 626, para 17.2.1. Contrast with the argument in J Herring and M Dempsey, "Why sexual penetration requires justification" (2007) 27 (3) *Oxford Journal of Legal Studies* 467.

<sup>56</sup> See Home Office, *Setting the Boundaries: Reforming the Law on Sexual Offences* (July 2000); H Hurd, "The Moral Magic of Consent" (1996) 2 *Legal Theory* 168; V Tadros, "Rape Without Consent" (2006) 26(3) *Oxford Journal of Legal Studies* 515.

<sup>57</sup> CP para 2.72.

<sup>58</sup> For when consent is invalidated by deception, see para 2.51 and following below.

2.48 A similar result would follow if the definition stated that D was liable unless V gave valid consent to being taken away *and* to losing liberty.<sup>59</sup> However, the existing definition, as given in *D*, clearly states that the relevant consent is consent to being taken or carried away, without more. There are two possible justifications for this:

- (1) The particular sense given to “deprivation of liberty”, as referring to the fact of being confined *without consent*. Consent to deprivation of liberty would then be a contradiction in terms.
- (2) Kidnapping appears to include a case where V is taken on a journey and only loses liberty by being kept in confinement once at the destination.<sup>60</sup> In cases like this, the journey and the deprivation of liberty occur at different times, and it is quite feasible that V may consent to one but not to the other. But if V consents to the journey and only withholds consent to the confinement, the appropriate charge is not kidnapping but false imprisonment.<sup>61</sup>

### Meaning of consent

2.49 Consent at common law, for example in the offence of assault, may be either express or implied. For example, a person who uses the streets or public transport necessarily consents to the minor jostling that is inevitable in these circumstances.<sup>62</sup> This would suggest that, in the context of kidnapping, there can be implied consent to being taken or carried away. For example, a person who joins a moving crowd, such as a queue for a football match, impliedly consents to be moved along in the swell.

2.50 Otherwise the common law mainly defines consent by specifying certain situations that do *not* amount to consent:

- (1) Where it is obvious there was no consent in any sense, for example if V was unconscious, or was physically overpowered.<sup>63</sup>
- (2) Consent depends on capacity to consent. There is therefore no consent if V was a young child who has not got the understanding and intelligence to

<sup>59</sup> One theoretical difference concerns the case in which D was unaware of the risk of loss of liberty. But in that case D will not have the level of intention or recklessness necessary for the offence: para 2.90 below.

<sup>60</sup> See paras 2.23 to 2.28 above.

<sup>61</sup> Unless the consent to the journey was obtained by deception as to the intended confinement; consent is then vitiated, on the principle mentioned at para 2.51 and following below.

<sup>62</sup> Smith and Hogan, p 627, para 17.2.1.1.

<sup>63</sup> CP para 2.81(1).

consent to the taking in question,<sup>64</sup> or an adult who lacks capacity to consent.<sup>65</sup>

- (3) Consent may be vitiated by duress, if apparent consent was obtained by force or the threat of it.<sup>66</sup> In sexual cases a distinction has been drawn between consent and “mere submission” which does not amount to consent. It is for the jury to decide whether any given instance of submission amounts to genuine consent.<sup>67</sup> The same distinction was applied to kidnapping in *Greenhalgh*.<sup>68</sup>
- (4) In some cases, consent may be vitiated by mistake or deception. We discuss this in the next few paragraphs.

### Effect of deception

- 2.51 The question here is in what circumstances consent is vitiated by a mistake on the part of V, or by a deception by D. The general principle underlying the law in this area is that consent must be “informed”. That is, one cannot consent to something if one does not know what it is.<sup>69</sup>
- 2.52 The traditional rule for when consent is vitiated by deception is that consent to any act is vitiated if, and only if, V is deceived as to:
- (1) the nature of the act to which V supposedly consents;<sup>70</sup> or
  - (2) the identity of the person performing that act.<sup>71</sup>
- 2.53 This rule was originally formulated in the context of the law of rape, though it has been held to apply to all offences against the person.<sup>72</sup> The law governing rape and other sexual offences has since been changed by the Sexual Offences Act

<sup>64</sup> As explained by Lord Brandon in *D*, there is no fixed age at which a child can give effective consent and it is a question of the level of understanding of the individual child. The same approach was later adopted in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112; [1985] 3 WLR 830 in relation to consent to medical treatment.

<sup>65</sup> For kidnapping, see CP paras 2.78 and 2.88 to 2.91. For offences against the person generally, see Smith and Hogan, p 629, para 17.2.1.2.

<sup>66</sup> Smith and Hogan, p 634, para 17.2.1.2.

<sup>67</sup> This is most clearly set out in *Olugboja* [1982] QB 320, [1981] 3 WLR 585 at 332: “The jury ...should be directed that consent, or the absence of it, is to be given its ordinary meaning and if need be, by way of example, that there is a difference between consent and submission; every consent involves a submission, but it by no means follows that a mere submission involves consent”. That case concerned rape contrary to the Sexual Offences Act 1956, but the same distinction exists under the Sexual Offences Act 2003: *Doyle* [2010] EWCA Crim 119 at [21].

<sup>68</sup> [2001] EWCA Crim 1367 at [34]; para 3.7(4)(b) above.

<sup>69</sup> Smith and Hogan, pp 630 to 632.

<sup>70</sup> *Case* (1850) 169 ER 381, (1850) 1 Den 580; *Flattery* (1877) 2 QBD 410; *Williams* [1923] 1 KB 340, (1924) 17 Crim App R 56.

<sup>71</sup> See “Rape - consent obtained by impersonation of boyfriend” [1995] *Criminal Law Review* 163 (case comment on *Elbekkay* (unreported) (CA)).

<sup>72</sup> Smith and Hogan, pp 632 to 634. In *Clarence* (1888) 22 QBD 23 the test was held to apply to the offence under Offences Against the Person Act 1861, s 20; and while this case was disapproved in *Dica* [2004] EWCA Crim 1103, [2004] QB 1257 this was on other grounds.

2003. The traditional rule continues to apply to non-sexual offences against the person such as assault.<sup>73</sup>

- 2.54 The logic behind the traditional rule is that, if V is deceived as to the nature of the act or the identity of the person performing it, V *has not* consented to the thing that actually happened. Any other deception, however crucially important to V, means at most that V *would not have* consented had the facts been known (the so-called “but-for” test).
- 2.55 Deception, for this purpose, is broadly interpreted. In the cases of *Dica*<sup>74</sup> and *Konzani*,<sup>75</sup> discussed below,<sup>76</sup> a man who infected a woman through unprotected intercourse without disclosing that he was HIV positive was held to have deceived her, even though he was not asked any question about his state of health and made no statement about it.
- 2.56 In theory, the same rule should apply in kidnapping when V is mistaken about the nature of the act or the identity of D, even when D has done nothing to induce the mistake. Here too, there is no “informed consent” to D’s act. However, if D was unaware of V’s mistake D will be able to escape liability, as the prosecution will then be unable to prove that D did not honestly believe that V consented.
- 2.57 A different rule now applies in the case of sexual offences. Sections 74 to 76 of the Sexual Offences Act 2003 set out a broader and more flexible test of consent. In general, a person consents if he agrees by choice, and has the freedom and capacity to make that choice. This principle is supplemented by various presumptions. In particular, a person does not consent if deceived as to the nature *or purpose* of the relevant act, or if the apparent consent was procured by impersonation. It is worth considering this different approach to consent at this stage, not least to emphasise the complexity which arises when lack of consent constitutes an express element of a criminal offence.
- 2.58 The distinction between the test under the Sexual Offences Act 2003 and the common law test is neatly illustrated by *Assange v Sweden*.<sup>77</sup> The complaint was that V consented to intercourse on the condition that D wore a condom, and D secretly removed it before intercourse occurred. There was no deception as to the nature of the act or the identity of the person so this was not lack of consent under the common law test. However, under the Sexual Offences Act 2003 the jury could decide whether V “had made clear that she would only consent to sexual intercourse if [D] used a condom, then there would be no consent if, without her consent, he did not use a condom, or removed or tore the condom

<sup>73</sup> Smith and Hogan, pp 632 to 634.

<sup>74</sup> [2004] EWCA Crim 1103, [2004] QB 1257. See also, case comment at [2004] *Criminal Law Review* 944.

<sup>75</sup> [2005] EWCA Crim 706, [2005] 2 Cr App R 14.

<sup>76</sup> Paras 2.61 and following below.

<sup>77</sup> [2011] EWHC 2849 (Admin), (2011) 108(44) LSG 17.

without her consent.”<sup>78</sup> The law is also in a state of some confusion in relation to cases of deception as to the purpose of an act.<sup>79</sup>

***Deception as to the nature of the act at common law***

- 2.59 The rule about deception as to the nature of the act was originally formulated in the context of rape<sup>80</sup> (although as discussed above<sup>81</sup> a different regime now operates in this context). A typical case was one in which V consented to penetration but was led to believe that it was a surgical procedure.<sup>82</sup>
- 2.60 Two types of deception found in kidnapping cases could be explained as instances of deception as to the nature of the act, namely:
- (1) deception as to the consequences of an act;
  - (2) deception as to the lawful authority for an act or the possibility of escape.

DECEPTION AS TO CONSEQUENCES

- 2.61 It appears that, in some cases, deception<sup>83</sup> about the likely consequences of an act can invalidate consent. In the cases of *Dica*<sup>84</sup> and *Konzani*,<sup>85</sup> for example, D engaged in intercourse with V without disclosing that he was HIV positive. He was charged with inflicting grievous bodily harm contrary to section 20 of the Offences Against the Person Act 1861 because he had infected her with HIV. It was held that V had consented to intercourse, but had not consented to being recklessly exposed to the risk of infection amounting to grievous bodily harm.
- 2.62 It is important to be clear about the limits of this rule.
- (1) A deception as to the likely consequences of an act does not necessarily invalidate consent to the act itself. If it did, *Dica* would have been guilty of rape as well as of inflicting grievous bodily harm, as the consent to intercourse would have been invalid.
  - (2) However, where there is a deception as to a likely consequence *and that consequence is an element of the offence* the deception does invalidate

<sup>78</sup> [2011] EWHC 2849 (Admin), (2011) 108(44) LSG 17 at [86].

<sup>79</sup> Contradictory cases *Jheeta* [2007] EWCA Crim 1699, [2008] 1 WLR 2582; *Devonald* [2008] EWCA Crim 527 and *B* [2013] EWCA Crim 823, [2013] 2 Cr App R 29. See Smith and Hogan, pp 733 to 735 which suggests that *Devonald* is out of step with *Jheeta* and should not be followed. This suggestion is supported by the Court of Appeal in *B* at [20].

<sup>80</sup> See K Laird, “Rapist or rogue? Deception, consent and the Sexual Offences Act 2003” (2014) 7 *Criminal Law Review* 492.

<sup>81</sup> See para 2.57 above.

<sup>82</sup> *Flattery* (1877) 2 QBD 410.

<sup>83</sup> And presumably mistake, subject to the question of D’s knowledge.

<sup>84</sup> [2004] EWCA Crim 1103, [2004] QB 1257. See also, case comment at [2004] *Criminal Law Review* 944.

<sup>85</sup> [2005] EWCA Crim 706, [2005] 2 Cr App R 14.

consent to the act. As observed by Lord Justice Judge (as he then was) in *Dica*.<sup>86</sup>

In our view, on the assumed fact now being considered, the answer is entirely straightforward. These victims consented to sexual intercourse. Accordingly, the appellant was not guilty of rape. Given the long-term nature of the relationships, if the appellant concealed the truth about his condition from them, and therefore kept them in ignorance of it, there was no reason for them to think that they were running any risk of infection, and they were not consenting to it. On this basis, there would be no consent sufficient in law to provide the appellant with a defence to the charge under section 20.

- 2.63 This was affirmed in *B*,<sup>87</sup> in which it was held that failure to disclose HIV status was irrelevant to the question of consent to intercourse, and therefore inadmissible in evidence on a charge of rape. After citing the above passage from *Dica*, the Vice President of the Queen's Bench Division went on to say:

... It seems to us that Mr Mackinnon's submissions based upon that paragraph in that judgment were correct. That judgment reflects the present legal position and nothing in the 2003 Act has, in our view, changed the position.

17. Where one party to sexual activity has a sexually transmissible disease which is not disclosed to the other party any consent that may have been given to that activity by the other party is not thereby vitiated. The act remains a consensual act. However, the party suffering from the sexual transmissible disease will not have any defence to any charge which may result from harm created by that sexual activity, merely by virtue of that consent, because such consent did not include consent to infection by the disease.

#### DECEPTION AS TO THE QUALITY OF THE ACT

- 2.64 The common law rule was held to extend to a deception as to the "quality" of the act. In *Tabassum*<sup>88</sup> D persuaded three women to let him examine their breasts by saying (falsely) that he was medically qualified and conducting research for a medical charity, when in fact it was for his sexual gratification. The conviction was upheld on the ground that D had defrauded them as to the quality of the act.
- 2.65 It would be difficult to conceive of an equivalent case involving kidnapping. There could be a case where V consented to enter a vehicle but did not know that it would be moved, or where V consented to be taken to one place but was in fact taken to another. However in these cases a court would have no difficulty in saying that V did not consent to the move that happened. This would be a more natural explanation than saying that there was apparent consent but that it was vitiated by deception.

<sup>86</sup> [2004] EWCA Crim 1103, [2004] QB 1257 at [39].

<sup>87</sup> [2006] EWCA Crim 2945, [2007] 1 WLR 1567.

<sup>88</sup> [2000] 2 Cr App Rep 328.



## DECEPTION AS TO LAWFUL AUTHORITY OR POSSIBILITY OF ESCAPE

- 2.66 In the CP we suggested that consent is also lacking if V was led to believe that there was no option, whether physically or legally, but to submit to the act that led to him being moved and consequently losing liberty.<sup>89</sup> As a matter of logic, this would seem sensible. Just as much as in cases of physical threats such as *Greenhalgh*,<sup>90</sup> what appears to be consent is in reality only submission. As a matter of authority, this suggestion was based on cases involving purported arrest, such as *Wellard*.<sup>91</sup>
- 2.67 The false arrest cases do not seem at first sight to fit within the general rule that deception only vitiates consent to an act when it relates to the nature of the act<sup>92</sup> or the identity of the actor.<sup>93</sup> One could, however, bring the false arrest cases within the “identity or nature of the act” rule in either of two ways.
- (1) One could argue that, in these cases, V is deceived as to the nature (or quality)<sup>94</sup> of the act. What purported to be a lawful arrest was in fact an illegal abduction.
  - (2) Alternatively, one could argue that, in these cases, it is the deception which constitutes the act of moving or restraint, because it is the means by which the move or restraint was effected. There may have been consent to remain in a place or to accompany D, but there was certainly no consent to that deception.<sup>95</sup>

### ***Deception as to identity at common law***

- 2.68 The rule about deception as to identity was also first formulated in the context of rape, and had statutory recognition in cases where D impersonated V’s husband.<sup>96</sup> The rule in sexual offences is now wider than this, and extends to every instance where D impersonates a specific individual known to V.<sup>97</sup>
- 2.69 The common law rule applying to offences against the person does not appear to extend to deceptions as to an attribute or qualification of D, such as being a

<sup>89</sup> CP paras 2.82(3), 2.85 and 2.86.

<sup>90</sup> [2001] EWCA Crim 1367; CP para 2.81(2).

<sup>91</sup> [1978] 1 WLR 921.

<sup>92</sup> Or consequences, in the situation described in *Dica*: see para 2.61 and following above.

<sup>93</sup> See para 2.59 above.

<sup>94</sup> See para 2.64 above.

<sup>95</sup> That was the argument in *Cort* [2003] EWCA Crim 2149, [2004] QB 388 at [19]; CP para 2.67. *Cort* was disapproved in *Hendy-Freegard* [2007] EWCA Crim 1236, [2008] QB 57, but on other grounds. In the CP, paras 2.66 and 2.68, we express the view that this argument cannot apply to a deception bringing about consent to being imprisoned or taken away. It could however apply where the deception is the act of imprisonment, as in false arrests.

<sup>96</sup> Sexual Offences Act 1956, s 1(2) (repealed by Sexual Offences Act 2003, sch 7).

<sup>97</sup> In relation to sexual offences, this rule is restated in Sexual Offences Act 2005, s 76(2)(b): see para 2.58 below.

registered medical practitioner or a police officer.<sup>98</sup> For this reason, it does not provide a solution to the false arrest cases.

### **Other deceptions**

- 2.70 As explained,<sup>99</sup> consent is not necessarily invalid simply because it was obtained by deception and would not have been given without it. However, we suggested in the CP that a jury *may* find that consent is lacking if there was a deception about something so important to V as seriously to prejudice V's autonomy.<sup>100</sup> This has been suggested in the academic literature as one possibility.<sup>101</sup> However there does not appear to be authority for it in the case law. The orthodox view appears to be that, at common law, the "nature or identity" test is exhaustive.<sup>102</sup>

### **Summary of the position at common law on consent**

- 2.71 To sum up:
- (1) deception as to the identity of D, where D impersonates an individual known to V, would be likely to be considered to vitiate V's consent;
  - (2) in general, consent to an act is not vitiated simply because D deceived V, or withheld information, about the likely consequences of that act; but
  - (3) where those consequences form part of the definition of the offence, (as where grievous bodily harm consists in infecting a sexual partner with disease), there is no valid consent unless V consented to those consequences as well as to the act in question. Accordingly, in cases of this kind, consent is indeed vitiated by deception about those consequences.
- 2.72 As explained above,<sup>103</sup> deprivation of liberty is a consequence forming part of the definition of kidnapping. V therefore cannot give valid consent to the act of being taken away, if deceived about the intended or likely consequence of the taking, namely deprivation of liberty.

### **LAWFUL EXCUSE**

- 2.73 Lawful excuse covers several situations. Examples include:
- (1) statutory powers such as police powers of arrest and the powers of prison officers and mental health staff;

<sup>98</sup> *Richardson* [1999] QB 444, [1998] 3 WLR 1292; but see *Tabassum* [2000] 2 Cr App Rep 328.

<sup>99</sup> See para 2.51 and following above.

<sup>100</sup> CP paras 2.82 to 2.87. It follows that D is only aware that V does not consent if D knows that the deception concerns something crucially important to V.

<sup>101</sup> G Williams, *Textbook of Criminal Law*, (2<sup>nd</sup> ed 1983), p 218, cited at CP para 2.160; R Williams, "Deception, mistake and vitiation of the victim's consent" [2008] *Law Quarterly Review* 131, cited CP para 2.82.

<sup>102</sup> Smith and Hogan, p 632.

<sup>103</sup> See para 2.4 above.

- (2) general defences such as self-defence,<sup>104</sup> duress and necessity;
- (3) parental authority; and
- (4) D's genuine but mistaken belief that there is a situation in which self-defence is required.

## **Statutory powers**

### ***Police Powers***

2.74 The most important police powers of arrest are conferred by the Police and Criminal Evidence Act 1984 (PACE).<sup>105</sup> Section 24 of that Act<sup>106</sup> provides that:

- (1) A constable may arrest without a warrant—
  - (a) anyone who is about to commit an offence;
  - (b) anyone who is in the act of committing an offence;
  - (c) anyone whom he has reasonable grounds for suspecting to be about to commit an offence; and
  - (d) anyone whom he has reasonable grounds for suspecting to be committing an offence.
- (2) If a constable has reasonable grounds for suspecting that an offence has been committed, he may arrest without a warrant anyone whom he has reasonable grounds to suspect of being guilty of it.
- (3) If an offence has been committed, a constable may arrest without a warrant—
  - (a) anyone who is guilty of the offence;
  - (b) anyone whom he has reasonable grounds for suspecting to be guilty of it.

Section 24A of that Act sets out the powers of arrest of persons other than police officers. Broadly:

- (1) one can arrest a person who is committing or who has committed an indictable offence,<sup>107</sup> or where there are reasonable grounds for suspecting that that person has committed such an offence, but

<sup>104</sup> Now contained in statute: Criminal Justice and Immigration Act 2008, s 76, as amended by Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 148 and Crime and Courts Act 2013, s 43.

<sup>105</sup> There are other powers covering specific situations, for example motorists affected by drink or drugs: Road Traffic Act 1988, s 10. See also, powers of arrest under ss 3 to 6 of the Extradition Act 2003.

<sup>106</sup> As substituted by Serious Organised Crime and Police Act 2005, s 110(1).

<sup>107</sup> This includes offences that are triable either way.

- (2) only where it is not reasonably practical for a police officer to do so, and only for the purpose of preventing personal injury, damage to property or the escape of the suspect.

### ***Prison Officers***

- 2.75 The powers of prison officers generally relate to detention rather than moving. Section 12 of the Prison Act 1952 provides that a prisoner may be lawfully confined in any prison, and shall be committed to such prisons as the Secretary of State may from time to time direct. This implies that, once the direction is given, there is a statutory power to move prisoners from one prison to another. Section 22 makes provision for the removal of prisoners to courts and hospitals when needed. In addition, prison officers acting as such have the same powers as police constables.<sup>108</sup>
- 2.76 Further, the Secretary of State has the power to detain an individual pending removal<sup>109</sup> in such places as the Secretary of State may direct, which includes any hospital.<sup>110</sup> This power is not limited by the express power to transfer prisoners to hospitals under the Mental Health Act 1983.<sup>111</sup>

### ***Repatriation***

- 2.77 The Repatriation of Prisoners Act 1984 gives power to “the relevant minister” to authorise the transfer of a person into or out of the United Kingdom for the purposes of international arrangements for the return of prisoners.

### ***Mental Health Staff***

- 2.78 In relation to health care workers, there are powers under the Mental Health Act 1983 (“MHA”):
  - (1) A justice of the peace may issue a warrant authorising the removal to a place of safety of a person believed to be suffering from a mental disorder.<sup>112</sup>
  - (2) A police constable, even without a warrant, can remove a person appearing to him to be suffering from a mental disorder to a place of safety, to enable a medical examination to take place in the next 72 hours.<sup>113</sup>
  - (3) There are powers to transfer patients between hospitals.<sup>114</sup>

<sup>108</sup> Prison Act 1952, s 8.

<sup>109</sup> Para 16(2), sch 2 Immigration Act 1971.

<sup>110</sup> Para 18(1), sch 2 Immigration Act 1971. Hospital has the same meaning as under s 145 Mental Health Act 1983.

<sup>111</sup> s 48. See *IM (Nigeria)* [2013] EWCA Civ 1561, [2014] 1 WLR 1870.

<sup>112</sup> MHA, s 135.

<sup>113</sup> MHA, s 136.

<sup>114</sup> MHA, s 19; Mental Health (Hospital, Guardianship and Treatment) (England) Regulations, SI 2008/1184, reg 7.

### ***Mental Capacity Act 2005***

- 2.79 Another example of relevant statutory powers is the scheme contained in the Mental Capacity Act 2005 (“MCA”). The general purpose of these powers is to allow decisions to be taken about the care and treatment of those who lack capacity to decide for themselves. The MCA applies only to the treatment of persons aged 16 or over.<sup>115</sup>
- 2.80 The general principle is that there is no criminal liability for an act done in connection with the care or treatment of a person (P), provided that:
- (1) reasonable steps have been taken to establish whether P lacks capacity to consent; and
  - (2) the person performing the act reasonably believes both that P does lack capacity to consent and that the act is in P’s best interests.<sup>116</sup>
- 2.81 However, where that act involves restraint, meaning the application of force or the restriction of freedom of movement, there are two further conditions:
- (1) the person performing the act reasonably believes that the act is necessary to prevent harm to P; and
  - (2) the act must be a proportionate response to both the likelihood and the seriousness of that harm.<sup>117</sup>
- 2.82 The MCA was amended in 2007<sup>118</sup> to incorporate “deprivation of liberty safeguards” which came into effect in 2009.<sup>119</sup> The effect of those safeguards is that none of the powers in the MCA allows P to be deprived of liberty, except:
- (1) pursuant to a decision of the Court of Protection;<sup>120</sup>
  - (2) where it is necessary for the purpose of giving that person life-sustaining treatment or doing an act reasonably believed to be necessary for preventing a serious deterioration of his or her condition;<sup>121</sup>
  - (3) where the managing authority of a hospital or care home detains a patient under a standard or urgent authorisation.<sup>122</sup>

<sup>115</sup> MCA, s 2(5).

<sup>116</sup> MCA, s 5.

<sup>117</sup> MCA, s 6.

<sup>118</sup> New provisions inserted by Mental Health Act 2007, s 50(2), with effect from 1 April 2009.

<sup>119</sup> Note also that as part of the Law Commission’s 12th programme of law reform, beginning this year, we will be undertaking a project specifically on the issue of deprivation of liberty of those lacking capacity (and the protections under the Mental Capacity Act 2005); see <http://lawcommission.justice.gov.uk/areas/capacity-and-detention.htm>.

<sup>120</sup> MCA, ss 16(2)(a) and 4A(3).

<sup>121</sup> MCA, s 4B.

<sup>122</sup> MCA, sch A1.

2.83 Deprivation of liberty, for these purposes, is defined in the same way as in article 5 of the European Convention on Human Rights.<sup>123</sup> The conditions for authorising deprivation of liberty are more stringent than those for authorising restraint, as restriction of liberty falls short of deprivation of liberty as a matter of legal classification:

- (1) The European Court of Human Rights draws a distinction between deprivation of liberty and restrictions on freedom of movement:

The distinction between a deprivation of, and restriction upon, liberty is merely one of degree or intensity and not one of nature or substance.<sup>124</sup>

- (2) Restraint can include momentary acts such as shutting a door or preventing a person from crossing the road.

Preventing a person from leaving a care home or hospital unaccompanied because there is a risk that they would try to cross a road in a dangerous way, for example, is likely to be seen as a proportionate restriction or restraint to prevent the person from coming to harm. That would be unlikely, in itself, to constitute a deprivation of liberty. Similarly, locking a door to guard against immediate harm is unlikely, in itself, to amount to a deprivation of liberty.<sup>125</sup>

- (3) Deprivation of liberty in this context requires the patient to be:

- (a) under continuous supervision and control; and
- (b) not free to leave.<sup>126</sup>

2.84 Unlike the other statutes discussed in this section, the MCA is not limited to the actions of health professionals or other persons in an official position. It applies equally to anyone who makes decisions on behalf of a person lacking capacity, including carers and family members. One exception is the power under sch A1, which is confined to the managing authority of a hospital or care home.<sup>127</sup>

<sup>123</sup> MCA, s 64(5). As the Supreme Court has recently confirmed, this is a broad definition which ensures that the safeguards are readily engaged, even in the context of a benevolent care regime where the best possible arrangements had been made: *Surrey County Council v P and Q; Cheshire West and Chester Council v P* [2014] UKSC 19, [2014] AC 896. See further para 4.135(5) below.

<sup>124</sup> *HL v United Kingdom* (2005) 40 EHRR 32.

<sup>125</sup> Deprivation of Liberty Safeguards: Code of Practice to supplement the main Mental Capacity Act 2005 Code of Practice (2008) ("DOLS Code of Practice") para 2.10. Note, this code of practice has not been updated since the decision in *Surrey County Council v P and Q; Cheshire West and Chester Council v P* [2014] UKSC 19, [2014] AC 896.

<sup>126</sup> *Surrey County Council v P and Q; Cheshire West and Chester Council v P* [2014] UKSC 19, [2014] AC 896, at [49] per Lady Hale. See also *HL v United Kingdom* (2005) 40 EHRR 32 at [91].

<sup>127</sup> The Law Commission is undertaking a project specifically on the issue of deprivation of liberty of those lacking capacity as part of its 12th programme of Law Reform beginning this year.

### **General defences**

- 2.85 The defences of self defence, lawful defence of property, defence of another, duress, duress of circumstances and necessity apply to kidnapping in the same way as to other offences against the person.<sup>128</sup> In relation to persons lacking mental capacity, the provisions of the MCA, cited above, restate and formalise the defence of necessity.<sup>129</sup>

### **Parental authority**

- 2.86 In the cases of *D*<sup>130</sup> and *Rahman*<sup>131</sup> it was clarified that it is possible for a parent to kidnap his or her own child, whatever the child's age. In that sense there is no automatic defence of parental authority. There is a defence where:

- (1) the taking was otherwise lawful (that is, it is not forbidden by any provision of the Children Act 1989 and it is not in breach of the rights of the other parent or person with parental responsibility); and
- (2) it falls within the bounds of reasonable parental discipline.<sup>132</sup>

### **Mistake**

- 2.87 Finally, there are "putative defences". These arise where D mistakenly believes that circumstances exist that excuse or justify his action. In *Faraj*<sup>133</sup> a householder mistook a heating engineer for a burglar and forced him into a corner at knifepoint. It was held that this belief, if genuinely held, was an excuse, whether or not there were reasonable grounds for it. The position is now set out in statute. The test is one of genuine belief, but the reasonableness of the belief can be relevant to how likely it is that D held it.<sup>134</sup>
- 2.88 This is not true for all defences. In the case of duress, for example, D only has an excuse if he or she *reasonably* believed that the threat or necessity existed.<sup>135</sup>

### **Consent**

- 2.89 As noted above<sup>136</sup> lack of consent on the part of the victim is an express element of the current kidnapping offence, and so there is presently no need to consider issues of consent under the heading of lawful excuse. However, were this position otherwise, and consent did not appear as an express element of the offence (as is the case, for instance, for offences of assault and the offence of

<sup>128</sup> CP paras 2.103 to 2.107.

<sup>129</sup> Hansard, HC Deb 11 October 2004, vol 425 col 29.

<sup>130</sup> [1984] AC 778.

<sup>131</sup> (1985) 81 Cr App R 349.

<sup>132</sup> CP paras 2.108 to 2.112.

<sup>133</sup> [2007] EWCA Crim 1033, [2007] 2 Cr App R 25.

<sup>134</sup> Criminal Justice and Immigration Act 2008, s 76.

<sup>135</sup> Smith and Hogan, p 345, para 12.2.1.3; CP para 2.107.

<sup>136</sup> Para 2.43 above.

false imprisonment) consent would remain capable of negating criminal liability<sup>137</sup> in some circumstances following general common law principles. We return to this point below.<sup>138</sup>

## INTENTION OR RECKLESSNESS

2.90 As we have seen, the external elements<sup>139</sup> of the offence of kidnapping are as follows:

- (1) D takes or carries away V;
- (2) the taking or carrying is by force or fraud;
- (3) the taking or carrying is without V's consent;
- (4) the taking or carrying amounts to deprivation of liberty on the part of V; and
- (5) there is no lawful excuse for the taking or carrying.

The question arises what mental element, if any, must be proved in relation to each of these elements? It is clear that there must be voluntary conduct. Beyond that, the question is whether intention or knowledge is required, or whether recklessness is sufficient.

2.91 Both kidnapping and false imprisonment are described in the cases as offences of recklessness<sup>140</sup> (false imprisonment is discussed further below).<sup>141</sup> In *Hutchins*,<sup>142</sup> D took various drugs at a party; under their influence he attacked a girl and took another girl hostage. It was held, dismissing D's appeal against conviction for both kidnapping and false imprisonment, that "there are analogies between kidnapping and false imprisonment" and that both offences can be committed either intentionally or recklessly.

2.92 The definition of recklessness has been set out in a series of cases culminating in *G*.<sup>143</sup> A person is reckless as to a consequence if:

- (1) he or she is aware that an action may have certain consequences;

<sup>137</sup> For offences such as common assault, the absence of effective consent could be considered as an element of the offence; albeit not an express part of the definition, but imported by the notion of 'unlawful' or 'without lawful excuse', or alternatively the existence of consent could be viewed as a defence. The issue is of limited, but real, practical significance, see Smith and Hogan, p 626, para 17.2.1.

<sup>138</sup> Para 4.159 below.

<sup>139</sup> The "external elements" of an offence are the physical facts that must be proved. They divide into: conduct elements (what the defendant must do or fail to do); consequence elements (the result of the defendant's conduct); the circumstance elements (other facts, for example in theft whether the property belongs to another; in rape whether V consented affecting whether the defendant is guilty or not).

<sup>140</sup> CP paras 2.141 to 2.150.

<sup>141</sup> Paras 3.15 and 3.16 below.

<sup>142</sup> [1988] *Criminal Law Review* 379.

<sup>143</sup> [2003] UKHL 50, [2004] 1 AC 1034.



- (2) he or she nevertheless decides to perform it; and
- (3) this decision is unjustifiable in the circumstances.

Equally, one may be reckless about circumstances. One example is if D is aware that V may not consent to some action, and nevertheless unjustifiably decides to perform it.

2.93 Recklessness, then, always involves some conduct voluntarily engaged in. It follows that one may be reckless about the consequences of the conduct or about the circumstances in which it occurs, but not about the conduct itself. In the case of kidnapping, recklessness may concern:

- (1) the fact that V does not consent (the circumstances of the conduct);
- (2) the fact that V will be caused to move (one consequence of the conduct);  
or
- (3) the fact that V will suffer a deprivation of liberty (another consequence of the conduct).

We do not discuss recklessness as to the existence of lawful excuse, as an honest<sup>144</sup> but mistaken belief in the existence of an excusing circumstance is an excuse in itself.

2.94 In *Hutchins*<sup>145</sup> the issue concerned recklessness as to consent. The analogy of the false imprisonment cases<sup>146</sup> shows that the offence would also include cases where D is reckless about V's suffering a deprivation of liberty. The remaining issue is whether the offence covers cases where D is reckless about whether D's conduct will cause V to move.

2.95 The test for recklessness in kidnapping is a subjective one. That is, D must in fact be aware that V may not consent, or that D's conduct may have certain consequences. It is not sufficient that, in all the circumstances, D *should* have been aware of it (the objective test).

2.96 In this respect non-sexual offences against the person, including kidnapping, differ from sexual offences such as rape. In rape, it is an ingredient of the offence that D does not *reasonably* believe that V consents.<sup>147</sup> Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps D has taken to ascertain whether V consents.<sup>148</sup> Sections 75 and 76 of the 2003 Act contain a series of presumptions. Many of these are relevant in deciding whether D believes, or reasonably believes, that V consents, as well as in deciding whether V consents in fact.

<sup>144</sup> Or in some cases, honest and reasonable.

<sup>145</sup> [1988] *Criminal Law Review* 379.

<sup>146</sup> See para 3.15 below.

<sup>147</sup> Sexual Offences Act 2003, s 1(1)(c).

<sup>148</sup> Sexual Offences Act 2003, s 1(2).

2.97 The kidnapping cases do not distinguish between recklessness about moving and recklessness about consent or deprivation of liberty. However there do not appear to be any reported cases where a person is convicted (or acquitted) of kidnapping for an unintentional but reckless act of moving another. This may be the result of two features of the existing offence.

- (1) Kidnapping must be carried out by force or fraud. These will usually involve intentional conduct. Cases of the reckless application of force could be devised, but will be unlikely and unusual.
- (2) There is no “taking or carrying away” unless D accompanies V; or rather, causes V to accompany D. This makes it likely, though not certain, that D has some control over the direction of travel. It also means that D will normally know that V is moving or being moved from one place to another, except in unlikely cases involving vehicles where the passenger cannot be seen.

**Example 1.** D, while drunk, commandeers a bus to drive home in, regardless of the presence of V sleeping on the upper deck.<sup>149</sup>

In conclusion, a reckless taking could in theory amount to kidnapping under the current law. But for the reasons just given, this is very unlikely to occur.

## SUMMARY OF PROBLEMS

2.98 In conclusion, there are at least the following basic problems with the present law of kidnapping.

- (1) The fact that the requirement of force or fraud is cumulative with that of lack of consent. This means that kidnapping will not include cases where no force or fraud was used but D took V away by exploiting V’s lack of capacity. This problem may arise in practice where V is a young child (though this will generally be covered by child abduction)<sup>150</sup> or an individual with a learning disability, dementia or similar lack of capacity.<sup>151</sup> More generally, this overlap creates confusion, as it generates uncertainty about the mischief at the heart of kidnapping. This raises various questions, for instance regarding the effect of movement induced by different types of fraud.
- (2) Uncertainty regarding the meaning to be attributed to deprivation of liberty and the role of this element of the offence.
- (3) Uncertainty about the timing of the deprivation of liberty: must this occur during the process of taking or carrying away, or can it be later?<sup>152</sup>

<sup>149</sup> CP paras 2.143 and 4.33.

<sup>150</sup> *Kayani* [2011] EWCA Crim 2871, [2012] 1 WLR 1927.

<sup>151</sup> *HM (Vulnerable Adult: Abduction)* [2010] EWHC 870 (Fam); [2010] 2 FLR 1057 at [65].

<sup>152</sup> Paras 2.23 to 2.28 above.

- (4) Uncertainty as to the mental element of the offence: is recklessness as to the taking or moving sufficient to establish liability?

## CHAPTER 3

# CURRENT LAW: OTHER OFFENCES

### FALSE IMPRISONMENT

- 3.1 The primary focus of the project is on kidnapping. However, kidnapping is to some extent based on the older offence of false imprisonment and some of the same issues arise in both offences. We therefore need to describe false imprisonment as well.
- 3.2 False imprisonment is defined as “the unlawful and intentional or reckless restraint of a victim’s freedom of movement from a particular place”. This definition has been quoted without dispute in many cases.<sup>1</sup>
- 3.3 False imprisonment is a common law offence related to assault and battery. Like these, it is a form of the tort of trespass against the person as well as being a crime.<sup>2</sup> It must involve confining a person within a limited area.<sup>3</sup>
- 3.4 Fundamentally, false imprisonment is a breach of personal autonomy. It is therefore not committed when one person (D) confines another (V) with V’s consent. For example, a recovering alcoholic may ask to be shut in a room and monitored so as to prevent his access to drink.
- 3.5 The offence will generally involve some act of compulsion or deception. However, this may be relevant for two different reasons.
- (1) Compulsion or deception may be the means by which V was imprisoned.
- (2) There may also be reasons for holding that V did not consent.

### The meaning of imprisonment

- 3.6 In *Bird v Jones*<sup>4</sup> Mr Justice Coleridge said:

A prison may have its boundary large or narrow, visible and tangible, or, though real, still in the conception only.

In other words, it is not necessary for false imprisonment that V be physically confined within a specified geographical limit.

- 3.7 The meaning of imprisonment appears to be the same in the crime of false imprisonment as in the tort. The following situations have been held to constitute false imprisonment:

<sup>1</sup> *Rahman* (1985) 81 Cr App R 349; *Daley* [2001] EWCA Crim 1666; *R (Chief Constable of Northumbria) v Newcastle upon Tyne Magistrates’ Court* [2010] EWHC 935 (Admin), [2010] ACD 55; Archbold Criminal Pleading and Practice (2014), para 19-417.

<sup>2</sup> CP para 2.152.

<sup>3</sup> CP para 2.154.

<sup>4</sup> (1845) 7 QB 742, 115 ER 668.

- (1) Physical confinement, such as locking V in a room. It need not be physically impossible to leave the room: it is sufficient if V can only escape by taking a risk that V cannot reasonably be expected to take, for example by climbing down a drainpipe.<sup>5</sup>
- (2) Restraining V from moving, for example by holding V's arm, or surrounding V by numbers of people.<sup>6</sup>
- (3) False arrest, either where D impersonates a police officer or where D is a genuine police officer but exceeds his powers.<sup>7</sup>
- (4) Restraint by intimidation, for example threatening V with violence should V leave a defined area: "if you step outside this circle I shall shoot you".<sup>8</sup>
  - (a) In *James (Anthony David)*<sup>9</sup> the question arose whether false imprisonment is committed if the result of D's actions is that V is too frightened to move. The Court of Appeal held that the jury should have been directed that "the complainant's fear had to arise from the appellant's intentionally aimed act to frighten".
  - (b) In *Greenhalgh*<sup>10</sup> D broke into V's home, threatened to set it alight and forced V to drive V's car while D sat in the seat behind V, pointing a crossbow at him. He was convicted of false imprisonment and kidnapping; the Court of Appeal upheld this conviction and stated that V was imprisoned from the moment D entered V's home.

3.8 It would seem to follow that at least one kind of deception, other than false arrest, can constitute false imprisonment. Suppose that D threatens V by saying "if you step outside this circle I shall shoot you" but has no real intention of doing so. This is just as much aimed to frighten, and just as frightening in effect, as if the stated intention were genuine.

3.9 In the CP we argued that false imprisonment can also be committed by deceiving V into believing that it is physically impossible to leave that area, for example by

<sup>5</sup> It has been suggested that the tort of false imprisonment is committed if V cannot escape without major humiliation, for example if D removes V's clothes so that V can only escape by walking naked through the streets: R F V Heuston and R A Buckley, *Salmond and Heuston on the Law of Torts* (20th ed 1996) p 125, para 7.2.

<sup>6</sup> In *Austin v Metropolitan Police Commissioner* [2007] EWCA Civ 989, [2008] QB 660 at [12], it was held that the practice of "kettling" did in principle amount to imprisonment, though justifiable in the circumstances. The subsequent proceedings in the European Court of Human Rights, as *Austin v UK* (2012) 55 EHRR 14, [2012] Crim LR 544, concern the human rights implications of the practice, but not the law of false imprisonment.

<sup>7</sup> CP paras 2.158, 2.161; *Clerk and Lindsell on Torts*, p 999, para 15-24.

<sup>8</sup> CP para 2.159; D Ormerod (ed) *Blackstone's Criminal Practice* (2015) para B2.95.

<sup>9</sup> *James*, The Times, 2 October 1997.

<sup>10</sup> [2001] EWCA Crim 1367; para 2.35(2) above.

rattling the lock so that V believes V has been locked in.<sup>11</sup> *Winfield and Jolowicz*,<sup>12</sup> in its description of the tort of false imprisonment, states:

If a person has the reasonable<sup>13</sup> means of escape, but does not know it, it is submitted that his detention is nevertheless false imprisonment unless any reasonable person would have realised that he had an available outlet.

- 3.10 We would argue that, when V is led to believe that it is impossible to escape from a place,<sup>14</sup> this should fall within the offence. The confinement of V is as effective as if physical means of detention were used. Apart from the suggestion by *Winfield and Jolowicz* cited above, however, the question appears to be free of authority one way or the other.
- 3.11 We argued in the CP that, while these kinds of deception may constitute false imprisonment, the offence cannot be extended any further. For example, it is not false imprisonment to keep V in a room by falsely and persistently assuring V that V's brother is due to arrive any minute.<sup>15</sup>

### **Consent**

- 3.12 False imprisonment is not committed if V consents to be detained; for example, in the case of the alcoholic,<sup>16</sup> or in bondage games.
- 3.13 The common law test for what constitutes consent is described above, in the discussion of kidnapping.<sup>17</sup> Apart from the cases of prior consent just mentioned, the types of compulsion that can constitute false imprisonment (physical coercion, threats of force, false arrest) will often also demonstrate lack of consent. There may be no need in these cases to separate the question of imprisonment from the question of consent.
- 3.14 We argue above<sup>18</sup> that, under the current law of kidnapping, there may be a difficulty about consent in deception cases. The same difficulty applies in false imprisonment:
- (1) An established form of false imprisonment is the case where D purports to arrest V, for example by pretending to be a police officer. This undoubtedly involves deception. However it is not clear that this deception always relates to the identity of D or the nature of the act, so as to negate

<sup>11</sup> CP para 2.161.

<sup>12</sup> W V H Rogers, *Winfield and Jolowicz on Tort* (18th ed 2010), para 4.18. No authority is cited for this proposition.

<sup>13</sup> See *McFadzean v Construction Forestry Mining and Energy Union* [2007] VSCA 289 for a full discussion. (Footnote in original.)

<sup>14</sup> Or that it is only possible to escape by taking a risk that V cannot reasonably be expected to take.

<sup>15</sup> CP para 2.120. This last point was made in relation to the loss of liberty requirement in kidnapping, but the same logic would apply to false imprisonment.

<sup>16</sup> Para 3.4 above.

<sup>17</sup> See para 2.49 and following above.

<sup>18</sup> See para 2.51 and following above.

consent. It could be argued that a false arrest is an act of a different nature from a genuine one. On the other hand, it might be viewed as a deception as to an attribute of D and not as to the nature of the act itself.

- (2) We have argued above<sup>19</sup> that other forms of deception can constitute false imprisonment, provided that the effect of the deception is that V feels compelled to remain. These deceptions, too, may not fall within the “identity of D or nature of the act” test.

If these deceptions are to continue to be classed as false imprisonment this may have implications for the drafting of any new statutory offence, which will be an opportunity to make the situation clearer.<sup>20</sup>

### **Intention or recklessness**

- 3.15 As noted above,<sup>21</sup> the description of false imprisonment as “the unlawful and intentional or reckless restraint of a victim’s freedom of movement from a particular place” has been quoted without dispute in many cases.

- (1) In *Michael Craik*<sup>22</sup> an individual was falsely imprisoned when his detention in a police station was not reviewed within the required time limit.
- (2) In *Re A*<sup>23</sup> it was stated a parent can be guilty of falsely imprisoning their child, although it was found that the subjects of the particular case had not been deprived of their liberty.
- (3) In *Abnett*<sup>24</sup> D locked the door to keep the police out of a house. According to the defence account, which was assumed for sentencing purposes, he was reckless as to the fact that this also had the effect of keeping his wife in.
- (4) In *Daley*,<sup>25</sup> D threatened and assaulted V. V was too frightened to leave, but (again according to the defence) that was not D’s purpose.
- (5) In *Iqbal v Prison Officers Association*,<sup>26</sup> industrial action by prison officers had the effect that the prisoners could not leave their cells. It was held that this would have been sufficient to constitute false imprisonment, except that the prisoners did not have the right to leave their cells.

It appears that the offence is committed if D is reckless either about whether D’s conduct will cause V to be restrained<sup>27</sup> or about whether V consents to be

<sup>19</sup> See paras 2.66 to 2.67 above.

<sup>20</sup> See paras 4.159 to 4.189 below.

<sup>21</sup> See para 3.2 above.

<sup>22</sup> [2010] EWHC 935 (Admin), [2010] ACD 55.

<sup>23</sup> [2010] EWHC 978 (Fam), [2010] 2 FLR 1363.

<sup>24</sup> [2003] EWCA Crim 841.

<sup>25</sup> [2001] EWCA Crim 1666.

<sup>26</sup> [2009] EWCA Civ 1312, [2010] QB 732.

<sup>27</sup> As in the cases in the preceding three footnotes.

restrained.<sup>28</sup> In this respect the offence of false imprisonment is different from the tort, where liability is strict.<sup>29</sup>

3.16 In conclusion, the elements of false imprisonment are as follows.

- (1) D's conduct results in the restraint of V's freedom of movement from a particular place. D intends the conduct to have this result, or is reckless as to whether it will or not.
- (2) The restraint is unlawful, in the sense that it was without lawful authority or reasonable excuse. (As with kidnapping, a mistaken belief in the existence of lawful authority or reasonable excuse can be an excuse in itself.)
- (3) V does not consent to be restrained and D knows or is reckless about this fact.

### CHILD ABDUCTION

3.17 In addition to kidnapping and false imprisonment, there are statutory offences of child abduction. The terms of reference for this project did not originally extend to a review of these offences. However, the offences need to be described for two reasons.

- (1) In considering possible gaps in the offence of kidnapping, it is useful to know whether charges of child abduction are available to fill those gaps in some cases. The law and practice of child abduction also impinges on kidnapping in another way: the same act may constitute both offences and the prosecution must decide which offence to charge.<sup>30</sup>
- (2) Since the publication of the CP, a new problem has been raised in *Nicolaou*.<sup>31</sup>
  - (a) The law provides an offence of child abduction by parents and connected persons.
  - (b) It also provides an offence of child abduction *or detention* by unconnected persons.
  - (c) But it does not provide for the case where a child is lawfully removed from the jurisdiction by a parent or connected person and then retained beyond the time for which permission was given. This is covered by neither child abduction nor kidnapping. (It does, however, fall within the scope of civil procedures for the recovery of the child pursuant to international conventions.<sup>32</sup>)

<sup>28</sup> As in *Hutchins* [1988] Criminal Law Review 379.

<sup>29</sup> *R v Governor of Brockhill Prison, ex parte Evans (No 1)* [1997] QB 443, [1997] 2 WLR 236.

<sup>30</sup> See para 3.31 to 3.39 below.

<sup>31</sup> [2012] EWHC 1647 (Admin), [2012] 2 Cr App R 23 ("*Nicolaou*"), discussed below at para 3.40 and following. See *Clarke, Hall and Morrison on Children* (11th ed) division 5, para 37.

<sup>32</sup> Para 5.24 below.



In July 2013 the terms of reference of the kidnapping project were extended to include this problem.

3.18 One of the elements of the current offence of kidnapping is that the taking or carrying away must be without the consent of the person taken or carried. This applies even when the person taken was a child. The offence is therefore not committed if the child consented to the taking<sup>33</sup> but the child's parent did not.<sup>34</sup>

3.19 For this reason the law has historically provided an offence of child stealing. The earliest form of this offence was introduced in 1814;<sup>35</sup> it was later included in section 56 of the Offences Against the Person Act 1861, which was repealed by the Child Abduction Act 1984.<sup>36</sup> The 1984 Act was passed following the report of the Criminal Law Revision Committee,<sup>37</sup> which criticised the offence of child stealing as inadequate.<sup>38</sup> The main defect identified was the fact that, like kidnapping, child stealing had a requirement of force or fraud and therefore did not cover the case where the child voluntarily accompanied the abductor.<sup>39</sup>

3.20 There are two child abduction offences under the Child Abduction Act 1984.

(1) The first, under section 1, covers the case where a parent or person with similar responsibility takes a child out of the United Kingdom without the consent of the other persons with responsibility for the child or of the court.

(2) The second, under section 2, is generally applicable where a person other than a parent takes or keeps a child out of the control of its parents, whether or not the child is taken out of the United Kingdom.

3.21 The relevant provisions are as follows.

1. Offence of abduction of child by parent, etc

(1) Subject to subsections (5) and (8) below, a person connected with a child under the age of sixteen commits an offence if he takes or sends the child out of the United Kingdom without the appropriate consent.

(2) A person is connected with a child for the purposes of this section if—

(a) he is a parent of the child; or

<sup>33</sup> Provided that the child has the necessary understanding and intelligence: Lord Brandon in *D* [1984] AC 778, at 806.

<sup>34</sup> This may not always have been the case. For a full discussion see CP paras 2.92 to 2.101.

<sup>35</sup> 54 Geo 3 c 101. Another such offence was provided by the Offences Against the Person Act 1828, s 20.

<sup>36</sup> Section 11(5).

<sup>37</sup> Fourteenth Report: Offences against the Person (1980) Cmnd 7844.

<sup>38</sup> J Masson, R Bailey-Harris and R Probert, *Cretney: Principles of Family Law* (8th ed 2008) ("Cretney") para 20-002.

<sup>39</sup> *Mears* [1975] *Criminal Law Review* 155.

- (b) in the case of a child whose parents were not married to each other at the time of his birth, there are reasonable grounds for believing that he is the father of the child; or
- (c) he is a guardian of the child; or
- (d) he is a person named in a child arrangements order as a person with whom the child is to live; or
- (e) he has custody of the child.<sup>40</sup>

(3) In this section ‘the appropriate consent’, in relation to a child, means—

- (a) the consent of each of the following—
  - (i) the child’s mother;
  - (ii) the child’s father, if he has parental responsibility for him;
  - (iii) any guardian of the child;
  - (iv) any person named in a child arrangements order as a person with whom the child is to live;
  - (v) any person who has custody of the child; or
- (b) the leave of the court granted under or by virtue of any provision of Part II of the Children Act 1989; or
- (c) if any person has custody of the child, the leave of the court which awarded custody to him.

(4) A person does not commit an offence under this section by taking or sending a child out of the United Kingdom without obtaining the appropriate consent if—

- (a) he is a person named in a child arrangements order as a person with whom the child is to live, and he takes or sends the child out of the United Kingdom for a period of less than one month; or
- (b) he is a special guardian of the child and he takes or sends the child out of the United Kingdom for a period of less than three months.

...

<sup>40</sup> A person is treated as having custody of a child if there is in force an order of a court in the United Kingdom awarding him (whether solely or jointly with another person) custody, legal custody or care and control of the child: Child Abduction Act 1984, s 1(7). This can only refer to orders made before the commencement of the Children Act 1989, which refers to “residence” or “parental responsibility” instead of “custody”: Halsbury’s Laws, vol 9 (5th ed 2012) para 150.

## 2. Offence of abduction of child by other persons

(1) Subject to subsection (3) below,<sup>41</sup> a person, other than one mentioned in subsection (2) below, commits an offence if, without lawful authority or reasonable excuse, he takes or detains a child under the age of sixteen—

- (a) so as to remove him from the lawful control of any person having lawful control of the child; or
- (b) so as to keep him out of the lawful control of any person entitled to lawful control of the child.

(2) The persons are—

- (a) where the father and mother of the child in question were married to each other at the time of his birth, the child's father and mother;
- (b) where the father and mother of the child in question were not married to each other at the time of his birth, the child's mother; and
- (c) any other person mentioned in section 1(2)(c) to (e) above.

...

## 4. Penalties and prosecutions

(1) A person guilty of an offence under this Part of this Act shall be liable—

- (a) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both such imprisonment and fine;
- (b) on conviction on indictment, to imprisonment for a term not exceeding seven years.

(2) No prosecution for an offence under section 1 above shall be instituted except by or with the consent of the Director of Public Prosecutions.

## 5. Restriction on prosecutions for offence of kidnapping

Except by or with the consent of the Director of Public Prosecutions no prosecution shall be instituted for an offence of kidnapping if it was committed—

- (a) against a child under the age of sixteen; and

<sup>41</sup> Which provides for defences where D is or believes himself to be the child's father, or believes that the child is 16 or over.

(b) by a person connected with the child, within the meaning of section 1 above.

3.22 The offences of child abduction are different in principle from kidnapping. Kidnapping is committed if the child does not consent, whether or not the parent consents (except where the taking falls within the scope of reasonable parental discipline and there is a defence of lawful authority<sup>42</sup>). Conversely, child abduction is committed when a child is taken without the consent of a parent or other responsible person, whether or not the child consents. There are, however, cases where the same act constitutes both kidnapping and child abduction and the prosecution must decide which offence to charge.

3.23 “Appropriate consent” exists in the following situations.<sup>43</sup>

- (1) Where consent is given by the parent or other person with similar responsibilities. Where there is more than one such person, the consent must be given by all of them. This consent, if given, is valid whether or not there are or have been any family proceedings relating to the child.
- (2) Where the court grants leave under any provision of Part II of the Children Act 1989. This will usually take the form of a child arrangements order under section 8 of that Act, which may be made whether or not there are already family proceedings in existence.<sup>44</sup>
- (3) Where leave is granted by a court which has awarded custody of the child to any person.<sup>45</sup>

In general terms, then, consent can be given either by the relevant parents or guardians or by the court. Consent is not required when the removal is for less than one month and there is a child arrangements order which provides, in favour of the person taking the child abroad, who the child is to live with and when..<sup>46</sup> These provisions reflect the provisions of the Children Act 1989 concerning the effect of residence orders.<sup>47</sup>

3.24 It should be noted that the maximum sentence for child abduction is seven years, compared to a maximum of life imprisonment for kidnapping.

3.25 There are two main differences between the offences under section 1 and section 2 of the 1984 Act.

- (1) The offence under section 1 can only be committed by a parent or person with similar responsibility. The offence under section 2 cannot be committed by a parent or person with similar responsibility, but can be committed by anyone else.

<sup>42</sup> See para 2.86 above.

<sup>43</sup> Child Abduction Act 1984, s 1(3).

<sup>44</sup> Children Act 1989, s 10(1) and (2) (as amended by the Children and Families Act 2014).

<sup>45</sup> See fn 40 above.

<sup>46</sup> Child Abduction Act 1984, s 1(4).

<sup>47</sup> Children Act 1989, s 13 (as amended by the Children and Families Act 2014).

- (2) The offence under section 1 can only be committed by taking the child out of the United Kingdom. The offence under section 2 can consist of moving the child either within or out of the United Kingdom. It can also include taking the child out of the control of its parents without any significant moving at all.<sup>48</sup> Taking, in the section 2 offence, can include any act causing the child to accompany D.<sup>49</sup>
- 3.26 Accordingly, when one parent takes a child away from the other without taking the child abroad, the abducting parent cannot be charged with any child abduction offence. However, provided that the remaining conditions for the offence are met, he or she can be charged with the more serious offence of kidnapping.
- 3.27 An unconnected person can assist or encourage the commission of a section 1 offence.<sup>50</sup> Conversely, a parent or connected person can presumably assist or encourage the commission of a section 2 offence.
- 3.28 A third difference between the offences in the 1984 Act was highlighted in *Nicolaou*<sup>51</sup> The section 1 offence can only be committed by “taking or sending” a child out of the United Kingdom, not by wrongfully detaining the child abroad. The section 2 offence encompasses “detaining” the child.
- 3.29 Child abduction offences can be committed intentionally or recklessly. According to *Foster v DPP*,<sup>52</sup> “the mens rea of the offence of abduction under section 2 is an intentional *or reckless* taking or detention of a child under the age of 16”. Here there could be recklessness about:
- (1) the consequence that the child is removed or kept,
  - (2) the age of the child, or
  - (3) the consent of the parent or other responsible person.
- The judgment does not differentiate between these possibilities.<sup>53</sup>
- 3.30 Unlike kidnapping and false imprisonment, child abduction is triable either way.<sup>54</sup>

<sup>48</sup> *Leather* (1994) 98 Cr App R 179, [1993] 2 FLR 770; see *Archbold Criminal Pleading Evidence and Practice* (2014) para 19-398.

<sup>49</sup> *A* [2000] 1 WLR 1879, [2000] 1 Cr App R 418.

<sup>50</sup> *Carter and Harrison on Offences of Violence* (2<sup>nd</sup> ed 1997) para 9-025; Smith and Hogan, p 692, para 17.13.1.1; *Sherry* [1993] Crim LR 536.

<sup>51</sup> [2012] EWHC 1647 (Admin), [2012] 2 Cr App R 23: discussed below at para 3.40 and following.

<sup>52</sup> [2004] EWHC 2955 (Admin), [2005] 1 WLR 1400 at [27], emphasis added.

<sup>53</sup> There is an administrative practice, in place across various different police forces, of issuing ‘child abduction warning notices’ warning unconnected adults who associate with a child against the parent(s) wishes that they risk committing the offence under section 2 of the Child Abduction Act 1984. This practice was referred to with approval in *G (Paul)* [2012] EWCA Crim 1296, with one purpose of the notice apparently being to put the recipient on notice of matters such as the child’s age and the lack of parental consent. Breach of such a notice is not itself a criminal offence.

<sup>54</sup> Child Abduction Act 1984, s 4(1), set out in para 3.21 above.

### **The problem in *Kayani***

3.31 The then Lord Chief Justice's judgment in *Kayani*<sup>55</sup> expresses concern about the possibility that, in cases where a charge of kidnapping is legally available against a parent, prosecutors may be reluctant to bring such a charge. This may have been conditioned by two factors:

- (1) the requirement for the DPP to consent to prosecutions in cases involving parents;<sup>56</sup>
- (2) the view expressed by the court in *C*<sup>57</sup> (but contradicted in *Kayani*) that kidnapping should not be charged in cases of abduction by a parent.

In what follows we consider whether there is a need to remove or amend the requirement of consent to prosecution, or alter the practice about when that consent is given.<sup>58</sup>

3.32 The general policy of the law is that parental disputes about the care of children should be pursued in civil rather than criminal proceedings.<sup>59</sup> The civil court has power to make child arrangements orders, prohibited steps orders and specific issue orders under the Children Act 1989.<sup>60</sup> Where a child is taken away in breach of such an order, the normal sanction will be proceedings for contempt of court.<sup>61</sup> For this reason, the consent of the Director of Public Prosecutions is required in order to prosecute a parent or other connected person for abducting a child.<sup>62</sup> This is true whether the offence charged is child abduction<sup>63</sup> or kidnapping.<sup>64</sup>

3.33 In *C*<sup>65</sup> Lord Justice Watkins said that, in most cases of abduction by a parent, if the facts are covered by section 1 of the 1984 Act that should be the only offence charged and only exceptional facts justified bringing a charge of kidnapping. There is no corresponding guidance on abduction by a person other than a parent. If the facts could justify either a charge of kidnapping or a charge under section 2 of the 1984 Act, the choice of offence remains open.

<sup>55</sup> [2011] EWCA Crim 2871, [2012] 1 WLR 1927.

<sup>56</sup> Child Abduction Act 1984, ss 4(2) (child abduction) and 5 (kidnapping).

<sup>57</sup> [1991] 2 FLR 252, [1991] Fam Law 522.

<sup>58</sup> Paras 4.219 to 4.230; we conclude that there is in fact no need to do any of these things.

<sup>59</sup> CS [2012] EWCA Crim 389, [2012] 1 WLR 3081.

<sup>60</sup> s 8, as amended by the Children and Families Act 2014, part 2, s 12.

<sup>61</sup> *M v M (Contempt: Committal)* [1992] 1 FCR 317, [1992] Fam Law 14.

<sup>62</sup> In practice this consent is given on behalf of the DPP by a senior Crown prosecutor.

<sup>63</sup> Child Abduction Act 1984, s 4(2).

<sup>64</sup> Child Abduction Act 1984, s 5.

<sup>65</sup> [1991] 2 FLR 252, [1991] Fam Law 522.

- 3.34 In *Kayani*, the observation of Lord Justice Watkins in *C*<sup>66</sup> that “prosecutors should, in future, avoid altogether charging anyone with child kidnapping at common law” was disapproved. The Lord Chief Justice said:

Our view is clear. Simply because the child has been abducted by a parent, given current conditions, it no longer necessarily follows that for policy reasons a charge of kidnapping must always be deemed inappropriate. To that extent the observation of the court in *R v C* has been overtaken by events and has no continuing authority.<sup>67</sup>

- 3.35 Following his observations about *C*, the Lord Chief Justice described the legal difficulty of charging kidnapping in cases of this kind, and invited the Law Commission to address the question of whether cases where children are removed from one parent by the other should be treated as kidnapping offences. He concluded:

In the meantime, in any event, pending any possible change to the substantive law, there are cases falling within the child abduction offence which merit a sentence greater than the maximum current sentence of 7 years imprisonment after a trial. We recommend that the maximum sentence for child abduction should be increased.<sup>68</sup>

- 3.36 Before *Kayani*, the DPP and Crown prosecutors would presumably have followed the guidance in *C* by taking a restrictive approach in exercising the power to consent to prosecutions for parental kidnapping. If so, this approach ought to have changed following *Kayani*.

- 3.37 The policy about prosecutions in general is set out in the Code for Crown Prosecutors.<sup>69</sup> Broadly, a prosecution will be brought only if:

- (1) there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge (“the evidential stage”); and
- (2) prosecution is in the public interest (“the public interest stage”), having regard to:
  - (a) the seriousness of the offence;
  - (b) the level of culpability of the suspect;
  - (c) the circumstances of, and harm caused to, the victim;
  - (d) the age of the suspect;
  - (e) the impact of the offence on the community;
  - (f) the proportionality of prosecution as a response; and

<sup>66</sup> [1991] 2 FLR 252, [1991] Fam Law 522.

<sup>67</sup> [2011] EWCA Crim 2871, [2012] 1 WLR 1927 at [13].

<sup>68</sup> [2011] EWCA Crim 2871, [2012] 1 WLR 1927 at [16].

<sup>69</sup> [https://www.cps.gov.uk/publications/docs/code\\_2013\\_accessible\\_english.pdf](https://www.cps.gov.uk/publications/docs/code_2013_accessible_english.pdf) (last visited 3 November 2014).

(g) the need to protect sources of information.

3.38 This Code is supplemented by legal guidance about particular offences.<sup>70</sup> The guidance for kidnapping states:

There are four elements to this common law offence:

- the taking or carrying away of one person by another;
- by force or fraud;
- without the consent of the person so taken or carried away;  
and
- without lawful excuse.

Often the kidnapping will be followed by the commission of further offences of sexual or aggravated assault. There is a specific offence of child abduction. *Regardless of the severity of any act that follows (with the possible exception of murder), kidnapping is such a grave offence that it will be usual to reflect it with a count in the indictment.*<sup>71</sup>

3.39 This guidance does not specifically mention the question of how to choose between charges of kidnapping and child abduction. The italicised passage, by emphasising that kidnapping should be charged whenever its conditions are fulfilled, despite the availability of other offences, appears to follow the approach in *Kayani*.<sup>72</sup>

#### **The problem in *Nicolaou***

3.40 A possible gap in the Child Abduction Act 1984 was identified in *Nicolaou*.<sup>73</sup> In this case a father took his son on holiday to Cyprus in accordance with the terms of a contact order made by the county court, but did not return the son when the permitted period had expired. It appeared that the father intended to keep the son in Cyprus permanently. The father applied for judicial review of the domestic arrest warrant on which the international warrant was based.

3.41 The application for judicial review was successful. The Divisional Court held that, as a matter of ordinary language, “takes or sends” cannot refer to the continuing act of keeping the child abroad. The court relied on the contrast between “takes or sends” in section 1 and “takes or detains” in section 2, while admitting that there was nothing in the Parliamentary debates to show why this contrast was present.

3.42 The reason for the difference of wording is not clear. Possible explanations are as follows.

<sup>70</sup> <https://www.cps.gov.uk/legal/index.html> (last visited 3 November 2014).

<sup>71</sup> [https://www.cps.gov.uk/legal/l\\_to\\_o/offences\\_against\\_the\\_person/](https://www.cps.gov.uk/legal/l_to_o/offences_against_the_person/) (last visited 3 November 2014). Emphasis ours.

<sup>72</sup> [2011] EWCA Crim 2871, [2012] 1 WLR 1927.

<sup>73</sup> [2012] EWHC 1647 (Admin), [2012] 2 Cr App R 23.



- (1) One possibility is that, if “detain” had been used in section 1, the section might cover the case of a child who was never in the United Kingdom at all, and thus transgress the intended jurisdictional limits of the offence.<sup>74</sup>
- (2) Another is that the main purpose of the section is to prevent the removal of a child from the jurisdiction of the courts, where questions of residence and custody can be determined.<sup>75</sup>
- (3) A third is that it is a by-product of the drafting. “Out of the United Kingdom” naturally suggests motion from within the United Kingdom to outside it, as opposed to stationary location outside the United Kingdom.

3.43 In the Parliamentary debates on the 1984 Act, Gerald Bermingham MP raised the question of “the child who goes abroad on holiday and is then detained by the other parent”, and wished to see the case covered, either by the Bill or by extradition arrangements or some form of international convention. The Home Office Minister, David Mellor MP, answered that “we have always had a very clear rule in Britain that only in the gravest circumstances is extraterritoriality of offences total”.<sup>76</sup> However, this exchange concerned the extraterritorial effect of criminal law generally, rather than the decision to use “takes or sends” without “detains”.

3.44 The issue of wording was raised in the third reading debate by Sir Nicholas Bonsor MP:

Thirdly, I notice the distinction between clauses 1 and 2 in relation to the detention of children. In clause 2, the offence is committed if somebody, “without lawful authority or reasonable excuse ... takes or detains a child under the age of sixteen”. However, under clause 1, which relates to parents taking children out of the United Kingdom, the phrase is anyone who “takes or sends the child out of the United Kingdom”. That point was raised earlier by the hon Member for St Helens, South (Mr Bermingham), and I agree that it may well be that the abduction, in so far as it occurs, could occur outside the United Kingdom in the first place. If I read the legislation correctly, if that should occur, no offence is committed. I should not have thought that it would be very difficult to add the words, “or detains” to clause 1 so as to embrace that offence, or to make that act an offence.<sup>77</sup>

No answer was given to this by the Minister. The (opposition) Labour front bench spokesman Alfred Dubs MP said that “It would be foolish of us to spend time delaying the Bill in an attempt to tighten up the one or two possible loopholes. That must be for another day.”

<sup>74</sup> See *A v A* [2013] UKSC 60, [2014] AC 1 on whether it is possible for a child to be “habitually resident” in a country where it has never been.

<sup>75</sup> CS [2012] EWCA Crim 389, [2012] 1 WLR 3081.

<sup>76</sup> Hansard (HC), 6 April 1984, vol 57, cols 1282-3. The scope of extraterritorial offences has widened considerably since 1984.

<sup>77</sup> Hansard (HC) 6 April 1984, vol 57, col 1318.

- 3.45 Whatever the reasons for the wording of the Act, *Nicolaou* confirms that “take” and “send” do not include “retain”. The law therefore does not cover the case where one parent takes the child abroad on a holiday that is permitted by the other parent, or by the court, but then does not return the child.
- 3.46 A reading contrary to that of the Divisional Court might be supported on the ground that section 1(4) contains the wording “takes or sends the child out of the United Kingdom for a period of less than one month”. This makes it sound as if the taking or sending is a continuing activity taking place throughout the period the child is away.<sup>78</sup> As against that, the following points may be made.
- (1) The wording in section 1(4) is a later addition.<sup>79</sup> It is therefore not decisive of the meaning of the original section. At most, it may illustrate what the drafter of the addition believed the original drafter to have meant.
  - (2) Further, “takes or sends V for a period” may be read as shorthand for “takes or sends V to be there for a period” but does not literally mean that the taking or sending itself lasts throughout that period. On this interpretation, V’s being abroad for a month or more would be a consequence element and not part of the conduct element of the offence.

On balance we believe that the wording in section 1(4) is insufficient to displace the normal meaning of “take” and “send” as acts referring to the journey alone, and that the decision of the Divisional Court is correct.

- 3.47 We believe that the father’s actions in *Nicolaou* would not constitute kidnapping either, as that offence requires “taking or carrying” rather than keeping or detaining.<sup>80</sup> Nor would the father’s actions amount to false imprisonment. The act complained of was not confining the child to a particular area in Cyprus but preventing his return to the United Kingdom.<sup>81</sup> It was not stated in the report of the case whether the child was held against his will.
- 3.48 One further ambiguity remains. *Nicolaou* makes clear that “takes or sends out of the United Kingdom” cannot include retaining a child in the place to which he or she was first taken. The question still remains whether it includes moving a child from one place outside the United Kingdom to another place outside the United Kingdom, or whether “out of” must mean “from a point inside to a point outside”.<sup>82</sup> The issue here is one of territoriality, rather than the presence or absence of the word “detains”, and cannot be resolved here: any change would risk including the case of a child with no UK links at all. For present purposes, we are concerned

<sup>78</sup> See case comment on *Nicolaou*: D Ormerod, [2013] *Criminal Law Review*.

<sup>79</sup> Substituted by Adoption and Children Act 2002, Sch 3 para 42(4).

<sup>80</sup> The old element of “secreting” no longer forms part of kidnapping: CP paras 2.31 to 2.41.

<sup>81</sup> According to W V H Rogers, *Winfield and Jolowicz on Torts* (18th ed 2010) para 4-17 fn 150, “Napoleon was certainly imprisoned on St Helena”. But “abroad”, or probably even Cyprus, is too large an area to be imprisoned in.

<sup>82</sup> On an analogous question, the provision concerning the “transfer of assets abroad” (now Income Tax Act 2007, s 721) has been held to apply to the transfer of assets from one foreign country to another, though the transferor must be ordinarily resident in the UK: *Inland Revenue Commissioners v Willoughby* [1997] 1 WLR 1071, [1997] 4 All ER 65.

only with the case of the child lawfully removed from the United Kingdom and unlawfully retained.

- 3.49 It appears from the debates that Parliament was aware of the possible omission but decided that that was a problem for another time: it did not deliberately choose the narrower wording for reasons of policy. We agree that the law should not address the position of children who were never in the UK and have no links with it. But when a child is once subject to the jurisdiction of the courts, there is a policy interest in ensuring that the child is not removed from that jurisdiction. For exactly the same reason, there is a policy interest in ensuring that a child should be returned to the jurisdiction when required. This interest is still stronger if there is already a court order and the temporary removal was by permission of the court. This policy interest is recognised by the Hague Convention on child abduction, which addresses wrongful retention as well as wrongful abduction.<sup>83</sup>
- 3.50 In conclusion we consider that there is a deficiency in the section 1 offence that ought to be addressed.

### **SUMMARY OF PROBLEMS**

- 3.51 In conclusion, two problems with the present law of child abduction have come to light or have been highlighted since the publication of the CP.
- (1) As explained in Chapter 2, many cases of parental abduction do not fall within kidnapping because of the force or fraud requirement. Child abduction is not an adequate substitute in the most serious cases, because of the limited sentencing powers.<sup>84</sup>
  - (2) The problem in *Nicolaou*:<sup>85</sup> the offence under section 1 of the Child Abduction Act 1984 is not committed when a parent lawfully removes a child from the United Kingdom, and then retains the child beyond the period for which permission was given.

<sup>83</sup> Para 5.19 and following below.

<sup>84</sup> *Kayani* [2011] EWCA Crim 2871, [2012] 1 WLR 1927.

<sup>85</sup> [2012] EWHC 1647 (Admin), [2012] 2 Cr App R 23.

## CHAPTER 4

# REFORMING KIDNAPPING AND FALSE IMPRISONMENT

4.1 In this chapter we consider our recommendations for the restatement of the common law offences of kidnapping and false imprisonment in statute.

(1) **Recommendation 1:** create a statutory offence of kidnapping which is clearer and simpler than the current law.<sup>1</sup> This would resolve the uncertainties with the current offence identified in Chapter 2.

(2) **Recommendation 2:** replace the offence of false imprisonment with a statutory offence of unlawful detention.<sup>2</sup> This would follow the current common law definition of false imprisonment, but would also provide the opportunity to clarify the relationship between this offence and the reformed offence of kidnapping.

4.2 We discuss our recommendations in relation to the offence of child abduction in Chapter 5.

### RECOMMENDATION 1: STATUTORY OFFENCE OF KIDNAPPING

#### Outline of Recommendation 1

4.3 The common law offence of kidnapping should be replaced in statute. This codified offence would reduce the number of elements of the offence, and ensure they do not overlap. This would resolve the ambiguities we have found in the existing offence.<sup>3</sup> False imprisonment would remain as a separate, though closely related, offence, renamed unlawful detention.<sup>4</sup>

4.4 To assist readers we begin with a brief description of our conclusion by summarising the elements of the recommended statutory offence of kidnapping. It should be noted that the intention here is merely to describe the elements; this is not an attempt to produce a draft suitable for immediate inclusion in a Bill.

4.5 We recommend the creation of a new offence of kidnapping, which would be committed when D:

- (1) without lawful authority or reasonable excuse,
- (2) intentionally uses force or threats of force,
- (3) in order to take V or otherwise cause V to move with him.

<sup>1</sup> Para 4.20 below.

<sup>2</sup> Paras 4.238 to 4.243 and following below. Throughout Chapter 4 we will refer to the offence as false imprisonment when discussing the current law and unlawful detention when discussing Recommendation 2. As will become clear, we do not intend the codification or change of name of this offence to change its substance.

<sup>3</sup> Para 2.98 above.

<sup>4</sup> See Recommendation 2 at para 4.232

- 4.6 In explaining Recommendation 1, we begin with a very brief summary of the problems with the law and then consider the responses we received on consultation. We outline the mischief which we believe underpins the current offence and see how this might be better and more clearly addressed by a new kidnapping offence. We then outline the elements of that new offence, before considering those elements of the current kidnapping offence which we recommend are removed. In particular, we describe the respects in which our final recommendation differs from the provisional wording of Model 2 as suggested in the CP.<sup>5</sup> We conclude this section on Recommendation 1 with consideration of mode of trial and possible changes to the charging practice.

#### **Benefits of our recommendation**

- 4.7 The benefits we see in Recommendation 1 include:
- (1) providing an offence with a clearer underlying rationale;
  - (2) providing an offence with clearly defined elements;
  - (3) providing a structure for the offence which avoids the complexities arising from the overlapping nature of the elements in the existing offence;<sup>6</sup> and
  - (4) ensuring that the relationship between unlawful detention and kidnapping is clear.

#### **Summary of the problems with the present law**

- 4.8 The principal problem with the present law of kidnapping is the unnecessary overlap between the current requirements of force and fraud and lack of consent. This was identified in our CP and echoed by the majority of consultees. However, there are a number of other problems and uncertainties which were highlighted in Chapter 2 and are also summarised below.

#### ***Overlap between force or fraud and lack of consent***

- 4.9 The definition of kidnapping in *D*<sup>7</sup> contains both a requirement of force or fraud and a requirement of lack of consent. This leads to some duplication, and gives rise to several issues<sup>8</sup> including:
- (1) The “lack of capacity case”: V lacks the capacity to consent, and can therefore be abducted without the need for force or fraud.
  - (2) The general uncertainty about the relationship between the force or fraud requirements and the role of consent in the offence.

<sup>5</sup> See CP para 4.108(2).

<sup>6</sup> See para 2.98(1) above.

<sup>7</sup> [1984] AC 778.

<sup>8</sup> See paras 2.37 to 2.42 above.

#### THE LACK OF CAPACITY CASE

4.10 As pointed out below,<sup>9</sup> the “lack of capacity case” poses only a narrow problem in practice.

- (1) Offences under the Child Abduction Act 1984 will usually apply where the case involves a child, even if there is no deprivation of liberty and no force or fraud.
- (2) False imprisonment will usually apply where there is a restriction on freedom of movement, regardless of force or fraud.
- (3) Kidnapping will not apply where there is no deprivation of liberty, regardless of force or fraud.

#### MORE GENERAL UNCERTAINTY GENERATED BY THE OVERLAP

4.11 The overlap between the force or fraud requirement and lack of consent requirement under the current law also generates more general uncertainty about the focus of the kidnapping offence. Requiring lack of consent in addition to force or fraud clearly suggests that kidnapping is concerned with more than merely moving a person by force or fraud.

4.12 The requirement of an element of consent begs the question which instances of movement by force or fraud are excluded from the scope of the offence? In other words, when will a person be considered to have consented to a forcible or fraudulent move? This problem is particularly acute in the context of moving a person by fraud, and leads to difficult questions regarding what such a fraud must relate to, and when a fraud will be considered to vitiate consent.<sup>10</sup>

#### ***Further problems with the present law***

4.13 Aside from the difficulties caused by the overlapping requirements of force or fraud and lack of consent, there are a number of other uncertainties, again outlined in detail in Chapter 2, which could helpfully be resolved by statutory reform. These include:

- (1) The timing of the deprivation of liberty: must this occur during the process of taking or carrying away, or can it be later?<sup>11</sup>
- (2) The meaning to be attributed to deprivation of liberty.<sup>12</sup>
- (3) The role of deprivation of liberty as an element of the offence.<sup>13</sup>
- (4) The mental element of the offence.<sup>14</sup>

<sup>9</sup> See paras 4.166 to 4.173.

<sup>10</sup> See paras 4.174 to 4.195 below.

<sup>11</sup> See paras 2.23 to 2.28 above.

<sup>12</sup> See paras 2.4 and following above.

<sup>13</sup> See paras 2.4 and following above.

<sup>14</sup> See paras 2.90 to 2.97, 4.92 to 4.97 and 4.109 to 4.110.

- (5) The relationship between kidnapping and false imprisonment.

**Should kidnapping be replaced by a statutory offence?**

- 4.14 In our CP we proposed that the offence of kidnapping should be replaced in statute,<sup>15</sup> and put forward three possible models for reform.<sup>16</sup> In this section we consider the responses to our consultation, both in terms of the desirability of statutory reform, and the shape any such reform should take.
- 4.15 As to whether there should be a new statutory offence of kidnapping, eight respondents were in favour, five expressed no view and one was opposed.
- 4.16 Arguments against creating a statutory offence of kidnapping include:
- (1) Creating a new statutory offence involves considering many complicated questions of law. Any attempt to restate the elements of kidnapping may lead to as many complications as does the current definition in *D*.<sup>17</sup>
  - (2) The logic of such a reform would equally require the replacement of false imprisonment, given the close relationship between the offences. From a practical point of view this is unnecessary, given that the law of false imprisonment could be argued to be comparatively unproblematic.<sup>18</sup> We discuss this argument when considering the creation of a statutory offence of unlawful detention below.<sup>19</sup>
  - (3) Redrafting the offence poses the risk of undesired consequences by criminalising care workers and others who move patients without sufficient authority. Avoiding this consequence is one reason why our final recommendation in this report is for a narrower offence than that which we discussed in the CP.<sup>20</sup>
- 4.17 The Crown Prosecution Service (CPS) alone thought that there was no need to create statutory offences of kidnapping or false imprisonment. However, they agreed that if they were codified, some anomalies could be put right.<sup>21</sup>

<sup>15</sup> See CP para 4.4.

<sup>16</sup> See CP paras 4.107 to 4.109.

<sup>17</sup> [1984] AC 778.

<sup>18</sup> The response to the CP from the senior judiciary (response drafted by Lord Chief Justice Thomas, when he was President of the Queen's Bench Division, and Lord Hughes, when he was Vice President of the Court of Appeal Criminal Division) stated that "there is, in contrast, no confusion at all in relation to the common law offence of false imprisonment, which is straightforward." Nevertheless they accepted that there were so many points in common between the two offences that they should be reformed together.

<sup>19</sup> See paras 4.233 to 4.237 below.

<sup>20</sup> See paras 6.1 to 6.12 below.

<sup>21</sup> In subsequent consultation the CPS have expressed support for our proposals, stating that they significantly clarify the relationship between kidnapping and false imprisonment in a way that should make the tasks of prosecutors and sentencing judges easier.

4.18 The response of the senior judiciary may be taken as typical of the majority:

As the Lord Chief Justice underlined in *Kayani and Solliman*<sup>22</sup> the law in relation to the common law offence of kidnapping is somewhat confused, and it is not open to the Court of Appeal to redefine its ingredients, at any rate by extending its ambit. There are also, as the [Law] Commission has identified, significant legal and practical issues – in particular as to the protection of children and mentally impaired persons, and as to the interaction between the offence and the various other related offences to which the Commission has made reference, as well as with offences contrary to section 62 of the Sexual Offences Act 2003. Thus, subject to the matters raised below, we would support the provisional proposal to abolish the common law offence of kidnapping and to replace it with one or more statutory offences.

4.19 We remain of the view that kidnapping requires statutory intervention because:

- (1) Following *Kayani*, statutory intervention is the only way to make any significant change to the offence, with the aim of simplifying or clarifying its ambit.
- (2) The creation of statutory offences would allow for a comprehensive and logically satisfactory solution to the problems and uncertainties identified in the current law.<sup>23</sup>
- (3) Comprehensive statutory intervention is preferable to a piecemeal common law approach of solving each problem separately.
- (4) The original purpose of the simplification project was to pave the way for codification of the criminal law. It is desirable in principle for common law offences to be restated in statute, even if they are found to be unproblematic. It is all the more desirable if there are problems and ambiguities, as restating the offences gives the opportunity to put them right.

4.20 **We recommend that the common law offence of kidnapping be replaced in statute.**

**Models on consultation**

4.21 In our CP we provisionally proposed that the new offence should not contain the separate requirements of force or fraud and consent. Our provisional proposal was to remove the force or fraud requirement.<sup>24</sup> A majority of consultees agreed that the dual requirement of force or fraud and consent in the present offence caused problems.

<sup>22</sup> [2011] EWCA Crim 2871, [2012] 1 WLR 1927.

<sup>23</sup> See para 2.98 above.

<sup>24</sup> CP para 4.26.



4.22 In consultation we offered three models for reform:

- (1) Model 1: a single offence of deprivation of liberty. This would cover the scope of both false imprisonment and kidnapping.
- (2) Model 2: two offences, one of unlawful detention and one of unlawful abduction or kidnapping.
- (3) Model 3:
  - (a) a basic offence of deprivation of liberty, and
  - (b) an aggravated offence of deprivation of liberty coupled with the intention to mistreat the victim in further ways.

4.23 The majority of consultees favoured Model 2 because, among other reasons:

- (1) It preserves the powerful label of kidnapping, a serious offence which would be intuitively familiar to the public and juries; and
- (2) It preserves an independent offence of unlawful detention which consultees generally considered was operating well without causing problems.<sup>25</sup>

4.24 As noted in Chapter 1,<sup>26</sup> Model 2 is now our preferred model for reform. We are therefore left with the task of solving the problems with the current law identified in Chapter 2,<sup>27</sup> whilst preserving two distinct offences.

4.25 We begin by identifying the mischiefs which the current offences address, in order to discover what sets kidnapping apart from false imprisonment as a distinct offence.

4.26 In formulating new statutory offences we aim to respect some core principles of criminalisation.<sup>28</sup> Any statutory criminal offence should:

- (1) reflect the harm caused;<sup>29</sup> and the culpability of the defendant;
- (2) provide a clear and accurate label for the conduct in question, and should be defined in language that is easy to understand;
- (3) explicitly set out each ingredient of the offence, whether an external element or a mental element, and not leave any to implication;
- (4) not contain overlaps or redundancies among different ingredients of the same offence;

<sup>25</sup> Para 4.233 below.

<sup>26</sup> Para 1.11 above.

<sup>27</sup> In particular the problematic overlap between the force or fraud and lack of consent requirements in kidnapping, and also reducing the substantial overlap between kidnapping and false imprisonment.

<sup>28</sup> A Ashworth and J Horder, *Principles of Criminal Law* (7th ed 2013) pp 45 to 48.

<sup>29</sup> A Ashworth and J Horder, *Principles of Criminal Law* (7th ed 2013) p 28.

- (5) not be unnecessarily wide. In particular, defendants should not be penalised for harm that is inadvertently caused and unforeseeable.

4.27 With these principles in mind, we then set about defining the elements of the offence. It follows from principle (1) that in order to do so, we must first have an idea of the harm and wrongdoing which kidnapping seeks to confront, or in other words the mischief addressed by the kidnapping offence.

### **The mischiefs which underpin the current offences of false imprisonment and kidnapping**

4.28 In seeking to identify the mischief at the heart of kidnapping, we should bear in mind that the offence does not exist in isolation. Kidnapping is an offence against the person<sup>30</sup> and, more particularly, one of the family of abduction offences. Its closest relation is false imprisonment, and kidnapping is often seen as a specific aggravated form of that offence.

### ***Relationship between kidnapping and false imprisonment***

4.29 The offences of kidnapping and false imprisonment both have similar concepts of restriction of movement or deprivation of liberty at their foundation. However, as noted in Chapter 2<sup>31</sup> deprivation of liberty, and related issues of freedom of movement and similar concepts, are somewhat vague and bear different definitions in different contexts.<sup>32</sup>

4.30 The most obvious difference between kidnapping and false imprisonment is that false imprisonment typically (though not necessarily) occurs at a fixed location, whereas kidnapping always requires the movement of the victim ('taking or carrying away' in the current law's terminology). However, at least without some further explanation, this difference alone does not seem to provide a good reason for continuing to differentiate between the two offences as consultees strongly preferred.<sup>33</sup>

4.31 In order to unpack the essential differences between these offences, we consider that it is helpful to look in more detail at the mischief which each offence seeks to address, starting with the offence of false imprisonment. There is a considerable literature, well beyond the scope of this report, analysing the approach taken in different moral philosophies to the classification of offences based on harms and wrongs. However, in this section of the paper we seek to do no more explain some of the obvious harms and wrongs that might be present in false imprisonment and kidnapping.

<sup>30</sup> For theoretical analysis of the harms and wrongs in offences against the person generally see "Rationality and the Rule of Law in Offences against the Person" (1994) 53 *Cambridge Law Journal* 502, reprinted in J Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (2007) pp 33 to 55; R A Duff and S Green, *Defining Crimes: essays on the general part of the criminal law* (2005) pp 4-5.

<sup>31</sup> Paras 2.4 to 2.28 above.

<sup>32</sup> And see further criticism of deprivation of liberty as an ingredient of the offence below at paras 4.197 to 4.218 below.

<sup>33</sup> Including Council of HM Circuit Judges, the Criminal Bar Association and the CPS.

***The mischief involved in the current law of false imprisonment***

- 4.32 It will be recalled that the current common law offence of false imprisonment is defined as the unlawful and intentional or reckless restraint of a victim's freedom of movement from a particular place. We described in Chapter 3 how the offence has been interpreted widely.
- 4.33 The courts have also construed the concept of restriction on freedom of movement widely: there is no requirement that V be physically confined within a specified geographical limit. It is sufficient that V is grabbed by the arm, surrounded by a crowd, or locked in a moving vehicle (although, depending upon how the situation arose, this last fact pattern might also constitute kidnapping).<sup>34</sup> That restriction on freedom of movement, however minor, is a clear harm suffered by V.
- 4.34 False imprisonment is committed even if the victim is unaware of the fact his freedom of movement has been restricted (as where, for instance, V is locked in a room for a period whilst he is asleep). Such pure false imprisonment liability is recognition of the symbolic harm which was done by infringing V's liberty, albeit without V's knowledge. This demonstrates that the law recognises the harm involved in such a restriction itself, irrespective of V's perception of it. The case for criminalising such behaviour is enhanced by the clear wrong done on the part of D since depriving V of liberty demonstrates a denial by D of V's autonomy. In other words this shows D's acute lack of respect for V's freedom of choice to go where he or she pleases, whether or not V is aware of it.
- 4.35 A case of false imprisonment in which V remains unaware of the restriction on his freedom of movement therefore involves:
- (1) Restriction on V's freedom of movement.
  - (2) Denial of V's autonomy.
- 4.36 In a more typical case of false imprisonment the victim will be aware of the fact of their imprisonment, and that introduces a further series of harms:
- (3) V's awareness of the fact of the restriction, leads to awareness of loss of autonomy, and consequent feelings of frustration, anguish etc.
  - (4) V's awareness generates fear of the unknown, including perhaps fear of the infliction of force or some other harm by the person responsible for the restriction, particularly if force was used or threatened by D in bringing about the restriction.
- 4.37 These can arise without the use of or threat of force by D as where D turns a key in the lock on V's room. In addition, where force is used to effect the restriction there is a further wrong, and often harm:
- (5) The use of force, and harmful results (physical and/or psychological) thereof.

<sup>34</sup> See paras 4.105 and following below for discussion of the case where V is enticed into entering a vehicle by D.

***The mischief involved in the current law of kidnapping***

- 4.38 With this brief consideration of the mischief of false imprisonment in mind, we can see how closely related the kidnapping offence is and tease out what justifies its distinct existence.
- 4.39 We know that kidnapping under current law requires the taking or carrying away of one person by another, by force or fraud, without the consent of the person so taken or carried away and without lawful excuse.
- 4.40 Deprivation of liberty<sup>35</sup> is an essential element of the current kidnapping offence. Accordingly, it seems clear that kidnapping will also generate the same basic harm as false imprisonment:

(1) Restriction on V's freedom of movement.

- 4.41 Again, the case for criminalising such behaviour is enhanced by the clear wrong done on the part of D<sup>36</sup> since depriving V of liberty demonstrates a denial by D of V's autonomy. In other words this shows D's acute lack of respect for V's freedom of choice to go where he or she pleases, whether or not V is aware of it. This results in the:

(2) Denial of V's autonomy.

- 4.42 Arguably, in cases of kidnapping a much graver wrong is involved by D causing V to accompany him. D demonstrates a more determined denial of V's autonomy than is present in cases of false imprisonment. Causing V to move in his or her company reduces that person to the status almost of a piece of personal property, to be moved at the owner's will, with complete disregard for that person's own freedom of choice. This will be particularly true in cases where the movement is brought about by force. The fact that the movement is in company with D also demonstrates a continuing commitment on D's part to treat V in this way. This is one basis for distinguishing kidnap from false imprisonment. This heightened form of wrong (2) might be described as:

(2A) A more radical denial of V's autonomy, as a result of the fact that moving V in D's company constitutes the committed and continuous treatment of V like a piece of personal property.

- 4.43 As we saw, false imprisonment can arise without V being aware of the denial of liberty. Likewise, kidnapping can arise where V is completely unaware of that fact that he or she has been taken - as where V is asleep or unconscious. Clearly, such cases can only arise where D has used force to move V with him. In such a case, the heightened wrong (2A) would be present, namely the radical denial of V's autonomy represented by forcible movement. Indeed a case in which D

<sup>35</sup> As noted in paras 2.8 and following above, the terms deprivation of liberty, attack on or infringement of liberty and restriction of freedom of movement have all been used at different times in the context of the criminal offences, but we do not believe the this different terminology has been intended to change the practical effect. For clarity, in this chapter we use 'restriction on freedom of movement' from the leading common law authority on false imprisonment (*Rahman* (1985) 81 Cr App R 349 at 353) except where discussing the existing law of kidnapping's elements.

<sup>36</sup> In bringing about the restriction recklessly or intentionally.

forcibly moved an unconscious V might be considered the most dramatic example of treating V like a piece of property, rather than a human agent.

- 4.44 As with false imprisonment, in most cases of kidnapping<sup>37</sup> V will, however, be aware of the restriction on movement. Therefore, the additional harms identified above for the central case of false imprisonment will also be present, namely:

(3) V's awareness of the fact of that restriction, leading to awareness of loss of autonomy, and consequent feelings of frustration, anguish etc.

(4) V's fear of the unknown, including perhaps fear of the infliction of force or some other harm by the person responsible for the restriction, particularly if force was used or threatened by D in bringing about the restriction.

- 4.45 As with false imprisonment, where force is used to effect the movement, the additional wrong will be present, with potential consequent harms:

(5) The use of force, and harmful results (physical and/or psychological) thereof.

- 4.46 The requirement that V be moved may also give rise to additional or heightened harms, over and above (3) and (4).

(4A) An enhanced fear of the unknown from that described above, as a consequence of the movement ('where are we going?', 'what is the nature of the final location – will it be particularly dangerous?', 'will anyone be able to find me?').

- 4.47 The requirement that V be moved *in D's company* introduces other harms:

(6) An enhanced level of objective endangerment as a result of being moved, and therefore potentially taken away from a familiar or safe place, in company with D. This is most acute when D has used force on V.

(7) An enhanced level of the fear of force or other physical harm from D, in consequence of the fact V is accompanied by D, especially if force has been used or threatened by D to effect the movement.

***The distinct mischief confronted by kidnapping***

- 4.48 The analysis above points to both differences and similarities in the mischiefs which seem to be confronted by the current offences.

- 4.49 Both offences under current law can involve:

(1) Restriction on V's freedom of movement.

(2) Denial of V's autonomy.

<sup>37</sup> Other than the exceptional unconsciousness case, see para 4.43 above.

4.50 In most cases of false imprisonment, and almost all cases of kidnapping, V will be aware of the fact of (1) and (2) above, and hence will also experience:

(3) Awareness of the fact of that restriction, leading to awareness of loss of autonomy, and consequent feelings of frustration, anguish etc.

(4) Fear of the unknown, including perhaps fear of the infliction of force or some other harm by the person responsible for the restriction, particularly if force was used or threatened by D in bringing about the restriction.

4.51 Where force is used to effect the restriction on freedom of movement (whether by way of forced imprisonment or forced movement) the offences will both also generate a further wrong and often consequent harm:

(5) The use of force, and harmful results (physical and/or psychological) thereof.

4.52 However, there are additional harms and wrongs which will only arise in cases of kidnapping. These all flow from the current law of kidnapping's requirement that V be moved in company with D. They are as follows:

(2A) A more radical denial of V's autonomy, as a result of the fact that moving V in D's company constitutes the committed and continuous treatment of V like a piece of personal property.

(4A) An enhanced fear of the unknown from that described above, as a consequence of the movement ('where are we going?', 'what is the nature of the final location – will it be particularly dangerous?', 'will anyone be able to find me?').

(6) An enhanced level of objective endangerment as a result of being moved, and therefore potentially taken away from a familiar or safe place, in company with D.

(7) An enhanced level of the fear of force or other physical harm from D, in consequence of the fact V is accompanied by D, especially if force has been used or threatened by D to effect the movement.

4.53 It is these additional harms and wrongs, which will only arise in cases of *accompanied movement*, which justify the existence of a kidnapping offence as distinct from the offence of false imprisonment. Crucially, these additional harms and wrongs arise most clearly only where D has taken V *by force*.

4.54 It is important to recall that one aim in this section is to identify these various harms and wrongs in order to assist us in distinguishing between false imprisonment and kidnapping. The strong desire on consultation was to retain both offences with kidnapping as an aggravated form of the offence. The basic harms and wrongs we have identified will be present in all false imprisonments. With kidnapping, only some of the further harms and wrongs might be present where D takes V by fraud, and even then to a lesser degree. It appears that it is only in the case where D takes V by force and causes V to accompany him that the conduct engages the range of harms and wrongs that are sufficiently distinct

from false imprisonment to warrant the grave and stigmatising label of kidnapping.

- 4.55 Having reached that conclusion, we are left to examine the current kidnapping offence to see whether it is best designed to confront the additional and heightened harms and wrongs which we believe it should address.
- 4.56 Considering that question has led us to conclude that the current kidnapping offence is over-inclusive. Whilst the additional harms and wrongs identified in this section will only arise in cases of accompanied movement, they will not arise in *all* cases of accompanied movement. Specifically, these additional harms and wrongs will arise in cases of forcible movement, but not in cases of movement by fraud.
- 4.57 We address below<sup>38</sup> the fact that there appears to be no evidence that fraudulent kidnaps in fact occur or lead to prosecution under the current law, with the possible exception of cases of false arrests involving movement. However, taking the hypothetical case of the fraudulently induced movement of V in company with D, it can be seen that neither the heightened wrong described in (2A), nor the additional harms (4A) and (7), nor even the basic harms (3) or (4) would be present.
- 4.58 In cases of fraudulently induced movement V, who is deceived into accompanying D, is still acting and being treated as a reason-guided agent, unlike a V who is forcibly taken by D, and so the radical attack on V's autonomy is lacking. Although the same basic wrong as in false imprisonment (2) may be present, the heightened wrong in (2A) is not.
- 4.59 Furthermore, harms (3), (4), and heightened forms (4A) and (7) would all also be absent. This is because, in the hypothetical fraudulent kidnap case, V would be unaware at the time of the true nature of the movement, since V will be labouring under an induced mistake as to its true purpose.
- 4.60 The harms and wrongs in such cases are the same as that in the most basic case of false imprisonment, namely (1) and (2) above: a restriction on V's freedom of movement in the absence of V's consent (assuming a fundamental nature to the deception<sup>39</sup>). In such a case the harm is one adequately and accurately addressed by false imprisonment and should fall squarely within the remit of the definition of that offence but not kidnapping.<sup>40</sup>
- 4.61 In cases where a person is fraudulently induced to move in D's company and at the end of the journey is detained, or is the victim of some other harm, then a discrete offence will be available (for example, false imprisonment, an offence of violence or a sexual offence). That further offence will accurately reflect the harm involved, in addition to a potential false imprisonment charge for the period during the movement. The harms and wrongs in the kidnap case (the heightened wrong (2A) and harms (3), (4), (4A) and (7)) do not arise in this case. At the time of the

<sup>38</sup> See para 4.105 below.

<sup>39</sup> See para 2.51 and following above.

<sup>40</sup> As to whether false imprisonment at the destination should render the earlier movement kidnapping, see the discussion below at para 4.84 below.

movement in the company of D there is no radical denial of V's autonomy, or any awareness by V of any restriction on freedom of movement or any awareness of threat of harm.

- 4.62 In cases where it is agreed or planned that an offence will be committed against V at the conclusion of the fraudulently induced movement, but this is happily avoided by some intervention, then a charge of a conspiracy and/or an attempt to commit that offence may well be available, in addition, again, to a possible false imprisonment charge during the movement. Once again, the harms and wrongs inflicted against the kidnap victim (heightened wrong (2A) and harms (3), (4), (4A) and (7) above) do not arise in this case at the time of the movement in the company of D: there is no awareness of any restriction on freedom of movement or awareness of any threat of harm.
- 4.63 If the victim of the fraudulently induced movement realises that he has been tricked during the move, and therefore objects, then he will either be released (as in *Cort*<sup>41</sup>) or inevitably force or threats will then be used to compel him to continue to move in company with the defendant.
- 4.64 If V is released, then the appropriate offence to reflect the harms suffered would be one of false imprisonment to represent the period of the fraudulently induced movement. If force or threats are used, then from that time a kidnapping by force would be made out as only at that point are the further harms and wrongs peculiar to kidnapping experienced (as well as a potentially further harm arising from V's realisation that he or she has been duped and placed in a dangerous situation).
- 4.65 It can be seen from these illustrations that the distinct harms and wrongs to be confronted by a new kidnapping offence are very serious but relatively narrow. In consultation there was strong support for the retention of two discrete offences - kidnapping and unlawful detention.<sup>42</sup> It is our intention to ensure that the new kidnapping offence successfully confronts the distinct mischief we have identified. In doing so, a new offence should avoid leaving any gaps in the law, whilst also avoiding the unnecessary overlap and consequent confusion which characterises the current law in this area.
- 4.66 All cases of kidnapping and false imprisonment will involve harm (1) and some level of wrongful denial of V's autonomy (2): these are the basis or foundation of both offences. In most cases of false imprisonment and almost inevitably in cases of kidnapping harms (3) and (4) will also be present, flowing from the fact that V realises that his freedom of movement has been restricted.
- 4.67 However, under the current law it is only in cases of kidnapping that the heightened wrong (2A) or the additional harms (4A) and (7) are ever present. These should therefore be the more definite focus of a new kidnapping offence, ensuring a clearer relationship between kidnapping and false imprisonment.

<sup>41</sup> [2003] EWCA Crim 2149, [2004] QB 388.

<sup>42</sup> See para 4.23 above.



### **The centrality of force to kidnapping**

- 4.68 This analysis leads us to conclude that the new offence of kidnapping, in order to reflect those harms and wrongs (and only those), should omit cases of taking by fraud. Kidnapping should be restricted to cases involving force or threats of force in order to cause V to move with D.
- 4.69 Only in cases of accompanied movement brought about by the use or threats of force is the key heightened wrong (2A) present, and only in such cases will the additional harms (4A) and (7) also generally be present. It is therefore forcible movement in company with D which is the mischief which an independent kidnapping offence must address.
- 4.70 We address the possibility of the use or threat of force against another person (other than V) in more detail below when considering the elements of our proposed new offence.<sup>43</sup>
- 4.71 A new focus on forcible movement meets one of the main concerns regarding the current law. As identified in the CP, and confirmed by consultees, there is an overlap between the current law's requirements of force and fraud on the one hand, and the requirement of lack of consent on the other. With the offence focused on forcible movement it is arguable that neither fraud nor lack of consent need remain as express ingredients of the offence.<sup>44</sup> We return to consider this argument, and the consequences to which it gives rise, in more detail below. However, if accepted this removes the overlapping elements in the existing law, and the confusion to which this gives rise.
- 4.72 We did not consult specifically on the question of adopting force (and/or fraud) in preference to consent. The assumption in our CP, which was shared by those consultees who responded on this issue, was that the natural choice in reducing this overlap was to focus on lack of consent. There is a superficial attraction to this approach, and it would certainly represent an improvement upon the current position. However, it follows from our discussion above that the focus should instead be on forcible takings. We also believe this would coincide with the public's intuitive perception of what kidnapping involves. Forcible taking is certainly what concerns those involved in combating kidnapping.<sup>45</sup>
- 4.73 It is our intention to give a narrower and clearer focus to both the conduct and the harm involved in cases of kidnapping. To that end we now turn to considering the elements of the new kidnapping offence.

### **Elements of the new offence of kidnapping**

- 4.74 So far we have established that it would be desirable to replace kidnapping in statute. We have also suggested that the mischief which should be addressed by

<sup>43</sup> See paras 4.111 to 4.121 below.

<sup>44</sup> Although as we will go on to explain at para 4.160 we recognise that consent will remain theoretically integral since V's consent to being forcibly moved would negate liability, though in practice we believe rarely relevant.

<sup>45</sup> See for an example of a recent typical case of serious violent kidnap <http://www.bbc.co.uk/news/uk-england-29027080> (last visited 10 November 2014).

a kidnapping offence (distinct from false imprisonment) is forcible movement in company with D.

4.75 Focusing on this mischief leads us to conclude that a new kidnapping offence should contain at least the following elements, all of which look familiar from the current law:

- (1) movement (currently 'taking or carrying away');
- (2) by force (the use or threat thereof); and
- (3) without lawful authority or reasonable excuse.<sup>46</sup>

4.76 We will discuss these elements of our proposed new offence in turn. Rather than giving it separate consideration, we discuss the question of the mental element of our new offence in respect of each of the other ingredients as we go along. Some definitional questions regarding these elements, following from our analysis of the current law in Chapter 2, are answered in this section:

- (1) Should the offence require D to accompany V during V's move from one place to another?
- (2) How should D's conduct be defined? "Taking or carrying"? Other verbs, such as "sending" and "moving"? Or should it be any conduct which causes V to go or be moved from one place to another?
- (3) Should the offence always require intention, or is recklessness sufficient? Recklessness about what: the moving or the use of force?
- (4) Should the definition of the offence include simply a reference to lawful authority or reasonable excuse, or should there be more detail about what would fall into those categories?

### ***Moving and accompanying***

4.77 As stated above, an essential ingredient of kidnapping is that V was in one place and has come to be moved as a result of some conduct by D. The question is:

- (1) whether the offence should include all such cases (subject to the other ingredients; or
- (2) whether it should be confined by prescribing particular forms of conduct as necessary for the offence.

4.78 The definition of the existing offence speaks of "taking or carrying away". According to *Handy-Freegard*,<sup>47</sup> one implication of this wording is that D must be

<sup>46</sup> As stated above at para 2.2 the current common law offence refers to 'lawful excuse'. However modern statutes prefer the language of lawful authority or reasonable excuse (as in the Child Abduction Act 1984 considered in this report) and we believe consistency in this regard is preferable.

<sup>47</sup> [2007] EWCA Crim 1236, [2008] QB 57. See para 2.31 above.

with V during the process. In the CP we speak of this restriction as “the requirement of accompanying”.<sup>48</sup> This raises the following questions:

- (1) Should the requirement of accompanying be retained?
- (2) If so, should the offence be defined by:
  - (a) retaining “take” and “carry away”;
  - (b) using a general formula such as “cause to go or be moved in D’s company”; or
  - (c) separating “taking” which seems to indicate the initial act of removal, from “moving” which suggests a more continuous on-going action?
- (3) If not, should this be done by:
  - (a) removing the requirement altogether;
  - (b) retaining “take” and “carry away” but adding other verbs such as “send” or “move”; or
  - (c) using a general formula such as “cause to go or be moved”?

#### SHOULD THE REQUIREMENT OF ACCOMPANYING BE RETAINED?

4.79 The requirement that D must accompany V was discussed in detail in the CP.<sup>49</sup>

4.80 Arguments in favour of retaining a requirement of accompanying are as follows:

- (1) The normal meaning of kidnapping, as we assume it to be understood by members of the public, is the capture and forcible abduction of one person by another.<sup>50</sup> Widening the offence to include cases of sending V without D being present would distort it beyond recognition.
- (2) Under the current law the requirement serves a useful purpose by excluding cases in which V is simply sent to some destination by means of a deception.<sup>51</sup>

**Example 2.** D tells V (falsely) that if V goes to a particular house at a specified time V will receive a prize.

- (3) If D accompanies V during the journey, this may add to V’s experience of fear, as V does not know what D may do next. If D is not present the harm

<sup>48</sup> CP paras 4.82 and 4.83.

<sup>49</sup> CP paras 3.25 to 3.32.

<sup>50</sup> This view was expressed by the Council of HM Circuit Judges, the CPS, the Criminal Bar Association and the senior judiciary (response drafted by Lord Chief Justice Thomas, when he was President of the Queen’s Bench Division, and Lord Hughes, when he was Vice President of the Court of Appeal Criminal Division).

<sup>51</sup> CP para 3.25.

suffered by V is known and limited. D's presence may also make it less likely that V will be rescued.

4.81 Arguments against retaining a requirement of accompanying are as follows:

- (1) The cases of sending by deception just mentioned,<sup>52</sup> such as the false promise of a prize, are already excluded under current law by the requirement of deprivation of liberty,<sup>53</sup> and would be excluded under our recommendation which removes fraud altogether.<sup>54</sup> There is no need to reinforce this exclusion by means of a requirement of accompanying.
- (2) The correlation between D's presence and V's experience of fear may not be all in one direction. If D accompanies V during the journey, in some cases V may be able to persuade D to release V. If V is alone that possibility may be more limited, and there is still scope for fear about what will happen next.
- (3) Given modern technology, it is increasingly possible to attempt to control a person's behaviour without being physically present. There are several recent cases in which D used the internet to blackmail or intimidate V into various forms of humiliating sexual conduct.<sup>55</sup> The newspapers frequently report cases of "cyber-bullying", sometimes leading to suicide. It is conceivable that cases may arise where D controls V's movements by threats or deception by remote electronic means. However, our informal consultation with experts from the police, legal practitioners and the judiciary confirmed that this is not a problem they have encountered. It may amount to other offences, particularly if involving children.<sup>56</sup>

4.82 The question whether to retain a requirement of accompanying was not formally put to consultation. However the Council of HM Circuit Judges expressed the view that:

The question of accompaniment...should be immaterial in any event. For example putting a person in a container and sending it should be classed as kidnapping. Those who cause a person to be conveyed but do not actually accompany the victim can be convicted on the normal principles of joint enterprise or aiding and abetting.

4.83 This last point, however, will only be true when the driver of the container lorry is party to the scheme. It will, in any event, be a false imprisonment for which the same sentence would be available.

4.84 The question is closely associated with whether the offence should include a case where the restraint occurs only at the conclusion of the journey, or whether

<sup>52</sup> Para 4.80 above.

<sup>53</sup> CP para 3.26.

<sup>54</sup> See para 4.196 below.

<sup>55</sup> See *B* [2013] EWCA Crim 823, [2013] 2 Cr App R 29.

<sup>56</sup> One example is the offence of meeting following sexual grooming: Sexual Offences Act 2003, s 15, as amended by the Criminal Justice and Immigration Act 2008, Sch 15 para 1.

it should be confined to cases where the restraint occurs during the journey. This question was raised in the CP.<sup>57</sup>

- (1) In the first case, the offence includes a case where V is confined at the end of a journey. If so, it makes sense to include cases where V is sent to the place of confinement as well as cases where V is taken there.
- (2) In the second case, the focus is on restraint to V's movement during the journey itself. In that case, subsequent events should be irrelevant. Kidnapping can then be confined to its primary form, in which D compels V to accompany D to a place of D's choosing and V is not free to leave D's company.

4.85 We consider that kidnapping should be confined to the compelled transportation of V in company with D, leaving false imprisonment to deal with other cases. Extending it to unconstrained movement followed by imprisonment complicates the offence and creates an unnecessary overlap with false imprisonment. Accordingly it is preferable to retain the understanding of kidnapping in which D physically abducts V.

4.86 **We recommend that the new offence of kidnapping should contain a requirement that D accompany V throughout.**

TAKING, CARRYING, MOVING OR CAUSING TO BE MOVED?

4.87 The next question is how to express the element of the offence that consists of the moving or transporting of V. The current definition speaks of "taking or carrying away".

4.88 One advantage of this definition is brevity. In its original context of "taking and carrying away", it means to capture or take possession of someone or something. In the definition in *D*,<sup>58</sup> which speaks of "taking *or* carrying away", it seems to mean to lead or accompany someone somewhere. "Carry", while unambiguous, would be too narrow on its own, as it includes the case where V is moved in a vehicle but not the case where V accompanies D using V's own powers of movement.

4.89 Rather than the over-narrow "carrying" we therefore consider that a broader term such as "causing to move" is preferable. However, since "taking" captures the initial act of capture which is the central case of kidnapping, and this language is familiar in the context of the existing offence, we consider it desirable to retain this language.

4.90 As our final recommendation is to tie kidnapping more closely to the use or threat of force we consider that the offence should be able to be committed in two ways:

- (1) First, the central case of kidnapping, which reflects at least the majority of the reported cases, namely the taking of a person by force or threats of force.

<sup>57</sup> CP para 2.123.

<sup>58</sup> [1984] AC 778.

- (2) Second, the continued movement of a person, whether the initial taking was by force or threats or otherwise (for example, the initial “taking” might have been with the victim’s consent, where they freely follow D) where that continued movement contains the necessary element of force or threats.<sup>59</sup>

4.91 **We recommend that the new offence of kidnapping should contain a requirement that D takes or otherwise causes V to move.**

#### INTENTION OR RECKLESSNESS AS TO MOVING

4.92 Should the new offence of kidnapping contain a requirement that D intended V to move in his company, or should recklessness be sufficient?

4.93 In the reported cases, the existing offence of kidnapping is described as one of recklessness.<sup>60</sup> We argue above<sup>61</sup> that this description does not distinguish between recklessness about moving and recklessness about consent or causing deprivation of liberty. However, we have found no reported kidnapping cases in which the moving of V was prosecuted on the basis of recklessness rather than intention. We suggest above<sup>62</sup> that such cases are at present unlikely to occur in practice because of two requirements of the existing offence:

- (1) the requirement of force or fraud; and
- (2) the requirement of accompanying.

4.94 Our proposed offence is narrower than the existing offence, in that it focuses on force or threats of force. This would appear to reduce further the practical possibility of a case of reckless kidnap.

4.95 In our view any hypothetical possibility of reckless kidnapping would in any event not be serious enough to deserve the label of kidnapping. In the absence of evidence that these cases of reckless taking occur and that the lack of criminal liability for them is regarded as problematic, the principle of minimum criminalisation<sup>63</sup> indicates that they should continue to be excluded from the offence.

4.96 **We recommend that the new offence of kidnapping should be committed only when D intends to take V or cause V to be moved with him and that recklessness should not be sufficient.**

4.97 So far, then, we consider that the offence should be committed when D intentionally takes V, or causes V to continue to be moved from one place to another, in company with D. This description is of course subject to the remaining ingredients of the offence. In the existing law, those remaining ingredients are force or fraud, deprivation of liberty and lack of consent.

<sup>59</sup> See para 4.98 and following below.

<sup>60</sup> *Hutchins* [1988] Criminal Law Review 379.

<sup>61</sup> Para 2.93 and following above.

<sup>62</sup> See para 2.97 above.

<sup>63</sup> A Ashworth and J Horder, *Principles of Criminal Law* (7th ed 2013) p 31 and following.

***The means by which D takes or moves V***

4.98 As noted in Chapter 2, the offence of kidnapping under existing law (with its requirement of force and fraud) incorporates the following scenarios:

- (1) V is taken by D using force.
- (2) V is taken by D using the threat of force.
- (3) V is taken by D using deception as to D's lawful authority to compel V to accompany D.
- (4) V is taken by D through some further deception by D, such as D's identity or the nature of the move.

4.99 The reported cases seem to be limited to instances (1) to (3). Despite the theoretical possibility of kidnapping by fraud, as discussed in Chapter 2 above, in practice the only kidnappings of this kind appear to be the false arrest cases. We recommend that such cases remain criminal but be prosecuted as unlawful detention<sup>64</sup> since V in such cases would not experience the harms and wrongs we identified as central to kidnapping.

4.100 In *Hendy-Freegard* the Court of Appeal discussed the facts of *Cort*,<sup>65</sup> and the relevance of the deception that the defendant in that case practised against the women who entered his vehicle.<sup>66</sup> The court concluded that although there was a deception, it was not one such as to vitiate consent to the journey, nor was it possible to say that the women had experienced a loss of liberty. The deception (impersonating an employee of the transport company) was not such as to render his actions kidnapping, since the nature of what the women consented to, being taken from one place to their chosen destination, was unchanged. If the women had desired to leave, as one did, the clear evidence was that they would have been allowed to do so, as the one was.

4.101 It appears from this authority, and the paucity of reported cases (or cases discussed with us by practitioners on further consultation) involving kidnapping by deception other than false arrest cases, that cases of kidnapping by fraud will be rare. We considered carefully whether the possibility of cases of fraud as to identity or nature of the movement (which would be kidnapping under existing law, as consent would be vitiated) were sufficiently likely to militate against dispensing with fraud as a mode of committing kidnapping. However, we concluded that in the absence of evidence of such frauds, and given that false imprisonment could be charged<sup>67</sup> it was worthwhile to create a coherent and narrow kidnapping offence focusing solely on force and threats of force.

4.102 In addition to practical gains in terms of certainty, and a reduced overlap between kidnapping and false imprisonment, we have explained above how focusing on force and threats of force gives kidnapping a conceptual coherence based on the

<sup>64</sup> See para 4.57 and following above.

<sup>65</sup> *Cort* [2003] EWCA Crim 2149.

<sup>66</sup> *Hendy-Freegard* [2007] EWCA Crim 1236, [2008] QB 57. See para 2.67 above.

<sup>67</sup> See para 4.246 and following below.

distinct harms and wrongs which will generally be present in cases of forcible movement.<sup>68</sup>

- 4.103 Although it is not our intention to engage in detailed drafting, in this chapter the word force is intended to convey a requirement of some physical contact between D and V. It is not our intention, in the absence of such physical contact or the threat of it, to include within the notion of force a case where a person is compelled to move by some external but inanimate energy source - such as by being locked in a moving vehicle without any threat of physical violence from a person. Such a case would always be false imprisonment (or unlawful detention under our recommendations), but should not be kidnapping unless some physical contact between D and V is used or threatened, explicitly or implicitly.
- 4.104 This is consistent with the general position in offences against the person. For example, in battery, force includes any contact with V's person to which they do not consent because "the fundamental principle, plain and incontestable, is that every person's body is inviolate".<sup>69</sup> On that basis, force is not defined by a minimum level of severity.<sup>70</sup>
- 4.105 We have considered the hypothetical case in which V is induced to enter a vehicle by fraud, and then later realises the mistake, but is prevented from leaving it during a subsequent journey as a result of being locked in, or simply as a result of the speed of the vehicle. We believe that at the time when V realises the mistake and makes it clear that they wish to leave, it is very likely that force would be used or threatened by D in order to ensure V did not leave. Invariably, depending on the circumstances as assessed by a jury, the actions of the defendant in preventing V from leaving would also be likely to be viewed as constituting an implicit threat of imminent force against V. If such a conclusion were reached on the facts, then this would become a kidnapping from that moment.
- 4.106 However, in the rare case where this did not occur, and V's inability to leave the vehicle was solely a product of being locked in, in the absence even of an implicit threat, we believe that it is appropriate that this be categorised as unlawful detention (and so still punishable with up to a maximum of life imprisonment) but not kidnapping. This is because several of the harms and wrongs usually present in kidnapping are absent in such a case. D has not used or threatened force, which is of course a distinct wrong in itself, and the heightened wrong identified above<sup>71</sup> involved in forcibly moving a person is absent. Such a scenario also lacks the graver harms in terms of fear and anxiety which would generally flow from being moved in company with a person who has already demonstrated a definite willingness to use or threaten violence.

<sup>68</sup> See paras 4.48 and following above.

<sup>69</sup> *Collins v Wilcock* [1984] 1 WLR 1172 at [1177]. Contrast with police use of force under s 117 of the Police and Criminal Evidence Act 1984 where the force need not be exerted against the physical person, see *Swales v Cox* [1981] QB 849 at 854.

<sup>70</sup> *Blackstone's Commentaries* (17th ed 1830), vol 3 p 120.

<sup>71</sup> Para 4.42 above.



4.107 We asserted above<sup>72</sup> that in almost all cases of kidnapping, under our proposed narrower offence, V would inevitably be aware of the fact of the restriction on freedom of movement in motion. The only exception to this assertion, which we can envisage, would be where V was unconscious at the time of the movement. There are no reported cases in England and Wales of kidnapping in which a defendant takes advantage of V's pre-existing unconsciousness in order to move them without their knowledge. However, even in such a case, the key heightened wrong which we believe informs kidnapping as distinct from false imprisonment would be present, namely the radical denial of V's autonomy represented by forcible movement. Indeed a case in which D forcibly moved an unconscious V might be considered the most dramatic example of treating V like a piece of property, rather than a human agent.

4.108 **We recommend that the new offence of kidnapping should contain a requirement that D takes V or otherwise causes V to move by force or threat of force.**

#### INTENTIONAL OR RECKLESS USE OR THREAT OF FORCE TO MOVE V

4.109 We consider that only an intentional use or threat of force on the part of D should suffice because:

- (1) it is difficult to imagine a realistic scenario in which D could recklessly use or threaten force with the result that another person moved in their company;
- (2) this reflects the serious nature of our proposed new kidnapping offence; and
- (3) the basis of the offence is a forcible movement. Therefore, it should be a requirement that in using or threatening force D's intention is to cause V to move in his company.

4.110 **We recommend that the new offence of kidnapping contain a requirement that D intentionally uses or threatens force in order to take or otherwise move V.**

#### FORCE DIRECTED AT WHOM?

4.111 With the recommended kidnapping offence focused securely on force and threats of force, there remains a subsequent question: at whom need the force or threats be directed? There are at least 2 possibilities:

- (1) the force or threats must be directed at V; or
- (2) the force or threats can be directed at V or another person or persons.

4.112 We discussed this issue with a range of stakeholders on further consultation, and although views were somewhat mixed, most came out in favour of (2).

4.113 The argument in favour of (2) is that the effect on V of experiencing D's threats or force directed at another could be just as (or even more) traumatic than the effect

<sup>72</sup> Para 4.43 above.

of force directed at V. For instance, threats of force directed at V's young child are likely to be just as effective in compelling V to move in company with D against V's will as would threats directed against V.

- 4.114 The counter-argument is that (2) shifts the focus of the offence away from being purely an offence against the person, and brings it closer to a general offence of threats, more akin to blackmail. This is particularly so since the object of the threats, unlike V, need not be present with D, and indeed need not in fact be in any danger at all.
- 4.115 It could also be objected that this approach might involve the law in a difficult line-drawing exercise if the closeness of the relationship was determinative. We would not want to draw up exhaustive lists of relationships which would be sufficiently close for these purposes - we do not believe that that would be possible or necessary. If the question is whether the relevant harms are generated, the position should be the same whether the force or threats of force are made against any individual if D's intention is to cause V to be so intimidated by them as to accompany him.
- 4.116 The question then arises, if such threats could be sufficient, why not threats of serious damage to valuable property: a threat to burn down V's house, for instance? If threats of property damage could ever be sufficient for these purposes, difficult questions of subjective or objective value would have to be confronted in deciding whether a particular threat to property was sufficiently grave. On the other hand, the criminal law confronts similar issues in the context of the defence of duress, and relatively certain lines have been drawn in this context.<sup>73</sup>
- 4.117 On balance, we consider that force or threats of force directed at another should suffice. This is because we consider the mischief identified above which forms the basis of our new re-focused kidnapping offence would typically be present in a case of movement brought about by force or threats of force against a third party (typically a close friend or relative).
- 4.118 In such a case V would experience the same basic harms and wrongs:
- (1) Restriction upon freedom of movement.
  - (2) Denial of autonomy.
  - (3) Awareness of that restriction, leading to awareness of loss of autonomy, and consequent feelings of frustration, anguish etc.
  - (4) Generalised fear of the unknown.

as a result of that restriction, as V would if the force or threats had been directed at V.

<sup>73</sup> Only threats to inflict immediate or almost immediate death or serious harm will suffice. Such threats can be towards V, or his immediate family or other person for whose safety V would reasonably regard himself responsible: *Hasan* [2005] UKHL 22, [2005] 2 AC 467 at [21].

4.119 Furthermore, V would also experience the same additional or heightened harms which we believe characterise kidnapping, namely:

(2A) A more radical denial of V's autonomy, as a result of the fact that moving V in D's company constitutes the committed and continuous treatment of V like a piece of personal property.

(4A) An enhanced fear of the unknown.

(6) An enhanced level of objective endangerment.

(7) An enhanced level of fear of force or other physical harm from D, in consequence of the fact that V is accompanied by D, especially if force has been used or threatened by D to effect the movement (albeit against another).

4.120 Finally, although a person, V, in this situation would not have suffered the harm of being the personal victim of force or threats<sup>74</sup> the same wrong (the use of or threat of force against a person) would have occurred and V would have suffered an alternative harm of a similar gravity. That harm would be experiencing the use or threat of force against another, often a loved one, and the feelings of powerlessness and fear for the safety of that other person this would bring about.

4.121 In terms of line-drawing concerns, the line drawn in the context of duress seems a principled one, namely that there is no closed class of personal relationships which are required, threats or force against any other person can in principle be sufficient.<sup>75</sup> Unlike duress, which for policy reasons must be kept within narrow bounds, we do not consider it necessary to restrict the level of threatened force to any particular threshold. However the force or threat of force must be against a person, force or threats of force to property will not give rise to kidnapping liability without more (though it would constitute various other criminal offences).

#### TIMING OF THE THREAT OR USE OF FORCE

4.122 We have recommended that D must intend his use or threat of force to cause V to move with D.<sup>76</sup> It follows that D must intend that his force or threats are operative upon V at the time of the taking or continued movement.

4.123 In cases where V is moved because of physical force this requirement will inevitably be satisfied. However, in a case where the threat or use of force precedes the taking or continued movement, this should be no bar to liability. In other words, kidnapping should not be restricted to situations in which V is physically manhandled by D, but should also apply where D's use or threat of force intimidates V, causing V to move in company with D, in order to prevent (further) force.

4.124 In such cases of kidnapping by intimidation, it must simply be D's intention that the effect of the threat or use of force (even where it substantially precedes the

<sup>74</sup> "Harm (5)", see 4.37 above.

<sup>75</sup> *Hasan* [2005] UKHL 22, [2005] 2 AC 467 at [21].

<sup>76</sup> See para 4.110 above.

movement) is to cause V to fear the use of further force, and that this fear is operative upon V's mind at the time of the taking or continued movement.

**Example 3.** On Monday, D approaches V and punches him repeatedly in the face. The following Friday D again approaches V and tells him to get into D's car and accompany him on a journey.

- 4.125 Although the use of force substantially precedes the movement, D is aware that the previous use of force is continuing to act on V's mind so as to cause them to fear further force at the time of the movement, and D intends that this continuing fear will cause V to accompany D. Kidnapping is made out.

**Example 4.** D says to his estranged wife "come with me now or the next time I have contact with our daughter I will harm her".

- 4.126 So far, then, we consider that the offence should be committed when D intentionally uses or threatens force in order to take or otherwise cause V to move in his company.

#### ***Lawful authority or reasonable excuse***

- 4.127 Excuses and defences are an area of the law that gives rise to considerable discussion in academic literature.<sup>77</sup>

- (1) There is a distinction between true defences and facts which, if proved, simply negate some part of the facts or state of mind required for the offence.<sup>78</sup>
- (2) There is a distinction between circumstances that justify the *act* (such as self-defence) and those that merely excuse the *actor* (such as duress).<sup>79</sup>
- (3) Then there is the question of putative defences. On the orthodox view, defences do not come into play until both the *actus reus* (objective facts) and *mens rea* (state of mind) are established. If so, believing that a defence (such as self-defence or duress) exists is not a negation of *mens rea*, but a separate defence of mistake. But is the position different where an offence is worded as "without reasonable excuse"?<sup>80</sup>

<sup>77</sup> R A Duff, *Answering for Crime* (2007) ch 11; J Horder, *Excusing Crime* (2004); W Wilson, "The Structure of Defences" [2005] *Criminal Law Review* 108; V Tadros, *Criminal Responsibility* (2005) pp 115 to 130; J Gardner, *Offences and Defences* (2007) pp 77 to 139.

<sup>78</sup> A Ashworth and J Horder, *Principles of Criminal Law* (7th ed 2013) para 6.1, p 193.

<sup>79</sup> A Ashworth and J Horder (above) para 6.7, p 225 and following.

<sup>80</sup> Yes, according to G Williams, *Textbook of Criminal Law* (2<sup>nd</sup> ed 1983) p 137; M Giles "Self-Defence and Mistake: a Way Forward" (1990) 53 *Modern Law Review* 187, 191. No, according to A Simester, "Mistakes in Defence" (1992) 12 *Oxford Journal of Legal Studies* 295, 299 and following.

- 4.128 These difficulties are conceptual and do not make much difference to the way any concrete case should be decided, except perhaps in the form of the honest mistake/reasonable mistake question.
- 4.129 Nor do these difficulties impinge on kidnapping more than on other offences. On the whole, the most likely to arise are those of self-defence, lawful (official or parental) authority and necessity.<sup>81</sup> However, because there is no requirement to prove lack of consent as an express element of our proposed new kidnapping offence, there is also a question about how the common law approach to consent, as it applies for instance to offences of common assault and battery, might apply to our new offence.

LAWFUL AUTHORITY AND NECESSITY: IS THERE A DANGER OF OVER-CRIMINALISATION?

- 4.130 The authority of police officers, medical staff and others to restrain or move those in their charge is very explicitly laid down in statute and regulations.<sup>82</sup> In addition, these actions may be justified by a common law defence of necessity.
- 4.131 A question arises whether these defences are equally applicable to the recommended new offence. At present the conduct element of kidnapping is “taking or carrying away by force or fraud”. We are recommending an offence, based on taking or continuing to move. (The new offence will have a requirement of accompanying<sup>83</sup> and a requirement of force or threats of force,<sup>84</sup> and so any widening is severely limited). This could theoretically have unintended consequences if one of the defences was explicitly confined to taking or carrying away and did not cover acts of continued moving.
- 4.132 In the course of consultation we raised this question with bodies including the UK Missing Persons Bureau, the National Crime Agency (NCA)<sup>85</sup> and the Department of Health. The NCA in turn consulted several police forces. None of these bodies considered that removing the overlap between force or fraud and lack of consent elements posed a significant danger of over-criminalisation. Our own analysis, given in the next few paragraphs, supports this conclusion.
- 4.133 The practical context of the question is as follows. Police, prison officers, care workers and health workers often have occasion to detain or move people. Occasionally this is held to fall outside their legal powers, for example because it is an infringement of the human rights of those moved.<sup>86</sup> In some such cases,

<sup>81</sup> Including the care of those lacking in capacity: Mental Capacity Act 2005, paras 2.79 to 2.84 above.

<sup>82</sup> Paras 2.78 and following above.

<sup>83</sup> See para 4.86 above.

<sup>84</sup> Para 4.108 above.

<sup>85</sup> We have consulted on this project with representatives of the NCA both before October 2013, when they were the Serious Organised Crime Agency (SOCA), and since they became the NCA.

<sup>86</sup> *G v E* [2010] EWHC 621 (Fam), [2010] 2 FLR 294. See also paras 2.73 and following above and *Surrey County Council v P and Q*; *Cheshire West and Chester Council v P* [2014] UKSC 19, [2014] AC 896.

while civil proceedings might appropriately be brought, it could be disproportionate to label and punish those responsible as kidnappers.

4.134 As against this, it may be observed that:

- (1) in most such cases, the workers in question will be exempt from criminal liability on the ground of belief (or reasonable belief) that the circumstances brought the act in question within their statutory powers; and
- (2) questions of degree occur in many offences and are largely resolved by prosecutorial discretion.

4.135 To investigate the question in more detail, we consider the relevant powers and defences in the same order as in Chapter 2.<sup>87</sup>

- (1) *Police powers of arrest.* Arresting a person almost always involves taking or carrying that person away. Some police actions, such as “kettling”, may involve continuing to move a person without any act of taking or carrying away. These could in principle be brought within the scope of the new offence. However, these actions are already potentially within the scope of false imprisonment, and have been held to be justified by broader police powers such as the power to prevent a breach of the peace.<sup>88</sup> They should therefore equally be excluded from the new offence.
- (2) *Prison officers.* The relevant powers are the power to detain and the power to move. These are broad enough to cover any act potentially falling within the scope of the recommended new offences.
- (3) *Repatriation.* The Repatriation of Prisoners Act 1984 speaks of “transfer”. This is broad enough to cover any act potentially falling within the offence which might be needed for the relevant purposes.
- (4) *Mental Health Act 1983.* The relevant powers are ones of “removal”. This is broad enough to cover any act potentially falling within the offence which might be needed for the relevant purposes.
- (5) *Mental Capacity Act 2005.* The relevant immunity covers the deprivation of liberty,<sup>89</sup> detention,<sup>90</sup> “any act done in connection with the care or treatment” of a person<sup>91</sup> and “restraint”, meaning the application of force or the restriction of freedom of movement. Subject to one question, discussed in the next few paragraphs, these powers are also broad enough to cover any act potentially falling within the scope of the recommended new offence.

<sup>87</sup> See paras 2.73 and following above.

<sup>88</sup> *Austin v Metropolitan Police Commissioner* [2007] EWCA Civ 989, [2008] QB 660: the appeal to the House of Lords ([2009] UKHL 5, [2009] 1 AC 564) concerned the human rights issue and did not consider the domestic law of false imprisonment.

<sup>89</sup> MCA, ss 4A and 4B.

<sup>90</sup> MCA, Sch A1.

<sup>91</sup> MCA, s 5.

- 4.136 Most of the above powers concern the actions of health professionals or other persons in an official position. The exception is the Mental Capacity Act 2005, which covers anyone who makes a decision on behalf of a person lacking capacity, including carers and family members.<sup>92</sup> In principle, then, that Act protects family members who take a patient away from a hospital or care home which they consider to be unsuitable, provided that they reasonably believe that this is in the patient's best interests. This will be true equally under the present law and if Recommendation 1 is implemented.
- 4.137 The one exception to this would be if the taking involved a deprivation of liberty, in the sense used in article 5 of the European Convention on Human Rights. Under the 2005 Act, such a taking can only be justified by:
- (1) an order of the Court of Protection,
  - (2) an authorisation by the managing authority of a hospital or care home, or
  - (3) an urgent need for medical treatment.<sup>93</sup>
- 4.138 There is therefore a theoretical possibility that Recommendation 1 will impose criminal liability on a family member who forcibly takes away a patient, in circumstances other than the three justifications given above.<sup>94</sup> We find it hard to devise a realistic example of such a case and, even if it occurs, we do not believe that it will cause problems in practice. If there is a strong enough need for the taking, there will be a defence of necessity at common law. If there is no such need, the taking will amount at least to false imprisonment in existing law and should properly amount to kidnapping if the other elements are made out.
- 4.139 In conclusion, we do not believe that widening the offence of kidnapping beyond "taking or carrying away", poses a significant danger of over-criminalisation. There is no need either to narrow the new offence to fit the defences or to widen the defences to fit the new offence.

#### OTHER DEFENCES AND EXCUSES

- 4.140 The remaining defences, such as self-defence, duress and mistake, take the same form in all offences against the person and raise no issues peculiar to kidnapping. In general, where there is a broad legal principle that affects many offences, it is preferable to reform that principle as a whole (if reform is needed) rather than offence by offence. This is not an absolute rule: some issues, like consent, do impinge very differently on different offences. But in this case, any attempt to be too explicit about what constitutes "lawful authority or reasonable excuse" would indeed risk unnecessary fragmentation in the law.
- 4.141 There is no need to make any provision for whether D knew or was reckless about the absence of a reasonable excuse. As in existing law, D's belief<sup>95</sup> in the

<sup>92</sup> See paras 2.79 to 2.84 above.

<sup>93</sup> See para 2.82 above.

<sup>94</sup> Para 4.137 above.

<sup>95</sup> Genuine belief, or reasonable belief, depending on which excuse is in question: paras 2.87 to 2.88 above.

existence of some lawful authority or reasonable excuse is itself a species of reasonable excuse.

#### INTOXICATION

- 4.142 There has been debate and uncertainty in the criminal law regarding the extent to which a defendant can rely on his self-induced intoxication (for instance drunkenness) to assist in resisting a criminal charge. In certain circumstances this fact could be relied upon in supporting the suggestion that the defendant lacked the required culpable mental state as a result of being intoxicated, and therefore the necessary elements of the offence cannot be made out. On the other hand, there are clear reasons of public policy for keeping any such defence within narrow limits.
- 4.143 Although the position remains somewhat unclear, the safest view appears to be that that any offence which may be committed recklessly is what the law has termed an offence of 'basic intent' in which the defendant's self induced intoxication does not provide an excuse. By contrast, crimes of 'specific intent' are those where evidence of voluntary intoxication negating mens rea can provide an excuse.<sup>96</sup>
- 4.144 We are conscious that the effect of our decision to make kidnapping an offence requiring intention<sup>97</sup> rather than recklessness is to render the new offence one of specific intent, such that a plea of voluntary intoxication *would* be available to a charge of kidnapping.
- 4.145 We consider it highly unlikely that facts will arise in which D uses threats or force with the effect that V is induced to move along in their company, in circumstances where D is so intoxicated as to be incapable of forming any positive intention.
- 4.146 However, as noted above,<sup>98</sup> false imprisonment is an offence of basic intent. False imprisonment (or its replacement, unlawful detention) would therefore be available as an alternative charge where a person was deprived of their freedom of movement whilst in transit, by a person who used threats or force against them, but was judged too intoxicated to have formed an intention (either to use such force or threats, or to have intended to bring about V's movement).
- 4.147 An alternative verdict of guilty of the basic intent offence of unlawful detention would be a more appropriate result in the rare case where D genuinely did not intend to use or threaten force, or did not intend to bring about V's movement, as it would reflect D's lesser culpability. On the other hand, the possibility of a conviction for unlawful detention even in such circumstances would ensure the wrongfulness of D's conduct was properly acknowledged were D to move V forcibly in a state of self induced intoxication.

<sup>96</sup> See generally *Smith and Hogan* at para 11.4.3; A Simester, J Spencer, G Sullivan and G Virgo *Simester and Sullivan's Criminal Law* (5th ed 2013) at p 699. See also R Williams "Voluntary intoxication: a lost cause?" (2013) 129 *Law Quarterly Review* 264

<sup>97</sup> Both as to the use or threat of force, and to the effect this would have, namely to move V, see paras 4.92 to 4.97 and 4.109 to 4.110 above.

<sup>98</sup> See para 3.15 above.



## CONSENT

- 4.148 There is extensive academic literature addressing the subject of the role of consent in the criminal law, particularly in the context of offences of force.<sup>99</sup>
- 4.149 In the most general terms, the common law position appears to be that effective consent of the subject (that is, consent not vitiated by some factor such as duress, fraud or lack of capacity) will always negate criminal liability for common assault or battery. However, for injury, such as would fall at least within the offence of causing actual bodily harm, factual consent of the injured party will not generally negate criminal liability, unless the case falls into one of a number of recognised exceptional categories.<sup>100</sup>
- 4.150 One of the aims of our reform is to align the offence of kidnapping more closely to offences of force. A forcible taking or moving, like an assault, is a clear wrong which requires a defence in order to be lawful. This is in contrast to acts of sexual intercourse and sexual touching, which are lawful acts unless there is something to make the conduct unlawful in a particular situation (for example, lack of consent).<sup>101</sup> For this reason, in addition to the reasons given above<sup>102</sup> we do not think that lack of consent need be expressly included as an external element of the new offence. A question therefore arises as to the application of the common law approach to consent in the context of our proposed offence.
- 4.151 We consider that the common law treatment of consent in the context of violent offences could be applied without great difficulty to our proposed kidnapping offence.
- 4.152 If V did consent to the use of force by D in order to be moved, that would mean that D was not liable. Similarly, if D genuinely believed that V consented to his use of force or threats of force to move V, that would mean that D lacked mens rea and was not liable.
- 4.153 We consider that situations in which a person consents to being moved *by force* will be highly uncommon (for the obvious reason that if a person consents to being moved, it will generally be unnecessary for force to be used against them for the purpose of moving them).
- 4.154 The only realistic situation in which we can envisage such consent being given is in the course of an elaborate game or role-play: consent of this type might truly be given in the context of an initiation ceremony or a stag party prank for

<sup>99</sup> See LC CP No 134 *Consent and Offences Against the Person* (1994), LC CP No 139 *Consent in Criminal Law* (1995); S Shute, "Something Old, Something New, Something Borrowed – Three Aspects of the Consent Project" [1996] *Criminal Law Review* 684; P Roberts, "The Philosophical Foundations of Consent in the Criminal Law" (1997) 17 *Oxford Journal of Legal Studies* 389.

<sup>100</sup> These categories include sports, 'horseplay', surgery, 'body modification' such as tattooing and piercing, lawful chastisement of children and consent to the risk of sexually transmitted infection. There is uncertainty as to whether liability for recklessly caused actual bodily harm, as opposed to intentional harm, might be negated by consent even outside of the exceptional categories. See Smith and Hogan p 636(2).

<sup>101</sup> Contrast with the view expressed in J Herring and M Dempsey, "Why sexual penetration requires justification" (2007) 27(3) *Oxford Journal Legal Studies* 467.

<sup>102</sup> See para 4.159 and following above.

instance. In cases where this is the case, and the use of force is of a minimal nature, or falls within one of the common law exceptions, we consider it likely, and provisionally desirable, that the courts would consider this to amount to a lawful authority or reasonable excuse applying general common law consent principles.

- 4.155 In short, we do not consider that a specific provision requiring lack of consent should be included in the new statutory offence of kidnapping. We believe that the common law approach to consent in offences against the person, as with the general defences considered above, is adequate.
- 4.156 **We recommend that the new offence of kidnapping should apply only to conduct performed without lawful authority or reasonable excuse. We take the view that it is unnecessary to provide any further detail within the statutory definition.**

**Elements of the current kidnapping offence which would be removed under our recommendations**

- 4.157 So far we have examined the harms and wrongs which we believe should lie at the heart of a distinct kidnapping offence, as opposed to those which are generally also present in the basic offence of false imprisonment. This has enabled us to identify the ingredients that should make up the new kidnapping offence, many of which are taken, with some modification, from the current common law. However, there are three elements of the current kidnapping offence which would become redundant under our recommendations:
- (1) Lack of consent.
  - (2) Fraud.
  - (3) Deprivation of liberty.
- 4.158 We now examine each of these in turn, explaining why we believe they can be removed, and examining the theoretical and practical consequences of doing so.

***Removing lack of consent as an express ingredient of the offence***

- 4.159 We have argued above<sup>103</sup> that the distinct mischief which should inform the offence of kidnapping is the forcible accompanied movement of V, which constitutes a radical attack on V's autonomy, and results in V experiencing heightened levels of endangerment and fear. We have further argued that refocusing kidnapping to target these harms and wrongs suggests that fraudulent takings should be excluded from kidnapping,<sup>104</sup> though they may often constitute unlawful detention. This has led us to conclude that kidnapping should be seen as an offence against the person - requiring force in all instances.
- 4.160 It follows from this conclusion that the role of consent in the offence would become considerably less significant. As with all offences against the person, the use of unlawful force is a clear wrong which requires a defence in order to be

<sup>103</sup> Para 4.48 and following above.

<sup>104</sup> See para 4.68 and following above.

lawful and that is at least as true when the violent conduct is to take or move a person. Consent will be capable of affecting liability in a kidnapping case and, as such, in certain circumstances consent could remain of central importance. However such circumstances will be rare, as it is difficult to conceive of realistic scenarios in which V consents to the use of unlawful force in order to be moved by D.<sup>105</sup> For this reason, as with other offences of violence, it would provide an unnecessary complication to include lack of consent as an express element in the new statutory definition of kidnapping.

4.161 In addition to the positive argument for placing force and threats of force at the heart of kidnapping, based on the core mischief which we believe should underpin the offence, we consider there are at least the following objections to the alternative of placing lack of consent at the centre of the offence:

- (1) Uncertainty as to what V's lack of consent should relate to.
- (2) Uncertainty as to the definition of consent in current law.
- (3) Problems caused for cases involving persons lacking capacity to consent.
- (4) Lack of cases in practice involving kidnapping through fraud, and the availability of false imprisonment (or the new unlawful detention offence) as a more appropriate charge to cover any such cases.

#### CONSENT TO WHAT?

4.162 We noted in Chapter 2<sup>106</sup> how under the current law it was unclear to which element(s) of the kidnapping offence consent need relate.

4.163 It is our intention that a new statutory offence would rectify these problems. The harms and wrongs we have identified suggest that the use or threat of force is key. As noted, it is implicit in that requirement that there is an absence of consent. If the offence is defined with force at its core, it would be unnecessary and confusing to draft it in terms of the "non-consensual use of unlawful force" to move V.

#### UNCERTAINTY AS TO THE DEFINITION OF CONSENT

4.164 One objection to retaining lack of consent as an express element of a new statutory kidnapping offence lies in the difficulty the criminal law has experienced in settling upon a satisfactory definition of consent when legislating in other contexts. It is undesirable in principle for an essential ingredient of a new offence to be uncertain or unclear.

4.165 We set out in some detail in Chapter 2 the general common law approach to consent in criminal law, and the different statutory approach to consent in offences under the Sexual Offences Act 2003.<sup>107</sup> It is sufficient to reiterate here

<sup>105</sup> See discussion above at para 4.154 on the exceptional cases where this might occur, and the way in which the general common law approach to consent should operate in such cases.

<sup>106</sup> See para 2.46 and following above.

<sup>107</sup> 2.49 and following above.

that in both contexts the exercise of defining consent has proved highly problematic. In particular, we note that despite extensive consultation and careful legislative scrutiny, the comprehensive definitions of consent in the Sexual Offences Act 2003 have provoked numerous challenges and appeals and have left the law in a state of considerable uncertainty for a range of very serious offences.

#### PERSONS LACKING CAPACITY TO CONSENT

- 4.166 A further principled problem that would arise if we were to retain consent as an essential ingredient of a new offence of kidnapping relates to persons lacking the capacity to give meaningful consent to the conduct of the defendant. We noted in the CP<sup>108</sup> how such a “lack of capacity case” caused potential problems for the current law, which does contain an express lack of consent ingredient.
- 4.167 As pointed out in Chapter 2,<sup>1</sup> the “lack of capacity case” poses only a narrow problem in practice for several reasons:
- (1) Offences under the Child Abduction Act 1984 will usually apply where the case involves a child, even if there is no deprivation of liberty and no force or fraud.<sup>109</sup>
  - (2) False imprisonment will usually apply where there is a restriction on freedom of movement, regardless of force or fraud.
  - (3) Kidnapping will not apply where there is no deprivation of liberty.
- 4.168 In practical terms, the potential gap in the protection of the current law arises only where the strict requirements of false imprisonment are not met, but there is still some attack on or infringement of liberty. An example might be if V, because of psychological dependence on D or fear of being lost, feels unable to leave D’s company during the journey.
- 4.169 Accordingly, the “lack of capacity case” is problematic because there is no “adult abduction” offence comparable to that available for children.<sup>110</sup> This may be problematic, but would not be resolved by making lack of consent an essential ingredient of the new kidnapping offence. A separate solution may be required.<sup>111</sup>
- 4.170 In short, “the lack of capacity case” involves three types of possible scenario. In all of them, V is a person lacking capacity and D, without lawful authority or reasonable excuse, takes V away *without using force or fraud*. For this reason, none of them is kidnapping in existing law.

<sup>108</sup> CP para 3.17.

<sup>109</sup> The one exception to this is the case where one parent abducts a child within the UK without the consent of the other parent, which is not covered by either section 1 or section 2 of the 1984 Act. This exception was created for clear policy reasons. In general, disputes between parents about where a child should live should be resolved through the civil and not the criminal courts. The only exception is where a child is taken out of the jurisdiction of the courts, thus making civil proceedings more difficult or less effective.

<sup>110</sup> Unless D is V’s carer, in which case the offence of ill treatment of a person lacking mental capacity might apply: s 44, Mental Capacity Act 2005.

<sup>111</sup> See para 1.24 above.

- (1) V is imprisoned on a journey (for example V is taken in a locked vehicle). False imprisonment is an available charge, and reflects the gravity of the situation. To the extent that the subsequent imprisonment involves the use or threat of force, and then there is continued movement, for instance in the vehicle, our proposed kidnapping offence would encompass this conduct from the time such force or threats were deployed.
- (2) V is not imprisoned on the journey, but is unable for psychological reasons to stop travelling in D's company.<sup>112</sup> There is an "attack on and infringement of personal liberty", but no false imprisonment. If V is a child, there is child abduction. If V is an adult, no offence is committed. This is the gap in the law which we considered in the CP might require filling.
- (3) V does not suffer any deprivation of liberty at all. If V is a child, child abduction is an adequate charge. If V is an adult, no offence is committed. This generally seems appropriate.

4.171 By focusing the new offence on force we simplify the position regarding persons lacking capacity to consent, since the offence will be made out in any case of forcible taking. There will be no need for separate consideration of the victim's capacity to consent in every case, as would be required if the focus were on lack of consent.

4.172 Our recommendation does not close the gap, to the extent that one exists, regarding persons lacking capacity being taken without the use of force or fraud. However, nor would this problem be resolved by having lack of consent as the focus of the offence.

4.173 Rather than seeing the "lack of capacity case" as posing a problem for the law of kidnapping generally, another possibility might be to create a new offence of detaining, taking or moving a person lacking the capacity to consent to being detained, taken or moved. We considered whether proposing such a new offence, either as a discrete reform option or in combination with our proposed kidnapping reform, was desirable. We ultimately conclude that this simplification project is not the correct vehicle for such a recommendation, and that any recommendation of additional offences designed specifically at the protection of adults lacking capacity should follow a consultation on how the law should protect those who may lack capacity.<sup>113</sup>

#### LACK OF FRAUDULENT KIDNAPPING CASES IN PRACTICE, AND AVAILABILITY OF FALSE IMPRISONMENT AS A MORE APPROPRIATE CHARGE

4.174 In addition to the theoretical objections identified above, there is a more practical objection to placing lack of consent at the centre of a new kidnapping offence. It is unnecessary because it caters for fraudulent takings, and these very rarely occur in practice and if they do they should be adequately protected by a prosecution for false imprisonment (or unlawful detention under our recommendations).

<sup>112</sup> See para 2.42 above.

<sup>113</sup> Which is being undertaken by the Law Commission as part of its 12<sup>th</sup> programme of law reform. See para 1.24 above.

- 4.175 The lack of consent element of the current law of kidnapping would generally only be decisive in the context of cases of fraudulently induced movement.<sup>114</sup> In this context, the role of the lack of consent requirement is to distinguish between frauds which are sufficiently fundamental to vitiate consent and those which are not. By contrast, the lack of consent ingredient will rarely be considered central to a case of kidnapping by force or threats, where the suggestion that the forcible movement was consented to, or the defendant believed it was, will rarely be tenable.<sup>115</sup>
- 4.176 This is because, as with offences against the person, and unlike certain sexual offences,<sup>116</sup> the conduct of taking or moving a person by force or threats of force is presumptively wrong. In other words, requiring force or threats of force as an external element of the offence significantly reduces the circumstances in which D could feasibly claim that V consented, or that D reasonably believed that V consented.
- 4.177 There is a scarcity of cases of kidnapping by fraud. Both on consultation,<sup>117</sup> and by reference to detailed research of the reported cases, we believe that instances of offences of kidnapping under the current law which are carried out through fraud rather than by force are vanishingly rare.<sup>118</sup>
- 4.178 In Chapter 2<sup>119</sup> we noted that one established form of false imprisonment is the case where D purports to arrest V but has no authority to do so. This could be, for example, because D is impersonating a police officer or because D is in a position of lawful authority but is exceeding it. The false arrest case of *Wellard*<sup>120</sup> involved some movement of the victim and this was also held to constitute kidnapping under the current law. We discuss these false arrest cases in more detail below when considering our recommendation for a statutory offence of unlawful detention,<sup>121</sup> and conclude that they should continue to be capable of leading to criminal liability for that offence.
- 4.179 The short point at this stage is that the only instance of kidnapping by fraud in the reported cases would continue to be capable of criminal prosecution under our recommendations, but as unlawful detention only, rather than as kidnapping.
- 4.180 This ensures our proposal leaves no gap in the protection provided by the criminal law. Further, it follows from our argument above, regarding the harm which should lie at the heart of the new kidnapping offence, that it is desirable

<sup>114</sup> *Wellard* [1978] 1 WLR 921.

<sup>115</sup> See discussion below at para 4.182 on the exceptional cases where this might occur, and the way in which the general common law approach to consent should operate in such cases.

<sup>116</sup> Contrast with the view expressed in J Herring, "Why sexual penetration requires justification" (2007) 27 (3) *Oxford Journal of Legal Studies* 467.

<sup>117</sup> Including further informal consultation in 2014 with the police, CPS and treasury counsel prosecutors at the independent bar.

<sup>118</sup> We have referred above at para 4.105 to one realistic scenario raised by some consultees, of a person fraudulently induced to enter a vehicle, such as a taxi.

<sup>119</sup> See para 2.35 above.

<sup>120</sup> [1978] 1 WLR 921.

that false arrest cases should be excluded from kidnapping. This is because the additional fear and anxiety which should characterise kidnapping would typically be lacking in a case of movement by deception. This is so since *during the move itself* the person labouring under a deception as to the true nature of the move will have no reason to feel such fear and anxiety. As argued above, in our view it is not the fact of movement itself, but what movement tends to represent, which renders kidnapping typically more terrifying and hence more serious than false imprisonment.

- 4.181 Removing lack of consent as an essential ingredient of the offence of kidnapping would avoid many of the complexities and difficulties identified above.
- 4.182 Were lack of consent removed as an express ingredient of the new offence, there would be no need to give distinct consideration in the kidnapping context to difficult questions in respect of the defendant's state of mind as to the victim's consent (honest belief in consent, reasonable belief in consent, recklessness as to non-consent). There was no agreement on consultation as to the best way to resolve these issues. Under our proposals, to the extent that consent infrequently remains a live issue in the kidnapping context, the general common law approach to these issues will be followed.<sup>122</sup>
- 4.183 This approach reflects that taken by the criminal law in the context, for instance, of common assault. There can be no doubt that the consent of the alleged victim, or the defendant's honest belief in such consent, is capable of negating criminal liability for common assault, and in certain circumstances for more serious assault offences.<sup>123</sup> Further, as noted in Chapter 2,<sup>124</sup> it is preferable as a matter of legal theory to see consent in this context as operating as a factor which prevents any criminal liability from arising, rather than as a defence.
- 4.184 However, this does not necessitate the inclusion of absence of consent as an express ingredient of the offences of unlawful assault. Where consent or belief in consent is a live issue (and these cases are the exception rather than the rule) then this is considered using principles of more general application. We believe that the same approach can be taken to our proposed narrower kidnapping offence. We consider how the general common law approach to consent might operate (rarely) in the context of our proposed kidnapping offence above.<sup>125</sup>
- 4.185 We draw support for this approach from the fact that in the closely related offence of false imprisonment, lack of consent does not currently feature as an express ingredient of the common law definition.<sup>126</sup> Again, this is so despite the fact that a

<sup>121</sup> See paras 4.246 to 4.251 below.

<sup>122</sup> See para 4.148 and following above.

<sup>123</sup> See 4.149 below.

<sup>124</sup> See 2.89 above.

<sup>125</sup> See para 4.148 and following above.

<sup>126</sup> The definition in *Rahman* (1985) 81 Cr App R 349 at 353 - "false imprisonment consists in the unlawful and intentional or reckless restraint of a victim's freedom of movement from a particular place" is supported in many authorities including R Harrison and P Carter, *Carter and Harrison on Offences of Violence* (2nd ed 1997) p 255; Smith and Hogan, p 678.

person's consent to being detained will clearly negate liability for false imprisonment.<sup>127</sup>

- 4.186 Although cases in which a person consents to being detained at a fixed location can and do arise<sup>128</sup> and will be more common than cases of consent to forcible movement under our proposed offence, consent has not caused the law particular difficulty in the context of false imprisonment.<sup>129</sup> This is by contrast to the confusion under the current law of kidnapping discussed in this chapter<sup>130</sup> and in Chapter 2.<sup>131</sup>
- 4.187 This may be due to the fact that the external element of the false imprisonment offence is certain, relatively narrow and a clear wrong (namely restriction on freedom of movement). The question 'consent to what?' therefore has a clear answer, and it will be in relatively few cases that consent will be a live issue. This is by contrast to the position under the current law of kidnapping, where the external elements of the offence are broad and unclear (it may be as wide as simply moving in company with another, possibly limited by some notion of causing a deprivation of liberty).
- 4.188 By having a kidnapping offence without lack of consent as an express ingredient, as with false imprisonment, and with narrower and clearer external elements,<sup>132</sup> again as with false imprisonment, we believe the relationship between consent and kidnapping can be made similarly unproblematic.
- 4.189 **We do not consider that the new offence of kidnapping need include an express ingredient of lack of consent in the statute.**

***Removing fraud as an express ingredient of the offence***

- 4.190 Under the current law, kidnapping can be committed by force or by fraud. It follows from our argument above regarding the mischief which lies at the heart of a distinct kidnapping offence<sup>133</sup> that we do not believe instances of moving a person by fraud should constitute kidnapping.
- 4.191 We also note, above, that there is very little evidence of instances of kidnapping by fraud being prosecuted under the current law, with the possible exception of false arrest cases, involving movement of the person wrongfully detained.
- 4.192 As noted in Chapter 2,<sup>134</sup> one current uncertainty with the law of kidnapping is whether the offence is made out when the victim is tricked into accompanying the

<sup>127</sup> As discussed in Chapter 3. See para 3.12 above.

<sup>128</sup> See para 3.12 above.

<sup>129</sup> In response to the CP, the senior judiciary stated, "there is no confusion...at all in relation to the common law offence of false imprisonment, which is straightforward".

<sup>130</sup> See paras 4.159 and following above.

<sup>131</sup> See paras 2.46 and following above.

<sup>132</sup> Forcible accompanied movement.

<sup>133</sup> See paras 4.48 and following above.

<sup>134</sup> See para 2.23 and following above.



defendant but does not suffer a deprivation of liberty until the conclusion of the journey.

- 4.193 In removing fraud as a possible mode of committing the offence, our proposed offence provides a clear answer to that question, namely ‘no’. Where there is detention at the final destination, this will clearly be a discrete offence of false imprisonment (or the new offence of unlawful detention). Where there is a fundamental deception as to the nature of the movement, such as would be considered to vitiate the victim’s consent (as in the well-settled case law on false arrest cases) there would also be a false imprisonment during the movement.
- 4.194 However, since the victim does not suffer from the core harm at the heart of our proposed kidnapping offence, namely the experiences arising from being forcibly moved in company with a person who has displayed a willingness to use or threaten force, such cases should not constitute kidnapping.
- 4.195 This has the further benefit of somewhat reducing the large overlap which currently exists between false imprisonment and kidnapping.
- 4.196 **We recommend that the new offence of kidnapping should not be capable of being committed by fraud.**

***Removing deprivation of liberty as an express ingredient of the offence***

- 4.197 As discussed above,<sup>135</sup> in *D* Lord Brandon described kidnapping as “an attack on and infringement of ... personal liberty”.<sup>136</sup> However, the language of *D* was unclear about whether this constituted a separate ingredient of the offence, or was simply a statement of the rationale of the offence, namely that it is an infringement of autonomy.<sup>137</sup> We discussed this issue in more detail in the CP.<sup>138</sup>
- 4.198 There is no doubt that the notion of an “attack on and infringement of ... personal liberty” captures the essence of the offence of kidnapping. The question is whether this is best considered simply as a partial summary of the harm underpinning the offence, or whether it should be retained as an independent element of the new offence.
- 4.199 In *Hendy-Freegard*<sup>139</sup> it was held that deprivation of liberty constituted a distinct ingredient of the offence. However, one motivation for this conclusion appears to have been to exclude from kidnapping cases of fraudulent movement which are

<sup>135</sup> See para 2.4 and following above.

<sup>136</sup> [1984] AC 778.

<sup>137</sup> This is consistent with our positioning the offence of kidnapping as an offence against the person, see para 1.22 above. See *Collins v Wilcock* [1984] 1 WLR 1172 at 1177 - “the fundamental principle, plain and incontestable, is that every person’s body is inviolate”.

<sup>138</sup> CP, paras 2.113 and following.

<sup>139</sup> [2007] EWCA Crim 1236, [2008] QB 57. The facts are given at para 2.17(1) above.

relatively unproblematic, either because V is clearly free to leave (as on the facts of *Cort*<sup>140</sup>) or where they are simply tricked into taking a journey.<sup>141</sup>

- 4.200 Since our proposed offence excludes all cases of pure fraudulent kidnapping (to the extent these in fact occur), deprivation of liberty is no longer needed as an independent requirement to exclude such low-level cases of fraudulent movement. Deprivation of liberty is inevitable because kidnapping requires movement by force in company with D.
- 4.201 Not only does deprivation of liberty appear unnecessary as an independent ingredient of the offence, but defining its scope if retained would be problematic:
- (1) Deprivation of liberty, if retained as an independent element, might have to include a situation where, because of D's conduct, one type of lack of liberty is substituted for another.
  - (2) In assessing whether V has been deprived of liberty, account would have to be taken of the circumstances, including V's personal characteristics.<sup>142</sup> Deprivation of liberty could not be confined to constraints which would deprive a capable person of freedom of movement.
- 4.202 If retained, deprivation of liberty would have to refer to a constraint imposed by D as opposed to an inability personal to V. But it would have to include a situation brought about by D in which V's inability comes into play.

**Example 5.** V, who is tetraplegic, is lying in bed. D carries V out of the room and V is unable to get back. This should count as deprivation of liberty even though V was equally unable to move while in the bed, and even though another person in V's position could have returned.

- 4.203 Under our recommendation the position is much simpler: D used force or threats of force intending to move V in his company. Kidnapping would be made out without any need for a problematic analysis of V's relative positions in terms of liberty before and after the move.
- 4.204 In summary, whilst deprivation of liberty is one useful articulation of the high-level harm addressed by kidnapping and false imprisonment,<sup>143</sup> it is problematic as an ingredient of the offence. It is also unnecessary, as the case of low-level

<sup>140</sup> [2003] EWCA Crim 2149, [2004] QB 388. See para 2.17(2) above.

<sup>141</sup> Where V is tricked into taking a journey in the absence of D, then this would be excluded from kidnapping in any event by the requirement that V be moved in D's company, as occurred on the facts of *Hendy-Freegard* itself.

<sup>142</sup> This would need to be stated expressly in any statutory definition. The test of compulsion, for example for the purposes of the defence of duress, is generally objective and takes no account of personal characteristics such as mental impairment: *Bowen* [1997] 1 WLR 372, [1996] 4 All ER 837.

<sup>143</sup> See paras 4.48 and following above.

fraudulent movement which the requirement was introduced to exclude in *Hendy-Freegard*<sup>144</sup> would be excluded under our proposed new offence in any event.

4.205 In false imprisonment, the higher-level harm of deprivation of liberty is reflected by the requirement that there be a restriction of freedom of movement.<sup>145</sup> We do not believe that a new 'restriction of freedom of movement' ingredient is required in kidnapping.<sup>146</sup> This is because it flows inevitably from the new offence's other ingredients (including the requirements of movement by force and the requirement of accompanying during the journey) that there will in all cases of kidnapping be a restriction on V's freedom of movement. For that reason, the new kidnapping offence *does* address the higher level harm of deprivation of liberty, through the combined effect of its other elements rather than through a discrete ingredient.

4.206 **We do not consider that the new offence of kidnapping need include an express ingredient of deprivation of liberty, or restriction of freedom of movement, in the statute.**

#### **Mode of trial**

4.207 At present both false imprisonment and kidnapping, being common law offences, are triable on indictment only. False imprisonment may, in some cases, occur for a very short duration and cause very minor harm. In the CP, we proposed that this offence should be made triable either way. We made the same proposal in relation to our provisionally proposed statutory kidnapping offence.<sup>147</sup>

4.208 In this connection, the Court of Appeal in *Spence and Thomas*<sup>148</sup> stated:

It seems to this court that, as with many crimes so with kidnapping, there is a wide possible variation in seriousness between one instance of the crime and another. At the top of the scale of course, come the carefully planned abductions where the victim is used as a hostage or where ransom money is demanded. Such offences will seldom be met with less than eight years' imprisonment or thereabouts. Where force or firearms are used, or there are other exacerbating features such as detention of the victim over a long period of time, then the proper sentence will be very much longer than that. At the other end of the scale are those offences which can perhaps scarcely be classed as kidnapping at all. They very often arise as a sequel to family tiffs or lovers' disputes, and they seldom require anything more than 18 months' imprisonment, and sometimes a great deal less.

<sup>144</sup> [2007] EWCA Crim 1236, [2008] QB 57.

<sup>145</sup> Harm (1), see para 4.35 above.

<sup>146</sup> As discussed above at para 2.8 and following above, this is not an element of the current kidnapping offence, but we consider that restriction of freedom of movement is an inherent feature of the current law of kidnapping as a result of its other elements. We intend no change in this regard.

<sup>147</sup> CP para 4.63.

- 4.209 In the CP,<sup>149</sup> we referred to statistics supplied by the Sentencing Council. These indicated that, over a period of 11 years, 11% of individuals sentenced for kidnapping and 27% of individuals sentenced for false imprisonment received a non-custodial sentence or a custodial sentence of less than six months, which would have been within the powers of a magistrates' court. A number of other cases resulted in suspended sentences, but the statistics did not specify the length of these sentences. This appeared to us to indicate that many kidnapping cases could be suitable for trial in the magistrates' court.<sup>150</sup> We accordingly made a provisional proposal that any new offence, whether of kidnapping or of false imprisonment, should be capable of being tried either in the Crown Court or in a magistrates' court.<sup>151</sup>
- 4.210 Of those who responded to the CP, seven favoured making one or more of the offences triable either way,<sup>152</sup> three expressed no view<sup>153</sup> and four wished to retain the position that these offences were triable on indictment only.<sup>154</sup> In particular the CPS regarded these offences as unsuitable for magistrates' court trial in any circumstances. They also indicated that the statistics set out in the CP did not correspond to their own experience as prosecutors.
- 4.211 Accordingly, in March 2013 we conducted a sampling exercise into the files of the CPS, which indeed yielded a very different picture from the Sentencing Council's figures. In a sample of 233 case files in which false imprisonment or kidnapping was charged, 78 resulted in a conviction for one of these offences, including guilty pleas. Out of these 78, 4 (5%) resulted in a sentence of six months or less or a community order, which would have been within the powers of a magistrates' court. Another case resulted in a total sentence of 10 months, which would have been within those powers pursuant to section 133(2) of the Magistrates Court Act 1980.<sup>155</sup> All of these cases relate to false imprisonment and not kidnapping. The cases examined were from a three-month period in 2012, and covered all police forces in England and Wales.
- 4.212 There is no clear explanation for the discrepancy between these figures and those of the Sentencing Council. The Sentencing Council's figures include only cases where kidnapping or false imprisonment is the "lead offence". Where the accused is sentenced for several offences, this is defined as the offence for which the longest sentence was imposed. If the sentences are of the same

<sup>148</sup> (1983) 5 Cr App R (S) 413 at 416; see D Thomas QC (ed Tom Rees), *Current Sentencing Practice* (last updated Dec 2013) B3-4.2. There is no binding guideline on kidnapping from the Sentencing Council.

<sup>149</sup> CP paras 2.2. and 2.3.

<sup>150</sup> See Appendix D to the CP, containing the impact assessment.

<sup>151</sup> CP para 4.63.

<sup>152</sup> Criminal Bar Association, Dean Henson, Jeremy Horder, Samantha Riggs, Anthony Edwards, London Criminal Courts Solicitors Association, Dr Jonathan Rodgers.

<sup>153</sup> Missing People, Rebecca Williams, UK Missing Persons Bureau.

<sup>154</sup> The Council of HM Circuit Judges, the CPS, the Justices' Clerks Society and the senior judiciary.

<sup>155</sup> Power of magistrates to impose up to a total of 12 months' imprisonment when sentencing two or more either way offences consecutively.

length, the “lead offence” is the offence with the greatest maximum penalty. The low sentences cannot therefore be explained away as cases where a short sentence for false imprisonment or kidnapping was concurrent with a longer sentence for another serious offence.

4.213 It should be noted that the Sentencing Council’s data indicated large variations in sentencing practice in different years. Although the proportion of sentences which would have been within the power of the magistrates’ courts averaged out at 11% (for kidnapping) and 27% (for false imprisonment) over the 11 year period, in some years the relevant percentages were as low as 4% and 17% respectively. However, even taking into account these variations, the results of our sampling exercise threw up far fewer sentences that could have been passed in the magistrates’ court, none in relation to kidnapping cases and just 4% in relation to false imprisonment.

4.214 More recent sentencing information provided by the Ministry of Justice (also in March 2013) indicates that:

- (1) the proportion of community penalties – for false imprisonment in particular – is decreasing as the use of suspended sentences increases; and
- (2) a large proportion of the community penalties for both kidnapping and false imprisonment were given to juvenile defendants.

4.215 The result of our sampling exercise was that during the three month period examined there were very few false imprisonment cases, and no kidnapping cases, that would have been suitable for magistrates’ court trial. This is consistent with what we were told was the experience of CPS prosecutors. As a consequence the case for making these offences triable either way is not made out. The main effect of making these offences triable either way may be to encourage prosecutions in minor cases which at present are not prosecuted at all.<sup>156</sup> The Council of HM Circuit Judges, in their response, observed that:

We are not persuaded by the argument that many cases are not prosecuted because the offence is triable only on indictment. On the contrary we fear that making it triable either way is likely to encourage the prosecution of trivial cases and to encourage over-charging as a means of obtaining a guilty plea to a lesser offence.

4.216 In addition, there is a risk that making false imprisonment and kidnapping triable either way would give the impression that the seriousness of these offences was being downgraded. There is an associated risk that the public perception of the criminal justice system would be harmed by the change. There would be some transitional costs entailed by making the change, and some continuing costs for the procedure for choosing the mode of trial, though the hope would be that these were outweighed by the eventual savings.

4.217 Finally, it should be noted that defendants would, if the mode of trial were amended, still have the option of electing for trial in the Crown Court, though it may be possible to make an estimate of the proportion that would do so by

considering the statistics for comparable offences.<sup>157</sup> It is therefore not possible simply to equate trial either way with a reduction in costs in 11% of kidnapping cases and 27% of false imprisonment cases in accordance with the figures in the Sentencing Council's statistics.

- 4.218 **We recommend that the existing offences of kidnapping and false imprisonment should continue to be triable on indictment only. Similarly we recommend that any offences enacted to replace them should be triable on indictment only.**

#### **Charging practice**

- 4.219 The general thrust of *Kayani*<sup>158</sup> was that, in some cases of parental abduction, the limited sentencing powers for child abduction were not a sufficient remedy.
- 4.220 In some cases, child abduction is the only charge available because there is no evidence of force or fraud and therefore kidnapping, as defined in existing law, cannot be made out. For the reasons explained in Chapter 1 and this chapter we believe that kidnapping should be preserved for cases where the victim is moved by compulsion, since such cases will involve a more radical attack on V's autonomy and heightened levels of fear and uncertainty and consequent mental anguish for the victim.
- 4.221 Some cases of child abduction which do not contain this ingredient are extremely serious, such that the current sentencing maximum seems inadequate. However, this is because of the high level of emotional harm and distress that such parental abduction can cause to the other parent and to the child and the family as a whole. This is a different type of harm to that which is the focus of our proposed narrower kidnapping offence, and we therefore do not consider that charging kidnapping in cases of parental child abduction not involving threats or force against the child would be the right solution. Rather, the solution lies in increasing the sentencing maximum for the child abduction offence, to recognise the high level of harm which can be involved in some cases of this type.
- 4.222 The court in *Kayani* also expressed a concern that, even in cases where charging kidnapping was legally speaking an option, it was not charged because of the observation in *C*<sup>159</sup> that it should not be charged in cases involving parents.<sup>160</sup>
- 4.223 This concern would be met by altering the charging practice so as to charge kidnapping more freely in cases where it is legally available. This may have been brought about by *Kayani* itself. If the necessity for the DPP's consent, as provided by section 5 of the Child Abduction Act 1984, is still thought to have too restrictive an effect, there are several possibilities:

<sup>156</sup> For arguments for and against allowing magistrates' court prosecutions in these minor cases, see CP paras 4.58, 4.59 and 4.62.

<sup>157</sup> This is already allowed for in the impact assessment attached to the CP.

<sup>158</sup> [2011] EWCA Crim 2871, [2012] 1 WLR 1927.

<sup>159</sup> [1991] 2 FLR 252.

<sup>160</sup> See paras 3.31 and following above.

- (1) Repeal section 5;
- (2) Amend section 5 so that it is confined to cases where a child abduction offence is available, though that would not meet the concerns expressed in *Kayani*; or
- (3) Recommend the liberalisation of the charging practice.

***Repealing or amending section 5***

- 4.224 Section 5 of the Child Abduction Act 1984 provides that no prosecution for the kidnapping of a child under 16 by a “connected person” can be brought without the consent of the Director of Public Prosecutions.
- 4.225 It should be noted that section 5 is not confined to cases where the child is taken abroad. Accordingly, it goes beyond the proposition that, where both kidnapping and child abduction are available, child abduction should be preferred unless there is good reason to the contrary. The consent of the Director of Public Prosecutions is equally required for a prosecution for child abduction under section 1.<sup>161</sup> The purpose of both provisions is to prevent private prosecutions in cases that should be resolved through family rather than criminal proceedings.<sup>162</sup> Without section 5, a vengeful parent could circumvent the effect of the DPP’s refusal of consent to prosecute for child abduction by bringing a private prosecution for kidnapping.<sup>163</sup>
- 4.226 For these reasons, we consider that section 5 still has a useful function and should not be repealed. Nor should it be confined to cases where child abduction would be a possible alternative charge.

***Amending the charging practice***

- 4.227 The problem may have lain not in the existence of section 5 as such but rather in the practice as to when consent under that section is given. When the prosecution in *Kayani* was undertaken, the practice presumably reflected the observation in *C*<sup>164</sup> mentioned above.<sup>165</sup> Since that observation was disapproved in *Kayani*, the practice should have changed. Accordingly the second problem in *Kayani* may have been solved by *Kayani* itself.

<sup>161</sup> Child Abduction Act 1984, s 4(2).

<sup>162</sup> For example, David Mellor MP in a debate on the Child Abduction Bill referred to “the requirement that the consent of the Director of Public Prosecutions needed to be obtained before proceeding under clause 1, to avoid the prospect of the criminal law being dragged into a dispute between an estranged husband and wife”: HC Deb 06 April 1984 vol 57 col 1299. What is now section 5 was added at a later stage, when the House of Lords in *D* had overturned the conclusion of the Court of Appeal that children below a certain age could not be kidnapped: HL Deb 25 June 1984 vol 453 col 683-91.

<sup>163</sup> It would be possible, even in the absence of section 5, for the CPS to assume responsibility for such a private prosecution, and then discontinue it under section 6(2) of the Prosecution of Offences Act 1985. However this would generally not occur until after the private prosecution had commenced and reached court, with consequent waste and inefficiency, and would depend on the CPS finding out about that prosecution.

<sup>164</sup> [1991] 2 FLR 252.

<sup>165</sup> See paras 3.31 and following above.

- 4.228 As mentioned above,<sup>166</sup> the present CPS guidance states that kidnapping should be charged whenever the conditions for the offence are fulfilled, whether or not other offences could be charged:

Often the kidnapping will be followed by the commission of further offences of sexual or aggravated assault. There is a specific offence of Child Abduction. Regardless of the severity of any act that follows (with the possible exception of murder), kidnapping is such a grave offence that it will be usual to reflect it with a count in the indictment.

- 4.229 The CPS guidance does not address the specific question of parental abduction. Nevertheless it gives encouragement to charge kidnapping whenever the elements of the offence are made out, despite the availability of child abduction. To that extent it is in accordance with *Kayani*. We therefore have no reason to think that, following *Kayani*, the practice for charging kidnapping is still too restrictive.

- 4.230 **We recommend that the practice for consent to prosecution, for kidnapping by parents, under section 5 of the Child Abduction Act 1984 should continue to follow the existing CPS guidance, taking account of the observations of the court in *Kayani*.**

#### **Summary of Recommendation 1**

- 4.231 We recommend the creation of a new statutory offence of kidnapping, which would be committed when D:

- (1) without lawful authority or reasonable excuse,
- (2) intentionally uses force or threats of force,
- (3) in order to take V or otherwise cause V to move with him.

### **RECOMMENDATION 2: STATUTORY OFFENCE OF UNLAWFUL DETENTION**

#### **Outline of Recommendation 2**

- 4.232 The common law offence of false imprisonment would be replaced with a statutory offence of unlawful detention. This new offence would clarify the relationship between this offence and the new statutory offence of kidnapping.

#### **Should false imprisonment be replaced by statutory offence?**

- 4.233 Compared with kidnapping, false imprisonment is fairly unproblematic. However, it has so many points in common with kidnapping that it would be anomalous to reform one without the other.<sup>167</sup> Furthermore, it is not quite true in our view that none of the problems in kidnapping apply to false imprisonment.

<sup>166</sup> See para 3.38 above.

<sup>167</sup> The response of the senior judiciary to the CP stated that “there is, in contrast, no confusion at all in relation to the common law offence of false imprisonment, which is straightforward.” Nevertheless, they accepted that there were so many points in common between the two offences that they should be reformed together.



- 4.234 The main problem in kidnapping is the duplication between the force or fraud requirement and the requirement of lack of consent. This problem does not apply to false imprisonment. We see nothing in the current definition of false imprisonment to exclude a case where D, without the use of force or fraud, exploits V's lack of capacity so as to prevent V from leaving a place.
- 4.235 There is however another problem about the relationship between fraud and lack of consent in the current law of kidnapping (dispensed with under our new kidnapping offence), that could carry across to false imprisonment. In cases of taking by fraud, there may be deceptions sufficient to accomplish the taking (and thus fulfil the current "by force or fraud" requirement) but not sufficient to negate consent. As we have seen, consent is only negated by a deception as to the nature of the act or the identity of the person performing it.<sup>168</sup>
- 4.236 The problem as it relates to false imprisonment is as follows.
- (1) As explained above, there is some doubt about whether false imprisonment covers a case where V is deterred from moving from a place by D's deceptive conduct, except in the case of a false arrest.<sup>169</sup>

**Example 6.** D shuts V in a room and rattles the key in the lock to make it appear that V has been locked in.

- (2) Even in false arrest cases there is a theoretical doubt about the effect of a deception as to the lawful authority of the person purporting to make the arrest. Is it a "deception as to the nature of the act or the identity of the person performing it", so as to preclude valid consent?

**Example 7.** In *Wellard*, D purported to be a police officer searching for drugs and made V accompany him to her car, where she sat until some friends arrived.

Certainly V suffered a loss of liberty in the car, and certainly, if V consented to be detained, this consent was obtained by deception. But did the deception concern the identity of D, or only his official status? And did it concern the nature of D's act, or only the lawful authority for it? This point was not taken in *Wellard* but it is a theoretical flaw in the definition; and, as we shall see below,<sup>170</sup> there is an easy legislative solution.

- 4.237 One argument against redefining the offence of false imprisonment in statute is that false imprisonment is a civil wrong as well as a crime. Redefining the crime would break the link between the crime and the civil wrong. It might be confusing for police, prison officers and others to apply two different tests in considering whether a proposed action amounts to false imprisonment. The counter arguments to this are that:

<sup>168</sup> See para 2.59 and following above.

<sup>169</sup> CP paras 2.160 and 2.161.

<sup>170</sup> See para 4.246 below.

- (1) the scope of the proposed statutory offence of false imprisonment would be little, if at all, different from that of the present common law offence (and therefore the tort);
- (2) in existing law the conditions for the tort and the offence are not identical. The tort is one of strict liability (at least as to the question of lawful authority). The offence requires intention or recklessness.

4.238 **We recommend that the offence of false imprisonment be replaced in statute.**

#### **Should false imprisonment be renamed unlawful detention?**

4.239 As stated above, Model 2 which, in the CP, proposed the separate offences of ‘unlawful detention’ and ‘kidnapping’ gained most support. Some consultees (judicial, academic and interest group) indicated support for renaming the offence of false imprisonment ‘unlawful detention’. The Council of HM Circuit Judges provided the most positive response:

We do think that false imprisonment should be renamed unlawful detention. Although the term is an historic one as both a tort and a crime, it is apt to mislead a jury. In ordinary speech “false” means untrue or not genuine rather than unlawful, while “imprisonment” means putting a person in a cell. It usually requires a brief explanation that it does not mean either of these things in legal terms.

Further, many consultees adopted the name unlawful detention, without explicitly addressing the change.

- 4.240 When recommending the codification of false imprisonment, the Criminal Law Revision Committee recommended that the offence should be renamed unlawful detention because it would “be a more accurate name for it.”<sup>171</sup>
- 4.241 When defining false imprisonment in *Rahman*, Lord Lane, the then Lord Chief Justice, stated, “in other words [false imprisonment] is unlawful detention which stops the victim moving away as he would wish to move.”<sup>172</sup> Accordingly, the words are used synonymously.
- 4.242 We agree that renaming the offence unlawful detention would improve clarity. The wording brings the offence up to date and makes the offence more intelligible to jurors and the public generally. We also feel, consistent with *Rahman*, that the wording is synonymous and thus should not change the substance of the offence.
- 4.243 **We recommend that the new offence replacing false imprisonment be called unlawful detention.**

<sup>171</sup> *Working Paper on Offences Against the Person* (1976) p 100.

<sup>172</sup> *Rahman* (1985) 81 Cr App R 349, p 353.

### **Elements of the new offence of unlawful detention**

4.244 The elements of the existing offence of false imprisonment, as stated above,<sup>173</sup> are that:

- (1) D's conduct results in the restraint of V's freedom of movement from a particular place.
- (2) D intends the conduct to have this result, or is reckless as to whether it will or not.
- (3) The restraint is unlawful, in the sense that it was without lawful authority or reasonable excuse (as with kidnapping, a mistaken belief in the existence of lawful authority or reasonable excuse can be an excuse in itself).

4.245 As noted above, lack of consent does not appear as an element of the leading common law definition, although it is clear that the consent of V (or honest belief in consent on the part of D) to the detention will negate any criminal liability, applying general common law principles. We consider that this is desirable and should continue to be the position, reflecting the position under our proposed new kidnapping offence.

4.246 As explained above,<sup>174</sup> there is a potential problem in cases where D causes V to believe that V is under arrest or otherwise lawfully detained. This is a recognised category of false imprisonment. However, it could be argued that:

- (1) V has consented to be detained, albeit under a misapprehension, and
- (2) the deception does not concern the identity of D or the nature<sup>175</sup> of the act, so as to invalidate that consent.<sup>176</sup>

4.247 We have not found any case in which this argument has been used as a defence, or in which the problem has occurred in practice and possible counter arguments are as follows:

- (1) A lawful arrest is a fundamentally different act from an unlawful abduction. There is therefore deception as to the nature of the act. As against this, one could argue that the physical act is the same and the deception is as to its purpose and circumstances rather than its nature.
- (2) In impersonation cases, there may be deception as to the identity of the person performing it. As against this, one could argue that the deception is not about identity but about a quality, namely the quality of being a police officer.<sup>177</sup>

<sup>173</sup> See para 3.16 above.

<sup>174</sup> See para 4.236 above.

<sup>175</sup> Or consequences.

<sup>176</sup> See paras 2.59 and following above.

<sup>177</sup> See para 2.64 above.

- (3) In these cases (one could argue) the deception is not the means of obtaining consent to a detention, taking or carrying away, but is itself the act of detention, taking or carrying. There was certainly no consent to the deception, and therefore no consent to the detention or taking that happened. This is similar to the argument in *Cort*,<sup>178</sup> but that argument has been criticised in the case comment<sup>179</sup> and in our CP<sup>180</sup> and could be regarded as strained.

4.248 Previous proposals for law reform have circumvented the difficulty by including deception as to lawful authority as a discrete factor vitiating consent.

- (1) The Law Commission's 1989 draft Criminal Code provides that:<sup>181</sup>

(d) a person acts without the consent of another if he obtains the other's consent —

(i) by force or threat of force; or

(ii) by deception causing the other to believe that he is under legal compulsion to consent.

- (2) The relevant provision in the Republic of Ireland<sup>182</sup> reads:

(2) For the purposes of this section, a person acts without the consent of another if the person obtains the other's consent by force or threat of force, or by deception causing the other to believe that he or she is under legal compulsion to consent

and the corresponding provision in the draft Irish Criminal Code<sup>183</sup> is similar.

4.249 Other cases of restriction of the freedom of movement of a person by deception (whether stationary or in transit) can also be envisaged, although we note no reported cases of this type appear to exist<sup>184</sup> nor were any examples given on further consultation with the police and prosecuting agencies.

4.250 We consider that the courts are likely to continue to consider cases of deception as to lawful authority (the false arrest type cases) as involving an absence of consent and therefore potentially amounting to unlawful detention. On balance, weighing the arguments above, we consider this desirable. One possible way of

<sup>178</sup> [2003] EWCA Crim 2149, [2004] QB 388.

<sup>179</sup> [2003] EWCA Crim 2149, [2004] QB 388. See also case comment by C Barsby and D Ormerod at [2004] *Criminal Law Review* 64.

<sup>180</sup> CP para 2.68. But see para 2.67(2) above.

<sup>181</sup> Criminal Law: a Criminal Code for England and Wales (1989) Law Com No 177 (vol 1), clause 79: the relevant provisions are set out in the CP Appendix A para A.4.

<sup>182</sup> Non-Fatal Offences Against the Person Act 1997, s 15; CP Appendix B para B.44.

<sup>183</sup> "Draft Criminal Code and Commentary", Criminal Law Codification Advisory Committee 2010, Head 3206(2); CP Appendix B para B.46.

<sup>184</sup> See para 4.177 above.

legislating for this position would be to borrow from the drafting examples given above.<sup>185</sup>

- 4.251 **We recommend that consideration be given to express statutory provision for the false arrest cases. Such provision could stipulate that such cases do constitute unlawful detention, and that the common law principles of consent should not apply so as to prevent criminal liability arising where the victim's consent is obtained by fraud as to lawful authority.**
- 4.252 As to other cases of movement by deception, it will be for the courts to assess on a case by case basis whether the deception in any given case is sufficiently fundamental (going to either the nature of the movement or the identity of D) as to vitiate consent. If so, unlawful detention may be made out, assuming V's freedom of movement was constrained within some reasonably certain boundaries during the move.
- 4.253 In cases where there is a movement by deception followed by stationary imprisonment at the final location, this will of course constitute a discrete unlawful detention, whether or not an unlawful detention can be made out during the move. For the reasons given above<sup>186</sup> we consider the fact of detention at the final location should not of itself render the movement criminal.
- 4.254 Further, because of the narrower re-focused nature of our proposed kidnapping offence, we do not consider that cases of movement by deception should continue to constitute kidnapping in any circumstances (contrary to the assumed position in *Wellard* under current law).
- 4.255 As argued above<sup>187</sup> we consider that the heightened harms which should lie at the heart of the kidnapping offence are absent in the false arrest cases, but it is appropriate that they continue to be caught by unlawful detention, as is the settled common law position.<sup>188</sup>
- 4.256 **We recommend that the new offence of unlawful detention should include all the elements of the current common law offence of false imprisonment.**

#### **Charging practice: kidnapping and unlawful detention**

- 4.257 A further point regarding charging practice in cases of kidnapping and unlawful detention arose on consultation and merits some consideration here. We understand from consultation with practitioners with extensive prosecuting experience that the current practice in many cases is to include counts of both kidnapping and false imprisonment on a single indictment, to get around some of the existing law's uncertainty about the boundaries between these offences.<sup>189</sup>

<sup>185</sup> See para 4.248 above.

<sup>186</sup> See para 4.84 above.

<sup>187</sup> See para 4.190 above.

<sup>188</sup> *Clerk and Lindsell on Torts* (20th ed 2010) p 1000, para 15 to 25.

<sup>189</sup> For instance where there is a journey with a forcible detention only at its conclusion, see paras 2.23 to 4.192 above.

- 4.258 We believe one effect of our proposed new offences would be to clarify the relationship between kidnapping and unlawful detention. However, it follows from the discussions above that kidnapping and unlawful detention will remain distinct offences. Whilst kidnapping under our recommendations is a narrower, and generally more serious, offence it is not our intention to create a strict hierarchy.
- 4.259 Further, depending on the drafting strategy adopted were our recommendations in this area to be adopted, it does not necessarily follow that unlawful detention would constitute a lesser included alternative offence on a kidnapping charge for the purpose of section 6 of the Criminal Law Act 1967.<sup>190</sup>
- 4.260 Subject to the drafting approach which may be adopted, we would therefore envisage that the current practice of charging both kidnapping and false imprisonment in separate counts on the indictment would continue. The advantage of our recommendations, if implemented, would be that explaining the different routes to verdicts on these separate counts to a jury would be more straightforward. Similarly, a sentencing judge would be more easily able to draw conclusions as to a jury's factual findings from its verdicts on an indictment containing counts charging both offences (whether the verdicts on the two counts were the same or different), since the difference between the offences in law would be much clearer than at present.

#### **Summary of Recommendation 2**

- 4.261 We recommend the creation of a new statutory offence of unlawful detention, which would be committed when D:
- (1) without lawful authority or reasonable excuse,
  - (2) intentionally or recklessly,
  - (3) causes the restriction of V's freedom of movement from a particular place.
- 4.262 As recommended above,<sup>191</sup> the offence should be triable on indictment only.

<sup>190</sup> See for example the suggestion above that whilst restriction on freedom of movement would be implicitly present in any finding of guilt for kidnapping, this need not be an express element of the kidnapping offence, as it is for false imprisonment, and would be for the proposed offence of unlawful detention.

<sup>191</sup> Para 4.218 above.

## CHAPTER 5

# REFORMING OTHER OFFENCES

5.1 In this chapter we discuss our recommendations for reform to the offences under the Child Abduction Act 1984.

(1) **Recommendation 3:** increase the maximum sentence for the offences under sections 1 and 2 of the Child Abduction Act 1984 to 14 years' imprisonment.<sup>1</sup> This would meet the concerns expressed by the Lord Chief Justice in *Kayani*.<sup>2</sup>

(2) **Recommendation 4:** criminalise child retention by parents or connected persons by amending section 1 of the Child Abduction Act 1984.<sup>3</sup> This would provide a statutory solution to the *Nicolaou*<sup>4</sup> problem. This recommendation is new and the issue was not discussed in the CP. Recommendation 4 could be enacted together with the other recommendations or separately.

5.2 We begin by explaining why we are not at this stage recommending a new abduction offence relating specifically to persons lacking capacity.

### AN OFFENCE OF ABDUCTING PERSONS LACKING CAPACITY?

5.3 As we explained in the CP and above<sup>5</sup> there is a potential narrow problem relating to the possibility of the exploitation of persons lacking the capacity to consent to being moved or detained. Whilst our new statutory kidnapping offence would solve many of the current problems and uncertainties with the law by refocusing the offence on forcible takings, it would not extend the protection afforded to this group by the law of kidnapping.

5.4 This means, as explained above,<sup>6</sup> that there are potentially situations in which a person's liberty or autonomy could be interfered with but without involving a definite restriction on their freedom of movement (such as to amount to false imprisonment) or a forcible taking (such as to amount to the new kidnapping offence). Such instances of exploitation might not involve criminal liability.

5.5 We have explained above why we believe this problem is likely to be a narrow one.<sup>7</sup> Another partial response is that the offence of false imprisonment has long

<sup>1</sup> Para 5.15 below.

<sup>2</sup> [2011] EWCA Crim 2871, [2012] 1 WLR 1927 at [16].

<sup>3</sup> Para 5.50 below.

<sup>4</sup> [2012] EWHC 1647 (Admin), [2012] 1 Cr App R 23.

<sup>5</sup> See para 4.166 and following above.

<sup>6</sup> See para 4.170 above.

<sup>7</sup> See para 4.166 and following above.

been cast widely in the authorities<sup>8</sup> and so may be capable of capturing at least some of this type of exploitative conduct.

5.6 However, we did consider whether this potential lacuna in the law<sup>9</sup> could be closed by the creation of a new offence targeted specifically at protecting persons lacking capacity to consent to being moved or detained.<sup>10</sup> As stated in the introduction to this report,<sup>11</sup> we have ultimately decided against such a course as part of this project on kidnapping and related offences. This is for the following reasons:

- (1) Our consultation was not targeted at the issue of persons lacking capacity to consent to movement or other partial restrictions on liberty. The law relating to mental capacity is a distinct, complex and growing field<sup>12</sup> and any suggested reforms in this area should be foreshadowed by targeted consultation and research. Further, the Law Commission is undertaking a project specifically on the issue of deprivation of liberty of those lacking capacity as part of its 12th programme of Law Reform beginning this year.<sup>13</sup>
- (2) In considering the formulation of such a targeted offence, it seemed to us that it was difficult to avoid very broad criminalisation. By its nature, an offence targeted at preventing exploitation of those lacking capacity should not include as an ingredient either lack of consent on the part of the victim or force or fraud. However, without these limiting factors, the remaining external elements of the offence are few, for instance simply moving a person lacking capacity to consent to the move. Such a broad offence would risk criminalising many people with legitimate cause to interfere with the autonomy of persons lacking capacity, such as close family members, medical professionals and others members of the caring professions. Whilst in many circumstances such people would be able to rely on a defence (for instance the potential defence of necessity, or a defence under the Mental Capacity Act 2005) it is contrary to principle to create very broad *prima facie* liability and rely upon defences to avoid undesirable over-criminalisation.
- (3) Finally, and closely connected to (1) and (2) above, we consider that the harm involved in such a hypothetical case of exploitation may be very different from that in kidnapping and false imprisonment. It follows from (1)

<sup>8</sup> *Bird v Jones* (1845) 7 QB 742, 115 ER 668 per Lord Coleridge at 744 and 669 respectively: "A prison may have its boundary large or narrow, visible and tangible, or, though real, still in the conception only."

<sup>9</sup> As described in *HM (Vulnerable Adult: Abduction)* [2010] EWHC 870 (Fam), [2010] 2 FLR 1057.

<sup>10</sup> In a similar vein, the majority view of the Criminal Bar Association in their response to the CP was that a situation involving exploitation of a lack of capacity could be included as an alternative to force or fraud as a mode of committing kidnapping.

<sup>11</sup> See para 1.24 above.

<sup>12</sup> For a recent authoritative summary of the history of the law's development in this area see: *Surrey County Council v P and Q; Cheshire West and Chester Council v P* [2014] UKSC 19, [2014] AC 896.

<sup>13</sup> See also para 1.24 above.



above that it would be wrong to express a settled view on this subject without carrying out more targeted research and consultation. However we provisionally consider that the harm in such a case might lie primarily not in any wrong done, or distress caused, to the victim at the time (as we believe is central to kidnapping) but more, by analogy to child abduction, in the fact of removing the victim from a place of safety. If this provisional view is correct then this would suggest a very different structure to any offence. This would be likely to avoid the problems of over-criminalisation identified in (2) above, but would require detailed work to identify appropriate categories of 'places of safety' (in the form e.g. of an exhaustive list of individuals or institutions with legal responsibility for the care of persons lacking capacity) from which it would be wrong to remove a person.

- 5.7 For all of these reasons, we are not as part of this report making recommendations for a targeted offence of abduction involving persons lacking capacity. We will now turn to our recommendations relating to the Child Abduction Act 1984.

### **RECOMMENDATION 3: INCREASE THE MAXIMUM SENTENCE FOR CHILD ABDUCTION**

- 5.8 The Lord Chief Justice in *Kayani*<sup>14</sup> observed:

We are left with this position. An offence under the 1984 Act, committed by one parent, involves the absence of consent not of the child, but of the other parent. The ingredients of the offence are straightforward. They are readily capable of proof. An offence of kidnapping by one parent of his or her children is much more problematic, and difficult of proof. The Law Commission may or may not recommend reform of the common law offence of kidnapping. If it does, any relevant reforms would require legislation. For the present, we invite the Law Commission to address the question whether cases where children are removed from one parent by the other should be treated as kidnapping offences. In the meantime, in any event, pending any possible change to the substantive law, there are cases falling within the child abduction offence which merit a sentence greater than the maximum current sentence of 7 years imprisonment after a trial. *We recommend that the maximum sentence for child abduction should be increased.*<sup>15</sup>

- 5.9 The Lord Chief Justice's position may be summarised as follows.

- (1) Some cases of child abduction by a parent are so cruel that they are morally tantamount to kidnapping.<sup>16</sup>
- (2) However, for technical reasons, principally the force or fraud requirement, they do not fall within the present offence.<sup>17</sup>

<sup>14</sup> [2011] EWCA Crim 2871, [2012] 1 WLR 1927 at [16].

<sup>15</sup> Our emphasis.

<sup>16</sup> Paras 5 and 54 of judgment.

<sup>17</sup> Para 14 of judgment.

- (3) The Law Commission should review the substantive requirements of the offence, to address the question of whether these cases should be treated as kidnapping.<sup>18</sup>
  - (4) In the meantime, the maximum sentence for child abduction should be increased to meet these cases.<sup>19</sup>
- 5.10 We have argued above<sup>20</sup> that the core mischief which should be addressed by a new statutory kidnapping offence is present in cases of forcible taking. It follows that the cases to which the Lord Chief Justice's observations apply would continue to be excluded from kidnapping under our kidnapping reforms.
- 5.11 This is not to say that such cases are not serious. However, just as some such cases are presently excluded under the current law because they do not involve force or fraud against the child, or a loss of liberty on the child's part, so they would be excluded by the proposed statutory offence as they would not involve a forcible taking and the consequent heightened fear and trauma for the child.
- 5.12 Child abduction cases will often involve additional harms and wrongs to kidnapping. The gravity of such offending can be extremely high, owing to the level of emotional harm and distress that such parental abduction can cause to the other parent and to the family as a whole. This is in addition to the significant trauma which will very often be caused to the child during the process of abduction or wrongful retention, and in its immediate aftermath, even in the absence of force. Such trauma can be caused, for instance, by the alienation of the child from established relationships prior to removal.
- 5.13 Accordingly, an increase in the maximum sentence for child abduction should not be regarded as merely a stop-gap solution pending the redefinition of the elements of kidnapping. Increasing the maximum sentence is a distinct reform and should be pursued whether or not Recommendation 1 is implemented.
- 5.14 At present the maximum sentence for child abduction is seven years, while the maximum sentence for kidnapping is life imprisonment. As pointed out by the Lord Chief Justice, "this wide discrepancy seems illogical". An intermediate figure such as 14 years would seem appropriate.<sup>21</sup>
- 5.15 **We recommend that the maximum sentence for the offences under sections 1 and 2 of the Child Abduction Act 1984 should be increased to 14 years' imprisonment.**

<sup>18</sup> Para 16 of judgment, quoted above.

<sup>19</sup> Para 16 of judgment, quoted above.

<sup>20</sup> Para 4.48 above.

<sup>21</sup> The following are some examples of offences that have a 14 year maximum: Trafficking people for sexual exploitation; domestic burglary; various serious driving offence such as causing death by careless driving under the influence and causing death by dangerous driving; numerous drugs offences (including fraudulent evasion of a prohibition by bringing into or taking out of the UK a controlled drug – Class B; possession of a controlled drug with intent to supply it to another – Class B or C; production of a controlled drug – Class B or C); money laundering offences under the Proceeds of Crime Act 2002 and various sexual offences including those related to children under 13 and those protecting people with a mental disorder.

#### **RECOMMENDATION 4: CRIMINALISE PARENTAL CHILD RETENTION**

- 5.16 Our final recommendation is to fill the gap in the law identified in *Nicolaou*, namely the fact that no offence (except, sometimes, contempt of court) is committed when a parent lawfully takes a child out of the UK but unlawfully retains the child away from the UK.<sup>22</sup>
- 5.17 One way of filling this gap would be to amend the Child Abduction Act 1984, to extend the offence under section 1 (taking or sending a child out of the UK) to include the case where a child is lawfully taken or sent out of the UK and unlawfully retained there. This reform may be carried out either on its own or together with any of the other recommendations.
- 5.18 Once more, our discussion is divided into:
- (1) the merits of amending the Child Abduction Act 1984 to meet this problem; and
  - (2) the form that such an amendment might take.

#### **Merits of extending child abduction to include retention**

- 5.19 The first question to consider is the policy one, of whether it is desirable to have an additional or extended offence.
- 5.20 Considering the matter broadly, this proposal can be set against the backdrop of a considerable shift in the approach of Parliament to the use of the criminal law in the context of family matters. Over the 30 years since the 1984 Act, both the law itself and the approach of lawyers and law enforcement agencies to issues such as domestic violence, forced marriage and marital rape have changed dramatically, reflecting changing societal attitudes. The direction of movement has clearly been an increase in the willingness of Parliament to use the criminal law to prevent serious harm where necessary, even in a family or domestic context.<sup>23</sup>
- 5.21 We discussed in Chapter 3<sup>24</sup> the extent to which the absence of a wrongful retention offence appears to have been the product of an intentional legislative policy, or otherwise, based on records of debates on the Bill in Parliament. To the extent that this was the case, however, a plausible argument could be advanced that the context has changed considerably since 1984.
- 5.22 The decision should be made in the knowledge that, as a result of arrangements between the UK and several other countries, adequate powers for the recovery of the child already exist in some cases in civil law, and in some other cases, attempts can be made to recover the child through diplomatic channels. The

<sup>22</sup> We would like to extend our particular thanks to Gay Bailey of the Ministry of Justice for her assistance in this part of the project.

<sup>23</sup> It is a criminal offence to breach a non-molestation order (Domestic Violence, Crime and Victims Act 2004 (DVCVA) s 1, adding a new s 42A to the Family Law Act 1994); to cause the death or serious physical harm of a child or vulnerable adult (DVCVA s 5 (as amended)); and to cause a forced marriage (Anti Social Behaviour Crime and Policing Act 2014 s 121).

<sup>24</sup> Para 3.43 above.

numerous treaties are complex, but in summary, there are adequate powers to seek to recover a child who is wrongfully abducted or retained, provided that the child is in a Hague Convention<sup>25</sup> country (all countries subject to Brussels II Revised<sup>26</sup> are also Contracting States to the 1980 Hague Convention). It must be recognised that in practice the legal decision to return, made by the court in the country where the child has been taken or retained, is a matter for the court dealing with the Hague proceedings.<sup>27</sup>

5.23 In more detail, the applicable treaties are as follows.

- (1) About 90 countries, including the UK, are Contracting States to the 1980 Hague Convention on the Civil Aspects of International Child Abduction. The main provisions of the Convention have been incorporated into the law within the UK and are set out in Sch 1 to the Child Abduction and Custody Act 1985.
- (2) In the EU itself (except for Denmark) the Council Regulation known as Brussels IIa, Brussels II Revised or Brussels II bis reinforces the operation of the 1980 Hague Convention between EU Member States.<sup>28</sup> This is directly applicable in UK law and has not been reproduced in a domestic statute.

5.24 Article 8 of the Hague Convention provides that:

Any person, institution or other body claiming that a child has been removed *or retained*<sup>29</sup> in breach of custody rights<sup>30</sup> may apply either to the Central Authority of the child's habitual residence<sup>31</sup> or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

With certain exceptions, the relevant court in the place where the child now is should order the child's return if proceedings are brought within a year from the wrongful removal or retention, and shall do so even thereafter "unless it is demonstrated that the child is settled in its new environment".<sup>32</sup> Those

<sup>25</sup> Para 5.23 below.

<sup>26</sup> See para 5.24 below.

<sup>27</sup> In addition, stakeholders have reported further uncertainty in practice arising from differing levels of ability or willingness of certain foreign state agencies to enforce court orders for a child's return.

<sup>28</sup> Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility repealing Regulation (EC) No 1347/2000. Council Regulation 1347/2000 was known as Brussels II.

<sup>29</sup> Emphasis ours.

<sup>30</sup> This includes all rights of care or custody under the law of the place where the child was habitually resident before the removal or retention, whether or not arising under a court order: Hague Convention Articles 3(a) and 5(a).

<sup>31</sup> In England and Wales, this is the Lord Chancellor: Child Abduction and Custody Act 1985, s 3(1)(a).

<sup>32</sup> Hague Convention, Article 12.

exceptions, for example that based on risk to the child, are for that court to adjudicate upon.<sup>33</sup>

- 5.25 It is generally considered desirable that disputes between parents about where a child should live should be resolved through the civil rather than the criminal law. Any criminal offence should be confined to actions which frustrate the civil court's process. The justification for the offence under section 1 of the Child Abduction Act 1984 is that the child is taken outside the jurisdiction of the civil court, making it harder for that court to make and enforce its decision about where the child should live.<sup>34</sup>
- 5.26 For this reason, the criminal proceedings are not concerned with the substantive question of where the child should eventually live, and the civil and criminal processes operate quite independently of each other. Where a person takes a child abroad, proceedings under the Hague Convention may recover the child but are not designed to recover the abductor. Conversely an extradition request for the purposes of criminal proceedings may recover the abductor but are not designed to recover the child.<sup>35</sup>
- 5.27 Following these principles, there is no objection to extending the offence under the 1984 Act to include the wrongful retention of a child. Wrongful retention, just as much as wrongful abduction, frustrates the process of the civil court by keeping the child out of its jurisdiction. It is for this reason that wrongful retention was included as a civil wrong, on an equal footing with wrongful removal, within the scheme of the Hague Convention. It seems anomalous that this same equal treatment is not provided for in the criminal context.
- 5.28 Proceedings for contempt of court will not always be an adequate remedy.<sup>36</sup> The situation can arise equally when the child is taken abroad with the consent of the primary carer and no court order exists.
- 5.29 Any reform of the 1984 Act would be designed not to impact on the procedures under the treaties. If the retention of the child is made an offence, civil procedures for the recovery of the child and criminal procedures for the arrest and punishment of the abductor could take place independently of each other just as they do now in the case of an unlawful abduction. Nor would such reform impact on the existing mechanism for dealing with threatened abduction by arresting the would-be abductor for attempted child abduction,<sup>37</sup> or by issuing a port alert,<sup>38</sup> without the need for civil proceedings.<sup>39</sup>

<sup>33</sup> Hague Convention, Article 13.

<sup>34</sup> Hence the fact that the section 1 offence does not include the abduction of a child by a parent to a place within the UK.

<sup>35</sup> Although in some cases they may have this indirect effect in practice.

<sup>36</sup> See *Re: K (a child) (removal from jurisdiction: committal for failing to secure child's return)* [2014] EWCA Civ 905, [2014] *Family Law* 1384.

<sup>37</sup> Home Office Circular No 75/1984 (Child Abduction Act 1984), cited in N Lowe, M Everall QC and M Nicholls, *International Movement of Children* (2004), paras 9.1 and 9.2.

- 5.30 In conclusion, we consider that it would be desirable to expand the scope of section 1 of the 1984 Act to cover retention, and see no technical difficulty in doing so.

#### **Details of the new or extended offence**

- 5.31 The amendments themselves may well be relatively straightforward. First of all, the problem only affects parental abduction, since section 2 of the 1984 Act, which addresses abduction by other persons, already reads “takes or detains”. It would only be necessary to amend section 1 to include similar wording. For example the section could provide that the offence is committed when D:

- (1) takes or sends the child out of the UK without the appropriate consent, or
- (2) having taken or sent the child out of the UK with the appropriate consent, keeps or retains that child outside the UK without the appropriate consent or in breach of the conditions of the consent given.<sup>40</sup>

(1) represents the existing offence. (2) could be regarded either as an extension of that offence or as a new offence.

- 5.32 As in existing law, consent could be granted either by the other parent (or other person in whose favour a residence order has been made) or by the court: the offence would only be committed if neither consents.<sup>41</sup> Some practical and drafting issues may arise.

- 5.33 The major issue is one of jurisdiction. In the absence of very special reasons, it is generally considered undesirable to create extraterritorial offences. The act of “retaining” (or failing to return) a child is one performed in the country to which the child has been taken. Criminalising such an act infringes the principle of territoriality.

- 5.34 One possible way of dealing with the territoriality problem would be to redefine the offence as one of removing a child with the intention at the outset to retain the child beyond the date for which consent was given, thereby deceiving the other parent or the court. There would be no doubt such an offence was committed within England and Wales. However there would be difficulties in proving D’s state of mind at the time the consent was given. This model of offence would also fail to catch cases where D originally intended to comply with the conditions in the consent but (perhaps as a result of contact with family abroad) had a genuine change of mind. We reject this model for those reasons.

<sup>38</sup> *Registrar’s Direction (Children: Removal from Jurisdiction)* [1986] 1 WLR 475, [1986] 2 FLR 89 and Home Office Circular 21/1986, both cited in Lowe et al (above) at para 9.55 and *Rayden & Jackson on Divorce and Family Matters* (18th ed), Vol 1, ch 46, section 7, para T46.55.

<sup>39</sup> Lowe et al (above) para 9.56. The last observation represents the law in England and Wales; in Scotland a court order is needed before a port alert can be issued.

<sup>40</sup> This is a description of a general idea rather than a drafting proposal. The international treaties mentioned in para 5.23 above contain definitions of wrongful retention which could be used or adapted at the drafting stage.

<sup>41</sup> At the point when either initial or further consent is required.

5.35 Our preference is to provide for extension of the section 1 offence to apply in two situations.

- (1) V is removed from the UK by one parent / responsible person (D) with the consent of the other (X). X's consent is given only on the basis of a trip of a limited duration. D takes V out of the country as planned, but fails to return V in breach of the terms of the consent given.
- (2) D takes V out of the country with the leave of the court under Part II of the Children Act 1989 (which will usually take the form of a child arrangements order naming a person with whom the child is to spend time or otherwise have contact and when, or a specific issue order), but fails to return V by the time specified by the court.

In both cases, the retention has an effect within England and Wales, namely that a child who formerly was, and ought still to be, within the jurisdiction of the civil courts in England and Wales is now not within that jurisdiction. The offence would therefore protect the legitimate interest of England and Wales in ensuring the effectiveness of its civil justice system. It would not be extraterritorial in the sense of affecting a child who was never in the jurisdiction and has no links with it.

5.36 A further possible situation is where there is a child arrangements order which provides, in favour of D, who the child is to live with and when. D is therefore entitled to take or send V out of the UK for a period of less than one month without needing to obtain consent.<sup>42</sup> On one reading of the Child Abduction Act 1984, liability for the existing offence under section 1 arises in any case where the month expires without V being returned to the UK, as the initial taking or sending is no longer within the exception in section 1(4). There may therefore be no need for the new offence to extend to this situation.

5.37 Another situation is where X, or the court, consents to V being taken to one country, but V is taken to another, with or without first visiting the country for which consent is given. Again we consider that this will usually constitute an offence under section 1 as it stands, without the need to extend it. However, the wording "or in breach of the conditions of the consent given", suggested above,<sup>43</sup> puts this beyond doubt.

5.38 It will need to be considered whether the relevant "consent" should be the original consent to the taking or sending, consent to the later keeping or retaining, or some combination.

- (1) If the relevant consent is to the keeping or retaining, there could be cases where X (the parent with parental responsibility) spitefully revokes consent in the middle of the agreed holiday.<sup>44</sup> As explained, however, the DPP must consent to any prosecution under section 1.<sup>45</sup> The DPP would

<sup>42</sup> Child Abduction Act 1984, s 1(4), as amended by the Adoption and Children Act 2002 Sch 3 para 42(4) and the Children and Families Act 2014 Sch 2(2) para 47(4).

<sup>43</sup> Para 5.31(2) above.

<sup>44</sup> This point is made in the case comment on *Nicolaou* [2014] EWHC 1647 (Admin) by D Ormerod at [2013] *Criminal Law Review* 54.

<sup>45</sup> Child Abduction Act 1984, s 4(2); 4.225 above.

presumably not give this consent in cases where the parent's consent to the stay was revoked unreasonably.

- (2) We consider that it would be undesirable for X to have the power to impose criminal liability on D by unilateral decision. The offence should be confined to failure to return V by the date specified in the original consent. It should be a defence if X, or the court, agreed to the absence being extended: the offence would then only be committed if V was retained past the extended date. However, the relevant consent should not be able to be changed to make the date earlier. If good reasons arose for V to be returned before the date originally specified, the court could make a fresh order: if this order was disobeyed, D would not be guilty of the new offence but would be guilty of contempt of court.
- 5.39 The offence would therefore be confined to cases where a definite time was specified in the original consent, for example the beginning of the child's school term. It would not extend to a case where both parents take the child on an open-ended trip abroad and later disagree about whether or when to return.
- 5.40 There may have to be special provision for cases where a child is taken by one person and retained by another: if they are acting in concert both will presumably be guilty of the offence. Where the child has only one "connected person" other than the parent with care this problem should not arise.
- 5.41 On the issue of jurisdiction, it should be recognised that there is no guarantee that the argument we advance above would be accepted by a foreign court. This is relevant because, by the nature of the proposed extension to the offence, at the time it is committed the defendant parent would inevitably be outside the UK. However, although we necessarily have some doubts about how courts in other jurisdictions will confront this issue, we believe the reform is important and may have significant practical effects in promoting rigorous investigation and police involvement. These may well encourage the parent to return the child to the UK even if there is no subsequent prosecution.
- 5.42 It is also possible that a defendant parent would return voluntarily to the UK after committing the offence. This might be, for instance, because the child in question is returned under the international civil law process, and the parent returns to follow the child and continue civil proceedings in the UK. This could also be because the defendant parent leaves the child in the foreign country with other family, whilst returning to the UK to work.
- 5.43 Nonetheless, it is likely that in many cases the defendant parent will be resident in a foreign country at the time when criminal proceedings under the proposed extension to the section 1 offence are being contemplated. In order for such an individual to be effectively tried and sentenced for the offence it would therefore generally be necessary to request their extradition to the UK.
- 5.44 It is not possible within the confines of this report to give even a helpful summary as to the likely success of such an extradition request, since this would turn entirely in each case on the exact nature of the extradition arrangements in place between the UK and the host country. However, we note the problem at this stage which arises from the arguably extraterritorial nature of the extended offence.



- 5.45 An example may help to illustrate the problem. In order to explain the many complexities that may arise, in this example the hypothetical request is made by a foreign state for return of an individual from the UK to the foreign state to face a charge of wrongful retention of a child in the UK. However, similar considerations might apply were the UK to make an extradition request of another country under the proposed extended offence. The example proceeds upon the basis that the law of the foreign state (in this case France) contains an offence of wrongful retention in the same terms as the new offence being considered here.

**Example 8.** D and X are the separated parents of a young child V. All three parties are resident in France. V lives with X, but there are regular contact arrangements in place in favour of D. D wishes to take V out of France to England. X objects, but D receives the appropriate authorisation from the French civil courts to do so for a 2 week holiday only. D travels with V to England as agreed, but fails to return to France at the conclusion of the two week period, instead communicating to X that he intends to live in England indefinitely with V. X contacts her lawyers in France, who arrange for proceedings to begin in the courts of England and Wales under the Hague Convention with the object of securing the return of V to France. A criminal charge against D<sup>46</sup> is also authorised by the French authorities, and an extradition request is made to the UK for the return of D to France to face a charge of wrongfully retaining V in the UK.

- 5.46 The attitude of the courts of England and Wales to the extradition request would depend in part on where it was concluded that the offence charged had taken place. Even if it were concluded (as we argued above it could be) that the offence took place in part in France then the extradition could only be ordered under the current arrangements between the UK and other EU states<sup>47</sup> if the UK court concluded either:

- (1) that no part of the conduct took part in the UK (which seems unlikely) and certain other requirements were fulfilled; or
- (2) if it were concluded that at least some of the conduct did occur in the UK, that wrongful retention was also an offence under the UK law in corresponding circumstances.

- 5.47 On the other hand if, contrary to the argument advanced above, it were concluded that all the relevant conduct occurred in the UK (in other words this was an offence over which France was exerting extra-territorial jurisdiction), then extradition could only be ordered if this was an offence over which the UK would itself exert extra-territorial jurisdiction, in addition to other requirements being satisfied.

- 5.48 Although in very summary form, and considering the mirror image of the problem we are confronted with in this report (namely a request for extradition *from* the UK

<sup>46</sup> In identical terms to the recommended extended offence under consideration here.

<sup>47</sup> Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA).

for a wrongful retention, rather than to the UK) the example above illustrates both the complexity of the issues involved in a extradition request for an offence of this type and the potential relevance of the territoriality question to the success of any such request.

5.49 Notwithstanding these potential difficulties, and the consequent possibility that an extradition request by the UK for an offence of wrongful retention might under certain circumstances be refused, we consider that the extension to the section 1 offence is still desirable. This is for at least the following reasons:

- (1) The declaratory effect of criminalising such conduct. For the reasons given above<sup>48</sup> a wrongful retention abroad can be just as harmful as an abduction which is unlawful from the outset, and it is right that it is similarly labelled as criminal.
- (2) The fact that extradition for this offence may in some circumstances be possible, for instance where the host state's courts form the view that the relevant offence took place entirely in the UK, where the host state also exerts extra territorial jurisdiction over a similar offence, or simply where the host state has a dissimilar arrangement for dealing with incoming extradition requests to that of the UK.
- (3) The fact of a criminal offence having been committed as a matter of UK law may be a threshold requirement for the involvement of the UK police, who could then bring valuable investigative resources to bear.
- (4) The fact that the defendant parent may return voluntarily to the UK after committing an act of wrongful retention.

5.50 **We recommend that the offence under section 1 of the Child Abduction Act 1984 should be amended to include the case where the connected person, having taken or sent the child out of the UK with the appropriate consent, keeps or retains that child outside the UK without the appropriate consent or in breach of the conditions of the consent given.**

<sup>48</sup> See para 5.19 and following above.

# CHAPTER 6

## RECOMMENDATIONS

### RECOMMENDATION 1: STATUTORY OFFENCE OF KIDNAPPING

- 6.1 We recommend that the common law offence of kidnapping be replaced in statute.

**[paragraph 4.20]**

- 6.2 We recommend that the new offence of kidnapping should contain a requirement that D accompany V throughout.

**[paragraph 4.86]**

- 6.3 We recommend that the new offence of kidnapping should contain a requirement that D takes V or otherwise causes V to move.

**[paragraph 4.91]**

- 6.4 We recommend that the new offence of kidnapping should be committed only when D intends to take V or cause V to be moved with him and that recklessness should not be sufficient.

**[paragraph 4.96]**

- 6.5 We recommend that the new offence of kidnapping should contain a requirement that D takes V or otherwise causes V to move by force or threat of force.

**[paragraph 4.108]**

- 6.6 We recommend that the new offence of kidnapping should contain a requirement that D intentionally uses or threatens force in order to take or otherwise move V.

**[paragraph 4.110]**

- 6.7 We recommend that the new offence of kidnapping should apply only to conduct performed without lawful authority or reasonable excuse. We take the view that it is unnecessary to provide any further detail within the statutory definition.

**[paragraph 4.156]**

- 6.8 We recommend that the new offence of kidnapping should not be capable of being committed by fraud.

**[paragraph 4.196]**

- 6.9 We recommend that the existing offences of kidnapping and false imprisonment should continue to be triable on indictment only. Similarly we recommend that any offences enacted to replace them should be triable on indictment only.

**[paragraph 4.218]**

- 6.10 We recommend that the practice for consent to prosecution, for kidnapping by parents, under section 5 of the Child Abduction Act 1984 should continue to follow the existing CPS guidance, taking account of the observations of the court in *Kayani*.

[paragraph 4.230]

- 6.11 We do not consider that the new offence of kidnapping need include lack of consent, deprivation of liberty or restriction on freedom of movement as express ingredients in the statute.

[paragraphs 4.189 and 4.206]

#### **Summary of recommended kidnapping offence**

- 6.12 We recommend the creation of a new statutory offence of kidnapping, which would be committed when D:

- (1) without lawful authority or reasonable excuse,
- (2) intentionally uses force or threats of force,
- (3) in order to take V or otherwise cause V to move with him.

[paragraph 4.231]

#### **RECOMMENDATION 2: STATUTORY OFFENCE OF UNLAWFUL DETENTION**

- 6.13 We recommend that the offence of false imprisonment be replaced in statute.

[paragraph 4.238]

- 6.14 We recommend that the new offence replacing false imprisonment be called unlawful detention.

[paragraph 4.243]

- 6.15 We recommend that consideration be given to express statutory provision for the false arrest cases. Such provision could stipulate that such cases do constitute unlawful detention, and that the common law principles of consent should not apply so as to prevent criminal liability arising where the victim's consent is obtained by fraud as to lawful authority.

[paragraph 4.251]

- 6.16 We recommend that the new offence of unlawful detention should include all the elements of the current common law offence of false imprisonment.

[paragraph 4.256]

### **Summary of recommended unlawful detention offence**

- 6.17 We recommend the creation of a new statutory offence of unlawful detention, which would be committed when D:
- (1) without lawful authority or reasonable excuse,
  - (2) intentionally or recklessly,
  - (3) causes the restriction of V's freedom of movement from a particular place.

**[paragraph 4.261]**

### **RECOMMENDATION 3: INCREASE SENTENCE FOR CHILD ABDUCTION**

- 6.18 We recommend that the maximum sentence for the offences under sections 1 and 2 of the Child Abduction Act 1984 should be increased to 14 years' imprisonment.

**[paragraph 5.15]**

### **RECOMMENDATION 4: CRIMINALISE PARENTAL CHILD RETENTION**

- 6.19 We recommend that the offence under section 1 of the Child Abduction Act 1984 should be amended to include the case where the connected person, having taken or sent the child out of the UK with the appropriate consent, keeps or retains that child outside the UK without the appropriate consent or in breach of the conditions of the consent given.

**[paragraph 5.50]**

*(Signed)* DAVID LLOYD JONES, *Chairman*

ELIZABETH COOKE

DAVID HERTZELL

DAVID ORMEROD

NICHOLAS PAINES

ELAINE LORIMER, *Chief Executive*

10 November 2014

