THE CRIMINAL BAR ASSOCIATION

Law Reform Committee

RESPONSE BY THE LAW REFORM COMMITTEE OF THE BAR COUNCIL AND THE CRIMINAL BAR ASSOCIATION OF ENGLAND AND WALES

SIMPLIFICATION OF CRIMINAL LAW: KIDNAPPING
A RESPONSE TO LAW COMMISSION C.P. 200

INTRODUCTION

1. The Law Reform Committee of the Bar Council and the Criminal Bar Association of England and Wales welcome the Law Commission's consultation paper and are grateful to be given the opportunity to respond to the issues raised within it.

2. We agree with the Law Commission's assertion that there are advantages and disadvantages to each of the issues set out in the paper. For that reason, for many of the questions we have provided both a majority and a minority view.

RESPONSE TO CONSULTATION QUESTIONS

5.1 Reform and codification

3. We agree that reform and codification of the offences of kidnapping and false imprisonment is desirable for many of the reasons set out in the paper.

5.2 Consent, force and fraud

(1) Lack of consent

4. We agree that lack of consent should be a condition of liability in any new offence.

(2) No separate requirement of force or fraud

Majority view: 'Force or fraud' should be retained

5. The majority favour retaining the requirement of force or fraud. It is the element that in the vast majority of cases lies at the heart of the crime and represents an important and integral aspect of D's conduct, making the offence clear, simple and easily understandable. It also serves to exclude trivial conduct that, though perhaps inconvenient or even reprehensible, is not worthy of criminalization. Its absence tends to rob the offences of the ingredient most closely associated with them, namely the 'flavour of compulsion'.

6. The lacuna identified in the paper, namely the position of the child or mentally impaired person who is simply encouraged or induced to behave in a way resulting in a confinement which is contrary to his or her interests, is a real one. However it may be possible to correct this by the simple expedient of including this situation as a type of conduct alternative to force or fraud, for example by the addition of 'or of a person who, by reason of age or mental impairment lacks capacity to consent'. Alternatively there could be a saving provision, such as 'by force or fraud, save where the person lacks capacity by reason of ….' or to include 'the encouragement or inducement of a person lacking mental capacity by reason of …'

7. The further alternative that the abandonment of force or fraud is designed to cover, that of fundamental mistake, as exemplified by the scenario described at para 2.78, should not, without more, be classified as criminal.

Minority view: 'Force or fraud' should be not be retained

8. The minority favour dispensing with 'force or fraud' as an element of kidnapping. Not only is it not an element of false imprisonment, neither is it an element of rape.

This inconsistency can lead to unusual consequences. For example, a person who returns to D's home and has sex with him only because D has falsely told them that he is a film star will have been kidnapped but not raped, as consent is vitiated by fraud with kidnapping but not with rape.

9. It is lack of consent that lies at the centre of kidnapping. The extra element of force or fraud makes the offence under-inclusive. For example, the taking of a child being reckless as to whether their parents consent, should constitute kidnapping regardless or whether or not force or fraud is used. However the requirement for force or fraud means that a D who falsely tells a child that he is taking them to see some puppies kidnaps them, but a defendant who correctly tells the child that he is taking them to see some puppies does not. If children and the mentally incapacitated were presumed to be incapable of consent then the offence would be made out regardless of force or fraud. It is suggested that this is the right result as parents are entitled to expect that other people will not take their children away in circumstances where that other person realizes that the child's parent does not, or might not consent to that.

10. It is desirable that the definition of consent in kidnapping should mirror the definition of consent in rape, not least so that the judge can more easily direct the jury.

5.3 Lawful excuse

11. We agree with the proposal set out in the paper.

5.4 Fault: State of mind

12. We agree that the fault element of any new offence should be intention or subjective recklessness.

5.5 Fault: Circumstances of V's lack of consent

13. We are of the view that the second option (genuine belief in V's lack of consent) is

preferable.

14. Where force or fraud is the means by which V's liberty is curtailed, it must surely follow that D does not genuinely believe that V is consenting, or at least giving an informed consent. In the case of the child or mentally impaired person, the question will depend upon the state of D's knowledge of that fact. If, absent force or fraud, when encouraging such a person to be confined or moved, D genuinely believes that the child is old enough to consent or that the person has sufficient mental capacity to consent, D's conduct should not be criminalised. The question of whether a person in facts lacks capacity is, in our view, well within the ability of a jury to determine. We suggest that it is the sort of fault element which is appropriately determined by the standards of a jury.

5.6 Triable either way

Majority view: Offences should be triable either way

15. The majority believe that the offences replacing kidnapping and false imprisonment should be triable either way. Prosecutorial discretion should prevent trivial offending being charged and jurisdiction will in reality only be retained in minor matters. The public perception of the gravity of kidnapping and false imprisonment should not preclude matters being dealt with in magistrates' courts if they are at the bottom end of the spectrum of seriousness.

Minority view: Offences should remain triable only on indictment

16. The minority believe that kidnapping and false imprisonment are offences that should only ever reflect serious criminality and should therefore remain triable only on indictment. Conduct of the kind described at para 4.58, while technically amounting to a crime, should not be prosecuted and there should be no encouragement to do so by allowing for such conduct to be tried in magistrates' courts; those instances regarded as serious enough to be tried on indictment should be prosecuted. In the example given at para 4.58, were some minimal force or threat of force deployed, common assault could be charged. Alternatively, if

significant force or threat were alleged, or the detention had serious consequences (eg. missing an examination) the matter may justify trial on indictment.

17. The statistics relied upon (See paras 2.2 – 2.4, 4.58 & Appendix D tables at p 137) do not reliably support the conclusion contended for, namely that because 21% of offences attract sentences of less than 6 months imprisonment they might have been dealt with in the magistrates' court. However experience shows that in the vast majority of kidnap and (especially) false imprisonment cases these offences are ancillary or subordinate to another offence, often rape or other sexual offences, blackmail, robbery or other offences of serious violence. That helps to explain why so few result in conviction – it is commonplace on pleas of guilty to the principal offence for the prosecution not to proceed with the ancillary one, even though generally it might be opened as part of the facts. Where the prosecution for false imprisonment or kidnap results in conviction it is equally commonplace for the sentence to be a short custodial term consecutive to the main sentence, taking into account the principle of totality. Accordingly, unless the statistics can reveal the extent to which the relevant offences are either parasitic or free standing, they do not support the proposition that many offences currently tried on indictment could be tried summarily.

5.7 Models for new offences

Model 1

18. Our unanimous view is that Model 1 is not the way forward, its principal drawbacks being loss of labeling and over-simplification. We acknowledge that a single offence would simplify indictments in cases where the victim is both held at and moved between several premises (eg. a hostage moved from house to house; a prisoner detained after their lawful release date moved between prisons and courts). However we feel that such cases could be indicted as a single false imprisonment or a single kidnap. Moreover the enormous breadth of a single offence would mean that a guilty plea on a basis far removed from the prosecution case would often result in the material facts being determined by judges not juries.

Model 2

19. The majority favour Model 2 as it broadly retains and codifies the current distinction between false imprisonment and kidnap and accords with what juries know and expect – 'kidnapping' is a much more readily understandable concept than 'wrongful deprivation of liberty'. We believe that the problems identified in paragraph 4.82 of the paper can be dealt with by an explanatory or definitional provision.

20. However it is felt that Model 2 is prolix in its current form, and therefore runs counter to making the offence more accessible and understandable, especially to the public. A suggested alternative would be to follow the scheme of the Republic of Ireland's Criminal Law Codification Advisory Committee suggestion at paragraph B.46.

Model 3

21. The minority favour Model 3 on the basis that a distinction between 'proper kidnap' and mere 'deprivation of liberty' is more important than a distinction between detention and abduction. It is felt that cases in which persons are moved without their consent are not necessarily more serious than cases in which they are detained without their consent. Model 3 also has the twin advantage of retaining the 'kidnap' label for the most serious cases and permitting less serious 'deprivation of liberty' cases to be tried in the magistrates' courts. Furthermore the two offences may serve to reduce the issues for the jury to determine, as a plea to the basic offence would allow them to focus solely on whether certain aggravating factors were present.

22. It would not be preferable to charge the basic detention or abduction offence together with an attempt to commit the other offence. Such an approach is at odds with the background to the paper (See para 1.6 "the lack of a compendious offence to cover ransom kidnappings means that the prosecution is obliged to include a number of separate counts in the indictment). The suggested danger of 'wrong charging' is felt to be illusory as the V of an aggravated kidnap is extremely

unlikely to fail to mention the aggravation (eg. threatened with harm/harmed, sent out of the country, held in service) in their witness statement. Neither is the prosecution likely to discover that a ransom was demanded for the first time during the trial. Furthermore D should be in a position to know in advance of the trial the nature of the case they have to answer.

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