WA CRIMINAL LAW FORUM

Consensual Fist Fights and Other Brawls: Are They a Crime?

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Two men who have been drinking heavily in a pub get into an argument. They decide to settle their differences by a fight. In the ensuing brawl one of the men, D, breaks the other man's jaw. D is later charged with an assault occasioning bodily harm, in respect of the injury caused. Can he plead, as a defence to this charge, that the other man consented to take part in the fight with him? Despite the commonplace nature of this scenario, the answer is far from clear.

ASSAULT is one of the oldest and commonest crimes in the calendar. Its roots can be traced back to mediaeval times. However, despite its antiquity, the exact parameters of the offence remain unclear. One problem which has, perhaps surprisingly, not been finally resolved by the courts is whether the consent of a victim (P) can provide a defence to an assailant (D) who is charged with assaulting him.

In practice this problem often arises when two men have a heated argument and decide to resolve their differences by a fist fight, in which cuts and bruises (and possibly also broken bones) are sustained. Does the fact that both men are willing participants in the fight mean that neither of them can be convicted of assaulting the other?

The answer to this question depends, in part, on the jurisdiction in which the fight takes place. If it is governed by the common law, the fight is almost certain to be 'unlawful' and the assailants can therefore be convicted of assault regardless of consent. In Australia this is the position

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in Victoria and New South Wales,[1] both of which have adopted the rule laid down by the English Court of Appeal in *Re Attorney-General's Reference (No 6 of 1980).*[2] In that case Lord Lane said:

> It is not in the public interest that people should try to cause, or should cause, each other bodily harm for no good reason. Minor struggles are another matter. So, in our judgment, it is immaterial whether the act occurs in public or private; it is an assault if actual bodily harm is intended and/or caused. This means that most fights will be unlawful regardless of consent.[3]

Whilst this rule was first formulated in a jurisdiction governed by the common law, it has since been expressly adopted in at least one of the Australian Code states (Tasmania)[4] and until recently it was assumed that it also applied in the other two Code states, Queensland and Western Australia.[5] But, in 1985, in *R v Raabe*,[6] the Queensland Court of Criminal Appeal held, in a split decision, that, contrary to the position at common law, consent *might* be a defence to a charge of common assault or assault occasioning bodily harm arising out of a fist fight. This was followed six years later by *Lergesner v Carroll*[7] in which the same court (differently constituted) held, unanimously, that consent could be a defence to these charges.

The decision in *Lergesner* is surprising. It removes an important deterrent against skirmishing and brawling, and it sets the law in Queensland on a quite different footing from that which prevails elsewhere in Australia. Importantly, however, the provisions of the Queensland Code on assault are identical to those in Western Australia: this raises the question whether the courts in this State will adopt the '*Lergesner* principle' or whether they will follow the common law rule, which takes a much firmer stand against fist fights and other brawls.

The purpose of this essay is to question the correctness of *Lergesner* and to suggest that it ought not to be adopted in Western Australia.[8] To do this it will be necessary, first, to trace the history of consent as a defence to

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1. *Pallante v Stadiums Pty Ltd (No 1)* [1976] VR 331, 338-339; and see B Fisse *Howard's Criminal Law* 5th edn (Sydney: Law Book Co, 1990) 152; RN Howie & PA Johnson *Annotated Criminal Legislation — NSW* (Sydney: Butterworths, 1996) ¶ 8241.2.
2. [1981] 1 QB 715.
3. Id, 719. If the fight takes place in public the combatants may be guilty of affray as well as assault.
4. *Holmes* [1993] 2 Tas R 232, Wright J 236: 'I am compelled to the conclusion that the law of Tasmania as expressed in the Code, s 182(4), coincides with the principle established by the English and Canadian decisions'. The case was one of 'spouse abuse'.
5. See Fisse supra n 1, 152; and *Watson* (1986) 22 A Crim R 308, McPherson J 311.
6. [1985] 1 Qd R 115.
7. [1991] 1 Qd R 206.
8. But note that *Lergesner* has been applied by the WA District Court: see eg *Mildwaters* (unreported) Dist Ct 26 July 1989 no 464.

assault *at common law*, and then to examine the corresponding provisions of the Western Australian (and Queensland) Criminal Codes, with a view to determining whether those provisions were intended to reflect or depart from the common law rule.

CONSENT AND ASSAULT: THE COMMON LAW

At common law it has long been held that, as a general rule, absence of consent is an integral element in the offence of assault. Thus, if D seizes P's hand in a friendly greeting, or taps P on the shoulder to draw his attention, P's consent (whether express or implied) means that D does not assault him.[9]

To this general rule, however, there have always been many exceptions. These can be traced back to at least the mid 19th century,[10] but they were most clearly affirmed by the English Court for Crown Cases Reserved in *R v Coney* (1882).[11] This case involved a so-called prize-fight, in which the contestants fought with bare fists to the point of exhaustion, whilst a crowd of onlookers placed bets on the outcome.[12] The injuries sustained in such fights were often severe. In *Coney*, the combatants were charged with common assault and the spectators with aiding and abetting them. Hawkins J began his judgment by restating the general rule on consent and assault. He said:

> *As a general proposition* it is undoubtedly true that there can be no assault unless the act charged as such be done without the consent of the person alleged to be assaulted, for want of consent is an essential element in every assault, and that which is done by consent is no assault at all.[13]

However, whilst Hawkins J recognised that absence of consent was an integral element in the offence of assault, he also acknowledged that there were many exceptions to that general rule. In the instant case, he held that since the prize-fight was a disorderly spectacle, which was likely to result in a breach of the peace, it was an unlawful act ('malum in se') and the consent of the protagonists was therefore immaterial. Stephen J was of

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9. *Collins v Wilcock* [1984] 1 WLR 1172; *Boughey* (1986) 161 CLR 10, Mason, Wilson and Deane JJ 24, Brennan J 39.
10. See eg *Boulter v Clarke* Buller's Nisi Prius 16; *Matthew v Ollerton* 87 ER 362; *Perkins* 172 ER 814; *Lewis* 174 ER 874. All these cases involved fights.
11. (1882) 8 QBD 534.
12. The history and nature of prize-fighting is discussed by McInerney J in *Pallante* supra n 1, 335-337.
13. *Coney* supra n 11, 553 (emphasis added). Cf *Schloss and Maguire* (1897) 8 Qd LJ 21, 22 where Griffith CJ said: 'The term assault of itself involves the notion of want of consent. An assault with consent is no assault at all'. Griffith was the author of the Qld and WA Codes.

the same view. Having held that no physical injury could be consented to if it was of such a nature, or inflicted in such circumstances, 'that its infliction [was] injurious to the public as well as to the person injured',[14] he continued:

> But the injuries given and received in prize-fights are injurious to the public, both because it is against the public interest that the lives and health of the combatants should be endangered by blows, and because prize-fights are disorderly exhibitions, mischievous on many obvious grounds. *Therefore the consent of the parties to the blows which they mutually receive does not prevent those blows from being assaults.*[15]

In this passage, Stephen J seemed to imply that the prize-fight was unlawful, not only because it was a 'disorderly exhibition', but also because it put the lives of the combatants at risk. From this it might seem to follow that in other, less serious fights, where life was *not* endangered, consent would be a defence.[16] However, over the years, the English courts came to adopt a much stricter view. This culminated in *R v Donovan* (1934), where it was held that if D deliberately subjected P to a degree of physical violence which was 'likely or intended to do him *bodily harm',*[17] P's consent was immaterial and D could be convicted of assaulting him. Under this test it was irrelevant that the violence was not such as to endanger P's life: it was sufficient that he suffered, or was likely to suffer, 'bodily harm.' This test was later endorsed by the Court of Appeal (Criminal Division) in *Re Attorney-General's Reference (No 6 of 1980).*[18]

As for the notion of 'bodily harm', this was defined in *Donovan* as:

> Any hurt or injury calculated to interfere with the health or comfort of [P]. Such hurt or injury need not be permanent, but must, no doubt, be more than merely transient or trifling.[19]

Typical examples of 'bodily harm' under the *Donovan* test include: a fractured bone, a broken nose, severe bruising or burning, a deep cut or cuts, or multiple minor injuries. Physical violence which is likely or intended to have such harm as its consequence is unlawful and cannot be consented to by P.

The upshot of these three cases, *Coney, Donovan* and *Re Attorney-General's Reference*, is that consent can provide a defence to a charge of

14. *Coney* supra n 11, 549.
15. Ibid (emphasis added).
16. Cf JF Stephen *A Digest of the Criminal Law* 3rd edn (London: Macmillan, 1883) Art 206: 'Everyone has a right to consent to the infliction upon himself of bodily harm not amounting to a maim'.
17. [1934] 2 KB 498, 509 (emphasis added).
18. Supra n 2. Note that Lord Lane held that the combatants in a fist fight would be guilty of assault if 'they intended to and/or did cause actual bodily harm,' a slightly different formulation from that in *Donovan.*
19. *Donovan* supra n 17, 509.

assault in cases involving fights only when the combatants have been involved in a most minor scuffle. An example would be where two schoolboys decide to settle an argument in the school playground by a short fight involving an exchange of punches, hair-pulling, kneeing, etc. Assuming no bodily harm, as defined in *Donovan,* is caused, and that the violence is truly 'consensual', there is no assault at common law.[20] On the other hand, if bodily harm is 'likely or intended', consent becomes irrelevant.

To this general rule the common law allowed various exceptions, based on 'public policy'. Some of these exceptions were recognised in *Coney*, whilst others have been laid down in subsequent cases. Thus it is now clear that surgical operations, boxing under the Queensberry rules, wrestling,[21] tattooing, ritual circumcision[22] and ear-piercing are all lawful activities notwithstanding that they may involve the infliction of 'bodily harm' as defined in *Donovan.*[23] No assault is committed in these cases, assuming they are done with the 'victim's' consent.

In *R v Brown* (1994),[24] the House of Lords was confronted with the question whether serious physical injuries inflicted by consenting adult male homosexuals on each other, in the course of a sado-masochistic ritual, should render the men guilty of assault occasioning actual bodily harm and unlawful wounding. The alternative was to treat the infliction of these injuries as an exception to the general rule in the same way as injuries sustained in a boxing or wrestling match. By a majority of 3:2 the House of Lords put sado-masochism in the same category as prize-fights and duels,[25] that is, it held that the activity was unlawful on public policy grounds with the result that the participants' consent was ineffective.

To sum up, the common law rules on consent and assault can be reduced to the following propositions:

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20. Occasionally a playground fight can give rise to a charge of assault occasioning bodily harm or inflicting grievous bodily harm: see *Jones* (1986) 83 Cr App Rep 375.
21. *Pallante* supra n 1. Referred to in *Coney* as 'manly diversions', boxing and wrestling were approved on the ground that they fit the combatants for military service. Other dangerous sports (eg ice-hockey) would also be approved under this head.
22. As to the legality of *female* circumcision at common law, see RD Mackay 'Is Female Circumcision Unlawful?' [1983] Crim L Rev 717. The practice is now outlawed by legislation in some jurisdictions: see eg Crimes (Female Genital Mutilation) Amendment Act 1994 (NSW); Statutes Amendment (Female Genital Mutilation and Child Protection) Act 1995 (SA).
23. See *Brown* [1994] AC 212, Lord Templeman 231, Lord Jauncey 242, 245, Lord Lowry 252, Lord Mustill 262-267, Lord Slynn 277, where these exceptions are outlined. The most detailed examination of them is by Lord Mustill (who, with Lord Slynn, dissented). Domestic discipline provides a further exception to the basic rule, though not one founded on consent: in WA, see Code s 257.
24. Ibid.
25. Duelling was held unlawful in *Coney* supra n 11, Mathew J 547, Coleridge CJ 567.

(i) Prima facie, if D uses force on P with P's consent, then D cannot be convicted of assaulting him.

(ii) However, in some cases, the use of force on P may constitute an assault, notwithstanding P's consent. One such case is where the force used on P is 'likely or intended to cause him bodily harm', as defined in *Donovan*: in this case the force is deemed to be 'injurious to the public as well as to the person injured'[26] and an assault is committed.

(iii) A range of exceptions to the principle set out in (ii) has been developed for certain worthwhile activities which are deemed to be in the public interest (sports, surgery, etc). In relation to these activities, P's consent absolves D from liability. Whether a particular activity is held to fall within the list of exceptions is based largely on a value-judgment made by the court.[27] The list of exceptions is not immutable, but can be added to by the courts from time to time.

THE POSITION UNDER THE CODES

The basic principles of the common law regarding consent and assault were clearly discernible at the end of the 19th century, when Sir Samuel Griffith was drafting the Criminal Code of Queensland (later adopted in Western Australia). It is therefore not surprising to find that many of these principles are reflected in the provisions of the Code.

Take, first, the basic definition of assault, which is laid down in section 222 of the Western Australian Code.[28] Like the corresponding common law definition, it requires absence of consent:

> **222. [Definition of assault]** A person who strikes, touches, or moves, or otherwise applies force of any kind to the person of another, either directly or indirectly, *without his consent*, or with his consent if the consent is obtained by fraud ... is said to assault that other person, and the act is called an assault.

The following section, section 223,[29] seemingly reflects the common law rule laid down in *Coney* that the use of force on P *may* be unlawful, notwithstanding P's consent. Section 223 is headed 'Assaults unlawful' and its second paragraph states:[30]

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26. *Coney* supra n 11, 549 (the quote is from Stephen J's judgment).
27. *Brown* supra n 23, Lord Mustill 265.
28. Cf Criminal Code (Qld) s 245.
29. Cf Criminal Code (Qld) s 246.
30. The 1st paragraph of s 223 states: 'An assault is unlawful and constitutes an offence unless it is authorized or justified or excused by law'.

> **223. [Assaults unlawful]** ... The application of force by one person to the person of another may be unlawful, although it is done with the consent of that other person.

Further resemblances between the Code and the common law can be found in sections 71, 72 and 73.[31] These sections reflect the rules laid down in *Coney,* and other cases, that affrays, duelling and prize-fights are illegal regardless of consent. Section 259 of the Code[32] likewise parallels the common law rule that a medically qualified person who carries out a surgical procedure in good faith and with due care cannot be convicted of an assault or any other offence. Finally, 'bodily harm' is defined in section 1 of the Code to mean 'any bodily injury which interferes with health or comfort' — a formulation which closely follows the wording of the common law test.[33]

The close resemblance between the provisions of the Code dealing with consent and assault, and the corresponding common law rules laid down in *Coney* and *Donovan,* could hardly be missed. Indeed, the Code provisions seem to be almost the mirror image of their counterparts at common law. It is surprising therefore that the Queensland Court of Appeal in *Raabe*[34] and *Lergesner* should have held that it was impermissible to have regard to the common law in construing the Code provisions on assault. Equally it is surprising that they should have reached a decision which is so strikingly at variance with the common law rule. Whether they were right to do so is the subject of the next part of this essay.

RAABE AND LERGESNER: THE FACTS AND RULINGS

The facts of *Raabe* and *Lergesner* were similar. In both cases two men who had been quarrelling resolved to settle their difference by fighting. In *Raabe,* one of the men — the victor — used a fence picket to repeatedly hit the other man, who was unarmed, about the head. This resulted in the unarmed man sustaining a fractured jawbone and a gash to his scalp about five centimetres in length. He was hospitalised for two weeks, during which time two operations had to be performed on him in order to reset his broken jaw. In *Lergesner v Carroll,* the fight was conducted with fists, rather than weapons, and the injuries sustained appear to have been less serious than those in *Raabe*, though full details are not given in the

31. Cf Criminal Code (Qld) ss 72, 73, 74 for the analogous provisions in Queensland.
32. Cf Criminal Code (Qld) s 282.
33. See the definition of 'bodily harm' in *Donovan*, set out at supra p 172. Cf *Scatchard* (1987) 27 A Crim R 136 interpreting 'bodily harm' under the Code.
34. See the judgment of Derrington J, discussed below. Connolly J took a different view.

judgment.

In both cases the victor was convicted of assault occasioning bodily harm. The issue on appeal was whether the victim's consent to take part in the fight should have absolved the victor from liability. In *Raabe,* Connolly J thought it should not. In his view, the Code provisions on assault were ambiguous and it was therefore appropriate to have regard to the common law in order to construe them. He said:

> In my judgment, [the definition of assault in section 222] is not to be read in isolation but in association with the rest of the Criminal Code *and in particular with regard to the state of the law when the Code was enacted.* So guided, the conclusion I have come to is that the consent which may be given for the purposes of [section 222] is to force which is not intended to and does not cause bodily harm as defined in the Code. This construction would bring the law into line with the current law of England. It is the preferable view from a social point of view, as discouraging violence.[35]

Derrington J, on the other hand, felt that there was no ambiguity in the Code which would justify recourse to the common law as an aid to interpretation. The statutory definition of assault,[36] he said, specifically requires that the force be applied to the victim 'without his consent'. From this it follows that the prosecution must negative consent beyond all reasonable doubt in order to secure a conviction. This is true irrespective of whether the force used is likely or intended to cause bodily harm, his Honour held.[37] The third judge, Thomas J, declined to resolve the difference of opinion between his brother judges,[38] though it is clear that he sympathised more with Derrington J than with Connolly J. In the second case, *Lergesner v Carroll*, the entire court adopted the view of Derrington J in *Raabe,* and rejected Connolly J's alternative position, thus creating a clear distinction on the rules applicable to fist fights in common law and Code jurisdictions.

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35. *Raabe* supra n 6, 119 (emphasis added). The references in square brackets in this quotation are to the relevant section in the WA Code; for the equivalent section in the Qld Code, see supra n 28.
36. In WA, s 222, set out at supra p 174.
37. *Raabe* supra n 6, Derrington J 124-125: 'If the charge is one of which assault is an element, then the absence of consent to the assault must be proved'. His Honour stressed that whether or not P consented to the degree of force used on him by D is a question of fact. Derrington J's judgment has received strong approval by one commentator, see J Devereux 'Consent as a Defence to Assaults Occasioning Bodily Harm — The Queensland Dilemma' (1985)14 Uni Qld LJ 151.
38. *Raabe* supra n 6, 123. Thomas J said: 'I expressly reserve the question whether the so-called defence of consensual fight should be allowed to go to the jury in a case of assault occasioning bodily harm'.

ARE THE PROVISIONS OF THE CODE AMBIGUOUS?

There is a well established rule that it is wrong to interpret the Code in the light of the pre-existing common law rules where the Code provisions are clear.[39] So, is it true that the sections of the Code which deal with assault are unambiguous? Cooper J in *Lergesner* clearly thought so. He said: 'In my view there is no ambiguity in the criminal code which justifies recourse to the common law'.[40] Derrington J had earlier expressed the same opinion in *Raabe*. He said:

> As the statutory requirement of absence of consent is clearly an element of the present charge [assault occasioning bodily harm], no common law intrusion, particularly of latter day origin, may qualify it.[41]

At first sight this argument seems convincing: the wording of section 222 (the definition of assault) expressly requires absence of consent, and the common law should not be invoked to override or qualify that requirement. There are, however, two difficulties with this argument. First, it is clear that, at least in some respects, the basic definition of assault in section 222 *is* meant to be read in the light of the common law rules. Thus this section provides that, although an assault normally requires absence of consent, a consent must be disregarded 'if [it] is obtained by fraud'. On the face of it, these words seem to imply that *any* type of fraud may vitiate consent, but it has long been held that this is not the case. It is only those frauds which relate to the *identity* of the wrongdoer or to the *nature* of his act which negative consent for legal purposes. This principle was originally laid down in *Clarence,*[42] a common law case, but it is now widely accepted that it also applies to the Code.[43] However, if the common law can be

39. See eg *Brennan* (1936) 55 CLR 253, Dixon and Evatt JJ 263: '[The section] forms part of a Code intended to replace the common law, and its language should be construed according to its natural meaning and without any presumption that it was intended to do no more than restate the existing law. It is not the proper course to begin by finding how the law stood before the Code, and then to see if the Code will bear an interpretation which will leave the law unaltered'. Cf *Stuart* (1974) 134 CLR 426, Gibbs J 437. These cases are cited with approval by Derrington J in *Raabe* supra n 6, 125. For a different and more accommodating view of the common law's role, see *Vallance* (1961) 108 CLR 56, Windeyer J 76, cited with approval by Wright J in *Holmes* supra n 4, 235.

40. *Lergesner* supra n 7, 218.

41. *Raabe* supra n 6, 125. But note that the Canadian Supreme Court in *Jobidon* infra n 77, 470 took the view that the common law rule, far from being 'of latter day origin' is of ancient and distinguished stock.

42. (1888) 22 QBD 23.

43. See EJ Edwards, RW Harding & IG Campbell *The Criminal Codes: Commentary and Materials* 4th edn (Sydney: Law Book Co, 1992) 542; Fisse supra n 1, 138, 147; RF Carter *Criminal Law of Queensland* 9th edn (Sydney: Butterworths, 1994) ¶ 1.45.

invoked for the purpose of interpreting the word 'fraud' in section 222, there is no reason why it cannot also be called upon to assist in the interpretation of other words and phrases in that section, including the phrase 'without his consent'. To put the point differently, the assumption which underlies *Lergesner*, namely that section 222 is a self-contained provision which should be construed without reference to the common law, seems questionable and wrong.[44]

There is a second difficulty with the suggestion in *Lergesner* that the definition of assault is unambiguous and that it is therefore inappropriate to have regard to the common law in order to construe it. It is true that if section 222 is considered *in isolation* it appears to be free from ambiguity. But to consider it in this way is surely the wrong approach. It has already been suggested that if the Code provisions on assault are considered *as a whole*, they very closely reflect the position at common law.[45] This is one reason why it is desirable to construe those provisions in the light of their common law counterparts.

A further argument, however, can be based on the wording of section 223 of the Code. This section, as previously noted, is headed 'Assaults unlawful' and it provides (in its second paragraph) that:

> The application of force by one person to the person of another may be unlawful, although it is done with the consent of that other person.

This provision seems to envisage that, at least in some circumstances, there may be an assault on P, notwithstanding that P has consented to the

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See also *Jobidon* infra n 77, 470 where the Canadian Supreme Court held that the word 'fraud' in the Canadian Criminal Code's definition of assault should be interpreted in the light of the common law. Gonthier J said: 'It can be seen ... that the absence of consent to intentionally applied force was a material component of the offence of assault throughout its existence in Canada. But it is also evident that consent would not be legally effective in all circumstances. For instance, it would be vitiated by fraud. Various limitations on the validity of consent have a long lineage in the history of the offence. *To observe those limitations one must advert to the common law'* (emphasis added).

44. See also *Hall v Fonceca* [1983] WAR 309, where the WA Supreme Court relied in part upon the common law to hold that the offence of *attempting* or *threatening* to apply force under s 222 requires proof of intent. The court said: 'It is generally accepted that [s 222] lays down the common law as understood at the time of enactment of the Code'. This further supports the view that the Code's definition of assault must be interpreted in the light of the common law rules. But it should be noted that the court's *principal* reason for holding that this offence requires proof of intent is that this requirement is implicit in the words 'attempts', 'threatens' and 'purpose' in s 222: see Smith and Kennedy JJ, 313, 314. It seems therefore that it was not necessary to have regard to the common law in *Hall v Fonceca* and thus the references to it in that case must be treated as obiter.

45. Supra pp 174-175.

use of force on him by D. Section 223 therefore appears to contradict the terms of section 222, which specify that absence of consent is integral to this offence. How can this contradiction — or ambiguity — be resolved? One possibility would be to say that section 223 is aimed at the case where the consent of P has been obtained *by fraud*: in this case the application of force to P is unlawful notwithstanding his *apparent* consent. This interpretation would certainly resolve any conflict between sections 222 and 223, but it would give the latter section a very narrow operation and one which is not really justified by its wording, which makes no reference to fraud.[46]

Another possibility is that section 223 is intended to affect the operation of section 222 by subjecting it to the common law rule, laid down in *Coney*, that consent becomes irrelevant if the injury inflicted on P is of such a nature, or is done in such circumstances, that 'the infliction is injurious to the public as well as to the person injured'.[47] This is the interpretation given to section 223 by Connolly J in *Raabe*: in his opinion, the two sections under consideration (ss 222 and 223) are intended to be read in conjunction and, if they are, they impliedly codify the common law rules as stated in *Coney*.[48]

In support of Connolly J's view it is interesting to note that the language of section 223, set out above, seems to be based on certain of the dicta in *Coney* itself. For example, Cave J stated that: 'an assault being a breach of the peace and unlawful, the consent of the person struck is immaterial'.[49] Likewise, Stephen J, having held that consent may *sometimes* provide a defence to a charge of assault, went on to say:

> But in all cases the question whether consent does or does not take from the application of force to another its illegal character, is a question of degree depending on the circumstances.[50]

Had Parliament intended to codify this dictum it could not have chosen a more appropriately worded provision than section 223. Indeed it is notable that both Stephen's dictum, and section 223, use the phrase 'the application of force'. This perhaps suggests, though it certainly does not prove, that

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46. Also, since s 222 *expressly* deals with the case where consent is obtained by fraud, it seems unlikely that s 223 is also intended to deal with this subject. An alternative interpretation of s 223 is offered by Devereux supra n 37, 156. According to this, s 223 may be concerned with the case where P agrees to D's using some force on him, but D then uses *more* force than has been agreed to (ie, excessive force). But this interpretation, like the one relating to fraud, is difficult to reconcile with the phraseology of s 223 and is not convincing.
47. The quote is from Stephen J's judgment in *Coney*: see supra p 172.
48. *Raabe* supra n 6, Connolly J 118-119.
49. *Coney* supra n 11, 539.
50. Id, 549.

Sir Samuel Griffith had Stephen's dictum in mind when he drafted section 223 and that his intention in incorporating that section into the Code was to give Parliament's endorsement to the principle stated in Stephen J's judgment.[51]

The Court in *Lergesner,* however, did not share the foregoing view. Surprisingly, it held that the second paragraph of section 223 is not concerned with assaults at all, but only with other crimes of violence in which assault is *not* an element (eg, homicide, grievous bodily harm ('GBH') and unlawful wounding).[52] But this view seems unconvincing for three reasons. First, section 223 comes under the heading '*Assaults* unlawful', so it seems odd to suggest that it has no application to those offences which necessarily depend upon proof of an assault (ie, common assault, assault occasioning bodily harm and serious assault). Surely, if the court in *Lergesner* were right in its view as to the role of the second paragraph of this section, Parliament would have placed it under some completely different, and less misleading, heading.

Secondly, it is notable that the language of section 223 mirrors that of section 222. Thus, the second paragraph of section 223 begins with the words 'The application of force ...', whilst the basic definition of assault in section 222 specifically refers to a person who 'applies force' to another. The fact that the two sections use identical phraseology — applying force — combined with the fact that they are juxtaposed in Chapter XXVI of the Code, strongly suggests that these sections are interrelated and are intended to be read together. This supports Connolly J's view in *Raabe* that section 223 qualifies the basic definition of assault in section 222, and is at variance with the ruling in *Lergesner* that the two sections are aimed at different sorts of crimes of violence.

Thirdly, the argument in *Lergesner* that section 223 applies not to assault-based offences, but only to other crimes of violence, such as murder and GBH,[53] is questionable. With respect to murder, there is no need for section 223 because section 261 specifically states that consent cannot be a defence to this crime. And, although section 223 may undoubtedly apply to GBH under sections 294 and 297, to restrict it to those offences alone

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51. Stephen and Griffith were more than merely brother judges: Stephen was the principle architect of the English Draft Criminal Code (1878-1879) which, though it was never enacted in that country, formed the basis of Griffith's Qld and WA Codes.

52. *Lergesner* supra n 7, Cooper J 218: 'The second part of the section [WA: s 223] does not deal with assaults'. Cf *Raabe* infra n 53, where Derrington J made the same point.

53. See *Lergesner* supra n 7, Cooper J 218-219; and *Raabe* supra n 6, 126 where Derrington J said: '[S 223] merely makes it clear that those offences involving the application of force to a person where the absence of consent is *not* made an element, eg murder or grievous bodily harm, are indifferent to consent and remain unlawful despite its presence and the absolving effect of that presence in the case of assault' (emphasis added).

would be to give it an exceptionally narrow and artificial interpretation.[54]

It is therefore suggested that Connolly J was right to hold in *Raabe* that the second paragraph of section 223 is intended to be read together with section 222 and that its purpose is to limit the circumstances in which consent can be a defence to assault-based crimes. The alternative view, that section 223 has no application to such offences, is difficult to reconcile with the wording of the section and also with the fact that it appears immediately beneath the basic definition of assault in Chapter XXVI of the Code.

TO WHICH OFFENCES DOES THE 'LERGESNER PRINCIPLE' APPLY?

1. Assaults

It is important to understand that the principle in *Lergesner* applies to a number of different offences. Whilst the defendant in that case was charged with assault occasioning bodily harm, it seems clear that the court intended its ruling to apply to *all* assault-based offences. In Western Australia, these are grouped together in Chapter XXX of the Code and comprise: (i) common assaults (section 313), (ii) assaults occasioning bodily harm (section 317), (iii) assaults with intent (section 317A), and (iv) serious assaults (section 318).[55]

Whilst the second of these offences, assault occasioning bodily harm, is commonly charged by the police in cases where fairly trivial injuries have been inflicted (eg, a black eye or a bloody nose) it is worth noting that it can also be used in some very serious cases as well. This is because the definition of 'bodily harm' (the key element of section 317) is apt to cover both trivial *and* serious injuries. As Connolly J pointed out in *Raabe:*

> While the definition of bodily harm is easily satisfied in that it calls for no more than bodily injury which interferes with health or comfort, by the same token it is not difficult to envisage injuries which have long, painful and costly consequences

54. Whilst in the author's view the 2nd paragraph of s 223 does apply to the assault-based offences in Chapter XXX of the Code, it is not limited to those offences but applies also to all other offences of violence including homicide, GBH and wounding. An example of its applicability to homicide is provided by *Gould and Barnes* [1960] Qd R 283. In that case a woman consented to the insertion of a caustic douche into her womb for the purpose of securing an abortion. Chemicals from the douche damaged the lining of her womb, seeped into her blood stream and caused her death. The abortionist was convicted of manslaughter. In WA, the 2nd paragraph of s 223 could be invoked to support the argument that the insertion of the douche was unlawful notwithstanding that the woman consented to the procedure.

55. S 318A creates an offence headed 'Assaults on members of crew of aircraft'. Since consent could not be in issue here, this offence is omitted from the discussion.

> for the victim but which, because they do not endanger life or cause permanent injury to health, do not fall within the definition of grievous bodily harm.[56]

It seems clear, therefore, that the defence of consent[57] can be invoked by D whenever he is charged with an offence of assault occasioning bodily harm (or indeed with any other offence in Chapter XXX). That he inflicted injuries which have 'long, painful and costly consequences for the victim' is not to the point — a rule quite different from that which applies at common law. On the other hand, for crimes of violence *other* than those in Chapter XXX, the Code, paradoxically, lays down a much stricter rule than the common law: for these offences consent can *never* be a defence. This point, and the difficulties inherent in it, are considered below.

2. Unlawful wounding and other offences

Conscious that their decision might be seen as a 'licence' for brawling, the judges in *Lergesner* were keen to point to its limitations. Thus, they specifically held that it did not apply to crimes of violence which do not necessarily involve proof of an assault (eg, homicide, GBH and unlawful wounding). Cooper J said:

> It is clear...that the legislature has set limits to the area where a person can consent to conduct. Beyond this limit it becomes irrelevant whether or not the conduct involved an assault, as an incident of it, or whether it involved conduct that was consented to. Relevant examples are occasioning grievous bodily harm and wounding.[58]

Cooper J's reason for holding that consent could not be a defence to such crimes is that they are 'generally...regarded as more serious offences'.[59] However, there are a number of difficulties with that view, particularly as it relates to unlawful wounding. First, the maximum penalty for wounding is five years' imprisonment, whilst the corresponding penalties for assaults occasioning bodily harm, assaults with intent and serious assaults are five years', five years' and ten years' imprisonment respectively. It is therefore difficult to agree that wounding is the 'more seriously regarded' offence. Secondly, the concept of wounding, like bodily harm, is an extremely broad one which covers not only very trivial injuries but also some very serious ones too. Lord Lowry made this point in *Brown,*

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56. *Raabe* supra n 6, 117. GBH has a narrower definition under the Code (s1) than at common law, where it is equated with 'really serious injury': *DPP v Smith* [1961] AC 290.
57. Note that the word 'defence' is technically a misnomer because the burden of disproving consent lies on the Crown: see *Lergesner* infra n 66 and accompanying text.
58. *Lergesner* supra n 7, 218. (The statement was obiter, as D was not charged with GBH or wounding.) See also *Raabe* supra n 6, Derrington J 126.
59. *Lergesner* supra n 7, 217.

where he held that wounding can involve 'anything from a minor breaking or puncture of the skin to a near fatal injury.... [W]ounding may simply occasion actual bodily harm or it may inflict grievous bodily harm'.[60]

Given that the offence of unlawful wounding, like assault occasioning bodily harm, may cover trivial as well as serious injuries, it is difficult to understand the moral basis of the rule laid down in *Lergesner* that consent cannot provide a defence to the former (wounding) though it can to the latter (assault). Surely the same rules should apply to both offences. This is certainly the position at common law which has never drawn a distinction between them. This was affirmed in *Coney,* where Stephen J held that the rules regarding consent apply equally to *all* 'charges of physical violence'.[61] Similarly, in *Brown,* all five Law Lords expressed the view that it would be impracticable to draw a distinction between the offences of assault and unlawful wounding. Lord Jauncey said: 'If consent is to be an answer to a charge under section 47 [assault occasioning actual bodily harm] but not to one under section 20 [unlawful wounding], considerable practical problems would arise'.[62] One such problem would be where an indictment contained two counts, one of wounding, the other of assault occasioning bodily harm. The judge would be required to give two quite separate directions on consent, something which might be baffling for the jury. In common law jurisdictions the problem does not arise because identical principles apply in relation to the two offences. But the problem does arise in Queensland, as a result of the ruling in *Lergesner.*

There is a further difficulty in holding that consent can be a defence to assault occasioning bodily harm but not to unlawful wounding. In the context of a fist fight, it may be purely fortuitous whether the blows inflicted on P result in bruises and/or broken bones (in which case assault occasioning bodily harm is the appropriate charge) or whether they *also* involve a breaking of P's skin (in which case wounding may be charged in the alternative). Since the nature of the injuries sustained is often governed largely by chance, it surely makes sense to adopt the same rules regarding consent irrespective of which offence is charged. The common law reflects this policy. The Code, on the other hand, draws a distinction between the two offences in question which it is difficult to defend on moral or social grounds.

60. *Brown* supra n 23, 249; *Devine* (1982) 8 A Crim R 42.

61. *Coney* supra n 11, 549.

62. *Brown* supra n 23, 245. The section numbers refer to the Offences against the Person Act 1861 (UK). Lord Jauncey's concern was based on the fact that in England assault occasioning actual bodily harm is a permissible alternative verdict on a charge alleging unlawful wounding. This underlines the need to have the same rules of consent applicable in both offences, his Lordship said. Note that assault occasioning bodily harm is not a permissible alternative verdict on a charge alleging unlawful wounding under the Code: s 594 and *Cushing (No 2)* [1977] WAR 141, 143.

Another objection can be raised against Cooper J's view that consent can *never* be a defence to unlawful wounding. That view would seem to render illegal a simple operation such as an ear-piercing by a jeweller,[63] or even the giving of blood by a blood donor. Both procedures involve a technical wounding (ie, a puncture of the skin). So, if consent is no defence to this charge, it is difficult to see how the jeweller, in the first case, or the doctor/nurse who takes the donor's blood in the second, can avoid the taint of criminality. A more serious example would be where one sibling agrees to donate one of his kidneys to save the life of his twin brother or sister, who is suffering from terminal kidney disease. The removal of the kidney from the healthy sibling would clearly involve a 'wounding', but would the surgeon who performed the operation have a defence if charged with this crime? Section 259 of the Code provides a defence for surgical operations, but this applies only where the operation is performed 'upon any person *for his benefit'* — a criterion which is not satisfied here since the operation is performed for the benefit, not of the healthy kidney donor, but of his ailing brother or sister. Thus, if consent is no defence to wounding, as maintained in *Lergesner*, the surgeon would appear to be guilty of this offence despite his moral blamelessness.[64]

At common law, by comparison, the operation on the healthy kidney donor would not be unlawful, notwithstanding the intention to cause him 'bodily harm'. This is because the operation would clearly fall within one of the public policy based exceptions to the general rule, outlined earlier in this paper. In *Brown,*[65] all the Law Lords affirmed that surgery was such an exception, and there can be little doubt that that exception would be interpreted to include an operation such as the one under discussion, which is actuated by the healthy sibling's desire to save the life of his dying twin.

To sum up: it is clear that the court in *Lergesner* was keen to set strict limits to the principle that consent can be a defence to crimes of violence. But in defining what those limits are, it has created an arbitrary distinction

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63. See M Murray QC *The Criminal Code: A General Review* (Perth, 1983) 202, where the legality of ear-piercing is questioned. The defence in s 259 applies to a 'surgical operation', a term which would not appear to cover the piercing of an ear by a jeweller.

64. But note that Sir Samuel Griffith, the author of the Code, assumed that the courts might retain the prerogative to develop new defences by analogy, notwithstanding that they are not expressly provided for in the Code. In his letter of 29 Oct 1897 to the Qld A-G, accompanying the draft Code, he wrote: 'I have attempted to state specifically all the conditions which can operate at Common Law as justification or excuse for acts prima facie criminal, *but have not formally excluded other possible Common Law defences'* (emphasis added). It is therefore possible that the courts could extend the defence in s 259 to the surgeon, notwithstanding that its wording does not justify this approach, using Griffith's letter as a pretext.

65. Supra n 23.

between assault occasioning bodily harm, on the one hand, and unlawful wounding, on the other. The common law rules on consent may perhaps seem more complicated than those in the Code. But by applying the same rules of consent to both offences, the common law achieves results which are easier to defend on moral and social grounds.

THE REALITY OF CONSENT

The central premise of *Lergesner* is that the protagonists must have consented to take part in the fight. But what does 'consent' involve in this context? Despite the obvious importance of the question, remarkably little is said about it either in *Lergesner* or in Derrington J's judgment in *Raabe.* However at least three points emerge clearly from these cases. The first relates to burden of proof. If D claims that P agreed to take part in the fight, then the prosecution must disprove that claim beyond reasonable doubt.[66] This is in line with the rule in *Woolmington v DPP,*[67] and it settles a long-standing dispute as to whether absence of consent is one of the constituent elements of assault (to be proved by the Crown) or whether consent is a defence to this crime (to be proved by D on balance of probabilities).[68]

The second point relates to the nature of the consent which has to be proved. Is it necessary to show that P consented to *the particular injuries* he sustained or merely that he consented to *the blows* which were struck? In *Lergesner*, Cooper J held that the latter was correct. 'The consent is to the application of force and not to the consequences which follow from it'.[69] This means, in a case like *Raabe*, that it is irrelevant that P did not consent to the fracture to his jaw or the gash to his scalp. What is important is that he knew that his opponent was armed with a fence picket; that he was aware that he (the opponent) would attempt to hit him with the picket; and that he agreed to a fight on those terms, knowing that he himself was unarmed.

Cooper J also emphasised that it is for the jury to determine whether the protagonists 'restricted' or 'limited' their consent in any way. He said:

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66. *Lergesner* supra n 6, Shepherdson J 212: 'I think the true view is that in some cases of assault occasioning bodily harm the prosecution will, on the evidence, have to negative consent beyond reasonable doubt, ie, prove that the assault was unlawful'. Cf Derrington J in *Raabe* supra n 37.
67. [1935] AC 462.
68. Note that in *Brown* supra n 23, Lord Jauncey took the opposite view and held obiter that consent, where available, is a defence to be proved by D on balance of probabilities: id, 246-247.
69. *Lergesner* supra n 7, 219.

> The jury must determine the limits of the consent *before the first blow is struck in a fight,* and this will include a consideration as to whether or not the person giving consent intended that it should be withdrawn or expire if any subsequent event should occur, eg, if the person should become incapable of defending himself.[70]

It is submitted that there are two problems with this proposition. First, it is unclear why the limits of consent must necessarily be determined '*before* the first blow is struck'. This approach might seem apposite in the context of a fight which lasts only a few seconds, and involves only a handful of blows and counter-blows. But it seems of less value where the fight is of a more protracted and vicious nature:[71] in such a case an *initial* consent by one of parties, given '*before* the first blow is struck', could well be modified or revoked *during* the fight, particularly if it becomes clear to that party that he is being overwhelmed. Since the 'limits' of each combatant's consent may be varied *as the fight progresses*, it seems unreasonable to insist that those limits must necessarily be determined, irrevocably, '*before* the first blow is struck'. It would be better to recognise that consent may be modified or revoked at any point in the fight; and that where it is so revoked no further blow can lawfully be aimed at P.[72]

Secondly, Cooper J's judgment surely underestimates the difficulties involved in determining, ex post facto, what the limits of the combatants' consents were. It must be remembered that many such fights will take place when the parties are angry, or drunk, or both. Powers of recollection may well be affected by such factors.[73] Further, if one of the parties is knocked unconscious, or killed, during the fight, it may become impossible to determine, at a later date, what the 'limits' of his consent were. This illustrates the problems inherent in making consent the central issue in an angry or drunken brawl.

Another consideration is that the so-called consent of the parties to the fight may well be fictitious. If one party challenges another to fight, the other may agree only because he wants to avoid being labelled a coward.

70. Ibid (emphasis added).

71. See eg *Carriere* infra n 75, where the combatants initially fought with fists but later resorted to knives. Laycraft CJA observed: 'One cannot consent to be stabbed'.

72. But even if consent is revoked, D can still plead that he honestly and reasonably believed that this was not the case: see *Lergesner* supra n 7, Shepherdson 215-216, citing s 24 of the Code.

73. Cf *Caldwell* [1982] AC 341, 352 where Lord Diplock, criticising the subjective test of recklessness in English criminal law, referred to the difficulty of determining, ex post facto, what thoughts had passed through D's mind at the time of the alleged offence. He said: 'The only person who knows what the accused's mental processes were is the accused himself — and probably not even he can recall them accurately when the rage or excitement under which he acted has passed, or he has sobered up if he were under the influence of drink at the time....' Whilst these remarks were made in the context of a case concerned with the meaning of recklessness at common law, they apply equally to the problem of determining the 'limits' of consent retrospectively under the Code.

Whether an agreement to fight extracted in these circumstances should be deemed to be 'consent' for purposes of section 222 is an open question. In Canada, where the courts have been confronted with the problem of 'consensual fist fighting', the judges have often queried the value of the consents given. Thus, in *R v Jobidon* the Ontario Court of Appeal said: 'The so-called consents to fight are often more apparent than real and are obtained in an atmosphere where reason, good sense and even sobriety are absent'.[74] The Alberta Court of Appeal made the same point in *R v Carriere* (where the protagonists initially fought with fists and then with knives). Laycraft CJA said:

> I observe in passing that the 'consent' in many of these 'fair fights' with fists is often more apparent than real. Challengers are, most often, those who feel assured that they can overwhelm opponents. Those who accept the challenge often do so, not because they wish to fight, or truly consent to it, but because they fear being branded as cowards by their peers. Moreover...fists are not insignificant weapons. Serious injury or death often results from these fair fights.[75]

These considerations have recently led the Supreme Court of Canada to reject the defence of consent in the context of fist fights and similar brawls, and to adopt the common law rule laid down in *Coney*. This is an important development because the definition of assault in Canada is similar to that in Queensland and Western Australia.[76] In *Jobidon,* it was argued by D that it was inappropriate to use the common law to override the words 'without [P's] consent' in the statutory definition of assault, but this was rejected by the Canadian Supreme Court.[77] Having referred to the 'social uselessness of fist fights' and to 'the common law's centuries-old persistence to limit the legal effectiveness of consent to a fist fight',[78] the Court concluded that Parliament would not have intended to abrogate the common law rule other than by the most explicit language.

The Supreme Court's decision in *Jobidon* is noteworthy because it came after *Raabe* and *Lergesner.* Those two cases referred to the Canadian jurisprudence which, at the time, held that consent could be a defence to assault.[79] That jurisprudence was relied upon in *Raabe* to support the conclusion that the same rule should be applied in Queensland.[80] But now that the Canadian Supreme Court has given a definitive ruling in *Jobidon*,

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74. (1988) 45 CCC (3rd) 176, 184 (affm'd by the Canadian Supreme Court: infra n 77).
75. (1987) 35 CCC (3rd) 276, 286-287.
76. S 265(1) of the Canadian Criminal Code provides: 'A person commits an assault when (a) *without the consent of another person*, he applies force intentionally to that other person, directly or indirectly'(emphasis added).
77. (1991) 66 CCC (3rd) 454 (a 5:2 majority decision).
78. Id, 491.
79. See eg *Dix* (1972) 10 CCC (2nd) 324, overruled in *Jobidon* supra n 77.
80. *Raabe* supra n 6, Thomas J 121.

reversing earlier decisions to the contrary by the lower courts,[81] and upholding the common law rule in *Coney*, one of the important pillars of the *Lergesner* principle has been removed. It is suggested therefore that the courts of Western Australia should not feel bound to follow *Lergesner;* on the contrary, they are free to adopt the opposite conclusion that has now been reached by the highest court in Canada, on a statutory definition of assault which in all relevant respects is the same as our own.

CONCLUSION

It has been suggested in this essay that there are substantial reasons why the Western Australian Code provisions on assault should be interpreted so as to conform with their common law counterparts. Whilst some readers may find the broad thrust of this argument persuasive, they may nevertheless harbour lingering doubts based on the wording of section 222. That section, after all, uses the expression 'without his consent' and it seems wrong to invoke case law to water down an express legislative requirement. The answer to this argument, however, is given by the Canadian Supreme Court in *Jobidon.* Gonthier J, who delivered the leading judgment, made the point that the law of consent is just far too complex to be reduced to a few simplistic statutory provisions. From this he deduced that Parliament, in enacting the Canadian Criminal Code, intended to do no more than provide a framework of the law of consent, leaving it to the courts to fill in the details as specific cases come before them. Thus, in his view, there was no constitutional impropriety involved in overriding, or at least qualifying, the phrase 'without [P's] consent' in the statutory definition of assault. He said:

> It would have been quite impractical, if not impossible, for Parliament to establish an adequate [definition of consent] to apply to all situations, old and knew. Policy-based limits are almost always the product of a balancing of individual autonomy (the freedom to choose to have force intentionally applied to oneself) and some larger societal interest. That balancing may be better performed in the light of actual situations, rather than in the abstract, as Parliament would be compelled to do.
>
> With the offence of assault, that kind of balancing is a function the courts are well-suited to perform. They will continue to be faced with real situations in which complicated actions and motivations interact, as they have in the past. I do not accept the argument that...Parliament intended to eliminate their role in the offence of assault....Such a major departure from well-established policy calls for more than mere silence....The common law is the register of the balancing function of the court — a register Parliament has authorised the courts to administer in respect of policy-based limits on the role and scope of consent.[82]

81. *Dix* supra n 79.
82. *Jobidon* supra n 77, 479.

The same reasoning may be applied to sections 222 and 223 of the Western Australian Criminal Code. Those sections are intended to provide only a framework of the relevant law, and Parliament has left it to the judges to fill in the details on a case by case basis. Those details relate to such mattes as (i) the effect of duress and fraud on consent[83] and (ii) whether (and when) consent may provide a defence to a crime of violence. In filling in the details, the courts can and should have regard to social policy. Thus it is submitted that the House of Lords in *Brown* was right to have regard to moral standards in holding that the law would not allow the consent of sado-masochists to be a defence to charges of assault (and unlawful wounding) arising out of serious physical injuries inflicted in the course of a sexual frenzy. 'Cruelty,' Lord Templeman said, 'is uncivilised'.[84] The same can be said of consensual street fights and other brawls: they are uncivilised — and also highly dangerous. In *Jobidon* such a fight resulted in the death of a 25 year old man at a stag party, on the eve of his wedding. Surely such incidents should not be tolerated by the courts. The common law provides the best deterrent against them.

83. As to the effect of intimidation and fraud on consent, see eg N Morgan 'Oppression, Fraud and Consent in Sexual Offences' infra p 223.

84. *Brown*, supra n 23, 237. Note that in Australia the legality of conduct such as that in *Brown* may be affected by the Human Rights (Sexual Conduct) Act 1994 (Cth).