



Law
Commission
Reforming the law

Reform of Offences against the Person

50
YEARS

Law Com No 361

Law Commission

Reform of Offences against the Person

Law Com No 361

ISBN 978-1-4741-2549-9



9 781474 125499

The Law Commission

(LAW COM No 361)

REFORM OF OFFENCES AGAINST THE PERSON

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

Ordered by the House of Commons to be printed on
2 November 2015

HC 555



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This publication is available at www.gov.uk/government/publications

Print ISBN 9781474125499

Web ISBN 9781474125505

ID 23101504 10/15

Printed on paper containing 75% recycled fibre content minimum

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

THE LAW COMMISSION

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The terms of this report were agreed on 20 October 2015.

The text of this report is available on the Law Commission's website at <http://www.lawcom.gov.uk>.

¹ Professor Hopkins joined the Commission on 1 October, after the report was approved in principle on 30 September.

THE LAW COMMISSION

REFORM OF OFFENCES AGAINST THE PERSON

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THE LAW COMMISSION

REFORM OF OFFENCES AGAINST THE PERSON

To the Right Honourable Michael Gove MP, Lord Chancellor and Secretary of State for Justice

CHAPTER 1 INTRODUCTION

THE PROJECT

- 1.1 The principal statute dealing with offences of violence committed against others remains the Offences Against the Person Act 1861 (“the 1861 Act”). In this report we make recommendations for reform of that Act and associated offences. Our consideration focuses primarily on those offences which deal with causing physical or psychiatric harm. However, because of their close connection with the 1861 Act offences, and in order to work towards coherent law reform in this area, we also consider offences such as assault and battery¹ and the offence of assaulting a constable in the execution of his duty.²
- 1.2 This project forms part of our 11th Programme of Law Reform.³ In introducing the project, we said that:

the Offences Against the Person Act 1861 is widely recognised as being outdated⁴

and stated our aim as being:

to redraft the law on offences against the person, probably by creating a structured hierarchy of offences, as well as modernising and simplifying the language by which these offences are defined.⁵

- 1.3 In November 2014, we published a scoping consultation paper on reforming offences against the person (“the SCP”).⁶ The paper examined the existing legal landscape and investigated whether reform was needed and, if so, what form such reform ought to take. The scoping study was in one sense a broader enquiry than our usual consultation papers, where it is generally already

¹ Which continue to be common law offences, we conclude, even though Criminal Justice Act 1988, s 39 provides for the mode of trial and maximum penalty: SCP para 2.7.

² Contrary to the Police Act 1996, s 89(1).

³ (2011) Law Com No 330.

⁴ (2011) Law Com No 330, para 2.61.

⁵ (2011) Law Com No 330, para 2.63.

⁶ Reform of Offences against the Person: a Scoping Consultation Paper, (2014) Law Commission Consultation Paper No 217.

accepted that reform is necessary. The SCP asked questions designed to address two issues:

- (1) whether the 1861 Act was in need of reform; and
- (2) whether the previous recommendations (advanced in their most refined state in the Home Office's draft Bill of 1998) would serve as a good model for reform.

LEGAL BACKGROUND

- 1.4 The 1861 Act has been in force for over 150 years. It has been frequently amended. Despite a long history of criticism of many aspects of the Act and repeated efforts at reform, it remains in heavy use: the offences in the 1861 Act form the basis of over 26,000 prosecutions every year. The Act is itself largely a consolidation of previous statutes governing the law of violence. Frequent changes to the law have left it in an incoherent and confusing state, with more provisions repealed than currently in force.⁷

The basic structure of core injury offences

- 1.5 The core offences of violence contained in the current law are structured in a rough hierarchy of seriousness, but, as explained in the SCP and below, this is flawed in several respects.⁸ The basic structure, in order of increasing seriousness, is as follows:
 - (1) At the lowest level are assault and battery, which exist outside the 1861 Act. At common law, these remain as two separate crimes. Battery is any act of unlawful personal violence,⁹ and assault is the threat of the immediate use of unlawful personal violence. Each carries a maximum penalty of six months' imprisonment and is triable only in a magistrates' court.
 - (2) The next offence in the scheme is assault occasioning actual bodily harm, with a maximum penalty of five years' imprisonment. For this offence there need be no proof that the accused intended or foresaw the harm caused. The offence is triable either in the Crown Court or in a magistrates' court.
 - (3) Next is the offence of malicious wounding or infliction of grievous bodily harm. It is treated by everyone as a more serious offence than assault occasioning actual bodily harm, but carries the same maximum penalty of five years' imprisonment. Only *some* harm need be foreseen by the defendant. This offence too is triable either in the Crown Court or in a magistrates' court.

⁷ 38 out of the 79 sections originally enacted are in force at the time of writing.

⁸ SCP, para 3.4 onwards.

⁹ Mere touching is enough – no injury need be caused. "Unlawful" (broadly) means that the physical contact was neither consented to nor justified in the circumstances: para 2.8 below.

- (4) The most serious offence in the non-fatal offence hierarchy is intentionally causing grievous bodily harm, with up to life imprisonment available as a penalty.¹⁰ This offence is triable only in the Crown Court.

Criticisms

- 1.6 These core provisions reveal many of the deficiencies of the Act as a whole.

Flawed hierarchy

- 1.7 The difficulty is that the hierarchy is not based on a unifying logical criterion. The hierarchy is not based exclusively on seriousness as measured by the available sentence, by the harm caused or by the offender's state of mind, but reflects an awkward compromise between the three. This problem arises in other parts of the Act dealing with other groups of offences under the Act, such as the three related to poisoning or the four related to setting off, placing and possessing explosives.¹¹ The lack of a clear basis for the hierarchy causes confusion.
- 1.8 While the intended order of seriousness of the offences is clear, the grading is arbitrary and uneven, and does not always correspond to the likely seriousness of the underlying facts. For example, in order of seriousness the offence of actual bodily harm ("ABH") lies between common assault (that is, assault or battery) on the one hand and inflicting grievous bodily harm ("GBH") on the other, and overlaps with both of them. Nevertheless, the maximum available sentence for ABH is identical to that for GBH (five years) and ten times that for assault or battery (six months).
- 1.9 There can be charging difficulties where the available offences overlap. For example, many cases involving minor injuries could be charged either as assault or battery or as ABH. A charge of ABH is legally correct, but may be disproportionate to the seriousness of the defendant's conduct. In addition to the high sentencing powers for ABH, defendants have the option to elect a jury trial in the Crown Court even though the conduct may have resulted in injury that is unlikely to be punished by a sentence of imprisonment.¹²
- 1.10 In these cases, prosecutors face difficulties in choosing a charge which is both proportionate and accurately reflects and labels the offending. We revealed in the SCP that, over a period from 2003 to 2013, between 7% and 12% of defendants sentenced for ABH by the Crown Court received a sentence of immediate imprisonment of six months or less, which could have been imposed by a magistrates' court. (More recent information suggests that, once one takes account of non-custodial sentences and suspended sentences, the proportion of Crown Court sentences which would have been within the power of the magistrates is actually much higher.¹³) On the other hand, the CPS's charging

¹⁰ Offence (2) is under OAPA 1861, s 47, (3) is under s 20 and (4) is under s 18.

¹¹ See SCP para 3.17 and following.

¹² <http://www.sentencingcouncil.org.uk/publications/item/assault-definitive-guideline/> (last visited 19 October 2015).

¹³ Sentencing Council's Crown Court Sentencing Survey for England and Wales for 2014; para 5.55 below.

standard¹⁴ advises prosecutors to lay charges in less serious cases for the lesser offences of assault or battery *even where* ABH is technically available, for precisely these reasons. However, this still results in some cases being tried at the Crown Court when the sentencing powers of the magistrates' court would have been adequate.

Unnecessary degrees of specificity and complexity

- 1.11 The Act is drafted in such a way that the offences are overly particular in their description, and unnecessarily complex. This is undesirable in principle. As examples, there are many separate offences each criminalising the same injury but doing so based on the different means by which the same harm was caused. Examples include specific offences for causing grievous bodily harm by poisoning (section 23) or using explosives (section 28). These offences are both covered by the more general injury offences involving that level of injury (section 18 or section 20).
- 1.12 There are also examples where even within the same provision an offence can be committed in a variety of ways. Two examples will show how this can be distractingly and unnecessarily complicated:
- (1) The very frequently charged section 18 offence can be committed by *causing* grievous bodily harm or wounding, whilst *intending* to cause grievous bodily harm or to resist or prevent apprehension or detention. This creates ten ways of committing the offence, some of which are considered to be distinct offences which must be charged separately on an indictment. This causes needless work for prosecutors, on what is essentially an archaic formality.
 - (2) The section 29 offence is even more complex, covering: causing explosions, sending explosives or other dangerous or noxious things, or putting corrosive fluid or any destructive or explosive thing in a place, or throwing corrosive fluid or any destructive or explosive substance at a person, all whilst intending to burn or maim or disfigure or disable or to otherwise do grievous bodily harm. Depending on how one counts, there could be said to be up to 50 possible ways of committing the offence contained in this single sentence of the 1861 Act.
- 1.13 These complexities are a product of the drafting style that was typical of the Victorian era; and in fact the 1861 Act was a consolidation of numerous offences created in the preceding centuries, with only limited amendment by the draftsman

¹⁴ Crown Prosecution Service, *Legal Guidance: Offences Against the Person, Incorporating Charging Standard*. Available from: https://www.cps.gov.uk/legal/l_to_o/offences_against_the_person/#a07 (last visited 19 October 2015).

effecting the consolidation.¹⁵ This is very different from the way we would expect a modern criminal statute to define offences.¹⁶

Unnecessary offences

- 1.14 A separate but related problem is that the Act contains offences that are unnecessary: assaulting a clergyman in the discharge of his duties is one such example. The general offences of assault and battery and public order offences provide protection in cases that might be prosecuted under that offence. Other examples of unnecessary provisions include the offences of impeding someone escaping a shipwreck and of assaulting a magistrate in the exercise of his duty to preserve a wreck. Neither of these offences is required today, as demonstrated by the complete absence of evidence of their use;¹⁷ and in most cases the facts will be covered by other offences such as false imprisonment or attempted murder for the first offence, and assault or battery for the second. As we noted in our 11th Programme of Law Reform: “[the 1861 Act] follows a Victorian approach of listing separate offences for individual factual scenarios, many of which are no longer necessary”.

Archaic language and terminology

- 1.15 A further undesirable aspect of the 1861 Act is that it is drafted in obscure and archaic language which should have no place in a criminal trial in the 21st century. Terms such as “detainer” (a term from the long-dead language Law French) and obsolete terminology (such as “penal servitude”, which originally meant a sentence involving hard labour but is now deemed to mean imprisonment¹⁸) can be confusing even to professionals, and certainly harm the accessibility of the law to lay people. The use of such inappropriately technical and obsolete language is especially important when increasing numbers of defendants are self-represented.¹⁹

The view of consultees on the current law

- 1.16 Consultees, including those working daily with the current law, largely agreed with the criticisms of the present law in the SCP, some of which are summarised above:

- (1) The Lord Chief Justice of England and Wales, the Rt Hon the Lord Thomas of Cwmgiedd, on behalf of the senior judiciary, said:

¹⁵ Charles Greaves – see his book on the 1861 Act (and others he was responsible for): *The Criminal Law Consolidation and Amendment Acts (1862)*.

¹⁶ See eg the Home Office’s draft Bill, reproduced as Appendix C to this report, or the Sexual Offences Act 2003.

¹⁷ SCP paras 2.148 and 2.237.

¹⁸ By a long paper trail of technical statutes, explained at SCP para 3.93 and following.

¹⁹ We can find no officially published figures confirming this information, but anecdotal evidence strongly supports the contention, as does a large survey of magistrates by the Bureau of Investigative Journalism: <https://www.thebureauinvestigates.com/2015/01/18/magistrates-warn-chris-grayling-legal-aid-new-survey/> (last visited 19 October 2015).

I recognise the problems identified in the paper in relation to the 1861 Offences Against the Person Act. The legislation is out of date and in some areas obsolete; new ways of offending are not adequately captured.

- (2) His Honour Judge Andrew Goymer, for the Council of HM Circuit Judges, said:

Judges and juries have frequently to grapple with the problems of the current law contained in a statute that is now 154 years old.

- (3) John Atherton, of the National Bench Chairmen's Forum, said:

Having started by trying to read and understand the 1861 Act, I was struck by the outdated use of words and phrases. Reading it was akin to plaiting fog.

PREVIOUS ATTEMPTS AT LAW REFORM

- 1.17 The 1861 Act, with its numerous well-acknowledged problems, remains on the statute books despite previous attempts at reform. As detailed in the SCP,²⁰ since 1980 there have been six law reform documents on this area of the law published by various government bodies, starting with the Criminal Law Revision Committee's 14th report "Offences Against the Person"²¹ in 1980 and culminating in the Home Office's 1998 consultation paper and draft Bill.
- 1.18 Each of these earlier efforts received strong practitioner and academic support at the time. Indeed, the Law Commission's consultation paper in 1992 received such overwhelming support that a report followed within a year, accompanied by a draft Bill.²² Stakeholders ranging from police organisations to all levels of the judiciary and all of the major practitioner groups supported the call for "urgently needed reform of offences against the person". As can be seen below and later in this report, our more recent experience in consultation on the 2014 SCP has been similar.²³

THE CASE FOR REFORM

- 1.19 We received 53 responses to our SCP. Of the 32 responses to the questions on whether the law in this area ought to be replaced by a new piece of modern legislation, 28 (or 88%) agreed.²⁴

²⁰ SCP, para 4.2 and following.

²¹ (1980) Cmnd 7844.

²² Legislating the Criminal Code: Offences Against the Person and General Principles (1993), Law Com No 218. See in particular para 3.1 onwards, and also Law Commission Consultation Paper No 122.

²³ See Chapter 3 below.

²⁴ Para 3.10 below.

- 1.20 We consider that the compelling case for reform has not diminished. We believe there is appetite for a modern, logical, coherent and workable scheme of offences to deal with violent behaviour. A new Act is needed that is comprehensible to the general public and clear for practitioners as to its precise meaning.
- 1.21 We recommend at paragraph 3.21 below that the 1861 Act should be replaced by a comprehensive modern statute on offences against the person.

THE 1998 BILL AS A MODEL FOR REFORM

- 1.22 Only one²⁵ of those 28 responses agreeing that a new piece of comprehensive legislation should be introduced disagreed with our proposal that reform ought to be based on the Home Office's 1998 draft Bill, as the culmination of prior efforts at reform, but it did not give any reasons for doing so.
- 1.23 Since 96% of those thinking that a new piece of legislation in this area ought to be enacted felt that the Home Office's 1998 draft Bill was the best starting point, this is what we have adopted as a model for reform in this report. Typical of those supporting this approach was the comment of the Lord Chief Justice:

I think it is sensible that you have based your discussion on the 1998 proposals for a draft Bill, and believe that this is a good model and a firm foundation on which to take forward long overdue reform in this area.

- 1.24 Whilst we have adopted the 1998 Bill as the basis for our recommendations, we also suggest some adjustments, in particular in relation to creating a new offence of aggravated assault and to reflect case law on disease transmission since the Bill was first published (see Chapter 6).

STRUCTURE OF THIS REPORT

- 1.25 The structure of this report is as follows.
- (1) In this chapter, we introduce the project and our aims in this report.
 - (2) In Chapter 2, we describe (in abbreviated form) the existing law. A full account is provided in the SCP.
 - (3) In Chapter 3, we restate the case for fundamental reform in this area of the law, and examine the consultation responses on this issue.
 - (4) In Chapter 4, we explain our preference for using the 1998 draft Bill on the basis of our consultation responses. We go on to look at how the main offences of causing injury in the draft Bill would work in practice, and suggest some small developments to improve them.
 - (5) In Chapter 5, we consider the offences of assault and battery and related offence such as assaults on police officers. We also recommend that the

²⁵ Sally Ramage, editor of *The Criminal Lawyer*.

draft Bill be amended to include a new offence of aggravated assault causing minor injury, triable only in the magistrates' courts.

- (6) In Chapter 6, we consider the special issues around harm caused by transmission of disease. We recommend changes to the scheme of the draft Bill to take account of common law developments since it was published.
- (7) In Chapter 7, we examine offences of endangerment, and recommend that the scheme of poisoning, explosives and railway offences in the 1998 Bill should be retained. We also conclude that a more general offence of endangering another should not be introduced at this time.
- (8) In Chapter 8, we examine other offences in the 1861 Act and the draft Bill, in particular those of threatening to kill and soliciting murder, as well as one procedural point about the jury's power to give alternative verdicts.
- (9) In Chapter 9, we summarise our recommendations. At the end of that chapter we set out a table showing how the new offences we recommend correspond to the existing ones.
- (10) In Appendix A, we set out a list of consultees who responded to our consultation.
- (11) In Appendix B, we provide a glossary of technical terms and a list of abbreviations used in this report.
- (12) In Appendix C, we reproduce the Home Office's 1998 draft Bill for the benefit of readers.

ACKNOWLEDGMENTS

- 1.26 We would like to thank everyone who took the time to respond to our consultation,²⁶ as well as the following who assisted us further in the process of writing this paper: DCI Chris Sephton (Association of Chief Police Officers, now National Police Chiefs' Council); Jo Taylor (College of Policing); Biney Kwame, Christina Manicom and Neil Moore QC (Crown Prosecution Service); Kerry O'Dea (Home Office); Emily Barnett, Ashley Singh and Karola Graupner (Ministry of Justice analysts); Diana Symonds, Neil Stevenson and Robert Ritchie (Ministry of Justice); Ruth Pope (Sentencing Council); Michael Jefferson (University of Sheffield); and Stephen Slack (Church of England legal office).

²⁶ They are listed in Appendix A to this report.

CHAPTER 2

CURRENT LAW

- 2.1 Our Scoping Consultation Paper (“the SCP”)¹ provided, in Chapter 2, a detailed analysis of the current law of non-fatal offences against the person. This chapter is a summary of the present law designed to provide an understanding of the law sufficient to understand and evaluate the reform recommendations. Those looking for a fuller explanation are advised to read the SCP.
- 2.2 It is important to understand that the scope of the project remains as set out in paragraph 2.1 of the SCP – we have consulted on, and will consider in this paper, the following offences:
- (1) most of the offences under the Offences Against the Person Act 1861 (“the 1861 Act”) that remain in force;
 - (2) assault and battery at common law; and
 - (3) assaulting a constable in the execution of his duty.

In this chapter, we will consider those offences in the order in which they appear in the SCP.

- 2.3 In analysing offences in this report, as in the SCP, we use the following terminology:
- (1) The “external elements” of an offence are the elements of the offence other than those relating to the defendant’s state of mind. They divide into:
 - (a) “conduct elements”: what the defendant (“D”) must do or fail to do;
 - (b) “consequence elements”: the result of D’s conduct (for example, in murder, that the victim (“V”) dies); and
 - (c) “circumstance elements”: other facts affecting whether D is guilty or not (for example, in rape, that V does not consent).
 - (2) The “mental element” (or “fault element”) is the state of mind which must be proved by the prosecution to show that D is responsible for the actions. Examples of mental elements include intention, recklessness, knowledge or belief (or the lack of it).²

¹ Reform of Offences Against the Person: A Scoping Consultation Paper, (2014) Law Commission Consultation Paper No 217.

² Other technical terms used in this report are defined in the glossary, Appendix B to this report.

THE HIERARCHY OF OFFENCES OF INJURY

2.4 As explained in the SCP,³ the offences with which we are concerned are as follows:

- (1) assault and battery, which are common law offences;
- (2) assault occasioning actual bodily harm, under section 47 of the 1861 Act;
- (3) malicious wounding or infliction of grievous bodily harm, under section 20;
- (4) wounding or causing bodily harm with intent, under section 18;
- (5) some offences of assaulting or causing harm to particular persons or in particular circumstances;
- (6) solicitation to murder and threats to kill;
- (7) offences concerned with poisoning, explosives and railways; and
- (8) a number of miscellaneous offences.

Assault and battery

2.5 Assault and battery are common law offences. Their terminology generates confusion: “battery” is unlawful physical touching, however slight. Strictly speaking, “assault” means any intentional or reckless conduct which causes someone to apprehend immediate unlawful violence.⁴ However “assault” is often used in a looser way, to refer either to that conduct or to a battery.

2.6 In the SCP, we adopted the term “psychic assault”, which is commonly used by academics, to mean assault in the strict, apprehension of violence sense of the word. However, consultees reported that this terminology was confusing so, in the rest of this report, when we say “assault” alone we mean assault in the strict sense (causing someone to apprehend unlawful personal violence), and when we say “common assault” we mean assault and/or battery.

2.7 Various procedural aspects of the offences are set out in section 39 of the Criminal Justice Act 1988, and they are often charged as being offences contrary to that section. However, in the SCP⁵ we explain why we think the better view is that they still exist as common law offences with provisions on procedure⁶ in statute, as well as why we think they remain two distinct offences.⁷

³ Para 3.4.

⁴ This definition was approved by the House of Lords in *Ireland* [1998] AC 147, [1997] 4 All ER 225.

⁵ SCP paras 2.6 and 2.7.

⁶ On matters such as mode of trial and maximum available sentence.

⁷ SCP paras 2.8 to 2.11.

External elements – battery

- 2.8 Battery requires proof that the defendant made physical contact with the victim. The contact must be “unlawful” – that is to say, it is not consented to, it is not part of the jostling expected in everyday life and there is no legally valid justification or excuse for it. The contact need not be direct, in that it can be by throwing something or by setting a trap.⁸
- 2.9 The offence can only be committed by omission in certain categories of case. For example, in *Fagan*⁹ D drove onto a policeman’s foot accidentally, but refused to remove the car having realised where he had parked. In that case, the offence was committed even though the required mental element (see below) was present only *after* the act causing the touching had occurred: he only noticed after he had already driven onto the policeman’s foot.
- 2.10 Liability for omission can also apply to the offence of battery where D has created a dangerous situation and on realising that to be the case has failed to take steps to avert the danger: *Miller*.¹⁰ Although that case concerned the offence of arson, it is considered to apply more generally in the criminal law, including to assault and battery.

External elements – assault

- 2.11 There seems to be no authority directly on whether assault can be committed by omission, though it is assumed that *Miller* and *Fagan* would apply. An example would be where D is cleaning his gun, and is pointing it to the door of the room as he did so. When V steps in to talk to D, D keeps his gun pointing at V in the doorway. D has created a situation where V is at risk of apprehending immediate unlawful personal violence, but D takes no steps to remove this hazard.¹¹
- 2.12 The victim must apprehend unlawful contact (which need not mean that V feels fear); the term “unlawful” has the same meaning here as for battery. Technically, there must be apprehension of an “immediate” battery, but this is interpreted generously – see for example *Ireland*, where the making of repeated silent phone calls was found to constitute an assault since it left the recipient in fear of immediate violence.¹²

Mental elements

- 2.13 The fault element for both assault and battery can be either:

⁸ *DPP v K* [1990] 1 WLR 1067, [1990] 1 All ER 331.

⁹ [1969] 1 QB 439.

¹⁰ [1983] 2 AC 161, [1983] 1 All ER 978. In that case the defendant fell asleep while smoking and set fire to a mattress, and did not try to quench the fire when he woke up. See also *Santana-Bermudez* [2003] EWHC 2908 (Admin), (2004) 168 JP 373.

¹¹ D Ormerod and K Laird, *Smith and Hogan’s Criminal Law* (14th ed 2015) (“*Smith and Hogan*”) para 17.1.4.2, p 712.

¹² [1998] AC 147, [1997] 4 All ER 225. Note that Lord Slynn, at 152, makes clear that the question of immediacy was not at issue in the appeal. See also *Constanza* [1997] 2 Cr App R 492, where the question was found to be whether V suffered “a fear of violence at some time not excluding the immediate future”.

- (1) intention¹³ to bring about the unlawful contact or the apprehension of it; or
- (2) recklessness as to whether that unlawful contact or apprehension would ensue.

2.14 In the context of criminal damage, recklessness has been authoritatively defined as follows:

A person acts recklessly...with respect to — (i) a circumstance when he is aware of a risk that it exists or will exist; (ii) a result when he is aware of a risk that it will occur; and it is, in the circumstances known to him, unreasonable to take the risk.¹⁴

We assume that the same definition now applies in relation to assault and battery as well.

In practice

2.15 Assault and battery are both summary only offences – that is to say, triable only in a magistrates’ court. There are two exceptions to this:

- (1) First, if a defendant faces charges in the Crown Court for other offences based on the same facts or series of events, he or she can also be tried for assault or battery along with those offences in the Crown Court.
- (2) Secondly, in the Crown Court generally, a jury can decide to acquit a defendant of an offence charged and convict of a less serious offence that can be included¹⁵ in the scope of the charged offence.¹⁶ Following changes in 2004¹⁷ this allows juries to convict of assault or battery when they have acquitted the defendant of ABH (section 47 OAPA), even though assault and battery cannot generally be tried in the Crown Court.

Even in cases where a conviction for assault or battery is secured in the Crown Court, the maximum penalty of six months (and/or an unlimited fine) applies.¹⁸

¹³ Intention includes what is known as “oblique intent”, in which the result in question is not desired but only foreseen as a virtually certain by-product. We cannot envisage a case in which it is necessary to rely on this concept in a prosecution for assault or battery, as such facts are in any event covered by recklessness. We therefore describe it at para 2.44 below, under the heading of the s 18 offence (wounding or causing grievous bodily harm with intent), for which recklessness is not sufficient.

¹⁴ G [2003] UKHL 50, [2004] 1 AC 1034, per Lord Bingham of Cornhill at [41].

¹⁵ *Wilson* [1984] AC 242 (HL), [1983] 3 All ER 448; see also SCP para 5.201.

¹⁶ Criminal Law Act 1967, s 6.

¹⁷ Criminal Law Act 1967, s 6(3A) and (3B), inserted by Domestic Violence, Crime and Victims Act 2004, s 11.

¹⁸ Criminal Justice Act 1988, s 39, read with Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 85(1), (2) and (4), commenced for offences committed after 12 March 2015 by SI 2015/504.

- 2.16 Assault and battery are the most commonly charged offences we consider in this report, with a total of 111,000 to 122,000 charges of common assault (assault or battery) reaching a first hearing in a magistrates' court each year between 2005 and 2013 according to the Crown Prosecution Service (CPS).

Assault occasioning actual bodily harm (ABH) – section 47

- 2.17 The 1861 Act provides for an offence of assault occasioning actual bodily harm, as follows:

47. Whosoever shall be convicted upon an indictment of any assault occasioning actual bodily harm shall be liable to be kept in penal servitude.¹⁹

- 2.18 For a technical explanation of the background and theoretical aspects of the offence, see paragraphs 2.47 and 2.48 of the SCP and the footnotes to those paragraphs. In essence, the offence is committed where D commits an assault or battery which also causes some harm to the victim. There is no requirement that D either intended to cause the harm or was reckless about that harm being caused.
- 2.19 Actual bodily harm means any hurt or injury which interferes with the health or comfort of V²⁰ and is more than “transient or trifling”. As well as the more obvious and commonplace types of injury such as bruises and grazes, the definition captures a huge range of harms including cutting off a person’s hair and causing a temporary loss of consciousness. It has also been held to include causing a recognised psychiatric condition.²¹

Consent

- 2.20 A further element of the section 47 offence involves consideration of whether the victim was consenting. As we noted in the SCP, this is a complex and controversial area, and we provide only the following brief summary.

- (1) The consent of the victim can only be valid in this context if it is freely given by someone with capacity to consent.²²
- (2) A person can consent to a mere assault or battery in any context.

¹⁹ In fact the maximum sentence is 5 years’ imprisonment: Penal Servitude Act 1891, s 1(1) and Criminal Justice Act 1948, s 1.

²⁰ *Miller* [1954] 2 QB 282, [1954] 2 All ER 529.

²¹ Cutting off hair: *DPP v Smith* [2006] EWHC 94 (Admin), [2006] 1 WLR 1571; loss of consciousness: *T v DPP* [2003] EWHC 266 (Admin), [2003] Crim LR 622; psychiatric injury: *Burstow and Ireland* [1998] AC 147, [1997] 4 All ER 225. On disease see Chapter 6 below.

²² Consent *can* still be valid for some purposes where these conditions are not satisfied; however, that complex area of law is outside the scope of this short summary. See generally *Brown* [1994] 1 AC 212.

- (3) A person's factual consent to more serious harm than that covered by simple assault or battery *may* be valid in law, depending upon the context in which the injury or harm is caused.
- 2.21 For V's freely given consent to injury of a more than "transient or trifling" nature (the threshold for the section 47 offence) to be valid in law, it must have occurred in the course of an activity which has been accepted by the case law as providing an excuse for the injury or risk of injury. Examples include sport, horseplay, surgery and tattooing. In contrast, activities such as a "consensual" pub fight or a duel are not recognised by the courts and any apparent factual consent to injury in the course of them is not legally valid consent.²³
- 2.22 Cases in which injury is caused in the course of consensual sexual activity can be categorised so as to fall on either side of the line. The House of Lords in *Brown* found that injuries deliberately caused in the course of sadomasochistic activity (such as caning) do amount to an offence, irrespective of consent.²⁴ On the other hand, in *Wilson*, when a husband branded his wife with his initials, there was held to be a valid consent to the activity which – it was emphasised – took place in the privacy of the marital home.²⁵ Lord Justice Russell in the latter case said, first, that branding is more akin to tattooing than to the extreme activities in *Brown* and, secondly, that each case must be considered on its own facts. Nevertheless there is certainly still doubt as to whether the two can properly be reconciled.
- 2.23 In short, the question of whether consent to injury or the risk of it is an answer to a charge depends almost entirely on the field of activity in which the injury takes place. Other factors, such as the degree of harm and the vulnerability of V, appear to be excluded from consideration. This position has been criticised as being arbitrary and inflexible.²⁶
- 2.24 A further complication is that D's awareness of the risk of causing injury is also relevant to consent. If D has V's consent to assault or battery and D does not intend or foresee harm over and above assault or battery, no offence is committed even if V is in fact caused some injury.²⁷ Under section 47 there is no requirement to prove that D intended or foresaw a risk of injury, but for any section 47 offence there must be proof of an assault or battery as a precondition, and this will not be present if the assault or battery (which is all either party ever foresaw) was consented to.

²³ *Smith and Hogan* para 17.2.1.3, pp 725 to 734.

²⁴ *Donovan* [1934] 2 KB 498; *Brown* [1994] 1 AC 212.

²⁵ *Wilson* [1997] QB 47, [1996] 2 Cr App R 241.

²⁶ J Tolmie, "Consent to harmful assaults: the case for moving away from category based decision making" [2012] *Criminal Law Review* 656.

²⁷ *Meachen* [2006] EWCA Crim 2414; *Smith and Hogan* p 727.

2.25 Consent in relation to cases of disease transmission will be considered later in this paper.²⁸ In summary, the law is based on the case of *Dica*.²⁹ There, D, knowing he was HIV positive, had unprotected sex with two women without disclosing this fact, and both of them became infected. On the facts, there was valid consent to sexual intercourse, so no rape was committed. Lord Justice Judge, as he then was, in the Court of Appeal, held that the relevant factor was whether there was consent *to the risk of infection*. He found that the trial judge was correct to say that, following *Brown* (discussed above), the women could not validly consent to being deliberately infected with HIV. However, the trial judge was wrong in saying that consent to a *risk* of infection was impermissible, because, Lord Justice Judge said, “interference of this kind with personal autonomy, and its level and extent, may only be made by Parliament.” Mr Dica was acquitted and sent for retrial based on the correct understanding of the law, where he was again convicted by a jury of the section 20 offence.³⁰

Mental element

2.26 The mental element for ABH is identical to that for assault or battery.³¹ There is no need for D to be shown to have intended or foreseen any harm. What is required is that D intended or was reckless as to an assault or battery.

2.27 Whether D intended or foresaw a risk of injury is relevant in one type of case. As mentioned above,³² D cannot be guilty of this offence if D did not intend or foresee any injury and V consented to the act which would otherwise be an assault or battery. If however D did intend or foresee a risk of injury, D is guilty unless both the following conditions are satisfied, namely that:

- (1) V consented *to that risk* (as well as to the act itself), and
- (2) the field of activity is one in which, following the principles in *Brown*, such consent is valid.

In practice

2.28 The offence is triable either way, that is to say, in a magistrates’ court or the Crown Court.³³

- (1) Whilst the threshold for actual bodily harm is quite low, the CPS charging standard³⁴ states that the section 47 offence should only be charged

²⁸ Para 6.47 and following (explanation of the issue and responses of consultees), paras 6.110 to 6.114 below (discussion and conclusions).

²⁹ [2004] EWCA Crim 1103, [2004] QB 1257.

³⁰ See below, para 2.31 and following.

³¹ See para 2.13 above.

³² Para 2.24 above.

³³ Magistrates’ Courts Act 1980, s 17 and Sch 1 para 5(h).

“where the injuries exceed those that can suitably be reflected by common assault – namely where the injuries are serious”. This is a pragmatic policy for prosecutors, allowing them to charge the less serious offence of common assault in cases where the sentence is unlikely to exceed six months’ imprisonment. In such cases it is worth ensuring that the case is kept in the magistrates’ court³⁵ which is an appropriate forum for less serious offences.

- (2) However, even with that charging standard in place, 7-12% of defendants sentenced for this offence in the Crown Court receive immediate custodial sentences within magistrates’ sentencing powers,³⁶ and many more receive non-custodial sentences or suspended sentences within those powers.³⁷

2.29 When tried in the Crown Court on indictment, the maximum penalty is 5 years’ imprisonment.³⁸ However, sentences that high will be very rare: the relevant sentencing guideline³⁹ sets the starting point for the highest category of cases at only one year six months, and the “offence range” only goes up to three years. This is because the maximum penalty for the next offence on the ladder of injury offences, namely malicious wounding or infliction of grievous bodily harm under section 20, is also five years, and that offence is considered to be much more serious.

Inflicting grievous bodily harm – section 20

2.30 The 1861 Act provides for an offence of malicious wounding or infliction of grievous bodily harm (“GBH”) as follows:

20. Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without

³⁴ Crown Prosecution Service, *Legal Guidance: Offences Against the Person, Incorporating Charging Standard*. Available from: https://www.cps.gov.uk/legal/l_to_o/offences_against_the_person/#a07 (last visited 19 October 2015).

³⁵ In cases which are triable either way, “allocation” (the process of determining which court a case will be tried in) is in essence the decision of the magistrates, but a defendant must consent to be tried “summarily” before the magistrates and has a right to opt for jury trial in the Crown Court instead. This procedure does not apply in cases which are triable only in the Crown Court, or only in a magistrates’ court.

³⁶ Amounting to 380-670 cases per year in the period 2003-2013, according to Ministry of Justice figures. (According to the same figures, 11,000 to 36,000 defendants were prosecuted each year for this offence.)

³⁷ For 2014, the proportion of Crown Court sentences for this offence which would have been within the power of a magistrates’ court was 34.5%: see the Sentencing Council’s Crown Court Sentencing Survey for England and Wales for 2014, para 5.55 below.

³⁸ See para 2.69 of the SCP for why this is the maximum penalty.

³⁹ http://www.sentencingcouncil.org.uk/wp-content/uploads/Assault_definitive_guideline_-_Crown_Court.pdf (last visited 19 October 2015).

any weapon or instrument, shall be guilty of a misdemeanor,⁴⁰ and being convicted thereof shall be liable to be kept in penal servitude.⁴¹

External elements

- 2.31 There are two modes of committing this offence: by wounding, and by inflicting GBH. Wounding refers to any break through all of the layers of the skin – so it need not be substantial, but must be more than a scratch.⁴²
- 2.32 Harm which is “grievous” is generally taken to mean that which is “serious”: whether it is in fact serious is entirely a matter for the jury.⁴³ In court, the phrase “really serious” is often used, but it is not necessary to direct a jury accordingly.⁴⁴ Whilst this offence uses the phrase “inflict ... GBH”, as distinct from “cause ... GBH” which is used in other offences in the Act, it is now clear that nothing turns on that: *Ireland*.⁴⁵ Over time, the words have simply been interpreted to have identical – or at least, very nearly identical – meanings. As in the offence under section 47,⁴⁶ “bodily harm” includes any injury in the form of a recognised psychiatric condition.⁴⁷
- 2.33 The offence under section 20 probably includes causing GBH by omission, given that “inflict” is now interpreted as almost synonymous with “cause”. It is less clear whether one can wound by omission, except in special circumstances like those in *Santana-Bermudez*.⁴⁸
- 2.34 Consent can be a valid defence to a section 20 charge, but – as for section 47 – it must be freely given and fully informed,⁴⁹ and the injury must take place in the context of an activity that has been accepted as an exceptional category in the

⁴⁰ The spelling “misdemeanor” (as opposed to the more usual “misdemeanour”) is the one used throughout the 1861 Act.

⁴¹ As with the offence under s 47, this now means imprisonment for up to 5 years: Penal Servitude Act 1891, s 1(1) and Criminal Justice Act 1948, s 1.

⁴² *Morris* [2005] EWCA Crim 609.

⁴³ In *Golding* [2014] EWCA Crim 889 a conviction for infliction of genital herpes was upheld: it is for the jury to decide whether it amounts to GBH, and they were entitled to do so on the evidence before them, especially since the experts said that it was a lifelong condition.

⁴⁴ The Crown Court Bench Book does use the phrase “really serious” in the sample sections of directions, but “serious” will often suffice for the jury: *Janjua* [1999] 1 Cr App R 91.

⁴⁵ [1998] AC 147.

⁴⁶ Para 2.19 above.

⁴⁷ *Morris* [1998] 1 Cr App R 386; *Chan-Fook* [1994] 1 WLR 689, [1994] 2 All ER 552; *Dhaliwal* [2006] EWCA Crim 1139, [2006] 2 Cr App R 24. For the same principle in civil cases, see *Glen v Korean Airlines Co Ltd* [2003] EWHC 643 (QB), [2003] QB 1386; *Nigeria v Ogbonna* [2012] 1 WLR 139, [2012] ICR 32.

⁴⁸ *DPP v Santana-Bermudez* [2003] EWHC 2908 (Admin), (2004) 168 JP 373. In that case (which was charged under s 47), a policeman put his hand into D’s pocket to search it after D had assured him that there were no “sharp”, and was wounded by some syringe needles that were there.

⁴⁹ Not the case in *Dica* [2004] EWCA Crim 1103 or *Konzani* [2005] 2 Cr App R 14, where the Vs validly consented to sexual intercourse (and thus no sexual offence or indeed battery was committed), but not to the risk of contracting HIV from the knowingly HIV positive D.

case law. Belief in consent is also a valid defence. That is, if D has an honestly-held belief that V consented, and the context is one in which D would have a defence if V consented, then there is no liability even if V did not in fact consent.

Example 1: D, a surgeon, honestly believes that V, a hospital patient, is consenting to some risky surgery. However, V speaks poor English and the translator misinterpreted V's response when asked about consent. The operation later goes wrong, causing V to lose a limb. However, D has committed no offence since, even though V did not consent, D honestly believed that V had done so, and D's act was in a category where consent would be valid.

Mental element

- 2.35 The offence requires proof of malice. According to *Cunningham*,⁵⁰ the word "malice" in an offence means that it must be done either intentionally or recklessly. "Intent" and "reckless" have the same meanings ascribed to them as for assault and battery, which are explained above.⁵¹ The case of *Mowatt*⁵² does not include the additional requirement contained in *G*⁵³ (explained above⁵⁴) that D must also be taking an *unjustified* risk of causing harm. However, in the SCP we explain why we think that this is now the law in relation to section 20 as well, in particular based on *Brady*.⁵⁵
- 2.36 The requirement of the section 20 offence is that D must intend or be reckless about causing *some* harm. There is no requirement to prove that D intended or was reckless as to the wound or grievous bodily harm actually caused.⁵⁶

In practice

- 2.37 The offence is triable either way, and punishable by up to 5 years' imprisonment.⁵⁷ Sentences approaching this length are considerably more likely here than for section 47, taking into account the guideline.⁵⁸ The CPS guidance on charging states that section 20 should only be used when "really serious" harm has been inflicted, even where it is technically available for much lesser harm (as is often the case in a wounding scenario). Between 3,000 and 5,500

⁵⁰ [1957] 2 QB 396, [1957] 2 All ER 412.

⁵¹ See paras 2.13 and 2.14 above.

⁵² [1968] 1 QB 421, [1967] 3 WLR 1192.

⁵³ [2003] UKHL 50, [2004] 1 AC 1034.

⁵⁴ Para 2.14 above.

⁵⁵ SCP paras 2.94 to 2.98; *Brady* [2006] EWCA Crim 2413.

⁵⁶ *Mowatt* [1968] 1 QB 421, [1967] 3 All ER 47. This was approved in *Savage* [1992] 1 AC 699, [1991] 4 All ER 698 (HL).

⁵⁷ Magistrates' Courts Act 1980, s 17 and Sch 1 para 5(b).

⁵⁸ Sentencing Council, *Assault: Definitive Guideline* (2011), <http://www.sentencingcouncil.org.uk/publications/item/assault-definitive-guideline/> (last visited 19 October 2015).

defendants were proceeded against annually for this offence between 2003 and 2013, according to Ministry of Justice figures.

Causing GBH with intent to cause GBH – section 18

2.38 The 1861 Act provides for an offence of wounding or causing grievous bodily harm with intent, as follows:

18. Whosoever shall unlawfully and maliciously by any means whatsoever wound or cause any grievous bodily harm to any person⁵⁹, with intent, to do some grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person, shall be guilty of felony,⁶⁰ and being convicted thereof shall be liable to be kept in penal servitude for life.⁶¹

2.39 The complex manner in which the offence is drafted results in there being ten different ways of committing the offence, with four basic modes:⁶²

- (1) wounding with intent to do grievous bodily harm;
- (2) causing grievous bodily harm with intent to do grievous bodily harm;
- (3) wounding with intent to resist or prevent apprehension or detention; and
- (4) causing grievous bodily harm with intent to resist or prevent apprehension or detention.

External elements

2.40 GBH and wounding have the same meanings as given above in relation to the section 20 offence. The requirement for causation is now virtually synonymous with the “inflict” element of the section 20 offence.⁶³ The section 18 offence can be committed “by any means whatsoever...” which clearly gives the offence a broad scope.

2.41 The offence can be committed by omission where D breaches a duty to act and causes GBH as a result. The view of the Criminal Law Revision Committee, and the Law Commission in 1993, was that only omissions which consist of failures to

⁵⁹ Note that s 20 uses “any other person” – thus the s 18 offence can probably include self-harm. We assert at para 2.122 of the SCP that this is to follow the offence of mayhem at common law.

⁶⁰ Now meaning “an offence”: Criminal Law Act 1967, s 12(5)(a).

⁶¹ Now meaning imprisonment for life: Criminal Justice Act 1948, s 1.

⁶² For further details, see fn 188 to Ch 2 on p 32 of the SCP. The number 10 is reached by dividing (3) and (4) into 4 modes each: intending to resist or prevent apprehension or detention.

⁶³ *Wilson* [1997] QB 47, [1996] 2 Cr App R 241 (assault not an element of s 20 offence in the branding case); *Ireland* [1998] AC 147, [1997] 4 All ER 225 (s 47 offence committed even though assault quite remote).

discharge common law duties are included in the offence.⁶⁴ An example would be if D deliberately fails to replace the cover of a manhole in the hope that V (who walks in that area at night) will fall in.

- 2.42 As with section 20, V's freely-given informed consent will mean that D has no liability where the injury was caused in the course of an activity which is in an accepted category of exception. Some commonly-encountered exceptions are surgery, combat sports and martial arts.

Mental element

- 2.43 For basic forms (1) and (2) of the offence, it is a requirement that D must intend to do GBH. Therefore, the word "maliciously" in the offence adds nothing since, as explained above,⁶⁵ it simply means intending or being reckless as to whether some bodily harm is caused. However, for forms (3) and (4), it adds in a further requirement: not only must D intend to resist or prevent apprehension or detention, he must do so maliciously: which means that D must also be reckless as to whether some harm might be caused to someone.

- 2.44 To intend to do something includes in law "oblique intent", as well as direct intention. Oblique intent covers the case where D was aware that a particular outcome was a virtually certain consequence of acting to bring about D's desired outcome, that outcome was in fact virtually certain, but D continued with his actions anyway.⁶⁶ A classic example of oblique intent is where D places a bomb on an aircraft in order to make a fraudulent claim under the insurance of the plane. D does not directly intend the death of the passengers, but knows that it is a virtually certain, though unwanted, consequence.

- 2.45 The issue of oblique intent rarely arises, and the few cases where it does arise generally concern murder. We explain it here because the section 18 offence, unlike those previously described in this report, requires intention rather than recklessness: oblique intent could therefore be relevant in marginal cases.

PARTICULAR ASSAULTS

- 2.46 Into this category we have placed those offences which criminalise violence, or threats of violence, against particular people or in particular circumstances. There are numerous offences of this type⁶⁷ in statute, but the core ones we considered in the SCP were (with statutory provision and maximum sentence given in brackets):

⁶⁴ CLRC 14th Report (1980) Cmnd 7844 para 253; Law Com No 218 (1993) paras 11.4 and 11.5. Both think this position ought to continue.

⁶⁵ See para 2.35 above.

⁶⁶ *Woollin* [1999] 1 AC 82, [1998] 4 All ER 103; Murder, Manslaughter and Infanticide (2006) Law Com No 304 at para 3.14.

⁶⁷ As set out in the SCP at fnn 215-218 of Chapter 2 at pp 35 to 36: this was not intended to be an exhaustive list. There are also offences of causing danger in airports and on aircraft by means of "acts of violence" (defined as including assault and certain offences under the 1861 Act): Aviation Security Act 1982, ss 1 and 2.

- (1) wounding or causing grievous bodily harm with intent to resist or prevent the lawful apprehension or detention of any person (section 18 of the 1861 Act – life);
- (2) obstructing or assaulting a clergyman in the discharge of his duties (section 36 of the 1861 Act – two years);
- (3) assault resulting in striking or wounding a magistrate or other person in the exercise of his duty preserving a wreck or any ship in distress (section 37 of the 1861 Act – seven years);
- (4) assault with intent to resist or prevent the lawful apprehension or detention of any person (section 38 of the 1861 Act – two years); and
- (5) assaulting a constable (or a person assisting him) in the execution of his duty (section 89(1) of the Police Act 1996 – six months).

External elements

2.47 Offence (1) has the same external elements as the other offences contained in section 18 of the 1861 Act.⁶⁸ For offences (2), (3), (4) and (5) above “assault” is taken to mean “common assault”, or rather assault or battery as they are defined at common law. Offence (2) can also be committed by *obstructing* a clergyman in the course of his duties. There is a separate offence of obstructing a constable in section 89(2) of the Police Act 1996, but we did not consult on this because it is not an offence of violence against the person.

Mental elements

2.48 For assaulting a police officer, (5) above, (which is by far the most commonly charged offence in this list⁶⁹) there is no mental requirement beyond that for assault and battery.⁷⁰ That is to say, D need not have any knowledge that V is in fact a constable to be convicted of the offence. If V is in plain clothes, for example, and D assaults V while V is in the execution of V’s duty, D commits the offence even if he had no knowledge that V was a constable. If, however, V attempts to arrest D and D thinks V is not a police officer and resists, hitting him in the process, then this may, depending on the circumstances, constitute lawful self-defence and provide a justification for D’s actions.⁷¹ This means that the lack of a requirement of knowing V is a constable might have less impact in practice than at first appears.

⁶⁸ Wounding, or causing serious harm. See further para 2.31 above.

⁶⁹ 9,000-13,000 defendants per year face hearings in magistrates’ courts on such charges. This compares to two in a decade for assaulting/obstructing a member of the clergy, and no recorded prosecutions for the OAPA 1861, s 37 offence.

⁷⁰ SCP para 2.142 and following; *Smith and Hogan* para 17.9.2.3, p 762; the rule dates back to at least *Forbes v Webb* (1865) 10 Cox CC 362.

⁷¹ *Smith and Hogan* pp 762-3; *Blackburn v Bowering* [1994] 1 WLR 1324.

- 2.49 The maximum penalty is, in any case, the same as for simple assault or battery, so the only downside for the defendant of this apparent harshness in the law is that D is labelled as a wrongdoer of a specific type.⁷²

THREATS TO KILL AND SOLICITATION TO MURDER

Threats to kill – section 16

- 2.50 The 1861 Act provides for an offence of threatening to kill, as follows:

16. A person who without lawful excuse makes to another a threat, intending that that other would fear it would be carried out, to kill that other or a third person shall be guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding ten years.

- 2.51 The conduct element is simply D making a threat to a person (A⁷³) to kill A or anyone else. We do not consider that there is a requirement that the threat should be believed,⁷⁴ nor is there any need that the threat be intended ever to be carried out.⁷⁵ A threat to kill a foetus is not an offence, although an unambiguous threat to kill the child once born probably is, according to *Tait*.⁷⁶
- 2.52 The mental element is that D must intend that A “would fear it would be carried out” – so A need not be certain that it will, and it probably encompasses a conditional threat. Threats to kill may be made in self-defence or to prevent a crime occurring. They might well be found by a jury to be a reasonable and lawful reaction, even where actual killing would clearly not be proportionate.⁷⁷
- 2.53 The offence is triable either way, and punishable by up to ten years’ imprisonment; there is no sentencing guideline available. The CPS cautions its prosecutors against charging it since it is so difficult to prove (especially compared to assault or public order offences),⁷⁸ and therefore suggests it ought

⁷² That said, the *Assault: Definitive Guideline* (see above) recommends consistently higher sentences for assaulting a police officer. However, whilst it is not explicit in the guideline, not realising that V was a constable would surely be a substantial point in mitigation for D, perhaps bringing the likely sentence back within the range for common assault.

⁷³ We use the letter “A” instead of “V” because the person to whom the threat is made, especially if the threat is in relation to killing a third person, may not consider themselves to be a victim of crime.

⁷⁴ D Ormerod and D Perry (eds), *Blackstone’s Criminal Practice* (26th ed 2016) (“*Blackstone’s*”), para B1.144; fn 237 to para 2.160 in the SCP.

⁷⁵ *Syme* (1911) 6 Cr App R 257, but see the reservations expressed in SCP Ch 2 fn 238.

⁷⁶ [1990] 1 QB 290, [1989] 3 All ER 682. The CA were reluctant in reaching the latter part of this result, but they felt bound by *Shephard* [1919] 2 KB 125, (1920) 14 Cr App R 26.

⁷⁷ Criminal Law Act 1967, s 3; *Cousins* [1982] QB 526 at 530.

⁷⁸ Court surveys show a low rate of conviction compared with other offences of violence. This may be because threats are often made without witnesses and it is simply one person’s word against another; there are also non-verbal threats which create a general fear of violence but seldom amount to an unequivocal threat to kill.

to be reserved for the most serious cases.⁷⁹ According to figures supplied by the Ministry of Justice, between 1,300 and 3,800 defendants were prosecuted each year in 2003-13.

Solicitation to murder – section 4

2.54 The 1861 Act provides for an offence of solicitation to murder, as follows:

4. Whosoever shall solicit, encourage, persuade, or endeavour to persuade, or shall propose to any person, to murder any other person, whether he be a subject of Her Majesty or not, and whether he be within the Queen's dominions or not, shall be guilty of a misdemeanor, and being convicted thereof shall be liable to imprisonment for life.

External elements

2.55 In what follows, we adopt the same terminology as in the SCP:⁸⁰ the offence revolves around D (defendant) soliciting, encouraging, persuading, endeavouring to persuade or proposing that M (person solicited/potential murderer) should kill V (potential victim).

2.56 Neither V nor M need be individuals who are specifically identified by D: V could be a child that may be born in the future⁸¹ or a member of a generic group,⁸² and M could be reached through a public appeal such as an internet advertisement.⁸³ It is however a requirement of the offence that D's solicitation (etc) to kill must reach its intended audience (of Ms).⁸⁴ It is unclear whether the offence is committed if D says to M "kill V only if event X happens" – in other words, a conditional solicitation. However, if condition X becomes fulfilled, the offence is definitely committed.

Example 2. In *Shephard*⁸⁵ D wrote a letter to his partner urging her to kill their unborn child if and when born. The court held that the offence was definitely committed once the child had in fact been born alive (if not before).

⁷⁹ http://www.cps.gov.uk/legal/l_to_o/offences_against_the_person/, under "other relevant offences" (last visited 19 October 2015).

⁸⁰ SCP para 2.172.

⁸¹ *Shephard* [1919] 2 KB 125, (1920) 14 Cr App R 26: example 2 at the end of this paragraph.

⁸² *El-Faisal* [2004] EWCA Crim 456. The intended victims were "Hindus, Jews and non-believers".

⁸³ *Smith and Hogan* para 16.1.1.3, p 664.

⁸⁴ *Krause* (1902) 66 JP 121.

⁸⁵ [1919] 2 KB 125, (1920) 14 Cr App R 26.

Mental element

- 2.57 The mental element of the offence is more complex: the verbs in section 4 all clearly denote deliberate acts, but it is unclear whether it is also a requirement that D must either intend or believe that his solicitation will be acted upon. Our view is that the offence follows, or is broader than, the offence of incitement at common law,⁸⁶ although that offence was itself uncertain on this point. *Smith and Hogan's* preferred view was that the only requirement was that D must be aware that, were M to act on D's suggestion, the principal offence would be committed.⁸⁷
- 2.58 We consider that the offence is committed even if D only acted to expose M as a potential murderer and does not expect any killing to occur.

Example 3. D is a vigilante and believes that M is a terrorist. D infiltrates M's organisation and urges M to bomb a building where many people are present. In the meantime, D tips off the police so that they can arrest M as he arrives at that building with the bombing materials.

If this view is correct, it is a wider offence than the statutory offences of assisting and encouraging crime under sections 44 and 45 of the Serious Crime Act 2007, since those respectively require D to *intend* or *believe* that M will in fact commit the crime.

In practice

- 2.59 The wording of the offence specifies that it applies whether or not D is within the jurisdiction, and whether or not D is a British subject. The reasons for this, and possible effects of it, are explored in more detail at paragraph 2.181 onwards of the SCP.
- 2.60 The offence is indictable only, punishable by up to life imprisonment, and is charged between 17 and 63 times per year according to Ministry of Justice figures for 2003-13.

POISONING OFFENCES

- 2.61 The 1861 Act provides for three offences concerned with poisons and noxious substances:

22. Whosoever shall unlawfully apply or administer to or cause to be taken by, or attempt to apply or administer to or attempt to cause to be administered to or taken by, any person, any chloroform, laudanum, or other stupefying or overpowering drug, matter, or thing, with intent in any of such cases thereby to enable himself or any other person to commit, or with intent in any of such cases thereby to assist any other person in committing, any indictable offence, shall be guilty

⁸⁶ Incitement was abolished by the Serious Crime Act 2007, which created new offences of assisting and encouraging crime.

⁸⁷ 11th ed 2005, p 354 (the last edition before the Serious Crime Act 2007).

of felony, and being convicted thereof shall be liable to be kept in penal servitude for life.

23. Whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, so as thereby to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for any term not exceeding ten years.

24. Whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, with intent to injure, aggrieve, or annoy such person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be kept in penal servitude.⁸⁸

External elements

Conduct elements

2.62 The conduct element of all three offences is administering a substance; the offence under section 22 refers to a range of stupefying substances while the offences under sections 23 and 24 refer to a “poison or other destructive or noxious thing”. The classification of the substance as noxious for these purposes is a purely objective question: so, for example, heroin is always noxious, even if V has built up a tolerance to it.⁸⁹ As Lord Bingham of Cornhill said in *Kennedy*,⁹⁰ there are three distinct offences in section 23: “(1) administering a noxious thing to any other person; (2) causing a noxious thing to be administered to any other person; and (3) causing a noxious thing to be taken by any other person”.

Offence (1) is committed where D administers the noxious thing directly to V, as by injecting V with the noxious thing, holding a glass containing the noxious thing to V’s lips, or ... spraying the noxious thing in V’s face.

Offence (2) is typically committed where D does not directly administer the noxious thing to V but causes an innocent third party (TP) to administer it to V. If D, knowing a syringe to be filled with poison instructs TP to inject V, TP believing the syringe to contain a legitimate therapeutic substance, D would commit this offence.

Offence (3) covers the situation where the noxious thing is not administered to V but taken by him, provided D causes the noxious

⁸⁸ In all three offences, references to penal servitude are to be read as meaning imprisonment. The maximum term for the s 24 offence is 5 years: para 3.93 of the SCP. Further, references to “felony” and “misdemeanor” now mean simply “an offence”: Criminal Law Act 1967, s 12(5).

⁸⁹ *Cato* [1976] 1 WLR 110, [1976] 1 All ER 260.

⁹⁰ [2007] UKHL 38, [2008] 1 AC 269, per Lord Bingham of Cornhill at [9].

thing to be taken by V and V does not make a voluntary and informed decision to take it. If D puts a noxious thing in food which V is about to eat and V, ignorant of the presence of the noxious thing, eats it, D commits offence (3).⁹¹

- 2.63 For offence (1), with which *Kennedy* was concerned, if D supplies a drug, or even prepares it and ties a tourniquet, but V actually pushes the plunger, this is not enough to count as administration by D. This is because V's free act breaks the chain of causation, meaning D could not be said to have actually administered the drugs.⁹²

Consequence elements

- 2.64 The offence under section 22 is also committed when D *attempts* to administer the substance. In practice this is an unnecessary offence, since attempting to commit any offence triable on indictment⁹³ is an indictable offence in itself under the Criminal Attempts Act 1981.
- 2.65 The section 23 offence has a required consequence: not only must the substance be administered, but it must "thereby ... endanger the life [of V]". By contrast, the section 24 offence need only be committed with the *intent* to "injure, aggrieve or annoy": if D intentionally gives V food containing arsenic, but V has taken small amounts of the poison to build up a resistance to it,⁹⁴ then the offence is still committed.

Consent

- 2.66 Consent has the same effects for sections 23 and 24⁹⁵ as in relation to section 20:⁹⁶ that is to say, V's freely given fully informed consent is only legally valid when the administration arises in the context of an activity in a category where the courts have accepted that consent is valid, such as surgery.⁹⁷

⁹¹ *Kennedy*, above, per Lord Bingham of Cornhill at [10]-[12].

⁹² *Kennedy*, above, in particular per Lord Bingham of Cornhill at [19].

⁹³ The method of trying a case at Crown Court before a jury, as opposed to "summary only" offences which can only be tried in a magistrates' court. All three of these offences are triable on indictment.

⁹⁴ The practice is known as Mithridatism, after King Mithridates VI of Pontus (134-63 BC) who allegedly engaged in it. Some snake handlers today use the technique to build up immunity to their dangerous charges.

⁹⁵ There can probably be no defence of consent to the s 22 offence, as the commission of an indictable offence is unlikely ever to be an accepted field of activity for the purposes of the rule in *Brown* [1994] 1 AC 212: see para 2.22 and following, above.

⁹⁶ Para 2.21 and following, above.

⁹⁷ *Brown* [1994] 1 AC 212: this could arise in the context of the administration of general anaesthetic for an operation.

Mental elements

- 2.67 The mental element for the section 22 offence is intent to commit, or assist another in committing, any indictable offence.⁹⁸
- 2.68 For the section 23 offence, the mental element is stated to be “maliciously” performing the conduct. In *Cunningham*,⁹⁹ this was stated to mean that D must intend V to be injured or be reckless as to whether V would be injured. On the facts of this case, that meant deciding whether, when D stole a gas meter, he either intended to injure someone or (more likely in the circumstances) foresaw the risk of injuring someone in the house by carbon monoxide poisoning from the leaking gas, but carried on anyway.
- 2.69 In *Cato*,¹⁰⁰ however, intentional administration of heroin through a syringe was considered sufficient to amount to the offence, even though D believed that there would be no injury. The distinction is explained on the basis that, in *Cunningham*, it was uncertain whether the substance would ever reach (be administered to) Mrs Wade (the victim) or someone in her position. In other words, depending on the circumstances, the mental element for section 23 can require either that D intends or is reckless as to the administration of a noxious substance, or that D intends or is reckless as to the causing of some injury. The end result is described in *Smith and Hogan*¹⁰¹ as “extraordinary”, in that a less culpable state of mind is required for this more serious offence than for the less serious one in section 24. That said, it could be explained by the fact that actual injury results in a section 23 offence, whereas it must merely be intended for section 24.¹⁰²
- 2.70 That higher degree of culpability required for the less serious offence in section 24 is intent to injure, aggrieve or annoy. “Injure” has been interpreted quite broadly, and effectively means any physiological effect brought about with a malevolent purpose in mind. Examples given in *Hill*¹⁰³ distinguish between injecting something to keep a pilot awake to avoid crashes and injecting it to keep a detainee awake for the purposes of an interrogation under torture.

In practice

- 2.71 These offences are triable on indictment only, and there are relatively small numbers of cases each year: 20-45 prosecutions reach a first hearing annually, across all three offences.¹⁰⁴

⁹⁸ This means that it overlaps with the Sexual Offences Act 2003, s 61 offence of administering a substance intending to stupefy or overpower and thus enable sexual activity.

⁹⁹ [1957] 2 QB 396.

¹⁰⁰ [1976] 1 WLR 110.

¹⁰¹ *Smith and Hogan* para 17.11.1.2, p 771.

¹⁰² In the terminology used in para 4.47(3), the s 24 offence is an offence of ulterior intent.

¹⁰³ (1986) 83 Cr App R 386.

¹⁰⁴ Ministry of Justice figures, 2003-13.

EXPLOSIVES AND DANGEROUS SUBSTANCES

2.72 The 1861 Act provides for four offences concerned with explosives and other dangerous substances:

28. Whosoever shall unlawfully and maliciously, by the explosion of gunpowder or other explosive substance, burn, maim, disfigure, disable, or do any grievous bodily harm to any person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court to be kept in penal servitude for life or to be imprisoned.¹⁰⁵

29. Whosoever shall unlawfully and maliciously cause any gunpowder or other explosive substance to explode, or send or deliver to or cause to be taken or received by any person any explosive substance or any other dangerous or noxious thing, or put or lay at any place, or cast or throw at or upon or otherwise apply to any person, any corrosive fluid or any destructive or explosive substance, with intent in any of the cases aforesaid to burn, maim, disfigure, or disable any person, or to do some grievous bodily harm to any person, shall, whether any bodily injury be effected or not, be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or to be imprisoned.¹⁰⁶

30. Whosoever shall unlawfully and maliciously place or throw in, into, upon, against, or near any building, ship, or vessel any gunpowder or other explosive substance, with intent to do any bodily injury to any person, shall, whether or not any explosion take place, and whether or not any bodily injury be effected, be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years or to be imprisoned.¹⁰⁷

...

64. Whosoever shall knowingly have in his possession, or make or manufacture, any gunpowder, explosive substance, or any dangerous or noxious thing, or any machine, engine, instrument, or thing, with intent by means thereof to commit, or for the purpose of enabling any other person to commit, any of the felonies¹⁰⁸ in this Act mentioned shall be guilty of a misdemeanor, and being convicted thereof shall be

¹⁰⁵ The effect of Criminal Justice Act 1948, s 1 is to substitute a maximum of imprisonment for life. "Felony" should be read as "an offence": Criminal Law Act 1967, s 12(5)(a).

¹⁰⁶ See fn 105 above.

¹⁰⁷ The effect of Criminal Justice Act 1948, s 1 is to substitute a maximum of 14 years' imprisonment. "Felony" should be read as "an offence": Criminal Law Act 1967, s 12(5)(a).

¹⁰⁸ Meaning here any offence for which a defendant (not previously convicted) may be tried on indictment otherwise than at their own instance: Criminal Law Act 1967, s 10 and Sch 2 para 8.

liable, at the discretion of the court, to be imprisoned for any term not exceeding two years.

- 2.73 In addition to the offences under the 1861 Act, there are offences under the Explosive Substances Act 1883,¹⁰⁹ however we did not consult on amending those and we do not consider them further here.

External elements

- 2.74 For section 28, the explosion must take place and V must suffer the specified injuries. By contrast, for the section 29 offence D need only set off the explosion (or send or throw etc): the offence is committed “whether any bodily injury be effected or not”. The section 30 offence is even more remote from actual injury: the explosives must be placed, but the offence is committed “whether or not any explosion take place”. Necessarily, this means that no injury need be caused. The section 64 offence does not require any act beyond possessing the explosives (or other items) that it prohibits.

Mental elements

- 2.75 The section 28 offence must be committed “maliciously”, meaning there must be intention to cause some physical injury, or awareness of the risk of such injury.¹¹⁰ Malice is stated to be a requirement in the section 29 offence as well, but cumulatively D must actually *intend* to burn, maim, disfigure etc. The requirement of malice is therefore superfluous. The position is the same for the section 30 offence – there, D must have intent to do some injury, so the requirement of malice (at least as now understood) probably adds nothing.¹¹¹ The offence in section 64 has an entirely different intent, of committing a felony¹¹² under the 1861 Act or allowing another to do so.

Relationship to other offences

- 2.76 Having regard to the terms of the offence, section 28 probably involves the infliction of GBH, unless it can be said that a burning or disfigurement exists which does not amount to that. By contrast, since the other offences do not require any actual harm to result, the conduct involved in those offences is not necessarily covered by any other substantive offence against the person.¹¹³

¹⁰⁹ Listed at SCP para 2.213. There, we also mention the offence of knowingly causing a nuclear explosion, contrary to the Anti-Terrorism, Crime and Security Act 2001, s 47(1)(a). Again, it is not proposed to amend this legislation.

¹¹⁰ *Cunningham* [1957] 2 QB 396; *Mowatt* [1968] 1 QB 421, 426. See also para 2.35, above.

¹¹¹ This is considered in more detail in SCP para 2.220.

¹¹² See fn 107 above.

¹¹³ Although under the Criminal Attempts Act 1981 commission of a section 29, 30 or 64 offence could also amount to a criminal attempt to commit a different offence against the person.

In practice

- 2.77 These are all triable on indictment only, and are considered very serious in sentencing terms, as evidenced by the high maximum sentences and the case of *Martin*,¹¹⁴ which sets out some guidance on the issue. Three to 13 prosecutions reach a hearing each year, across all four offences.¹¹⁵

RAILWAY OFFENCES

- 2.78 The 1861 Act provides for three offences concerned with creating danger on railways.¹¹⁶

- (1) Section 32 makes it an offence “unlawfully and maliciously” to interfere with railway lines (such as by putting obstacles on the track, removing rails or sleepers, interfering with points or signals) with intent to endanger the safety of any person travelling or being on the railway. This offence is triable on indictment only, and the maximum sentence is imprisonment for life.
- (2) Section 33 makes it an offence “unlawfully and maliciously” to throw things at a train with intent to endanger the safety of a person on the train. This too is triable on indictment only and has a maximum sentence of imprisonment for life.
- (3) Section 34 makes it an offence to endanger the safety of a person on a railway by any unlawful act or wilful omission or neglect. This is triable either way and has a maximum of two years’ imprisonment.

- 2.79 The offences under sections 32 and 33 are both offences of ulterior intent, in that they require intention to endanger the safety of persons on a railway. The mental element of the offence under section 34 is expressed in the words “unlawful” and “wilful”: it is not clear whether there is any requirement of intention or recklessness as concerns the danger caused.¹¹⁷ Usage statistics for these offences may be found in paragraph 2.233 of the SCP.

OTHER OFFENCES

- 2.80 The 1861 Act provides for an offence of attempting to choke, as follows:

Whosoever shall, by any means whatsoever, attempt to choke, suffocate, or strangle any other person, or shall by any means calculated to choke, suffocate, or strangle, attempt to render any

¹¹⁴ [1999] 1 Cr App R (S) 477, [1999] *Criminal Law Review* 97.

¹¹⁵ Ministry of Justice figures, 2003-13.

¹¹⁶ There are also offences concerned with causing danger on other means of transport, such as aircraft, for example the offences under Aviation Security Act 1982, ss 2 and 3. These are outside the scope of this project.

¹¹⁷ In *Sheppard* [1981] AC 394, concerning the offence of wilful neglect of a child, “wilful” was interpreted as implying recklessness as to harm. See D Ormerod’s case comment on *D*, [2009] *Criminal Law Review* 280. However, it could be argued that in the context of s 34 the wilfulness or recklessness relates to the neglect of duty rather than to the risk of harm.

other person insensible, unconscious, or incapable of resistance, with intent in any of such cases thereby to enable himself or any other person to commit, or with intent in any of such cases thereby to assist any other person in committing, any indictable offence, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for life.¹¹⁸

The reference to “felony” should be read as “an offence”,¹¹⁹ and the reference to “penal servitude” should be read as “imprisonment”.¹²⁰

2.81 There is an offence of preventing escape from a shipwreck:

17. Whosoever shall unlawfully and maliciously prevent or impede any person, being on board of or having quitted any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, in his endeavour to save his life, or shall unlawfully and maliciously prevent or impede any person in his endeavour to save the life of any such person as in this section first aforesaid, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for life.

2.82 This offence, which carries a maximum life sentence, consists of intentionally or recklessly impeding a person (V) who is escaping a shipwreck from doing so, or someone who is attempting to rescue V from doing so. Having examined government prosecution statistics since 2003 we can find no evidence of any charges for this offence being brought,¹²¹ and we are not aware of when the last prosecution was – if indeed there have ever been any.

2.83 There is also an offence of failing to feed servants and apprentices:

26. Whosoever, being legally liable, either as a master or mistress, to provide for any apprentice or servant necessary food, clothing, or lodging, shall wilfully and without lawful excuse refuse or neglect to provide the same, or shall unlawfully and maliciously do or cause to be done any bodily harm to any such apprentice or servant, so that the life of such apprentice or servant shall be endangered, or the health of such apprentice or servant shall have been or shall be likely to be permanently injured, shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be kept in penal servitude.

2.84 This is a complex offence with two routes to conviction: either D must have a duty to provide V with food (etc) and intentionally or recklessly fail to do so, thereby endangering V’s health or life, or D must intentionally or recklessly do bodily harm to V (or cause it to be done to V), with the same effect on V’s health or life. Again, it is a serious offence, with life imprisonment as the maximum sentence. It is in

¹¹⁸ OAPA 1861, s 21.

¹¹⁹ Criminal Law Act 1967, s 12(5)(a).

¹²⁰ Criminal Justice Act 1948, s 1(1).

¹²¹ Using Ministry of Justice and CPS statistical data.

very occasional use, with one instance shown in the decade's worth of data we have reviewed.¹²² Since the publication of our SCP, the Modern Slavery Act 2015 has been passed, the offence in section 1 of which may cover most or all of the (rare) conduct currently associated with this offence.

2.85 There are also offences of:

- (1) exposing children to danger;¹²³
- (2) setting a spring gun, man trap or other engine calculated to destroy life or cause grievous bodily harm;¹²⁴ and
- (3) causing harm by furious driving.¹²⁵

Usage statistics for these offences can be found in paragraph 2.235 and following of the SCP.

2.86 There are some other offences¹²⁶ under the Act which are not dealt with in this project. This is because these offences often raise issues going well beyond the core offences of violence against the person considered in this paper, and would require much broader research and consultation to repeal or amend. The offences we do not propose to consider in this report are:

- (1) bigamy;¹²⁷
- (2) attempted abortion;¹²⁸
- (3) procuring drugs for abortion;¹²⁹ and
- (4) concealing birth.¹³⁰

2.87 A full list of offences under the 1861 Act, together with our proposed replacements, is contained in the table following Chapter 9 below.¹³¹

¹²² Ministry of Justice figures 2003-13: the one instance was in 2004.

¹²³ OAPA 1861, s 27.

¹²⁴ OAPA 1861, s 31; fn 322 to Chapter 2 of the SCP. In *Cockburn* [2008] EWCA Crim 316, [2008] QB 882 it was held that a spiked steel plate placed so as to fall from a shed door could be an "engine" though it had no motive power of its own. See D Ormerod's case comment at [2008] *Criminal Law Review* 802. See also *Munks* [1964] 1 QB 304, [1963] 3 All ER 757 (only mechanical, and not electrical, devices are covered by the offence).

¹²⁵ OAPA 1861, s 35.

¹²⁶ More information is given at paragraph 2.231 and following in the SCP.

¹²⁷ OAPA 1861, s 57.

¹²⁸ OAPA 1861, s 58.

¹²⁹ OAPA 1861, s 59.

¹³⁰ OAPA 1861, s 60.

¹³¹ Page 200, below.

CHAPTER 3

THE CASE FOR REFORM

DEFECTS IN THE EXISTING LAW

- 3.1 In Chapter 3 of our scoping consultation paper (“the SCP”) we set out in detail what we considered to be the defects in the current law of offences against the person and asked consultees whether they agreed with our analysis. We also asked whether they agreed that the 1861 Act should be replaced by a comprehensive modern statute.
- 3.2 In the next few paragraphs we summarise the criticisms of the current law with which there was general agreement. Some other issues, which gave rise to a wider diversity of views, are discussed separately below, namely:
- (1) whether general offences of causing injury are preferable to offences of causing injury by particular means;¹
 - (2) what harm the defendant should be required to intend or foresee in each offence;² and
 - (3) whether there should be offences of exposing people to danger, and if so whether these should be general or restricted to particular contexts such as drugs and explosives.³

Definitions of offences

- 3.3 In the SCP we argued that the drafting of the offences in the 1861 Act is unnecessarily complex, in particular in two respects: there are too many divisions between the offences, and too many divisions within the offences.
- (1) There are often several narrowly defined and highly detailed offences relating to the same subject matter, which could be covered by a single broader offence with fewer elements. For example, there are four offences relating to the misuse of explosives and similar substances (and three more under the Explosives Substances Act 1883).⁴
 - (2) In other cases, the same section of the 1861 Act contains a list of different but related detailed situations, leaving doubt about whether the section creates one offence or several. One example is section 18, which arguably creates four offences,⁵ covering ten different factual situations.⁶ We argue in the SCP that “if there is a common theme to the scenarios

¹ Para 4.14 and following, below.

² Para 4.46 and following, below.

³ Chapter 7 below.

⁴ SCP para 3.7.

⁵ SCP para 2.117; para 2.39 above.

⁶ Para 2.39 above.

listed, the offence should be defined by that common theme. If there is not, the scenarios should be separate offences set out in separate sections.”⁷

3.4 We also argued that there is no clear hierarchy among the main offences.⁸ At first sight there does appear to be a hierarchy: the offence under section 18 (wounding or grievous bodily harm with intent) is the most serious, the offence under section 20 (malicious wounding or grievous bodily harm) is the middle-ranking offence and the offence under section 47 (assault occasioning actual bodily harm) is the least serious. However, this apparent hierarchy is marred by two facts:

- (1) the maximum sentence for the offences under sections 20 and 47 is the same (5 years);
- (2) the special status given to “wounding” means that the offences are not clearly distinguished by the seriousness of the injury caused: a wound can be quite minor and nevertheless constitute the offence under section 20 or even section 18.

Unnecessary offences

3.5 There are several offences which are seldom or never encountered in modern conditions and could be considered for abolition.⁹ Examples include:

- (1) assaulting a magistrate or other person in the exercise of his duty preserving a wreck;¹⁰
- (2) impeding a person escaping from a shipwreck;¹¹
- (3) not providing apprentices or servants with food;¹²
- (4) exposing children to danger;¹³ and
- (5) setting a spring gun, man trap or other engine calculated to destroy life or cause grievous bodily harm.¹⁴

Language and style

3.6 Further criticisms of the 1861 Act are that:

⁷ SCP paras 3.8 and 3.9.

⁸ SCP para 3.16 and following.

⁹ SCP para 3.5.

¹⁰ OAPA 1861, s 37.

¹¹ OAPA 1861, s 17.

¹² OAPA 1861, s 26.

¹³ OAPA 1861, s 27.

¹⁴ OAPA 1861, s 31.

- (1) it uses archaic vocabulary, such as “grievous” (to describe a serious injury) and “detainer” (to mean detention);¹⁵
- (2) it uses words without a clear meaning, such as “maliciously”, that have required extensive interpretation by the courts and are sometimes redundant;¹⁶
- (3) it refers to specific devices and chemicals, such as laudanum,¹⁷ as means of committing offences and is therefore liable to obsolescence as these means fall out of use or further inventions are made;¹⁸
- (4) it refers to obsolete legal concepts, such as felony, misdemeanour and penal servitude, which have to be re-interpreted by provisions in other statutes;¹⁹ and
- (5) it does not state the penalties for major offences, such as those under sections 47 and 20: these have to be deduced from a chain of interlocking provisions in other statutes.²⁰

PRINCIPLES OF REFORM

3.7 In the SCP, we argued that piecemeal reform was insufficient to solve these problems, and that the 1861 Act should be replaced by a statute that would be clear, modern and simple. Any such new statute should respect the following principles, which we quote from the SCP.²¹

- (1) It should provide a clear hierarchy of offences from the most serious to the least. The place of each offence in the hierarchy should reflect:
 - (a) the harm caused; and
 - (b) the culpability of the defendant;
 and the maximum penalty should be in proportion.
- (2) Each offence should provide a clear and accurate label for the conduct in question, and should be defined in language that is easy to understand.
- (3) Each ingredient of an offence, whether an external element or a mental element, should be set out explicitly and not left to implication. There

¹⁵ SCP para 3.69 and following.

¹⁶ SCP para 3.79 and following.

¹⁷ Tincture of opium.

¹⁸ SCP para 6(4).

¹⁹ SCP para 3.92.

²⁰ SCP para 3.93.

²¹ SCP para 5.2. There was no consultation question relating to these principles as such. Particular points, such as those concerning the hierarchy of offences and the fault element, are raised in other questions and we describe the responses to these below.

should not be overlaps or redundancies among different ingredients of the same offence.

- (4) So far as possible, each offence should be set out in a separate section, which should express a single coherent concept (for example, by targeting one type of harm) and minimise the need to sub-divide the offence into alternative forms.
- (5) Within a given subject matter, fewer broader offences are preferable to numerous specialised ones.
- (6) The statute should where possible avoid references to specific types of chemicals, machinery or technology, as these are liable to be superseded.
- (7) Offences should not be unnecessarily wide. In particular, defendants should not be penalised for harm that is inadvertently caused and unforeseeable.
- (8) The offences should be drawn in such a way that all offences are tried in a court of the appropriate level.
- (9) References to other statutes and legal concepts and procedures should be up to date.

3.8 The SCP posed questions about all these issues:

- (1) In questions 1 and 2 we asked consultees whether they agreed with our criticisms of the number, level of detail and grading of the offences in the 1861 Act.
- (2) In questions 7 to 9 we asked whether they agreed with our criticisms of the language and style of the Act.
- (3) In question 10 we asked whether these problems justified pursuing reform.
- (4) In question 11 we asked whether they were aware of further theoretical or practical problems.
- (5) In question 12 we asked:

We consider that there would be benefit in pursuing reform of the law of offences against the person in the form of a modern statute replacing all or most of the Offences Against the Person Act 1861. Do consultees agree?²²

We consider the responses to these questions together, as they are all concerned with the overall case for reform.

²² SCP para 4.5.

RESPONSES TO CONSULTATION

- 3.9 We received a total of 53 responses to the SCP, both from individuals and from official bodies and representatives of groups. Of these, 20 answered all or most of the consultation questions, and another 20 confined their responses to particular issues not including the overall case for reform. The remaining 13 gave opinions on reform in principle without going through the questions in detail.
- 3.10 Accordingly, a total of 32 respondents expressed a view on the case for reform in principle. Out of these, 28 agreed with the criticisms mentioned in questions 7 to 9 and supported the principle of replacing the 1861 Act by a modern statute.

Responses in favour of reform

- 3.11 There was strong support for comprehensive reform from, among others, the judiciary, bodies concerned with the magistracy and the Law Society.

- (1) The Lord Chief Justice, responding on behalf of the senior judiciary, supported reform in the form of a modern statute:

I recognise the problems identified in the paper in relation to the 1861 Offences against the Person Act. The legislation is out of date and in some areas obsolete; new ways of offending are not satisfactorily captured. ... Work to reform this area would also provide an opportunity to modernise our criminal law.

- (2) The Council of District Judges (Magistrates' Courts) said:

We strongly recommend that reform is not done piecemeal. The entire 1861 Act should be repealed and replaced by a new, complete statute without references to provisions contained in other statutes.

- (3) The Magistrates' Association said:

The Offences Against the Person Act 1861 contains a large number of offences distinguished by specific type and individual circumstance. Some will be known to the public, usually by their abbreviated forms such as GBH and ABH, but without a clear understanding of the differences in law. It also contains offences rarely used in the modern court such as assaulting a magistrate in the exercise of his duty preserving a wreck. Finally, the language used is sometimes archaic, referring to penal servitude, felonies and misdemeanours.

The current offences do not adopt the structured approach which is considered more normal in more recently-legislated offences and there is an inconsistent approach to both harm and culpability across a number of offences within the Act.

...

There does not appear to be a clear hierarchy of offences based on seriousness, the harm caused, culpability or the maximum sentence. This lack of clarity is exacerbated by the illogical section numbers for each offence. Furthermore, the considerable overlap in the sentences under section 39 of the Criminal Justice Act 1988²³ and section 47 of the Offences Against the Person 1861 offences can give the perception that charging decisions are based on CPS views on appropriate venue.

- (4) The Justices' Clerks Society said:

We think that having the law in one place with a coherent set of sentencing provisions which reflect the seriousness of the offences and deals with cases in a progressive order is long overdue.

- (5) The National Bench Chairmen's Forum described the attempt to read the existing Act as "akin to plaiting fog".
- (6) Ian Dennis argued that the law of offences against the person was clearly not fit for purpose in 2015 and required comprehensive reform:

There comes a point where [the difficulties and deficiencies of the present law] are so great that we should stop trying to patch up the defects and opt instead for a fresh start. The incremental, 'make do and mend' approach runs deep in the English legal tradition, but there are times when it must be abandoned (as we did with the law of larceny in the 1960s).²⁴

... the present law suffers from an incoherent grading and penalty structure of the main offences, some archaic and/or misleading terminology, some questionable offence definitions, some uncertain boundaries in relation to the important issue of liability for the transmission of disease, and it contains a number of obsolete and unnecessary offences defined by reference to irrelevant circumstantial detail.

Responses opposed to reform

3.12 Of those who disagreed with the criticisms:

- (1) The Bar Council and the Criminal Bar Association both argued that the defects in the Act were largely theoretical, and that its legal meaning had largely been settled by judicial decision and worked well in practice. A few redundant offences could be removed, and some piecemeal changes could be made to the hierarchy of offences, without the need for comprehensive replacement.

²³ Meaning assault and battery.

²⁴ This is a reference to the Theft Act 1968 reform of property offences.

- (2) The London Criminal Courts Solicitors' Association agreed that some cautious updating of the language was required but argued that most of the terms were well understood and that modernisation sometimes created more problems than it solved. Removing redundant offences from the 1861 Act was of little significance, in comparison to the large number of new offences which are regularly created but seldom prosecuted.²⁵
- (3) John Spencer considered that the defects in language and structure were relatively unimportant, but that the number of offences concerned with assault and injury could be reduced.²⁶ He was concerned that "well-intentioned attempts to improve the law can go badly wrong".

DISCUSSION

- 3.13 There are three possible approaches one could take to reform of the 1861 Act.
- (1) One is to argue that the Act works in practice, and that the meaning of most of the provisions is well settled by judicial interpretation, however far it may appear to be from the literal meaning of the sections. On this view there is no pressing practical need for reform.
 - (2) Another would be to retain the 1861 Act as the main statute on offences against the person but cautiously update the language. For example, references to felony, misdemeanour and penal servitude would be removed and the correct penalty would be explicitly stated in each section. Some obsolete offences, such as those concerned with wrecks, could be abolished.
 - (3) The third is to replace the 1861 Act with a comprehensive new statute, as discussed in the SCP.
- 3.14 The overwhelming weight of responses was in favour of the third approach. Further, as shown in chapter 4 of the SCP, there has been demand for a new statute since the 1970s, resulting in several carefully considered drafts culminating in the Home Office's 1998 draft Bill.
- 3.15 The main arguments against reform are that the present system works in practice and that a new statute would be difficult to draft and probably result in further mistakes. We do not find either of these arguments convincing.
- 3.16 In answer to the first argument, we do not agree that the meaning of the 1861 Act is fully settled by judicial decision. Judges have complained more than once that, though it had been thought that the law was now clear, they are required to

²⁵ Similarly Rupert Barnes, while supporting comprehensive support in principle, says that "modern legislative practice is to multiply the number and subtlety of offences in a way which makes the 1861 Act look positively restrained" and cites the Road Traffic Act 1988 as an example.

²⁶ See his proposals at para 4.41 below.

address yet another ambiguity.²⁷ In addition, judicial responses to the SCP bear out the degree of concern felt at all levels of the judiciary. Particular examples where the meaning of the 1861 Act is still not clear are as follows:

- (1) whether the word “maliciously” implies not only that the defendant was aware of a risk but also that it was unreasonable to take it;²⁸
- (2) whether solicitation to murder requires an intention or belief that the advice will be followed;²⁹ and
- (3) whether threatening to kill includes a conditional threat.³⁰

These examples are just the ones mentioned in the SCP. Past experience shows that further unforeseen ambiguities may arise concerning the very issues where it is thought that the law is settled.

3.17 The problems are not confined to the 1861 Act. A range of further difficulties affects the offences of assault and battery, some of which (for example the complications about consent) impinge on the offence under section 47. Some of these are:

- (1) whether assault and battery are common law offences or offences under section 39 of the Criminal Justice Act 1988;³¹
- (2) whether statutory references to “assault” or “common assault” include battery;
- (3) whether a person charged with battery may be convicted of assault if the evidence shows that only a psychic assault³² has been committed.³³

3.18 Finally, even assuming that the meaning of the 1861 Act is now settled by judicial decision, it is not apparent on the face of the statute. In effect, the law in this area is the product of ‘judicial legislation’, accessible only to those lawyers and officials who are experts in the field. From the point of view of that class the law may³⁴ be clear and the system may work without problems. That however is not good enough. One basic function of law is to inform the public clearly about what

²⁷ For example, *Mandair* [1995] 1 AC 208, [1994] 2 All ER 715, in SCP para 3.87. For the same complaint in relation to assault and battery, see *Lynsey* [1995] 3 All ER 654, [1995] 2 Cr App R 667, in SCP para 3.3.

²⁸ SCP para 2.96; para 2.14 above.

²⁹ SCP para 2.177; para 2.56 and following, above.

³⁰ SCP para 2.162; para 2.52 above.

³¹ SCP paras 2.6 and 2.7; para 2.7 above.

³² To adopt the language used in the SCP to denote an assault in the technical sense of the word. In Chapter 5, we propose using the term “threatened assault”, since consultees told us that “psychic assault” was a confusing term.

³³ *Nelson* [2013] EWCA Crim 30, [2013] 1 WLR 2861.

³⁴ On this assumption: as shown above, we are not convinced of this.

conduct is permitted or forbidden, and if it is forbidden what the consequences are. This is not achieved by a statute which is in effect written in code.

Example 4: D is charged with inflicting grievous bodily harm under section 20. D has heard of “GBH” and thinks it means something like a serious beating-up (as it often does). Nothing in the Act or the charge gives D any clue that:

- (a) grievous bodily harm may include a psychiatric condition;
- (b) D need only have intended or foreseen some physical or psychiatric harm, however minor; or
- (c) the maximum sentence is 5 years’ imprisonment.

3.19 The second argument is it would be difficult to draft a replacement statute that would not give rise to as many problems and mistakes as the existing Act. Whether this is so must partly depend on the outcome of our discussion, in Chapter 4 below, of whether the 1998 draft Bill should be used as the basis of reform and if so what changes are required. At present we need only observe that drafts similar to the draft Bill have been in the public domain for several decades, beginning with the 1985 draft by a group of academics chaired by Professor Sir John Smith QC and since successively refined and submitted to public consultation on several occasions. Over this long period, neither the comments made at the time of the successive drafts nor any of the responses to the SCP contain any suggestion of “problems or mistakes” at all comparable to those in the existing Act.

3.20 Some consultees have raised questions about matters of principle, such as the fault element of the offences³⁵ and the desirability of endangerment offences,³⁶ which we analyse below. If given effect to, these concerns could result in some variation to the scheme of the 1998 draft Bill. Even so, they should not give rise to insuperable drafting problems. We therefore believe that, in principle, the case for comprehensive reform is made out.

3.21 We recommend that the 1861 Act and associated offences should be replaced by a comprehensive modern statute on offences against the person.

³⁵ Chapter 4 below.

³⁶ Chapter 7 below.

CHAPTER 4

THE 1998 DRAFT BILL AS A BASIS FOR REFORM; THE MAIN INJURY OFFENCES

INTRODUCTION

4.1 As explained in Chapter 4 of the SCP, there have been many attempts to reform this area of the law in the last few decades.

- (1) Criminal Law Revision Committee, Fourteenth Report, Offences against the Person, in 1980;¹
- (2) Codification of the Criminal Law (report with draft code submitted to the Law Commission by a group of academics chaired by Professor Sir John Smith QC), in 1985;²
- (3) Draft Criminal Code with commentary, in 1989;³
- (4) Legislating the Criminal Code: Offences against the Person and General Principles (consultation paper), in 1992;⁴
- (5) Legislating the Criminal Code: Offences against the Person and General Principles (report), in 1993;⁵ and
- (6) Home Office Consultation Paper with draft Bill, entitled *Violence: Reforming the Offences against the Person Act 1861*, in 1998.⁶

The drafts attached to these documents were all similar in structure and differed only in a few points of detail, which are discussed in Chapter 4 of the SCP.

4.2 The structure of the Home Office's draft Bill of 1998 ("the draft Bill") is as follows.

- (1) Clauses 1 to 3 create offences of causing injury. Clause 1 covers intentionally causing serious injury, clause 2 covers recklessly causing serious injury and clause 3 covers causing injury in general, whether intentionally or recklessly.
- (2) Clause 4 creates an offence replacing assault and battery, and clauses 5 to 7 cover particular assaults, such as assault on a constable and assault to resist arrest.

¹ (1980) Cmnd 7844. This was based on a Working Paper published in 1976.

² (1985) Law Com No 143.

³ (1989) Law Com No 177 (2 vols).

⁴ (1992) Law Commission Consultation Paper No 122.

⁵ (1993) Law Com No 218.

⁶ Set out in Appendix C.

- (3) Clauses 8 and 9 create offences of using dangerous or explosive substances intending or risking injury.
- (4) Clause 10 covers threats to kill, clause 11 covers administering substances capable of causing injury (poisoning), clause 12 covers torture and clause 13 covers causing danger on railways.
- (5) Clause 14 defines intention and recklessness and clause 15 defines injury.
- (6) Clauses 16 to 20 contain other provisions relating to fault in particular situations.
- (7) Clauses 21 and 22 provide for combining charges and alternative verdicts.
- (8) Clause 23 abolishes certain common law offences.

4.3 In Chapter 4 of the SCP we argued for using the draft Bill as the basis for reform, while remaining free to adopt clauses from the earlier drafts on particular points or make other changes in order to adapt the draft to the requirements of the present day.

RESPONSES TO CONSULTATION

4.4 In question 13 we asked whether the draft Bill should be used as the starting point for reform.

4.5 In the previous chapter, we explained that:

- (1) of 32 respondents who expressed views on the principle of reform, 28 agreed with our criticisms of the existing law, and
- (2) of those 28, 27 favoured reform by way of a comprehensive statute replacing the 1861 Act.

Of these 27, 19 explicitly favoured using the draft Bill as a model. Another six expressed general support for the principle of reform but did not explicitly say whether or not the 1998 draft should be followed. Sally Ramage answered “no” to question 13 but did not give reasons or advance an alternative proposal.

4.6 Responses in favour of using the draft Bill included the following:⁷

- (1) The Lord Chief Justice, representing the views of the senior judiciary, said:

⁷ The others were Council of HM Circuit Judges, Council of District Judges (Magistrates’ Courts), Magistrates’ Association, National Bench Chairmen’s Forum, Justices’ Clerks Society, Law Society, British Transport Police, Findlay Stark, Jonathan Rogers, Antony Duff, Richard Wood, Rupert Barnes, Michael Devaney, Richard Taylor and David Hughes.

I think it is sensible that you have based your discussion on the 1998 proposals for a draft Bill, and believe that this is a good model and a firm foundation on which to take forward long overdue reform in this area.

- (2) A group of academics from the University of Sussex⁸ said:

Yes, these are a logical place to start – stemming, as they do, from multiple previous law reform proposals. However, we believe that the Commission should remain open to changes from this starting point.

- (3) A group of academics from the University of Northumbria⁹ said:

We agree that statutory reform should include consideration of the 1998 draft Bill and should broadly adopt the approach contained therein, subject to the issues for consideration raised elsewhere in this response.

- (4) Respect (a body concerned with combating domestic violence) said:

There is considerable benefit in using the draft Bill, which has had thorough consideration and is still needed nearly twenty years on from drafting.

- 4.7 Several respondents emphasised that, if the draft Bill is used, it is necessary to be flexible in considering possible changes to it (a point made in the SCP¹⁰).

- (1) The Council of District Judges (Magistrates' Courts) said:

The 1998 draft Bill is certainly more recent than its predecessor, however it was drafted 17 years ago and should be reconsidered making it fit for the 21st century.

- (2) Richard Taylor said:

Yes in that there is no point in re-inventing the wheel, but reforms should not necessarily be constrained by any presumption in favour of adopting previous recommendations if there are good arguments now for preferring a different approach, whether in general terms or in matters of detail.

- 4.8 In short, there was overwhelming support for using the draft Bill as the basis for a new draft, but being flexible in departing from it in particular respects.

⁸ M Walters, J Child and A Owusu-Bempah.

⁹ T Storey and A Jackson.

¹⁰ SCP para 4.7.

MAIN FEATURES OF THE DRAFT BILL

- 4.9 The principal features of the draft Bill, as contrasted with the 1861 Act, are as follows:
- (1) The three offences of causing injury in clauses 1 to 3 apply in relation to injury of any type, caused by any means (except, in some cases, the transmission of disease, which we discuss later¹¹). There are no separate offences of causing injury by particular means such as drugs or explosives, though there are offences of causing risk of injury by these means. This is a shift away from the 1861 Act.
 - (2) The offences involve just two levels of injury: “injury” and “serious injury”. In addition, the draft Bill contains an offence corresponding to assault and battery, where no injury at all need occur. This is quite unlike the numerous forms of injury and harm found in the 1861 Act.
 - (3) The two offences involving serious injury respectively require intention to cause serious injury and recklessness as to the risk of serious injury. The offence involving injury requires either intention to cause injury or recklessness as to the risk of injury. In other words, in these offences the harm that must be intended or foreseen matches the harm that must occur. This is quite unlike the 1861 Act, where liability can arise without foresight as to the degree of harm caused.
- 4.10 As stated above, there was overwhelming support for the principle of using the draft Bill as a basis for reform. Nevertheless, this chapter would not be complete without discussion of the support for maintaining these three essential features of the draft Bill in our final recommendations, as changing any of them would result in a substantially different Bill.
- 4.11 In the SCP we asked consultees for their views on both the 1861 Act and the draft Bill, concerning all three topics.
- (1) In question 1 we asked consultees for their views on the number and division of offences in the 1861 Act.
 - (2) In question 2 we asked consultees for their views on the hierarchy of offences in the 1861 Act, and in question 19 we asked whether in any new statute there should be a hierarchy of offences of causing injury.
 - (3) In questions 3 and 4 we asked consultees whether the new offences should always require intention or foresight of the level of harm that is required to occur.
- 4.12 In this chapter we discuss all these topics. We also discuss the remaining details of the main injury offences in the draft Bill, namely:

¹¹ In Chapter 6 below.

- (1) whether there should be liability for omissions;¹²
- (2) the definitions of injury,¹³ intention¹⁴ and recklessness;¹⁵
- (3) whether there should be special provision for cases where the act or the resulting injury takes place outside England and Wales;¹⁶
- (4) the role of consent in the offences;¹⁷ and
- (5) the mode of trial of the offences: that is, whether they should be tried in the Crown Court or a magistrates' court.¹⁸

CLASSIFICATION BY TYPE OF INJURY

The issue

4.13 Injuries may be classified in several ways, in particular by:

- (1) the type of injury (for example bruises, burns, scalds, infection or wounds);
- (2) the means by which it is caused (for example stabbing, hitting, explosion or poisoning);
- (3) the gravity of the injury;
- (4) the circumstances (for example the characteristics of the victim or the fact that the injury was caused in the course of resisting arrest).

4.14 In the next few paragraphs, concerning question 1, we discuss the law reform options of creating (i) general offences of causing injury or (ii) separate offences of causing injury of particular types or by particular means. We discuss distinguishing offences by the gravity of the injury under question 2, concerning the hierarchy of offences.¹⁹ Offences consisting of assaults and injuries caused in particular circumstances are discussed in Chapter 5.²⁰

¹² Para 4.107 and following, below.

¹³ Para 4.117 and following, below.

¹⁴ Para 4.127 and following, below.

¹⁵ Para 4.142 and following, below.

¹⁶ Para 4.154 and following, below.

¹⁷ Para 4.159 and following, below.

¹⁸ Para 4.169 below.

¹⁹ Para 4.35 and following, below.

²⁰ Para 5.69 and following, below.

4.15 If we were devising a law of offences of violence from scratch, there would, in very general terms, be a choice between two different approaches.²¹

- (1) In approach 1, the main offences would have external elements²² defined as the causing of “injury”, without distinguishing the type of injury or the means by which it was caused.
- (2) In approach 2, there would be separate offences in which the external elements consisted of causing injuries of different types or by different means: for example, offences of “wounding” and “poisoning”.

4.16 Both these approaches are found in other areas of the criminal law.

- (1) Approach 1 is found in the law of homicide. Both murder and manslaughter can consist of causing death by any means: shooting, strangling, drowning, poisoning etc.
- (2) Approach 2 is found in property offences. Theft, robbery and handling stolen goods are all distinct offences, though all involve dishonest interference with another’s property interests. In addition, there are offences of fraud²³ and cheat,²⁴ each describing a particular means of dishonest property interference.²⁵

4.17 The 1861 Act does not consistently follow either approach.

- (1) The offence under section 18 was based on an older offence covering only wounding and shooting.²⁶ It can now consist of either wounding or causing grievous bodily harm by any means.
- (2) Some forms of the section 18 offence involve causing grievous bodily harm “with intent to resist or prevent the lawful apprehension or detainer²⁷ of any person”. This does not restrict the kind of harm or the means by which it is caused, but does require highly specific circumstances.

²¹ That is, in principle. In practice there may be a mixture of both types of offence, as there are in the 1861 Act.

²² “External elements” means the facts about an offence that must be proved other than those relating to mental fault; that is to say, the physical nature of the conduct constituting the offence and the circumstances and consequences of that conduct, as opposed to D’s state of mind in engaging in it: para 2.3 above.

²³ Fraud Act 2006.

²⁴ A common law offence, now only applicable to frauds against the public revenue: Theft Act 1968, s 32(1)(a).

²⁵ See J Gardner, “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; see also, generally, S Green, *Thirteen Ways to Steal a Bicycle: Theft Law in the Information Age* (2012).

²⁶ Offences Against the Person Act 1837, s 4.

²⁷ Meaning “detention”.

- (3) The offence under section 20 can consist of either wounding or “inflicting” grievous bodily harm. Infliction was once thought to mean a direct forcible injury such as an assault. It is now recognised as being wider than this, and can cover indirect injuries such as the transmission of infection.²⁸ There now seems to be little if any distinction between “inflict” in section 20 and “cause” in section 18²⁹ This offence, like that under section 18, would therefore appear to cover injuries of any kind (provided they are serious enough) caused by any means.
- (4) In the offence under section 47, the actual bodily harm must be occasioned by an assault (or a battery).
- (5) In the poisoning offence under section 23, the administration of the substance must have the effect of either endangering life or inflicting grievous bodily harm. Again this could be harm of any kind; but it must be inflicted by particular means. The “inflicting” form of this offence appears to fall wholly within the offence under section 20, and the maximum sentence is the same (five years): the distinction is simply one of labelling.
- (6) The offence under section 28 consists of burning, maiming, disfiguring, disabling or doing any grievous bodily harm to a person by explosion of gunpowder or other explosives. The maximum penalty is life.
- (7) There are several other offences relating to harm of particular types or caused in particular ways or particular circumstances, such as attempting to choke³⁰ and setting man-traps.³¹ However these are generally offences of attempt or endangerment and do not require the harm to be caused in fact.

4.18 The draft Bill mostly follows approach 1.

- (1) The three main injury offences cover all types of injury, caused by any means, without distinction, except that:
 - (a) they distinguish serious injuries from injuries in general;
 - (b) for the purposes of the offences under clauses 2 (recklessly causing serious injury) and 3 (intentionally or recklessly causing injury), “injury” excludes anything caused by disease.

²⁸ *Wilson* [1984] AC 242, [1983] 3 All ER 448; *Ireland and Burstow* [1998] AC 147; *Dica* [2004] EWCA Crim 1103, [2004] QB 1257.

²⁹ William Wilson, in his consultation response, expresses the view that they are still not quite synonymous and that “inflict” has the effect of excluding injuries caused by omission. He acknowledges that he is “in a minority of one”.

³⁰ OAPA 1861, s 21.

³¹ OAPA 1861, s 31.

- (2) Specialised offences involving poisoning, explosives and railways are retained, but these are pure endangerment offences and do not require any injury to be caused in fact.

Responses to consultation

4.19 In answer to question 1, 12 respondents discussed whether general injury offences (approach 1) were in principle preferable to offences of causing injuries of particular types or by particular means (approach 2).³² These 12 responses may be divided as follows.

4.20 Six respondents agreed with the use of approach 1, as in the draft Bill.³³ For example:

- (1) The Council of District Judges (Magistrates' Courts) said that:

We agree that it would be preferable to have fewer comprehensive offences with clear general rules. Prosecutors are better placed to know exactly what must be proved and jurors/magistrates are better placed to assess if that burden has been discharged.

- (2) Professor Ian Dennis acknowledges the force of the "moral clarity" argument³⁴ in relation to property offences, but goes on to say:

... subject to one point below,³⁵ I am not persuaded that the argument applies in the context of offences against the person. It seems to me that the public understands perfectly well that injuring people is wrong, and that seriously injuring them is even more wrong. I don't believe that any 'moral clarity' is gained by distinguishing between, for example, injury caused by stabbing or punching or kicking. For this reason we can do away with offences of attempting to choke in order to commit an indictable offence and throwing corrosive fluid at a person. The conduct involved amounts to offences of causing (serious) injury or of an attempt to do so, and nothing more by way of definition is needed.

- (3) Rupert Barnes agreed that there was an oversupply of discrete offences in the 1861 Act, but argued that modern legislative practice (for example in the Road Traffic Acts) was often even more complicated.

³² Responses confined to less used offences such as those concerned with shipwrecks are described at para 5.91 and following and para 8.41 and following, below, and are not included here.

³³ Ian Dennis, Council of HM Circuit Judges, Council of District Judges (Magistrates' Courts), Rupert Barnes, CPS Inspectorate, Magistrates' Association.

³⁴ This is a reference to the argument of John Gardner, fn 25 above.

³⁵ Namely the debate about domestic violence (our footnote).

4.21 Four respondents³⁶ discussed whether more specific offences would have the virtues of moral clarity and proper labelling of offenders.

(1) The group of academics from the University of Sussex said:

A greater number of offences and complexity is often justified in order to properly label a defendant, and to isolate the criminal wrong being targeted. However, we agree with the Commission that, in several areas, the current OAPA 1861 is *unnecessarily* complex.

(2) Findlay Stark agreed that the number and level of detail of the offences in the 1861 Act was unsatisfactory, but defended the view of Professors Gardner and Green that legal concepts should reflect those in everyday moral discourse.

(3) Antony Duff said that there is room for discussion about how particularised the names and definitions of offences should be, but that those in the 1861 Act are clearly archaic.

(4) Rebecca Williams said:

It will also be important to think about whether there is any need to track levels of a particular kind of offending (drug assault, disease transmission etc) in a manner which would not be possible if defendants were simply being convicted of one overarching offence defined by reference to level of harm, desirable though that might otherwise be in terms of consistency and simplicity.

4.22 Two respondents³⁷ recommended retaining the existing mix of broad and narrow harm offences.

(1) The Bar Council agreed that there were some redundant offences in the 1861 Act, but added:

In our experience, the number of often overlapping offences in the 1861 Act does not cause problems in practice. The tribunal of fact will usually only be asked to consider one or two different offences in the context of the case, and therefore the continued existence of other offences that might proscribe the same or similar conduct as that under consideration is not problematic. Experience therefore does not appear to show that the scheme of the 1861 Act causes practical problems in relation to the more frequently encountered offences under section 18, section 20 or section 47.

³⁶ Findlay Stark, Richard Wood, Sussex academics, Antony Duff and Rebecca Williams.

³⁷ The Bar Council and Richard Wood.

- (2) Richard Wood said that offences of broader definition are usually more useful but that this is not a reason to get rid of all of the more specialised offences.
- 4.23 In summary, about half the respondents who expressed a view on this issue favoured approach 1, as followed in the draft Bill. The others either defended the mix between the two approaches found in the 1861 Act or discussed the question without arriving at a conclusion. None advocated consistently following approach 2, that is to say having only offences of causing injuries of particular types or by particular means without any residual offence of causing injury in general. Nor did any of them argue for retaining the special status of wounding.
- 4.24 One final issue about offences of causing injury by particular means concerns the transmission of disease, in particular through consensual sexual activity. The current legal position on this is significantly different from that prevailing at the time of the draft Bill in 1998, and one question discussed in the SCP³⁸ was whether the draft should be modified to reflect these changes. Here there was a wide variety of views, with some favouring decriminalising the reckless transmission of disease, others favouring retaining the existing position in which this can constitute the offence under section 20, and others again favouring a specialised offence. We discuss these responses in detail in Chapter 6 below.

Discussion

- 4.25 The options for reform are broadly as follows:
- (1) adopt the scheme of the draft Bill (approach 1): general injury offences only;
 - (2) create particularised offences of causing injury by wounding, poisoning, maiming etc, but have no general injury offence (approach 2); or
 - (3) retain a mixture, as at present: some detailed offences – wounding, choking, etc – and one or more residual general offences.
- 4.26 The first option has the advantage of being a clear, streamlined and readily understandable scheme. As argued in the SCP, there is just one offence of murder and one of manslaughter, which do not distinguish between different means of causing death. These offences are readily understood by the public and would not be improved or made more accessible by being divided into separate offences of causing death by stabbing, shooting, poisoning and so on. Exactly the same reasoning is applicable to causing non-fatal injuries.³⁹
- 4.27 The second option did not have any support from consultees. It would also be impractical, as human inventiveness will always extend to new ways of causing injury.

³⁸ SCP chapter 6.

³⁹ See the argument of Ian Dennis, para 4.20(2) above.

- 4.28 The main argument for the third option is that some means of causing injury, such as poisoning and the use of explosives, rightly attract an especially high level of public disapproval. It is therefore just that people who are guilty of them are labelled appropriately, and where necessary given a higher sentence. This argument needs to be considered separately under the head of labelling and that of appropriate punishment.
- 4.29 In our view the scheme of the draft Bill meets the requirement for appropriate labelling, because it is possible to charge an offence of administering substances capable of causing injury or causing danger by explosives together with one of the general injury offences.
- 4.30 The draft Bill also meets the sentencing needs in the most serious cases. The need for punishment is strongest when there is either an intention to cause death or an intention to cause serious injury. In a case involving poisoning or explosives the current offence of attempted murder (which would be unaltered by the recommendations), and the proposed offence of intentionally causing serious injury under the draft Bill (and therefore the offence of attempting to do so), all carry a maximum life sentence. These charges, with or without a charge of causing danger by drugs or explosives, fully meet the need for adequate punishment.
- 4.31 When there is no intention to cause death or serious injury, the main reason for public disapproval of the acts involving poisons or explosives is that the defendant was acting in a dangerously irresponsible way. Adequate punishment for this is achieved by charging an offence of causing danger by drugs or explosives together with that of recklessly causing serious injury, or intentionally or recklessly causing injury, as the case may be.
- 4.32 For these reasons, we favour the first option, which is to follow the scheme of the draft Bill.
- 4.33 We recommend that any new statute governing crimes of violence should follow the scheme of the draft Bill by providing for one or more general offences of causing injury, rather than offences of causing injury of particular types or by particular means.**

HIERARCHY OF OFFENCES

- 4.34 In question 2 we asked about the grading of the offences. A hierarchy of offences, designed to distinguish degrees of seriousness, could reflect some or all of three factors:
- (1) the seriousness of the harm caused;
 - (2) the seriousness of the harm intended or foreseen; and
 - (3) whether D intended the harm caused or was merely reckless as to it being caused.

Grading by harm caused

Current law

- 4.35 The levels of harm distinguished by the present law and practice are as follows:
- (1) “Grievous bodily harm” – the 1861 Act contains two offences of “grievous bodily harm” (sections 18 and 20), and variants of this phrase are found in some other offences such as those relating to explosives and poisons. The offences under sections 18 and 20 can also consist of “wounding”.⁴⁰
 - (2) “Actual bodily harm” – section 47 distinguishes those assaults that occasion “actual bodily harm”. However, the maximum sentence is five years, the same as for section 20.
 - (3) Low level harm – in practice, and following CPS charging standards,⁴¹ assaults causing low level harms are usually charged as common assault though technically they fall within the scope of the section 47 offence.
- 4.36 In the SCP we criticised this as not providing a clear hierarchy of seriousness. That is, in principle there is a distinction between serious harm (sections 18 and 20) and less serious harm (section 47). However, this distinction is blurred because:
- (1) the offences under sections 18 and 20 can be committed by wounding, without causing serious harm; and
 - (2) the distinction is not reflected in sentencing, as the maximum sentences for sections 20 and 47 are the same.

The draft Bill

- 4.37 The draft Bill does not significantly change the distinction between grievous and actual bodily harm, though it calls them “serious injury” and “injury”. Wounding does not have any distinct status. The SCP proposed a further offence of causing minor injuries, though this is not in the draft Bill: we discuss responses to this below.⁴²
- 4.38 In question 2 we asked consultees for their views on the grading of offences in the 1861 Act and in question 19 we asked whether they agreed that, in any new statute, there should be a clear hierarchy of offences.

⁴⁰ That is, the s 18 offence can take the form of (1) wounding with intent to do grievous bodily harm or (2) wounding with intent to prevent or break arrest. Wounding with intent to wound is not sufficient (though it will constitute the s 20 offence).

⁴¹ Crown Prosecution Service, *Legal Guidance: Offences Against the Person, Incorporating Charging Standard*. Available from: https://www.cps.gov.uk/legal/l_to_o/offences_against_the_person/#a07 (last visited 19 October 2015).

⁴² Para 5.36 and following, below.

Responses to consultation

4.39 24 respondents addressed these questions. Of these:

- (1) 18⁴³ supported the hierarchy of offences as proposed in the draft Bill (whether or not they also supported the creation of an offence of causing minor injuries);
- (2) three⁴⁴ considered that the distinctions between the offences, as they exist at present, are unproblematic and can be retained;
- (3) two⁴⁵ considered that it would be possible to reduce the number of offences further; and
- (4) Rebecca Williams argued that there was some confusion in the existing law between the hierarchy of injuries and the classification by type of harm, but expressed no decided conclusion on what form a hierarchy of offences might take.

4.40 Many consultees expressed agreement with our criticisms of the hierarchy of offences in the 1861 Act, as follows.

- (1) The Law Society said:

There is no apparent logic to the grading of offences in the 1861 Act. This lack of a structure means that it is difficult for lay people to readily understand.

- (2) The Council of District Judges (Magistrates' Courts) said:

We agree that the grading in the 1861 Act is illogical. There is no rhyme or reason as to why offences are set out as they are, and attract the maximum penalties that they do. There is an argument that section 20 ought to carry a greater penalty than section 47. It is the offence which "bridges the gap" between section 47 and section 18, but where section 18 is not appropriate, section 20 can leave the court with insufficient sentencing powers.

- (3) The Council of HM Circuit Judges said:

[A] clear example ... can be found in sections 20 and 47. Both carry the same maximum sentence of five years. The

⁴³ Jonathan Rogers, Ian Dennis, Sussex academics, Law Society, Respect, Council of District Judges (Magistrates' Courts), Antony Duff, Justices' Clerks Society, Council of HM Circuit Judges, British Transport Police, Richard Wood, Richard Taylor, London Criminal Courts Solicitors' Association, Association of Police and Crime Commissioners (some members), CPS Inspectorate, National Bench Chairmen's Forum, Magistrates' Association, Kiron Reid.

⁴⁴ Sally Ramage, Criminal Bar Association, Bar Council.

⁴⁵ John Spencer, Rupert Barnes.

Sentencing Guidelines now draw a distinction between the two but there is still overlap.

- (4) The Magistrates' Association observed that "the lack of clarity is exacerbated by the illogical section numbers for each offence" and that there could be a "perception that charging decisions are based on CPS views on appropriate venue".
- (5) The group of academics from the University of Sussex said:

It is logical to base offences against the person on a ladder of harms, and the courts have done a good job to try and rationalise the current law along these lines. However, there remain obvious problems with the current structure (e.g. same maximum sentence for sections 20 and [47]; the extended mens rea for section 18 beyond an intention to cause grievous bodily harm, etc.) A rationalisation of this structure, through legislative reform, is essential.

- 4.41 The Criminal Bar Association and the Bar Council expressed the view that the CPS charging standards and the Sentencing Council's guideline secured the right result, and that there were therefore no problems in practice concerned with the hierarchy of offences. John Spencer and Rupert Barnes considered that the number of offences should be as small as possible, with distinctions of seriousness being reflected in aggravating factors rather than in separate offences. John Spencer, for example, thought there should be just two harm offences: recklessly causing harm and intentionally causing grievous bodily harm.
- 4.42 None of the respondents in principle wished to remove the distinction between grievous/really serious harm and lesser degrees of harm, or to retain the special status of wounding. Even the Criminal Bar Association and the Bar Council were only questioning whether reform was necessary, rather than defending the present law as superior.

Discussion

- 4.43 The main distinction in the present law is between "grievous bodily harm" and "actual bodily harm". The draft Bill preserves this distinction, modernising the language to read "serious injury" and "injury".
- 4.44 Assuming that some distinction of degrees of injury is desirable, the next question is whether distinguishing between "serious injury" and "injury" is sufficiently precise. As pointed out in the SCP,⁴⁶ the word "serious" is ambiguous, as it can mean either "really serious", that is to say of exceptional gravity, or "sufficient to be taken seriously", that is to say more than minor. To avoid ambiguity, it might be best for the offences under clauses 1 and 2 to be defined using wording making clear that the offences must involve an exceptionally grave injury. This

⁴⁶ SCP para 2.83.

would have the effect of preserving the test in the present law, which describes grievous bodily harm as being “really serious”.⁴⁷

4.45 We recommend using the hierarchy of injury offences in the draft Bill, distinguishing between serious or severe injuries and injury in general.⁴⁸

Grading by level of injury intended or foreseen

4.46 An important question discussed in the SCP is whether offences should generally require that the defendant intended or foresaw the same level of injury as that described in the external elements of the offence. For example, if an offence involves causing serious injury, should the requirement be that the defendant intended or foresaw serious injury, or only that the defendant intended or foresaw any injury?

4.47 In Chapter 3 of the SCP we discussed the general principle and explained the differences between the possible positions:

- (1) Some offences conform to the “correspondence principle”. In these offences, the level of harm that D must intend or foresee in any given offence is the same as the level of harm defined in the external element of the offence.⁴⁹ This is the position in battery: D must intend or be reckless about the possible touching of the victim, and that touching must occur.
- (2) Others are offences of “constructive liability”. In these, it is accepted that, once D intends or foresees a basic level of harm, he or she may also be held to blame for any greater degree of harm that results.⁵⁰ An example is murder, where D is guilty if he or she kills, despite only intending to cause grievous bodily harm.
- (3) There are also offences of “ulterior intent”, where D must intend a consequence that need not occur in fact: for example, assault with intent to rob, where no actual robbery need take place.⁵¹

Following that discussion, we addressed the choice between these approaches as applied to the injury offences under the 1861 Act and the draft Bill.⁵²

Current law

4.48 In the 1861 Act:

⁴⁷ *DPP v Smith* [1961] AC 290, [1960] 3 All ER 161; *Janjua* [1999] 1 Cr App R 91, [1998] *Criminal Law Review* 675; *Brown* [1998] *Criminal Law Review* 485.

⁴⁸ We consider whether also to use the draft Bill’s hierarchy of mental fault at para 4.66 and following, below.

⁴⁹ SCP para 3.35 and following.

⁵⁰ SCP para 3.38 and following.

⁵¹ SCP paras 3.37(3) and 3.42.

⁵² SCP para 3.44 and following.

- (1) the section 18 offence requires:
 - (a) grievous bodily harm or wounding;
 - (b) with intent either to cause grievous bodily harm or “to resist or prevent the lawful apprehension or detainer of any person”;
- (2) the section 20 offence requires:
 - (a) grievous bodily harm or wounding;
 - (b) with intent or recklessness as to some harm;
- (3) the section 47 offence requires:
 - (a) assault (or battery) occasioning actual bodily harm;
 - (b) with the necessary intent or recklessness for assault or battery.

4.49 The second and third offences are offences of “constructive liability” in the sense defined above. The first offence is more complicated, and combines elements from all three approaches:

- (1) It can consist of causing grievous bodily harm, with intent to do grievous bodily harm. In this form, it conforms to the correspondence principle.
- (2) It can consist of wounding, with intent to do grievous bodily harm. This is an offence of both constructive liability (the defendant need not intend or foresee a wound) and ulterior intent (the wound that actually occurs need not amount to grievous bodily harm).
- (3) It can consist of wounding or grievous bodily harm, with intent to resist or prevent arrest or detention. Again this is an offence of both constructive liability (the word “maliciously” implies that the defendant must intend or foresee some harm, but no more) and ulterior intent (the attempt to resist or prevent arrest or detention may be unsuccessful).

The draft Bill

4.50 In the draft Bill, there are offences of:

- (1) causing serious injury, intending to cause serious injury (clause 1);
- (2) causing serious injury, being reckless about causing serious injury (clause 2); and
- (3) intentionally or recklessly causing injury (clause 3).

These clearly described offences all follow the “correspondence principle” in the sense defined above. In the SCP, we propose following the position in the draft

Bill, apart from the introduction of an offence of causing minor injury, which we consider later.⁵³

- 4.51 In question 3 we asked consultees for their views on correspondence and constructive liability generally, and in question 4 we asked about the application of those principles to the particular offences. (Questions 15 and 16 concerned the definitions of intention and recklessness: we discuss these later.⁵⁴)

Responses to consultation

VIEWES ON CORRESPONDENCE AND CONSTRUCTIVE LIABILITY IN GENERAL

- 4.52 27 consultees discussed the general question (question 3).
- 4.53 Of these, 15⁵⁵ were in favour of the correspondence principle as the default position, though the Criminal Bar Association, the Bar Council and Kiron Reid would allow some constructive liability in minor offences. For example:

- (1) The Council of HM Circuit Judges defended the “subjective” definition of recklessness.⁵⁶ Some of them were concerned that a strict correspondence test might, if applied across other areas of law, be undesirable for offences such as manslaughter, but appreciated that this was not being proposed and was outside the consultation.

- (2) The London Criminal Courts Solicitors’ Association said:

Yes we believe it is desirable for the offender to intend or foresee the type and level of harm specified. Indeed this principle seems to run contrary to current law and practice in joint enterprise cases for which we as criminal law practitioners would welcome a fresh approach.

- (3) The Criminal Bar Association said:

As a broad statement of principle we agree it is desirable that offences of violence to the person should be so defined. We note, and we endorse, the correspondence principle, which best enshrines this broad statement of principle.

It would allow some constructive liability in limited circumstances, but regards the “open-ended nature of this form of liability, as it has

⁵³ Para 5.40 and following, below.

⁵⁴ Para 4.127 and following, below.

⁵⁵ CPS, Council of HM Circuit Judges, Magistrates’ Association, Justices’ Clerks Society, CPS Inspectorate, Law Society, Northumbria academics, Sussex academics, Richard Taylor, Sally Ramage, John Spencer, London Criminal Courts Solicitors’ Association, ACPO, Council of District Judges (Magistrates’ Courts), Kiron Reid, Criminal Bar Association.

⁵⁶ In a subjective definition, liability depends on whether the risk was actually foreseen. In an objective definition, liability depends on whether the risk should have been foreseen.

developed through the common law, as unclear, draconian, and too remote from the core principles of criminal liability”.

(4) The Sussex academics group said:

We agree that it is important that a defendant only be liable for what she has chosen to cause or risk causing. This approach is aligned with the notion of “cognitive mens rea”; that is to say the defendant must have intention or foresight of a particular result before he or she is found criminally responsible for the consequences of his actions. The current law imposes a normative standard of mens rea which often results in constructive liability. We do not believe that this creates sufficient consistency or certainty in the application of the law. Rather, liability is based to a large extent on luck. Therefore, we support an approach to remove elements of constructive liability from this area of the law.

4.54 Eleven others⁵⁷ were against correspondence as a principle of general application; for example Findlay Stark sympathised with the arguments of John Gardner⁵⁸ and defended “constrained constructive liability”.

4.55 The CPS argued against the correspondence principle, and for constructive liability, on the following grounds.

- (1) There is merit in the correspondence principle when applied to intentional injuries: the very word “intentional” implies that the intention corresponds to the result. However, once recklessness is recognised as a kind of fault, it should mean recklessness in general and not foresight of any precisely defined result.
- (2) The guiding principle should be that offences are graded by the level of harm caused. This is inconsistent with grading them by the defendant’s state of mind.
- (3) It is generally recognised that a defendant does not deserve a lesser degree of blame if the injury caused was greater than anticipated because of a special vulnerability on the part of the victim (the so-called “eggshell skull” principle). A strict application of the correspondence principle would not allow for this.
- (4) Other offences fail to follow the correspondence principle. A defendant is guilty of manslaughter if death is caused by any unlawful act carrying some danger of injury, whether or not death was a foreseeable consequence. The same approach is reflected in more modern offences such as causing death by dangerous driving and causing death while

⁵⁷ British Transport Police, Richard Wood, Jonathan Rogers, Findlay Stark, Rupert Barnes, Respect, William Wilson, Cath Crosby, Bar Council, David Hughes.

⁵⁸ “Rationality and the Rule of Law in Offences against the Person” (1994) 53 *Cambridge Law Journal* 502.

driving unlicensed or uninsured. It would be inconsistent to treat serious injuries differently.

- (5) The current legislative approach to sentencing, in section 143 of the Criminal Justice Act 2003, is to assess the level of injury and whether the defendant was to blame; but the injury to be taken into account is not limited to that intended or foreseen.

4.56 Two more consultees⁵⁹ discussed the question without arriving at a conclusion.

VIEWS ON CORRESPONDENCE AND CONSTRUCTIVE LIABILITY IN RELATION TO OFFENCES AGAINST THE PERSON

4.57 Opinions were also divided on the fault element for specific offences (question 4).

Reckless serious injury

4.58 There were 21 responses on the offence of reckless serious injury (section 20 of the 1861 Act; clause 2 of the draft Bill). Eleven⁶⁰ supported the scheme in the draft Bill (recklessness only as to serious injury), seven⁶¹ supported some degree of constructive liability, in which recklessness as to injury in general is sufficient and three⁶² had other observations.

4.59 Responses **in favour of the correspondence principle** for this offence included comments as follows:

- (1) The Council of HM Circuit Judges said:

They [the offences under sections 20 and 47] are unsatisfactory not because of any great difficulty in directing juries but more in relation to sentence where the result may be very serious but its exact nature may not have been intended or foreseen.

- (2) David Hughes, though not advocating that the correspondence principle (or any other principle) should be the invariable position for all offences, pointed out that, at present, when a jury convicts of the offence under section 20 it does not have to decide whether the defendant intended or foresaw that the injury would amount to grievous bodily harm. Nor is that question reflected in the sentencing guidelines. Accordingly, neither the sentence nor the label reflects the defendant's real level of culpability.

4.60 Some responses **defended constructive liability** for this offence as follows:

⁵⁹ Ian Dennis and Antony Duff.

⁶⁰ David Hughes, Jonathan Rogers, Sussex academics, Law Society, Council of District Judges (Magistrates' Courts), Findlay Stark, Kiron Reid, Council of HM Circuit Judges, Justices' Clerks Society, Richard Taylor, Magistrates' Association.

⁶¹ Respect, British Transport Police, Richard Wood, Rupert Barnes, Criminal Bar Association, Bar Council, William Wilson.

⁶² John Spencer, London Criminal Courts' Solicitors' Association, Cath Crosby.

(1) Findlay Stark defended the existence of constructive liability, but regarded the discrepancy between the outcome foreseen and the outcome required in the existing section 20 as “a massive jump”. He favoured:

- (a) an offence of intentionally causing serious injury, as in the draft Bill;
- (b) an offence of “causing objectively foreseeable serious injury, intending or being reckless as to the causing of injury”; and
- (c) an offence of “causing objectively foreseeable injury, intending or being reckless as to the causing of minor injury”.

He did not state that foreseeing “injury” (in the second of his three proposed offences) must mean foreseeing an injury that is more than minor, but this is necessary to give coherence to his scheme.

(2) The views of the CPS are described above.⁶³

Causing injury

4.61 There were 19 responses on the offence of causing injury (section 47 of 1861 Act, clause 3 of draft Bill).

4.62 Ten respondents⁶⁴ favoured the scheme in the draft Bill.

- (1) The view of the Council of HM Circuit Judges, cited above in connection with the offence under section 20,⁶⁵ relates equally to the offence under section 47.
- (2) The University of Sussex academics argued that it was unfair that the maximum sentence for the same conduct, with the same intention, should increase from six months to five years because of an unforeseen and unintended result. This difference is largely a matter of luck.

4.63 Six⁶⁶ regarded the present law as defensible but did not specifically recommend reproducing it in a new statute.

- (1) The Bar Council thought that, if the fault element were upgraded as proposed, this would lead to more people being convicted of the lesser offence, which would not reflect the full harm caused. Given the guidance

⁶³ Para 4.55 above.

⁶⁴ David Hughes, Sussex academics, Law Society, Council of District Judges (Magistrates’ Courts), Kiron Reid, Council of HM Circuit Judges, Justices’ Clerks Society, Richard Taylor, London Criminal Courts Solicitors’ Association, Magistrates’ Association.

⁶⁵ Para 4.59(1) above.

⁶⁶ Respect, Findlay Stark, British Transport Police, Richard Wood, Rupert Barnes, Bar Council.

of the Sentencing Council, the existing system does not produce injustice in practice.

- (2) The London Criminal Courts Solicitors' Association expressed "sympathy for the view of the Law Commission with regard to the section 47 offence, where it appears there is no alternative where the offender does not foresee the harm which occurs".⁶⁷ However, they did not regard this as a practical problem given that many of the less serious cases (where no harm is foreseen) are charged as common assault.
- (3) As stated above,⁶⁸ Findlay Stark thought that it should be sufficient to foresee minor injury; but he did not advocate that the offence should include cases where the defendant foresaw no injury at all but only an assault (that is, physical impact or apprehension of such impact).
- (4) Richard Wood argued that every assault carries an inherent risk of causing some injury. It is therefore not unfair to punish the assailant for causing that injury if it occurs.

4.64 Three had other suggestions.

- (1) The Criminal Bar Association thought there should be a single offence of assault, with a maximum sentence of five years, whether or not harm is caused.
- (2) Jonathan Rogers suggested that the offence under section 47 should be abolished without replacement.
- (3) John Spencer suggested that both section 20 and section 47 should be replaced by a single offence of recklessly causing bodily harm.

4.65 In conclusion, just over half of those who responded on this issue approved of the fault element of the injury offences as set out in the draft Bill. The rest wished the fault element to be less stringent (and therefore the offence to be more inclusive): either by allowing some degree of constructive liability or by allowing a form of recklessness falling short of actual awareness of risk.

Discussion

4.66 The situations to be covered by the injury offences in any new statute must include the following four possible permutations:

- (1) D causes serious injury, intending or foreseeing serious injury;
- (2) D causes non-serious injury, intending or foreseeing non-serious injury;
- (3) D causes non-serious injury, intending or foreseeing serious injury; or

⁶⁷ In the s 47 offence, D must intend or be reckless about the fact of assault or battery, but need not intend or foresee that V will suffer any harm: para 2.26 above. We criticise this in SCP para 3.46 and following.

⁶⁸ Para 4.60(1) above.

- (4) D causes serious injury, intending or foreseeing non-serious injury.

CASE (1): SERIOUS INJURY INTENDED OR FORESEEN, AND OCCURS

- 4.67 There is no disagreement about the offence in clause 1, of intentionally causing serious injury. Serious injury must occur in fact, and there must be intention to cause serious injury. This case must be on the highest level of seriousness, on any view.
- 4.68 Similarly, there was no disagreement that, where D was reckless about causing serious injury and that level of injury results, this deserves to be a serious offence, as provided in section 20 of the 1861 Act and clause 2 of the draft Bill. The only difference made by the draft Bill in this situation is that the maximum sentence is increased from five to seven years, to reflect the fact that the injury foreseen was a serious one. In a revised statute on offences of violence based on the draft Bill, it would of course be open to Parliament to set a different limit.

CASE (2): NON-SERIOUS INJURY INTENDED OR FORESEEN, AND OCCURS

- 4.69 There was little disagreement about this case. Under the draft Bill it will fall within the offence in clause 3, of intentionally or recklessly causing injury. For that offence, it is sufficient to cause any injury at all; and it is sufficient to intend or foresee the risk of any injury at all.

CASE (3): SERIOUS INJURY INTENDED OR FORESEEN, BUT DOES NOT OCCUR

- 4.70 In this case, D intends to cause serious injury, or is reckless about the risk of serious injury, but in fact only causes a non-serious injury. In this case, should D be blamed only for the injury that occurred? Or is the correct view that, morally speaking, D is as guilty as if the serious injury had occurred, because it was only a matter of luck that it did not?
- 4.71 In existing law, the answer to this question depends on whether there was intention or recklessness. If D intended to cause serious injury, D will be guilty of attempt to commit the offence under section 18. Similarly under the draft Bill, where D intends to cause serious injury, but only succeeds in causing non-serious injury, he or she can be convicted of attempt to commit the offence in clause 1 (as well as actually committing the offence in clause 3).

Example 5: D attempts to stab V, a police officer. Unknown to D, V is wearing a protective vest. The knife glances off and V suffers a small nick in the arm.

- 4.72 The position is different if D was merely reckless as to causing serious injury, because the offence of attempt requires intention to commit the main offence:⁶⁹ recklessness is not sufficient.

⁶⁹ And this is so regardless of whether the main offence itself requires intention: *Smith and Hogan* para 13.2.1.2, p 460.

Example 6: D, in a heated emotional argument, throws a corkscrew at V's face. The sharp end could easily have gone in V's eye, and D must have realised that there was some risk of it. In fact the handle hits V on the cheek, causing bruising.

At present, D is only guilty of the offence under section 47. On the scheme of the draft Bill, D would be guilty of the offence in clause 3 (which carries the same maximum sentence as section 47). To make D guilty of the more serious injury that did not occur amounts to creating an offence of endangerment: we discuss the merits of endangerment offences in Chapter 7 below.

- 4.73 In summary, both under the existing law and under the draft Bill, D's guilt is limited by the level of injury that in fact occurs,⁷⁰ even though this may give him or her the benefit of undeserved luck. None of the consultees raised this question or appeared to regard the position as unfair, and we do not propose to alter it.

CASE (4): SERIOUS INJURY OCCURS, BUT IS NOT INTENDED OR FORESEEN

- 4.74 The major disagreement is about the case where D intends to cause, or is reckless about the risk of causing, a non-serious injury but, through an unforeseen chain of events, a serious injury results. Should the serious injury be regarded as just bad luck, so that D should only be blamed for a non-serious injury? Or is the correct view that the serious injury was "D's fault", as D had no business causing any injury at all?

- 4.75 An example may make it clearer.

Example 7: D gets into a fight with V in the street. D punches V in the face. D foresees that it might cause a black eye or a nosebleed, but does not intend or foresee any injury greater than this. In fact V falls and breaks an arm.

- 4.76 It is undoubtedly true that V's broken arm (which for these purposes is treated as serious injury) is attributable to D's conduct. It would not have happened but for D's act, and D should not have done it. In that sense, it is "D's fault" and one might think that D does not deserve much sympathy.

- 4.77 Consider another case.

Example 8: D gets into a fight in a field and hits V, expecting to cause a black eye. V runs away and trips over a protruding metal object. Unknown to both of them it was a bomb left over from the Second World War, which explodes. V survives but loses both legs.

In this case, the chain of events is so unlikely that one would not normally regard D as being to blame.

- 4.78 It seems, then, that when we say that in the first case it was "D's fault", we do not only mean that D did something wrong and that V's injury was the result; we also

⁷⁰ Except in cases where D is guilty of attempt.

mean that the injury was to some extent foreseeable. This position is reflected in the response of Findlay Stark,⁷¹ who wished to impose a double test: actual foresight of some injury, and objective foreseeability of the serious injury that occurred.

- 4.79 More generally, the argument for constructive liability is closely related to that for objective recklessness: the defendant was acting in an irresponsibly dangerous manner and the result is “D’s fault”. The currently accepted definition of recklessness depends on a more subjective concept of fault. If the test is a subjective one of actual foresight of risk, as opposed to irresponsible failure to address one’s mind to risk, it seems logical that D should only be liable to the extent of the harm actually foreseen.

THE PRACTICAL EFFECT

- 4.80 At present the maximum sentence for the offences under section 20 (maliciously wounding or inflicting grievous bodily harm) and section 47 (assault occasioning actual bodily harm) is the same: five years. This would continue to be the maximum sentence under clause 3 of the draft Bill (intentionally or recklessly causing injury).
- 4.81 The disputed case is that in which D causes serious injury while only foreseeing a lesser injury; one example of this is the “egg-shell skull” type of case where V suffers greater injury than expected because he or she is exceptionally vulnerable. At present this falls within the offence under section 20, maliciously inflicting grievous bodily harm. Under the scheme of the draft Bill, and in accordance with the correspondence principle, this falls within clause 3, intentionally or recklessly causing injury, and not clause 2, recklessly causing serious injury.
- 4.82 The CPS argue that this case ought to fall within the clause 2 offence, to reflect the seriousness of the injury. However, the fact that it falls within clause 3 does not reduce the court’s sentencing powers below what they are at present: the maximum sentence for the clause 3 offence, like that for the present section 20 offence, is five years. And as argued below,⁷² in the disputed case, the fact that the injury caused is serious will be reflected in sentencing, as the sentence imposed will be at the upper end of the range.
- 4.83 In support of the CPS argument it could be urged that, once a more serious offence of recklessly causing serious injury is created, with higher sentencing powers, it should cover the disputed case as well. In other words, the complaint is not that the draft Bill in its current form weakens the law, but that it misses an opportunity to strengthen it.
- 4.84 We doubt, however, that there is much practical difference between the proposals in the SCP and those of the CPS, even on that argument. On the system as advocated by the CPS, the offence under clause 2 would include both the case where serious injury occurs and is foreseen and the case where serious

⁷¹ Para 4.60(1) above.

injury occurs but is not foreseen. Within the sentencing range for that offence it would presumably be accepted that, if D does foresee serious injury, there is an additional degree of culpability justifying a higher sentence;⁷³ so the practice might well be to impose sentences of up to five years where serious injury is not foreseen and sentences of up to seven years⁷⁴ where it is foreseen. The distinction between the offences under clause 2 and clause 3, as found in the present form of the draft Bill, simply formalises this distinction in sentencing.

- 4.85 In short, both under the present law and under the draft Bill, the maximum available sentence for causing a serious injury is always at least five years. The difference made by the draft Bill is that, if serious injury is both caused and foreseen, this additional culpability increases the maximum sentence from five years to seven years.⁷⁵
- 4.86 A further complaint might be that, whatever the sentencing powers, the scheme of the draft Bill will appear to downgrade the disputed cases as a matter of labelling, as the clause 3 offence will be thought of as “the new section 47”. That is not quite the function of clause 3 as we envisage it. In Chapter 5 below⁷⁶ we discuss the possibility of an offence covering less serious injuries, which would perform some of the functions of the present section 47 offence. The clause 3 offence, in that case, will include the more serious cases now dealt with under section 47 and the less serious cases now dealt with under section 20.

GRADING BY HARM OR BY STATE OF MIND?

- 4.87 The CPS argued in their response that the classification of offences in the draft Bill relied on a hierarchy of states of mind rather than a hierarchy of harm. In fact the draft Bill’s principle of classification is neutral between the two: conduct causing harm is graded according to the harm caused, or the harm foreseen, whichever is the less.
- 4.88 The CPS further argued that this is inconsistent with the approach of section 143 of the Criminal Justice Act 2003. Under that section, sentencing should take account of the harm caused and the defendant’s culpability, as separate factors. The scheme of the Bill was to take account of harm caused only insofar as it was foreseen. To be consistent with that scheme, the CPS argue that section 143 would have had to read:

the court must consider the offender’s culpability in committing the offence and any harm the offence was intended to cause or might foreseeably have caused and, *within the boundaries of harm intended or foreseen only*, the harm it in fact did cause.⁷⁷

⁷² Para 4.89(1) below.

⁷³ See para 4.89 below.

⁷⁴ Or whatever other maximum is chosen for the clause 2 offence.

⁷⁵ And as mentioned at para 4.68 above, a different limit could be chosen.

⁷⁶ Para 5.40 and following, below.

⁷⁷ The italicised words were those added by the CPS to the text of s 143.

4.89 We would maintain that there is no inconsistency here: the draft Bill sets the sentencing range for each offence, while section 143 concerns how sentences should be set within that range. The classification of offences in the draft Bill depends on the injury caused or the injury foreseen, whichever is the less. But within the range set for each offence, the sentencer must take account of the injury caused and the injury foreseen as independent factors.

(1) A case where serious injury is caused, but only moderate injury is foreseen, falls within clause 3 (intentionally or recklessly causing injury) rather than clause 2 (recklessly causing serious injury). But, within the sentencing range set by clause 3, there can be no doubt that such a case would receive a higher sentence than one where only moderate injury was caused.

(2) Conversely, a case where moderate injury was caused but serious injury was intended or foreseen would receive a higher sentence than one where only moderate injury was either caused or foreseen.

In short, under the combined effect of the draft Bill and section 143, a sentencing court would be “left to assess seriousness of an offence by reference to both culpability and harm [actual or potential, intended or foreseen], *each untrammelled and unrestricted by the limits of the other*”,⁷⁸ exactly as the CPS advocates.

4.90 It could be argued that, though there is no formal inconsistency between the draft Bill and section 143, there is a divergence of approach. However, there is a far greater divergence of approach between section 143 and the classification of offences advocated by the CPS. Under a system of constructive liability, offences would be graded exclusively by the harm caused without reference to the harm foreseen. But within each offence, a sentencing court would have regard to the harm caused *and* the harm foreseen as independent factors of equal weight. Under the draft Bill, by contrast, the injury caused and the injury foreseen are given equal weight in the classification of offences as well as in sentencing.

THE MANSLAUGHTER ARGUMENT

4.91 The CPS further argued that the scheme of the draft Bill would mean that there was an unacceptable disparity between the injury offences and the offence of manslaughter. If D punches V on the head and V dies, D will be guilty of manslaughter; whereas if V suffers a serious brain injury resulting in a permanent vegetative state V will only be guilty of the offence under clause 3 (intentionally or recklessly causing injury).

4.92 Manslaughter is a highly unusual offence, as it can be committed either by gross negligence or by any unlawful act which a reasonable person would regard as entailing danger of some physical harm.⁷⁹ The second form (“unlawful act manslaughter”) requires no fault in the defendant except for the fault element of the underlying offence.

⁷⁸ Para 19 of CPS response: emphasis in original.

- 4.93 There are two points to be made here. First, the definition of manslaughter is too unusual in form to be a model for other offences. Secondly, the draft Bill does not alter the position in practice. It will remain the position that the “one-punch” cases will constitute manslaughter, with a maximum sentence of life, if death is caused and an injury offence, with a maximum sentence of five years, if it is not.
- 4.94 In our report on Murder, Manslaughter and Infanticide⁸⁰ we recommended that the renamed “criminal act manslaughter” should encompass:
- killing another person:
- (a) through the commission of a criminal act intended by the defendant to cause injury, or
- (b) through the commission of a criminal act that the defendant was aware involved a serious risk of causing some injury.⁸¹
- 4.95 In this revised form, manslaughter would still be an offence of constructive liability, and would still be highly unusual in form compared to most other criminal offences. This could be justified by the exceptional importance which the law gives to the preservation of human life. We see no justification for extending the scheme of this offence to all cases of serious injury.
- 4.96 Even if that reform to the law of manslaughter were also to be implemented at some time, it would remain the position that the “one-punch” cases will constitute manslaughter, with a maximum sentence of life, if death is caused and an injury offence, with a maximum sentence of five years, if it is not.

CONCLUSION

- 4.97 In conclusion, the arguments which have been put do not shake our belief that the correspondence principle is correct in principle and should be the default position, though there may be reasons for departing from it in particular instances. In a previous report,⁸² we mentioned the argument that, if any factor is important enough to make the difference between guilt and innocence, awareness of that factor or of the possibility of it should in principle be an element of the offence.⁸³ Otherwise potential defendants will not know whether they are committing the offence, and the requirement of fair warning is not met.⁸⁴ The alternative, namely constructive liability, accepts the fault element for a lower level but related offence on the argument that D knew that he or she was doing

⁷⁹ *Smith and Hogan* pp 622 to 647.

⁸⁰ (2006) Law Com No 304.

⁸¹ Law Com No 304, para 2.163. This recommendation was based on, though not identical to, those in our previous report on Involuntary Manslaughter (1996) Law Com No 237 and the Home Office’s report on Reforming the Law on Involuntary Manslaughter: The Government’s Proposals (2000).

⁸² Simplification of Criminal Law: Public Nuisance and Outraging Public Decency (2015) Law Com No 358 para 3.142.

⁸³ *Smith and Hogan* para 5.3.1, p 148; Draft Criminal Code (1989) Law Com No 177, cl 24(1).

⁸⁴ W Chan and A Simester, “Four functions of mens rea” [2011] *Cambridge Law Journal* 381.

“something wrong”. This is in effect a reversion to the Victorian concept of malice in “the old vague sense of wickedness in general”.⁸⁵

4.98 As concerns the injury offences that we are considering, the scheme of the draft Bill, which reflects the correspondence principle, will enable prosecutors to choose levels of offence that more effectively reflect the wrong that occurred. At the same time, it will not weaken the protection given by the current law, as the disputed cases, as described above, will continue to carry a maximum sentence of five years.

4.99 We recommend using the hierarchy of offences in the draft Bill, in which the offence of recklessly causing serious injury is only committed if the defendant is aware of the risk that his or her conduct will cause serious injury.

Grading of offences by distinguishing intention from recklessness

4.100 In the draft Bill, there are separate offences of intentionally causing serious injury (clause 1) and recklessly causing serious injury (clause 2). However, there is only one offence of intentionally or recklessly causing injury (clause 3).

4.101 We discussed this in detail in the SCP.⁸⁶ However we did not ask a separate question specifically relating to the number of offences, though some consultees addressed it in their answers to question 19, concerning the hierarchy of offences.

4.102 A total of 21 respondents were in favour of a reforming statute and thought it ought to be based on the draft Bill or a similar hierarchy of offences. Of these:

- (1) David Hughes and Antony Duff thought there should be four injury offences, distinguishing between intentionally causing injury and recklessly causing injury;
- (2) Rupert Barnes thought there should be fewer offences;⁸⁷
- (3) Findlay Stark advocated a different hierarchy of offences, based on limited constructive liability;⁸⁸
- (4) Michael Devaney explicitly agreed with the structure of three offences in the draft Bill.

The remaining 16⁸⁹ should also be taken as agreeing with that structure, given their general support for the draft Bill.

⁸⁵ Kenny's *Outlines of Criminal Law* (16th ed 1952) p 186.

⁸⁶ SCP paras 5.67 to 5.86.

⁸⁷ As did John Spencer, who did not favour following the draft Bill and is therefore not counted among the 22.

⁸⁸ Para 4.60(1) above.

4.103 Some of these responses should be discussed in more detail. David Hughes thought that clause 3, as at present drafted, covers too wide a range of cases, from cases of significant injury where a maximum sentence of five years might be appropriate to cases of minor injury where it would be disproportionate. We acknowledge this point. However, it is not an argument for distinguishing intentional from reckless injury; rather, it is an argument for a separate offence to cover injuries at the lower end of the scale. We discuss this in Chapter 5 below.⁹⁰

4.104 Antony Duff considered that:

... it does seem worth distinguishing the reckless from the intentional causing not just of serious injury, but of injury — given what a wide range of degrees of culpability a single offence would cover (and I'd argue the same for criminal damage).

Again, we would argue that, while the injury offence under clause 3 covers a wide range of degrees of culpability, the seriousness of a case is not exclusively, or even principally, related to whether the injury was caused intentionally or recklessly.⁹¹ A case where a reckless punch results in severe brain injury would rightly attract a higher sentence than one where D intentionally cuts off part of a person's hair.⁹²

4.105 We therefore consider that there is no reason to depart from the scheme of three injury offences as recommended in all the previous reform attempts⁹³ and discussed in the SCP. This conclusion is of course subject to the question of whether to create an additional offence of causing minor injuries, discussed in Chapter 5 below.

4.106 We recommend using the hierarchy of offences in the draft Bill, including one offence of intentionally causing serious injury, one offence of recklessly causing serious injury and one offence of intentionally or recklessly causing injury.

⁸⁹ Association of Police and Crime Commissioners, British Transport Police, Council of HM Circuit Judges, Council of District Judges (Magistrates' Courts), CPS Inspectorate, Ian Dennis, Jonathan Rogers, Justices' Clerks Society, Law Society, the Lord Chief Justice, the Magistrates' Association, Northumbria academics, Respect, Richard Taylor, Richard Wood, Sussex academics.

⁹⁰ Para 5.40 and following, below.

⁹¹ For the factors taken into account in assessing degrees of culpability for the purposes of assault and offences under the 1861 Act, see the Sentencing Council's Definitive Guideline on Assault (2011): http://www.sentencingcouncil.org.uk/wp-content/uploads/Assault_definitive_guideline_-_Crown_Court.pdf (last visited 19 October 2015).

⁹² At present this can amount to actual bodily harm for the purposes of the offence under section 47: *DPP v Smith* [2006] EWHC 94 (Admin), [2006] 1 WLR 1571.

⁹³ Para 4.1 above; SCP chapter 4.

FURTHER DETAILS OF THE MAIN INJURY OFFENCES

Liability for omissions

The draft Bill

- 4.107 In the draft Bill, the offence in clause 1 (intentional serious injury) is defined as involving an act or omission, while those in clauses 2 and 3 involve acts only. This distinction reflects the understanding, at the time of drafting, of the distinction between the offences under section 18 and section 20 of the 1861 Act: section 18 speaks of “causing” harm, by any means, while section 20 speaks of “inflicting” it. This was traditionally understood as requiring a direct forcible act such as an assault. That view was disapproved in *Wilson*,⁹⁴ well before the draft Bill was published. Nevertheless it remained (and remains) arguable that the section 20 offence requires an act of some kind.⁹⁵
- 4.108 In addition, clause 16 of the draft Bill provides that an offence consisting of causing a result by an act can be committed if:
- (1) the act was performed, but without the fault required by the offence;
 - (2) the result follows;
 - (3) D failed to take reasonable steps to prevent the result occurring or continuing; and
 - (4) D had the required fault in relation to that failure.

The clause makes corresponding provision for offences of causing a result by omission. The purpose of this clause is to preserve the position in *Miller*,⁹⁶ which held that a person can be guilty of an offence of recklessness if he or she innocently created a risk but then recklessly failed to take measures to counteract it.

Examples 9 and 10. In *Fagan*⁹⁷ D accidentally drove onto a policeman’s boot, but refused to drive off it when he realised he had done this. In *Miller* a person fell asleep while smoking and set fire to the mattress, but did nothing to put out the fire when he woke.

The consultation

- 4.109 In question 22 we asked whether this distinction can be justified, and more generally when there should be liability for omissions. Two possibilities are:
- (1) that there should be liability whenever injury is caused by failure to comply with a common law (or possibly statutory) duty;

⁹⁴ [1984] AC 242, [1983] EIL ER 448.

⁹⁵ For example, this was the view expressed by William Wilson in his response to consultation, though he describes himself as being in “a minority of one”.

⁹⁶ [1983] 2 AC 161, [1983] 1 All ER 978.

⁹⁷ [1969] 1 QB 439; para 2.9 above.

- (2) that there should *only* be liability for omissions in the special circumstances of *Miller*; that is to say, where D has created a risk of injury by some prior act, and has intentionally or recklessly failed to do anything to avert that risk.

Responses to consultation

- 4.110 None of the consultees advocated retaining the distinction between clause 1 and the other offences as in the draft Bill. Ten⁹⁸ considered that all the injury offences should include liability for omissions. Six⁹⁹ considered that there should not be liability for omissions except in circumstances such as *Miller*.
- 4.111 Seven other respondents¹⁰⁰ discussed the topic but did not conclude in favour of either the broader or the narrower definition. For example:
- (1) the Criminal Bar Association held that the whole discussion was theoretical and that there was no need for any special provision;
 - (2) Respect argued that it should be ensured that failing to prevent acts of domestic violence by one's partner should not be an offence;
 - (3) British Transport Police advocated a separate offence of causing injury by omission;
 - (4) the rest either confined themselves to saying that the answer must be consistent across all the offences or that more discussion was needed.
- 4.112 In conclusion, there was no consensus in favour of any particular regime for omissions, but it was generally thought that the position should be the same for all the offences.

Discussion

- 4.113 "Omission" could, in principle, cover failure to perform any legal duty whatever. The duty could be entirely unconnected with the risk of injury to individuals. It could be argued that this is too wide, and that only a duty to avoid injury should be included.
- 4.114 In practice, however, this problem is avoided because the offences in question contain a requirement of intention or recklessness. Whatever the nature of the omission, D must also foresee the risk of injury resulting from it. This is in accordance with the common sense meaning. Strictly speaking, an omission is never the actual motive force for an event: when one says that an undesirable

⁹⁸ Jonathan Rogers, Sussex academics, Law Society, Council of District Judges (Magistrates' Courts), Findlay Stark, Kiron Reid, John Spencer, Cath Crosby, Rebecca Williams, ACPO.

⁹⁹ Sally Ramage, Justices' Clerks Society, Council of HM Circuit Judges, Richard Wood, Rupert Barnes, London Criminal Courts Solicitors' Association, Bar Council.

¹⁰⁰ Respect, Antony Duff, British Transport Police, Richard Taylor, Criminal Bar Association, Magistrates' Association, David Hughes.

result is “caused” by an omission, one generally means that there is a culpable failure to prevent it.¹⁰¹

- 4.115 In our view it would be undesirable for a reforming statute meant for daily use to contain too minute or philosophical an analysis of what is meant by omission and causation. We recommend that the offences should be defined using words such as “conduct”, rather than “act” or “omission”. It would then be for the courts to decide whether an omission amounts to “conduct”, and whether it has “caused” the injury, for the purpose of these offences.
- 4.116 It is for those drafting the statute to decide whether it is necessary to incorporate a clause similar to clause 16. If the recommendation above is adopted, it will be possible to halve the length of that clause by referring to “conduct”: the provision will not then need to be repeated to cover both acts and omissions.

The definition of injury

The draft Bill

- 4.117 The 1998 draft Bill defines injury in clause 15, as including “physical injury” and “mental injury”.
- 4.118 The treatment of disease is more complicated. Both physical and mental injury can include disease for the purposes of the offence under clause 1 (intentional serious injury),¹⁰² but exclude it for the purpose of all the other offences in the Bill, including the injury offences under clauses 2 and 3.¹⁰³

The consultation

- 4.119 We asked consultees for their views on the definition of injury in question 14 of the SCP. The question may be divided into the following:
- (1) whether a new statute should include a definition of injury at all;
 - (2) if so, what that definition should be; in particular:
 - (a) what forms of mental harm, if any, should be included; and
 - (b) whether disease should be included.
- 4.120 In the SCP we expressed the provisional views that:
- (1) there should be a definition of injury;
 - (2) injury should, as in existing law, include recognised psychiatric conditions but not other forms of mental disorder or distress;

¹⁰¹ For a detailed treatment of omissions in criminal law, see A Ashworth, *Positive Obligations in Criminal Law* (2013).

¹⁰² Draft Bill, clause 15(4).

¹⁰³ Draft Bill, clause 15(2) and (3).

- (3) disease should in principle be included, subject to consideration of the medical case for decriminalisation of certain forms of disease transmission in a wider review.

The question about disease is so important and controversial that we consider it in a separate chapter (Chapter 6 below). Here we discuss the other two questions.

Responses to consultation

- 4.121 On the first question, of whether there should be a statutory definition, eight respondents¹⁰⁴ considered that there should, without stating what that definition should be. Four¹⁰⁵ were against including any definition.
- 4.122 On the second question, of what if any mental harm should be included in the definition:
- (1) three respondents¹⁰⁶ argued that, in principle, mental harm (such as that caused by domestic abuse) should be included in the definition of injury, but did not clarify what the boundaries of mental harm should be, for example whether it should go beyond recognised psychiatric conditions;
 - (2) three¹⁰⁷ considered that the boundary in the present law should be kept; and
 - (3) three¹⁰⁸ discussed the question but did not arrive at a conclusion.

Discussion

- 4.123 We agree with the conclusion of a majority of consultees that a definition is required. The terms “grievous bodily harm” and “actual bodily harm”, vague though they are in themselves, are hallowed by usage and the boundaries have been clarified judicially. The word “injury” is comparatively straightforward, but is not generally understood as including mental harm of any kind (other than perhaps harm resulting from brain damage). Clarification of the kind of mental harm covered is certainly required, whatever boundary is decided upon.
- 4.124 On the substantive question of what kinds of mental harm to include, the main problem is one of drawing clear boundaries. There may be some merit in extending injury beyond the boundaries of recognised psychiatric harm. However, in medical practice the distinction between psychiatric harm and other undesirable psychological conditions is reasonably clear, and the courts do not

¹⁰⁴ Jonathan Rogers, Sussex academics, Council of District Judges (Magistrates’ Courts), Law Society, Justices’ Clerks Society, Richard Wood, Richard Taylor, Northumbria academics.

¹⁰⁵ Sally Ramage, Criminal Bar Association, Bar Council, David Hughes.

¹⁰⁶ Respect, Kiron Reid, British Transport Police.

¹⁰⁷ Findlay Stark, Rupert Barnes, London Criminal Courts Solicitors’ Association.

¹⁰⁸ Law Society, Antony Duff, ACPO.

appear to have experienced difficulty in applying it.¹⁰⁹ There is far less clarity in distinguishing treatable psychological conditions from unpleasant but normal states of mind such as shock, distress and feelings of depression, as the difference is often one of degree rather than kind.

4.125 Another point is that the new offences do not require any kind of physical attack, but include every possible means of causing injury. This is a further reason for caution. There is a case for criminalising a physical attack which causes any kind of harm, however remote from physical injury. There is also a case for criminalising any act that causes a physical or related injury. But allowing the offence to cover purely psychological means of causing purely psychological harm goes too far. A statutory code primarily concerned with offences of violence should not cover examples such as causing depression by dismissing a person from employment or ending a relationship, and we have not been able to devise a test for distinguishing these from more deserving examples such as inducing depression by systematic domestic abuse. This last example will however often be caught by section 76 of the Serious Crime Act 2015,¹¹⁰ which makes it an offence to engage in controlling or coercive behaviour towards a person in an intimate or family relationship which “causes [V] serious alarm or distress which has a substantial adverse effect on [V]’s usual day-to-day activities”.

4.126 We recommend that the definition of mental injury should have the same limits as the existing law, namely recognised psychiatric conditions.

The definition of intention

The draft Bill

4.127 Clause 14 of the draft Bill defines intention as follows:

14.—(1) A person acts intentionally with respect to a result if—

(a) it is his purpose to cause it, or

(b) although it is not his purpose to cause it, he knows that it would occur in the ordinary course of events if he were to succeed in his purpose of causing some other result.

Subsection (3) makes a similar provision for intention about the results of an omission.

4.128 Paragraph (b) was designed to cover what is known as “oblique intent”. However, there are some differences between this formulation and the accepted legal position. Most importantly, the generally accepted position is that in these circumstances the jury *may* find that there was intention, rather than that they *must*. A distinction may also be drawn between:

¹⁰⁹ There have been no reported appeals concerning the distinction since *Dhaliwal* [2006] EWCA Crim 1139, [2006] 2 Cr App R 24.

¹¹⁰ Not yet commenced: para 5.117 below.

- (1) cases where the result is virtually certain to follow from D's action;
- (2) cases where D's action is aimed at bringing about some other result, that other result is not certain to follow, but *if* it does then the forbidden result will certainly follow as well.

Example 11: D places a bomb on an aircraft, intending to collect on the insurance. D does not act with the purpose of causing the death of the passengers, but knows that their death is virtually certain if the bomb explodes. D also knows that the bomb is unreliable and has only a 50% chance of exploding.¹¹¹

The consultation

4.129 In question 15 of the SCP we suggested incorporating a definition of intention, and asked consultees for their views. We suggested that, instead of the formulation in the draft Bill, a reforming statute should use wording based on that in our report on *Murder, Manslaughter and Infanticide*:¹¹²

... the jury should be directed that they may find that D intended a result¹¹³ if they are sure that D realised that that result was certain (barring an extraordinary intervention)¹¹⁴ if D did what he or she was set upon doing.

Responses to consultation

4.130 There are two issues here: whether a definition should be included in the statute, and what the definition should be. A total of 21 respondents gave answers to these questions.

4.131 Eight respondents considered that no definition should be given in statute. Of these:

- (1) four¹¹⁵ believed that there was a case for a single definition applying across all offences, preferably in a criminal code: for that very reason, there should not be definitions for individual offences or groups of offences; and

¹¹¹ Example given in *Legislating the Criminal Code: Offences Against the Person and General Principles* (1993) Law Com No 218, para 7.12, following J C Smith, "A note on intention" [1990] *Criminal Law Review* 85.

¹¹² (2006) Law Com No 304 para 3.14; para 2.13 above.

¹¹³ In original, "to kill V or to cause V serious injury". In the SCP we adapted the extract so as to include offences other than murder.

¹¹⁴ In original, "that V was certain (barring an extraordinary intervention) to die or suffer serious injury".

¹¹⁵ Sussex academics, Council of HM Circuit Judges, British Transport Police, Richard Taylor.

- (2) four¹¹⁶ thought that the matter should be left to the common law.
- 4.132 In the first group, Richard Taylor observed that:
- There may be some difficulties in adopting a statutory definition for non fatal offences if the common law on homicide offences does not follow suit. On the other hand there are equally difficulties if key terms are unclear. This is a matter which probably requires further reflection and discussion and presumably does not have to be resolved at this stage.
- 4.133 Ten respondents favoured incorporating a definition in the statute. Of these:
- (1) five¹¹⁷ favoured the formulation in the draft Bill;
- (2) five¹¹⁸ favoured a formulation based on that in the 2006 report.
- 4.134 Three respondents were neutral on whether, in principle, the statute should contain a definition, but had points of disagreement with both the particular definitions proposed.
- (1) Jonathan Rogers believed that any definition should include direct intention only;
- (2) Findlay Stark thought that intention should include any case in which D believed that the result was certain, whether that belief was true or not;
- (3) Rebecca Williams thought that it was sufficient to say “certain to follow from D’s actions”, without reference to the case where the result was certain to follow from some ulterior purpose of those actions.

Discussion

WHETHER TO INCLUDE A DEFINITION

- 4.135 The definition of intention properly belongs to the general principles of criminal law rather than to any particular offence or group of offences. We therefore agree with those respondents who considered that, ideally, the place for such definitions is the general part of a criminal code. A definition of “intentionally” is in fact given in clause 18 of the Law Commission’s draft Criminal Code of 1989.¹¹⁹
- 4.136 The present question is what the second best solution would be, in the absence of a criminal code. One argument is that, even if a definition is likely to be the same across several families of offences, there is a case for stating it repeatedly

¹¹⁶ Sally Ramage, Richard Wood, Bar Council, David Hughes.

¹¹⁷ Michael Devaney, Council of District Judges (Magistrates’ Courts), Rupert Barnes, London Criminal Courts Solicitors’ Association.

¹¹⁸ Law Society, Antony Duff, Justices’ Clerks Society, William Wilson, Magistrates’ Association, ACPO.

¹¹⁹ A Criminal Code for England and Wales, volume 1: Report and draft Criminal Code Bill (1989) Law Com No 177.

when reforming each such family until such time as codification is a realistic possibility. On the other hand, it could be argued that this risks giving the impression that the law is fragmented, and make comprehensive codification more difficult when the time comes, because of the number of separate definitions that will need to be repealed.

- 4.137 The need to define intention really only arises in connection with oblique intent, as the meaning of direct intent is obvious. In the context of non-fatal offences against the person, cases involving oblique intent are rare; almost all instances of oblique intent, whether in reported cases or in academic discussion, concern murder.¹²⁰ As we have said, the proper place for a definition of oblique intent is in a statute governing the general part of the criminal law; but if this cannot be achieved, its natural place is in a statute governing murder rather than one governing non-fatal offences against the person.
- 4.138 Within the context of non-fatal offences against the person, the definition of oblique intent is mainly relevant to the clause 1 offence, intentionally causing serious injury, corresponding to the existing offence under section 18. In all other offences, these marginal cases will all be caught by recklessness. It could be argued that, even in these offences, it is relevant to know whether D's conduct was intentional or reckless, for the purposes of labelling or sentencing. But the jury will not usually state whether the conduct was intentional or reckless, and the sentence if the judge considers that there was an exceptionally high degree of recklessness will approach that for low-level intention.
- 4.139 Ultimately the question of whether to incorporate an explicit definition of intention is a drafting one. Having considered the matter further in the light of the responses, we are now of the view that there would be little benefit in enacting such a definition and that it would be outweighed by the possible complications. In particular, there could be cases where a person is charged with both attempted murder and intentionally causing serious injury. It would be awkward directing juries using one common law and one statutory definition of intention, even if they largely coincided.
- 4.140 We recommend that a reformed statute on offences against the person should not contain a definition of intention, and that the meaning of intention should continue to be decided according to general principles of criminal law.**

WHAT DEFINITION TO USE

- 4.141 This conclusion makes it unnecessary to consider which of the two proposed definitions would be preferable. However, we are strongly of the view that, should it be necessary to choose, the definition in the Murder and Manslaughter report is preferable. The definition in the draft Bill, being mandatory in its terms, suggests that the jury would have to be instructed about oblique intent in every case, although it will only be relevant in a small number of them.

¹²⁰ And according to *Woollin* [1999] 1 AC 82, [1998] 4 All ER 103 the question rarely arises even there.

The definition of recklessness

The draft Bill

4.142 Clause 14 of the draft Bill defines recklessness as follows:

(2) A person acts recklessly with respect to a result if he is aware of a risk that it will occur and it is unreasonable to take that risk having regard to the circumstances as he knows or believes them to be.

Subsection (4) makes a similar provision for recklessness about the results of an omission.

4.143 The definition in the draft Bill was intended to reproduce the position in *G*,¹²¹ which we believe represents the present law.

The consultation

4.144 In question 16 of the SCP we suggested incorporating a definition of recklessness similar to that in the draft Bill and asked consultees if they agreed.

Responses to consultation

4.145 Of the 22 respondents who addressed this question:

- (1) eleven¹²² agreed with the proposal to state this definition in statute;
- (2) four agreed that this definition represented the current law and should be perpetuated, but were against stating it in statute: two of these¹²³ thought that it should be left to the common law, and the other two¹²⁴ thought that it should await codification of the criminal law;
- (3) three¹²⁵ believed that the “subjective” test was too narrow, and that cases of closed mind or practical indifference should be included, and another three¹²⁶ discussed this question, either arriving at no conclusion or suggesting different answers for different offences;
- (4) Findlay Stark thought that it should be sufficient if D believed there was a risk, whether it existed in fact or not;
- (5) the CPS had no objection to defining recklessness, but disagreed with the particular definition proposed as it reflected the correspondence principle.

¹²¹ [2003] UKHL 50, [2004] 1 AC 1034.

¹²² Jonathan Rogers, Law Society, Respect, Council of District Judges (Magistrates’ Courts), Justices’ Clerks Society, Council of HM Circuit Judges, British Transport Police, Richard Wood, London Criminal Courts Solicitors’ Association, Magistrates’ Association, ACPO.

¹²³ Sally Ramage, Bar Council.

¹²⁴ Sussex academics, Richard Taylor.

¹²⁵ Antony Duff, Rupert Barnes, Cath Crosby.

¹²⁶ William Wilson, Leslie Francis, Kiron Reid.

4.146 Some sample responses in favour of the proposed definition are as follows:

(1) The London Criminal Courts Solicitors' Association said:

A definition of recklessness would assist especially when having regard to the extensive case law which is in existence. Some of this case law does cause confusion.

(2) Jonathan Rogers said:

Yes, considering all the aggravation that arose in the 1980s/early 1990s.

(3) The Law Society said:

Yes. There should be a definition of recklessness in the modern statute similar to that in the draft Bill. We agree that, where possible, the definitions of the mental elements should be consistent across all offences.

(4) The Council of HM Circuit Judges said:

There is a more convincing case for the definition of recklessness. Over the years it acquired a variety of definitions in the case law. In some contexts it was subjective and in others objective. As a result of *G*¹²⁷ it has become generally subjective. We would support the continuation of this definition and welcome its endorsement and clarification in statute.

4.147 Some sample opinions opposed to a statutory definition, or favouring a different definition, are as follows:

(1) Antony Duff said:

Again, I think there is more to be said for a conception of recklessness that does not always require actual awareness of risk, but realize that I'm on the losing side in that debate — and that statutory clarity needs to be provided.

(2) Cath Crosby said:

There is a good argument for including an offence of inadvertently causing serious injury where the risk was obvious to the reasonable person in any reform, provided that the offender had the capacity to appreciate the risk. What would need to be ascertained before criminal liability was established was why the offender failed to foresee the risk. If the failure is morally blameworthy criminal liability is justified.

¹²⁷ [2004] 1 AC 1034.

It is anomalous that an offender can be convicted of manslaughter through inadvertence but if he/she causes really serious harm without intention or recklessness being established, there is no offence.

Discussion

- 4.148 The argument about the general principle of including a statutory definition is the same as for intention. Such a definition would be best placed in the general part of a criminal code, or in a statute dealing with the general part of criminal law; enacting it separately in statutes dealing with different groups of offences creates an impression of fragmentation, even if the definitions are in fact identical.¹²⁸ A further point is that common law meanings sometimes change; this means that, in the future, a difference may open up between those offences where the meaning of recklessness has been restated in statute and those where it is governed by the common law.¹²⁹
- 4.149 The law of recklessness has indeed been fragmented in the past. It was once held that, while the “recklessness” limb of the malice requirement in the 1861 Act had roughly its present meaning, which requires actual foresight of risk, explicit statutory mentions of “recklessness” (for example in the offence of criminal damage) had a broader meaning, including failure to consider a risk which one ought to have foreseen.¹³⁰
- 4.150 Since *G*¹³¹ the preferred view is that recklessness has the same meaning in all offences where it is mentioned, namely being aware of a risk and unreasonably taking it. There is still some doubt whether this last qualification applies in the offences under the 1861 Act, as these speak of “malice” rather than “recklessness”.¹³² However, this doubt would be resolved if the draft Bill were enacted, even without the definitions in clause 14, as the draft Bill speaks of recklessness.
- 4.151 There is one major difference between the question of defining intention and the question of defining recklessness. Doubts about the meaning of intention, other than in murder, are of rare occurrence and therefore have little application to non-fatal offences against the person. Recklessness, by contrast, is at the heart of most of the offences in the draft Bill, and juries will frequently require to be directed about it.
- 4.152 From a drafting point of view, however, a reformed statute should define both states of mind or neither: it would look distinctly lopsided if it defined recklessness but not intention. We believe that a satisfactory consensus on the meaning of recklessness, spread across a wide range of offences, exists since the decision

¹²⁸ SCP para 5.21(2).

¹²⁹ SCP, fn 20 to para 5.21(2).

¹³⁰ *Caldwell v Metropolitan Police Commissioner* [1982] AC 341, [1981] 1 All ER 961.

¹³¹ [2003] UKHL 50, [2004] 1 AC 1034.

¹³² See the discussion in SCP para 2.96.

in G and that there is no need to disturb it by a series of piecemeal statutory definitions.

- 4.153 We recommend that a reformed statute on offences against the person should not contain a definition of recklessness, and that the meaning of recklessness should continue to be decided according to general principles of criminal law.**

Jurisdiction

- 4.154 Two questions arise here. One is whether the main injury offences should include a case where conduct in England and Wales causes injuries to happen abroad. The other is whether, if so, this needs to be specifically stated in statute.
- 4.155 In the SCP¹³³ we explained that the law now followed a “substantial measure” approach, in which an offence is considered to be committed in England and Wales if any substantial part of the conduct or its results occurs there. We left open the question whether this should be specifically stated: this was our question 23.
- 4.156 None of the respondents considered that this case should be excluded from the offences. However, they were divided on whether there should be a specific provision in statute, with ten in favour of inclusion¹³⁴ and seven against.¹³⁵
- 4.157 In short there is no consensus either for or against a special provision about jurisdiction. In some cases it is clearly important to have such a provision: for example, if in order to comply with an international convention it is necessary to provide that an offence has extra-territorial scope beyond what the general law would provide. But in the case of offences against the person, we believe that the “substantial measure principle”, as at present accepted, would secure the desired result without any special provision. As with the questions of whether to define intention and recklessness, there is a strong argument that the proper place for this kind of provision is the general part of a criminal code.
- 4.158 Ultimately this is a question of drafting rather than legal policy, and is therefore for those drafting the relevant statute. Our present view is that it would be undesirable to incorporate a specific provision which does no more than restate general principles of law.

Consent

The consultation

- 4.159 The draft Bill contains no provisions specifically relating to consent,¹³⁶ though clause 18 preserves all existing rules of law relating to excuses and defences. In

¹³³ SCP para 5.119.

¹³⁴ Respect, Law Society, Council of District Judges (Magistrates’ Courts), Antony Duff, Council of HM Circuit Judges, British Transport Police, Richard Wood, Richard Taylor, Rupert Barnes, Sussex academics.

¹³⁵ Jonathan Rogers, Sally Ramage, Kiron Reid, London Criminal Courts Solicitors’ Association, Criminal Bar Association, Bar Council, David Hughes, ACPO.

the SCP we explicitly stated that this project would not consider the definition or implications of consent as a factor affecting liability for offences of violence.¹³⁷ However, we suggested that our proposals might simplify the law of consent in two respects.

- (1) If an offence of causing minor injury were introduced, it could be stated that consent is a valid defence to it (alternatively, that it is only an offence if done without consent). That is, for these minor injuries the statute could exclude the principle in *Brown*¹³⁸ that public policy does not allow valid consent to injury or the risk of it except in particular fields of activity.¹³⁹
- (2) In any case, the proposals would remove the complication at present affecting the offence under section 47. At present, there is some complication as to whether the excusing factor (when effective at all) is consent to the assault or battery or consent to the injury caused by it. Under the draft Bill the position would be more straightforward. In clause 3 (intentionally or recklessly causing injury) the relevant consent would be to the injury. In clause 4 (assault and battery) it would be to the assault or battery.¹⁴⁰

Responses to consultation

4.160 Four consultees¹⁴¹ expressed disappointment that we were not reviewing the law of consent and presented arguments for doing so. In particular, issues of consent were central to the law of transmission of disease: it did not make sense to review the effect of consent in this context without reviewing the law of consent generally. Particular issues were:

- (1) whether lack of consent is an ingredient of assault, or consent is a defence to it;
- (2) in what circumstances consent should be sufficient to negate liability (the *Brown* principle);
- (3) whether belief in consent, to be a defence, should have to be reasonable; and
- (4) whether matters such as age and mental capacity should always be an impediment to the giving of effective consent.

4.161 Some sample responses are as follows:

- (1) William Wilson said:

¹³⁶ Unlike some of the previous drafts: see para 5.21 and following, below.

¹³⁷ SCP para 2.55.

¹³⁸ [1994] 1 AC 212.

¹³⁹ SCP para 3.92(3).

¹⁴⁰ SCP para 5.43.

¹⁴¹ J Elvin and C de Than (joint response), Dennis Baker, Leslie Francis, William Wilson.

For what it's worth I think the simplest solution is to make consent presumptively a defence to all harms which are not directly intended for their own sake. This encapsulates almost all the current law apart from boxing. In the case of harms which are not directly intended the presumption should be that consent to the injury or risk thereof is operative. This also encapsulates the current law. The questions of policy you mention should be tailored to the odd problem case eg extreme non-clinically demanded surgery, dangerous exhibitions etc.

(2) Jesse Elvin and Claire de Than, in their joint response, said:

We are aware that the Law Commission are not proposing to reform the general principles governing consent in this project. However, we believe that this is an error: our view is that comprehensive re-examination of the law is necessary here, and that it cannot take place in the absence of a reconsideration of the general principles governing consent.

...

Consent is of major importance in this particular field of criminal law [the law on non-fatal offences]. Thus, any comprehensive reform of this area of the law should reconsider the general principles governing consent as they relate to non-fatal offences. It would not be logical to consider reforming the law on the transmission of disease, where consent is a significant issue, without also reconsidering the general principles relating to consent and non-fatal offences.

Discussion

4.162 The present law concerning the effect of consent on crimes of violence is complicated, and gives rise to both technical problems and disputed questions of policy. Many of these also impinge on sexual offences, and would need a full review similar to that which we carried out in 1995.¹⁴² This kind of question is well outside the scope of this project, and expanding the project to include it would have the effect of postponing a much needed reform of offences against the person almost indefinitely.

4.163 Nevertheless, this project does permit simplification of the law of consent in some respects.

MINOR INJURIES: THE THRESHOLD OF HARM

4.164 One of the proposals in the SCP was to create an offence of causing injury, confined to the lower level of injury and triable only in a magistrates' court. It

¹⁴² Consent and Offences Against the Person (1994) Law Commission Consultation Paper No 134 and Consent in the Criminal Law (1995) Law Commission Consultation Paper No 139.

would be open to a court to hold that, for this level of injury, the *Brown* doctrine does not apply and consent is always a defence. Alternatively, an explicit provision to this effect could be included in the provision creating the offence.

- 4.165 We consider this question further in Chapter 5, where we discuss the proposal for such an offence.¹⁴³

CONSENT TO HARM OR TO ACT CAUSING HARM

- 4.166 One major difficulty in the existing law is the question “consent to what?” This particularly in the offence under section 47, as this offence includes both an act of assault or battery and a resulting harm. Briefly, the position is:

- (1) In some cases D did not intend, and was not reckless as to any risk of, physical harm. If so, the offence under section 47 is not committed provided that V consented to D’s physical act. The reason is that, in such cases, there is no assault.¹⁴⁴ It is then irrelevant whether V also consented to the risk of physical harm.
- (2) If D did intend or was reckless about the risk of physical harm, there is a further distinction.
 - (a) If the injury was caused or the risk was run in the course of certain accepted activities, such as surgery or sport, D is not guilty of the offence provided that V consented to the risk of harm as well as to D’s physical act.
 - (b) Outside those activities, it is held that V cannot consent to injury or the risk of it, unless the injury is “transient and trifling”.¹⁴⁵ Accordingly D is guilty whether or not V consented.¹⁴⁶

- 4.167 In the SCP we argue that one benefit of the scheme of the draft Bill is to avoid this complication. The offence under clause 3, which replaces that under section 47, has no requirement of assault or battery; therefore the only relevant consent is to the injury. Further, in this offence there must always be intent or recklessness as to the risk of injury: the situation in *Meachen*,¹⁴⁷ where the harm is unintended and unforeseen and the only relevant consent is to the act causing it, cannot arise. Accordingly the doctrine in *Brown*, that consent exempts D from liability for causing injury to V only in the context of certain accepted activities, will apply to all the offences under clauses 1 to 3.

¹⁴³ Para 5.40 and following, below: consent is discussed at para 5.56 and following.

¹⁴⁴ SCP para 2.59 and following; *Meachen* [2006] EWCA Crim 2414; *Smith and Hogan* p 727; see also *Slingsby* [1995] *Criminal Law Review* 570; *Boyea* (1992) 156 *Justice of the Peace Reports* 505, [1992] *Criminal Law Review* 574.

¹⁴⁵ And if the injury was only of that nature, the offence under section 47 is not committed anyway.

¹⁴⁶ *Brown* [1994] 1 AC 212.

¹⁴⁷ [2006] EWCA Crim 2414.

4.168 Conversely, the offence or offences in the draft Bill corresponding to common assault have no requirement of injury; accordingly the only relevant consent is to the act constituting the possible assault. For clarity, it could be stated specifically that consent is always a sufficient answer.¹⁴⁸

Mode of trial

4.169 In existing law:

- (1) the offence under section 18 (wounding or causing grievous bodily harm with intent) is triable only in the Crown Court;
- (2) the offences under sections 20 (malicious wounding or infliction of grievous bodily harm) and 47 (assault occasioning actual bodily harm) are triable either way: that is, either in the Crown Court or in a magistrates' court.

4.170 The position in the draft Bill is similar:

- (1) the offence under clause 1 (intentionally causing serious injury) would be triable only in the Crown Court;
- (2) the offences under clauses 2 (recklessly causing serious injury) and 3 (intentionally or recklessly causing injury) would be triable either way.

As this more or less reproduces the existing law, we did not ask a consultation question about it, and do not propose to alter this position.

4.171 We recommend that:

- (1) the offence under clause 1 of the draft Bill (intentionally causing serious injury) should be triable on indictment only; and**
- (2) the offences under clauses 2 (recklessly causing serious injury) and 3 (intentionally or recklessly causing injury) should be triable either in the Crown Court or in a magistrates' court.**

SUMMARY

4.172 There is overwhelming support for using the 1998 draft Bill as the basis for reform, and we recommend doing so. We also recommend maintaining the principal features of the draft Bill, namely:

- (1) creating general offences of causing injury by whatever means, rather than specific offences distinguishing the type of injury or the means by which it was caused;
- (2) distinguishing offences of causing serious harm from offences of causing harm;

¹⁴⁸ This is discussed further in relation to those offences, at para 5.20 and following, below.

- (3) in each offence, making the level of injury that must be intended or foreseen correspond to the level of injury that must occur;
- (4) creating separate offences of intentionally causing serious injury and recklessly causing serious injury, but a single offence of intentionally or recklessly causing injury.

4.173 On points of detail, we recommend:

- (1) that the main injury offences should be defined in terms of “conduct”, and not distinguish between acts and omissions;
- (2) that injury should be defined as in the existing law, so that mental injury is confined to recognised psychiatric conditions;
- (3) that there should be no statutory definition of intention or recklessness;
- (4) that there should be no explicit provision about jurisdiction in cases where the conduct or the harm caused by it occurs outside England and Wales;
- (5) that there should be specific provisions about consent in the offences replacing assault and in any offence concerning low level injuries;
- (6) that the mode of trial of the three main injury offences should be as stated in the draft Bill, namely that the offence under clause 1 should be triable on indictment only and the offences under clauses 2 and 3 should be triable either way.

CHAPTER 5

ASSAULT AND RELATED OFFENCES

INTRODUCTION

- 5.1 In Chapter 3 we discussed the case for reform, for which there was overwhelming support in the consultation responses. In Chapter 4, also based on the consultation responses, we recommended following the scheme of the 1998 draft Bill. Under that scheme, there would be three offences of causing injury: intentionally causing serious injury, recklessly causing serious injury and intentionally or recklessly causing injury. We also discussed the details of those offences.
- 5.2 In this chapter we discuss the details of the lower level offences in the draft Bill, in particular those corresponding to assault and battery. Particular issues are:
- (1) the details of the offence or offences replacing assault and battery; in particular, whether there should be one offence or two;
 - (2) whether there should be a summary offence¹ of causing low level injuries and if so what form it should take; and
 - (3) the details of other offences in which assault is an element, such as assault on a police constable and assault aggravated by racial or religious hatred.

ASSAULT AND BATTERY

- 5.3 At common law, assault and battery are separate offences, though they are dealt with together in section 39 of the Criminal Justice Act 1988 and collectively referred to as “assault” or “common assault” in many other statutes.²

The draft Bill

- 5.4 Clause 4 of the draft Bill replaces both assault and battery with a single offence that can be committed two ways.

- 4.—(1)** A person is guilty of an offence if—
- (a) he intentionally or recklessly applies force to or causes an impact on the body of another, or
 - (b) he intentionally or recklessly causes the other to believe that any such force or impact is imminent.

¹ That is, an offence triable only in a magistrates’ court.

² Para 2.5 and following, above.

(2) No such offence is committed if the force or impact, not being intended or likely to cause injury, is in the circumstances such as is generally acceptable in the ordinary conduct of daily life and the defendant does not know or believe that it is in fact unacceptable to the other person.

(3) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding level 5 on the standard scale or both.

The scoping consultation paper

- 5.5 In the SCP, we proposed creating two separate offences, corresponding to assault and battery in the current law.³ Our reason was that, in current law, assault covered many forms of threatening behaviour that did not form part of an actual or imminent physical attack.
- 5.6 We asked consultees about these offences in questions 17 and 18. In question 17 we asked whether assault and battery should form part of our reform of offences against the person. In question 18 we asked whether they should be one offence or two.

Responses to consultation

- 5.7 On question 17, there was general agreement that the law of assault and battery should be reformed: only the Criminal Bar Association and Sally Ramage recommended leaving it as it is.
- 5.8 On question 18, five respondents⁴ favoured the scheme of the draft Bill, that is to say a single offence that can be committed two ways. 18⁵ favoured two separate offences as proposed in the SCP.
- 5.9 Of those who favoured two offences:
- (1) Ian Dennis argued that using force on another person and putting someone in fear of force are distinct wrongs, even though often found together, and that calling both “assault” and treating them as one offence causes difficulty and confusion.

- (2) Respect said:

We agree that both types of acts and the consequences of these must be clearly and effectively covered. We agree that the law needs clarity and we are not sure if bringing them

³ SCP paras 5.44 to 5.48.

⁴ Jonathan Rogers, Michael Devaney, Council of District Judges (Magistrates’ Courts), John Spencer, London Criminal Courts Solicitors’ Association.

⁵ Ian Dennis, Sussex academics, Respect, Findlay Stark, Kiron Reid, Antony Duff, Justices’ Clerks Society, Council of HM Circuit Judges, British Transport Police, Richard Wood, Richard Taylor, Rupert Barnes, William Wilson, Northumbria academics, National Bench Chairmen’s Forum, Magistrates’ Association, ACPO, CPS.

together would achieve this. It would appear that this risks leaving the current misunderstandings in place.

- (3) The British Transport Police said:

It would be easy to identify if someone was committing – or the victim – of an assault or battery act. This would be a different offence to where someone threatened assault – instilling fear that they would be the victim of an attack.

- (4) The Magistrates' Association pointed out that, at present, defendants sometimes plead not guilty because they misunderstand the term "assault", and that this would continue to be the position if there were a single offence.

5.10 Of those who favoured a single offence:

- (1) Jonathan Rogers said that:

... it is a matter not so much of reforming their scope but a matter of amalgamating the two offences into one larger offence of "assault". It is quite normal to be able to commit one offence in more than one way (eg fraud) ... the draft Bill approach is preferable.

- (2) The London Criminal Courts Solicitors' Association said:

If the offences are separated we believe this will encourage many additional prosecutions and cause additional congestion in the criminal justice system.

- (3) John Spencer favoured a single offence to cover the scope of assault, battery and the section 47 offence, with a maximum sentence of six months if no injury is caused or three years if injury is caused.

- (4) The Council of District Judges (Magistrates' Courts) favoured one offence but thought that:

... the wording of the proposed clause 2⁶ appears over-complicated, difficult to comprehend and is likely to cause considerable difficulty to suspects/defendants be they legally represented or not.

5.11 Some respondents suggested alternative schemes.

- (1) Both the Law Society and the London Criminal Courts Solicitors' Association suggested that assault not amounting to battery (that is, that involves no physical touching) should not form part of a new statute on offences against the person but should instead be a public order offence.

⁶ Presumably this meant clause 4.

- (2) The Bar Council suggested that assault (as distinct from battery) could be abolished without replacement, as it was already covered by section 4 of the Public Order Act 1986.
 - (3) David Hughes suggested that there was no need for a separate offence of battery. If a touching causes neither apprehension of violence nor physical harm, it should not be criminal.
- 5.12 Many respondents queried our use of the term “psychic assault”. This term is one commonly used by academics to describe those assaults that involve no physical contact and have no effect other than to cause apprehension of violence. However, many respondents regarded it as unfortunate and some misunderstood it as referring to the causing of psychiatric injuries, as referred to in the discussion of the bodily harm offences. The Justices’ Clerks Society recommended “threatened assault”, and the Council of HM Circuit Judges recommended “psychological assault”.
- 5.13 Several respondents also considered that the word “battery” was obsolete and/or misleading and that another way of labelling the two offences should be found. For example, the CPS recommended “application of force” and “causing apprehension of force”.
- 5.14 In conclusion, there was strong support for the view that assault and battery should be two separate offences.

Discussion

- 5.15 Common assault is the most commonly charged of all offences of violence. According to the figures supplied by the Ministry of Justice and the Crown Prosecution Service, between 55,000 and 80,000 defendants are prosecuted for common assault in each year, and the total number of charges in a year can range from 111,000 to 122,000.⁷ The figures do not distinguish cases of assault from cases of battery.

Distinguishing assault and battery

- 5.16 Though the offences of assault and battery are distinct, in many (possibly most) cases they occur together. That is, where D makes a frontal attack on V, V will see the attack coming (so D has committed assault), and D in fact hits V (so D has committed battery). The two exceptional cases are:
- (1) assault without battery: D threatens V, or swings a fist at V but misses;
 - (2) battery without assault: D hits V from behind, or while V is asleep.
- 5.17 Nevertheless we adhere to the view in the SCP that assault and battery are fundamentally different wrongs, particularly since assault includes threatening behaviour such as telephone calls that need not form the opening stage of an

⁷ SCP para 2.41. The figures differ because some relate to the numbers of defendants and some the numbers of charges. The number of defendants is restricted to cases where assault was the lead offence.

intended attack:⁸ it is enough that V apprehends that an attack will take place in the near future. The complexity of the draft clauses in both the 1998 draft Bill and its predecessors, and the wide variations among them, testify to the difficulty of embodying both forms of behaviour in a single concept.

5.18 We do not agree with the suggestion that pure assault (that is, assault without battery) should be included as a public order offence, still less that it is covered by the existing public order offences.

- (1) The offences under sections 4 (fear or provocation of violence) and 5 (harassment, alarm or distress) of the Public Order Act 1986 cannot be committed if both D and V are inside a dwelling (either the same dwelling or different dwellings). This is a considerable exception, and the two offences fall well short of covering the existing scope of assault, even excluding cases involving battery. Relying on these offences as a substitute for assault would have the effect of decriminalising all domestic violence not involving an actual battery.
- (2) It would be possible to remove this exception, or to create a similar offence in which the exception is not present. However, this would go well beyond the scope of the 1986 Act, which is, as the name implies, designed to combat behaviour that causes disorder in public.
- (3) Furthermore, there would be considerable practical difficulties. There are many statutory references to “assault” that cover both offences, all of which would need complicated amendments if the two offences were contained in different statutes. Also, ideally it would be desirable that a person charged with battery could be convicted of assault,⁹ though if there is any doubt on the facts a defendant could always be charged with both offences.

5.19 David Hughes suggested that there is no need for a separate offence of battery where neither fear nor injury is caused, as this amounts only to an unwanted touching. However, the current offence of assault also includes cases where V only apprehends an unwanted touching and feels no fear. If it is felt that a mere unwanted touching should not give rise to criminal liability, this should be so equally for the purposes of both offences. It would be strange if an unwanted touching were permitted if and only if V did not expect it. For this reason, we are not persuaded by this suggestion.

⁸ Assault can be committed by words alone or by a letter or telephone call: para 2.12 above; SCP para 2.18(3); *Smith and Hogan* pp 711 and 712.

⁹ This suggestion was made by Richard Wood. At present this is not the case: *R (Kracher) v Leicester Magistrates' Court* [2013] EWHC 4627 (Admin). He also suggested that a defendant charged with assault should be able to be convicted of battery; we are less persuaded by this, as we regard battery as being one degree more serious than assault.

Consent

- 5.20 In existing law D cannot be convicted of assault or battery if V consented to it.¹⁰ However, there is some doubt whether this is because consent is a defence or because lack of consent is one of the ingredients of the offence; in other words, whether a physical contact that is consented to is properly described as being an excusable battery or as not being a battery at all.¹¹
- 5.21 This question is not addressed in the definition in the 1998 draft Bill, as questions of consent were regarded as falling outside the scope of the reform.¹² However, some of the previous draft definitions on which it was based did explicitly require that V did not consent. This makes it clear that lack of consent is an ingredient of the offence: consent is not a “defence”.
- 5.22 One example of a definition explicitly mentioning consent is that in the Law Commission’s draft code of 1989,¹³ which provides that a person is guilty of assault if he intentionally or recklessly applies force to or causes impact on the body of another or causes that other to believe that any such force or impact is imminent “without the consent of the other or, where the act is likely or intended to cause personal harm, with or without his consent”.¹⁴
- 5.23 We consider that it is desirable for the definitions of the new offences explicitly to require that V does not consent, as this resolves the theoretical doubt about the role of consent in the offences. However, the position in cases where injury is likely or intended could be simplified.
- 5.24 The present law, as laid down in *Brown*,¹⁵ states that a person cannot legally consent to harm that is more than “transient and trifling” except in the context of certain accepted activities such as sport or surgery. We are not proposing to change this position. Under the draft Bill, however, in cases where this principle applies, one of the main injury offences¹⁶ will always be available; there is no need also to charge D with an assault offence.
- 5.25 We therefore propose that, in the offences replacing assault and battery, it should be a condition that V does not consent; there is no need for any exception or reservation for cases where injury is intended or likely. The result of this, in cases

¹⁰ Different considerations may apply where actual bodily harm was caused, so that the offence under s 47 could be charged.

¹¹ *Smith and Hogan* para 17.2.1, pp 716 and 717.

¹² Home Office Consultation Paper “Violence: Reforming the Offences against the Person Act 1861” (1998), para 3.27.

¹³ A Criminal Code for England and Wales, (1989) Law Com No 177 vol 1, cl 75 of draft Bill.

¹⁴ The corresponding clause in the draft presented to the Law Commission in 1985, Codification of the Criminal Law: A Report to the Law Commission (1985) Law Com No 143, HC 270, also contained a subsection excluding acts done with consent “if it is a reasonable act to do in the course of a lawful game, sport, entertainment or medical treatment”. This is roughly the principle later confirmed in *Brown* [1994] 1 AC 212.

¹⁵ [1994] 1 AC 212.

¹⁶ Intentionally causing serious injury (cl 1), recklessly causing serious injury (cl 2) and intentionally or recklessly causing injury (cl 3).

where V in fact consents to the act that would otherwise constitute an assault or battery, would be as follows.

- (1) Where injury is intended or foreseen, and occurs, D will be guilty of one of the offences under clauses 1 to 3.
- (2) Where injury is intended but does not occur, D will be guilty of attempt to commit one of those offences.
- (3) Where injury occurs, but is neither intended nor foreseen, D will not be guilty of any offence; this is the same as the existing law.¹⁷
- (4) Where injury is likely, but is not intended and does not occur, D will not be guilty of any offence.¹⁸

5.26 This is a logical consequence of the scheme of the draft Bill, which is to separate offences concerned with assault from offences concerned with injury. In assault offences, the relevant factor is consent to the physical act.¹⁹ In injury offences, the relevant factor is consent to the injury. It is only in the latter case that the issue in *Brown*, concerning the validity of consent to injury, should arise.

Fault

5.27 One other issue concerns the fault element of the offences. At present the fault elements of pure assault and battery are not interchangeable: the external elements of assault and the mental element of battery, or vice versa, do not add up to an offence.²⁰ In the scheme we envisage, the new offences would be in a hierarchy, in which battery (under whatever name) occupies the rank immediately above pure assault (under whatever name).²¹ We therefore consider that, if D intends or is reckless about an actual physical contact with V, but only succeeds in causing apprehension of violence, this should amount to the assault offence.

5.28 Finally there is the question of labelling, that is to say what names the new offences should have. The word “battery” is not in common use, and “batter” suggests repeated blows. “Assault” is more common, but normally means a physical attack: its legal meaning as including behaviour causing no more than apprehension of violence is not widely understood. We suggest that the offences be called “physical assault” and “threatened assault” (or “assault by threats”) respectively. This allows the word “assault” in other statutes to cover both, as it does at present, though an interpretation provision to this effect would be desirable.

¹⁷ *Meachen* [2006] EWCA Crim 2414; SCP para 2.59.

¹⁸ In Chapter 7 we give our reasons for not recommending an offence of causing danger of injury.

¹⁹ Unless D has deceived V as to the nature and consequences of the act, in which case the absence of consent to the risk of injury could be relevant.

²⁰ SCP para 2.28; *Smith and Hogan* 17.1.6.2, p 715.

²¹ Though the maximum sentence would be the same for both (6 months) because of the powers of magistrates’ courts.

5.29 We recommend that a reformed statute on offences of violence should provide for the following two offences:

- (1) physical assault, where a person intentionally or recklessly applies force to or causes an impact on the body of another, without the consent of that other; and**
- (2) threatened assault, where a person intentionally or recklessly causes another to think that any such force or impact is or may be imminent, and that other does not consent to the conduct in question.**

CAUSING LOW LEVEL INJURIES

The proposal

5.30 In the SCP we suggested that there should be an offence of causing minor injuries, triable only in a magistrates' court.

5.31 At present, when only low level injuries are caused it is normal prosecution practice to charge common assault,²² even though these cases also fall within the offence under section 47 (assault occasioning actual bodily harm). The purpose of this practice is to ensure that these cases are tried in a magistrates' court. For this reason, an injury is regarded as minor if the prosecutor believes that, if the charge is proved, the likely sentence imposed would be no more than six months' imprisonment.

5.32 The primary purpose of the new offence would be to cover these cases. The advantage of keeping these cases in the magistrates' court would be retained, and the labelling of the offence would be more appropriate, as it would reflect the fact that some injury was caused.

5.33 In the SCP we explained that the new offence would also be used for some cases where at present the offence under section 47 is charged. In support of this we mentioned figures indicating that, over a period of 11 years, between 7% and 12% of all sentences passed for this offence in the Crown Court were for six months' imprisonment or less.²³ (More recent information suggests that, once one takes account of non-custodial sentences and suspended sentences, the proportion of Crown Court sentences which would have been within the power of the magistrates is actually much higher.²⁴) If the new offence were charged in cases of this type, they would be tried in a magistrates' court. The sentencing

²² Crown Prosecution Service, *Legal Guidance: Offences Against the Person, Incorporating Charging Standard*. Available from: https://www.cps.gov.uk/legal/l_to_o/offences_against_the_person/#a07 (last visited 19 October 2015); see also SCP para 2.32 and following.

²³ SCP para 2.74.

²⁴ Sentencing Council's Crown Court Sentencing Survey for England and Wales for 2014, para 5.55 below.

outcome would be the same, but the case would be heard by a court of the appropriate level and a considerable amount of money would be saved.²⁵

- 5.34 Correct allocation of cases between the courts is desirable as a matter of principle as well as in financial terms. As argued in Sir Brian Leveson's *Review of Efficiency in Criminal Proceedings*:²⁶

338. In drawing a line between the two forms of trial, the public has a proper interest in the financial and human cost of the criminal justice system and how best to apply its limited resources, with recognisable justice to all. Ultimately, it is a policy decision, according to the nature and seriousness of the offence, and in the light of the public interest, how different offences should be tried.

339. It is of course implicit in a scheme of 'either-way' offences that – depending on the seriousness and other circumstances of the case – some cases simply do not merit the more elaborate, costly and time-consuming procedures of the Crown Court. Others by their very nature, or, perhaps, the consequences to those accused of crime, justify different facilities and more searching procedures than those which the Magistrates' Court may offer.

- 5.35 In question 20 we asked for the opinions of consultees on this proposal, and in question 21 we asked how the new offence would fit into the hierarchy of offences.

Responses to consultation

- 5.36 Of those who commented on this question, nine were in favour of such an offence.²⁷ 13 were against it,²⁸ in addition to the five who did not favour reform in principle.²⁹
- 5.37 The reasons advanced in favour of this proposal were the same as in the scoping consultation paper: more accurate labelling, and keeping in the magistrates' courts cases that ought to be dealt with there.
- 5.38 The most detailed response in favour of the proposal was from the CPS. They considered that it was important to include an offence involving minor injury, so

²⁵ SCP para 5.92.

²⁶ January 2015, available at <https://www.judiciary.gov.uk/publications/review-of-efficiency-in-criminal-proceedings-final-report/> (last visited 19 October 2015).

²⁷ Justices' Clerks Society, National Bench Chairmen's Forum, Respect, British Transport Police, Council of District Judges (Magistrates' Courts), Richard Taylor, Law Society, ACPO, CPS.

²⁸ Jonathan Rogers, Ian Dennis, Antony Duff, Richard Wood, Findlay Stark, Association of Police and Crime Commissioners, Sussex academics, Council of HM Circuit Judges, Northumbria academics, Michael Devaney, Sally Ramage, South West London Magistrates' Association, David Hughes.

²⁹ Bar Council, John Spencer, Criminal Bar Association, London Criminal Courts Solicitors' Association, Rupert Barnes.

as to keep these cases in the magistrates' court. The more serious offence under clause 3 of the draft Bill³⁰ should be "causing significant injury", and the offences under clauses 1³¹ and 2³² would be "really serious" or "exceptionally serious" injury.

5.39 Reasons advanced against this proposal were as follows.

- (1) The Council of HM Circuit Judges considered that distinguishing three different levels of seriousness in the same statute could pose problems of definition and lend itself to subjective decisions. They also pointed out that victims will resent the description of their injuries as "minor".³³
- (2) According to Richard Wood, the fact that between 7% and 12% of those convicted of the section 47 offence in the Crown Court receive a sentence that would have been within the powers of the magistrates' court is a normal and predictable result, and does not indicate any fault or malfunction in the system.
- (3) David Hughes considered that the arguments put in the scoping consultation paper about potential over- and under-charging are not convincing, and in any case tend to cancel each other out.
- (4) Ian Dennis and Rupert Barnes considered that common assault was an adequate label for the sort of minor injury that soon mends. John Spencer considered that there should be a single offence covering all forms of assault including those causing some harm, punishable with up to three years' imprisonment.
- (5) Michael Devaney thought it was sufficient to take account of minor injuries as an aggravating factor in sentencing for assault or battery.

Discussion

5.40 We have some sympathy with the argument that distinguishing too many levels of seriousness can lead to arbitrary and subjective decision-making, both on the part of the prosecution and on the part of the court. On the other hand, the three levels of seriousness (really serious injury, significant injury, minor injury) that would result from the proposal in the SCP correspond to those used in existing charging practice, and it could be argued that the proposal simply formalises current practice.

³⁰ Intentionally or recklessly causing injury.

³¹ Intentionally causing serious injury.

³² Recklessly causing serious injury.

³³ In the SCP the word "minor" was only used for convenience and was not intended to form part of the formal title of the offence. The point remains that the offence would be explicitly addressed to lower levels of injury and that victims might dispute the choice of offence.

5.41 Another problem was pointed out in the SCP.³⁴ That is, it would have to be decided whether the offence under clause 3³⁵ included all injuries, as at present, or whether it should be confined to significant (that is, more than minor) injuries. Neither position is quite satisfactory.

(1) In the first case, all cases falling within the minor injuries offence would also fall within clause 3. This would look distinctly odd. It is common for a more serious offence to include a less serious offence: for example, every murder is also a manslaughter, and all (or very nearly all) instances of the offence under section 18 of the 1861 Act are also instances of the section 20 offence.³⁶ The reverse pattern, in which every instance of a less serious offence also falls within a more serious offence, is much less common and would make it look as if the less serious offence was unnecessary.³⁷

(2) In the second case, there would be serious problems about proving recklessness. The clause 3 offence would be confined to the causing of injuries that were more than the “minor” injuries covered by the lesser offence. Following the correspondence principle, as reflected in all three of the main injury offences in the draft Bill, the offence would therefore also require proof that D intended or foresaw an injury that was more than minor. This could be difficult. A person who is “reckless” is unlikely to consider the probable results of his or her action with a great deal of precision: it is hard enough to prove whether D foresaw a serious injury or just an injury, without the further question whether D foresaw that it would be significant, or more than minor.

5.42 In the draft Bill as it stands clause 3 encompasses a very wide range of cases, from the simple causing of a black eye to the causing of quite severe injury. Because the offence under clause 2 is narrower than the existing offence under section 20, clause 3 would cover both the scope of the current section 47 and a significant part of the scope of section 20. Like both those existing offences, the offence under clause 3 may be tried either in the Crown Court or in a magistrates’ court and, if tried in the Crown Court, carries a sentence of up to five years’ imprisonment. This is clearly far too serious an offence for the incidents we are considering, where Crown Court trial would be disproportionate. As pointed out in the Leveson review,³⁸ “some cases simply do not merit the more elaborate, costly and time-consuming procedures of the Crown Court”.

5.43 We also regard it as unsatisfactory that so many injury cases are at present labelled as “common assault”, and would presumably continue to be charged as

³⁴ SCP para 4.94 to 4.96.

³⁵ Intentionally or recklessly causing injury.

³⁶ The possible exception is that acts of self-harm can fall within s 18 (which refers to “any person”) without falling within s 20 (which refers to “any other person”): SCP para 2.122.

³⁷ D Husak, *Overcriminalization* (2008), at p 38 and following, argues that where conduct is already covered by an offence, further offences covering sub-forms of the same conduct should not be created unless it is important to draw attention to some aggravating feature.

³⁸ Para 5.34 above.

an assault offence if the draft Bill were enacted in its present form. The mode of trial and power of punishment may be adequate for these cases, but the labelling is insufficient, and victims will rightly feel aggrieved that their injuries are not reflected in the charge.

- 5.44 In summary, these cases of low level injury would be over-charged if charged under clause 3 and under-charged if charged as an assault offence.³⁹ Nor do we accept David Hughes' argument that these facts cancel each other out: being forced to choose between "too much" and "too little" does not average out as being "enough".
- 5.45 The question is whether there is another way of distinguishing the more serious from the less serious cases falling within clause 3. One possibility, already discussed and rejected above,⁴⁰ is to distinguish intentional from reckless causing of injury.
- 5.46 We believe that the root of the problem is the fact that clause 3 was designed as a replacement for section 47 of the 1861 Act. Section 47 performs two different functions.

- (1) In its original context, it did not create a separate offence: it was simply a provision about the sentencing powers for assault, to the effect that a somewhat higher sentence (originally three years) was available if the assault caused bodily harm than if it did not. That is why the offence still does not require any intention to cause bodily harm, or foresight of bodily harm.⁴¹
- (2) In current practice, it is the offence of choice for some quite significant injuries. This is consistent with the fact that the sentencing powers extend to five years, the same as for the section 20 offence.

It is because there is significant strain between these two functions that the first function has in current practice been largely removed from section 47 and taken over by common assault.

Offence of aggravated assault?

- 5.47 One solution would be to separate these two functions. The offence under clause 3, triable either way, would continue to cover the causing of injury of any level by any means, provided that it was intentional or reckless. There would also be a separate offence triable only in a magistrates' court, covering cases where D causes injury by assault or battery, whether the injury was foreseen or not. We suggest that it should be called "aggravated assault".

³⁹ SCP para 5.92(4).

⁴⁰ Para 4.100 and following, above.

⁴¹ Para 2.26 above.

ADVANTAGES

- 5.48 This would have the advantages that the lesser offence is not wholly covered by the greater and that there is a clear distinction between the two: one offence is confined to intentional or reckless injuries, while the other includes inadvertent injuries. The new offence of aggravated assault would also provide an adequate label for D's conduct and avoid alienating victims by telling them that their injuries are minor.
- 5.49 As explained, the formal distinction between the two injury offences is that the offence under clause 3 requires intention or recklessness as to the causing of injury, while aggravated assault would not (though it would require intention or recklessness as to the underlying assault or battery). In practice, aggravated assault would be used for three types of cases:
- (1) cases involving low level injuries – black eyes, split lips, bruising, abrasions – which are currently charged as common assault following the charging standard;⁴² the charging standard would accordingly be amended to refer to aggravated assault instead of common assault;
 - (2) cases where, currently, the prosecution brings a charge under section 47 but seeks to keep the case in the magistrates' court, because the facts are at the lower end of the range for that offence and the expected sentence is within the power of that court (up to 12 months, if our recommendation below⁴³ is accepted);⁴⁴ and
 - (3) cases involving injuries of any level where it is impossible to prove intention or recklessness as to causing injury.

In the first two types of case, D will often in fact have intended or been reckless about the risk of some injury; but if aggravated assault is charged there will be no need to prove this.

- 5.50 In short, the new offence would be used to cover both the more serious cases now prosecuted as common assault and the less serious offences now prosecuted under section 47 (assault occasioning actual bodily harm). As argued above,⁴⁵ this would have the advantage of keeping these cases in the magistrates' courts: at present a considerable proportion of cases under section 47 are tried in the Crown Court but receive sentences which would have been within the power of a magistrates' court. We discuss the number of cases affected under the heading of sentencing, below.⁴⁶

⁴² SCP para 5.92(1); para 5.31 above.

⁴³ Para 5.54(2) below.

⁴⁴ SCP para 5.92(2).

⁴⁵ Para 5.33 above.

⁴⁶ Para 5.55 below.

DISADVANTAGES

- 5.51 In the SCP we criticised the offence under section 47 for its failure to respect the correspondence principle:

In short, here is an offence popularly known as “ABH”, of which the main distinguishing feature is the causing of bodily harm. Yet, for the purpose of assessing how far D is to blame, D’s state of mind about bodily harm is ignored. Juries may find this confusing, and the offence appears both lopsided and misdescribed.⁴⁷

- 5.52 The proposed offence of aggravated assault would be open to the same theoretical criticism. However, the main injustice involved in the section 47 offence is that a purely accidental consequence, of which D need have no awareness at all, appears to be the central feature of the offence and increases the possible sentence from six months to five years.⁴⁸ In the proposed offence of aggravated assault, the assault would be the central feature of the offence and the injury caused would be mainly relevant as an aggravating factor, with limited consequences for sentencing. Significantly, some consultees⁴⁹ who in general favoured following the correspondence principle thought that a limited degree of constructive liability was acceptable at the lower end of the scale of offences.

SENTENCING

- 5.53 The general sentencing powers of magistrates’ courts are currently limited to six months for an individual offence.⁵⁰ However, section 154 of the Criminal Justice Act 2003 increases this limit to 12 months, though the section has not been commenced. It is of course always open to Parliament to create a higher sentencing limit for individual offences, and this is expressly recognised in the opening words of section 78(2) of the Powers of Criminal Courts (Sentencing) Act 2000 (“unless expressly excluded”).
- 5.54 We recommend that a new statute on offences against the person should differentiate between the sentencing powers for aggravated assault and the other assault offences, by providing that:
- (1) the power to imprison for physical or threatened assault is limited to six months for any one offence; and
 - (2) the maximum sentence for aggravated assault is 12 months, notwithstanding the general limits imposed by the Powers of Criminal Courts (Sentencing) Act 2000.
- 5.55 This could result in a further saving. If the maximum sentence for the new offence is 12 months as we recommend, the practice will be to charge it in all cases

⁴⁷ SCP para 3.48.

⁴⁸ SCP para 3.47.

⁴⁹ Notably Kiron Reid: the Criminal Bar Association and Findlay Stark also favoured schemes involving some limited constructive liability: para 4.53 above.

⁵⁰ Powers of Criminal Courts (Sentencing) Act 2000, s 78(1).

where it is expected that the sentence imposed, if the defendant is found guilty, will be 12 months or less, unless there is some special reason to the contrary.

- (1) The Sentencing Council's Crown Court Sentencing Survey for England and Wales for 2014 showed the following pattern for sentences passed by the Crown Court for the section 47 offence:
 - (a) 21% of cases received a discharge, a non-custodial sentence or a sentence of immediate custody for six months or less;
 - (b) 40% of cases received a suspended sentence; these break down as follows:
 - (i) 33.75% of suspended sentences (13.5% of all sentences) were for up to or including six months;
 - (ii) 52.5% of suspended sentences (21% of all sentences) were for more than six months but not more than 12 months;
 - (iii) 13.75% of suspended sentences (5.5% of all sentences) were for more than 12 months;
 - (c) 18% of cases received a sentence of immediate custody of more than six months but not more than 12 months;
 - (d) 21% of cases received a sentence of immediate custody of more than 12 months.
- (2) Under our proposals, assuming existing powers for the magistrates' courts, 34.5% of ABH cases now tried in the Crown Court⁵¹ would instead be charged with the new offence and tried in a magistrates' court.
- (3) Under our proposals, assuming that the sentencing powers of magistrates' courts for this offence are increased to 12 months, this figure rises to 73.5%.⁵²

These figures assume that predictions of likely sentences, as made by the prosecution in selecting a charge, are correct on average; the actual savings may of course vary from this average.

CONSENT

5.56 We proposed, above, that:

- (1) it should be a condition of the new offences of physical assault and threatened assault that V did not consent to D's conduct; and this should

⁵¹ That is, those which currently result in a discharge or non-custodial sentence or an immediate or suspended term of imprisonment for up to 6 months.

⁵² That is, those which currently result in a discharge or non-custodial sentence, or an immediate or suspended term of imprisonment for up to 12 months.

be true whether or not that conduct resulted, or was intended or likely to result, in injury to V;⁵³ but

- (2) consent should be a defence to the offences of causing injury under clauses 1 to 3 of the draft Bill only in the circumstances described in *Brown*, namely that the injury was caused in the course of an accepted activity such as sport or surgery.⁵⁴

It would need to be decided what the position should be in the proposed offence of aggravated assault, which requires both an assault and a resulting injury.

5.57 The proposed offence of aggravated assault is closely based on the existing offence under section 47, which is committed whether or not D intends or foresees injury. The present position about consent, in relation to the section 47 offence, is as follows:

- (1) If D does intend or foresee injury (beyond the “transient and trifling” level), consent is only an answer to a charge under section 47 if V consents to the risk of injury and the activity is an accepted one following *Brown*.⁵⁵
- (2) If D does not intend or foresee injury, consent to D’s physical act will be a sufficient answer, whether or not V consents to or foresees injury, and whatever the activity: *Meachen*.⁵⁶

5.58 There would be two possible rules for the role of consent in aggravated assault. The choice between them would be for the courts, or could be reviewed in a future project on consent.

- (1) One possibility would be to reason that, since aggravated assault is so close to the existing offence under section 47, the rule must be the same: namely, that *Brown* applies if injury was intended or foreseen, while *Meachen* applies if it was not.
- (2) The other would be to reason that, since aggravated assault is based on physical assault and threatened assault, and lack of consent is an ingredient of those offences, it follows that consent is always an answer to aggravated assault, whether or not injury was intended or foreseen. In effect, *Meachen* would apply in all cases.

5.59 The disadvantage of the first possibility is its complexity. One of the purposes of this project was to disentangle the role of assault from the role of injury, so that it is always clear which of them is the main feature of a given offence, whereas the existing section 47 straddles the two. In effect, the first possibility perpetuates all the existing complications affecting section 47.

⁵³ Para 5.20 and following, above.

⁵⁴ Para 4.162 and following, above.

⁵⁵ [1994] 1 AC 212.

⁵⁶ [2006] EWCA Crim 2414; SCP para 2.59.

- 5.60 The disadvantage of the second possibility is that different rules would apply to aggravated assault and the offence under clause 3 (intentionally or recklessly causing injury), though both could be charged on the same facts and be heard in the same court. This would be confusing for a jury or a court if both charges are brought together, or if a court hearing a charge under clause 3 is considering an alternative verdict of aggravated assault.
- 5.61 As against this, it could be argued that, on the first possibility, the same inconsistency would arise, but at a different boundary. An assault causing a low level of harm could be charged either as physical assault or as aggravated assault. But in physical assault consent would always be an answer; in aggravated assault the rule in *Brown* would apply. This would be even more confusing than the situation in the previous paragraph, as aggravated assault is defined as always including a physical or threatened assault.
- 5.62 A third possibility would be for the Supreme Court in a future case to decide, or for the Law Commission in a future project to recommend, that consent was always a defence in the case of any injury that was not serious: the rule in *Brown* would be confined to serious injuries. This would resolve the apparent inconsistency between clause 3 and aggravated assault. However, it could give rise to a further difficulty. Would the rule in *Brown* be confined to the offences in clauses 1 and 2, where serious harm both occurs and is intended or foreseen? Or would it also apply to those cases under clause 3 where serious injury is caused but only a lesser injury was intended or foreseen?
- 5.63 As explained, issues of consent lie outside the scope of this project, so we do not make a formal recommendation about which of these three possibilities should be adopted. Our provisional view is that, since under our recommendations physical assault and threatened assault are explicitly defined in such a way that lack of consent is always a requirement,⁵⁷ and aggravated assault is based on these two offences, a court would decide that the same rule applies to aggravated assault. That is to say, that consent would always be an answer to aggravated assault, whether or not any injury was intended or foreseen.
- 5.64 If that approach were to be adopted, in a case on the facts of *Brown*, aggravated assault would not be available but the defendants could be charged and convicted under clause 3. The justification for this is that different rules can quite properly apply to consent to assault and consent to injury. In clause 3, the injury is the main external element of the offence, and the relevant consent can only be to injury or the risk of it. In aggravated assault, the main external element is the assault itself, and injury is only an aggravating factor: the relevant consent is therefore only to the assault as such.

OTHER DETAILS OF THE OFFENCE

- 5.65 The fault element of the offence, like that of the existing offence under section 47, would be the same as that for the underlying physical or threatened assault, namely intention or recklessness as to the facts constituting the assault. The offence would therefore be one of “basic intent”, meaning that D would not

⁵⁷ Para 5.20 and following, above.

escape liability by showing that he or she was too intoxicated to be able to form the relevant intention or foresee the relevant risk.⁵⁸

5.66 As the offence would be triable only in a magistrates' court, it follows that there would be no offence of attempted aggravated assault. Under section 1(4) of the Criminal Attempts Act 1981, with some exceptions provided by that Act the offence of criminal attempt only includes attempts to commit offences triable on indictment.

5.67 It would be necessary to ensure that the new offence fitted properly into the hierarchy of offences, especially as concerns the power to give alternative verdicts.⁵⁹ In particular:

- (1) though the offence should generally be tried only in the magistrates' court, it should be possible to include it on an indictment together with one or more counts for offences under clauses 1 to 3, in the same way that in current law assault can be included together with a count under section 18, 20 or 47;⁶⁰
- (2) whether or not a count of aggravated assault is included on the indictment, it should be possible for a jury to convict a defendant of aggravated assault as an alternative to the more serious injury offences, again in the same way as for assault in current law;⁶¹ and
- (3) ideally, where a defendant is charged with aggravated assault a magistrates' court should be able to convict him or her of one of the basic assault offences instead, even though the system of alternative verdicts does not in general apply in magistrates' courts.

The first two changes could be effected by amending section 40 of the Criminal Justice Act 1988.⁶²

5.68 We recommend that a reformed statute on offences of violence should provide for an offence of aggravated assault, defined as follows:

- (1) the conduct element would be the same as that for physical or threatened assault (that is, it would be one offence that can be committed in two ways);**
- (2) the assault must have the result of causing some injury;**

⁵⁸ *Smith and Hogan* para 11.4.3, pp 356 to 366; *Majewski* [1977] AC 443, [1976] 2 All ER 142 (HL).

⁵⁹ For more detail on our proposals about alternative verdicts, see para 8.57 and following, below.

⁶⁰ Criminal Justice Act 1988, s 40(1); SCP para 2.30.

⁶¹ Criminal Law Act 1967, s 6 as amended by Domestic Violence, Crime and Victims Act 2004, s 11; SCP para 2.31.

⁶² SCP para 5.99.

- (3) the fault element should be the same as that for physical or threatened assault, without the need for intention or recklessness in relation to the injury caused;
- (4) the offence should be triable only in a magistrates' court; and
- (5) the maximum sentence should be 12 months.

PARTICULAR ASSAULT OFFENCES

5.69 In what follows we discuss various offences concerning violence against particular people or in particular circumstances:

- (1) wounding or causing grievous bodily harm with intent to resist or prevent the lawful apprehension or detainer of any person (section 18 of the 1861 Act; represented by clause 6 of the draft Bill);⁶³
- (2) assault with intent to resist or prevent the lawful apprehension or detainer of any person (section 38 of the 1861 Act; represented by clause 7 of the draft Bill);⁶⁴
- (3) assault on a constable in the execution of his duty (section 89(1) of the Police Act 1996; represented by clause 5 of the draft Bill);⁶⁵
- (4) assault on a clergyman in the discharge of his duties (section 36 of the 1861 Act; not represented in the draft Bill);⁶⁶
- (5) assault on a magistrate or other person in the exercise of his duty preserving a wreck (section 37 of the 1861 Act; not represented in the draft Bill);⁶⁷
- (6) racially or religiously aggravated offences (Crime and Disorder Act 1998; based on offences of assault, assault occasioning actual bodily harm and malicious wounding or infliction of grievous bodily harm);⁶⁸
- (7) domestic violence (not a separate offence in current law or in the draft Bill; in the SCP we discuss whether it should become one).⁶⁹

Grievous bodily harm or assault with intent to resist arrest

5.70 The offence under section 18 of the 1861 Act includes wounding or causing grievous bodily harm "with intent to resist or prevent the lawful apprehension or

⁶³ Para 5.70 and following, below.

⁶⁴ Para 5.70 and following, below.

⁶⁵ Para 5.80 and following, below. There are also offences of assaulting other officials, listed in SCP para 2.139.

⁶⁶ Para 5.90 and following, below.

⁶⁷ Para 5.90 and following, below.

⁶⁸ Para 5.95 and following, below.

⁶⁹ Para 5.111 and following, below.

detainer of any person”. Like other forms of the section 18 offence, this is punishable with life imprisonment.

- 5.71 The draft Bill includes (in clause 6) an offence of causing “serious injury to another intending to resist, prevent or terminate the lawful arrest or detention of himself or a third person”. This is also punishable with life imprisonment. In the SCP we asked (in question 24) whether this offence is needed, and if so whether there should be a lower maximum sentence.
- 5.72 There is also an offence under section 38 of the 1861 Act, of assault with intent to resist or prevent the lawful apprehension or detainer of any person. This is reproduced in clause 7 of the draft Bill, with the same changes of language as in clause 6. In question 24 of the SCP we asked whether this offence, as well as that in clause 6, should be included in the proposed reform. (The same question addressed the offence of assault on a constable, discussed below.)

Responses to consultation

- 5.73 Most consultees, in replying to question 24, confined their remarks to the offence of assault on a police constable, or simply expressed agreement with reform in general. Only seven expressed detailed views on the offences in clauses 6 and 7 of the draft Bill. Of these:
- (1) two⁷⁰ advocated incorporating the offences in clauses 6 and 7 of the draft Bill as they stand;
 - (2) three⁷¹ advocated incorporating those offences while considering reducing the maximum sentence for the clause 6 offence (one consultee suggested 14 years);
 - (3) Sally Ramage advocated keeping the existing offences without change; and
 - (4) David Hughes advocated abolishing both offences without replacement.
- 5.74 Some more consultees⁷² simply said “Yes” to question 24. It is not clear whether these should be treated as agreeing with considering reduction of the maximum sentence, given that that was part of the question.

Discussion

- 5.75 There was general agreement to keeping both these offences, as they provide additional protection to the police in the execution of their duties. As argued in the SCP,⁷³ the drafting of the offences in clauses 6 and 7 of the draft Bill is easier to understand than the existing offences. In particular, it is clarified that each clause creates just one offence, and it is made clear that the offences are only

⁷⁰ Sussex academics, Council of District Judges (Magistrates’ Courts).

⁷¹ Richard Wood, Richard Taylor, National Bench Chairmen’s Forum.

⁷² Findlay Stark, British Transport Police, Kiron Reid.

⁷³ SCP para 5.130.

committed if the detention or arrest would be lawful on the facts as D believes them to be.

- 5.76 The remaining question is what the maximum sentence should be for the offence under clause 6. In the draft Bill this is stated as imprisonment for life, to preserve the position in existing law, and the accompanying Home Office consultation paper explains that this was done so as not to reduce the protection given to the police. We have been unable to establish what sentences are typically passed for this branch of the offence under section 18, as the statistics do not distinguish cases arising under different branches of the offence.⁷⁴
- 5.77 As stated in the SCP,⁷⁵ Professor Ashworth⁷⁶ argued that there was no justification for retaining a life sentence for the offence under clause 6, and questioned whether there was any need to retain the offence at all. In this offence, provided that D intends to resist arrest, there need be no intention or recklessness as to any injury at all: as concerns injury, it is an offence of strict liability. If there is intent to cause serious injury, clause 1 will apply.
- 5.78 We consider the case for reducing the maximum sentence for the clause 6 offence to be a powerful one. Nevertheless the maximum fixed should be significantly greater than that for the offences under clauses 2 and 3, to reflect the special nature of these attacks. The level fixed would be a matter for Parliament, but we consider that it should not be life imprisonment.
- 5.79 We recommend that a reformed statute on offences of violence should contain offences of:**

- (1) causing serious injury intending to resist, prevent or terminate the lawful arrest or detention of himself or a third person; and**
- (2) assault intending to resist, prevent or terminate the lawful arrest or detention of himself or a third person;**

as set out in clauses 6 and 7 of the draft Bill. The maximum penalty for the offence under clause 6 should be set at more than 7 years but less than life.

Assaults on police

- 5.80 Assaulting a constable in the execution of his duty is an offence under section 89(1) of the Police Act 1996. This section is reproduced with minimal changes in the draft Bill. Both in the existing section and in the draft Bill:
- (1) the maximum penalty is six months, the same as for common assault; and

⁷⁴ An internet search shows that reported prosecutions for wounding or causing grievous bodily harm with intent to resist or prevent lawful apprehension or detainer are rare; prosecutions for the corresponding assault offence are somewhat more common.

⁷⁵ SCP para 5.132.

⁷⁶ "Reforming the Offences Against the Person Act 1861" [1998] *Criminal Law Review* 233.

- (2) there is no need for D to know or believe that V is or might be a police officer.

In question 24 we ask about this offence. The two main questions are whether a requirement of knowledge or recklessness (as to the fact that V is a constable) should be introduced and whether the offence is necessary at all.

Responses to consultation

5.81 20 respondents expressed views on question 24, as concerns the offence of assault on a constable. Out of these:

- (1) 12 respondents⁷⁷ considered that the offence should be retained but with a requirement of knowledge or recklessness;
- (2) three⁷⁸ considered that the offence should be left in its present form;
- (3) the CPS supported the inclusion of the offence, but expressed no view on the requirement of knowledge or recklessness;
- (4) three⁷⁹ considered that the offence should be abolished;
- (5) the Justices' Clerks Society suggested that the fact that an assault is on a police officer should be an aggravating factor within common assault, but that if a separate offence were retained then it should have a requirement of knowledge or recklessness.

5.82 Among those favouring the addition of a requirement of knowledge or recklessness:

- (1) The Council of HM Circuit Judges said:

We are not convinced by the argument that assault on the police should remain in effect an offence of strict liability as a means of giving protection to police officers. On the contrary it can blur the sentencing exercise. If the defendant did not know that the victim was a police officer this will be relied on as mitigation. If it has to be proved that he either knew that the victim was a police officer or was reckless about this there can then be no doubt about his culpability. If the assault is a serious one it should be charged as one of the more serious offences and if there is a conviction sentenced accordingly.

- (2) The London Criminal Courts Solicitors' Association said:

⁷⁷ Sussex academics, Law Society, Council of District Judges (Magistrates' Courts), Kiron Reid, Antony Duff, Council of HM Circuit Judges, Richard Taylor, London Criminal Courts Solicitors' Association, National Bench Chairmen's Forum, Magistrates' Association, Bar Council, ACPO.

⁷⁸ Respect, Sally Ramage, Criminal Bar Association.

We agree with this proposal and indeed welcome the introduction of the requirement that D know that or was reckless as to whether V was a police constable as a positive step.

(3) The Bar Council said:

Our experience is that the summary-only offence of assaulting a police constable in the execution of their duty is a widely-used provision. It has the virtue of reflecting the particular disapproval levelled at such conduct. We agree, however, that a defendant should only be liable for this particular offence if they had some level of awareness of the officer's position. That tends to be reflected in the requirement that a police officer acting in the execution of their duty tends to be required to identify himself as such in order for the actus reus to be complete.

(4) The Law Society also raised the question of whether D needs to know or be reckless about the fact that V was acting in the execution of his or her duty;

(5) Antony Duff called for a larger debate on the particularisation of offences.

5.83 Among those favouring leaving the offence in its present form, the Criminal Bar Association said:

There is no case for revising the maximum sentence. There is no case for introducing a requirement that D knew or was reckless as to whether V was a police constable.

5.84 Among those favouring the abolition of the offence:

(1) Jonathan Rogers said:

Since I do not see the need for an aggravated offence of assault and battery, I am not persuaded by the need for an offence of assaulting a police constable. Generally the status of the victim will already be considered in the decision to prosecute (as opposed to offering a caution) and in sentencing guidelines. That said, if we are to be stuck with the offence, I would welcome codification which introduced the need for the defendant to know or see the risk that he was assaulting a constable.

(2) Richard Wood said:

The summary offence of assaulting a police constable serves no purpose and should be abolished. It should be charged as assault, and the circumstances treated as aggravating the

⁷⁹ Jonathan Rogers, Richard Wood, David Hughes.

sentence. If the offence is retained, then there should be no requirement to prove that the defendant knew or was reckless as to whether the complainant was a police officer, as this would make the offence even harder to prove and even more pointless. People who assault people have only themselves to blame if the person they assault turns out to be a police officer.

Discussion

- 5.85 A clear majority of respondents favoured retaining the offence of assaulting a police officer but introducing a requirement of knowledge or recklessness as to whether V was a police officer. We believe that in principle this would be the correct course to take.
- 5.86 We do not favour the suggestion that the offence should also contain a requirement that D should know or be reckless as to whether V was on duty. Once D is on notice that V is a police officer, it is not unreasonable that he or she should bear the risk of whether V is on duty or not. Further, D's opinion that V is not acting in the course of duty could well be an opinion of law rather than fact.⁸⁰
- 5.87 If the offence of assaulting police officers is amended as proposed, it will at some point need to be considered whether to amend the statutes governing assault on court staff, Revenue officers, immigration officers, detainee custody officers, prison custody officers, secure training centre custody officers, park keepers and various officials with auxiliary police functions.⁸¹ This would require full consultation with representatives of these interests, and does not fall within the scope of the present project of reform.
- 5.88 As with the recommended offence of aggravated assault,⁸² it would be possible to provide that the maximum sentence for assault on a police officer should be increased to 12 months, while the maximum for the basic assault offences remains six months. We believe that this would provide more effective protection for the special position of the police than the present law.
- 5.89 We recommend that:**
- (1) a reformed statute on offences of violence should contain an offence of assaulting a police constable in the execution of his or her duty;**
 - (2) that offence should contain a requirement that the defendant knew that the victim was a constable, or was reckless as to whether the victim was a constable or not;**

⁸⁰ For example, the question could arise whether a householder has revoked the police officer's implied licence to remain on the premises: *Robson v Hallett* [1967] 2 QB 939, [1967] 2 All ER 407; *Snook v Mannion* [1982] RTR 321, [1982] *Criminal Law Review* 601.

⁸¹ SCP para 2.139.

⁸² Para 5.54 above.

- (3) the maximum sentence for that offence should be 12 months.

Assaults on clergy and on magistrates preserving a wreck

- 5.90 Section 36 of the 1861 Act makes it an offence to assault or obstruct a clergyman performing, or on his way to or from performing, religious duties, and section 37 makes it an offence to assault a magistrate or other person engaged in the duty of preserving a wreck. Neither of these offences is reproduced in the draft Bill, and in question 25 of the SCP we asked whether these offences should be abolished.

Responses to consultation

- 5.91 17 respondents⁸³ answered that these offences should be abolished, and several more agreed in more general terms with the abolition of little-used offences in the 1861 Act. Some typical responses were as follows.

- (1) The London Criminal Courts Solicitors' Association said:

The offences of assaulting or obstructing a clergyman and assaulting magistrates and others preserving a wreck are utterly redundant and should be abolished. Other offences already exist to cover the criminal behaviour covered by these sections of the OAPA.

- (2) The Law Society said:

Yes: while these offences may once have had a specific rationale, they are now either rarely or never prosecuted and should therefore be removed from the statute book.

- (3) The Council of HM Circuit Judges said:

We favour abolition of these offences. They are very rarely prosecuted in practice. The conduct can be adequately dealt with as other offences such as public order or perverting the course of justice. Offences of failing to provide apprentices with food and drink have an archaic sound to them. Such matters should be left to employment or health and safety legislation.

- (4) The Council of District Judges (Magistrates' Courts) said:

There seems to be no real logic as to why members of the clergy or magistrates are singled out as favoured groups within the law.

⁸³ Jonathan Rogers, Sussex academics, Law Society, Respect, Council of District Judges (Magistrates' Courts), Sally Ramage, Findlay Stark, Justices' Clerks Society, Council of HM Circuit Judges, British Transport Police, Richard Taylor, London Criminal Courts Solicitors' Association, Criminal Bar Association, CPS Inspectorate, Bar Council, David Hughes, ACPO, CPS.

It would be an aggravating factor in terms of sentence to commit an offence against such a person if committed while that person is carrying out his duties. This is the norm as for example with healthcare workers, teachers, traffic wardens or any other public official.

5.92 There were two who disagreed:

- (1) Richard Wood agreed that there was no need for an offence of assaulting a clergyman, but considered that the “obstruction” part of the offence should be kept. Preventing religious services from taking place can cause distress, for example to those attending a wedding or funeral. The same point was made in correspondence by Stephen Slack, of the legal office of the Church of England.
- (2) Rupert Barnes considered that the offences concerned with wrecks should be preserved (section 17 makes it an offence to impede a person escaping from a shipwreck). They may seem unlikely and remote to those living in London but could still be of relevance in counties such as Cornwall where wrecks occur.

Discussion

5.93 So far as we have been able to ascertain, there have been no prosecutions for assault on a magistrate or other person preserving a wreck in recent decades, and very few for assault or obstruction of clergy.

5.94 In conclusion, **we recommend that the offences of assault on a magistrate or other person preserving a wreck and assault on or obstruction of a clergyman in performance of religious duties should be abolished.**

Hate crimes

5.95 There are aggravated forms of the offences under sections 20 and 47 and of common assault. Aggravated here means that the offence was motivated by, or accompanied by the demonstration of, hostility on the grounds of race or religion. The racially aggravated offences were created by the Crime and Disorder Act 1998; the sections creating those offences were amended by the Anti-terrorism, Crime and Security Act 2001 to include religious aggravation. In our recent report on hate crime⁸⁴ we considered whether the offences should be further extended, to include hostility on the grounds of sexual orientation, disability or transgender identity. We did not make any immediate recommendation for such an extension, but advised that the question should be considered in a wider review.

5.96 This topic was not considered in the draft Bill, as these offences were first created in 1998, the same year as the draft Bill.⁸⁵ In question 26 of the SCP, we asked whether these offences should be revised in accordance with the changes

⁸⁴ Hate Crime: Should the Current Offences be Extended? (2014) Law Com No 348.

⁸⁵ That is, the racial hostility offence was created in that year. Religious hostility was added by Anti-terrorism, Crime and Security Act 2001.

to the underlying offences. The paper also pointed out that, if the offences were extended to hostility on the grounds of sexual orientation, disability or transgender identity, these new offences would also need to be revised.

Responses to consultation

5.97 There was general agreement that, if the offences of assault, actual bodily harm and grievous bodily harm were replaced, the aggravated offences would have to be amended to take account of these changes. In addition, many respondents took this question as an invitation to comment on the merits of hate crimes generally, or on the proposal to extend the offences to other forms of hostility.

5.98 One question which we did not raise, but on which we received useful comments, is where the statutory home of the revised hate crime offences should be. That is, should they remain offences under the Crime and Disorder Act 1998, but with revised wording, or should they be incorporated into the new statute on offences against the person?

5.99 The pattern of responses was as follows.

- (1) Eleven respondents⁸⁶ agreed that the aggravated offences should be amended to take account of changes to the underlying offences. (Of these, two⁸⁷ thought that the new offences should be incorporated into the new offences against the person statute.) For example, Findlay Stark said:

I would maintain the aggravations that exist at present, but not seek to build on them – at least not until a wider project on aggravations/“hate crime” (such as the one recommended in *Hate Crime: Should the Current Offences be Extended?* (2014) Law Com No 348) takes place.

- (2) Three respondents⁸⁸ disagreed with any changes to the aggravated offences, because they were opposed to the proposed changes to the underlying offences.
- (3) Two respondents⁸⁹ considered that the offences should be extended to the other three types of hostility. For example, Respect said:

We agree and we also ask for consideration of the potential value of offences aggravated by disability, gender or sexuality. If it is recognised in law that offences based on hatred on religious or racial grounds should be considered aggravated, we contend that it is important at least to

⁸⁶ Sussex academics, Findlay Stark, Antony Duff, Justices’ Clerks Society, Richard Wood, London Criminal Courts Solicitors’ Association, Magistrates’ Association, David Hughes, ACPO, Law Society, Council of District Judges (Magistrates’ Courts).

⁸⁷ Law Society, Council of District Judges (Magistrates’ Courts).

⁸⁸ Sally Ramage, Criminal Bar Association, Bar Council.

⁸⁹ Respect, British Transport Police.

consider offences based on hatred on gender, disability and sexuality/transgender status, in line with current equalities legislation.

- (4) Four respondents⁹⁰ considered that the aggravated offences should be curtailed or abolished; for example, the Council of HM Circuit Judges recommended that the maximum sentences for the underlying offences should be increased, and hostility taken into account as an aggravating factor within those offences.

Discussion

5.100 Question 26 was not intended to reopen the debate about the reform of hate crime or to anticipate the wider review recommended in our 2014 report. The issue was the purely technical one of how to adapt the existing hate crime offences to fit the new offences of violence recommended in this project.

5.101 At present there are racially and religiously aggravated offences based on:

- (1) common assault (that is, assault and battery);
- (2) assault occasioning actual bodily harm, under section 47 of the 1861 Act; and
- (3) malicious wounding or infliction of grievous bodily harm, under section 20 of that Act.

There are also aggravated forms of other offences such as criminal damage and various public order offences. There is no aggravated form of the offence under section 18 (wounding or grievous bodily harm with intent): the maximum sentence for that offence being life imprisonment, it cannot be further aggravated.

5.102 In this project we recommend that all three of these offences should be abolished and replaced. To preserve the present position, it will be necessary to create racially and religiously aggravated forms of the new offences of:

- (1) recklessly causing serious injury, under clause 2;
- (2) intentionally or recklessly causing injury, under clause 3;
- (3) physical assault and threatened assault, as discussed in this chapter.

5.103 We recommend, above,⁹¹ an offence of aggravated assault: that is, assault causing some physical injury, without the need for intent or recklessness. This raises the question of whether there should be a racially or religiously aggravated form of this offence as well as those mentioned in the previous paragraph.

⁹⁰ Jonathan Rogers, Council of HM Circuit Judges, Richard Taylor, Rupert Barnes.

⁹¹ Para 5.68 above.

- 5.104 We do not recommend creating such an offence. The main purpose of the offence of aggravated assault is to ensure that less important cases are tried in the magistrates' courts; although we recommend that in this instance the maximum sentence be 12 months. A racially or religiously aggravated form of that offence would have to have a still higher sentencing limit, and therefore be triable either way. There would then be no reason to charge this offence rather than the racially or religiously aggravated form of the offence under clause 3.⁹²
- 5.105 The one possible exception is the case where injury was caused but it is impossible to prove intention or recklessness as to that injury. This could not be charged under clause 3, and would remain a case of racially or religiously aggravated common assault. However, the maximum sentence for that offence is two years. As this is well in excess of the proposed maximum sentence for aggravated assault (12 months), we believe that it is a sufficient sanction, without the need for a doubly aggravated offence.
- 5.106 One further point arises about sentencing powers. At present, the maximum sentence for the section 20 offence is five years, and the maximum sentence for the racially or religiously aggravated form of that offence is seven years. Under our proposals, the maximum sentence for the offence under clause 2 (recklessly causing serious injury) is seven years. The maximum for the aggravated form of that offence should therefore be more than seven years: the next higher maximum found in normal legislative practice is ten years.
- 5.107 Our hate crime report, as mentioned above, discusses the possibility of extending the aggravated offences to include hostility on the grounds of sexual orientation, disability or transgender status. Were the offences to be extended in this way, the extended offences would also need to be based on the new offences recommended in this project. But as explained,⁹³ this is not the place to discuss whether the offences should be extended or not.
- 5.108 Finally, we consider that the most convenient way to update the aggravated offences is by textual amendment to the Crime and Disorder Act 1998, rather than by incorporating the aggravated offences into the new statute governing crimes of violence.
- 5.109 We recommend that the provisions of the Crime and Disorder Act 1998 relating to racially and religiously aggravated crimes of violence should be amended to refer to the recommended offences of recklessly causing serious injury, intentionally or recklessly causing injury and physical and threatened assault. Those provisions should not also refer to the recommended offence of aggravated assault.**
- 5.110 The maximum sentence for the racially or religiously aggravated form of recklessly causing serious injury should be ten years.**

⁹² There could also be difficulty in nomenclature. "Racially or religiously aggravated aggravated assault" is an awkward phrase, though an alternative could presumably be devised.

⁹³ Para 5.100 above.

Domestic violence

- 5.111 One further question discussed in the SCP is whether there should be offences specifically addressing domestic violence. There is no specific offence of domestic violence in the 1861 Act (apart from the offence of exposing children to danger), nor is one proposed in the draft Bill. In question 27 of the scoping consultation paper we ask whether such offences should be considered. If so, they would probably take the form of aggravated versions of the general offences of assault or causing injury, applying when V lives with D as a member of the family.
- 5.112 Briefly, the argument in favour of creating such offences was that it enabled perpetrators of domestic violence to be labelled, so that their criminal records would show the pattern of such behaviour. The argument against it was that it diluted the message that “violence is violence” and gave a misleading impression that domestic violence is principally an offence against family relationships rather than behaviour that is wrong in itself, no matter who the victim is.

Responses to consultation

- 5.113 Twenty-three respondents discussed this issue. Of these:
- (1) four⁹⁴ were in favour of such offences;
 - (2) fourteen⁹⁵ were against creating such offences, including three⁹⁶ who were against reform of the general offences, and
 - (3) five⁹⁷ were undecided.
- 5.114 Those who favoured such offences argued on the ground of proper labelling of offenders rather than on the ground that violence is intrinsically more serious in a domestic context. Some examples are as follows.
- (1) Jonathan Rogers said:

Yes. This is a bit different; domestic violence is arguably a separate wrong rather than an aggravated version of another wrong (eg offences v police, ethnic minorities, etc). To get an appropriate sentence in some domestic violence cases, one may need to prove a whole set of earlier incidents, and so some special legislation might be needed. But, I am open-minded about this; it is not as though defining a “course of conduct” is at all easy. It may be that where serious injury has

⁹⁴ British Transport Police, Findlay Stark, Sally Ramage, Jonathan Rogers, ACPO.

⁹⁵ Council of HM Circuit Judges, Council of District Judges (Magistrates’ Courts), Law Society, Ian Dennis, Magistrates’ Association, Richard Taylor, Rebecca Williams, Richard Wood, Rupert Barnes, David Hughes, Bar Council, Criminal Bar Association, London Criminal Courts Solicitors’ Association, CPS.

⁹⁶ Bar Council, Criminal Bar Association, London Criminal Courts Solicitors’ Association.

⁹⁷ University of Sussex academics, Antony Duff, South West London Magistrates’ Association, Justices’ Clerks Society, Respect.

been caused, then that general offence should be charged, whilst a domestic violence offence should be limited to cases where although there have been assaults and batteries, no serious injury has been caused yet; but the pattern of D's behaviour – perhaps including lifestyle habits and refusals to seek psychiatric or other help – would cause a reasonable person in V's position to fear that there is a serious risk that he will seriously injure her (note that this formulation would not require V herself to testify to her perception of risk).

(2) Findlay Stark said:

My colleagues presented two arguments against my position during a recent discussion. The first was that there is nothing distinct about domestic violence, as opposed to non-domestic violence. I am with Tadros⁹⁸ there: the domination of the abused party, and the consequent impact on freedom, is something present in the domestic setting but not, in the same way, to offences of violence (or harassment) generally. The second was that making it a specific wrong might result in the criminal justice system view[ing] domestic violence as somehow less serious. If anything, I think the identification of a specific wrong would mark this out as particularly odious conduct, deserving of additional censure. Further, at present offences presumably get lost in the general category of offences against the person, so a specific offence or specific offences of domestic violence could help gauge State action more accurately.

5.115 Those who opposed such offences argued that, even without a specialised offence, a court could treat the context as an aggravating factor, in the same way as where the victim is an elderly person. Some examples are as follows.

(1) The CPS referred to the Home Office consultation on domestic abuse⁹⁹ and said:

There is a danger that a specific offence of domestic violence may not capture offences that are not prosecuted as offences against the person.

Overall the imminent creation of an offence of domestic abuse in addition to the matters we have set out is such that we are not of the view that a specific offence of domestic violence is required.

(2) The London Criminal Courts Solicitors' Association said:

⁹⁸ V Tadros, "The Distinctiveness of Domestic Abuse: A Freedom-based Account" in R A Duff and S P Green (eds), *Defining Crimes: Essays on the Special Part of the Criminal Law* (2005), pp 119-142.

⁹⁹ Para 5.117 below.

We are not convinced of the argument that domestic violence needs to be charged as a separate offence as violence is violence. Better recording of information on antecedents provided by the Crown can ensure the court is aware of the offender's history. The creation of a new broader offence of domestic abuse has been addressed in a recent Home Office consultation and we set out our views in our response strongly opposing the proposal.

- (3) David Hughes pointed out that domestic violence is not the only instance of violence involving abuse of a position of power or destruction of the sanctity of a relationship; conversely there are instances of domestic violence (for example between in-laws) where no such abuse or destruction is involved.

- (4) The Council of HM Circuit Judges said:

We do not see a need for specific offences of domestic violence. We are not sure what form these would take. It would for example be unacceptable to create offences that reverse the burden of proof. The existing law is no more inadequate for this type of offence against the person than any other. New offences would be adequate to deal with this. The real difficulties with domestic violence are evidential and not the result of specific deficiencies in the substantive law.

- (5) The Council of District Judges (Magistrates' Courts) said:

We do not feel this is necessary and makes the law over prescriptive. The civil law contains provisions for swifter measures of protection to be put in place for victims. The existing and proposed new offences are adequate coupled with the protection offered by ancillary orders.

We can however see the benefit to potential future partners of domestic offenders in that criminal record checks would label any assaults as domestic assaults. It would simply be a matter of honest labelling.

- (6) Rupert Barnes said:

It must be clear in law that an assault upon one's wife is as much an offence as an assault on a stranger. A separate offence would suggest to the mind eager for an excuse that it does not count.

That said, a domestic assault is more serious than an equivalent assault on a stranger; amongst other factors, it involves the betrayal of a relationship of trust, it destroys the safety of the home and it engenders constant fear of repetition. Therefore the domestic element of an attack is a severe aggravating factor.

(7) The Magistrates' Association said that:

... having a separate specific offence of domestic violence would place the focus back onto offences of violence and undermine the move to extend the approach to recognise both physical and mental abuse and coercive and controlling behaviour.

(8) Kiron Reid argued that some definitions of domestic violence encountered in campaign literature were wider than the normal usage, and expressed concern that an offence based on them could lend itself to uncertainty and over-extension in the same way as the concepts of stalking and harassment.

5.116 Two more consultees¹⁰⁰ produced responses devoted to the subject of violence against children. They argued that "reasonable chastisement" should no longer be a defence against a charge of assault or battery. (It has already been abolished as a defence to assault occasioning actual bodily harm.¹⁰¹) However they expressed no view on whether a new offence should be created.

Discussion

5.117 In the SCP¹⁰² we referred to a Home Office consultation on domestic abuse,¹⁰³ which focused on abusive behaviour not necessarily involving physical violence; examples were controlling behaviour and keeping a person short of money. This consultation has now resulted in new legislation¹⁰⁴ creating an offence of controlling or coercive behaviour towards a person who is personally connected, meaning either that there is an intimate relationship or that there has been such a relationship and the parties are living as members of the same family. The behaviour in question is not limited to threats of violence; nor does it include all instances of violent behaviour in a domestic context.

5.118 We consider that, given the existence of this new offence, a reformed statute on offences of violence should not contain additional offences of domestic violence. The balance of the arguments set out in the SCP appears to us to be against such offences, and for treating domestic violence in the same way as violence in general; and as pointed out by several consultees, the existence of an offence of domestic violence side by side with an offence of domestic abuse could cause confusion.

¹⁰⁰ NSPCC, Children Are Unbeatable.

¹⁰¹ Children Act 2004, s 58.

¹⁰² SCP para 5.152.

¹⁰³ Home Office, "Strengthening the Law on Domestic Abuse – A Consultation" August 2014, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/344674/Strengthening_the_law_on_Domestic_Abuse_-_A_Consultation_WEB.PDF (last visited 19 October 2015).

¹⁰⁴ Serious Crime Act 2015, s 76; not yet commenced.

CHAPTER 6

TRANSMISSION OF DISEASE

INTRODUCTION

- 6.1 In this chapter we discuss whether, under a revised statute governing offences against the person, there should be criminal liability for the transmission of disease. In particular we are concerned with the reckless transmission of HIV or sexually transmissible infections through consensual sexual intercourse. In what follows, the person who transmitted the infection is D; the person to whom it was transmitted is V.¹
- 6.2 Historically, the reckless transmission of disease did not fall within the major offences in the 1861 Act: the view taken was that these offences existed to address crimes of violence, and therefore did not cover causing harm through consensual sexual intercourse.²
- 6.3 The 1998 draft Bill was designed to reproduce the law as it then stood. Accordingly, clause 15 of the draft Bill provided that, except for the purposes of the clause 1 offence (intentionally causing serious injury), “injury” does not include anything caused by disease.
- 6.4 The law about this has changed since the 1998 draft Bill was published. Since *Dica*,³ the law has been that transmitting an infection can amount to the infliction of harm, and that consent to intercourse does not imply consent to that harm or the risk of it. Accordingly, if D has infected V and D was aware that he or she was infected, but V was not aware that D was infected, V cannot have consented to that risk and D is guilty of the malicious infliction of grievous bodily harm under section 20.
- 6.5 Some other countries have stricter laws than England and Wales. In England and Wales, there is no criminal liability for an offence against the person unless infection actually passed from D to V. In some other countries, there are offences of putting V in danger of infection, or failing to disclose D’s HIV status.⁴
- 6.6 A considerable body of opinion, in particular medical opinion and HIV charities, holds that there ought not to be criminal liability for the unintentional transmission of disease by consensual sexual intercourse, as this is counterproductive in public health terms. In particular, the 2013 UNAIDS document entitled “Ending overly broad criminalization of HIV non-disclosure, exposure and transmission:

¹ This terminology is adopted for convenience, to allow comparison with other cases where offences against the person are charged. We do not intend to imply that the parties in such cases should in fact be regarded as culprit and victim respectively, as that is part of the subject of debate in this chapter.

² *Clarence* (1888) 22 QBD 23.

³ [2004] EWCA Crim 1103, [2004] QB 1257.

⁴ SCP para 6.53.

Critical scientific, medical and legal considerations”⁵ advocates that liability should be confined to cases where disease is transmitted intentionally.

6.7 In the SCP we asked a series of questions about whether and how to adapt the scheme of the draft Bill to the current situation. Possibilities raised were as follows:

- (1) to follow the scheme of the draft Bill as it stands, adopting the definition of “injury” that excludes disease;
- (2) to follow the scheme of the draft Bill, omitting that definition, so that reckless transmission of disease can in principle fall within the offences;
- (3) to exclude the unintentional transmission of infection through consensual intercourse by means of a tailored exemption; or
- (4) to create a specific offence for the transmission of disease (and possibly for endangerment and non-disclosure as well).

CURRENT LAW

6.8 “Grievous bodily harm”, in the 1861 Act, includes disease, if the effect on V is serious enough. Accordingly, the intentional transmission of a serious disease, by whatever means, must fall within the offence under section 18, though as this is a rare situation it has never been tested in any reported case in England and Wales.

6.9 It also follows that an act done without V’s consent, which has the effect of causing V to contract a serious disease, can in principle fall within the offence under section 20. Examples would be:

- (1) if D attacked V with an infected syringe, or
- (2) if D infected V with HIV or a sexually transmissible disease in the course of a rape or other sexual act that was not consented to.

We argue in the SCP that this must have been true even before the decision in *Dica*.⁶

6.10 The difficulty arises when the infection is transmitted through an act of consensual intercourse. In that case, though V has not consented to being infected or to the risk of it, he or she has consented to the act that caused the infection.

⁵ Linked at http://www.unaids.org/en/media/unaids/contentassets/documents/document/2013/05/2013_0530_Guidance_Ending_Criminalisation.pdf (last visited 19 October 2015).

⁶ SCP paras 2.86 and 6.64.

- 6.11 In *Clarence*⁷ it was held that a husband who infected his wife with gonorrhoea was not guilty of the offence under section 20. At that time, the word “inflict”, in that section, was interpreted as requiring an act of direct aggression such as an assault. An act of consensual intercourse was not sufficient to amount to inflicting harm in this sense: it did not have the necessary character of aggression, or if it did it was consented to.⁸
- 6.12 Since *Clarence* there has been a series of cases holding that the section 20 offence does not require anything in the nature of an assault.⁹
- 6.13 In *Dica*¹⁰ D, knowing that he was HIV positive, had unprotected sex with two women, both of whom contracted the infection. He was charged with malicious infliction of grievous bodily harm under section 20 and convicted. On his appeal to the Court of Appeal, the court held that the relevant point in an offence under section 20 was not whether there was consent to the intercourse but whether there was consent to the risk of infection.

In our view, on the assumed fact now being considered, the answer is entirely straightforward. These victims consented to sexual intercourse. Accordingly, the defendant was not guilty of rape. Given the long-term nature of the relationships, if the defendant 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 defendant with a defence to the charge under section 20.¹¹

Dica's appeal against conviction was allowed on another ground, and the case was sent back for re-trial: in the retrial, he was again convicted.

- 6.14 Following *Dica*, then, the relevant question is not whether V consented to the act causing the infection.¹² Nor is it whether V consented to the infection itself. Rather, the test is whether V consented to the risk of infection.
- 6.15 In short, D will be guilty of the offence under section 20 if the following conditions are satisfied:

⁷ (1888) 22 QBD 23.

⁸ The choice between these two explanations is equivalent to the question about the role of consent in assault. Consent could be regarded as a defence, but the preferred view is that lack of consent is a condition for the act being an assault in the first place: *Smith and Hogan* 17.2.1, p 716.

⁹ *Wilson* [1984] AC 242, [1983] 3 All ER 448; *Ireland and Burstow* [1998] AC 147, [1997] 4 All ER 225.

¹⁰ [2004] EWCA Crim 1103, [2004] QB 1257. See also case comment by J Rogers, “Criminal Liability for the Transmission of HIV” (2005) 64(1) *Cambridge Law Journal* 20.

¹¹ Para 39 of judgment, Judge LJ.

¹² Both in *Dica* and in the later case of *B* [2006] EWCA Crim 2945, [2007] 1 WLR 1567, the court rejected the suggestion that V's being unaware of D's infected status invalidated her consent to the intercourse itself.

- (1) D in fact infected V with the disease;
- (2) D intended to cause some harm to V (whether or not that harm consists of the transmission of disease),¹³ or was reckless as to whether such harm would be the result of D's actions;
- (3) V did not consent to the risk of being infected; and
- (4) D did not honestly believe that V consented to that risk.

Recklessness

- 6.16 One unresolved question is whether, in order to be reckless about the risk of transmitting disease, D must know that he or she is infected, or whether it is sufficient to know that he or she may be.¹⁴ Logically it would seem that, even in the latter case, D is aware of a risk that V may contract an infection. However, so far all successful prosecutions¹⁵ have been on the basis that D knew of his or her own infection.
- 6.17 This does not always mean that D knew of the infection following a medical test. The CPS guidance to prosecutors¹⁶ points out that there may be cases in which D is found to have the necessary knowledge because he or she has deliberately closed his or her mind by not undergoing testing, despite an obvious indication that he or she is infected.
- 6.18 If liability extends to cases where D knows that he or she may be infected, this should be restricted to cases where D is aware of specific information about him or herself that indicates a high level of probability of infection: for example, where a previous partner of D has contracted the infection in circumstances that strongly indicate that D is the likely source though other possibilities have not been conclusively eliminated.¹⁷ It should not be sufficient that D belongs to a high risk group.
- 6.19 Recklessness requires not only that D was aware of the risk of harm but also that, in the circumstances as D knew or believed them to be, it was unreasonable to take that risk.¹⁸ As explained in the SCP,¹⁹ there are now treatments for HIV that have the effect of reducing the viral load to an undetectable level and making

¹³ For this point, see SCP para 6.31.

¹⁴ SCP para 6.24.

¹⁵ With the possible exception of *Adaye*, *The Times* 10 January 2004, where the defendant pleaded guilty.

¹⁶ "Intentional or Reckless Sexual Transmission of Infection"
http://www.cps.gov.uk/legal/h_to_k/intentional_or_reckless_sexual_transmission_of_infection_guidance/ (last visited 19 October 2015).

¹⁷ SCP para 6.38.

¹⁸ Para 2.14 above.

¹⁹ SCP para 6.43.

the risk of infecting another very low.²⁰ It is arguable that, where D is undergoing this treatment, it is not unreasonable for D to take this very low risk of infecting a partner, and the recklessness requirement is therefore not met.²¹

Consent

- 6.20 Similar questions arise about V's state of knowledge. In *Konzani*,²² on similar facts to *Dica*, the court held that, for D to avoid liability, V must give "informed consent". That is, V must be informed of D's status and give consent with that knowledge: it is not sufficient for V to know that, in general terms, unprotected sex is a risky activity.
- 6.21 We argue in the SCP that this does not necessarily mean that D has disclosed his or her status to V. V may be aware of the risk by other means such as noticing sores on D's genitals or being informed by third parties that D has been tested.²³
- 6.22 Again, there is no authority on whether there is "informed consent" if V knows that D may be infected, rather than that D is infected. As in the context of recklessness, if such knowledge is sufficient it should mean knowledge of specific facts about D that indicate a high level of probability.

Belief in consent

- 6.23 Finally, D is not guilty of the offence if he or she genuinely believed that V consented to the risk of infection. This belief need not be correct, or even reasonable. However, it is necessary that D should believe that V's consent to the risk of infection was informed, in the sense described in the last few paragraphs. It is not sufficient for D to believe that V consented to intercourse and to the general risks involved in unprotected sex. In such a case, D only "believed that V consented" because D did not know what the law means by consent.²⁴

THE DRAFT BILL

- 6.24 Clause 15 of the draft Bill defines injury as consisting of either "physical injury" or "mental injury". Both physical and mental injury are in turn defined as excluding "anything caused by disease", except for the purposes of the offence in clause 1, intentionally causing serious injury. The effect of this is that the unintentional but

²⁰ The risk is practically non-existent – a study involving 44,000 unprotected sex acts where one partner was HIV+ but with an undetectable viral load due to treatment came across not a single instance of transmission. See SCP Ch 6 fn 74; (2014) 22 *Topics in Antiviral Medicine* (e-1) 24-5; article accessible here: <https://iasusa.org/sites/default/files/tam/22-e1-4.pdf> (last visited 19 October 2015).

²¹ J Chalmers, *Legal Response to HIV and AIDS* (2008) p 146; D Hughes, "Condom use, viral load and the type of sexual activity as defences to the sexual transmission of HIV" [2013] *Journal of Criminal Law* 136; SCP para 6.25 and following.

²² [2005] EWCA Crim 706, [2005] 2 Cr App R 14.

²³ CPS guidance for prosecutors, above. We defend this view in SCP para 6.32 and following.

²⁴ SCP para 6.13.

reckless transmission of disease can never fall within any of the injury offences in the draft Bill.

- 6.25 In this respect, the draft Bill intentionally departed from the scheme of the previous drafts on which it was based.²⁵ The logic of those drafts was that a reformed statute should not distinguish between different means of causing injury. Rather than separate offences of causing injury by assault (section 47, and section 20 as formerly interpreted), by poisoning (section 23) and by explosives (section 28), there should be a graded set of offences based on causing injury by any means.
- 6.26 Accordingly, our 1993 report²⁶ argued that the transmission of disease was a means of causing injury like any other, and should be included in the new injury offences.²⁷ The report acknowledged that this would be a change to the law as it then existed but justified this change as being simply the removal of a technical bar to conviction.
- 6.27 Detailed discussions followed between the Home Office and the All Party Parliamentary Group on AIDS.²⁸ The Home Office took the view that it was not appropriate to extend the law in this way without comprehensive consideration of the public health policy aspects.²⁹ The 1998 draft Bill therefore included the definition in clause 15 as described, so as to preserve the effect of the law as it was then understood.
- 6.28 As pointed out in the SCP, the draft Bill does not in fact reproduce the effect of the 1861 Act as then understood.³⁰ Under the 1861 Act, there was no doubt that a disease, sexually transmitted or otherwise, is in principle a form of bodily harm. The only exclusion was the transmission of disease by a consensual act, and the reason for this depended on the circumstances of transmission rather than the type of harm.
- 6.29 This difference has a significant practical effect. Under the 1861 Act, as understood in 1998, the section 20 offence covered the transmission of disease by non-consensual means, such as an attack with a syringe or a sexual assault.³¹ These cases would not be included in the offences under clauses 2 and 3 of the draft Bill if that draft were enacted as it now stands.³²

²⁵ These are described in SCP Chapter 4.

²⁶ *Legislating the Criminal Code: Offences Against the Person and General Principles* (1993) Law Com No 218, paras 15.16 and 15.17.

²⁷ SCP para 6.60.

²⁸ M Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (2007) pp 21 to 27.

²⁹ Home Office CP, para 3.16.

³⁰ SCP para 6.64.

³¹ Para 6.9 above.

³² SCP paras 6.64, 6.68.

THE SCOPING CONSULTATION PAPER

6.30 In the SCP we asked the following questions:

33. We consider that future reform of offences against the person should take account of the ramifications of disease transmission. Do consultees agree?

34. We also consider that in such reform consideration should be given to:

- (1) whether disease should in principle fall within the definition of injury in any reforming statute that may be based on the draft Bill;
- (2) whether, if the transmission of sexual infections through consensual intercourse is to be excluded, this should be done by means of a specific exemption limited to that situation. This could be considered in a wider review; alternatively
- (3) whether the transmission of disease should remain within the offences as in existing law.

Do consultees agree?

35. If the transmission of disease is to be included in any future reform including offences of causing injury, it will be necessary to choose between the following possible rules about disclosure of the risk of infection, namely:

- (1) that D should be bound to disclose facts indicating a risk of infection only if the risk is significant; or
- (2) that D should be bound to disclose facts indicating a risk of infection in all circumstances; or
- (3) that whether D was justified in exposing V to that risk without disclosing it should be a question for the jury in each particular case.

Do consultees have any preference as between these possible rules?

36. We consider that reform of offences against the person should consider the extent to which transmission of minor infections would be excluded from the scope of the injury offences. Do consultees agree?

37. Do consultees consider that future reform should pursue the possibility of including specialised offences of transmission of infection, endangerment or non-disclosure?

38. Do consultees have observations on the use of ASBOs, SOPOs or other means of penalising non-disclosure?

- 6.31 Question 33 is introductory. If the law of offences against the person is to be reformed on the basis of the draft Bill, consideration of the effect on disease transmission becomes unavoidable, if only because the position under the draft Bill is different from that under the 1861 Act. The question was not directly asking whether the law of disease transmission, as it now stands, requires reform, though some respondents understood it in this sense.
- 6.32 The most important of the questions is 34, which considers whether reckless transmission of disease should in principle be criminal, and if so what offence it should fall under. In more detail:
- (1) In principle, should the reckless transmission of disease through consensual sexual intercourse be an offence?
 - (2) If so, should this be achieved by:
 - (a) including it in the scope of the general offence under clause 2 (recklessly causing serious injury), or
 - (b) creating a targeted offence for the purpose?
 - (3) If not, should this be achieved by:
 - (a) the scheme of the draft Bill (that is, excluding disease from the definition of injury), or
 - (b) a targeted exemption for consensual intercourse?
- 6.33 Question 35 is concerned with the relevance of non-disclosure of risk to recklessness. Recklessness requires, not only that D was aware of a risk, but also that it was unreasonable to take it.³³
- (1) As explained above,³⁴ there is an argument that, if D is HIV positive but the viral load is so low as to make the risk of transmission very small, it cannot be unreasonable to take that risk. As the question of recklessness is logically prior to the question of consent, this (on this argument) should not be affected by whether V was informed of the risk.
 - (2) On the other side, it could be argued that, however low the risk, it is for V rather than D to decide whether to take it. Putting it another way, it may be reasonable for two people together to decide to take a risk, when it would not be reasonable for one person to impose that risk on the other. Accordingly (on this argument) for D to engage in sex with V without

³³ Para 2.14 above.

³⁴ Para 6.19 above.

disclosing the fact that D is HIV positive is in itself unreasonable and therefore reckless.³⁵

In question 35 we were inviting views on this debate. We were not considering a proposal to introduce an independent legal duty of disclosure, though some consultees appear to have understood question 35 as implying this.

6.34 Question 36 concerns the transmission of infections too minor to qualify as “serious injury”.³⁶ Due to the nature of the infection, it is not “grievous bodily harm” and there is therefore no offence under section 18 or 20. There is no authority on whether it would be an offence under section 47. Liability would turn on whether there is an underlying assault or battery. This could occur, for example, if D spat at V, thereby infecting V with some ailment (whether or not D was aware of the risk of doing so). The Divisional Court in *DPP v K* accepted that it is possible to commit a battery by indirect means.³⁷ In the scheme of the draft Bill, whether or not there is an assault or battery the transmission of such infections would fall within the clause 3 offence, of intentionally or recklessly causing injury, were it not for the exclusion of “anything caused by disease” in clause 15.

6.35 The questions arising here are:

- (1) should non-serious infections be excluded from the injury offences?
- (2) if so, should this be done by:
 - (a) a specific exclusion to that effect; or
 - (b) relying on the presumption that it is not unreasonable to take the risk of passing those minor infections that may be expected in the course of normal social life?

6.36 Question 37 is included for completeness. Question 34 already raises the possibility that the transmission of disease should be addressed by a dedicated offence, rather than by a general offence of causing injury. Question 37 raises the possibility of additional offences of putting a person in danger of infection and

³⁵ This counter-argument does not apply if the risk of transmission is literally non-existent. But this does not affect the present question, as by definition we are discussing a case where the infection has in fact passed. There may also be special cases where it is reasonable to take the risk without disclosing it, for example if D apprehends violence from V should D disclose D’s condition or refuse sex without giving a reason; other examples could be where D fears eviction or social ostracism should D’s condition become a matter of public knowledge.

³⁶ This is subject to the qualification that what may be a minor infection if contracted by a healthy adult may be much more serious if contracted by a child or someone with a compromised immune system. In *Bollom* [2003] EWCA Crim 2846, [2004] 2 Cr App R 6 the Court of Appeal accepted that, when assessing the severity of injury inflicted upon V, it is permissible to take account of his or her characteristics.

³⁷ [1990] 1 All ER 331.

failing to disclose that one is infected, such as exist in some other countries.³⁸ These offences could be committed even if no infection actually passed.

- 6.37 Question 38 was suggested by a blog entry by Professor Matthew Weait, criticising the way in which certain judicial orders (at that time ASBOs³⁹ or SOPOs⁴⁰) were used in connection with disease transmission.⁴¹ According to him, the orders too often require the defendant to disclose his or her condition to potential sexual partners, when a more appropriate order would have been to seek the correct treatment. One effect of the orders, as so used, is to create liability for non-disclosure even when no infection passes, and thus create a non-disclosure offence by the back door. We asked consultees whether they agreed with these criticisms. It should be noted that both ASBOs and SOPOs have since been superseded by other types of order.⁴²

RESPONSES TO CONSULTATION

Question 33: should reform take account of the ramifications of disease transmission?

- 6.38 Twenty-five consultees answered “yes” to this question. Another eight did not answer this question specifically, but discussed the issue of disease transmission in a way which showed that they agreed that any reform must take account of it. Two answered “no”, and 17 did not address the question at all.
- 6.39 Some important views from those who answered “yes” are as follows.

- (1) The Sussex academics said:

We agree that this is an area that is not well dealt with within the current law. In particular, neither *Konzani*⁴³ nor *Dica*⁴⁴ are clear as to whether a defendant who thinks that he or she may have a disease and does not disclose this to his or her sexual partner will be guilty of an offence if said partner then contracts a disease. Clarification is therefore needed as to not only the acceptability of consenting to the risks of contracting a disease but also the acceptability of the risks taken by disease carriers who are yet to know for certain whether they are in fact carriers.

³⁸ Para 6.5 above.

³⁹ Under Crime and Disorder Act 1998, s 1: now superseded by Anti-social Behaviour, Crime and Policing Act 2014, s 1.

⁴⁰ Sexual Offences Act 2003, s 104: now superseded by Anti-social Behaviour, Crime and Policing Act 2014, Sch 5.

⁴¹ Blog entry at <http://weait.typepad.com/blog/2011/08/> (last visited 19 October 2015).

⁴² Anti-Social Behaviour, Crime and Policing Act 2014.

⁴³ [2005] EWCA Crim 706.

⁴⁴ [2004] EWCA Crim 1103.

- (2) The Northumbria academics argued that *Golding*,⁴⁵ concerning the transmission of genital herpes, had “blurred the parameters of so-called ‘biological GBH’” and that *McNally*,⁴⁶ concerning non-disclosure of gender, had re-opened the possibility that non-disclosure of infection could invalidate consent for the purposes of sexual offences. “For these reasons we suggest that it is essential that the law relating to transmissible diseases is clarified.”

6.40 The two who answered “no”, namely the Criminal Bar Association and Sally Ramage, were opposed to the suggested reform of offences against the person in principle. For this reason, the question of whether such reform should take account of disease transmission did not arise. The Criminal Bar Association further expressed the view that there were no gaps in the present law of disease transmission which required reform.

Question 34: should disease transmission fall within the injury offences?

6.41 The pattern of responses was briefly as follows.

- (1) Nine consultees considered that the reckless transmission of disease should be decriminalised.
- (2) Seven considered that it should fall within the general injury offences, as in the present law.
- (3) Nine considered that there should be a specific offence of disease transmission.
- (4) Another eight discussed the question without expressing a firm conclusion.

Opinions in favour of decriminalisation

6.42 The consultees who favoured decriminalising reckless disease transmission were Edwin Bernard of the HIV Justice Network, BHIVA, the Herpes Viruses Association, the Terrence Higgins Trust, the group of academics from Southampton University, Professor Leslie Francis, Matthew Phillips, the Hepatitis C Trust and the National AIDS Trust.

- (1) In the SCP⁴⁷ we distinguished the question of the effect of criminal liability on public health from the broader ethical question of whether public health considerations should always be paramount. In answer to this, Edwin Bernard said:

It is evident to me – and UNAIDS and most other informed, clear thinking experts on this issue – that if the criminal law in this area does not consider public health above and beyond

⁴⁵ [2014] EWCA Crim 889.

⁴⁶ [2013] EWCA Crim 1051.

⁴⁷ SCP paras 6.46, 6.69.

any other consideration (i.e. deterrence, punishment, ethical norm creation) then it does more harm than good.

- (2) The National AIDS Trust acknowledged our argument⁴⁸ that the law in England and Wales was less punitive than that in many other countries and came fairly near to the recommendations of UNAIDS, though they thought that this was overstated. They pointed out that the UNAIDS recommendation about recklessness was very much a second best, and argued that it would be better to comply with the primary UNAIDS recommendation, which was to confine liability to intentional transmission.
- (3) Professor Leslie Francis put the arguments, already mentioned in the SCP, that criminalisation of reckless transmission would discourage testing⁴⁹ and create “false senses of being protected in partners to whom such disclosures are not made”.⁵⁰

6.43 The SCP also raised the subsidiary question of how decriminalisation should be effected: by excluding disease from the definition of injury (as in the draft Bill) or by a specific exemption.

- (1) As mentioned above, in the SCP we argued that excluding disease from the definition of injury would have the undesired result of decriminalising the transmission of disease even by physical or sexual assault. In answer to this, Edwin Bernard pointed out that, in such cases, D could be prosecuted for the assault or sexual assault as such, and the fact of disease transmission would be an aggravating factor in sentencing.
- (2) BHIVA expressed concern about the criminalisation of other means of transmission of disease:

To include disease within the definition of injury regardless of whether transmission was intentional or reckless would leave considerable scope for prosecutions related to reckless transmission of a wide range of diseases e.g. TB. Such an approach would be unpractical and could cause considerable harm to public health. Excluding transmission of sexual infections through consensual intercourse is similarly problematic as non-sexual transmission of disease including HIV e.g. by sharing injecting equipment or breast feeding could still be prosecuted.

The Terrence Higgins Trust expressed similar views.

⁴⁸ SCP para 6.58.

⁴⁹ SCP para 6.48.

⁵⁰ SCP para 6.50. See also L Francis and J Francis, “HIV Treatment as Prevention: Not an Argument for Continuing Criminalization of HIV Transmission”, *International Journal of Law in Context* (2013) 9(4): 520 - 534.

- (3) The Herpes Viruses Association suggested that the transmission of infections should be excluded unless the infection is transmitted during a non-consensual physical assault.
- (4) The National AIDS Trust argued that the case for decriminalisation extended equally to sexual activity other than intercourse and the sharing of infected needles. An exemption specifically for transmission by consensual sexual intercourse would not be wide enough.
- (5) On the other side of the question, the Southampton University academics considered that:

... in order to achieve vital public health aims, such as encouraging honesty and openness between infected persons and sexual health clinicians and encouraging all people to take responsibility for combating the spread of infection, there is a clear and important rationale for exempting harms caused by consensual sexual activity specifically.

- (6) Leslie Francis agreed with our argument that excluding all reckless transmission of disease is too broad, but argued that an exemption for consensual sexual intercourse alone is too narrow and that more study is needed.

Opinions in favour of including reckless transmission in the general injury offences

6.44 The consultees who favoured using the general injury offences (in practice the offence under clause 2, of recklessly causing serious injury) were the Crown Prosecution Service, Jonathan Rogers, John Spencer, Ian Dennis, the University of Sussex academics group and the Law Society. Findlay Stark appears to take the same view by implication, as he discusses how to exempt minor infections, which presupposes that major infections should continue to be caught.

- (1) The Sussex academics group, in answer to the question whether there should be a specific offence, answered:

No. We are concerned that any specific offences will carry the risk of stigmatising certain groups (eg, the debate is often focused on HIV alone), and we do not believe the wrong is sufficiently different to require separate treatment. Rather, **we believe that the core offences should be defined to include the transmission of disease**, with certain exclusions to prevent liability in reasonable cases (eg, spreading the common cold when going to work).⁵¹

⁵¹ Emphasis ours.

- (2) Jonathan Rogers said that “we would need a very good reason to treat diseases separately from injuries” and that “we should not need specific offences”.
- (3) John Spencer referred to his published work on the topic, and to Udo Schüklenk’s critical review of Matthew Weait’s book.⁵² Spencer also advanced the following further arguments:
 - (a) The argument that there should be no liability for reckless transmission because V should have equal responsibility for the risk is unsound. At most, V could be guilty of contributory negligence, which is not a defence in criminal law.
 - (b) Nor does he agree with the argument that criminal liability discourages testing. Given the availability of anti-retroviral treatment, the incentive for being tested is overwhelming: it could make the difference between a virtually normal life and an unpleasant early death.

6.45 The Association of Police and Crime Commissioners did not express a decided preference, but agreed that “the relative simplicity of using the ‘injury’ to additionally cover disease does have some appeal and may lead to more flexibility in enabling the specific facts of the case and harm suffered to be taken proportionately into account”.

Opinions in favour of a specific offence of disease transmission

6.46 The consultees who favoured a specific offence of disease transmission were the Council of HM Circuit Judges, Samantha Ryan, Margot Brazier and Catherine Stanton (joint response), D Hughes of Teesside University, the Northumbria academics group, Cath Crosby, Richard Wood and Kiron Reid. The British Transport Police said that “disease should have its own definition”.

- (1) The Council of HM Circuit Judges said:

We think that if the law on offences against the person is going to be reformed, the opportunity should be taken to consider the creation of specific offences involving the intentional or reckless transmission of disease. We think that this is preferable to trying to incorporate it within either the existing or any new definition of injury.

- (2) Richard Wood said:

The transmission of disease through consensual sex seems to me to be a special case that merits its own offence in its own section, rather than trying to fit it into the general

⁵² U Schüklenk, “Should we use the criminal law to punish HIV transmission?” [2008] *Journal of Criminal Law in Context* 277, reviewing M Weait, *Intimacy and Responsibility* (2008).

offences against the person, which are concerned mainly (if not exclusively) with violence.

- (3) The Northumbria academics group said:

In order to accommodate the reality of sexual transmission of HIV within a justifiable approach to criminal liability the issue of justifiability of risk-taking needs to be fully explored. This requires detailed consideration of several factors such as the seriousness of the risk, likelihood of the risk occurring; social utility of the conduct involved, ability to use precautions, need if any for disclosure of infected status and victim awareness of the risk and willingness to accept it. Whilst the Scoping Paper appears to operate on the basis that the issue of justifiability of the risk is something that is part of our understanding of recklessness it is submitted that it is simply not possible for an offence of causing serious injury to properly take account of the various considerations listed above. It is therefore necessary to introduce a specific offence of intentionally or (possibly) recklessly transmitting a sexual infection which will have to take account of these factors either in terms of offence definition or by way of recognised defences. For example when drafting the new offence it would have to be decided whether the use of condoms afforded a 'safe-sex' defence or operated to negate recklessness.

- (4) D Hughes of Teesside University suggested a draft for a new offence of transmitting HIV or intentionally exposing a person to it by unprotected intercourse.
- (5) Margot Brazier and Catherine Stanton suggested that there should be an offence as part of the public health legislation rather than in any statute governing offences against the person.

However, if such an approach is not deemed appropriate, we agree that in principle, disease should fall within the definition of injury in any reforming statute.

Question 35: should D always be required to disclose the presence of infection?

6.47 As explained, the question here is whether, when the risk of transmission is low, it can ever be reasonable for D to expose V to that risk without disclosing it. In the SCP we offered three options:

- (1) a rule that D need only disclose the infection if the risk of transmission is significant;
- (2) a rule that D must always disclose the infection;
- (3) leaving it as a jury question in each individual case.

This question is closely related to the previous question, of whether to have a specialised offence of disease transmission or leave it as a form of the general offence of causing injury. Options (1) and (2) naturally belong to a specialised offence with its own rules. In a general offence of causing injury, option (3) would be the obvious rule to apply.

Option (1): no obligation to disclose unless risk significant

6.48 Option (1) was favoured by BHIVA, the Terrence Higgins Trust, the Southampton academics group, the National AIDS Trust and James Chalmers.

(1) BHIVA thought that:

... any future reforms must ensure that there is clear guidance not to prosecute when the risk of transmission is considered very small. It should not be left to individual juries to decide whether the level of risk in a specific case was acceptable or not as this will lead to considerable inconsistency and injustice.

They also said that there were other circumstances in which non-disclosure is justified, even in the absence of protective measures.

(2) The Terrence Higgins Trust did not accept that there was any need to choose between the three suggested rules. They believed that, in existing law:

Currently, if someone is not on treatment but a condom is used during sex then there should be no need to disclose their status. If reasonable precautions are taken either through treatment and an undetectable viral load or condom use there is no need to disclose their status ...

and that this position should not change. In effect, this is the same as option (1).

(3) The Southampton academics group advocated a specific rule that:

... evidence of 'recklessness' may be rebutted by any one of the following: that a condom was used, that D was on anti-retroviral treatment, that D had an undetectable viral load, that D was undergoing testing or showing signs of willingness to co-operate with sexual health advice, that D disclosed his infection to V. We would emphasize that this is a non-exhaustive list.

(4) The National AIDS Trust believed that the question of recklessness should be framed without reference to disclosure, and that if the law is unclear it should be stated unequivocally that one is reckless only when taking a significant/unjustified risk.

(5) James Chalmers argued that, if D can only be sure of avoiding liability by disclosure, then the incentive to use a condom would be diminished and

this could undermine public health policy. In particular, an option other than (1) could produce anomalous results if it were also decided that it was sufficient that D knew that he or she might be infected, rather than that he or she was infected.

Option (2): disclosure always required

6.49 Option (2) was favoured by Jonathan Rogers, Ian Dennis, the British Transport Police, Cath Crosby and Rebecca Williams.

(1) Jonathan Rogers said:

I think it has [to] be (2). Awkward though it may be for the would-be lover, it can be justified in policy terms; and by contrast, the awkwardness of the other options for the lawyers and jurors hardly bears thinking about. Eg, in option (1) how is the word “significant” to be defined, and would one assess the “risk” differently if D were having sex with the same endangered person several times? Suppose that scientific opinion changes over time over whether repeated exposure increases the risk in individual encounters – could that really affect D’s assumed duty to disclose?

(2) Ian Dennis said:

It seems to me that if D knows that he is or may be infected with a disease that is capable of causing serious injury he is reckless if he does not disclose to a sexual partner that there is a risk of transmission unless appropriate precautions are taken. I would justify this position on the policy ground that sexual partners who are unaware of the risk are potential victims who deserve protection by the law, and as a matter of moral principle that honesty in sexual relationships should be promoted.

(3) The British Transport Police argued:

... putting a person at risk by having knowledge of a disease and not disclosing it would negate consent based on the full facts known. (If (A) knew that (B) had a sexual infection, would (A) have consented?)

(4) Cath Crosby said:

If the transmission of disease is to be included in any reforms, D should be bound to disclose facts indicating a risk of infection in all circumstances; only here is there true consent.

(5) Rebecca Williams said:

I would be very much against taking the option in 35(3) which seems very likely to lead to *Adomako* and *Ghosh* style

problems of uncertainty and unpredictable moral judgment.
My preference would be for option 35(2).

Option (3): question of fact in each case

6.50 Option (3) was favoured by the CPS, the London Criminal Courts Solicitors' Association, David Hughes, the Sussex academics group, Law Society, Findlay Stark, the Council of HM Circuit Judges, Richard Wood, D Hughes of Teesside University, Margot Brazier and Catherine Stanton, Samantha Ryan (but only with detailed guidance, and a requirement to distinguish non-disclosure from active deception) and Matthew Phillips.

(1) The CPS believed that there were so many complicated policy factors that there should be a wider review. Pending such review, the effect of non-disclosure on recklessness should remain a jury question.

(2) The Law Society said:

We would prefer option (3), because it leaves the degree of risk necessary to make out the offence as non-prescriptive and as future-proof as possible, bearing in mind its applicability to other types of possible infectious disease, and their means of infection.

(3) Findlay Stark thought that options (1) and (3) were indistinguishable, as a jury would tend to treat the questions of substantial risk and justification together.

(4) The Council of HM Circuit Judges said:

We think that it is too broad to impose a duty in all circumstances. If the risk is significant how can the jury assess this? We think that the question of the significance of the risk is likely to encourage a proliferation of experts on each side without any appreciable benefit to the interests of justice. We favour the third solution of leaving it to the jury to decide whether the defendant was justified in exposing the victim to that risk in the particular circumstances. This is most likely to achieve practical justice.

(5) D Hughes of Teesside University argued that in some cases individuals would find it difficult to inform prospective partners of their status. In his draft offence⁵³ both disclosure of risk and low viral load are defences.

(6) Margot Brazier and Catherine Stanton argued that there were many other circumstances, apart from a low level of risk, that might make it reasonable not to disclose one's status to a potential partner, and similar considerations might apply to other means of transmitting infection, such

⁵³ Para 6.46(4) above.

as going to work while one is ill. It would therefore be wrong to enact a blanket rule.

- (7) Samantha Ryan, while favouring option (3), thought that the law would have to set out when the use of precautions or the level of risk meant that disclosure was not necessary. A distinction should be drawn between non-disclosure and active deception.

- 6.51 Antony Duff suggested a fourth option. Simple non-disclosure of a low level risk should not be sufficient to make D's action unreasonable enough to amount to recklessness. But if D is asked about his or her status and lies, D should be liable.

Question 36: should transmission of minor infections be excluded and if so how?

- 6.52 Fourteen respondents considered that minor infections should be specifically excluded from the offences (we exclude those who simply agreed that the extent to which these infections are to be excluded should be considered). Two considered that the test of reasonableness, as found in the current law or the scheme of the draft Bill, was sufficient for this purpose. One believed that there was no reason not to include the transmission of minor infections in the offences. Four were undecided or had other views.

Opinions in favour of a specific exclusion

- 6.53 Among those favouring a specific exclusion for minor infections were the Hepatitis C Trust, the Herpes Viruses Association Terrence Higgins Trust, the Southampton academics group, Matthew Phillips and the National AIDS Trust. Their basic position was that the reckless transmission of even serious infections should not be an offence,⁵⁴ but if it had to be, then at least minor infections should be excluded.
- 6.54 Those who favoured an exemption for minor infections, while retaining an offence covering the reckless transmission of serious infections, were the London Criminal Courts Solicitors' Association, Jonathan Rogers, the Sussex academics group, the Law Society, Findlay Stark, Richard Wood, Ian Dennis and D Hughes of Teesside University. These argued that such a rule was desirable for the sake of certainty, and that it was socially unacceptable that inadvertently transmitting minor infections should be criminal. They did not address the possibility of holding that, even without a specific exemption, such transmission is not "reckless" because it may reasonably be expected in the course of normal life.

Opinions against a specific exclusion

- 6.55 The Criminal Bar Association argued that "sentencing judges are already very capable of determining threshold questions such as this, on a case-by-case basis, assisted by counsel for both parties". Similarly the Council of HM Circuit Judges considered it was important that minor infections should be excluded, but

that the correct result would be achieved by the reasonableness test. Neither of them addressed the argument in the SCP⁵⁵ that, on this scheme, the intentional transmission of non-serious infections would be caught.

- 6.56 Antony Duff considered that the transmission of non-serious infections should in principle fall within the criminal law. On his argument, non-serious injuries are caught, and there is no logical reason for non-serious infections to be treated any differently, given that the only justification for criminalising any infection is that it is a form of injury.

Other opinions

- 6.57 It was pointed out that “minor” should not be used to mean everything that is not “serious”; there is an intermediate category, which needs to be addressed.⁵⁶ Further, an infection may be minor as a matter of classification, but have a serious effect on a particular individual.⁵⁷

Question 37: offences of endangerment or non-disclosure

Endangerment

- 6.58 The question of endangerment arises in two forms.
- (1) In our SCP, we canvassed the possibility of a general offence of putting a person at risk of serious harm by whatever means.⁵⁸ If such an offence is introduced, it will be necessary to decide whether disease counts as serious harm for this purpose.
 - (2) In current law, and on the scheme of the draft Bill as it stands, there is no general endangerment offence, but only specific offences of creating danger by means of poisons or explosives or on the railway. The question then becomes whether sexual activity by infected people is a comparably dangerous activity, justifying another specific endangerment offence.
- 6.59 The responses concerning the merits of a general endangerment offence are described in Chapter 7.⁵⁹
- 6.60 Of those respondents who favoured considering a general endangerment offence:
- (1) David Hughes thought that it was worth considering whether to have a general endangerment offence, but this should apply across the board:

⁵⁴ In the case of the Herpes Viruses Trust, unless the infection is transmitted in the course of a non-consensual physical assault.

⁵⁵ SCP para 6.87.

⁵⁶ David Hughes.

⁵⁷ Margot Brazier and Catherine Stanton.

⁵⁸ SCP questions 5 and 6 and para 3.60 and following; see also para 7.26 and following, below.

⁵⁹ Para 7.19 and following, below.

there should not be offences confined to sexually transmitted diseases or infections. A similar view was expressed by Jonathan Rogers.

- (2) The Sussex academics favoured considering a general endangerment offence, and were against any offence specific to sexually transmitted infections or HIV. But they did not state whether creating a risk of infection should fall within the general endangerment offence. The same was true of the Law Society.
- (3) Findlay Stark did not come to a decided conclusion on a general endangerment offence, but thought that there was an argument for treating endangerment through transmission of infection as a distinct wrong.
- (4) Ian Dennis thought there was a good case for a general endangerment offence, but that it should not extend to a case where D, knowing he or she is or may be infected, has sex with an unaware partner but no disease is transmitted.

6.61 Of those respondents who did not favour a general endangerment offence or did not answer questions 5 and 6:

- (1) D Hughes of Teesside University thought that “there should be a specific statutory provision that criminalises transmission *and exposure*”.
- (2) Some other respondents, replying to question 37 in general terms, thought it worth considering “specialised offences of transmission of infection, endangerment or non-disclosure”, but did not discuss the merits of endangerment offences as against the other two possibilities. These were the Bar Council, the London Criminal Courts Solicitors’ Association, the Justices’ Clerks Society, the British Transport Police, Richard Wood and Cath Crosby.
- (3) The Council of HM Circuit Judges thought the possibility of specific offences worth investigating, but that it required further research. Again they did not distinguish endangerment offences from the other two possibilities.
- (4) Margot Brazier and Catherine Stanton thought that:

Whereas offences of endangerment and non-disclosure might not be appropriate in the context of sexually transmissible disease, such offences might be considered appropriate in the context of other transmissible disease eg where an individual with a notifiable disease knowingly acts in a way which puts members of the public in danger.
- (5) The following consultees, while favouring criminal liability when disease is actually transmitted, were against an offence of endangerment through infection: Samantha Ryan, the Crown Prosecution Service and the Criminal Bar Association.

- (6) The following consultees were against criminal liability for either endangerment or actual transmission: Edwin Bernard, the Hepatitis C Trust, BHIVA, the Herpes Viruses Association, the Terrence Higgins Trust, the Southampton academics group, Matthew Phillips and the National AIDS Trust.

Non-disclosure

- 6.62 The main discussion of non-disclosure was under question 35; we describe the responses to this above.⁶⁰ This question, however, related purely to failure to disclose as a possible ingredient of recklessness: it did not concern an independent duty of disclosure, still less a criminal offence of failing to disclose one's status. However, some consultees chose to discuss disclosure in general in their response to that question.
- 6.63 The following consultees answered question 37 in general terms, and thought it worth considering "specialised offences of transmission of infection, endangerment or non-disclosure", without any separate discussion of non-disclosure: the Bar Council, the London Criminal Courts Solicitors' Association, the Justices' Clerks Society, the British Transport Police, Richard Wood and Cath Crosby. David Hughes agreed that future reform of offences against the person should *consider* such offences, but tended to agree with the arguments against them put in the SCP.⁶¹ The Council of HM Circuit Judges thought that the question was worth investigating but required further research.
- 6.64 The following consultees were against an offence of non-disclosure in principle: the Sussex academics group, the Crown Prosecution Service, the Criminal Bar Association, Edwin Bernard, the Hepatitis C Trust, BHIVA, the Herpes Viruses Association, the Terrence Higgins Trust, the Southampton academics group, Matthew Phillips and the National AIDS Trust.
- 6.65 Jonathan Rogers opposed a specific offence of non-disclosure, but thought that the general offences of causing serious injury and poisoning could contain subsections about non-disclosure. The Law Society said that, if such offences are considered, the concerns raised in the SCP "should be borne very much in mind".

Question 38: use of ASBOs and SOPOs

- 6.66 As these orders are now abolished,⁶² the question is no longer strictly relevant. However, some of the same considerations could apply to the orders which have been introduced in their place, such as injunctions against anti-social behaviour,⁶³ criminal behaviour orders⁶⁴ and sexual harm prevention orders.⁶⁵

⁶⁰ Para 6.47 and following, above.

⁶¹ SCP paras 6.102 and 6.103.

⁶² Anti-social Behaviour, Crime and Policing Act 2014, Sch 11.

⁶³ Anti-social Behaviour, Crime and Policing Act 2014, s 1.

⁶⁴ Anti-social Behaviour, Crime and Policing Act 2014, s 22.

⁶⁵ Sexual Offences Act 2003, s 103A, inserted by Anti-social Behaviour, Crime and Policing Act 2014, Sch 5 para 2.

6.67 Some sample views are as follows.

(1) The CPS said:

ASBOs, SOPOs or other means of penalising non-disclosure have been imposed as a response to the particular behaviour of individuals and not as a general tool for use in promoting safe activity. It is in that sense that their effectiveness ought to be considered.

(2) The London Criminal Courts Solicitors' Association said:

Our observations are that caution should be exercised when using court orders to penalise non-disclosure. The suggestion that orders can be used to enforce treatment is also dangerous as unlike SOPO's and ASBO's the court is ordering D to do a positive act as opposed to being prohibited from doing something. The most similar correlation is with drug and alcohol orders but these are only imposed after the offender has committed a criminal offence not because D has failed to act (non-disclosure).

(3) The Law Society said that they saw some merit in the use of SOPOs as a legal vehicle to prevent the transmission of disease by non-disclosure.

(4) The Council of HM Circuit Judges said:

These are always useful measures as an adjunct to general sentencing powers but we have doubts about their efficacy on their own in this particular context. Such orders would serve to keep the defendant away from the victim of the actual offence in the same way as a restraining order for harassment offences. On the other hand it would be difficult to enforce a prohibition on otherwise lawful consensual sexual activity with others.

(5) Richard Wood said that these orders were used far too much already, and should be discouraged.

(6) The Northumbria academics groups said:

We are of the opinion that it is not appropriate to use Sexual Offences Prevention Orders as a means of penalising non-disclosure. The hybrid nature of these orders, civil in nature but with a criminal sanction for their breach is highly objectionable. The issue of non-disclosure should be dealt with in the actual provisions of the specialised offence of transmission. It should be clear when disclosure is required and when it is not.

Samantha Ryan made the same point in her response.

- (7) Margot Brazier and Catherine Stanton, in their joint response, said:

We consider that ASBOS and SOPOS are not appropriate for use in this context. Particularly in relation to sexually transmitted diseases, we consider that such orders have the scope to increase stigma. We consider it more appropriate to have a clear criminal law which sets out individuals' responsibilities and the circumstances in which defendants may be prosecuted if they do not meet these.

- (8) More than one respondent⁶⁶ made the point that SOPOs were never an appropriate remedy, even in existing law, as the transmission of disease is not a sexual offence,⁶⁷ and several more opposed the use of both types of orders.⁶⁸
- (9) Leslie Francis made the point that the orders could not be used to require a person to seek treatment; at most, they could restrain a person from engaging in sexual activity without first seeking treatment.

DISCUSSION

The case for decriminalisation

6.68 As stated in the SCP,⁶⁹ the reasons advanced for decriminalising the unintentional transmission of infections are briefly as follows:

- (1) an offence of reckless transmission encourages people to choose not to be tested, so as not to have the knowledge necessary for recklessness;
- (2) it discourages openness with (and by) medical professionals, because these may have to give evidence against their patients;
- (3) it encourages people to think that disclosure of HIV status is always a duty, and that if a potential partner has not mentioned his or her status then he or she is not infected;
- (4) because of the difficulty of proving transmission, the existence of the offence leads to very wide-ranging and intrusive investigations affecting a great many people, out of all proportion to the small number who will be found deserving of prosecution; and

⁶⁶ Edwin Bernard, Hepatitis C Trust, BHIVA, Terrence Higgins Trust, National AIDS Trust

⁶⁷ A SOPO could be made when dealing with a defendant for either a sexual or a non-sexual offence, but must be in order to prevent "serious sexual harm", which is defined by Sexual Offences Act 2003, s 106 as harm caused by a sexual offence listed in Sexual Offences Act 2003, Sch 3. However, the Court of Appeal in *Marangwanda* [2009] EWCA Crim 60 assumed that the transmission of gonorrhoea "is clearly serious sexual harm as defined in section 106(3) of the Act", even though the defendant had pleaded guilty to an offence under s 20 and the basis of the plea was that no sexual activity had taken place.

⁶⁸ Samantha Ryan, Herpes Viruses Association, Matthew Phillips.

⁶⁹ SCP para 6.78.

- (5) the whole topic of HIV/AIDS is affected by an atmosphere of fear (often irrationally so), and there is still an undesirable stigma against people infected with HIV; the existence of an offence reinforces both these phenomena.
- 6.69 The Law Commission does not have the organisational resources or expertise to assess all these arguments, and this is one reason for suggesting a wider review.⁷⁰ There may be some force in the arguments in paragraphs (2), (4) and (5), though further empirical evidence is needed. We have some disagreements with arguments (1) and (3).

Argument (1): discouraging testing

- 6.70 It seems unlikely that anyone, while conscious of a significant risk that he or she is indeed infected with HIV or a serious disease, would deliberately refrain from being tested in order to avoid satisfying the recklessness requirement of the offence under section 20. Such an attitude would combine exceptional legal knowledge with exceptional indifference to one's own health and safety.⁷¹ As argued by John Spencer,⁷² for most people the prospect of criminal conviction would probably weigh less than the prospect of avoiding a painful early death.
- 6.71 It is also strongly arguable that, if D did refrain from being tested for this reason, this in itself would amount to recklessness.⁷³ This is another reason for holding that, in existing law, it is sufficient if D knows that he or she may be (rather than is) infected, and for reproducing this position in any proposed new law.
- 6.72 Discussion with the National AIDS Trust and other advocates of decriminalisation shows that they do not envisage that a potential defendant would consciously go through this process of thought. The argument is, rather, that the very fact that transmission of disease can ever be criminal is a further factor making people reluctant to face the possibility that they may be infected. In other words, it is not a case of a conscious weighing up of the risk of conviction against the risk of disease, but of an instinctive reluctance to allow awareness of risk to surface at all.
- 6.73 There has been some research on the effects of criminal law on the behaviour of those at risk of HIV.⁷⁴ Most of this, however, was carried out in the United States and concerns the effect of offences that are specific to HIV; it cannot be reliably extrapolated to the different culture and legal system of the UK, where the

⁷⁰ Para 6.97 below.

⁷¹ It is also inconsistent. One's eyes cannot be simultaneously closed to the risk that one is infected and open to the risk of being prosecuted for passing on that infection.

⁷² Para 6.44(3)(b) above.

⁷³ Para 6.16 and following, above.

⁷⁴ S Burris and others, "Do Criminal Laws Influence HIV Risk Behavior? An Empirical Trial" (2007) 39 *Arizona State Law Journal* 467; Lazzarini and others, "Evaluating the Impact of Criminal Laws on HIV Risk Behavior" (2002) 30 *Journal of Law, Medicine and Ethics* 239; Sun Goo Lee, "Criminal Law and HIV Testing: Empirical Analysis of How At-Risk Individuals Respond to the Law" (2014) 14 *Yale Journal of Health Policy Law and Ethics* 194.

transmission of disease is covered by the general offence of inflicting grievous bodily harm under section 20. Also, the research was generally aimed at finding out whether criminalisation has a deterrent effect on risky sexual behaviour rather than whether it discourages individuals from being tested.

- 6.74 One important study has been carried out in the UK.⁷⁵ This describes the effect of the criminal law on the sexual behaviour of men in the sample, including whether they take greater precautions, disclose their HIV status to the partners or seek greater anonymity, but it does not discuss their willingness to be tested.
- 6.75 The most recent study, by Lee,⁷⁶ suggests that reluctance to be tested is not correlated with the existence of criminal offences but may be correlated with how often those offences are reported. He also mentions “many other empirical studies that have found that HIV testing policies do not affect at-risk individuals’ HIV testing decisions as much as critics of the policies assume”. On the effect of reporting, he says that:

Frequent media coverage of criminalization may have alerted at-risk individuals that positive HIV test results could be used against them to prove criminal liability for knowingly exposing others to HIV.

Alternatively, the adoption of a criminal statute and the robust media reporting of HIV exposure’s criminalization could have deepened social hostility against HIV-positive individuals. HIV-specific statutes could have singled out the HIV-positive population from the rest of society and stigmatize this population as a dangerous group requiring special attention and social regulation ... The prevalence of this negative sentiment could have deterred at-risk individuals from utilizing public health services, including HIV testing.

He emphasises that, while this is highly likely based on what is already known about HIV, these theories are not evidence-based and more research needs to be done.

Argument (3): excessive reliance on disclosure

- 6.76 The argument here is that, if transmission of disease is a crime, people are encouraged to think that the entire burden of preventing it rests on those who are already infected.⁷⁷ Accordingly, V will assume that, if D has not mentioned his or her status, D is not infected. This means that V will have no incentive either to ask D about his or her status or to take precautions.

⁷⁵ C Dodds, A Bourne and M Weait, “Responses to criminal prosecutions for HIV transmission among gay men with HIV in England and Wales” (2009) 17(34) *Reproductive Health Matters* 135. The same survey is described in more detail at A Bourne and others, “Relative safety II: risk and unprotected anal intercourse among gay men with diagnosed HIV” (2009), at <http://sigmaresearch.org.uk/reports/item/report2009d> (last visited 19 October 2015).

⁷⁶ Fn 74 above.

⁷⁷ SCP para 6.50.

6.77 We believe that this argument contains some fallacies.

- (1) First, it assumes a belief on the part of V that the offence in question is such a strong deterrent that D, as a matter of rational self-interest, will always avoid committing it, and that the criminal law is a complete protection making all other precautions unnecessary. As the spread of HIV and sexually transmissible diseases is a matter of public notoriety, V would have to be naïve in the extreme to hold this belief. We do not believe that the average person confuses the need for protective measures with the need for the criminal law: people rely on the existence of the offence of burglary to discourage break-ins and punish them when they occur, but still lock the door to their homes.
- (2) Secondly, even assuming that V trusts D to be law-abiding, V would only expect D to disclose an infection, or to take precautions against it, if D is aware of it: if D transmits an infection without being aware of it, there is no offence. However, the risk of transmission of an unknown infection is just as great: in the case of HIV, the highest risk exists in the early stages of the infection when D is almost certainly unaware of it.

6.78 The basis of the argument is the apparently unexceptionable proposition that it is for both parties, and not only the party carrying the infection, to take responsibility for issues of sexual health.⁷⁸ However, this is not as simple as it sounds.

- (1) It confuses two senses of the word “responsibility”. When one says that V should be responsible for his or her sexual health, what is meant is that V would be well advised to take the appropriate measures as a matter of practical prudence: there is no question of moral duty or blame.⁷⁹ But when one speaks of D’s responsibility for infecting V, it is duty to others, and consequent moral blame, that is meant. The two kinds of responsibility are not of the same kind and cannot be set against each other: one would not say that, because V left the door open, D ought not to be criminally liable for burgling the house. As argued by John Spencer,⁸⁰ contributory negligence is no defence in criminal law.
- (2) As argued in the SCP,⁸¹ decriminalising the transmission of disease does not distribute the responsibility evenly between the parties: in practice it imposes the entire burden on the party not previously infected (V). This is unfair. If two people are confronting the same danger, and one of them is aware of it and the other is not, the primary blame for failing to avoid it

⁷⁸ M Weait, “Criminal Law and the Sexual Transmission of HIV: *R v Dica*” (2005) 68 *Modern Law Review* 121, 128-9.

⁷⁹ In the same way, in civil law one speaks of a claimant’s “duty” to mitigate damages. This only means that the claimant cannot recover a loss which he or she could have avoided. It is not a genuine duty owed to the defendant, to be set against the claimant’s right to damages.

⁸⁰ Para 6.44(3)(a) above.

⁸¹ SCP para 6.51(1) and (2).

must be that of the person who was aware. This must be all the more true when the danger is only to the party who was not aware.

6.79 The use of V's "responsibility" as an argument for exempting D from all liability appears to us to suffer from two flaws.

- (1) First, if the primary duty of avoiding infection rested on V, that is to say the party with less knowledge of the risk, the burden imposed would be a heavy one. To be "responsible", V would first have to ask D whether he or she is aware of being infected. If D answers no, V would then have to ask whether this means that D is not aware of any infection but may have one for all D knows, or that D is sure of not being infected, and if so on what D's certainty is based. Depending on the answers, V would then have to ask D to take the necessary precautions and ensure that D had indeed taken them.
- (2) Secondly and more importantly, it seems that, on this argument, it makes no difference however responsibly V behaves. That is, even if V asks all the right questions and D lies in answer to all of them, takes no precautions and infects V, D would still not be liable for any harm caused (except, perhaps, in civil law).

Other arguments about decriminalisation

6.80 The arguments in favour of decriminalisation are largely concerned with the effect of the criminal law on public health. We argued in the SCP that the preservation of public health is not the primary purpose of the criminal law⁸² and that the question of what legal framework would be best for public health must be distinguished from the broader ethical question of whether public health considerations must always prevail over all others.⁸³

6.81 Edwin Bernard, in his response to consultation, argued that most informed opinion held that public health considerations should indeed be decisive.⁸⁴ We are not prepared to accept that public health should always be the primary reason for creating or maintaining criminal offences in this area. However we do agree that, if an existing or proposed offence is shown to be strongly deleterious to public health, it should not be maintained or created even if it seems desirable on other grounds.

6.82 The scheme of the draft Bill is that, in principle, the main offences cover the intentional or reckless causing of physical and mental harm to another, without distinguishing different forms of harm or different means of causing it.⁸⁵ At first sight, disease is a form of physical harm and should be treated like any other. Exempting the transmission of disease would be a step away from that understanding towards a scheme in which different means of causing harm were

⁸² SCP paras 6.46 and 6.77.

⁸³ SCP paras 6.46 and 6.69.

⁸⁴ Para 6.42(1) above.

⁸⁵ Paras 4.9(1) and 4.13 and following, above.

represented by separate offences with different conditions of liability; making such an exception would have to be supported by very good reasons. In short, as explained in the SCP,⁸⁶ the question is not “shall we create an offence of recklessly transmitting disease?” but “here is an offence of recklessly causing injury:⁸⁷ should causing disease be any different?”

- 6.83 The argument about public health arises in two different forms. One question is whether the criminal law has any part to play in improving public health, for example by encouraging safe practices or disclosure of risk. It is quite another question whether the existence of criminal liability for transmission is so deleterious to public health that an exception should be made to the general principle of liability for harm.
- 6.84 On the first question, the study by Dodds and others⁸⁸ suggests that the effect of criminal law on the sexual behaviour of gay and bisexual men is broadly neutral. In the case of approximately half the sample, it had no effect at all. In the other half of the sample, the number reporting that they were motivated to take precautions and disclose their status was approximately counter-balanced by those reporting that they tried to avoid conviction by maintaining anonymity.
- 6.85 We do not know whether the same pattern is to be found in the behaviour of other at-risk groups. For the purposes of argument we are prepared to accept that the criminalisation of disease transmission does not have significant public health benefits, for example by deterring irresponsible sexual behaviour or encouraging disclosure, or that if there are such benefits they are offset by the adverse effects discussed above.
- 6.86 On the second question, a principled case has been made for decriminalisation, and this proposal is supported by a copious legal and medical academic literature.⁸⁹ It is also recommended by UNAIDS.⁹⁰ However, the main empirical evidence in support of this proposal is drawn from jurisdictions where there are HIV-specific offences, or offences of endangerment or non-disclosure where no infection need actually pass. There is also a considerable body of academic

⁸⁶ SCP para 6.73.

⁸⁷ In existing law, and in the draft Bill.

⁸⁸ Fn 75 above. See also C Dodd and others, “Sexually charged: the views of gay and bisexual men on criminal prosecutions for sexual HIV transmission” (2009) <http://sigmaresearch.org.uk/reports/item/report2009a> (last visited 19 October 2015).

⁸⁹ M Weait, *Intimacy and Responsibility; the Criminalisation of HIV Transmission* (2007); R Jürgens and others, “Ten reasons to oppose the criminalization of HIV exposure or transmission” (2009) 17 *Reproductive Health Matters* 163; M Weait, “Knowledge, autonomy and consent: *R v Konzani*” [2005] *Criminal Law Review* 763; D Gurnham, “What role should criminal justice play in the fight against STIs?” (2012) 88 *Sexually Transmitted Infections* 4. The SCP also cites articles criticising the HIV-specific offences in other countries.

⁹⁰ “Ending overly broad criminalization of HIV non-disclosure, exposure and transmission: Critical scientific, medical and legal considerations”, at http://www.unaids.org/en/media/unaids/contentassets/documents/document/2013/05/2013_0530_Guidance_Ending_Criminalisation.pdf (last visited 19 October 2015).

opinion against the proposal,⁹¹ and it was not supported by a majority of consultees.

- 6.87 In the SCP,⁹² we argued that the existing law in England and Wales is already fairly close to the UNAIDS recommendations: there are no offences specific to HIV, and no offences of endangerment or non-disclosure, and the definition of “recklessness” is fairly close to what many other countries recognise as a form of intent. In response to this, the National AIDS Trust argued that this argument was overstated and that, from the point of view of UNAIDS, allowing any form of recklessness was only a second best.⁹³
- 6.88 We see the force of this last point. However, we should also point out that, in one respect, the scheme of the draft Bill (even without the exclusion of anything caused by disease) comes nearer to the UNAIDS recommendations than the present law.
- (1) UNAIDS recommends that, if recklessness is included at all, it should be confined to a “conscious disregard” in relation to acts that represent, on the basis of best available scientific and medical evidence, a significant risk of HIV transmission.⁹⁴ In other words, one must be reckless specifically about the risk of transmitting the disease.
 - (2) In existing law, recklessness means that one is aware of a risk and nevertheless takes it, and this is close to conscious disregard. However, it is sufficient to be reckless about any physical harm whatever: so if one foresees causing minor injuries unrelated to disease, but in fact transmits HIV, the requirement of recklessness is satisfied.⁹⁵
 - (3) In the draft Bill, the offence under clause 2 (recklessly causing serious injury) requires recklessness as to the risk of *serious* harm. This does not fully comply with the recommendation that D should specifically foresee a risk of HIV transmission, but it comes closer to it than the existing law.

⁹¹ S Ryan, “Reckless transmission of HIV: knowledge and culpability” [2006] *Criminal Law Review* 981; G Mawhinney, “To be ill or to kill: the criminality of contagion” [2013] 77(3) *Journal of Criminal Law* 202; J R Spencer QC, “Liability for reckless infection — part 1” (2004) 154 *New Law Journal* 384 and “Liability for reckless infection — part 2” (2004) 154 *New Law Journal* 448; A du Bois-Pedain, “HIV and responsible sexual behaviour” [2005] 64(3) *Cambridge Law Journal* 540; H Law, “Offences against the person: reckless transmission of HIV” [2005] 69(5) *Journal of Criminal Law* 389; S Ramage, “The criminal offence of causing infection of HIV virus” (2008) 187 *Criminal Lawyer* 2; L Cherkassky, “Being informed: the complexities of knowledge, deception and consent when transmitting HIV” (2010) 74(3) *Journal of Criminal Law* 242; U Schüklenk, “Should we use the criminal law to punish HIV transmission?” [2008] *Journal of Criminal Law in Context* 277.

⁹² SCP para 6.58.

⁹³ Para 6.42(2) above.

⁹⁴ UNAIDS document, para 38.

⁹⁵ SCP para 6.31.

How decriminalisation should be effected

- 6.89 A subsidiary question is, supposing the case for decriminalisation to be accepted in principle, how widely it should be applied and how it should be effected?
- 6.90 In the SCP we offered two options. The first was to follow the scheme contained in the draft Bill, in which the definition of injury excludes anything caused by disease except in the offence of intentionally causing serious harm. The second was to introduce a specific exemption for infections transmitted by consensual sexual intercourse.

Defining injury to exclude anything caused by disease

- 6.91 We argued against the exclusion in the draft Bill on the ground that, under that scheme, an infection transmitted by a sexual or other assault (for example an attack with a syringe) would not give rise to liability. In answer to that, it was argued that, in such a case, D would be prosecuted for the underlying assault, and the fact of infection would be an aggravating factor to be taken into account in sentencing.⁹⁶
- 6.92 This may be sufficient where the assault amounts to a rape or assault by penetration⁹⁷ or a sexual assault.⁹⁸ However, the position is more problematic in the case of a non-sexual assault. To be guilty of the offence under clause 2 or 3 of the draft Bill, D must both cause and foresee an injury other than the disease, and in the case of clause 2 the injury foreseen (and the injury caused) must be serious. If D only foresees causing, or only succeeds in causing, a minor scratch but transmits the disease, the only offence committed is battery, for which the maximum sentence is six months.⁹⁹
- 6.93 Similar problems arise in connection with the poisoning offence in clause 11 of the draft Bill. The exclusion of disease from the definition of injury, in clause 15, applies to *all* offences under the Bill except that in clause 1, and therefore applies to the offence in clause 11. Accordingly, recklessly administering a serum or other substance containing the germs of a major disease will not fall within the offence unless the substance is also noxious in some other way. Similar considerations could apply to the administration of a mind-altering drug. It would be odd for this to be criminalised when the state likely to be produced by the drug is a temporary mental malfunction but not when it amounts to a psychosis or other recognised disease of the mind.¹⁰⁰ This is a major omission from the scope of clause 11.

⁹⁶ Para 6.43(1) above.

⁹⁷ Sexual Offences Act 2003, ss 1 and 2; maximum sentence life imprisonment.

⁹⁸ Sexual Offences Act 2003, s 3: maximum sentence 10 years if charged on indictment; 6 months and/or a fine if charged in a magistrates' court.

⁹⁹ Or under our proposals, aggravated assault with a maximum sentence of 12 months, if the scratch was actually caused. (If the exclusion in the draft Bill were maintained, disease would not count as injury for the purpose of this offence either.)

¹⁰⁰ The term "disease" is in any case ambiguous: it is not clear whether it means an illness caused by infection or any illness.

- 6.94 It would be possible to provide that the exclusion in clause 15 does not apply for the purposes of either clause 1 or clause 11. This however would largely undo the desired decriminalisation, as it would be possible to argue that the bodily fluids of an infected person are a “substance capable of causing injury”. From the point of view of the decriminalisation agenda, this would be worse than the existing law: clause 11, being an endangerment offence, could be used even when the infection does not pass.

Exemption for consensual sexual intercourse

- 6.95 The other possibility suggested in the SCP was that the offences under clauses 2 and 3 of the draft Bill should be subject to a specific exception for the reckless transmission of disease through consensual sexual intercourse. In the responses to consultation this was widely criticised as too narrow. Disease may be transmitted through sexual activities other than intercourse, through breast-feeding and through the sharing of needles. It was argued that the whole discussion has been too focused on sexual infections, and HIV in particular: there may be examples of equally innocent consensual activities that risk transmitting entirely different diseases such as tuberculosis.
- 6.96 An intermediate possibility was suggested by the Herpes Viruses Association.¹⁰¹ In their suggested scheme, the transmission of an infection would be criminal only where it took place during a non-consensual physical assault. This would in effect reinstate the law as understood in *Clarence*.¹⁰²

Conclusion on decriminalisation

- 6.97 We give, above,¹⁰³ our reasons for disagreeing with two of the arguments that have been advanced in support of decriminalisation. Those do not amount to reasons for rejecting decriminalisation as such: as stated above, there are other arguments which appear to us to have some possible force.¹⁰⁴ However, there is not the strength of evidence and unanimity of opinion that would justify us in adopting the decriminalisation proposal without further investigation. If it is to be pursued, we would need to conduct a wider review than this scoping exercise permits, involving the Department of Health and the relevant medical bodies as well as including a detailed survey of the law in different countries and its effect on public health and attitudes. In particular, it would be necessary to give full consideration to non-sexual transmission of diseases in general.
- 6.98 As shown above,¹⁰⁵ there are also technical difficulties about how decriminalisation should be effected. As stated by more than one consultee, it would be necessary to carry out more study and compile a detailed list of situations which it is desired to criminalise or exempt from liability. This is a

¹⁰¹ Para 6.43(3) above.

¹⁰² (1888) 22 QBD 23.

¹⁰³ Para 6.70 and following, above.

¹⁰⁴ Para 6.69 above.

¹⁰⁵ Para 6.89 and following, above.

further reason for leaving the question of decriminalisation to a wider review and not expressing a conclusion as part of the present project.

- 6.99 The overall case for reform of the law of offences against the person, as discussed in previous chapters, is overwhelmingly supported by consultees and appears to us to be both powerful and of high priority. We therefore believe strongly that reform of the offences in general should not be delayed while such a review takes place. A revised statute on offences against the person, as recommended in the present project, should preserve the existing legal position (namely that transmission of disease is included in the general injury offences) pending any wider review.

Specific offence of transmitting infection, or included in general injury offences?

- 6.100 This is the converse of the question discussed in the last section. If the case for decriminalisation is not accepted, and it is desired to retain criminal liability for the reckless transmission of infection, what form should this take? Should there be specific offences of transmitting infection, or should it continue to be included in general offences of causing injury?

Arguments for a specific offence

- 6.101 The existing law on the transmission of disease has been widely criticised.¹⁰⁶ Leaving aside the arguments in favour of decriminalisation, as described above, the two main criticisms are:
- (1) there are uncertainties in the law, in particular in relation to recklessness and consent;
 - (2) the law does not give sufficient guidance to juries in deciding on questions of fact which depend on highly technical medical and scientific questions. For example, it is not clear whether the use of a condom is a defence.

For these reasons, it is argued that a specific offence, devised in the light of the latest scientific knowledge about the infections in question, would be preferable to attempting to apply the broad general definitions in the general injury offences.

UNCERTAINTIES IN THE LAW

- 6.102 The first uncertainty is that already discussed: is D reckless only if D knows that D is infected, or also if D knows that D may be? On this there is a wide variety of views:

¹⁰⁶ J Elfer, "The Sorry State of English Transmission Law: Does the Criminal Law Sufficiently Address the Problems Presented by Reckless Transmission of Serious Diseases and is Criminalisation the Correct Approach?" *The Student Journal of Law* <http://www.sjol.co.uk/issue-3/transmission-diseases> (last visited 19 October 2015); M Davies, "R v Dica: lessons in practising unsafe sex" [2004] *Journal of Criminal Law* 498; Samantha Ryan, "Reckless transmission of HIV: knowledge and culpability" [2006] *Criminal Law Review* 981. See also the responses summarised in para 6.46 above.

- (1) Matthew Weait¹⁰⁷ believes that the existing law only covers cases where D knows of the infection, and that this is the desirable position (if reckless transmission must be criminalised at all);
- (2) John Spencer¹⁰⁸ believes that the law also covers cases where D knows that there may be an infection, again desirably so; and
- (3) Samantha Ryan¹⁰⁹ believes that the law at present covers cases where D knows that there may be an infection, but ought only to cover cases where D knows for certain that there is one.

6.103 The second uncertainty concerns consent. *Konzani*¹¹⁰ lays down that consent must be “informed”: one cannot consent to a risk if one does not know that it exists. However there are still some loose ends.

- (1) It is not clear whether D can escape liability on the ground of V’s consent if V knows of D’s condition but D does not know that V knows.¹¹¹
- (2) It is not clear whether there is liability if:
 - (a) V strongly suspects that D is infected (but does not know for sure) and willingly consents to take the risk of whether D is infected or not;
 - (b) V knows nothing whatever about D’s condition but willingly accepts the risk whatever it might be; or
 - (c) without any deception on the part of D, V believes there is a low level of risk and accepts it, but in fact there is a high level of risk.

UNCERTAINTIES ON QUESTIONS OF FACT

6.104 Recklessness means not only that D knowingly takes a risk but also that doing so was unjustified in the circumstances as D knows or believes them to be.¹¹² Factors contributing to whether a risk is justified must include the level of harm risked, the probability of its occurrence and the social value of the activity in question.

¹⁰⁷ M Weait, “Criminal Law and the Sexual Transmission of HIV: *R v Dica*” (2005) 68 *Modern Law Review* 121.

¹⁰⁸ J Spencer, “Liability for reckless infection — part 2” (2004) 154 *New Law Journal* 448.

¹⁰⁹ S Ryan, “Reckless transmission of HIV: knowledge and culpability” [2006] *Criminal Law Review* 981.

¹¹⁰ [2005] 2 Cr App R 14.

¹¹¹ *Konzani* at para [44] suggests that consent is a defence in these circumstances, and we defend this view in SCP paras 6.32 to 6.34. But this has been doubted by S Cooper and A Reed, “Informed consent and the transmission of sexual diseases: *Dadson* revived” [2007] 71(5) *Journal of Criminal Law* 461.

¹¹² Para 2.14 above.

- 6.105 The freedom to pursue sexual relationships is one of the social values that can justify some degree of risk-taking. For this reason the Court of Appeal in *Dica* rejected the view of the trial judge that, following the principles in *Brown*,¹¹³ the risk of transmission of HIV is not one to which V can legally consent. However, this leaves quite open the question of whether there are low levels of risk which D is justified in taking, even without the informed consent of V, for example:
- (1) if D is undergoing treatment which reduces the viral load to a point where the risk of infecting V is minimal;¹¹⁴
 - (2) if D has a significant viral load, or is infected with a sexually transmitted infection other than HIV, but is using a condom.
- 6.106 According to the argument now being considered, these questions largely depend on technical information about levels of risk which a jury cannot be expected to be aware of or to understand, and it would be preferable for the law to contain detailed prescriptive rules on the basis of the current state of scientific knowledge.¹¹⁵
- 6.107 One other argument in favour of a specific offence could be drawn from the mental element of the offence. At present, to be liable for the transmission of disease, it is sufficient for D to foresee a risk of some physical harm; under the scheme of the draft Bill, D must foresee a risk of serious injury, not necessarily in the form of disease.¹¹⁶ If there is a specific offence of transmitting disease, D will have to foresee a risk of transmitting disease. This comes much closer to the UNAIDS recommendation that recklessness should mean a conscious disregard of the risk of HIV transmission.

Arguments against a specific offence

- 6.108 The first argument against a specific offence is one of principle. The main justification for criminalising the transmission of disease is that disease is a form of injury and the law ought not to distinguish between injuries caused by different means. A specific offence of disease transmission would be inconsistent with that justification and a step towards a scheme of separate and specialised injury offences.¹¹⁷
- 6.109 There is also a more practical difficulty, namely the scope of the new offence. Would it cover the transmission of any disease by any means? Or only the transmission of disease through sexual intercourse? Or only the transmission of HIV? The argument about the need to reflect technical knowledge would suggest

¹¹³ [1994] 1 AC 212. In this case it was held that, unless there is some justifying social value in the activity in question (for example sport), V cannot legally consent to the risk of significant injury, and that the deliberate infliction of injury in the course of sadomasochistic practices does not fall within the category of justified socially valuable activities.

¹¹⁴ Para 6.19 above. This is the subject of Question 35.

¹¹⁵ An example of a draft offence containing such prescriptive rules is given in the response of D Hughes of Teesside University, para 6.46(4) above.

¹¹⁶ Para 6.88 above.

¹¹⁷ SCP para 6.103; para 4.25 and following, above.

that there should be a separate offence for each disease. This would mean an unacceptable level of fragmentation in the criminal law. Also, the evidence about the adverse effects of criminalising disease transmission is far stronger in the case of HIV-specific offences. In particular, such offences are far more likely than a general offence of causing injury to contribute to a stigma on people who have that infection.¹¹⁸

- 6.110 Thirdly, we question whether the difficulties found in marginal cases, such as whether there should be disclosure of low levels of risk, are really dependent on technical knowledge. How high the risk of transmission is, when D is undergoing a given form of treatment or using a condom, is a question of medical evidence. But once that risk is assessed, whether D is justified in exposing V to it without informing V is a purely moral decision, on which medical experts as such have no more expertise than anyone else.
- 6.111 The same is true of any other prescriptive rules which it may be desired to include in a new offence. In making such rules, the legislature will essentially be trying to decide what levels and types of risk are justifiable in different types of case. This is exactly the same decision that the jury is trying to make in individual cases under the present law. It seems preferable to leave this decision to the jury, who will have full information about the facts of the particular case, including any medical evidence that may be relevant.
- 6.112 In short, we do not accept that the question of what risks are justifiable is an objective legal or medical decision to be codified in rules set out in advance. Such a view implies that every situation can be foreseen and provided for, that Parliament, on advice from the experts, always knows best and that the views of the jury, and still more of V, on what risks are acceptable can be left out of account.
- 6.113 A further reason for not laying down prescriptive rules about risk disclosure is that there are many factors of a non-medical kind that may be regarded by a jury as excusing a decision not to disclose the fact of infection, or even a decision to lie about it. For example, D may fear violent reprisals from V or exclusion from the house or community if the fact of infection becomes known.¹¹⁹ That does not mean that non-disclosure and lying are justified in all circumstances.
- 6.114 Finally, the state of medical knowledge changes. It would be undesirable to have continually to amend the legislation to take account of it.¹²⁰

Conclusion on a specific offence

- 6.115 The weight of argument appears to us to be against creating a specific offence of disease transmission and in favour of leaving disease transmission within the scope of the core injury offences. In this scheme, questions such as whether low-

¹¹⁸ SCP para 6.105.

¹¹⁹ SCP para 6.94.

¹²⁰ SCP para 6.102.

level risks need to be disclosed would not be specifically legislated for and would remain questions of fact for the jury.

- 6.116 Should it be decided to create one or more specific offences, contrary to our view as expressed above, the terms of any such offence or offences, and any rules about the conditions of liability, will need full investigation in the light of the best available medical knowledge, listing all the types of cases likely to arise. This proposal, like that for decriminalisation, would need a wider review, which we would need to undertake in consultation with the Department of Health and the relevant medical bodies.
- 6.117 For similar reasons we do not recommend offences of endangerment by disease,¹²¹ or of failure to disclose infection. As argued in the SCP,¹²² the usual justification for an endangerment offence is that the activity in question (such as handling drugs and explosives) is exceptionally hazardous by nature and that it is D's choice whether to engage in it: it is therefore important to prevent and punish irresponsible behaviour even before any actual harm is caused. It would be undesirable and offensive to regard sexual activity, albeit involving people at risk of infection, as falling within this category of hazardous activities. It was on similar reasoning that the court in *Dica*¹²³ rejected the view of the trial judge that, following the principles in *Brown*,¹²⁴ V cannot legally consent to a risk of infection.
- 6.118 In conclusion:
- (1) Pending a wider review, we do not recommend the creation of a specific offence of transmitting disease, either in general or in relation to any particular disease.
 - (2) In any event, we do not recommend the creation of offences of endangerment by disease or failure to disclose infection.

Exclusion of non-serious illnesses

- 6.119 One issue does need to be resolved as part of the present project. If the transmission of disease is to be covered by the general injury offences, should this extend to diseases not amounting to a serious injury? If not, how should these be excluded? This was the subject of question 36.
- 6.120 At present it is unclear whether there can be liability under section 47 for the transmission of disease through consensual sexual intercourse, because of the requirement for there to be an assault or a battery. In *Golding*,¹²⁵ concerning the transmission of genital herpes through consensual intercourse, D pleaded guilty to a charge of inflicting grievous bodily harm, but in terms which suggested that he had the section 47 offence in mind. After further medical evidence it was

¹²¹ For a discussion of endangerment offences in general, see Chapter 7 below.

¹²² SCP para 6.106.

¹²³ [2004] EWCA Crim 1103, [2004] QB 1257. See SCP para 6.11(3).

¹²⁴ [1994] 1 AC 212.

¹²⁵ [2014] EWCA Crim 889, [2014] *Criminal Law Review* 686.

decided that the facts could not amount to the section 47 offence, as there was no assault, but that there was a valid plea of guilty to the offence under section 20. It follows that, had the herpes not been found to constitute “grievous bodily harm”, D would not have been guilty of any offence. If the mode of transmission had been different, however, there could have been liability under section 47. Examples would be if the infection was transmitted through non-consensual sexual activity, or through a spitting amounting to battery.

6.121 Rebecca Williams, in her response to consultation, describes one possible way in which there might be liability under section 47, even in the context of consensual intercourse. Her argument may be expressed as follows.

- (1) According to *Dica*, non-disclosure of, or deception about, the fact that D is infected means that there is no consent to the risk of transmission of infection, but this does not affect consent to the act of intercourse so as to turn it into a rape. On the same reasoning, it will not normally affect consent to any touching, sexual or not, whereby the disease was transmitted, so as to turn it into a battery.
- (2) However, in the cases of *Assange v Sweden*,¹²⁶ *R (F) v DPP*¹²⁷ and *McNally*¹²⁸ it was held that, in certain circumstances, D’s deliberate deception of or breach of a promise to V concerning a factor which D knows to be crucial to V’s consent to intercourse can have the effect of invalidating that consent and making D guilty of rape, assault by penetration or sexual assault.¹²⁹
- (3) There *could* therefore be cases of touching, sexual or otherwise, where V makes it clear that V’s consent to being touched is conditional on D being free of infection and D deliberately deceives V into giving that consent. In such a case, the consent could be treated as invalid, thus turning the touching into a battery, and the offence under section 47 would be committed.

6.122 This argument only concerns cases of deception, where V explicitly makes consent conditional on the fact that D is not infected. It will not apply, and Rebecca Williams did not argue that it does apply, in the more usual case where D and V do not discuss the issue of infection and V appears to consent unconditionally.

¹²⁶ [2011] EWHC 2849 (Admin).

¹²⁷ [2013] EWHC 945 (Admin); [2014] QB 581.

¹²⁸ [2013] EWCA Crim 1051.

¹²⁹ Another kind of deception that can invalidate consent to sexual activity is deception as to purpose: Sexual Offences Act 2003, s 76. This is narrowly construed: *Jheeta* [2007] EWCA Crim 1699; *B* [2013] EWCA Crim 823. For discussion, see K Laird, “Rapist or Rogue? Deception, Consent and the Sexual Offences Act 2003” [2014] *Criminal Law Review* 492.

6.123 Even within those limits, we are not certain that the argument is correct. It could be argued that the decisions in *Assange* and *F*¹³⁰ depended on the broader and more flexible approach to lack of consent found in sections 74 and following of the Sexual Offences Act 2003. In *F*, for example, Lord Judge CJ stated that the issue of consent in the context of section 74 ought to be approached in a “broad commonsense way”. For the purposes of the offences of assault and battery, and therefore of the offence under section 47, consent has its meaning at common law: deception only vitiates consent if it concerns the nature of the act performed or the identity of the person performing it.¹³¹ Infection with HIV or disease does not fall within either category. It is evident that in relation to what forms of deception are capable of vitiating consent, there is now a divergence of approach between the common law of consent and consent as it is found in section 74 of the Sexual Offences Act 2003.¹³²

What illnesses are at present excluded?

6.124 In the SCP, we referred for convenience to “minor illnesses”, and took as the typical case the person who spreads infection by going to work with a common cold. The responses to consultation pointed out two inaccuracies in this phrase.

(1) It is wrong to use “minor” to mean everything that is not “serious”. In normal parlance there are many infections that are more than minor but less than serious.¹³³

(2) Also, the phrase suggests a classification of diseases, as if a given disease is either always serious or always minor. In fact people have very different susceptibilities, and a disease that most people would regard as minor (or rather, as non-serious) may do serious harm to particular individuals in particular circumstances.¹³⁴

6.125 We accept both these points. In *Golding*, for example, the main reason for the decision was that a jury would have been entitled to find that genital herpes had a devastating effect on a particular individual, rather than that herpes is “a serious disease” and therefore always constitutes grievous bodily harm.

6.126 The present law may be stated more accurately by saying that, except perhaps in the special case referred to by Rebecca Williams, the intentional or reckless transmission of disease through consensual sexual intercourse or other consensual touching is not criminal unless it causes grievous bodily harm to the individual affected.

¹³⁰ But probably not that in *McNally*, where the deception concerned the gender of D, and therefore arguably concerned the nature of the act performed.

¹³¹ *Smith and Hogan*, p 722, under heading “Consent procured by fraud”.

¹³² In *Richardson* [1999] QB 444, decided before the enactment of the Sexual Offences Act 2003, the Court of Appeal stated that the rules which determine whether consent has been vitiated should not be dependent upon whether the case is one involving an offence against the person or a sexual offence.

¹³³ David Hughes.

¹³⁴ Margot Brazier and Catherine Stanton.

The position in the draft Bill

- 6.127 In the draft Bill in its 1998 form, except for the purposes of clause 1 (intentionally causing serious injury) “injury” excludes anything caused by disease. Disease transmission therefore does not fall within the offence under clause 3, of intentionally or recklessly causing injury.
- 6.128 This exclusion is not present in earlier versions of the draft Bill, for example that attached to our report in 1993.¹³⁵ In that earlier scheme, the transmission of infection can in principle amount to any of the three main injury offences, including that under clause 3.
- 6.129 In the draft Bill, the offence corresponding to assault and battery is subject to the following defence:¹³⁶

(2) No such offence is committed if the force or impact, not being intended or likely to cause injury, is in the circumstances such as is generally acceptable in the ordinary conduct of daily life and the defendant does not know or believe that it is in fact unacceptable to the other person.

There is no corresponding defence in clause 3, which creates the offence of intentionally or recklessly causing injury; and even in assault and battery, the defence is not available if injury is intended or likely to be caused.

- 6.130 Therefore, it appears at first sight that, if the exclusion for “anything caused by disease” were removed from the draft Bill, infecting others with a cold or other non-serious infection could indeed fall within that offence. This result could be avoided in practice by holding that the risk was a reasonable one to take in the circumstances and that D was therefore not reckless.
- 6.131 The aggravated assault offence, as recommended in Chapter 5 above,¹³⁷ will require an assault or battery like the existing offence under section 47. Accordingly, cases of transmission of disease will not normally fall within this offence.

How to exclude non-serious disease

- 6.132 All but one of the consultees who answered question 36 agreed in principle that the transmission of non-serious illnesses such as the common cold should be excluded from the offences, and a strong majority thought that this should be done by an explicit statutory exclusion.
- 6.133 There would be several possible ways of drafting such an exclusion.

(1) Option 1: there could be a modified version of clause 15 of the 1998 draft Bill, providing that “injury”, for the purposes of all the offences in the Bill,

¹³⁵ Legislating the Criminal Code: Offences Against the Person and General Principles (1993) Law Com No 218. See para 6.24 and following, above.

¹³⁶ Draft Bill, clause 4(2).

¹³⁷ Para 5.68 above.

does not include anything caused by disease unless the injury is a serious one.

- (2) Option 2: either clause 3 or clause 15 could provide that injury does not include anything caused by disease, for the purpose of clause 3 only.
- (3) Option 3: clause 3 could contain a provision similar to clause 4(2), to the effect that no offence is committed if the risk taken is such as to be generally acceptable in the ordinary conduct of daily life.

6.134 The first two options could give rise to problems where serious injury is foreseen but less serious injury is caused, or vice versa.

Example 12: D takes her young son, who is infected with rubella, to a children's party. She is conscious that other children may catch the disease but is prepared for this to happen. Unknown to D, there is a pregnant woman (V) present; the child is born with severe defects and V contracts a serious psychiatric illness.

Example 13: D, who has genital herpes, has sexual intercourse with V. D knows that V may contract the disease and that it may be a serious one. In fact V is robust and the disease, while causing inconvenience, does not amount to "serious harm".

6.135 The way in which these cases are treated would depend on which of the three options is chosen.

- (1) In option 1, in cases of disease any injury that is not serious would be disregarded from the point of view of both the external element and the fault element. Therefore, unless disease amounting to *serious* injury is both foreseen and occurs, no offence is committed. In effect, the transmission of disease could fall within the offences in clause 1 and clause 2 but not clause 3, and in both the examples described no offence is committed. (There would be an exception if D caused a disease amounting to serious injury, while foreseeing an injury other than disease: this case would fall within clause 3.)

Another result of option 1 is that the exclusion would apply equally for the purposes of the offence of administering substances capable of causing injury.¹³⁸ That is, the offence would not be committed if D administered a substance only capable of causing disease that did not amount to serious injury, for example by injecting V with the serum for a mild infection.

- (2) In option 2, cases of disease transmission would be excluded from the offence in clause 3, even if D did foresee an injury other than disease; so again, both the examples mentioned would be excluded from liability. On the other hand, the offence of administering substances capable of

¹³⁸ Draft Bill, cl 11.

causing injury would be committed whether the disease capable of being caused does or does not amount to serious injury.

- (3) In option 3, it would be a jury question whether the risk taken is generally acceptable in the ordinary conduct of daily life.
- 6.136 The problem with options 1 and 2 is that they exclude disease not amounting to serious injury from the basic ingredients of the offences. Therefore, following the correspondence principle, foresight of such disease must equally be excluded from the fault element. Defences can be devised more flexibly, and can depend on either the facts, D's state of mind or both. If there is to be a specific exclusion of disease not amounting to serious injury, it would be preferable to word it as a defence, rather than to make the seriousness of the effects of the disease an ingredient of the offence.
- 6.137 In other words, we would not wish to lay down a hard and fast rule in either of our examples to the effect that D is always, or never, guilty of the offence under clause 3. The question should be whether the known risk of harm was sufficient to make D's conduct reprehensible enough to justify criminal liability. Option 3 is designed to secure this result.
- 6.138 However, we do not believe that a defence in the form of option 3 would make any practical difference to the law. A defence of this kind would generally only apply to the reckless transmission of infection, as the intentional transmission of infection will not (except in fairly specific circumstances¹³⁹) be "generally acceptable in the ordinary conduct of life". The definition of recklessness requires that it was unreasonable to take the risk, in the circumstances as D knows or believes them to be. This in itself is sufficient to exclude cases where the risk is generally acceptable in the ordinary conduct of life.
- 6.139 We therefore advise that there should be no specific provision to exclude the transmission of infections that do not amount to serious injury, as the desired result is achieved by the requirement of recklessness in the offence

CONCLUSIONS ON A WIDER REVIEW

- 6.140 The question whether reckless transmission of disease should remain criminal, and the desirability of a specific offence of transmission of disease, would both need to be considered in a wider review. Among other issues, such a review would have to consider whether any such offence or exemption should relate to disease in general or particular diseases.
- 6.141 There was support from several of our consultees for a review of this kind. For example:

¹³⁹ One instance that comes to mind is "chicken pox parties", where young children are deliberately exposed to infection in order to acquire immunity early. This would presumably be covered by a defence of parental authority. Deliberately infecting an unconsenting stranger, even with a similar altruistic motive, would not in our view be "generally acceptable in the ordinary conduct of life".

- (1) The CPS¹⁴⁰ said that the question whether non-disclosure of infection should be capable of amounting to recklessness gave rise to wider policy issues that should be considered in a wider review before any reform attempted to address this.
- (2) The Council of HM Circuit Judges¹⁴¹ thought that further research was required to consider the possibility of offences of endangerment by disease and failure to disclose infection.

6.142 Pending any such review, a revised statute on offences against the person, as recommended in the present project, should preserve the broad outlines of the existing legal position, namely that transmission of disease is included in the general injury offences.¹⁴²

OUR RECOMMENDATIONS

- 6.143 In any new statute governing offences against the person based on the draft Bill, the offences of causing serious injury should be capable of including the intentional or (as the case may be) reckless transmission of disease; accordingly disease should fall within the definition of injury.**
- 6.144 If it is desired to pursue further the possibility of excluding criminal liability for the reckless transmission of disease, or of creating special offences for such transmission, this should follow a wider review. However, the reform of offences against the person should not be delayed to await the results of that review.**
- 6.145 We do not recommend offences of exposing persons to the danger of disease, or of failing to disclose infection.**
- 6.146 The offence under clause 3, of intentionally or recklessly causing injury, should exclude cases where the risk taken is such as to be generally acceptable in the ordinary conduct of daily life, but we consider that this is sufficiently ensured by the recklessness requirement of the offence.**

¹⁴⁰ Para 6.50(1) above.

¹⁴¹ Para 6.61(3).

¹⁴² The position would not be identical to the existing law in all respects. To be liable, D would have to intend or foresee *serious* injury; there is also an open question about the transmission of diseases not amounting to serious injury, which we discuss above.

CHAPTER 7

OFFENCES OF CAUSING DANGER

INTRODUCTION

- 7.1 The offences discussed so far in this report have been ones involving the causing of actual harm to an individual, even if the harm only takes the form of an unwanted touching or the fear of it. In this chapter we discuss whether it is right to create offences involving the creation of danger of harm, which would be committed whether or not the harm occurs. We refer to these as “endangerment offences”.
- 7.2 As with offences involving actual harm,¹ endangerment offences could take two forms. There could be a general offence of causing danger of injury, or there could be specific offences of causing danger by particular means or in particular circumstances.
- 7.3 There is no general endangerment offence in existing law, though offences of this kind exist in some other countries, in particular in some States of the United States and Australia.² Nor is there a general endangerment offence in the draft Bill.
- 7.4 The 1861 Act contains offences concerned with poisons and noxious substances, explosives and railways. Some of these offences require actual harm to be caused, while in others endangerment is sufficient. There is also an offence of exposing children to danger.
- 7.5 The draft Bill retains offences concerning poisons and noxious substances, explosives and railways. Unlike the position in the 1861 Act, these are all pure endangerment offences: the causing of actual injury by these means falls within the general injury offences in clauses 1 to 3.
- 7.6 In the SCP, we asked both about the merits of a general endangerment offence (question 5 and 6) and about the particular offences concerning poisons and noxious substances (question 30) and explosives (question 31). We did not address the offences concerning railways.

EXISTING LAW

- 7.7 The 1861 Act at present contains three offences concerned with poisons and noxious substances, four offences concerned with explosives, three offences involving causing danger on railways³ and one offence of exposing children to

¹ Para 4.15 above.

² Para 7.26 below.

³ OAPA 1861, ss 32 to 34.

danger.⁴ Details of the offences relating to poisons and noxious substances and explosives are given in Chapter 2 above.⁵

- (1) Of the poisoning offences, one⁶ involves causing grievous bodily harm. Another⁷ involves intent to commit another offence and a third⁸ requires intent to injure, aggrieve or annoy, but neither requires actual harm to be caused.
- (2) Of the explosives offences, one⁹ involves the causing of grievous bodily harm. Two more¹⁰ involve using or placing explosives with intent to cause harm, but do not require actual harm to be caused. A fourth¹¹ is possessing or making explosives with intent to commit certain offences.
- (3) The railway offences are all offences of endangerment and none require actual harm to be caused.

7.8 In more detail, the offences are as follows.

- (1) Poisoning offences:¹²
 - (a) administering a stupefying substance with intent to commit an offence;¹³
 - (b) administering poison so as to endanger life or inflict grievous bodily harm;¹⁴ and
 - (c) administering poison with intent to injure, aggrieve or annoy.¹⁵
- (2) Explosives offences:¹⁶
 - (a) causing grievous bodily harm by gunpowder or explosives;¹⁷

⁴ OAPA 1861, s 27.

⁵ Para 2.61 and following, above.

⁶ OAPA 1861, s 23.

⁷ OAPA 1861, s 22.

⁸ OAPA 1861, s 24.

⁹ OAPA 1861, s 28.

¹⁰ OAPA 1861, ss 29 and 30.

¹¹ OAPA 1861, s 64.

¹² These offences are described in detail in SCP para 2.189 and following; see also para 2.61 and following, above.

¹³ OAPA 1861, s 22.

¹⁴ OAPA 1861, s 23. "So as to" here means "in such a way as to", rather than "in order to".

¹⁵ OAPA 1861, s 24.

¹⁶ These offences are described in detail in SCP para 2.211 and following; see also para 2.72 and following, above.

¹⁷ OAPA 1861, s 28.

- (b) using, sending or throwing explosive or corrosive substances with intent to cause grievous bodily harm;¹⁸
 - (c) placing explosives near a building or vessel with intent to do bodily injury;¹⁹ and
 - (d) making or having explosives with intent to commit a felony²⁰ in the Act.²¹
- (3) Railway offences:²²
- (a) interfering with railway lines (such as by putting obstacles on the track, removing rails or sleepers, interfering with points or signals) with intent to endanger the safety of any person travelling or being on the railway;²³
 - (b) throwing things at a train with intent to endanger the safety of a person on the train;²⁴ and
 - (c) endangering the safety of a person on a railway by any unlawful act or wilful omission.²⁵

7.9 There are related offences outside the 1861 Act.

- (1) Section 61 of the Sexual Offences Act 2003 creates an offence of administering a stupefying substance to enable a sexual activity with V; the maximum sentence is ten years on indictment, or six months on summary trial.
- (2) There are three further explosives offences under the Explosives Act 1883.

DRAFT BILL

7.10 The scheme of the draft Bill is that the principal offences²⁶ cover causing injury in general, whatever the type of injury or the means by which it is caused. There are

¹⁸ OAPA 1861, s 29.

¹⁹ OAPA 1861, s 30.

²⁰ Meaning any offence for which a person (not previously convicted) may be tried on indictment otherwise than at his own instance: Criminal Law Act 1967, s 10(1) and Sch 2 para 8.

²¹ OAPA 1861, s 64.

²² These offences are described in SCP para 2.232 and para 2.78 above.

²³ OAPA 1861, s 32.

²⁴ OAPA 1861, s 33.

²⁵ OAPA 1861, s 34.

²⁶ Clause 1: intentionally causing serious injury; clause 2: recklessly causing serious injury; clause 3: intentionally or recklessly causing injury.

therefore no offences of causing injury by poisons or explosives. Instead there are the following:

- (1) one offence²⁷ of administering a substance knowing that it is capable of causing injury;
- (2) two offences of using explosives, intending to cause or being reckless about causing serious injury²⁸ or injury²⁹ respectively; and
- (3) one offence of causing danger on railways.

7.11 We discuss, above,³⁰ whether it is better to create general offences of causing injury or specific offences of causing injury of particular types or by particular means. A corresponding question could be raised about endangerment offences. The approach of the draft Bill is a compromise: it contains general offences of causing actual injury and a limited number of specialised offences of creating danger of injury by particular means.

Poisoning and noxious substances

7.12 The poisoning offence in the draft Bill is defined as follows:

- 11.—**(1) A person is guilty of an offence if—
- (a) he administers a substance to another or causes it to be taken by him and (in either case) he does so intentionally or recklessly,
 - (b) he knows the substance is capable of causing injury to the other, and
 - (c) it is unreasonable to administer the substance or cause it to be taken having regard to the circumstances as he knows or believes them to be.
- (2) A person guilty of an offence under this section is liable—
- (a) on conviction on indictment, to imprisonment for a term not exceeding five years;
 - (b) on summary conviction, to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum or both.

7.13 As we pointed out in the SCP,³¹ no distinction is made according to whether:

²⁷ Clause 11.

²⁸ The clause 8 offence.

²⁹ The clause 9 offence.

³⁰ Para 4.25 and following, above.

³¹ SCP para 5.180.

- (1) the conduct was intentional or reckless;
- (2) the expected injury was serious or not; or
- (3) the injury in fact occurred.

Explosives

7.14 The explosives offences in the draft Bill are defined as follows:

8.—(1) A person is guilty of an offence if he acts as mentioned in subsection (2) and—

- (a) he intends to cause serious injury, or
- (b) he is reckless whether serious injury is caused.

(2) A person acts as mentioned in this subsection if he—

- (a) causes an explosive substance to explode,
- (b) places a dangerous substance in any place,
- (c) delivers or sends a dangerous substance to a person,
- (d) throws a dangerous substance at or near a person, or
- (e) applies a dangerous substance to a person.

(3) For the purposes of subsection (2) a dangerous substance is an explosive substance or any other dangerous substance.

(4) In this section “explosive substance” has the same meaning as in the Explosive Substances Act 1883.

(5) A person guilty of an offence under this section is liable on conviction on indictment to imprisonment for life.

9.—(1) A person is guilty of an offence if he acts as mentioned in section 8(2) and—

- (a) he intends to cause injury, or risk injury, or
- (b) he is reckless whether injury is caused.

(2) A person guilty of an offence under this section is liable on conviction on indictment to imprisonment for a term not exceeding 14 years.

7.15 The draft Bill contains no replacement for the offence under section 64 of the 1861 Act, namely possessing or making explosives with intent to commit an offence, but this behaviour is covered by sections 3 and 4 of the Explosive Substances Act 1883, which respectively cover:

- (1) making or possessing explosives with intent to endanger life or cause serious injury to property;³² and
- (2) making or possessing explosives in suspicious circumstances or without a lawful object.³³

Railway offences

7.16 The draft Bill contains one offence of causing danger on railways.

13.—(1) A person is guilty of an offence if he intentionally or recklessly causes danger to a person who is on a railway or is being carried on a railway.

(2) A person is guilty of an offence if he omits to do an act which he has a duty to do at common law, the omission results in danger to a person who is on a railway or is being carried on a railway, and he intends the omission to have that result or is reckless whether it will have that result.

(3) A person guilty of an offence under this section is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding two years;

(b) on summary conviction, to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum or both.

This was largely based on the clause in the previous drafts, except that some of these extended it to other means of transport.³⁴

THE CONSULTATION

7.17 In our scoping consultation paper we asked about the merits of a general endangerment offence in questions 5 and 6. We asked about the poisoning and explosives offences in the draft Bill in questions 30 and 31 respectively. We did not ask a specific question about railway offences.

7.18 In the SCP we described three possible positions of principle about endangerment offences.

- (1) On one view, endangerment offences are generally justifiable, because creating a danger of harm involves the same conduct, and should attract

³² Maximum sentence: life.

³³ Maximum sentence: 14 years.

³⁴ For details of the previous proposals, see SCP chapter 4. There are already separate offences relating to some other means of transport. For example in the case of aircraft there are offences of causing danger in airports and on aircraft under Aviation Security Act 1982, ss 2 and 3.

similar blame, whether or not the harm actually occurs.³⁵ On this view, it would be logical to create a general endangerment offence, to match the general harm offences in the draft Bill.

- (2) On another view, endangerment offences are wrong in principle: “penalising simply irresponsible behaviour, where no harm is caused, subjects too many people to liability for too much of the time”.³⁶
- (3) On an intermediate view, endangerment offences are only justified when D has voluntarily engaged in an exceptionally hazardous activity, such as the use of firearms, where it is right to impose a duty of exceptional caution.³⁷ Thus, particular endangerment offences relating to these activities are justified, but a general endangerment offence is not. It is this view that appears to underlie both the 1861 Act and the draft Bill.

RESPONSES TO CONSULTATION

General endangerment offence

7.19 Twenty-three respondents expressed views on the merits of a general endangerment offence. Of these:

- (1) eight respondents³⁸ were in principle in favour of a general offence of causing danger of injury, though one of them³⁹ thought that it should not be incorporated in the current project as it would hold it up;
- (2) nine⁴⁰ were against a general endangerment offence; and
- (3) six⁴¹ were undecided.

7.20 The most detailed discussion was by John Spencer. He mentioned the general endangerment offences in the French criminal code and the United States Model Penal Code, and argued that in principle the case for such an offence is a strong one. He went on to say that:

... the ground is already covered by a great many specific offences of this sort, to the point where it is quite hard to think of examples of reckless endangerment which do not involve some form of criminal

³⁵ SCP para 3.63.

³⁶ SCP para 3.64.

³⁷ SCP para 3.65.

³⁸ Ian Dennis, Sussex academics, Law Society, Michael Devaney, Respect, Council of District Judges (Magistrates’ Courts), Sally Ramage, David Hughes.

³⁹ David Hughes.

⁴⁰ Council of HM Circuit Judges, Richard Wood, Richard Taylor, Justices’ Clerks Society, London Criminal Courts Solicitors’ Association, Criminal Bar Association, CPS, British Transport Police, Rupert Barnes.

⁴¹ Jonathan Rogers, Findlay Stark, Kiron Reid, Antony Duff, John Spencer, Bar Council.

liability.⁴² If a general offence of reckless endangerment were created by which some or all of these specific offences were then replaced, a valuable simplification of the criminal law would be achieved. The political reality, however, is probably that if a new general offence were created it would just be added to the existing list – so adding a further complication to the criminal law to little useful purpose.

Poisoning and noxious substances

7.21 Eighteen respondents expressed views on question 30, concerning poisoning offences. Of these:

- (1) ten respondents⁴³ approved the scheme in the draft Bill;
- (2) two⁴⁴ thought that this conduct should be dealt with through a general endangerment offence;
- (3) two⁴⁵ considered that the offence in the draft Bill should be used unless a general endangerment offence is created;
- (4) one⁴⁶ was in favour of retaining the existing offences;
- (5) one⁴⁷ agreed that an endangerment offence relating to noxious substances should be created but had no views on its form; and
- (6) two⁴⁸ had no decided view.

7.22 Some respondents had particular points to make.

- (1) The London Criminal Courts Solicitors' Association considered that any offence created should exclude the consensual sharing of drugs.
- (2) Jonathan Rogers thought that the offence could also be used for the transmission of disease by sexual intercourse.
- (3) The Council of District Judges (Magistrates' Courts) thought that the maximum sentence should be seven years instead of five.

⁴² A Ashworth, *Principles of Criminal Law* (4th ed 2003) para 7.7 (the passage is omitted from the 6th and subsequent editions of that work).

⁴³ Jonathan Rogers, Law Society, Respect, Council of District Judges (Magistrates' Courts), Sally Ramage, Findlay Stark, Council of HM Circuit Judges, British Transport Police, Richard Wood, Richard Taylor.

⁴⁴ Sussex academics, Bar Council.

⁴⁵ David Hughes, Antony Duff.

⁴⁶ Criminal Bar Association.

⁴⁷ Rebecca Williams.

⁴⁸ Justices' Clerks Society, London Criminal Courts Solicitors' Association.

- (4) Richard Wood thought that the existing offence under section 22 (administering substance with intent to commit an offence) should be retained, in addition to creating a new offence as in the draft Bill.

Explosives

7.23 The pattern on explosives offences was very similar to that on poisoning and noxious substances. Of the 17 respondents who answered this question:

- (1) nine⁴⁹ approved the scheme in the draft Bill;
- (2) two⁵⁰ favoured dealing with these cases through a general endangerment offence;
- (3) three⁵¹ provisionally favoured the scheme in the draft Bill subject to whatever is decided about a general endangerment offence; and
- (4) two⁵² favoured retaining the existing offences.

7.24 Of those who approved the scheme in the draft Bill, one⁵³ thought that the drafting could be made simpler and another⁵⁴ recommended reforming the offences under the Explosives Act 1883 at the same time.

Railway offences

7.25 As stated, we did not ask a formal consultation question about the railway offences, but did receive some opinions in the course of our work on this project.

- (1) Richard Smith, of Network Rail, said that the current railway offences are still in regular use. In a sample provided by him, there were no instances of prosecutions under section 32 (interfering with railway lines) or 33 (throwing things at trains) but several under section 34 (creating danger on railways) as well as for other offences such as trespassing on railways or stealing supplies. He expressed the view that, in any successor offence, it is important to keep the flexibility of section 34: for example, a common form of this offence involves attempting to shine laser pens into the eyes of train drivers, which could not have been envisaged when the 1861 Act was drafted but shows the continuing relevance of this offence.
- (2) The British Transport Police, in their consultation response, called for simplification of the existing offences, on the grounds that they use archaic language, that there are some situations they fail to cover and

⁴⁹ Law Society, Respect, Council of District Judges (Magistrates' Courts), Findlay Stark, Justices' Clerks Society, Council of HM Circuit Judges, British Transport Police, Richard Wood, Richard Taylor.

⁵⁰ Sussex academics, Bar Council.

⁵¹ David Hughes, Jonathan Rogers, Antony Duff.

⁵² Criminal Bar Association, Sally Ramage.

⁵³ Findlay Stark.

⁵⁴ Law Society.

that mistakes are often made in deciding which of these closely related offences to charge. They also gave the instance of shining laser pens into drivers' eyes.

DISCUSSION

General endangerment offence

7.26 Examples of general endangerment offences in other countries are as follows:

- (1) The US Model Penal Code contains an offence of recklessly engaging in conduct which places another person in danger of death or serious bodily injury.⁵⁵
- (2) There are similar offences in four of the Australian states.⁵⁶ There are some differences between them: in Western Australia the conduct creating the danger need not be reckless but must be "unlawful", while in Victoria it must be reckless and "without lawful excuse".
- (3) As mentioned by John Spencer in his response, the French criminal code⁵⁷ contains an offence defined as follows:

The direct exposure of another person to an immediate risk of death or injury likely to cause mutilation or permanent disability by the manifestly deliberate violation of a specific obligation of safety or prudence imposed by any statute or regulation is punished by one year's imprisonment and a fine of €15,000.⁵⁸

This offence is more limited than the American and Australian ones, as it is confined to risks of death, mutilation or permanent disability, rather than of any serious injury.

7.27 Out of a sample of 13 reported cases from Victoria and South Australia:

- (1) five⁵⁹ concerned dangerous driving;
- (2) one⁶⁰ concerned child neglect;

⁵⁵ Section 211.2, cited in K Smith, "Liability for Endangerment: English Ad Hoc Pragmatism and American Innovation" [1983] *Criminal Law Review* 127, 131. Examples of states which have incorporated this provision are New York (Penal Law, ss 120.20 and 120.25), Connecticut (Penal Code, s 53a-63 and 64) and Maryland (Criminal Code 2010, s 3-204).

⁵⁶ Victoria, South Australia, the Northern Territory and Western Australia: D Lanham, "Danger down under" [1999] *Criminal Law Review* 960; C Clarkson, "General Endangerment Offences: The Way Forward?" (2004-5) 32 *University of Western Australia Law Review* 131.

⁵⁷ Article 223-6.

⁵⁸ Spencer's translation.

⁵⁹ *Hicks v R* [2013] VSCA 324 (Vic); *Gorladdenchearau v R* [2011] VSCA 432 (Vic); *Stott* [2011] SASCF 145 (SA); *Lindner v Police* [2000] SASC 308 (SA); *Police v Pithang* [2015] SASC 88.

- (3) three⁶¹ resulted in serious injury;
- (4) three⁶² concerned the irresponsible use of firearms;
- (5) one⁶³ concerned exposure to the risk of HIV;
- (6) one⁶⁴ concerned strangulation;
- (7) in two,⁶⁵ the conviction was quashed.⁶⁶

Excluding the two cases where the conviction was quashed, the only one of these cases that would not be covered by an offence in English law is the one concerning HIV.

7.28 In England and Wales most examples would fall within one of the following offences:

- (1) offences under the 1861 Act relating to noxious substances, explosives or railways;
- (2) offences concerned with dangerous driving;
- (3) offences under the Health and Safety at Work etc Act 1974; and
- (4) offences under the Explosives Act 1883.

None of our consultees has informed us of practical instances of dangerous behaviour falling outside these offences and deserving of punishment even when no actual harm is caused, nor have our own researches discovered such instances. There would therefore appear to be no practical need to create a general offence of recklessly causing danger of injury, to sit side by side with the existing offences.

7.29 There is an argument⁶⁷ for saying that the present law of endangerment is too complicated. Apart from distinctions concerning the means by which danger is caused, there is a further distinction between:

⁶⁰ *Staker* [2011] SASCFC 87 (SA).

⁶¹ *Gorladenchearau v R* [2011] VSCA 432 (Vic); *Wilson* [2003] SASC 18 (SA); *Nemer* [2003] SASC 375 (SA);

⁶² *H and LP* [2013] SASC 183 (SA) (attempted murder was also charged); *Joszef Marcus Bedi v R* [1993] SASC 4639 (SA); *Nemer* [2003] SASC 375 (SA).

⁶³ *Parenzee* [2008] SASC 245 (SA).

⁶⁴ *James* [2002] SASC 311 (SA).

⁶⁵ *Abdul-Rasool* [2008] VSCA 13 (Vic); *Joszef Marcus Bedi v R* [1993] SASC 4639 (SA).

⁶⁶ These numbers add up to 16 rather than 13, as three cases fall within more than one category.

⁶⁷ J Spencer and M-A Brajeux, "Criminal Liability for Negligence – A Lesson From Across the Channel?" (2010) 59 *International Criminal Law Quarterly* 1.

- (1) offences of dangerous behaviour where harm is caused (for example, causing death by dangerous driving);⁶⁸
- (2) offences of causing danger, without more (for example, dangerous driving); and
- (3) offences consisting of behaviour regarded by the legislature as dangerous, without the need to prove actual danger (for example, driving while using a mobile phone).⁶⁹

This argument, if accepted, would indicate a need for a fundamental review of endangerment offences, exploring the possibility of replacing the existing patchwork of offences with a few simple offences.

7.30 Introducing a general endangerment offence on these lines would require a comprehensive review devoted to this topic, and would fall outside the scope of the present project, which is mainly concerned with modernising and rationalising the existing law of offences against the person. We agree with the argument of David Hughes that, whatever the merits of a general endangerment offence, it would be wrong to delay reform of the offences of violence while such an offence is considered.

7.31 A general endangerment offence would also have an undesirable consequence in the field of disease transmission, as discussed in Chapter 6. We argued, there, that the law in England and Wales is regarded by experts in the field as preferable to that of some other countries, where there are dedicated offences of transmission, endangerment and non-disclosure, either confined to HIV or relating to infectious diseases in general. A general offence of endangerment would make it criminal to risk passing on a serious infectious disease, whether the infection is actually transmitted or not.⁷⁰ This would enormously increase the impact of the criminal law on cases of disease transmission, with its attendant risks of intrusive investigation and stigmatisation of infected people, and discourage openness between possibly infected people and their medical advisers.

7.32 We regard this as a test case for the working of endangerment offences in general. Cases of endangerment where injury is intended would in any case constitute an offence of attempt to commit the offence under clause 1 (intentionally causing serious injury) or clause 3 (intentionally or recklessly causing injury) as the case may be. Penalising merely reckless behaviour, where no actual harm is caused, would expand the reach of the criminal law and its intrusion into people's private lives to an unacceptable degree. By shifting the focus from the harm caused to V to the propriety of D's behaviour, it would

⁶⁸ C Clarkson, "Aggravated Endangerment Offences" (2007) 60 *Current Legal Problems* 278.

⁶⁹ "Implicit endangerment offences", as discussed by A Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (2007) para 7.3.

⁷⁰ Unless the definition of "injury" explicitly excluded disease, as in the draft Bill.

effectively create a victimless offence.⁷¹ In cases where a substantial section of the public is put at risk, this behaviour is likely to be covered by the offence of public nuisance.⁷²

7.33 We recommend that a revised statute governing offences of violence should not include a general offence of exposing another person to the danger of injury.

Specific endangerment offences

7.34 We adopt and repeat the argument in the SCP⁷³ that it is justified to create endangerment offences in relation to intrinsically dangerous activities which D undertakes through choice.⁷⁴ Such offences may also be justified if the danger is of an exceptionally high degree or if the potential victim is particularly vulnerable. It is for these reasons that there are offences such as dangerous driving,⁷⁵ endangering the safety of aircraft and airports⁷⁶ and exposing children to danger.⁷⁷ There are also “implicit endangerment offences”, which criminalise activities such as the handling and possession of particular objects and substances in certain circumstances on the ground that they are dangerous, but do not make the actual existence of danger an explicit ingredient of the offence.⁷⁸ Examples are:

- (1) offences connected with the unlawful possession or use of drugs, firearms and explosives; and
- (2) traffic offences such as driving through red lights or while using a mobile phone.⁷⁹

In all these cases, the justification is that harm should be prevented before it occurs.⁸⁰

7.35 Particular features of the offences concerned with drugs and noxious substances and explosives, as contained in the draft Bill, are:

⁷¹ For further discussion, see Jeroen ter Voorde, “Prohibiting Remote Harms: On Endangerment, Citizenship and Control” (2014) 10 *Utrecht Law Review* 163.

⁷² Simplification of the Criminal Law: Public Nuisance and Outraging Public Decency (2015) Law Com No 358.

⁷³ SCP paras 3.65 and 5.184.

⁷⁴ For a discussion of the role of specific endangerment offences, see paras 4.25 to 4.33 above.

⁷⁵ Road Traffic Act 1988, s 2.

⁷⁶ Aviation Security Act 1982, ss 2 and 3 and Air Navigation Order 2009/3015, art 137; Aviation and Maritime Security Act 1990, s 1.

⁷⁷ OAPA 1861, s 27; compare child neglect, Children and Young Persons Act 1933, s 1.

⁷⁸ See A Duff, fn 69 above.

⁷⁹ One might possibly include in this category various offences of disruptive behaviour on aircraft, such as that under Air Navigation Order 2009/3015, art 142.

⁸⁰ A Ashworth and L Zedner, *Preventive Justice* (2014) ch 5.

- (1) they are all offences of endangerment, where no actual harm need be caused (if actual harm is caused, the main injury offences in clauses 1 to 3 apply);
 - (2) they all require intention or recklessness as to the harm potentially caused; and
 - (3) there are two offences concerning explosives, depending on whether the potential harm is serious or not, but only one offence concerning drugs and noxious substances.
- 7.36 In the SCP we discussed all these features and did not propose any change to the scheme of the draft Bill; nor was any change proposed by any of the respondents.
- 7.37 One respondent⁸¹ advocated the retention of the offence under section 22, namely administering stupefying substances with intent to commit an offence. Figures supplied by the Ministry of Justice indicate that, in the period from 2003 to 2013, the Crown Court never passed more than two custodial sentences for this offence in a year, and in several years passed none at all. We believe that all or most instances of this offence would be adequately covered either by the offence under clause 11 of the draft Bill (administering substances capable of causing injury) or by the offence under section 61 of the Sexual Offences Act 2003 (administering stupefying substances to enable sexual activity). Where actual harm is caused (including loss of consciousness), the case will fall within clause 3 of the draft Bill (intentionally or recklessly causing injury). We therefore do not consider that the offence under section 22 should be retained.
- 7.38 Another question is that of sentencing. The maximum sentence for the offence under clause 11 of the draft Bill (administering substances capable of causing injury) is five years, the same as for the current offence under section 24 of the 1861 Act. There is no equivalent for the offence under section 23 of that Act, where the maximum is imprisonment for ten years.
- 7.39 The offence under section 23 requires grievous bodily harm to occur in fact. Under the scheme of the draft Bill, these cases will fall within the offence under clause 1 (life), clause 2 (seven years) or clause 3 (five years), depending on whether it was intended or foreseen that the injury would be serious. Taking account of the possibility of a consecutive sentence for the offence under clause 11, this adds up to an available maximum of ten years in even the least serious case. If there is concern about the loss of the ten year maximum for poisoning cases, higher maximum sentences could be chosen for the offences under

⁸¹ Richard Wood, para 7.22(4) above.

clauses 2 and 3; but we see no justification for increasing the maximum for the clause 11 offence, where no injury at all need occur.⁸²

7.40 We recommend that a revised statute governing offences of violence should contain offences of administering substances capable of causing injury and creating danger by explosives, as set out in clauses 8 and 9 of the draft Bill.

Railway offences

7.41 The railways offence as set out in clause 13 of the draft Bill is in keeping with the other endangerment offences, such as those concerning drugs and explosives, and appears to us to be a welcome simplification. The new offence covers all the cases in the three existing offences, including the case mentioned by consultees involving the use of laser pens.⁸³ No objection to the new offence was expressed in the course of work on the project or consultation, and the two opinions we received at a later stage are supportive of the principle of reform.

7.42 Draft clause 13 reproduces the proposal in our 1993 report,⁸⁴ which recommended the repeal of sections 32 and 33 of the 1861 Act and the substitution of a widened version of section 34. In our commentary we pointed out that sections 32 and 33 are very narrow, in that they require intention to endanger the safety of persons travelling on the railway. The Home Office draft Bill departed from the 1993 proposal only by incorporating the new offence into the body of the Bill instead of stating it in a substituted section 34 of the 1861 Act.

7.43 We do have one concern about sentencing. The maximum sentence for this proposed offence is two years, like the existing offence under section 34; the more serious offences under sections 32 and 33, which currently have a maximum of life imprisonment, are not represented at all. The scheme of the draft Bill therefore appears significantly to lower the existing level of protection.

7.44 It is true that, where intention to cause serious injury is proved, D can be charged with attempt to commit the offence under clause 1 (intentionally causing serious injury), which is also punishable with life imprisonment. Where this intention is not proved, it would seem logical for the maximum penalty to be five years, in keeping with those for the offences under draft clauses 3 (intentionally or recklessly causing injury) and 11 (administering substances capable of causing injury).

⁸² In para 4.31 above, we point out that in a case where injury is caused by poisoning, it would be possible to bring charges both for administering substances capable of causing injury and for one of the main injury offences. In a serious case the sentences for these two offences could run consecutively. This would achieve the same maximum of 10 years (if the offence under clause 2 is charged, 12 years).

⁸³ We are told that there are similar cases involving airline pilots. These would fall within the offence of endangering the safety of aircraft, Aviation Security Act 1982, ss 2 and 3.

⁸⁴ Legislating the Criminal Code: Offences against the Person and General Principles (1993) Law Com No 218, draft Bill, Sch 3 para 5; discussed in para 10.1 and following of that report.

7.45 We recommend that a revised statute governing offences of violence should contain an offence of causing danger on railways, similar to that in clause 13 of the draft Bill, but that the proposed maximum sentence for this offence should be reconsidered.

CHAPTER 8

OTHER OFFENCES

INTRODUCTION

8.1 This chapter addresses:

- (1) the offences of threats to kill and solicitation to murder;
- (2) the remaining offences in the 1861 Act that are not included in the draft Bill; and
- (3) procedural issues, in particular the provisions for alternative verdicts.

THREATS TO KILL

8.2 Section 16 of the 1861 Act provides an offence of threatening to kill, “intending [the hearer] to fear that [the threat] would be carried out”. Clause 10 of the draft Bill provides a similar offence, except that the threat can be of death or serious injury, and that the fault element is “intending that other to believe that it will be carried out”. Both offences include cases where a threat to kill one person is made to another person.

8.3 In the SCP we pointed out that it is unclear whether clause 10 would cover a conditional threat, such as “do this or I’ll kill you”. We proposed that the clause should be amended to include such a case, and this was the subject of question 29.

Responses to consultation

8.4 Of the 21 respondents who answered this question:

- (1) sixteen¹ agreed with our proposal;
- (2) two² believed that there was no need for such an offence, as it should be dealt with under the Serious Crime Act 2007;³ and
- (3) three⁴ considered that the offence under section 16 should be left as it is.

8.5 One important point made by Rupert Barnes was that, if conditional threats are to be an offence, they should only include cases where the stated conditions, and

¹ Jonathan Rogers, Law Society, Respect, Council of District Judges (Magistrates’ Courts), Findlay Stark, Kiron Reid, Antony Duff, Justices’ Clerks Society, Council of HM Circuit Judges, British Transport Police, Richard Wood, Richard Taylor, Rupert Barnes, Association of Police and Crime Commissioners, Magistrates’ Association, David Hughes.

² Sussex academics, London Criminal Courts Solicitors’ Association.

³ We do not understand the reference to the Serious Crime Act 2007, which concerns offences of assisting and encouraging crime. It would therefore seem to be relevant to the offence of solicitation to murder rather than threats to kill.

⁴ Sally Ramage, Criminal Bar Association, Bar Council.

therefore the threat, are still capable of realisation. That is, it should be an offence to say “unless you give me your phone I will kill you”, but not “if it were not for the policeman standing outside I would kill you”.⁵

- 8.6 There was general agreement that it was right to extend the offence to threats of serious injury. Richard Wood thought it should also include threats to rape, as this was a tactic of intimidation often used by gangs. Kiron Reid thought the offence should include threats of violence of any kind.

Discussion

- 8.7 The questions arising are:

- (1) Is an offence of threatening to kill needed?
- (2) If so, should it be extended to threats of serious injury or other forms of violence?
- (3) Should it cover conditional threats?
- (4) Should there be special provisions about jurisdiction?

Need for the offence

- 8.8 On the first question, it could be argued that there are offences under the Public Order Act 1986, in particular those under sections 4 (fear or provocation of violence), 4A (intentional harassment, alarm or distress) and 5 (harassment, alarm or distress) which should be adequate for most cases. However, these do not reflect the full gravity and nature of the wrongdoing, either in labelling or in sentencing terms. In particular:

- (1) as pointed out in Chapter 5,⁶ these offences cannot be committed if both D and V are inside a dwelling (either the same dwelling or different dwellings⁷); and
- (2) these offences are triable only in a magistrates’ court; the maximum sentence is six months for the offences under sections 4 and 4A and a level 3 fine⁸ for the offence under section 5. The maximum sentence for the offence under section 16 of the 1861 Act, and for the proposed offence under clause 10 of the draft Bill, is ten years.

We therefore consider that there is a need for an offence of this kind.

⁵ In *Tuberville v Savage* (1669) 1 Mod Rep 3, 86 ER 684, a defendant who said “if it were not assize time I would not take such language from you” was held not to be guilty of assault: as it was in fact assize time, the defendant was clearly not threatening actual violence. (Assizes were court sessions for serious cases held periodically by judges visiting a town.)

⁶ In relation to the need for an offence of assault – see 5.18(1) above.

⁷ Accordingly, the offences exclude many threats made by telephone or through the internet.

⁸ Currently £1000: Criminal Justice Act 1982, s 37; *Blackstone’s* para E15.9.

Threats of non-fatal violence

- 8.9 There was general agreement that this offence should cover threats of serious injury as well as death threats.
- 8.10 We do not consider that the offence should be extended to other threats of violence, as suggested by Kiron Reid. There are a variety of offences that may be committed in this situation.
- (1) Where D and V are not inside a dwelling, there will be offences under the Public Order Act 1986.
 - (2) Where the threats are repeated, there will be offences under the Protection from Harassment Act 1997.
 - (3) Where the threats are intended to obtain submission to a sexual act, an offence under section 62 of the Sexual Offences Act 2003 will be committed. (There is an assault, and the assault was with the intention of committing a sexual offence.)
 - (4) In all cases, it will amount to assault (under the present law) or threatened assault (under our recommendations).

The offence under clause 10 is clearly intended to be a serious one: its effectiveness in labelling terms would be severely reduced if the requirements were lowered to include threatening behaviour in general.

- 8.11 We agree with the suggestion⁹ that the offence should also include threats to rape. It could be argued that being raped in itself amounts to serious injury; and if there is any doubt about this a provision could be incorporated in the statute expressly incorporating being raped in the definition of serious injury, either generally or for the purposes of this offence. Alternatively the offence could simply be worded so as to include threats to rape. The decision between these two approaches is one for those drafting the relevant statute.
- 8.12 For the purposes of the present project, we recommend adopting the proposal in the draft Bill, namely that this offence should cover threats to kill or cause serious injury; the offence should also include threats to rape.

Conditional threats

- 8.13 We regard it as very important that the new offence should cover conditional threats, and this had general support among those consultees who addressed this issue at all. A common purpose of threats is to coerce the victim into a course of conduct by inspiring fear of the consequences of disobedience, and this necessarily takes the form “unless you do so and so I shall ...”. At the same time, we agree with Rupert Barnes that this should only cover cases where the threat, and the circumstances in which it is to be carried out, are capable of realisation.

⁹ By Richard Wood.

- 8.14 For this reason we consider that the wording of clause 10 is unsatisfactory as it stands and should be amended to cover conditional threats, whether or not the condition relates to V's conduct. This should include all cases in which D intends V to believe that the threat will be carried out in certain circumstances, whether or not the threat is worded in a conditional form.¹⁰

Jurisdiction

- 8.15 In the SCP¹¹ we raised the question whether to make specific provision for any or all of the following cases:

- (1) threats made in England and Wales, to kill a person abroad;
- (2) threats made abroad, to kill a person in England and Wales; and
- (3) threats made abroad, to kill a person abroad.

- 8.16 We believe that some guidance is given by the provisions of the Serious Crime Act 2007 on the offence of assisting and encouraging crime.¹² Briefly, an act of assisting and encouraging murder is a crime triable in England and Wales if:

- (1) the proposed murder is to take place in either England and Wales, a country within section 4 or 5 of the Suppression of Terrorism Act 1978 (that is, a country designated as party to the 1977 European Convention on the Suppression of Terrorism, India or the United States);
- (2) the act of assisting or encouraging took place in England and Wales; or
- (3) D is a British citizen.

- 8.17 We consider that the same logic should apply to the offence of threatening to kill or cause serious injury. That is, the offence should be committed if:

- (1) the threat was made in England and Wales (wherever the proposed killing, injury or rape was to take place);
- (2) the proposed killing, injury or rape was to take place in England and Wales; or
- (3) the threatened offence amounts to murder or manslaughter and:
 - (a) D is a British citizen, or
 - (b) the threatened offence is to take place in a country within section 4 or 5 of the Suppression of Terrorism Act 1978.

¹⁰ In the somewhat similar context of blackmail (Theft Act 1968, s 21), "menaces" necessarily include threats of the form "unless you ...".

¹¹ SCP para 5.173.

¹² These are described in detail in paras 8.22 and 8.23 below.

- 8.18 **We recommend that a reformed statute governing offences of violence should include an offence of threatening to kill, cause serious injury to or rape any person, including cases where the threat is conditional on the conduct of the person to whom the threat is made or any other fact or event.**

SOLICITATION TO MURDER

- 8.19 Section 4 of the 1861 Act provides for an offence of solicitation to murder, defined as follows.

4. Whosoever shall solicit, encourage, persuade, or endeavour to persuade, or shall propose to any person, to murder any other person, whether he be a subject of Her Majesty or not, and whether he be within the Queen's dominions or not, shall be guilty of a misdemeanor, and being convicted thereof shall be liable to imprisonment for life.

- 8.20 One might wonder why such an offence was considered necessary, as there was a common law offence of incitement, meaning encouragement to commit an offence. It was explained in *Abu Hamza*¹³ that the reason was that, at the time the 1861 Act was drafted, the common law offence of incitement to murder did not cover the case of foreign nationals in England and Wales inciting acts of murder to take place abroad.

- 8.21 However, no offence of encouraging murder was included in the 1998 draft Bill, as it was felt that this behaviour was sufficiently covered by existing offences.¹⁴ Those responsible for the draft Bill and the previous law reform proposals do not appear to have considered the difficulty about incitement of murder abroad.

- 8.22 Since then, the common law offence of incitement has been replaced by offences of assisting and encouraging crime under Part 2 of the Serious Crime Act 2007. Under those provisions, D is liable for assisting and encouraging crime if:

- (1) the proposed crime is to take place in England and Wales;¹⁵ or
- (2) the act of assisting and encouraging takes place in England and Wales and one of the following conditions is satisfied:
 - (a) the proposed crime would be triable in England and Wales if it took place in the country in question;¹⁶
 - (b) the proposed crime would be so triable if it took place in the country in question and D satisfied the relevant nationality requirements;¹⁷ or

¹³ [2006] EWCA Crim 2918, [2007] QB 659.

¹⁴ SCP para 5.159.

¹⁵ Serious Crime Act 2007, s 52(1).

¹⁶ Serious Crime Act 2007, Sch 4 para 1(1)(c)(i).

(c) the proposed crime is also an offence in the country in which it is to take place;¹⁸ or

(3) both the proposed crime and the act of assisting and encouraging take place outside England and Wales, but there would be jurisdiction to prosecute D in England and Wales if D had committed the proposed crime in the country in question.¹⁹

8.23 Murder is likely to be an offence in all foreign jurisdictions, though there may be variations in what particular acts amount to murder. A murder taking place abroad can be prosecuted in England and Wales if committed by a British citizen²⁰ or in a country which is designated as party to the 1977 European Convention on the Suppression of Terrorism.²¹ It follows that:

(1) An act of assisting and encouraging a murder proposed to take place in England and Wales is always triable in England and Wales, wherever the act of encouraging is performed and whatever the nationality of D.

(2) An act of assisting and encouraging taking place in England and Wales, relating to a proposed murder outside England and Wales is *always* triable in England and Wales:

(a) if D is a British citizen, or the proposed murder is to take place in a 1977 Convention country,²² by the combined effect of section 9 of the 1861 Act and Schedule 4 para 1(1)(c)(i) of the Serious Crime Act 2007;

(b) if D is not a British citizen, under Schedule 4 para 1(1)(c)(ii) of the Serious Crime Act 2007; and

(c) in any case, on the assumption that the proposed murder is criminal under the law of the country in question.

(3) An act of assisting and encouraging taking place outside England and Wales, relating to a proposed murder outside England and Wales, is triable in England and Wales only if:

(a) D is a British citizen; or

¹⁷ Serious Crime Act 2007, Sch 4 para 1(1)(c)(ii). Usually, this means “if D had been a British citizen”.

¹⁸ Serious Crime Act 2007, Sch 4 para 2.

¹⁹ Serious Crime Act 2007, Sch 4 para 3.

²⁰ OAPA 1861, s 9.

²¹ Under the Suppression of Terrorism Act 1978, s 4, a person can be guilty of a murder or manslaughter committed in a country designated as party to the 1977 European Convention on the Suppression of Terrorism, whether or not that person is a British citizen, and under s 5 of that Act there is power to extend this to other countries. So far it has been extended to India and the United States. This provision extends the jurisdictional reach of the existing offence of murder, and does not create a separate crime of “murder outside the jurisdiction”: *Venclosvas* [2013] EWCA Crim 2182, [2014] *Criminal Law Review* 684.

²² Or India or the United States.

- (b) the proposed murder is to take place in a 1977 Convention country, India or the United States.

- 8.24 In other words, the only excluded case is that where the facts have no connection with England and Wales at all. This largely removes the difficulties about jurisdiction: acts within England and Wales, encouraging a murder to take place abroad, are always within the offence. The original reason for having a separate offence of solicitation to murder therefore no longer applies.²³
- 8.25 However, in the SCP²⁴ we explained that there is another possible reason for retaining the offence. The offences under the Serious Crime Act 2007 generally require an intention or belief that the crime encouraged (or one of a suggested range of crimes) will be committed.²⁵ The case of *El-Faisal*²⁶ shows that solicitation to murder can be wider than this, and covers generic encouragement to kill people in certain categories (in that case Hindus, Jews and “unbelievers”) should the occasion arise.
- 8.26 We therefore proposed retaining the offence in an updated form, and asked about this in question 28 of the SCP.

Responses to consultation

- 8.27 Seventeen respondents answered this question. Out of these:
- (1) nine respondents²⁷ agreed with the proposals in the SCP;
 - (2) three²⁸ believed that the offence should be left in its unreformed state; and
 - (3) five²⁹ thought that there was no need for the offence given the Serious Crime Act 2007.
- 8.28 Particular views expressed were as follows:
- (1) Findlay Stark argued that, if the encouragement is too generic to fall within the Serious Crime Act 2007, it should not be an offence; and
 - (2) the Association of Police and Crime Commissioners argued that the Serious Crime Act 2007 should be reformed to cover the doubtful case.

²³ SCP para 5.168.

²⁴ SCP para 5.160 and following.

²⁵ SCP para 5.160.

²⁶ [2004] EWCA Crim 343.

²⁷ Law Society, Respect, Council of District Judges (Magistrates’ Courts), Sally Ramage, Justices’ Clerks Society, Council of HM Circuit Judges, British Transport Police, Richard Taylor, London Criminal Courts Solicitors’ Association.

²⁸ Jonathan Rogers, Richard Wood, Bar Council.

²⁹ Sussex academics, Findlay Stark, Antony Duff, David Hughes.

Discussion

- 8.29 The main question is whether there is the need to retain an offence of solicitation to murder, to cover cases of generic or conditional encouragement which may not be covered by the Serious Crime Act 2007, for example:
- (1) *El-Faisal*,³⁰ where D preached sermons encouraging or authorising the killing of “Hindus, Jews and non-believers”; and
 - (2) *Shephard*,³¹ in which D wrote a letter to a pregnant woman saying that, when her child was born, she should not let him or her live.
- 8.30 We remain of the view that there is a disparity between the present offence of solicitation to murder and the offences of assisting and encouraging crime under the Serious Crime Act 2007. That is, there are instances of generic or conditional encouragement, such as the cases mentioned in the last paragraph, which are certainly covered by solicitation to murder but may not be covered by assisting and encouraging crime, because of the requirement that D should intend or believe that the offence “will” be committed by the person encouraged.
- 8.31 On any view, this disparity is undesirable. In a rational system, the position concerning generic or conditional encouragement should be consistent whatever the offence encouraged: there is no justification for having one rule for encouragement of crime generally and a different rule for encouragement to murder.
- 8.32 That still leaves the question of whether generic or conditional encouragement should in principle be criminal.
- (1) If not, there is no need for a separate offence of solicitation of murder: the offence of assisting and encouraging crime covers all cases deserving prosecution.
 - (2) If so, the ideal long term solution would be to amend the Serious Crime Act 2007 to include generic and conditional encouragement. In that case, again there will be no need for a separate offence of solicitation of murder. But unless and until such an amendment can be effected, the offence of solicitation to murder should be retained.
- 8.33 We consider that offences of encouragement should cover conditional encouragement when it amounts to practical advice intended to be acted upon in particular circumstances. An example is *Shephard*, above. We are by no means sure that cases of this kind would be caught by the Serious Crime Act 2007, as the offences under that Act require an intention or belief that the offence “will” (not “would”) be committed. The problem is similar to that discussed in the previous section, that the related offence of “threats to kill” might not cover cases where the threat is conditional.

³⁰ Para 8.25 above.

³¹ [1919] 2 KB 125.

8.34 The question of generic encouragement to kill members of groups is more complicated.

- (1) At one extreme there could be cases of the type described in the SCP,³² where a gang leader instructs a henchman to select and kill a member of a rival gang to make an example. This is certainly covered by the existing offence, and will also constitute an offence under the Serious Crime Act 2007.
- (2) At the other extreme are purely rhetorical statements such as saying that people of a given description “should be shot”. This does not fall within either solicitation to murder or assisting and encouraging crime, and should not fall within any new offence of this kind. (Such statements may in certain circumstances constitute threatening behaviour under the Public Order Act 1986 or various offences of stirring up hatred.³³)
- (3) The facts in *El-Faisal* fall somewhere in the middle: the statements in question amounted to saying that the killing of unbelievers is lawful and that one should feel free to do so if the occasion arises, for example in the course of armed struggles abroad. This goes beyond rhetorical vilification, and amounts to practical advice intended to be acted upon in particular circumstances. This is covered by solicitation to murder, and should be covered by any new offence. However, it is doubtful whether it is covered by the offence of assisting and encouraging crime under the Serious Crime Act 2007, as the encouragement could be regarded as conditional and *El-Faisal* may not have believed that those conditions would be fulfilled.

8.35 In conclusion, ideally the Serious Crime Act 2007 should be amended to include these doubtful cases; if this were done no separate offence of encouragement to murder would be necessary. Failing that, we consider that such an offence should be retained.

8.36 There should be provisions about jurisdiction similar to those in the Serious Crime Act 2007.³⁴ That is, the offence is committed if:

- (1) the act of encouragement takes place within England and Wales; or
- (2) the proposed murder is to take place in England and Wales; or
- (3) D is a British subject or section 4 of the Suppression of Terrorism Act 1978 would apply if D committed the proposed murder.

³² SCP para 5.61.

³³ Public Order Act 1986, ss 18 and following, as amended by Racial and Religious Hatred Act 2006, Sch 1 and Criminal Justice and Immigration Act 2008, s 74 and Sch 16.

³⁴ For these, see paras 8.22 and 8.23 above.

8.37 We recommend that a reformed statute governing offences of violence should include an offence of encouragement to murder, and that this should include cases where the encouragement is conditional.

OTHER OFFENCES IN THE 1861 ACT

8.38 The remaining offences in the 1861 Act fall into two groups:

- (1) little used offences which could be considered for abolition;
- (2) offences outside the scope of this project.

Less common offences

8.39 In the SCP³⁵ we considered the abolition of the following offences (in addition to assaults on clergy and magistrates preserving wrecks, considered above³⁶):

- (1) impeding a person escaping from a shipwreck;³⁷
- (2) attempting to choke in order to commit an indictable offence;³⁸
- (3) not providing apprentices or servants with food;³⁹
- (4) exposing children to danger;⁴⁰
- (5) setting a spring gun, man trap or other engine calculated to destroy life or cause grievous bodily harm;⁴¹ and
- (6) causing harm by furious driving.⁴²

8.40 Of these, attempting to choke in order to commit an indictable offence and causing harm by furious driving are sometimes encountered in practice; exposing children to danger and setting man-traps less often; the other two seldom or never.⁴³ The draft Bill abolished all these offences without replacement, except for setting man-traps and causing harm by furious driving. It provided for the sections of the 1861 Act containing these last two offences to be amended to refer to “serious injury” instead of “grievous bodily harm”.⁴⁴

³⁵ SCP para 5.196.

³⁶ Para 5.90 and following, above.

³⁷ OAPA 1861, s 17.

³⁸ OAPA 1861, s 21; para 2.80 above.

³⁹ OAPA 1861, s 26.

⁴⁰ OAPA 1861, s 27.

⁴¹ OAPA 1861, s 31; fn 322 to Chapter 2 of the SCP.

⁴² OAPA 1861, s 35.

⁴³ SCP para 2.235.

⁴⁴ Draft Bill, Sch 1 paras 5 to 8.

Responses to consultation

8.41 We did not put a specific consultation question about these offences, but some consultees nevertheless expressed views.

- (1) The Association of Police and Crime Commissioners considered that exposing children to danger and causing harm by furious driving could be abolished.
- (2) Richard Wood warned that one should be very careful before repealing the offence of exposing children to danger.
- (3) The British Transport Police informed us that the offence concerning man traps and similar engines occurs in their experience, for example in the form of putting needles in light switches.

Discussion

8.42 The offence of attempting to choke with intent to commit an offence⁴⁵ is a prime example of a needlessly specific offence, as discussed in Chapter 3 of the SCP.⁴⁶ Facts of this kind certainly occur, and there are some tens of prosecutions each year. However, on a sample of sentencing appeals all the examples occurred either in the course of a robbery or in the course of an attempted rape or sexual assault. In all such cases, adequate powers of punishment will be afforded by some combination of:

- (1) one of the offences of causing harm, under clause 1, 2 or 3 of the draft Bill, or an attempt to commit one of those offences; and
- (2) the intended offence (robbery, rape, sexual penetration etc.) or attempt to commit that offence.

We therefore consider that this offence can be abolished without loss.⁴⁷

8.43 In Chapter 7⁴⁸ we criticise proposals for a general endangerment offence, and this could be a reason against retaining the offence of exposing children to danger. Our argument was that endangerment offences are justified, if at all, on the ground that D was voluntarily engaging in an exceptionally hazardous activity such as handling explosives. However, it could be argued that another justification is the vulnerable nature of the potential victim, and this would certainly cover the offence now being discussed. There is some overlap between this offence and the offence of wilful neglect;⁴⁹ however, that offence can only be

⁴⁵ OAPA 1861, s 21; para 2.80 above.

⁴⁶ SCP para 3.5 and following.

⁴⁷ The proposal to abolish this offence did not form part of our original consultation, but we have since consulted both the Home Office and the CP and they confirm that they have no objection to the proposal.

⁴⁸ Para 7.26 and following, above.

⁴⁹ Children and Young Persons Act 1933, s 1.

committed by a person with responsibility for the child. We therefore recommend that the offence of exposing children to danger should be retained.

- 8.44 As noted in the SCP,⁵⁰ the offence of furious driving is generally used to prosecute cases where the vehicle involved is a bicycle or cart rather than a motor vehicle, and for incidents taking place off the public highway, where offences under the Road Traffic Acts are not always available. We recommend retaining this offence.
- 8.45 We also recommend retaining the offence concerning mantraps. This would become unnecessary if a general endangerment offence were introduced; but in Chapter 7⁵¹ we advise against this.
- 8.46 It could be argued that the offence of not feeding servants and apprentices might have some continuing relevance, given the frequent reports in the press about foreign workers kept in virtual servitude. However, there is now a new and specifically designed offence of holding a person in slavery or servitude or requiring a person to perform forced or compulsory labour;⁵² this carries a maximum sentence of life imprisonment.
- 8.47 Preventing escape from wrecks is certainly very reprehensible behaviour, meriting serious punishment. However, there has been no prosecution for this offence since 2003 at the latest,⁵³ and were such facts to occur they would justify a charge of at least false imprisonment⁵⁴ and possibly attempted murder, both of which already carry a potential sentence of life imprisonment.
- 8.48 We recommend that sections 17, 21 and 26 of the 1861 Act, respectively providing for offences of preventing escape from wrecks, attempting to choke with intent to commit an offence and failing to feed servants and apprentices, should be repealed. The offences of causing harm by furious driving, setting man traps and exposing children to danger should be retained, with any necessary updating to the wording.**

Offences outside the scope of the project

- 8.49 As explained in the SCP,⁵⁵ the following offences under the 1861 Act are not within the scope of this project:

- (1) bigamy;⁵⁶

⁵⁰ SCP para 3.6(5) and fn 14; P Richardson (ed), *Archbold: Criminal Pleading, Evidence and Practice* (2015 edition) (“*Archbold*”) para 19-306; *Blackstone’s* para C3.61; *Hall* [2009] EWCA Crim 2236, [2010] 1 Cr App R (S) 95.

⁵¹ Para 7.33 above.

⁵² Modern Slavery Act 2015, s 1, replacing Coroners and Justice Act 2009, s 71.

⁵³ That is, we only have figures for the period from 2003 onward. We do not know when this offence was last charged.

⁵⁴ See our recent report, *Simplification of Criminal Law: Kidnapping and Related Offences* (2014) Law Com No 355.

⁵⁵ SCP para 2.231.

- (2) attempted abortion;⁵⁷
- (3) procuring drugs for abortion;⁵⁸ and
- (4) concealing birth.⁵⁹

They are not included in the 1998 draft Bill or in previous Law Commission projects on offences against the person, and raise issues going well beyond the law of offences against the person. We therefore make no recommendations about these offences in this report.

- 8.50 There is an offence of torture under section 134 of the Criminal Justice Act 1988, which is reproduced in clause 12 of the draft Bill with minimal technical changes. It will be a matter for those drafting a new statute on offences of violence to decide whether to follow the draft Bill by including this offence or to leave it in the Criminal Justice Act 1988.

ALTERNATIVE VERDICTS

- 8.51 Under section 6(3) of the Criminal Law Act 1967, a person charged with an indictable offence may be acquitted of that offence but convicted of another offence included within it.⁶⁰ In the SCP⁶¹ we explain that “included” is now used rather loosely: the second offence does not have to be a necessary logical consequence of the first.⁶² For example, a person charged under section 20 can be found guilty of the offence under section 47, although the section 20 offence need not involve an assault.⁶³
- 8.52 This provision only applies when both offences are indictable, except that there is also power to convict that person of assault or battery. This arises through a somewhat indirect statutory route.

- (1) Section 40 of the Criminal Justice Act 1988 provides that:

(1) A count charging a person with a summary offence to which this section applies may be included in an indictment if the charge—

(a) is founded on the same facts or evidence as a count charging an indictable offence; or

⁵⁶ OAPA 1861, s 57.

⁵⁷ OAPA 1861, s 58.

⁵⁸ OAPA 1861, s 59.

⁵⁹ OAPA 1861, s 60.

⁶⁰ In directing a jury, the judge should draw attention to the availability of the included offence if there is any evidence to support it: *Blackstone's* D19.58 to D19.66; *Coutts* [2006] UKHL 39, [2006] 1 WLR 2154; *Foster (Mark)* [2007] EWCA Crim 2869, [2008] 1 WLR 1615; *Foster (Stephen Peter)* [2009] EWCA 2214.

⁶¹ SCP para 2.105 and paras 5.199 and following.

⁶² *Archbold* paras 4-525 to 4-527; *Blackstone's* para D19.47 and following.

⁶³ *Wilson and Jenkins* [1984] AC 242 (HL), [1983] 3 All ER 448.

(b) is part of a series of offences of the same or similar character as an indictable offence which is also charged

...

Subsection (3) of that section contains a list of the summary offences to which the section applies: this includes “common assault”, meaning assault or battery.

(2) Section 6 of the Criminal Law Act 1967⁶⁴ provides:

(3) Where, on a person’s trial on indictment for any offence except treason or murder, the jury find him not guilty of the offence specifically charged in the indictment, but the allegations in the indictment amount to or include (expressly or by implication) an allegation of another offence falling within the jurisdiction of the court of trial, the jury may find him guilty of that other offence or of an offence of which he could be found guilty on an indictment specifically charging that other offence.

(3A) For the purposes of subsection (3) above an offence falls within the jurisdiction of the court of trial if it is an offence to which section 40 of the Criminal Justice Act 1988 applies (power to join in indictment count for common assault etc.), even if a count charging the offence is not included in the indictment.

8.53 Clause 22 of the draft Bill contains provisions intended to preserve and extend this position.⁶⁵ In summary:

- (1) for the purposes of section 6 of the Criminal Law Act 1967, every offence involving intention includes the corresponding offence involving recklessness;⁶⁶
- (2) whenever D is charged on an indictment with any of the offences under clauses 1, 2, 3, 6 and 7 (that is to say, the injury offences and assault to resist arrest), the court may instead find D guilty of the offence under clause 4 (corresponding to assault or battery); and
- (3) in certain cases, the magistrates have similar powers.

8.54 The effect is similar to that of the existing law, but the drafting technique is different. The power to find a person guilty of assault as a substitute for a more serious charge is provided directly, and not by reference to the power in section 40 of the Criminal Justice Act 1988 to include a count for assault on the indictment. The power is also extended to the magistrates’ courts.

⁶⁴ As amended by Domestic Violence, Crime and Victims Act 2004, s 11.

⁶⁵ Set out in SCP para 5.204.

⁶⁶ For the meanings of intention and recklessness, see paras 2.13 and 2.14, above.

8.55 In the SCP we proposed making use of a provision similar to clause 22. However, we pointed out that the position would become considerably more complicated if a summary-only offence of causing minor injuries were created. It would be necessary to introduce provisions similar to the existing ones about assault. We asked about alternative verdicts in question 32.

Responses to consultation

8.56 Of those who commented on this question:

- (1) fourteen⁶⁷ were in favour of using a provision similar to clause 22;
- (2) three⁶⁸ were against, either because they opposed the whole reform or because they thought the provisions unnecessary;
- (3) some had particular points about which existing provisions would need to be amended to accommodate the proposed offence of causing minor injury, and the Magistrates' Association advocated extending the full system of included offences to the magistrates' courts.⁶⁹

Discussion

8.57 To preserve the position in existing law as closely as possible, it is necessary to ensure that:

- (1) a person charged under clause 1 (intentionally causing serious injury) can be convicted of the offence under clause 2 (recklessly causing serious injury) or 3 (intentionally or recklessly causing serious injury);
- (2) a person charged under clause 2 (recklessly causing serious injury) can be convicted of the offence under clause 3 (intentionally or recklessly causing serious injury);
- (3) a person charged with an offence under any of those three clauses can be convicted of the offences replacing assault and battery, which we have called "threatened assault" and "physical assault";⁷⁰
- (4) a person charged with the offence under clause 6 (causing serious injury with intent to resist arrest) or 7 (assault with intent to resist arrest) can be convicted of threatened or physical assault.⁷¹

⁶⁷ Jonathan Rogers, Sussex academics, Law Society, Council of District Judges (Magistrates' Courts), Findlay Stark, Antony Duff, Justices' Clerks Society, Council of HM Circuit Judges, British Transport Police, Richard Wood, Richard Taylor, London Criminal Courts Solicitors' Association, Magistrates' Court, David Hughes.

⁶⁸ Sally Ramage, Criminal Bar Association, Bar Council.

⁶⁹ For the purposes of the present project, we can only consider this recommendation so far as it relates to crimes of violence.

⁷⁰ Para 5.28 above.

⁷¹ We do not advocate that a person charged with causing serious injury with intent to resist arrest should be able to be convicted of any of the offences under clauses 1 to 3 as an included offence: a person may commit the clause 6 offence without either intending or being reckless about the risk of causing injury.

- 8.58 Some of these results would in any case be achieved by section 6 of the Criminal Law Act 1967, given the elastic meaning of “included” laid down in *Wilson and Jenkins*.⁷² However, the position is put beyond doubt by clause 22 of the draft Bill. This clause also has the advantage of extending these powers to the magistrates’ courts.
- 8.59 In addition, special provision must be made for the new offence of aggravated assault, as recommended in Chapter 5 above.⁷³ That is, it is necessary to ensure that:
- (1) a person charged with an offence under any of clauses 1 to 3 (or clause 6) can be convicted of aggravated assault; and
 - (2) a person charged with aggravated assault can be convicted of physical or threatened assault.
- 8.60 One minimalist way of achieving the first of these results is simply to add the offence of aggravated assault to the list of “offences to which this section applies” in section 40(3) of the Criminal Justice Act 1988. This should in any case be done, in order to allow a count for aggravated assault to be included on an indictment together with a count for an injury offence under any of clauses 1 to 3. Under section 6(3A) of the Criminal Law Act 1967, this would allow aggravated assault to be found as an alternative verdict, even if not so charged.
- 8.61 In our view, however, it would be preferable to bring about both results by adding further explicit provisions to this effect to clause 22 of the draft Bill. This would have the advantage of extending these powers to the magistrates’ courts.
- 8.62 We recommend that a reformed statute governing offences of violence should contain a provision concerning alternative verdicts similar to clause 22 of the draft Bill, with added sub-sections to ensure that:**
- (1) a person charged with an offence of causing injury can be convicted of aggravated assault; and**
 - (2) a person charged with aggravated assault can be convicted of physical or threatened assault.**

⁷² [1984] AC 242 (HL), [1983] 3 All ER 448.

⁷³ Para 5.68 above.

CHAPTER 9

RECOMMENDATIONS

- 9.1 We recommend that the 1861 Act and associated offences should be replaced by a comprehensive modern statute on offences against the person.¹
- 9.2 We recommend that any new statute governing crimes of violence should follow the scheme of the draft Bill by providing for one or more general offences of causing injury, rather than offences of causing injury of particular types or by particular means.²
- 9.3 We recommend using the hierarchy of injury offences in the draft Bill, distinguishing between serious or severe injuries and injury in general.³
- 9.4 We recommend using the hierarchy of offences in the draft Bill, in which the offence of recklessly causing serious injury is only committed if the defendant is aware of the risk that his or her conduct will cause serious injury.⁴
- 9.5 We recommend using the hierarchy of offences in the draft Bill, including one offence of intentionally causing serious injury, one offence of recklessly causing serious injury and one offence of intentionally or recklessly causing injury.⁵
- 9.6 We recommend that the definition of mental injury should have the same limits as the existing law, namely recognised psychiatric conditions.⁶
- 9.7 We recommend that a reformed statute on offences against the person should not contain a definition of intention, and that the meaning of intention should continue to be decided according to general principles of criminal law.⁷
- 9.8 We recommend that a reformed statute on offences against the person should not contain a definition of recklessness, and that the meaning of recklessness should continue to be decided according to general principles of criminal law.⁸
- 9.9 We recommend that:
- (1) the offence under clause 1 of the draft Bill (intentionally causing serious injury) should be triable on indictment only; and
 - (2) the offences under clauses 2 (recklessly causing serious injury) and 3 (intentionally or recklessly causing injury) should be triable either in the Crown Court or in a magistrates' court.⁹

¹ Para 3.21 above.

² Para 4.33 above.

³ Para 4.45 above.

⁴ Para 4.99 above.

⁵ Para 4.106 above.

⁶ Para 4.126 above.

⁷ Para 4.140 above.

9.10 We recommend that a reformed statute on offences of violence should provide for the following two offences:

- (1) physical assault, where a person intentionally or recklessly applies force to or causes an impact on the body of another, without the consent of that other; or
- (2) threatened assault, where a person intentionally or recklessly causes another to think that any such force or impact is or may be imminent, and that other does not consent to the conduct in question.¹⁰

9.11 We recommend that a reformed statute on offences of violence should provide for an offence of aggravated assault, defined as follows:

- (1) the conduct element would be the same as that for physical or threatened assault (that is, it would be one offence that can be committed in two ways);
- (2) the assault must have the result of causing some injury;
- (3) the fault element should be the same as that for physical or threatened assault, without the need for intention or recklessness in relation to the injury caused;
- (4) the offence should be triable only in a magistrates' court; and
- (5) the maximum sentence should be 12 months.¹¹

9.12 We recommend that a reformed statute on offences of violence should contain offences of:

- (1) causing serious injury intending to resist, prevent or terminate the lawful arrest or detention of himself or a third person; and
- (2) assault intending to resist, prevent or terminate the lawful arrest or detention of himself or a third person;

as set out in clauses 6 and 7 of the draft Bill. The maximum penalty for the offence under clause 6 should be set at more than 7 years but less than life.¹²

9.13 We recommend that:

- (1) a reformed statute on offences of violence should contain an offence of assaulting a police constable in the execution of his or her duty;
- (2) that offence should contain a requirement that the defendant knew that the victim was a constable, or was reckless as to whether the victim was a constable or not;

⁸ Para 4.153 above.

⁹ Para 4.171 above.

¹⁰ Para 5.29 above.

¹¹ Para 5.68 above.

¹² Para 5.79 above.

- (3) the maximum sentence for that offence should be 12 months.¹³
- 9.14 We recommend that the offences of assault on a magistrate or other person preserving a wreck and assault on or obstruction of a clergyman in performance of religious duties should be abolished.¹⁴
- 9.15 We recommend that the provisions of the Crime and Disorder Act 1998 relating to racially and religiously aggravated crimes of violence should be amended to refer to the recommended offences of recklessly causing serious injury, intentionally or recklessly causing injury and physical and threatened assault. Those provisions should not also refer to the recommended offence of aggravated assault.¹⁵
- 9.16 The maximum sentence for the racially or religiously aggravated form of recklessly causing serious injury should be ten years.¹⁶
- 9.17 We consider that a reformed statute on offences of violence should not contain additional offences of domestic violence.¹⁷
- 9.18 In any new statute governing offences against the person based on the draft Bill, the offences of causing serious injury should be capable of including the intentional or (as the case may be) reckless transmission of disease; accordingly disease should fall within the definition of injury.¹⁸
- 9.19 If it is desired to pursue further the possibility of excluding criminal liability for the reckless transmission of disease, or of creating special offences for such transmission, this should follow a wider review. However, the reform of offences against the person should not be delayed to await the results of that review.¹⁹
- 9.20 We do not recommend offences of exposing persons to the danger of disease, or of failing to disclose infection.²⁰
- 9.21 The offence under clause 3, of intentionally or recklessly causing injury, should exclude cases where the risk taken is such as to be generally acceptable in the ordinary conduct of daily life, but we consider that this is sufficiently ensured by the recklessness requirement of the offence.²¹
- 9.22 We recommend that a revised statute governing offences of violence should not include a general offence of exposing another person to the danger of injury.²²

¹³ Para 5.89 above.

¹⁴ Para 5.94 above.

¹⁵ Para 5.109 above.

¹⁶ Para 5.110 above.

¹⁷ Para 5.118 above.

¹⁸ Para 6.143 above.

¹⁹ Para 6.144 above.

²⁰ Paras 6.143 to 6.145 above.

²¹ Para 6.146 above.

²² Para 7.33 above.

- 9.23 We recommend that a revised statute governing offences of violence should contain offences of administering substances capable of causing injury and creating danger by explosives, as set out in clauses 8 and 9 of the draft Bill.²³
- 9.24 We recommend that a revised statute governing offences of violence should contain an offence of causing danger on railways, similar to that in clause 13 of the draft Bill, but that the proposed maximum sentence for this offence should be reconsidered.²⁴
- 9.25 We recommend that a reformed statute governing offences of violence should include an offence of threatening to kill, cause serious injury to or rape any person, including cases where the threat is conditional on the conduct of the person to whom the threat is made or any other fact or event.²⁵
- 9.26 We recommend that a reformed statute governing offences of violence should include an offence of encouragement to murder, and that this should include cases where the encouragement is conditional.²⁶
- 9.27 We recommend that sections 17, 21 and 26 of the 1861 Act, respectively providing for offences of preventing escape from wrecks, attempting to choke with intent to commit an offence and failing to feed servants and apprentices, should be repealed. The offences of causing harm by furious driving, setting man traps and exposing children to danger should be retained, with any necessary updating to the wording.²⁷
- 9.28 We recommend that a reformed statute governing offences of violence should contain a provision concerning alternative verdicts similar to clause 22 of the draft Bill, with added sub-sections to ensure that:
- (1) a person charged with an offence of causing injury can be convicted of aggravated assault; and
 - (2) a person charged with aggravated assault can be convicted of physical or threatened assault.²⁸

(Signed) DAVID BEAN, *Chairman*
 NICK HOPKINS²⁹
 STEPHEN LEWIS
 DAVID ORMEROD
 NICHOLAS PAINES

ELAINE LORIMER, *Chief Executive*
 20 October 2015

²³ Para 7.40 above.

²⁴ Para 7.45 above.

²⁵ Para 8.18 above.

²⁶ Para 8.37 above.

²⁷ Para 8.48 above.

²⁸ Para 8.62 above.

²⁹ Professor Hopkins joined the Commission on 1 October, after the report was approved in principle on 30 September.

TABLE OF EXISTING AND NEW OFFENCES

Existing offences			New offences		
Section (of OAPA 1861 unless otherwise stated)	Description	Mode of trial and sentence	Clause (of 1998 draft Bill unless otherwise stated)	Description	Mode of trial and sentence
18	Wounding or causing grievous bodily harm with intent to cause grievous bodily harm	Crown Court; life	1	Intentionally causing serious injury <i>Note: wounding is not included unless the wound is a serious injury.</i>	Crown Court; life
20	Malicious wounding or infliction of grievous bodily harm <i>Note: the defendant must intend or be reckless about some harm; not necessarily about a wound or grievous bodily harm.</i>	Either way; 5 years	2	Recklessly causing serious injury <i>Note: D must be reckless about the risk of serious injury; wounding is not included unless the wound is a serious injury.</i>	Either way; 7 years
47	Assault occasioning actual bodily harm <i>Note: this includes every assault or battery which in fact causes injury, whether or not the defendant intended or was reckless about injury.</i>	Either way; 5 years	3	Intentionally or recklessly causing injury (whether or not by assault) <i>Note: D must intend or be reckless about the risk of some injury.</i>	Either way; 5 years
Common law	Battery <i>Note: this means actual physical violence, including any unlawful touching however slight. At present, this offence is sometimes used for cases of low-level injuries.</i>	Magistrates' court; 6 months	recommended in report but not in 1998 draft Bill	Aggravated assault <i>Note: includes every physical or threatened assault which in fact causes injury, whether or not D intended or was reckless about injury.</i>	Magistrates; 12 months
			4 (modified)	Physical assault <i>Note: should not be used for cases of low-level injury, as these may be charged as aggravated assault.</i>	Magistrates; 6 months

Existing offences			New offences		
Section (of OAPA 1861 unless otherwise stated)	Description	Mode of trial and sentence	Clause (of 1998 draft Bill unless otherwise stated)	Description	Mode of trial and sentence
Common law	Assault <i>Note: this means causing a person to apprehend physical violence, in the same sense as for battery above.</i>	Magistrates; 6 months	4 (modified)	Threatened assault	Magistrates; 6 months
Police Act 1996, s 89(1)	Assault on a constable in the execution of his duty <i>Note: the defendant need not know or suspect that the victim is a police officer</i>	Magistrates; 6 months	5 (modified)	Assault on a constable in the execution of his duty <i>Note: the defendant must know that the victim is a police officer, or be reckless as to whether the victim is a police officer or not</i>	Magistrates; 12 months
OAPA 1861, s 18	Wounding or causing grievous bodily harm with intent to resist or prevent the lawful apprehension or detention of any person	Crown Court; life	6	Causing serious harm intending to resist, prevent or terminate the lawful arrest or detention of himself or a third person	Crown Court; not set
38	Assault with intent to resist or prevent the lawful apprehension or detention of any person	Either way; 2 years	7	Assault intending to resist, prevent or terminate the lawful arrest or detention of himself or a third person	Either way; 2 years
37	Assault resulting in striking or wounding a magistrate or other person in the exercise of his duty preserving a wreck or any ship in distress	Crown Court; 7 years	Abolished without replacement		
36	Obstructing or assaulting a clergyman in the discharge of his duties	Either way; 2 years	Abolished without replacement		

Existing offences			New offences		
Section (of OAPA 1861 unless otherwise stated)	Description	Mode of trial and sentence	Clause (of 1998 draft Bill unless otherwise stated)	Description	Mode of trial and sentence
28	Doing grievous bodily harm by explosion	Crown Court; life	8	Using dangerous or explosive substances intending or risking serious injury	Crown Court; life
29	Exploding or sending substance with intent to do grievous bodily harm	Crown Court; life			
30	Placing or throwing explosives with intent to injure	Crown Court; 14 years	9	Using dangerous or explosive substances intending or risking injury	Crown Court; 14 years
64	Possessing or making explosives with intent to commit an offence	Crown Court; 2 years		Abolished without replacement, but same conduct already covered by Explosive Substances Act 1883, ss 3 and 4.	
16	Threats to kill	Crown Court; 10 years	10	Threatening death or serious injury	Either way; 10 years
4	Soliciting murder	Crown Court; life	recommended in report but not in draft Bill	Encouraging murder	Crown Court; life
22	Using stupefying substance in order to commit offence	Crown Court; life	11	Administering a substance capable of causing injury	Either way; 5 years
23	Administering noxious substance to endanger life or inflict grievous bodily harm	Crown Court; 10 years		<i>Note: where injury caused, offences under clauses 1 to 3 may also apply. There is also an offence of using a stupefying substance to enable sexual activity, with a maximum sentence of 10 years: Sexual Offences Act 2003, s 61.</i>	
24	Administering noxious substance with intent to injure or annoy	Crown Court; 5 years			

Existing offences			New offences		
Section (of OAPA 1861 unless otherwise stated)	Description	Mode of trial and sentence	Clause (of 1998 draft Bill unless otherwise stated)	Description	Mode of trial and sentence
32	Placing things on railway track with intent to endanger passengers	Crown Court; life	13	Causing danger to a person on a railway	Either way; 2 years in draft Bill (we suggest 5 years)
33	Throwing things at train with intent to endanger passengers	Crown Court; life			
34	Endangering passengers on railway	Either way; 2 years			
17	Impeding person escaping from wreck	Crown Court; life		Abolished without replacement	
21	Attempting to choke in order to commit offence	Crown Court; life		Abolished without replacement	
26	Not providing servants or apprentices with food	Either way; 5 years		Abolished without replacement	
27	Exposing children to danger	Either way; 5 years		Retained in 1861 Act	
31	Setting spring guns, man-traps etc	Crown Court; 5 years		Retained in 1861 Act	
35	Causing harm by furious driving	Crown Court; 2 years		Retained in 1861 Act	
57	Bigamy	Either way; 7 years		Outside scope of project; retained in 1861 Act	
58	Unlawful abortion	Crown Court; life			

Existing offences			New offences		
Section (of OAPA 1861 unless otherwise stated)	Description	Mode of trial and sentence	Clause (of 1998 draft Bill unless otherwise stated)	Description	Mode of trial and sentence
59	Procuring drugs for abortion	Crown Court; 5 years	Outside scope of project; retained in 1861 Act		
60	Concealing birth of child	Either way; 2 years			

APPENDIX A

LIST OF CONSULTEES

COURTS AND JUDICIARY

Lord Thomas of Cwmgiedd, Lord Chief Justice

Council of HM Circuit Judges

HM Council of District Judges (Magistrates' Courts)

Magistrates' Association

John Atherton, National Bench Chairmen's Forum

South West London Magistrates' Association

Justices' Clerks' Society

PUBLIC AUTHORITIES

Association of Police and Crime Commissioners

British Transport Police

CPS

HM Crown Prosecution Service Inspectorate

John Starbuck, Wakefield Metropolitan District Council

LEGAL PROFESSION

Bar Council

Criminal Bar Association

Law Society

London Criminal Courts Solicitors' Association

Rupert Barnes, solicitor

Michael Devaney, solicitor

Sally Ramage, editor, *The Criminal Lawyer*

Richard Wood, barrister

LEGAL ACADEMICS

Professor Peter Alldridge, Queen Mary College, London

Professor Dennis Baker, University of Surrey

Professor Michael Bohlander, University of Durham

Professor Margot Brazier and Dr Catherine Stanton, University of Manchester

Professor James Chalmers, Glasgow University

Dr Cath Crosby, Teesside University

Emeritus Professor Ian Dennis, University College, London

Claire de Than and Dr Jesse Elvin, City University

Professor Antony Duff, University of Stirling

Professor Leslie Francis, University of Utah

Dr David Gurnham, Mark Telford and Dr A M Viens, Southampton University

Professor Jeremy Horder, London School of Economics

D Hughes, Teesside University

Adam Jackson and Tony Storey, Northumbria Law School's Centre for Evidence and Criminal Justice Studies, Northumbria University

Nicola Padfield, Fitzwilliam College, Cambridge

Kiron Reid, University of Liverpool

Dr Jonathan Rogers, University College, London

Samantha Ryan, Newcastle Law School, Newcastle University

Professor John Spencer, University of Cambridge

Dr Findlay Stark, Jesus College, Cambridge

Professor Richard Taylor, University of Central Lancashire

Associate Professor Rebecca Williams, Pembroke College, Oxford

Professor William Wilson, Queen Mary College, London

Dr John Child, Dr Abenaa Owusu-Bempah and Dr Mark Walters, Criminal Law, Criminal Justice and Criminology Stream (CCC) of the Centre for Responsibilities, Rights and the Law, Sussex Law School, University of Sussex

MEDICAL ACADEMICS AND PRACTITIONERS

Dr Matthew Phillips

ORGANISATIONS

BHIVA

Children Are Unbeatable

Hepatitis C Trust

Herpes Viruses Association

HIV Justice Network (Edwin Bernard)

LSE Pro Bono Research

National Aids Trust

NSPCC

Respect

Terrence Higgins Trust

MEMBERS OF THE PUBLIC

David Hughes

APPENDIX B

GLOSSARY

ABH – (a) an abbreviation for actual bodily harm;
(b) the offence of assault occasioning actual bodily harm, contrary to section 47 of the Offences Against the Person Act 1861

Actual bodily harm – any physical or psychiatric harm to an individual beyond the transient and trifling

Actus reus – The external elements of an offence, that is, the elements of an offence other than those relating to the defendant's state of mind or fault: they divide into conduct elements, consequence elements and circumstance elements

Assault – (a) an offence consisting of intentionally or recklessly causing a person to apprehend immediate unlawful violence;
(b) a collective term for assault (sense (a)) and battery

Basic intent – where a defendant is voluntarily intoxicated and the offence is one classified by the courts as being an offence of "basic intent" D can be guilty, despite not having the state of mind that would otherwise need to be present: contrasted with "specific intent"

Battery – the intentional or reckless infliction of unlawful violence, consisting of any unjustified physical contact, either between D and V or between V and some object; also known as "assault by beating"

Circumstance element – within the external elements of the offence, the circumstance element is any fact other than the conduct element or the consequence elements affecting whether D is guilty or not (for example, in rape, that V does not consent)

Common assault – a collective term for the basic offences of assault and battery, as contrasted with assault occasioning actual bodily harm and other assault-based offences

Conduct element – within the external elements of the offence, the act or omission to be performed by D to be guilty of the particular offence

Consequence elements – within the external elements of the offence the consequence element prescribes the required result of D's conduct (for example, in murder, that the victim ("V") dies)

Constructive liability – in an offence of constructive liability, D can be guilty of an offence despite only intending or being reckless about a lesser degree of harm than that required for the offence (for example, in murder, D must bring about V's death but need only intend to cause grievous bodily harm). Contrasted with the correspondence principle, strict liability and ulterior intent

Correspondence principle – the view that the fault element of an offence should relate to the same facts or results as those specified in the external elements of that offence (for example, in battery, D must cause physical impact on V,

intending or being reckless about that physical impact). Contrasted with constructive liability, strict liability and ulterior intent

Defendant (“D”) – the person accused of an offence

Detainer – old word for detention

Direct intent – D intends a result, in the sense that D acts in order to bring it about and that D would consider his act a failure if the result did not occur

Endangerment offence – any offence of exposing a person to danger that does not require the danger to result in actual harm

External elements, also known as the **actus reus** – the elements of an offence other than those relating to the defendant’s state of mind or fault: they divide into conduct elements, consequence elements and circumstance elements

Fault element, also known as the mental element or mens rea – the state of mind necessary for D to be guilty of an offence, for example intention, recklessness, knowledge or belief (or the lack of it). In some cases fault is not about the state of mind of the defendant as the standard is one of negligence

Felony – an old classification of offences, abolished in 1967; contrasted with “misdemeanour”

GBH – (a) an abbreviation for grievous bodily harm;
(b) the offence of maliciously inflicting actual bodily harm, contrary to section 20 of the Offences Against the Person Act 1861

Grievous bodily harm – really serious physical or psychiatric harm to an individual

Indictable offence – an offence triable in the Crown Court (whether or not it can also be tried in a magistrates’ court); contrasted with a summary offence

Indictable-only offence – (an offence) that can be tried only in the Crown Court

Intention – D “intends” a result if D acts in order to bring it about (direct intent), or if D knows that it is virtually certain to occur if D succeeds in achieving some other purpose (oblique intent). See also basic intent, specific intent and ulterior intent

Jurisdiction – the right of a court to try a case (especially in relation to cases where some of the events took place outside England and Wales)

Malice (malicious, maliciously) – the state of mind required to be guilty of the offence under section 20 of the 1861 Act (and some other offences): it can consist of either intention to cause some harm (not necessarily amounting to grievous bodily harm) or recklessness as to some harm resulting

Mens rea – another term for the fault element of an offence

Mental element – another term for the fault element of an offence

Misdemeanour (sometimes spelled “misdemeanor”) – an old classification of offences, abolished in 1967

Mode of trial – whether a case is tried in the Crown Court with a jury or in a magistrates’ court

Objective recklessness – the state of mind in which D may not be aware of a risk, but ought reasonably to have been aware of it (this is not now the accepted test for recklessness)

Oblique intent – D is said to intend a result, although D did not act in order to bring it about, if D knows that it is virtually certain to occur (barring some extraordinary intervention) if D succeeds in achieving some other purpose

Penal servitude – a formerly available sentence consisting of imprisonment with hard labour; now replaced by imprisonment

Racially or religiously aggravated – an offence is racially or religiously aggravated if D demonstrates hostility to a particular racial or religious group while committing, or immediately before or after committing, the offence or if the offence is motivated by that hostility

Recklessness – the state of mind in which D is aware of the risk of a particular result or circumstance, but unreasonably (given the facts as D knows or believes them to be) takes that risk: this test is known as “subjective recklessness”

Specific intent – an offence of “specific intent” is one in which D cannot be guilty if too intoxicated to form the state of mind required by the offence in question: contrasted with “basic intent”

Strict liability – in an offence of strict liability, D may be guilty despite not intending or being aware of one or more of the facts or results specified in the external elements of that offence (for example having sex with a child under 13 where there is no need to prove D’s knowledge of the child’s age). Contrasted with the correspondence principle, constructive liability and ulterior intent

Summary offence – an offence triable only in a magistrates’ court; contrasted with an indictable offence

Triable either way – (an offence) that can be tried either in the Crown Court or in a magistrates’ court

Ulterior intent – in an offence of ulterior intent, D must intend some result other than those which must occur to satisfy the external elements of the offence (for example, in assault with intent to rob no actual robbery need take place). Contrasted with the correspondence principle, constructive liability and strict liability

Victim (“V”) – the person against whom an offence is said to have been committed. Also, until conviction, more properly called the complainant.

Wounding – any penetration through all the layers of skin (that is, more than a scratch)

ABBREVIATIONS

ABH – actual bodily harm

ACPO – Association of Chief Police Officers: a policing policy organisation, now known as the National Police Chiefs' Council

Archbold – P Richardson (ed), *Archbold: Criminal Pleading, Evidence and Practice* (2015 edition)

ASBO – Anti-Social Behaviour Order

BHIVA – British HIV Association

Blackstone's – D Ormerod and D Perry (eds), *Blackstone's Criminal Practice* (26th ed 2016)

CLRC – Criminal Law Reform Committee

CPS – the Crown Prosecution Service

GBH – grievous bodily harm

OAPA – Offences Against the Person Act

SCP – Scoping Consultation Paper

Smith and Hogan – D Ormerod and K Laird, *Smith and Hogan's Criminal Law* (14th ed 2015)

SOPO – Sexual Offences Prevention Order

the 1861 Act – the Offences Against the Person Act 1861

UNAIDS – Joint United Nations Programme on HIV/AIDS

APPENDIX C

HOME OFFICE 1998 DRAFT BILL

Offences Against the Person Bill

ARRANGEMENT OF CLAUSES

Injury and assault

1. Intentional serious injury.
2. Reckless serious injury.
3. Intentional or reckless injury.
4. Assault.
5. Assault on a constable.
6. Causing serious injury to resist arrest etc.
7. Assault to resist arrest etc.

Dangerous substances

8. Dangerous substances: intending or risking serious injury.
9. Dangerous substances: intending or risking injury.

Other offences

10. Threats to kill or cause serious injury.
11. Administering a substance capable of causing injury.
12. Torture.
13. Causing danger on railways.

Meaning fault terms and of injury

14. Meaning of fault terms.
15. Meaning of injury.

Matters affecting liability

16. Supervening fault.
17. Transferred fault.
18. General defences etc.
19. Effect of voluntary intoxication.
20. Attempts.

Charges and verdicts

21. Charging more than one offence.
22. Alternative verdicts.

Amendments etc.

23. Abolition of certain common law offences.
24. Amendments and repeals.

General

25. Extent.

26. Commencement.

27. Citation.

SCHEDULES:

Schedule 1—Amendments.

Schedule 2—Repeals.

DRAFT

OF A

BILL

INTITULED

An Act to amend the law relating to non-fatal offences against the person.

BE IT ENACTED by the Queen’s most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Injury and assault

1.—(1) A person is guilty of an offence if he intentionally causes serious injury to another.

(2) A person is guilty of an offence if he omits to do an act which he has a duty to do at common law, the omission results in serious injury to another, and he intends the omission to have that result.

(3) An offence under this section is committed notwithstanding that the injury occurs outside England and Wales if the act causing injury is done in England and Wales or the omission resulting in injury is made there.

(4) A person guilty of an offence under this section is liable on conviction on indictment to imprisonment for life.

2.—(1) A person is guilty of an offence if he recklessly causes serious injury to another.

(2) An offence under this section is committed notwithstanding that the injury occurs outside England and Wales if the act causing injury is done in England and Wales.

(3) A person guilty of an offence under this section is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding 7 years;

(b) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both.

3.—(1) A person is guilty of an offence if he intentionally or recklessly causes injury to another.

(2) An offence under this section is committed notwithstanding that the injury occurs outside England and Wales if the act causing injury is done in England and Wales.

(3) A person guilty of an offence under this section is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding 5 years;

(b) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both.

4.—(1) A person is guilty of an offence if—

(a) he intentionally or recklessly applies force to or causes an impact on the body of another, or

(b) he intentionally or recklessly causes the other to believe that any such force or impact is imminent.

(2) No such offence is committed if the force or impact, not being intended or likely to cause injury, is in the circumstances such as is generally acceptable in the ordinary conduct of daily life and the defendant does not know or believe that it is in fact unacceptable to the other person.

(3) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding 6 months or a fine not exceeding level 5 on the standard scale or both.

5.—(1) A person is guilty of an offence if he assaults—

(a) a constable acting in the execution of his duty, or

(b) a person assisting a constable acting in the execution of his duty.

(2) For the purposes of this section a person assaults if he commits the offence under section 4.

(3) A reference in this section to a constable acting in the execution of his duty includes a reference to a constable who is a member of a police force maintained in Scotland or Northern Ireland when he is executing a warrant, or otherwise acting in England and Wales, by virtue of an enactment conferring powers on him in England and Wales.

(4) For the purposes of subsection (3) each of the following is a police force—

(a) a police force within the meaning given by section 50 of the Police (Scotland) Act 1967;

(b) the Royal Ulster Constabulary and the Royal Ulster Constabulary Reserve.

(5) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding 6 months or a fine not exceeding level 5 on the standard scale or both.

6.—(1) A person is guilty of an offence under this section if he causes serious injury to another intending to resist, prevent or terminate the lawful arrest or detention of himself or a third person.

(2) The question whether the defendant believes the arrest or detention is lawful must be determined according to the circumstances as he believes them to be.

(3) A person guilty of an offence under this section is liable on conviction on indictment to imprisonment for life.

7.—(1) A person is guilty of an offence if he assaults another intending to resist, prevent or terminate the lawful arrest or detention of himself or a third person.

(2) The question whether the defendant believes the arrest or detention is lawful must be determined according to the circumstances as he believes them to be.

(3) For the purposes of this section a person assaults if he commits the offence under section 4.

(4) A person guilty of an offence under this section is liable—

- (a) on conviction on indictment, to imprisonment for a term not exceeding 2 years;
- (b) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both.

Dangerous substances

8.—(1) A person is guilty of an offence if he acts as mentioned in subsection (2) and—

- (a) he intends to cause serious injury, or
- (b) he is reckless whether serious injury is caused.

(2) A person acts as mentioned in this subsection if he—

- (a) causes an explosive substance to explode,
- (b) places a dangerous substance in any place,
- (c) delivers or sends a dangerous substance to a person,
- (d) throws a dangerous substance at or near a person, or
- (e) applies a dangerous substance to a person.

(3) For the purposes of subsection (2) a dangerous substance is an explosive substance or any other dangerous substance.

(4) In this section “explosive substance” has the same meaning as in the Explosive Substances Act 1883.

(5) A person guilty of an offence under this section is liable on conviction on indictment to imprisonment for life.

9.—(1) A person is guilty of an offence if he acts as mentioned in section 8(2) and—

- (a) he intends to cause injury, or risk injury, or
- (b) he is reckless whether injury is caused.

(2) A person guilty of an offence under this section is liable on conviction on indictment to imprisonment for a term not exceeding 14 years.

Other offences

10.—(1) A person is guilty of an offence if he makes to another a threat to cause the death of, or serious injury to, that other or a third person, intending that other to believe that it will be carried out.

(2) A person guilty of an offence under this section is liable—

- (a) on conviction on indictment, to imprisonment for a term not exceeding 10 years;
- (b) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both.

11.—(1) A person is guilty of an offence if—

- (a) he administers a substance to another or causes it to be taken by him and (in either case) he does so intentionally or recklessly,
- (b) he knows the substance is capable of causing injury to the other, and

(c) it is unreasonable to administer the substance or cause it to be taken having regard to the circumstances as he knows or believes them to be.

(2) A person guilty of an offence under this section is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding 5 years;

(b) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both.

12.—(1) A person is guilty of an offence if he intentionally inflicts severe pain or suffering on another and he does the act—

(a) in the performance or purported performance of his of official duties as a public official, or

(b) at the instigation or with the consent or acquiescence of a public official who is performing or purporting to perform his official duties.

(2) A person is guilty of an offence if—

(a) he omits to do an act which he has a duty to do at common law,

(b) he makes the omission as mentioned in subsection (1)(a) or (b),

(c) the omission results in the infliction of severe pain or suffering on another, and

(d) he intends the omission to have that result.

(3) The following are immaterial—

(a) the nationality of the persons concerned;

(b) whether anything occurs in the United Kingdom or elsewhere;

(c) whether the pain or suffering is physical or mental.

(4) References in this section to an official include references to a person acting in an official capacity.

(5) Proceedings for an offence under this section may be instituted only by or with the consent of the Attorney General.

(6) A person guilty of an offence under this section is liable on conviction on indictment to imprisonment for life.

13.—(1) A person is guilty of an offence if he intentionally or recklessly causes danger to a person who is on a railway or is being carried on a railway.

(2) A person is guilty of an offence if he omits to do an act which he has a duty to do at common law, the omission results in danger to a person who is on a railway or is being carried on a railway, and he intends the omission to have that result or is reckless whether it will have that result.

(3) A person guilty of an offence under this section is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding 2 years;

(b) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both.

Meaning of fault terms and of injury

14.—(1) A person acts intentionally with respect to a result if—

(a) it is his purpose to cause it, or

- (b) although it is not his purpose to cause it, he knows that it would occur in the ordinary course of events if he were to succeed in his purpose of causing some other result.
- (2) A person acts recklessly with respect to a result if he is aware of a risk that it will occur and it is unreasonable to take that risk having regard to the circumstances as he knows or believes them to be.
- (3) A person intends an omission to have a result if—
 - (a) it is his purpose that the result will occur, or
 - (b) although it is not his purpose that the result will occur, he knows that it would occur in the ordinary course of events if he were to succeed in his purpose that some other result will occur.
- (4) A person is reckless whether an omission will have a result if he is aware of a risk that the result will occur and it is unreasonable to take that risk having regard to the circumstances as he knows or believes them to be.
- (5) Related expressions must be construed accordingly.
- (6) This section has effect for the purposes of this Act.

15.—(1) In this Act “injury” means—

- (a) physical injury, or
- (b) mental injury.
- (2) Physical injury does not include anything caused by disease but (subject to that) it includes pain, unconsciousness and any other impairment of a person’s physical condition.
- (3) Mental injury does not include anything caused by disease but (subject to that) it includes any impairment of a person’s mental health.
- (4) In its application to section 1 this section applies without the exceptions relating to things caused by disease.

Matters affecting liability

16.—(1) Where it is an offence under this Act to be at fault in causing a result by an act and a person lacks the fault required when he does an act that may cause or does cause the result, he nevertheless commits the offence if—

- (a) being aware that he has done the act and that the result may occur or (as the case may be) has occurred and may continue, and
- (b) with the fault required,

he fails to take reasonable steps to prevent the result occurring or continuing and it does occur or continue.

(2) Where it is an offence under this Act to be at fault in causing a result by an omission and a person lacks the fault required when he makes an omission that may cause or does cause the result, he nevertheless commits the offence if—

- (a) being aware that he has made the omission and that the result may occur or (as the case may be) has occurred and may continue, and
- (b) with the fault required,

he fails to take reasonable steps to prevent the result occurring or continuing and it does occur or continue.

(3) For the purposes of this section fault is intention or recklessness, and references to a person being at fault must be construed accordingly.

(4) Common law rules relating to matters provided for in this section do not apply to offences under this Act.

17.—(1) This section applies in determining whether a person is guilty of an offence under this Act.

(2) A person's intention, or awareness of a risk, that his act will cause a result in relation to a person capable of being the victim of the offence must be treated as an intention or (as the case may be) awareness of a risk that his act will cause that result in relation to any other person affected by his act.

(3) A person's intention, or awareness of a risk, that his omission will have a result in relation to a person capable of being the victim of the offence must be treated as an intention or (as the case may be) awareness of a risk that his omission will have that result in relation to any other person affected as a result of his omission.

(4) Common law rules relating to matters provided for in this section do not apply to offences under this Act.

18.—(1) The provisions of this Act have effect subject to any enactment or rule of law providing—

(a) a defence, or

(b) lawful authority, justification or excuse for an act or omission.

(2) In the application of subsection (1) to section 12 "lawful authority justification or excuse" means—

(a) in relation to pain or suffering inflicted in the United Kingdom, lawful authority, justification or excuse under the law of the part of the United Kingdom where it was inflicted;

(b) in relation to pain or suffering inflicted outside the United Kingdom by (or as a result of an omission by) a United Kingdom official acting under the law of the United Kingdom or any part of the United Kingdom, lawful authority, justification or excuse under that law;

(c) in any other case, lawful authority, justification or excuse under the law of the place where the pain or suffering was inflicted.

(3) The reference in this section to an official includes a reference to a person acting in an official capacity.

19.—(1) For the purposes of this Act a person who was voluntarily intoxicated at any material time must be treated—

(a) as having been aware of any risk of which he would have been aware had he not been intoxicated, and

(b) as having known or believed in any circumstances which he would have known or believed in had he not been intoxicated.

(2) Whether a person is voluntarily intoxicated for this purpose must be determined in accordance with the following provisions.

(3) A person is voluntarily intoxicated if—

- (a) he takes an intoxicant otherwise than properly for a medicinal purpose,
 - (b) he is aware that it is or may be an intoxicant, and
 - (c) he takes it in such a quantity as impairs his awareness or understanding.
- (4) An intoxicant, although taken for a medicinal purpose, is not properly so taken if—
- (a) the intoxicant is not taken on medical advice, and the taker is aware that the taking may result in his doing an act or making an omission capable of constituting an offence of the kind in question, or
 - (b) the intoxicant is taken on medical advice, but the taker fails then or afterwards to comply with any condition forming part of the advice and he is aware that the failure may result in his doing an act or making an omission capable of constituting an offence of the kind in question.
- (5) Intoxication must be presumed to have been voluntary unless there is adduced such evidence as might lead the court or jury to conclude that there is a reasonable possibility that the intoxication was involuntary.
- (6) An intoxicant is any alcohol, drug or other thing which, when taken into the body, may impair the awareness or understanding of the person taking it.
- (7) A person must be treated as taking an intoxicant if he permits it to be administered to him.

20.—(1) This section applies for the purpose of deciding whether a person is guilty under section 1 of the Criminal Attempts Act 1981 of attempting to commit an offence under this Act.

- (2) For that purpose a person acts with intent with respect to a result if—
- (a) it is his purpose to cause it, or
 - (b) although it is not his purpose to cause it, he knows that it would occur in the ordinary course of events if he were to succeed in his purpose of causing some other result.

Charges and verdicts

21. For the purposes of the rules against charging more than one offence in the same count or information, each of sections 1 to 13 creates one offence.

22.—(1) For the purposes of the application of section 6(3) of the Criminal Law Act 1967 (alternative verdicts) to the trial of a person on indictment for any offence under this Act, an allegation in the indictment of intention includes an allegation of recklessness.

(2) If on the trial on indictment of a person charged with an offence under section 1, 2, 3, 6 or 7 the jury find him not guilty of the offence charged, they may (without prejudice to section 6(3) of the Criminal Law Act 1967) find him guilty of an offence under section 4.

(3) If on the summary trial of a person charged with an offence under section 2 the magistrates' court find him not guilty of that offence, they may find him guilty of an offence under section 3 or 4.

(4) If on the summary trial of a person charged with an offence under section 3, 5 or 7 the magistrates' court find him not guilty of that offence, they may find him guilty of an offence under section 4.

(5) If—

(a) on the summary trial of a person charged with an offence under section 2 the magistrates' court convict him of that offence and make no decision whether he is guilty of an offence under section 3 or 4, and

(b) he appeals to the Crown Court against the conviction,

the Crown Court may reverse the conviction and find him guilty of an offence under section 3 or 4.

(6) If—

(a) on the summary trial of a person charged with an offence under section 3, 5 or 7 the magistrates' court convict him of that offence and make no decision whether he is guilty of an offence under section 4, and

(b) he appeals to the Crown Court against the conviction,

the Crown Court may reverse the conviction and find him guilty of an offence under section 4.

Amendments etc.

23. The following common law offences are abolished—

(a) common assault;

(b) battery;

(c) mayhem.

24.—(1) The enactments mentioned in Schedule 1 are amended in accordance with that Schedule.

(2) The enactments mentioned in Schedule 2 are repealed to the extent specified.

General

25.—(1) Subject to subsection (2), this Act extends to England and Wales only.

(2) Paragraph 45 of Schedule 1 extends to Scotland only.

26.—(1) Sections 1 to 22 apply in relation to acts or omissions done or made on or after the appointed day.

(2) Nothing in section 23 applies in relation to an act or omission done or made before the appointed day.

(3) No amendment or repeal made by Schedule 1 or 2 applies in relation to an act or omission done or made before the appointed day.

(4) If an act or omission is alleged to have been done or made over a period of two or more days, or at some time in a period of two or more days, it must be taken for the purposes of this section to have been done or made on the last of those days.

(5) The appointed day is such day as the Secretary of State appoints for the purposes of this Act by order made by statutory instrument.

27. This Act may be cited as the Offences Against the Person Act 1998.

SCHEDULES

SCHEDULE 1 AMENDMENTS

Night Poaching Act 1828 (c.69)

1. In section 2 of the Night Poaching Act 1828 (power to seize offenders) insert at the end—

“For the purposes of this section a person assaults if he commits the offence under section 4 of the Offences Against the Person Act 1998.”

London Hackney Carriage Act 1831 (c.22)

2. In section 56 of the London Hackney Carriage Act 1831 (assault of officers) insert at the end—

“For the purposes of this section a person assaults if he commits the offence under section 4 of the Offences Against the Person Act 1998.”

Piracy Act 1837 (c.88)

3. In section 2 of the Piracy Act 1837 (piracy when murder is attempted) insert at the end—

“For the purposes of this section a person assaults if he commits the offence under section 4 of the Offences Against the Person Act 1998.”

Markets and Fairs Clauses Act 1847 (c. 14)

4.—(1) The Markets and Fairs Clauses Act 1847 is amended as follows.

(2) In section 16 (assault of appointed persons) insert at the end—

“For the purposes of this section a person assaults if he commits the offence under section 4 of the Offences Against the Person Act 1998.”

(3) In section 40 (assaults of authorised persons) insert at the end—

“For the purposes of this section a person assaults if he commits the offence under section 4 of the Offences Against the Person Act 1998.”

Offences against the Person Act 1861 (c. 100)

5. The following provisions of the Offences against the Person Act 1861 shall cease to have effect—

- (a) section 16 (threats to kill);
- (b) section 17 (impeding saving from shipwreck);
- (c) section 18 (wounding with intent to do grievous bodily harm etc.);
- (d) section 20 (inflicting bodily injury);
- (e) section 21 (attempting to choke etc.);
- (f) section 22 (using drugs to commit indictable offence etc.);
- (g) sections 23 to 25 (administering poison etc.);
- (h) section 26 (not providing servants with food etc.);

- (i) section 27 (exposing a child etc.);
- (j) section 28 (causing bodily injury by gunpowder etc.);
- (k) section 29 (exploding gunpowder etc.);
- (l) section 30 (placing gunpowder near building etc.).

6.—(1) In section 31 of the Offences against the Person Act 1861 (setting spring guns etc. with intent to inflict grievous bodily harm)—

- (a) for “inflict grievous bodily harm” (where first occurring) substitute “cause serious injury”, and
- (b) for “inflict grievous bodily harm upon” substitute “cause serious injury to”.

(2) At the end of that section add—

“In this section “serious injury” has the same meaning as in the Offences Against the Person Act 1998 (ignoring section 15(4)).”

7. Sections 32 to 34 of the Offences against the Person Act 1861 (acts intended to endanger railway passengers etc.) shall cease to have effect.

8.—(1) Section 35 of the Offences against the Person Act 1861 (harm by furious driving etc.) is amended as follows.

(2) For “do or cause to be done any bodily harm” substitute “cause any injury”.

(3) At the end insert—

“In this section “injury” has the same meaning as in the Offences Against the Person Act 1998 (ignoring section 15(4)).”

9. Sections 36 to 38, 44, 45 and 47 of the Offences against the Person Act 1861 (certain assaults etc.) shall cease to have effect.

Parks Regulation Act 1872 (c. 15)

10.—(1) Section 6 of the Parks Regulation Act 1872 (assault on park constable) is amended as follows.

(2) For “is convicted of an assault on” substitute “assaults”.

(3) At the end insert—

“For the purposes of this section a person assaults if he commits the offence under section 4 of the Offences Against the Person Act 1998.”

Stamp Duties Management Act 1891 (c.38)

11. In section 18 of the Stamp Duties Management Act 1891 (assault of authorised person) insert after subsection (4)—

(5) For the purposes of this section a person assaults if he commits the offence under section 4 of the Offences Against the Person Act 1998.”

Children and Young Persons Act 1933 (c. 12)

12.—(1) The Children and Young Persons Act 1933 is amended as follows.

(2) In section 1 (cruelty to persons under 16) insert after subsection (1)—

“(1A) For the purposes of this section to assault is to—

- (a) apply force to or cause an impact on the body of another, or

- (b) cause the other to believe that any such force or impact is imminent.”
- (3) In section 14(2) (charging of offences together or separately) after “the offences” insert “under section 1 of this Act”.
- (4) In Schedule 1 (offences against children and young persons with respect to which special provisions of that Act apply) for “Common assault, or battery” substitute—
“Any offence under section 4 of the Offences Against the Person Act 1998 (assault)”

House to House Collections Act 1939 (c.44)

13. In the Schedule to the House to House Collections Act 1939 (offences justifying refusal or revocation of licence) at the end add “Offences under section 3 of the Offences Against the Person Act 1998.”

Visiting Forces Act 1952 (c.67)

14.—(1) Paragraph 1 of the Schedule to the Visiting Forces Act 1952 (offences against the person subject to restrictions on trial in the United Kingdom) is amended as follows.

- (2) In sub-paragraph (a) omit “and assault”.
- (3) In sub-paragraph (b) at the end add—
“(xiii) the Offences Against the Person Act 1998, except sections 5 (assault on a constable) and 12 (torture)”

Post Office Act 1953 (c.36)

15. In section 59 of the Post Office Act 1953 (false information of assault etc.) insert at the end—

“For the purposes of this section to assault is to—

- (a) apply force to or cause an impact on the body of another, or
- (b) cause the other to believe that any such force or impact is imminent.”

Sexual Offences Act 1956 (c.69)

16.—(1) The Sexual Offences Act 1956 is amended as follows.

(2) In section 14 (indecent assault on a woman) insert after subsection (4)—

“(5) For the purposes of this section a person assaults if he commits the offence under section 4 of the Offences Against the Person Act 1998.”

(3) In section 15 (indecent assault on a man) insert after subsection (3)—

“(3A) For the purposes of this section a person assaults if he commits the offence under section 4 of the Offences Against the Person Act 1998.”

(4) In section 16 (assault with intent to commit buggery) insert after subsection (1)—

“(1A) For the purposes of this section a person assaults if he commits the offence under section 4 of the Offences Against the Person Act 1998.”

(5) In section 28 (causing or encouraging indecent assault on girl under 16) insert after subsection (2)—

“(2A) For the purposes of this section a person assaults if he commits the offence under section 4 of the Offences Against the Person Act 1998.”

Marine etc. Broadcasting (Offences) Act 1967 (c.41)

17. In section 7A of the Marine etc. Broadcasting (Offences) Act 1967 (assaults on officers) insert after subsection (8)—

“(8A) For the purposes of this section a person assaults if he commits the offence under section 4 of the Offences Against the Person Act 1998.”

Criminal Law Act 1967 (c.58)

18.—(1) Section 6 of the Criminal Law Act 1967 (trial of offences) is amended as follows.

(2) In subsection (2)(a) for “causing grievous bodily harm with intent to do so” substitute “an offence under section 1 of the Offences Against the Person Act 1998 (intentional serious injury)”.

(3) In subsection (4) omit “assault or other”.

Sexual Offences Act 1967 (c.60)

19. In section 7 of the Sexual Offences Act 1967 (time limit on prosecution) after subsection (2) insert—

“(3) For the purposes of this section a person assaults if he commits the offence under section 4 of the Offences Against the Person Act 1998.”

Sea Fish (Conservation) Act 1967 (c.84)

20.—(1) The Sea Fish (Conservation) Act 1967 is amended as follows.

(2) In section 15 (assaults on officers) insert after subsection (3)—

“(3A) For the purposes of this section a person assaults if he commits the offence under section 4 of the Offences Against the Person Act 1998.”

(3) In section 16 (assaults on officers) insert after subsection (1A)—

“(1B) For the purposes of this section a person assaults if he commits the offence under section 4 of the Offences Against the Person Act 1998.”

Firearms Act 1968 (c.27)

21. In Schedule 1 to the Firearms Act 1968 (offences to which provisions relating to use of firearm to resist arrest apply) after paragraph 2A insert—

“2B. Offences under any of the following provisions of the Offences Against the Person Act 1998—

section 2 (reckless serious injury);

section 3 (intentional or reckless injury);

section 5 (assault on a constable);

section 7 (assault to resist arrest etc.);

section 9 (dangerous substances: intending or risking injury);

section 11 (administering a substance capable of causing injury);

section 13 (causing danger on railways).”

Theft Act 1968 (c.60)

22.—(1) The Theft Act 1968 is amended as follows.

(2) In section 8 (robbery) insert after subsection (2)—

“(3) For the purposes of this section a person assaults if he commits the offence under section 4 of the Offences Against the Person Act 1998.”

(3) In section 9 (burglary)—

- (a) in subsection (1)(b) for “inflicts or attempts to inflict on any person therein any grievous bodily harm” substitute “causes or attempts to cause any person therein serious injury (within the meaning of the Offences Against the Person Act 1998, ignoring section 15(4))”, and
- (b) in subsection (2) for “inflicting on any person therein any grievous bodily harm” substitute “intentionally causing serious injury to another therein contrary to section 1(1) of the Offences Against the Person Act 1998”.

Sea Fisheries Act 1968 (c. 77)

23. In section 10 of the Sea Fisheries Act 1968 (assaults on officers) insert after subsection (2A)—

“(2B) For the purposes of this section a person assaults if he commits the offence under section 4 of the Offences Against the Person Act 1998.”

Powers of Criminal Courts Act 1973 (c.62)

24.—(1) Section 44 of the Powers of Criminal Courts Act 1973 (driving 10 disqualification when vehicle used for purposes of crime) is amended as follows.

(2) In subsection (1A) for “common assault or of any other offence involving an assault” substitute “an offence under section 4 of the Offences Against the Person Act 1998 (assault) or of an offence involving an offence under that section”.

(3) In subsection (2A) for “assault” substitute “offence”.

Greater London Council (General Powers) Act 1973 (c.xxx)

25. In section 13 of the Greater London Council (General Powers) Act 1973 (assaults on officers) insert at the end—

“For the purposes of this section a person assaults if he commits the offence under section 4 of the Offences Against the Person Act 1998.”

Greater London Council (General Powers) Act 1974 (c.xxiv)

26. In section 21 of the Greater London Council (General Powers) Act 1974 (removal of vehicles for street cleansing) insert after subsection (6)—

“(6A) For the purposes of this section a person assaults if he commits the offence under section 4 of the Offences Against the Person Act 1998.”

Domestic Violence and Matrimonial Proceedings Act 1976 (c.50)

27. In section 2(1) of the Domestic Violence and Matrimonial Proceedings Act 1976 (arrest for breach of injunction) for “actual bodily harm” substitute “injury (within the meaning of the Offences Against the Person Act 1998, ignoring section 15(4))”.

Internationally Protected Persons Act 1978 (c.17)

28. In section 1 of the Internationally Protected Persons Act 1978 (attacks and threats of attacks on protected persons) in subsection (1)(a)-

- (a) omit “occasioning actual bodily harm or”, and
- (b) after “Explosive Substances Act 1883” insert “or section 1,2,3,6,8,9 or 11 of the Offences Against the Person Act 1998”.

Suppression of Terrorism Act 1978 (c.26)

29.—(1) The Suppression of Terrorism Act 1978 is amended as follows.

(2) In section 4 (jurisdiction in respect of offences committed outside United Kingdom) in subsection (1)(a) after “5,” insert “8A(e) or (f),”.

(3) In Schedule 1 (list of offences) in paragraph 6 (assault occasioning actual bodily harm or causing injury) omit “occasioning actual bodily harm or”.

(4) In that Schedule, after paragraph 8 insert—

“8A. An offence under any of the following provisions of the Offences Against the Person Act 1998—

- (a) section 1 (intentional serious injury);
- (b) section 2 (reckless serious injury);
- (c) section 3 (intentional or reckless injury);
- (d) section 6 (causing serious injury to resist arrest etc.);
- (e) section 8 (dangerous substances: intending or risking serious injury);
- (f) section 9 (dangerous substances: intending or risking injury);
- (g) section 11 (administering a substance capable of causing injury);
- (h) section 12 (torture).”

Customs and Excise Management Act 1979 (c.2)

30. In section 16 of the Customs and Excise Management Act 1979 (assaults on officers) insert after subsection (1)—

“(1A) For the purposes of this section a person assaults if he commits the offence under section 4 of the Offences Against the Person Act 1998.”

Magistrates’ Courts Act 1980 (c.43)

31.—(1) The Magistrates’ Courts Act 1980 is amended as follows.

(2) In section 102(8) (which refers to the power to join a count for common assault etc.) for “common assault etc.” substitute “assault etc.”.

(3) In section 103 (evidence of persons under 14 in committal proceedings for assault etc.) for subsection (2)(a) substitute—

“(a) to an offence which involves an offence under section 4 of the Offences Against the Person Act 1998 (assault) or an offence which involves injury or a threat of injury to a person.”

Aviation Security Act 1982 (c.36)

32.—(1) The Aviation Security Act 1982 is amended as follows.

(2) In section 2 (destroying, damaging or endangering safety of aircraft) in subsection (7)(a)—

- (a) for “, culpable homicide or assault” substitute “or culpable homicide”, and
- (b) after “Explosive Substances Act 1883” insert “or under section 1,2,3,4,6,8 or 11 of the Offences Against the Person Act 1998”.

(3) In section 6 (ancillary offences) in subsection (1)—

- (a) for “, culpable homicide or assault” substitute “or culpable homicide” and
- (b) after “Explosive Substances Act 1883” insert “or section 1,2,3,4,6,8 or 11 of the Offences Against the Person Act 1998”.

(4) In section 10 (purposes to which-Part II applies) in subsection (2)—

- (a) for “, culpable homicide or assault” substitute “or culpable homicide”, and
- (b) after “Criminal Damage Act 1971 “ insert “or under section 1,2,3,4,6,8 or 11 of the Offences Against the Person Act 1998”.

Criminal Justice Act 1982 (c.48)

33.—(1) Schedule I to the Criminal Justice Act 1982 (offences excluded from early release) is amended as follows

(2) In Part I, for paragraph 4 (assault of any description) substitute—

“4. Any offence involving an offence under section 4 of the Offences Against the Person Act 1998.”

(3) At the end of Part II add, appropriately numbered—

“OFFENCES AGAINST THE PERSON ACT 1998 (c00)

Section 1 (intentional serious injury).

Section 2 (reckless serious injury).

Section 3 (intentional or reckless injury).

Section 4 (assault).

Section 6 (causing serious injury to resist arrest etc.).

Section 8 (dangerous substances: intending or risking serious injury).

Section 10 (threats to kill or cause serious injury).

Section 11 (administering a substance capable of causing injury).

Section 12 (torture).”

British Fishing Boats Act 1983 (c.8)

34. In section 4 of the British Fishing Boats Act 1983 (assaults of officers) insert after subsection (1)

“(1A) For the purposes of this section a person assaults if he commits the offence under section 4 of the Offences Against the Person Act 1998.”

Nuclear Material (Offences) Act 1983 (c.18)

35. In section 1 of the Nuclear Material (Offences) Act 1983 (extended scope of certain offences) in subsection (1)(b) after “Criminal Damage Act 1971” insert “or 25 section 1, 2 or 6 of the Offences Against the Person Act 1998”.

Telecommunications Act 1984 (c.12)

36. In section 46 of the Telecommunications Act 1984 (assaults on persons engaged in business of public telecommunications operator) insert after subsection (1)—

“(1A) For the purposes of this section a person assaults if he commits the offence under section 4 of the Offences Against the Person Act 1998.”

County Courts Act 1984 (c.28)

37. In section 14 of the County Courts Act 1984 (assaulting officers of courts) insert after subsection (1)—

“(1A) For the purposes of this section a person assaults if he commits the offence under section 4 of the Offences Against the Person Act 1998.”

Police and Criminal Evidence Act 1984 (c.60)

38.—(1) The Police and Criminal Evidence Act 1984 is amended as follows.

(2) In section 80 (competence and comparability of accused’s spouse) for subsection (3)(a) substitute—

“(a) the offence charged is or involves an offence under section 4 of the Offences Against the Person Act 1998 (assault) against the wife or husband of the accused or a person who was at the material time under the age of sixteen, or the offence charged involves injury or a threat of injury to such wife or husband or person; or”.

(3) In Schedule 5 (serious arrestable offences) in Part II at the end add—

“Offences Against the Person Act 1998 (c.00)

25. Section 12 (torture).”

Criminal Justice Act 1988 (c.33)

39.—(1) The Criminal Justice Act 1988 is amended as follows.

(2) In section 32 (evidence through television links) for subsection (2)(a) substitute—

“(a) to an offence under section 4 of the Offences Against the Person Act 1998 (assault) or an offence which involves an offence under that section, or an offence which involves injury or a threat of injury to a person;”.

(3) In section 40 (power to join in indictment count of common assault etc.) for subsection (3)(a) substitute—

“(a) an offence under section 4 of the Offences Against the Person Act 1998 (assault);”.

(4) Section 134 (torture) shall cease to have effect.

(5) In Schedule 15 (minor and consequential amendments) in paragraph 9 for “that Act” substitute “the Children and Young Persons Act 1933”.

Aviation and Maritime Security Act 1990 (c.31)

40.—(1) The Aviation and Maritime Security Act 1990 is amended as follows.

(2) In section 1 (endangering safety at aerodromes) in the definition of “act of violence” in subsection (9)—

(a) for “, culpable homicide or assault” substitute “or culpable homicide”, and

(b) after “Explosive Substances Act 1883” insert “or under section 1,2,3,4,6,8 or 11 of the Offences Against the Person Act 1998”.

(3) In section 11 (destroying ships or fixed platforms or endangering their safety) in the definition of “act of violence” in subsection (7)—

- (a) for “, culpable homicide or assault” substitute “or culpable homicide”, and
- (b) after “Explosive Substances Act 1883” insert “or under section 1,2,3,4,6,8 or 11 of the Offences Against the Person Act 1998”.

(4) In section 14 (ancillary offences) in subsection (2)—

- (a) for “, culpable homicide and assault” substitute “and culpable homicide”, and
- (b) after “Explosive Substances Act 1883” insert “and sections 1, 2, 3, 4, 6, 8 and 11 of the Offences Against the Person Act 1998”.

(5) In section 18 (purposes to which Part III applies) in subsection (2)—

- (a) for “, culpable homicide or assault” substitute “or culpable homicide”, and
- (b) after “Criminal Damage Act 1971” insert “or under section 1, 2, 3, 4, 6, 8, or 11 of the Offences Against the Person Act 1998”.

Criminal Justice Act 1991 (c.53)

41.—(1) The Criminal Justice Act 1991 is amended as follows.

(2) In section 78 (protection of court security officers) insert after subsection (1)

“(1A) For the purposes of this section a person assaults if he commits the offence under section 4 of the Offences Against the Person Act 1998.”

(3) In section 90 (protection of prisoner custody officers) insert after subsection (1)

“(1A) For the purposes of this section a person assaults if he commits the offence under section 4 of the Offences Against the Person Act 1998.”

Railways Act 1993 (c.43)

42. In section 119 of the Railways Act 1993 (security) in the definition of “act of violence” in subsection (11)—

- (a) omit “assault,”, and
- (b) after “Criminal Damage Act 1971 “ insert “or under section 1,2,3, 4,6, 8 or 11 of the Offences Against the Person Act 1998”.

Criminal Justice and Public Order Act 1994 (c.33)

43.—(1) The Criminal Justice and Public Order Act 1994 is amended as follows.

(2) In section 13 (protection of custody officers) insert after subsection (2)—

“(2A) For the purposes of this section a person assaults if he commits the offence under section 4 of the Offences Against the Person Act 1998.”

(3) In section 123 (protection of prisoner custody officers) insert after subsection (3)—

“(3A) For the purposes of this section a person assaults if he commits the offence under section 4 of the Offences Against the Person Act 1998.”

Merchant Shipping Act 1995 (c.21)

44. In section 246 of the Merchant Shipping Act 1995 (interfering with wrecked vessel or wreck) in subsection (3) after paragraph (a) insert—

“(aa) he impedes or hinders or attempts to impede or hinder the saving of any person on board any vessel stranded or in danger of being stranded, or otherwise in distress, on or near any coast or tidal water;”.

Criminal Procedure (Scotland) Act 1995 (c.46)

45.—(1) Schedule 5A to the Criminal Procedure (Scotland) Act 1995 (automatic 35 sentences) is amended as follows.

(2) In paragraph 11 for sub-paragraph (d) substitute—

“(d) an offence under section 1 of the Offences Against the Person Act 1998 (intentional serious injury);

(dd) an offence under section 6 of the Offences Against the Person Act 1998 (causing serious injury to resist arrest etc.);”.

(3) In paragraph 12, in sub-paragraph (a) for “(a) to (e)” substitute “(a) to (c) or (e)”, and after that sub-paragraph insert—

“(aa) an offence under section 18 of the Offences against the Person Act 1861 (wounding, or causing grievous bodily harm, with intent);”.

Police Act 1996 (c.16)

46. Section 89(1) of the Police Act 1996 (assaults on constables) shall cease to have effect.

Criminal Procedure and Investigations Act 1996 (c.25)

47. In section 1(2) of the Criminal Procedure and Investigations Act 1996 to (application of Part I) in paragraph (d) for “(common assault etc.)” substitute “(assault etc.)”.

Education Act 1996 (c.56)

48. In section 549(1) of the Education Act 1996 (meaning of corporal punishment) for “battery” substitute “an offence under section 4(1)(a) of the 15 Offences Against the Person Act 1998”.

United Nations Personnel Act 1997 (c.13)

49. In section I of the United Nations Personnel Act 1997 (attacks on UN workers) in subsection (2) at the end add—

“(d) an offence under section 1, 2, 3, 6, 8, 9 or 11 of the Offences Against the Person Act 1998.”

Crime (Sentences) Act 1997 (c.43)

50. In section 2 of the Crime (Sentences) Act 1997 (mandatory life sentence for second serious offence) in subsection (5) after paragraph (c) insert—

“(cc) an offence under section 1 (intentional serious injury) or section 6 (causing serious injury to resist arrest etc.) of the Offences Against the Person Act 1998;”.

SCHEDULE 2

REPEALS

<i>Chapter</i>	<i>Short title</i>	<i>Extent of repeal</i>
1861 c. 100	Offences against the Person Act 1861	Sections 16 to 18 Sections 20 to 30 Sections 32 to 34 Sections 36 to 38 Sections 44 and 45 Section 47.
1933 c. 12	Children and Young Persons Act 1933	In Schedule 1, in the entry relating to the Offences against the Person Act 1861, the words “twenty-seven or”.
1939 c. 44	House to House Collections Act 1939.	In the Schedule, the entry for the Offences against the Person Act 1861.
1952 c. 67	Visiting Forces Act 1952	In the Schedule, in paragraph 1(a) the words “and assault”.
1967 c. 58	Criminal Law Act 1967	In section 6(4) the words “assault or other”.
1968 c. 27	Firearms Act 1968	In Schedule 1— (a) paragraph 2; (b) in paragraph 5, the words “section 89(1) of the Police Act 1996 or”.
1977 c. 45	Criminal Law Act 1977	In Schedule 12, the entry for the Offences against the Person Act 1861.
1978 c. 17	Internationally Protected Persons Act 1978	In section 1(1)(a) the words “occasioning actual bodily harm or” and the words from “section 18” to “1861 or”.
1978 c. 26	Suppression of Terrorism Act 1978	In section 4(1)(a) the words “12,”. In Schedule 1— (a) in paragraph 6 the words “occasioning actual bodily harm or”, and (b) paragraphs 8(a) to (f), 9A and 12.
1980 c. 43	Magistrates’ Courts Act 1980	In Schedule 1, paragraph 5(a) to (h)
1982 c. 36	Aviation Security Act 1982	In section 2(7)(a) the words from “section 18” to “1861 or”. In section 6(1) the words from “section 18” to “1861 or”. In section 10(2) the words from “section 18” to “1861, under”.

1982 c. 48	Criminal Justice Act 1982	In Schedule 1, in Part II, paragraphs 2 to 8 and 30.
1983 c. 18	Nuclear Material (Offences) Act 1983	In section 1(1)(b) the words from “section 18” to “1861 or”.
1984 c. 60	Police and Criminal Evidence Act 1984	In Schedule 5, in Part II, the entry relating to section 134 of the Criminal Justice Act 1988.
1984 c. 33	Criminal Justice Act 1988	Section 39. Section 134. In section 135, paragraph (a). In Schedule 15, paragraphs 2 to 4, 8, 91 and 102.
1990 c. 31	Aviation and Maritime Security Act 1990	In section 1(9), in the definition of “act of violence” the words from “section 18” to “1861 or under”. In section 11(7), in the definition of “act of violence” the words “section 18” to “1861 or under” In section 14(2) the words from “section 18” to “1861, and”. In section 18(2) the words from “section 18” to “1861, under”.
1993 c. 43	Railways Act 1993	In section 119(11), in the definition of “act of violence” the word “assault,” and the words from “section 18” to “1861, under”.
1996 c.16	Police Act 1996	Section 89(1) In Schedule 7, paragraph 16.
1996 c. 25	Criminal Procedure and Investigations Act 1996	Section 57(1).
1997 c. 13	United Nations Personnel Act 1997.	Section 1(2)(b).
1997 c. 43	Crime (Sentences) Act 1997	Section 2(5)(d).