

The Law Commission
Consultation Paper No 200 (Analysis of Responses)

**SIMPLIFICATION OF CRIMINAL LAW:
KIDNAPPING**

Analysis of Responses to Consultation Paper No 200

29 January 2014

KIDNAPPING: ANALYSIS OF RESPONSES

1.1 This minute analyses the responses to Consultation Paper No 200, Simplification of Criminal Law: Kidnapping. The questions for consultation may be summarised as follows.

- (1) Whether the offences of false imprisonment and kidnapping, or either of them, should be replaced by statute.
- (2) Whether “force or fraud” should continue to exist as a separate condition of liability or should be treated simply as evidence of lack of consent.
- (3) Whether there should be a condition of “lawful excuse”, leaving to the general law the question of what is a lawful excuse.
- (4) Whether the fault element should be “intention or subjective recklessness”.
- (5) Whether honest belief in consent should be a complete defence or whether the belief should be reasonable.
- (6) Whether the new offence or offences should be triable either way.
- (7) Whether the new offence or offences should take the form of:
 - (a) Model 1: one offence covering all forms of deprivation of liberty;
 - (b) Model 2: separate offences of detention and kidnapping;
 - (c) Model 3: one basic offence of deprivation of liberty and one aggravated offence where any of a list of named factors or intentions is present.

THE INDIVIDUAL RESPONSES

Anthony Edwards

1.2 Taking the questions in the same order, his responses are as follows.

- (1) Both offences should be replaced.
- (2) Force or fraud should be evidence of lack of consent.
- (3) There should be a condition “without lawful excuse”.
- (4) “Intention or subjective recklessness” is right.
- (5) Honest belief.
- (6) Either way.
- (7) Model 3.

Council of Circuit Judges

1.3 The response was:

- (1) Both offences should be replaced.
- (2) Force or fraud should be evidence of lack of consent. Consent should be defined as in section 74 of the Sexual Offences Act 2003, to address the position of children and the learning disabled, but the remaining evidential presumptions in that Act should not be imported.
- (3) There should be a condition “without lawful excuse”.
- (4) “Intention or subjective recklessness” is right.
- (5) Honest belief.
- (6) Should not be triable either way.
- (7) Model 2. Kidnapping should mean that the victim is “taken or conveyed to another place”. Putting someone in a sealed container and sending it (unaccompanied) should be kidnapping; sending someone on a wasted journey by deception should not.

Crown Prosecution Service.

1.4 The response was:

- (1) There is no need to codify the offences. But if they are codified, some anomalies could be put right.
- (2) Force or fraud should be evidence of lack of consent.
- (3) There should be a condition “without lawful excuse”.
- (4) “Intention or subjective recklessness” is right.
- (5) Reasonable belief.
- (6) Should not be triable either way.
- (7) Model 2.

Criminal Bar Association

1.5 The response was:

- (1) Both offences should be replaced.
- (2) Majority: force or fraud should remain a separate condition, but lack of capacity should be added as a third option. Minority: force or fraud should be evidence of lack of consent.
- (3) There should be a condition “without lawful excuse”.

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- (4) "Intention or subjective recklessness" is right.
 - (5) Honest belief.
 - (6) Majority: triable either way. Minority: indictable only.
 - (7) Majority: Model 2, but simplified as in Irish definition. Minority: Model 3.

It is not stated whether the same members of the committee constitute the "minority" in each case.

Dean Henson, West Yorkshire Police

1.6 This response does not address the questions in order, and is mostly concerned with children and consent.

- (1) Not addressed.
- (2) Not addressed.
- (3) Making consent a condition of the new offence or offences would not deal with the case where a child is willingly abducted. There should be an irrebuttable presumption that a child under 13 cannot consent.
- (4) Not addressed.
- (5) Not addressed.
- (6) Triable either way.
- (7) The response sets out the three models in detail without choosing between them. If Model 3 is adopted there should be a further aggravating factor, namely the removal of a child from a person with lawful control.

Jeremy Horder

1.7 This response too is not ordered by the consultation questions. Sorting it out into those questions, the views expressed are as follows.

- (1) Not addressed.
- (2) Not addressed.
- (3) Should be "unlawfully" or "subject to any other enactment providing that detention or kidnap is lawful in particular circumstances". The "ordinary social contact exception", such as may occur in boisterous parties, should be addressed.
- (4) Not addressed.
- (5) Reasonable belief.
- (6) Triable either way.

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- (7) Model 3, but the aggravating factor should be intention to commit an indictable offence (presumably other than the kidnap itself).

Justices' Clerks' Society

1.8 Their response was as follows.

- (1) Both offences should be replaced in statute.
- (2) Force or fraud should be evidence of lack of consent.
- (3) There should be a lawful excuse exception, to be left to the general law; but at present the general law of putative defences is unsatisfactory (e.g. belief in self defence need only be honest, while belief in necessity must be reasonable).
- (4) "Intention or subjective recklessness" is right.
- (5) No decided conclusion on honest or reasonable belief, particularly when the kidnapping has sexual purposes or overtones.
- (6) The offences should not be triable either way, though an either-way offence of minor restriction of liberty could be devised.
- (7) Model 2.

Judicial response

1.9 This response was signed by John Thomas J (President of the QBD) and Hughes LJ.

- (1) It would make sense to replace both offences together, though there are no problems with false imprisonment taken on its own.
- (2) Force or fraud should be evidence of lack of consent. There should be an offence of kidnapping children, to bridge the gap between kidnapping proper and child abduction.
- (3) Lawful excuse should be determined in accordance with the general law.
- (4) "Intention or subjective recklessness" is right.
- (5) Honest belief.
- (6) Should not be triable either way.
- (7) Model 2, but with three offences as above.

London Criminal Courts Solicitors' Association

1.10 This response recommended as follows.

- (1) Both offences should be replaced in statute.

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- (2) No need for force or fraud; but intention to use force could be an aggravating factor within Model 3.
 - (3) “Unlawfully” or “without lawful excuse” is sufficient.
 - (4) Intention or subjective recklessness, in relation to any of the external elements of the offence.
 - (5) Honest belief.
 - (6) Either way for basic offence; indictable only for aggravated offence.
 - (7) Model 3.

Missing People

1.11 This response was by letter and did not consider the consultation questions separately.

- (1) Both offences should be replaced in statute.
- (2) No separate requirement of force or fraud.
- (3) Not addressed.
- (4) Not addressed.
- (5) Reasonable belief.
- (6) Not addressed.
- (7) Model 2.

Rebecca Williams

1.12 This response consisted of two documents. One contains a very detailed analysis of the law of false imprisonment and kidnapping as it stands, but makes no comment on possible reforms. The other does contain comments on the proposed reforms.

- (1) Not specifically addressed.
- (2) No separate requirement of force or fraud; lack of consent could also result from non-disclosure.
- (3) Not addressed.
- (4) Not addressed.
- (5) Reasonable belief.
- (6) Not addressed.
- (7) Model 1; or Model 3 if reasons for distinction are clearly made out.

Jonathan Rogers

1.13 This response also only addressed some of the issues.

- (1) Not specifically addressed.
- (2) Not addressed.
- (3) Not addressed.
- (4) Not addressed.
- (5) Honest belief, except perhaps when defendant is acting on behalf of a third party and on the faith of representations made by that party.
- (6) Triable either way.
- (7) Model 3.

Samantha Riggs

1.14 Samantha Riggs was junior counsel in the Hendy-Freegard case and many of her comments were in relation to that case.

- (1) Not specifically addressed.
- (2) Lack of consent should be a requirement; no comment on force or fraud.
- (3) Not addressed.
- (4) Not addressed.
- (5) Reasonable belief.
- (6) Triable either way.
- (7) Model 2.

UK Missing Persons Bureau

1.15 Comments were as follows.

- (1) Offences should be replaced in statute.
- (2) No separate requirement of force or fraud.
- (3) Not addressed.
- (4) Not addressed.
- (5) Reasonable belief.
- (6) Not addressed.
- (7) Model 3.

SUMMARY OF RESPONSES ON INDIVIDUAL ISSUES

- 1.16 On whether the offences should be replaced in statute, eight thought that they should be, five expressed no view and one was opposed.
- 1.17 On the requirement of force or fraud, nine thought that there was no need for a requirement except as evidence of lack of consent, four expressed no view and one thought that the requirement should be retained.
- 1.18 On the question of lawful excuse, seven agreed with wording such as “without lawful excuse” or “unlawfully”, six expressed no view and one (Jeremy Horder) wanted more detailed treatment.
- 1.19 On the fault element, seven agreed with our proposal of intention or subjective recklessness and seven expressed no view.
- 1.20 On honest or reasonable belief, six favoured honest belief, six favoured reasonable belief, two favoured a distinction between different categories of case and one expressed no view.
- 1.21 On mode of trial, seven favoured trial either way, three expressed no view and four favoured trial on indictment only.
- 1.22 On the choice of model, one favoured Model 1, seven favoured Model 2, five favoured Model 3 and one expressed no preference.