***Para 6.11-6.13 and 6.18** In *BM* [2018] EWCA Crim 560, D, a registered tattooist and body piercer, with no medical training, added 'body modifications' to his services. The body modifications included the removal of a person ear, the removal of a person's nipple and the division of a person's tongue to create an effect similar to that enjoyed by a reptile. The modifications were performed without an aesthetic. D was charged with wounding three customers with intent to do grievous bodily harm, contrary to the Offences Against the Person Act 1861, s 18, in respect of such modifications. The trial judge, applying *Brown* (paras 6.3 and 6.8 of the text), refused to leave the defence of consent to the jury. D was convicted and appealed. The Court of Appeal were asked to consider if the body modifications that D had performed, albeit causing serious bodily harm, should be immune from incurring criminal liability. Dismissing the appeal, the Court of Appeal held (at [38] and [39]) that 'the exceptions to the general rule confirmed in the *Brown* case deliver no easily articulated principle by which any novel situation may be judged… Instead, the most that might be said about the special cases is that they represent a balance struck by the judges to reflect a series of different interests.' The Court of Appeal recognised that two features might be thought to underpin almost all of the recognised exceptions (1) those exceptions that conferred a social benefit (as, for example, in the case of the sporting exceptions, and possibly boxing, dangerous exhibitions and those with a religious hue), and (2) those exceptions where it would be regarded as unreasonable for the common law to criminalise the activity when consent was given (as in the case of tattooing and piercing and, again, possibly those of a religious hue, including ritual male circumcision).

The Court of Appeal recognised (at [41] to [43]) that:

> 'New exceptions should not be recognised on a case by case basis, save perhaps where there is a close analogy with an existing exception to the general rule established in the *Brown* case. The recognition of an entirely new exception would involve a value judgement which is policy laden, and on which there may be powerful conflicting views in society. The criminal trial process is inapt to enable a wide-ranging inquiry into the underlying policy issues, which are much better explored in the political environment.
>
> That said, there is, to our minds, no proper analogy between body modification, which involves the removal of parts of the body or mutilation as seen in tongue splitting, and tattooing, piercing or other body adornment. What the defendant undertook for reward in this case was a series of medical procedures performed for no medical reason. When Lord Lane referred to "reasonable surgical interference" in the *Attorney General's Reference* case … it carried with the implication that elective surgery would only be reasonable if carried out by someone qualified to perform it. The professional and regulatory superstructure which governs

> how doctors and other medical professionals practice is there to protect the public. The protections provided to patients, some of which are referred to in the medical evidence before the judge, were not available to the appellant's customers or more widely to the customers of those who set themselves up as body modifiers. It is immaterial that this appellant took some trouble to ensure a sterile environment when he operated, or that his work was in some respects tidy and clean. Consent as a defence could not turn on the quality of the work then performed.
>
> The protection of the public in this context extends beyond the risks of infection, bungled or poor surgery or an inability to deal with immediate complications. Those seeking body modification of the sort we are concerned with in this appeal invited the appellant to perform irreversible surgery without anaesthetic with profound long-term consequences. The fact that a desire to have an ear or nipple removed or tongue split is incomprehensible to most, may not be sufficient in itself to raise the question whether those who seek to do so might be in need of a mental health assessment. Yet the first response in almost every other context to those who seek to harm themselves would be to suggest medical assistance. That is not to say that all who seek body modification are suffering from any identifiable mental illness but it is difficult to avoid the conclusion that some will be, and that within the cohort will be many who are vulnerable. There are good reasons why reputable medical practitioners will not remove parts of the body simply when asked by a patient. One only has to reflect on the care, degree of inquiry and support given to a patient before gender reassignment surgery can be performed to appreciate the extensive nature of the protections provided in the medical context.'

The Court of Appeal also recognised (at [44]) that the personal autonomy of D's customers did not provide 'a justification for removing body modification from the ambit of the law of assault.' The Court of Appeal concluded (at [45]) that they saw 'no good reason why body modification should be placed in a special category of exemption from the general rule that the consent of an individual to injury provides no defence to the person who inflicts that injury if the violence causes actual bodily harm or more serious injury.' The Court of Appeal continued (at [45]):

> 'Even were the general rule to be revisited by Parliament or the Supreme Court and a different line drawn which allows consent to act as a defence to causing actual bodily harm and wounding, body modification causes really serious harm. Neither of the dissentient voices in the *Brown* case would have been willing to allow consent to act as a defence to causing grievous (serious) bodily harm and we note that the proposals of the Law Commission, whilst suggesting some loosening of the constraints found in

> *Brown*, would also not have gone that far. The appellant's argument envisages consent to surgical treatment providing a defence to the person performing the surgery whether or not that person is a suitably qualified as a doctor, and whether or not there is a medical (including psychological) justification for the surgery. Even were we attracted by the argument, which we are not, such a bold step is one that could only be taken by Parliament.'

***Para 6.13** The Public Health (Wales) Act 2017, s 95, an Act of the Welsh Assembly which came into force on 1 February 2018, made it an offence in Wales to perform or make arrangement to perform an intimate piercing on a person under the age of 18.

***Paras 6.64 and 6.68** In *Wheeldon v CPS* [2018] EWHC 249 (Admin) the Divisional Court stated, *obiter*, applying *Oraki* (below), that in principle there was no rule that the defences of self-defence and defence of another - which defences operate on the basis of the circumstances as D believed them to be - were not available to a person who assaulted a police officer acting in the execution of his duty under the Police Act 1996, s 89.

***Para 6.69** In *Oraki v DPP* [2018] EWHC 115 (Admin) D, who was driving with his mother in the passenger seat, was stopped by two uniformed police officers. The police officers reasonably suspected that D was driving without insurance (which turned out to be the case) and lawfully detained the car. It was at this point that D became upset. His mother, who had initially removed the keys from the ignition, returned to the car and got into the driver's side. One of the police officer's observed his mother inserting the keys in the ignition with a view of driving off. With a view to stopping her from starting the engine, the police officer place his hand on her arm. His mother began to scream, and D alarmed by what was happening to his mother, came over to pull the officer away. The other officer intervened. D was charged and convicted with obstructing a police officer in the execution of his duty under the Police Act 1996, s 89(2). D alleged that he was acting in defence of another, his mother, in trying to pull the police officer away from his mother as he was concerned for her safety. The trial judge held that D's conduct was not unreasonable given his mother's screams, but concluded that the defence was not available to a charge of obstructing a police officer in the execution of his duty under the Police Act 1996, s 89(2). D appealed and the Divisional Court held that the defences of self-defence and defence of another would as a matter of law be available to a defendant charged with obstructing a police officer in the execution of his duty under the Police Act 1996, s 89(2).