

The Law Commission

(LAW COM. No. 177)

CRIMINAL LAW A CRIMINAL CODE FOR ENGLAND AND WALES

VOLUME 1 REPORT AND DRAFT CRIMINAL CODE BILL

*Laid before Parliament by the Lord High Chancellor
pursuant to section 3(2) of the Law Commissions Act 1965*

*Ordered by The House of Commons to be printed
17th April 1989*

LONDON

HER MAJESTY'S STATIONERY OFFICE

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The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Commissioners are –

The Honourable Mr. Justice Beldam, *Chairman*

Mr. Trevor M. Aldridge

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A CRIMINAL CODE FOR ENGLAND AND WALES

VOLUME 1: REPORT AND DRAFT CRIMINAL CODE BILL

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A CRIMINAL CODE FOR ENGLAND AND WALES

Summary

In this Report (which is published in two volumes) the Law Commission recommends that there should be a Criminal Code for England and Wales. The Report includes a draft Criminal Code Bill to give effect to this recommendation. Part I of the draft Bill (clauses 1 to 52) covers the general principles of criminal liability applicable to a Criminal Code and is designed to replace the present fluctuating mix of common law and statutory provisions. Part II (clauses 53 to 220) contains specific offences grouped in five Chapters dealing with: offences against the person; sexual offences; theft, fraud and related offences; other offences relating to property; and offences against public peace and safety. These groups include the most frequently encountered indictable offences and together would encompass 90 - 95 per cent of the work of the criminal courts in relation to such offences. The Commission argues that implementation of the draft Criminal Code Bill, which is a matter for Parliament, would make the criminal law more accessible, comprehensible, consistent and certain.

THE LAW COMMISSION

Item XVIII of the Second Programme

CRIMINAL LAW

A CRIMINAL CODE FOR ENGLAND AND WALES

VOLUME 1: REPORT AND DRAFT CRIMINAL CODE BILL

*To the Right Honourable the Lord Mackay of Clashfern,
Lord High Chancellor of Great Britain*

PART I

INTRODUCTION

1.1 This Report, which is published in two volumes, contains, in **Volume 1**, our recommendations for a Criminal Code for England and Wales, together with a draft of a Criminal Code Bill. Part I of the draft Bill covers general principles of liability applicable to a Criminal Code, while Part II contains specific offences. **Volume 2** of the Report contains our commentary on the clauses in the draft Bill.¹

1.2 The Report and the draft Bill are the culmination of many years' work by the Commission in the field of criminal law. Since 1981, much of the burden of work on this project has been carried out under the auspices of the Law Commission by a small group of distinguished academic lawyers — Professor J.C. Smith, C.B.E., Q.C., (chairman), Professor Edward Griew and Professor Ian Dennis (hereafter referred to as “the Code team”). It was the Code team’s “Report to the Law Commission on Codification of the Criminal Law” which, in 1985, we presented to the then Lord Chancellor, Lord Hailsham of St Marylebone, as a “document for discussion”.² That Report contained the Code team’s proposals for a draft Criminal Code Bill, stating the “General Part” of the criminal law (in Part I) and including some specific offences (in Part II) for the purpose of illustrating how those general principles would function. The draft Criminal Code Bill contained in the present Report³ takes account of the many comments received on the earlier draft Bill and our own conclusions, as well as considerably expanding the scope of offences covered in Part II.

The background

1.3 English criminal law is derived from a mixture of common law and statute. Most of the general principles of liability are still to be found in the common law, though some for example, the law relating to conspiracy and attempts to commit crime have recently been defined in Acts of Parliament.⁴ The great majority of crimes are now defined by statute but there are important exceptions. Murder, manslaughter and assault are still offences at common law, though affected in various ways by statute.⁵ There is no system in the relative roles of common law and legislation. Thus, incitement to commit crime — though closely related to conspiracy and attempts — is still a common law offence. Whether an offence is defined by statute has almost always been a matter of historical accident rather than systematic organisation. For example, rape is defined in the Sexual Offences (Amendment) Act 1976 because of the outcry which followed the decision in *Morgan v. D.P.P.*⁶ and led to the subsequent Heilbron Report.⁷ The legislation in force extends over a very long period of time.⁸ It is true that only a very small amount of significant legislation is earlier than the mid-nineteenth century, but that is quite long enough for the language of the criminal law and the style of drafting to have undergone substantial changes.

¹In this Volume, referred to as “Report, Vol. 2”.

²Criminal Law: Codification of the Criminal Law. A Report to the Law Commission (1985), Law Com. No. 143. We refer to this document hereafter as “the Code team’s Report” and the draft Criminal Code Bill contained in it as “the Code team’s Bill”.

³See Appendix A below.

⁴The Criminal Law Act 1977, Part I and the Criminal Attempts Act 1981, respectively.

⁵The definition of the crime of murder is currently being reviewed by the House of Lords Select Committee on Murder and Life Imprisonment: see Report, Vol. 2, para. 14.5.

⁶[1976] A.C. 182.

⁷Report of the Advisory Group on the Law of Rape (1975), Cmnd. 6352.

⁸The earliest criminal statute in force is the Treason Act 1351.

1.4 There has been a steady flow of reform of the criminal law in recent years but it has been accomplished in somewhat piecemeal fashion. Some of it is derived from our own reports, where in recent years we have been pursuing a policy of putting common law offences into statutory form, and some from reports of the Criminal Law Revision Committee and committees, like the Heilbron Committee, appointed to deal with particular problems. Other reforms have resulted from the initiative of Ministers or private Members of Parliament in introducing Bills. As there is no authoritative statement of general principles of liability or of terminology to which we or these other bodies, or their draftsmen, can turn it would be surprising if there were not some inconsistencies and incongruities in the substance and language of the measures which are proposed and which become law. Some examples are pointed out below. This Report addresses the question whether it is desirable to replace the existing fluctuating mix of legislation and common law by one codifying statute.

The history of the project

1.5 The Law Commission set out in its Second Programme (1968) its objective of a comprehensive examination of the criminal law with a view to its codification.⁹ The first stage of that examination was to include consideration of certain specific offences and, with the assistance of a Working Party, the general principles of the criminal law.¹⁰ While no specific mention was made in the Second Programme of work upon criminal procedure and evidence, it was envisaged that these would find a place within a complete criminal code and that such work would in due course be undertaken.

1.6 In the years following the Second Programme the Commission made substantial progress in the examination of specific offences. It published a series of working papers and reports upon offences at common law and some statutory offences in need of revision,¹¹ and this work continues. Some of the reports have been implemented by legislation based upon the draft Bills annexed to them.¹²

1.7 Some progress was also made in the examination of the general principles of liability to be incorporated in a code of the substantive criminal law. A series of working papers was produced by the Working Party assisting the Commission¹³ and some reports by the Commission on these subjects were published.¹⁴ Again, certain of these reports have been implemented by legislation.¹⁵ Some years ago, however, the Commission realised that its limited resources prevented it from making as much progress as it wished in this area.¹⁶ In particular insufficient attention could be devoted to matters which, while in need of clarification and restatement with a view to codification, had not shown themselves to be in pressing need of reform to meet apparent shortcomings in the law. Within this category of subject matter came some of the topics on which the Working Party had earlier produced working papers, and the Commission therefore felt it right formally to set them aside in favour of other matters.¹⁷

1.8 Consequently the Commission welcomed the initiative of the Criminal Law Sub-Committee of the Society of Public Teachers of Law which in 1980 proposed that a team drawn from its members should consider and make proposals to the Commission in relation

⁹(1968), Law Com. No. 14, Item XVIII.

¹⁰Work on specific offences was to be undertaken by both the Commission and the Criminal Law Revision Committee, particular items being allocated to each body.

¹¹See Reports on Offences of Damage to Property (1970), Law Com. No. 29; Forgery and Counterfeit Currency (1973), Law Com. No. 55; Offences relating to Interference with the Course of Justice (1979), Law Com. No. 96; Offences relating to Public Order (1983), Law Com. No. 123; Offences against Religion and Public Worship (1985), Law Com. No. 145; Poison-Pen Letters (1985), Law Com. No. 147; Criminal Libel (1985), Law Com. No. 149, Cmnd. 9618. See also Working Papers Nos. 72, Treason, Sedition and Allied Offences (1977); 104, Conspiracy to Defraud (1987). Much work has also been done by the Criminal Law Revision Committee, e.g., their Fourteenth Report: Offences against the Person (1980), Cmnd. 7844, and Fifteenth Report: Sexual Offences (1984), Cmnd. 9213.

¹²See Criminal Damage Act 1971, Forgery and Counterfeiting Act 1981, Public Order Act 1986 (Part I), Malicious Communications Act 1988.

¹³Working Papers Nos. 31, The Mental Element in Crime (1970); 43, Parties, Complicity and Liability for the Acts of Another (1972); 44, Criminal Liability of Corporations (1972); 50, Inchoate Offences: Conspiracy, Attempt and Incitement (1973); 55, Defences of General Application (1974).

¹⁴See Reports on Conspiracy and Criminal Law Reform (1976), Law Com. No. 76; Defences of General Application (1977), Law Com. No. 83; Mental Element in Crime (1978), Law Com. No. 89; Territorial and Extraterritorial Extent of the Criminal Law (1978), Law Com. No. 91; Attempt, and Impossibility in relation to Attempt, Conspiracy and Incitement (1980), Law Com. No. 102.

¹⁵See Criminal Law Act 1977 (Parts I and II); Criminal Attempts Act 1981.

¹⁶See Fifteenth Annual Report 1979-1980 (1981), Law Com. No. 107, para. 1.4.

¹⁷See Sixteenth Annual Report 1980-1981 (1982), Law Com. No. 113, para. 2.32.

to a criminal code. The Commission saw this as an opportunity not only for consideration of subjects upon which it had not itself been able to report but also, and of equal importance, for the systematic examination and synthesis of all matters which should be incorporated in a code of the substantive law, an aim which up to that time its resources had not enabled it to fulfil. Accordingly, the Commission invited Professor J.C. Smith, C.B.E., Q.C., then Head of the Department of Law at the University of Nottingham and co-author of Smith and Hogan's *Criminal Law*, to chair the project. In consultation with the Commission, he chose as the other members of his team Professor Edward Griew, then of the University of Leicester, Mr Peter Glazebrook, lecturer in law at Cambridge University¹⁸ and Mr. (now Professor) Ian Dennis, then lecturer in law at University College, London. The establishment of the Code team was announced in March 1981.

1.9 The Code team's terms of reference were as follows:

- “(1) to consider and make proposals in relation to
- (a) the aims and objects of a criminal code for England and Wales
 - (b) its nature and scope
 - (c) its content, structure, lay-out and the inter-relation of its parts
 - (d) the method and style of its drafting and
- (2) to formulate, in a manner appropriate to such a code,
- (a) the general principles which should govern liability under it
 - (b) a standard terminology to be used in it
 - (c) the rules which should govern its interpretation.”

1.10 The Code team submitted their Report to the Law Commission in November 1984.¹⁹ Together with a short introduction by the Commission, it was published in March 1985.²⁰

1.11 The Code team's Report contained the draft of Part I (general principles of liability) of a Criminal Code Bill. It consisted of fifty-five clauses covering such matters as jurisdiction, proof, external elements of offences, fault, parties to offences, mental disorder and incapacity, defences and preliminary offences (e.g., incitement, conspiracy and attempt). In order to illustrate how the substantive law creating criminal offences might look when enacted as part of a criminal code, the Report included as part of Part II of the draft Bill, twenty-six clauses setting out the offences against the person (derived from recommendations made in the Fourteenth Report of the Criminal Law Revision Committee)²¹ and nine clauses relating to offences of damage to property (derived from the Criminal Damage Act 1971).

The nature and value of the scrutiny

1.12 The Commission decided that the Code team's Report should be published, not only to inform the profession and the public, but also to canvass the views of those with current, day-to-day, practical experience in the working of the criminal law. The first and most fundamental issue upon which these views were sought was whether codification was an objective which should continue to be pursued. The Commission's own enthusiasm for codification had been increased by publication of the Report. Obviously, however, if codification was not an aim which continued to command any substantial support, it was necessary that the Commission should reconsider whether its resources should in future be devoted to it. Secondly, it was necessary for every part of the draft Code Bill to be examined in detail in order to see whether the words chosen were the best which could be chosen.

1.13 Shortly after receiving their Report, steps were put in hand to establish groups of lawyers around the country who would be asked to scrutinise in detail some particular part of the draft Code Bill and report back to the Commission with views both on the detail and on the general principle of codification. Eight circuit “scrutiny groups” were established,²² each

¹⁸Mr. Glazebrook withdrew from the Code team in January 1984.

¹⁹As we acknowledged then (see *op. cit.*, next note, para. 27), to have completed their Report in just over three years was a considerable achievement in itself, bearing in mind that the Code team prepared it in their spare time and only needed to take one sabbatical term from their respective universities to complete it.

²⁰Criminal Law: Codification of the Criminal Law. A Report to the Law Commission (1985), Law Com. No. 143.

²¹Offences against the Person (1980), Cmnd. 7844.

²²It had originally been envisaged (see Law Com. No. 143, para. 25) that only one scrutiny group would be established. However, it was felt that the task might have been too much for one body and would have unduly delayed the project.

headed by a circuit judge and comprising representatives of those who would be likely to be professional users of a code.²³ In addition, a special group,²⁴ headed by Lord Justice Lawton, considered the draft clauses intended to give effect to the recommendations in the Criminal Law Revision Committee's Fourteenth Report on Offences against the Person. Reports were received from each of these groups and we subsequently held meetings to discuss their contents with representatives of several of them. The Commission is extremely grateful to the many judges, barristers, solicitors, academic lawyers, justices' clerks and others who gave so freely of their time and assisted us by subjecting the draft Code to their close scrutiny from the point of view of its use in practice.

1.14 Apart from this form of detailed scrutiny, we received more than sixty responses from individuals and bodies to our general invitation for comments.²⁵ The publication of the draft Code also stimulated a great deal of debate by way of lectures, conferences and articles in legal journals.²⁶ The comments which we received from all these sources have been enormously valuable to us in the formulation of the revised and expanded draft Criminal Code Bill in this Report.

The preparation of the present Report and draft Bill

1.15 In the light of the substantial support from the scrutiny groups and many others for the principle of codification of the criminal law which publication of the Code team's Bill stimulated,²⁷ we decided that it was important, as the next stage of this project, to present to the public and Government a Bill which is sufficiently comprehensive to be recognisable as a criminal code. To help us to accomplish the task of producing a revised and expanded Criminal Code Bill and a commentary on it,²⁸ we invited the Code team to assist with the redrafting of their Bill and with the drafting of the additional offences for the expanded Part II. The team's first task was to prepare a thorough analysis of the detailed comments on their draft Bill in a series of papers which identified all the policy issues requiring to be settled by the Commission. Only once these policy issues had been settled at meetings of the Commission, attended and advised by the Code team, were the team able to begin their work of drafting the Criminal Code Bill appended to this Report.

1.16 It has been an immense advantage for this project that we have had the Code team acting as both our advisers *and* draftsmen. The style and presentation of the Code team's Bill had attracted very favourable comment on consultation. We were therefore more than pleased to accept the suggestion that the Code team, who have been intimately concerned with the project throughout, continue to act as draftsmen of the Criminal Code Bill. The style and form of drafting adopted by the Code team is eminently well-suited to furthering the aims of codification (discussed more fully in the next part), particularly in relation to making the criminal law more accessible, comprehensible, consistent, and certain.

Acknowledgments

1.17 It will already be apparent that the Commission owes a great debt not only to the Society of Public Teachers of Law for their original initiative but also to the members of the Code team for their sustained and invaluable efforts without which the publication of a Criminal Code could not have been achieved for many years to come. We are glad to take this opportunity to express our gratitude to the Code team for bringing to the project their unrivalled knowledge of the criminal law and the determination and industry which was essential to complete it. Within their mandate they have produced an incomparably clear and systematic statement of the principles of the criminal law; we trust that their efforts will lead to early enactment of a Criminal Code for England and Wales with all the subsequent benefits for those whose duty it is to consider and apply the criminal law. Then the real value of the work of Professor John Smith C.B.E., Q.C., Professor Edward Griew and Professor Ian Dennis will be justly appreciated and the debt owed to them universally acknowledged.

²³The names of the Chairmen and members are listed in Appendix E.

²⁴See *ibid.*

²⁵The names of those responding are set out in Appendix D.

²⁶See, e.g., J.C. Smith, *Codification of the Criminal Law*, The Child & Co. Lecture 1986; A.T.H. Smith, Bennion, Ashworth, Wells, "Codification of the Criminal Law" (1) The Case for a Code, (2) The Technique of Codification, (3) The Draft Code, Complicity and The Inchoate Offences, (4) Restatement or Reform", [1986] *Crim. L.R.* 285 - 323; Temkin, "Pre-natal Injury, Homicide and the Draft Criminal Code", [1986] *C.L.J.* 414; "Codification of the Criminal Law: Statute Law Society's Working Party Report", [1986] *Stat. L.R.* 162; *Stone's Justices Manual 1986*, 118 ed., Preface, p. vii *et seq.*; N.A. McKittrick, "Codification — The Magistrates' Court Dimension", [1986] *Crim. L.J.* 171; Dennis (ed.), *Criminal Law and Justice: Essays from the W.G. Hart Workshop 1986* (1987); Williams, "What should the Code do about omissions?", (1987) 7 *Legal Studies* 92.

²⁷See further Part 2 below, "The Case for a Criminal Code", where the arguments for codification are considered.

²⁸See Report, Vol. 2 (Parts 4 to 18).

PART 2

THE CASE FOR A CRIMINAL CODE

A. Why codify the criminal law? — The aims of codification

2.1 The Code team identified the aims of codification at the present time as being to make the criminal law more accessible, comprehensible, consistent and certain.¹ These aspirations have a number of theoretical and practical aspects which we examine in more detail below. We believe, however, that there are also fundamental constitutional arguments of principle in favour of codification which we consider first.

1. *The constitutional arguments for codification*

2.2 The constitutional arguments relating to codification were not stressed in the Code team's Report but were mentioned by some commentators on consultation as important arguments in favour of codifying the criminal law. These arguments were developed, in particular, by Professor A.T.H. Smith² and were conveniently summarised (as well as being endorsed) by the Society of Public Teachers of Law in their submission to us as follows:

“The virtues and advantages of a Code that [the Code team's Report] identifies (accessibility, comprehensibility, consistency and certainty) relate to essentially lawyerly concerns: what needs to be stressed is that they serve the more profound aspirations of due notice and fair warning characteristic of a system that seeks to adhere to the principle of legality. In the *first* place, a Code is the mechanism that will best synthesise the criminal law's conflicting aims of social protection and crime prevention with concern for legality and due process. As Professor Wechsler, principal draftsman of the Model Penal Code, has put it,³ a Code demonstrates that, ‘when so much is at stake for the community and the individual, care has been taken to make law as rational and just as law can be.’ A Code will, *secondly*, provide what the mix of common law and legislation never can, one fixed starting point for ascertaining what the law is. *Thirdly*, because a Criminal Code makes a symbolic statement about the constitutional relationship of Parliament and the courts, it requires a judicial deference to the legislative will greater than that which the courts have often shown to isolated and sporadic pieces of legislation. Far from it being ‘a possible disadvantage of codification’ that it places ‘limitations upon the ability of the courts to develop the law in directions which might be considered desirable’,⁴ we believe that for the criminal law this is one of its greatest merits. Then, *fourthly*, codification will make it possible to effect many much needed and long-overdue reforms in both the General and the Special Parts of the criminal law, that have already been adumbrated in the reports of official bodies...”

With much of this we agree. “Due notice” or “fair warning” — by which is meant the idea that the law should be known in advance to those accused of violating it — should clearly be regarded as a principle of major importance in our criminal justice system. While there is room for argument as to how much or how little of the content of the criminal law should be left to be developed by the common law, codification provides the opportunity for ensuring that this principle is followed over a substantial part of the criminal law. Moreover, since the criminal law is arguably the most direct expression of the relationship between a State and its citizens, it is right as a matter of constitutional principle that the relationship should be clearly stated in a criminal code the terms of which have been deliberated upon by a democratically elected legislature.

2.3 We shall return to consider some of the arguments in the passage above in more detail later, for example, the third and fourth arguments concerning codification and the role of the court and the relationship between restatement and reform. Suffice it to note here that we endorse them, subject to the considerations mentioned later.⁵ The second argument (that a code will provide a fixed starting point for ascertaining what the law is) relates to accessibility which is considered next.

¹See Law Com. No. 143, paras. 1.3 - 1.9.

²“Codification of the Criminal Law: (1) The Case for a Code”, [1986] Crim. L.R. 285, esp. 289-290.

³See “The Challenge of a Model Penal Code”, (1952) 65 Harv.L.Rev 1097.

⁴Law Com. No. 143, Introduction by the Law Commission, para. 20.

⁵See paras. 2.19 and 2.14 and paras. 3.28 - 3.35 below.

2. *Accessibility and comprehensibility*

2.4 If the terms of the criminal law are set out in one well-drafted enactment in place of the present fluctuating mix of statute and case-law,⁶ the law must necessarily become more accessible and comprehensible to everyone concerned with the interests of criminal justice. Accessibility and comprehensibility are important values for a number of reasons.

2.5 A large and growing number of people are now involved in administering and advising upon the criminal law. One reason for this is that the volume of work in the criminal courts has hugely increased in recent years. To meet this rise, there has been a substantial increase in the numbers of Crown Court judges, recorders and assistant recorders appointed. Many of these judges are recruited from outside the ranks of specialist criminal practitioners. In the magistrates' courts, magistrates depend upon their clerks for advice on the law: in this area too the number of court clerks has risen to try to meet the increased workload. The position of the common law in criminal matters, and in particular the interface between common law and statutory provisions, undoubtedly contributes to making the law obscure and difficult to understand for everyone concerned in the administration of justice, whether a newly-appointed assistant recorder or magistrates' clerk. Obscurity and mystification may in turn lead to inefficiency: the cost and length of trials may be increased because the law has to be extracted and clarified, and there is greater scope for appeals on misdirections on points of law. Moreover, if the law is not perceived by triers of fact to be clear and fair, there is a risk that they will return incorrect or perverse verdicts through misunderstanding or a deliberate disregard of what they are advised the law is. Finally, the criminal law is a particularly public and visible part of the law. It is important that its authority and legitimacy should not be undermined by perceptions that it is intelligible only to experts.

2.6 Codification would help to meet all these dangers. One of its main aims would be to provide a single clear agreed text, published under the authority of Parliament. The law would immediately become more accessible; all users would have an agreed text as a common starting-point and the scope for dispute about its terms and application should be reduced. The source of the general principles of criminal liability would be found in little more than fifty sections of an Act of Parliament instead of many statutes, thousands of cases and the extensive commentaries on them to be found in the textbooks. While much criminal law would remain outside the Criminal Code Act, the law relating to most of the gravest crimes could be brought within it so that the reader would find it within one volume. Of course, no code or statute on a single subject can ever be truly comprehensive. The interpretive role of the judiciary will continue to be important; indeed, during the early years of legislation on a subject the judges' interpretive role is more crucial than at any time thereafter.⁷ Nor do we pretend that codification will make the law accessible to Everyman in the sense that he can pick up one volume and in it find the answer to whatever his problem is.⁸

2.7 It is impossible to quantify the potential savings in time and costs which could be brought about by codification, but they could be substantial. The impact of presenting the criminal law in clear, modern and intelligible terms should be felt at all stages of the criminal process, from operational decisions by police officers to appeals to the higher courts. Practitioners should be assisted in advising clients and preparing for trial, trial judges should find the task of directing juries on the law easier and quicker and the length of time spent arguing points of law on appeal should be reduced.

3. *Consistency*

2.8 The Code team commented in their Report that:⁹

“The haphazard development of the law through the cases, and a multiplicity of statutes inevitably leads to inconsistencies, not merely in terminology but also in

⁶See paras. 1.3 and 1.4 above.

⁷The expected increase in appeals during the early years after a code came into force was a ground upon which some objected to the introduction of a code at all: see further para. 2.24 below.

⁸There is some force, therefore, in the following comment by Professor Hogan:

“I am not sure, whether by codification or otherwise, that law can be made all that accessible to the ordinary man. Still less do I think that the criminal law, say, becomes more understandable the more detailed it is. The ordinary man gets by with knowing, in an imprecise but substantially correct way, that it is an offence to kill, maim, rape, steal and so on. What is important is that the law should be understandable by lawyers and that it should operate efficiently, fairly and well.”

See “Some Reflections on Law Reform”, in *Crime, Justice and Codification: Essays in Commemoration of Jacques Fortin* (1986), 65 at 71.

⁹*Ibid.*, para. 1.8.

substance. Codification must seek to remove these. If two rules actually contradict one another they cannot both be the law. The codifier cannot rationally restate both. He must restate one and abolish the other or propose some third rule to replace both. More frequently, the inconsistency is one of principle and policy rather than of mutual contradiction...”

Inconsistency both in terminology and substance is a serious problem in English criminal law. A notable example is the use of the word “reckless”. Recklessness is a central element of fault requirements but it has four different meanings depending on whether it is used in the context of non-fatal offences against the person, criminal damage and manslaughter, rape or driving offences.¹⁰ This is impossible to defend. It makes the law unnecessarily complex and less intelligible, and it results in difficulty and embarrassment in directing juries and advising magistrates. Two such offences may well be involved in the same trial when it is clearly undesirable that the law should be seen to be laying down inconsistent tests of liability without any clear policy justification. Another example concerns combinations of preliminary offences (attempt to incite, incitement to conspire, conspiracy to attempt and so on). Some combinations constitute offences known to the law, others do not.¹¹ No policy can be found to support these distinctions, and the scrutiny group examining the provisions of the draft Code Bill dealing with preliminary offences agreed that in this topic the present law is an irrational mess.

2.9 This kind of inconsistency across a range of offences is not in practice remediable by use of the common law. It is most unlikely, for example, that cases will arise which raise the issue of recklessness in *all* the relevant offences in an appropriate form. In relation to the preliminary offences it would be impossible for the courts to reintroduce forms of liability which have been expressly abolished by statute. Codification alone, pursuing a conscious policy of the elimination of inconsistency, can deal adequately with this kind of problem. Elimination of inconsistency will also help to ensure that the offence of one accused is dealt with fairly in relation to other offences by other accused. Unjustifiable disparity of treatment can thus be avoided.

4. Certainty

2.10 In some areas of the criminal law there is substantial uncertainty as to its scope. Uncertainty can arise where the accidents of litigation and piecemeal legislation leave gaps, so that there is no law at all on a particular point. Alternatively, a statute or case may state the law obscurely, so that it is impossible to be certain as to the law to be applied to a particular problem. Uncertainty is an impediment to the proper administration of criminal justice since it may discourage the bringing of prosecutions where there is a colourable case to answer, and tend to increase the number of unmeritorious but successful submissions of “no case to answer” if charges are brought. In either event respect for the law may be diminished. Certainty is very important to prevent unwarranted prosecutions being brought at all or prosecutions collapsing or convictions being quashed on appeal. Lack of certainty may also cause difficulties for defence lawyers advising their clients and for judges directing juries.

2.11 The common law method of resolving uncertainty by “retrospective” declaration of the law is objectionable in principle. It may lead to the conviction of a defendant on the basis of criminal liability not known to exist in that form before he acted. Much criticism was directed at the decision of the House of Lords in *DPP v. Shaw*¹² where this was generally perceived to have happened.¹³ On the other hand, the effect of an appeal may be to narrow the law retrospectively, either by acknowledging the existence of a defence to criminal liability which was not previously recognised or by altering the definition of a criminal offence. In the recent cases of *Moloney*¹⁴ and *Hancock*¹⁵ the House of Lords restated the meaning of “intention” as the mental element for murder.¹⁶ In doing so, the House

¹⁰See further Report, Vol. 2, paras. 8.17 *et seq.* The Road Traffic Law Review (the North Report) recommended the reform of driving offences involving “recklessness” so as to avoid use of this term: (1988), Chapters 4 and 5, esp. para. 5.13. The Government has accepted this recommendation: see *The Road User and the Law: The Government's Proposals for Reform of Road Traffic Law* (1989), Cm. 576, paras. 2.2 - 2.13.

¹¹See Report, Vol. 2, paras. 13.13 - 13.16 and 13.48.

¹²[1962] A.C. 220.

¹³However, some members of the House of Lords in *Knulier v. DPP* [1973] A.C. 435 said that there is no longer power in the courts to create new offences: see Report, Vol.2, para. 4.8.

¹⁴[1985] A.C. 905.

¹⁵[1986] A.C. 455.

¹⁶The effect of these decisions (as explained by the Court of Appeal in *Nedrick* [1986] 1 W.L.R. 1025, [1986] 3 All E.R. 1) is that, when a jury is sure that a person accused of murder knew that death (or grievous bodily harm) was a virtual certainty as a result of his actions, they may infer (possibly as a matter of irresistible inference) that he intended to kill (or cause grievous bodily harm): see further Report, Vol. 2, para. 8.16.

disapproved the terms of a direction to a jury given ten years earlier in the leading case of *Hyam*.¹⁷ Such a change may give rise to a suggestion not only that the conviction in the earlier case was unsafe but also cast doubt on the validity of the convictions in other cases during the intervening ten year period which had been based on the terms of the direction approved in the earlier case.¹⁸ Such suggestions, which are inherent in the development of the law on a case by case basis,¹⁹ must undermine confidence in this important branch of the law. Statutory changes, on the other hand, do not have retrospective effect. They come into force only after full Parliamentary debate with the commencement of the provisions of the statute. Earlier cases are unaffected.

B. The weight of opinion on consultation

2.12 We have argued above that codification of the criminal law is desirable as a matter of constitutional principle and also because it offers instrumental benefits in the way of greater accessibility, comprehensibility, consistency and certainty. Our view that these arguments point strongly to the desirability of codification has been reinforced by the weight of opinion revealed on consultation. A very substantial majority of the responses to the Code team's Report and draft Bill supported the proposal to codify the criminal law. This support has come in particular from those who are directly involved in the administration of the criminal justice system, including members of the judiciary (Law Lords, Judges of the Supreme Court, Circuit Judges, Magistrates), practising barristers and solicitors, court officers and academic lawyers specialising in this field. Only four consultees (three individuals, one body) in fact argued against it. The scrutiny groups were unanimously in favour of the principle, although naturally they and other respondents had reservations about some of the details.

2.13 However, this report might be regarded as one-sided if we did not set out the arguments which have been made against codification. These arguments have been distilled from the four adverse responses received.

C. Arguments against codification

1. Codification and reform

2.14 Several commentators referred to the relationship between codification and reform. Arguments concerning the inclusion of particular reforms are not, in our view, arguments against codification in principle. They are arguments against a code (or a part of it) taking one form or another and will be returned to later.²⁰

2. Codification and comprehensiveness

2.15 Some commentators doubted the feasibility of producing a comprehensive code. However, we regard codification as a process of replacing the common law and existing legislation with statute law arranged in the form of a code. While we recognise that in some other legal systems a code must be comprehensive, this need not be the case initially (or eventually) in this country. Codification is still desirable even if this process does not result in all of the common law being replaced. The desirability in principle of codification is not, in our view, dependent on codification resulting in a comprehensive statement of our criminal law to the exclusion of *all* common law principles or even offences.²¹

3. Codification and immutability

2.16 One commentator wrote to us saying:

“The outstanding defect of codes is that, unless they are stated in terms so general as to be unacceptable to the modern codifier, they must inevitably lead to ossification of the

¹⁷[1975] A.C. 55.

¹⁸A point made by Professor Smith in *Codification of the Criminal Law*, The Child & Co. Lecture 1986, p. 15.

¹⁹See, e.g., The Lord Mackay of Clashfern L.C., The Maccabean Lecture in Jurisprudence, “Can Judges Change the Law?”, *Proceedings of the British Academy*, LXXIII, 1987, 285-308, at 302: “I do not think judges should be taken to task if they are reluctant in some cases to change the law, for in every case where the judge overrules or modifies an earlier decision this has retrospective effect...”. Lord Mackay later considers (at 302 *et seq.*) the technique of “prospective overruling” adopted by judges in other jurisdictions (e.g. U.S., Canada, European Court of Justice) but concludes (at 308) that on balance “[it] would not be a useful addition to our Constitution”.

²⁰See paras. 3.28 - 3.35 below.

²¹See further paras. 3.36 - 3.38 below.

law and to the perpetuation of error... (T)he very virtues of codification propounded in the Report, especially consistency and certainty, have (as might be expected) their own correlative vice. This is that, for the law to be stated in a form which aspires to consistency and certainty, it must be imprisoned within a framework of principle which is rigid and is also immutable in the sense that it is incapable of gradual development in the light of practical experience ... (A) complete and perfect statement of principle is impossible...”.

2.17 Although there is force in this view, we feel that it is based on several misconceptions. First, a Code can, whenever necessary, be updated, and made subject to textual amendments.²² Secondly, the criticism presupposes that the present law is always capable of “gradual development in the light of practical experience”. Yet a glance in any criminal law textbook or journal will show that this is not true. The common law often has to struggle on with flaws and “perpetuation of error” until a suitable set of facts arises or until some party decides to take a case to the House of Lords. Moreover, as we indicated above,²³ the common law technique of amendment of the criminal law is objectionable in principle. A third point is that it is arguable that, as a matter of general constitutional principle, “gradual development” of the criminal law is a task for Parliament and not the judges, at least as far as the creation of new forms of liability are concerned.²⁴ Moreover, there is relatively little common law of crime left. Only a few common law offences of any importance survive; and the general principles of criminal liability at common law have already been much eroded by statute. Codification can therefore be seen as merely the logical conclusion to a process of gradual change from common law to statute law which has been continuing for more than a century.

2.18 Thus, while we appreciate the arguments in favour of the flexibility of the common law, we are not convinced that a codified criminal law would be as rigid as has been suggested.

4. *Codification and the role of the court*

2.19 It has also been suggested that codification would reduce the role of the courts. The role of the courts in developing new offences has already been relinquished,²⁵ but it will still be the function of the court to interpret the codified law and to apply it to differing circumstances. Although the primary result of codification would be to change the source of some parts of the criminal law from common law to statute, there would still be many occasions on which the courts would need to have recourse to precedent.

5. *Codification and other legal systems*

2.20 In our introduction to the Code team’s Report, we asked “whether it can credibly be asserted that, of all common law countries, England and Wales alone is unsuited to have a code of criminal law”.²⁶ It has since been suggested that in other countries codification was prompted by lack of uniformity and development in the existing law, considerations which do not exist in England and Wales today. Although we take this point, we do not think it is an argument of principle against codification. The further reasons which made codification attractive in other countries may not exist here but this does not detract from the basic advantages and arguments in favour of codification.

2.21 Similarly we are not impressed by the argument that, since no codification of Scottish law is proposed, it should not be attempted for England and Wales. The criminal law of Scotland is wholly distinct from the criminal law of England and Wales, both in content and in theoretical and practical tradition. There is not only a different system of criminal procedure²⁷ and a separate appeal system, but the substantive law is substantially different. Unlike in Scotland, most of our substantive law is already statutory. We can only make

²²See further paras. 3.49 - 3.52.

²³See para. 2.11.

²⁴See para. 2.2 above.

²⁵See *Knüller v. DPP* [1973] A.C. 435 and n.13 above.

²⁶Law Com. No. 143, para. 6. As we noted in the Report (*ibid.*, n.10), the other common law countries without codes of criminal law include Scotland (see further para. 2.21 below), the Republic of Ireland and the Australian states of South Australia and Victoria.

²⁷Scottish criminal procedure is in fact codified (see Criminal Procedure (Scotland) Act 1975 and Criminal Justice (Scotland) Act 1980), whereas English procedure is not.

proposals for codification of the criminal law of England and Wales and are not in a position to judge whether codification would be desirable in Scotland.²⁸

6. *Objections to codification which apply equally to other legislation*

2.22 Some commentators raised practical objections to codification based, for example, on the difficulties of ensuring that the courts interpret the codifying statute in accordance with the intentions of Parliament. Just as we cannot claim that a code will rid us of the need to rely on precedent, we cannot claim that a code will solve this problem which is inherent in all statutory interpretation.²⁹ Our objective, however, has been to ensure that the Criminal Code Bill has been drafted with sufficient clarity to reduce difficulties of interpretation as far as is reasonably possible. The present draft Bill takes account of the detailed scrutiny given to the Code team's Bill by members of the judiciary, practising and academic lawyers, the scrutiny groups and others.

7. *Objections to learning how to "interpret codes"*

2.23 One commentator referred to the difficulties of learning how to interpret a code as an objection to codification.

"It is all very well to talk about the success of the Code Napoleon and the like ... But it will take half a century to retrain English lawyers and especially English criminal lawyers to alter their approach to these problems. English lawyers have enough trouble with English statutes based on international conventions in other branches of the law. I do not believe they will ever learn to interpret codes as do their continental counterparts."

We believe that the reference to English lawyers having to "learn to interpret codes as do their continental counterparts" reveals a misunderstanding of the nature of the Criminal Code. There will be nothing special about the interpretation of the proposed Criminal Code Act as an English statute. English lawyers are already used to dealing with many new and sometimes lengthy statutes and "mini-codes".³⁰ The use of the term "code" ought not to conjure up the concept of a "continental code" if that term implies a method of interpretation and a judicial function characteristic of a legal tradition different from our own.

8. *Objections to relearning the law*

2.24 Others have objected to codification on the ground that those who have learnt the law once ought not to have to learn it again. For our part, we do not agree that English lawyers are so unwilling or unable to relearn as is suggested. A new approach will certainly be necessary: for example, there will be a need to be familiar with the way in which the Criminal Code Act is laid out and to read it as a whole; it will be necessary to analyse by reference to statutory text problems that were formerly analysed on the basis of imprecise case law; and, in so far as the Code implements law reform proposals, learning that new law. These difficulties were part of the "painful short-term consequences" to which the Code team referred³¹ and will be borne in mind no doubt when deciding the way in which to implement the Code Bill.³²

9. *The creation of confusion and new appeals*

2.25 An objection related to that of relearning the law is that the introduction of a code will be likely to cause confusion in law thereby wasting time and giving rise to an increased number of appeals. We do not think that this will be the case. Even if there were to be an increase in appeals due to the introduction of the Code, it will only be temporary and in the long term time will significantly be saved.³³ Moreover, the saving of time will apply not only to the courts, but also in other respects throughout the criminal justice system.

²⁸The Scottish Law Commission have indicated in their annual reports that they are keeping our codification project under review and are continuing to consider the possible implications for Scotland: see, e.g., Nineteenth Annual Report 1983-1984, (1985) Scot. Law Com. No. 89, para. 3.3.

²⁹See paras. 3.14 *et seq.* below.

³⁰E.g., the Theft Acts 1968 and 1978, the Misuse of Drugs Act 1971 and the Police and Criminal Evidence Act 1984; and, in a non-criminal context, the 1925 property legislation, the Companies Act 1985 and the Income and Corporation Taxes Act 1988.

³¹Law Com. No. 143, para. 2.28(i).

³²See paras. 3.45 *et seq.* below.

³³A saving of time should, of course, lead to a saving in costs: see para. 2.7 above.

10. *Implementing a Code*

2.26 As many have pointed out, a substantial obstacle to codification, however desirable it may be in principle, would be the difficulty in securing sufficient Parliamentary time for enacting a Criminal Code Bill. This is a problem of which we have been aware throughout the project. If we had thought that there was little or no prospect of implementation at some stage in the future, we would not have wished to devote our own resources to the continuation of this project in the form that we have done³⁴ or invited the Code team to help us to prepare this Report and draft Bill. However, the problem of implementation is not an objection in principle to codification. That is not say it can be ignored. We consider the matter further in the next part.³⁵

D. Conclusion and recommendation

2.27 We believe that codification of the criminal law of England and Wales would be desirable. We respect the views of those who are opposed to it in principle but are unable to accept that their arguments outweigh the strong arguments in favour of codification.

2.28 Accordingly, we *recommend* that there should be a Criminal Code for England and Wales.

³⁴We did consider a number of possible alternative courses to the production of a Report with a draft Criminal Code Bill, namely the production of (i) a Report without draft legislation (ii) a Report together with a Restatement of the Criminal Law (iii) a Report with an outline of a Model Penal Code or (iv) a Report together with several draft Bills or several reports each with a draft Bill (i.e. reform with a view to codification later). Each of these courses seemed to us to involve serious disadvantages.

³⁵See paras. 3.45 *et seq.*

PART 3

THE CONTENTS OF THE CODE

A. A comprehensive Criminal Code

3.1 Before outlining in general terms the contents of the Criminal Code Bill appended to this Report, it may be helpful to explain how a more comprehensive Code than we have prepared might eventually look. The Code team proposed¹ that the Criminal Code should eventually embrace as much as is practicable of the whole of the law relating to the criminal process. They envisaged that it would comprise four parts:

Part I General Principles of Liability.

Part II Specific Offences.

Part III Evidence and Procedure.

Part IV Disposal of Offenders.

1. *Part I: General Principles of Liability*

3.2 The Code team proposed that “Part I of the Code should state all the principles which are applicable to offences generally”.² We agree with their proposal. We recognise that not all drafters of codes accept the need for a “general part”. There is, for example, no general part in the Indian Penal Code.³ However, consultation on the Code team’s Report and scrutiny of the draft Bill suggest that there is considerable agreement here that a general part would be essential to codification of the criminal law of England and Wales. It is, after all, in relation to this part of the criminal law that the difficulties⁴ arising from the interface between common law and statutory provisions are most apparent. Provision of a largely, statutory-based general part would help to alleviate many of those difficulties.

2. *Part II: Specific Offences*

3.3 The Code should be as comprehensive a statement of the criminal law as is practicable;⁵ but, as the Code team recognised, there are overwhelming reasons for excluding many offences from it — though not from the application of Part I. There are several thousand offences⁶ and a code that contained all of them would be impossibly bulky. As the team pointed out, there are other considerations besides bulk. A great many offences are contained in legislation which is not primarily penal in character but which regulates activities in a variety of ways (e.g. licensing), as well as by the provision of criminal sanctions. The Code team were convinced that the governing principle should be “the convenience of the users of the legislation — that an offence should be incorporated in Part II only if the balance of convenience so dictates”.⁷ It is obviously true of much regulatory legislation that its typical users — those governed by it and those enforcing it — will wish to be able to consult the legislation as a whole rather than have to go to the Criminal Code Act for the offences it creates and to a more general Act for the larger context. Moreover, many offence-creating provisions, standing alone, would be meaningless. The team pointed out that incorporation of these in Part II of the Code would require either the repetition in the Code of technical matters from other legislation (where it would also have to remain for other purposes) or elaborate cross-referencing that would in any case throw the user back to the other legislation. We agree with the Code team that these types of inconvenience are to be avoided.

The problem illustrated: road traffic offences.

3.4 The Code team illustrated the problem of the borderline case by considering the more

¹Law Com. No. 143, para. 2.1.

²*Ibid.*, para. 2.2.

³This was drafted by Lord Macaulay between 1835 and 1837, enacted in 1860 and is now in force in many of the Asiatic countries that are or were members of the Commonwealth as well as in parts of Africa: see Sir Rupert Cross, “The Making of English Criminal Law: (5) Macaulay”, [1978] Crim. L.R. 519.

⁴See para. 2.5 above.

⁵Law Com. No. 143, para. 2.10.

⁶A Committee of JUSTICE found over 7,200 offences and thought there were probably many more. They concluded that “it is now impossible to ascertain the entire content of the criminal law at any given time”: *Breaking the Rules* (1980), p.53.

⁷Law Com. No. 143, para. 2.10.

serious driving offences.⁸ They suggested that it was obviously tempting to place causing death by reckless driving in the Code alongside other homicides; to place with it reckless driving, careless and inconsiderate driving and the corresponding cycling offences; and perhaps to add other “bad driving” offences and offences evincing serious irresponsibility (the drink-driving offences; driving while disqualified; using a motor vehicle without third party insurance). The team thought that not everyone who wished to see serious road traffic offences in the Code would contend for the whole of that list; but that every item in the list would have its champions. No-one, however, would claim that *all* road traffic offences should be in the Code. Apart from the triviality of many of them, there are some which depend upon the most detailed technical regulations. But, as the team pointed out, serious difficulties would attend a division of offences between the Code and the Road Traffic Act. The two most obvious difficulties are, first, that the serious offences which, taken alone, are suitable for the Code, share with some of the other offences complex provisions relating to disqualification from driving and the endorsement of licences, and, secondly, that offences in the former class are commonly associated with other road traffic offences in a group of charges made together. We agree with the team that it would not be satisfactory to enact the disqualification and endorsement provisions in two places; on the other hand, if resort to the Road Traffic Act is going to be necessary to find them, there seems little point in placing the offences anywhere else. Similarly, we agree that it must be doubtful whether prosecutor, defendant or court should be required to look to two statutes for the full range of offences relating to the same subject-matter. Because they thought the case of causing death by reckless driving, if no other, would be controversial, the Code team placed “some offences under the Road Traffic Act 1972”⁹ in the list of borderline cases.¹⁰ Our own view coincides with that of the Code team and respondents, namely that none of these offences ought to be designated for inclusion in the Criminal Code Act.

3.5 The Code team stressed that the process of incorporating into Part II all of those offences which will properly find a place there is one that must last some time. Before it can begin there will necessarily be consultations as to what offences ought to be designated for inclusion in Part II in the long run. The Code team sketched out the possible contents of Part II in its eventual form and a scheme for arranging the offences. They gave examples of offences which they believed would have to stay outside the Criminal Code Act on the principle of convenience: these included, for example, offences contained in the Companies Act 1985 and the Misuse of Drugs Act 1971.¹¹ Finally, they suggested, again by way of example only, some borderline cases — that is, some Acts in relation to which powerful arguments might be made either way on the question whether the offences they create should in due course be separated from them and placed in the Code or should remain in their parent legislation. We thought it would be helpful to include an Appendix in this Report¹² setting out the scheme of a more comprehensive Code as we envisage it at the present time. This follows, with modifications, the Code team’s suggested scheme.

3.6 We should stress at this point that we regard completion of the Code by the addition of further offences not contained in the present draft Criminal Code Bill as desirable, but by no means essential, for the fulfilment of the aims of codification described earlier in Part 2. Enactment of the present draft Bill and no more would be sufficient in itself.¹³ However, we envisage that it would in many cases be a relatively straightforward process for offences created after the present Bill has been enacted to be incorporated in the Criminal Code Act.

3. *Parts III and IV: Evidence and Procedure; Disposal of Offenders*

3.7 The Code team were unable to give any detailed consideration to the structure and

⁸*Ibid.*, para. 2.11. Since the Code team reported to us, road traffic legislation has been consolidated in the Road Traffic Act 1988 (which includes the road traffic offences), the Road Traffic Offenders Act 1988 (which includes provisions relating to sentencing of road traffic offenders) and the Road Traffic (Consequential Provisions) Act 1988. Road traffic law has also been the subject of a wide-ranging review: see the Road Traffic Law Review Report (1988) and the Government’s White Paper with proposals for legislation (see para. 2.8, n.10 above). However, none of these developments affects the illustration in the text.

⁹Now consolidated in the Road Traffic Act 1988: see last note.

¹⁰See Law Com. No. 143, para. 2.11 and Appendix A.

¹¹The 1971 Act (and now also the Drug Trafficking Offences Act 1986) contains some very serious criminal offences, in some cases carrying liability to a maximum penalty of life imprisonment. However, these offences form part of a broader scheme regulating the misuse of drugs and we agree they ought not to find their way into the Criminal Code. Moreover, there are other serious offences in Customs and Excise legislation controlling the importation of controlled drugs which it would be inappropriate to remove from their parent legislation for similar reasons. The fact that none of these offences will appear in the Code should not be taken as in any way diminishing their importance.

¹²Appendix C.

¹³See further paras. 3.25 - 3.26 below.

contents of Parts III and IV of the Code. This was because, as they pointed out,¹⁴ the intimate relationship which must exist between Parts I and II does not extend to Parts III and IV. The team suggested that, subject to their proposals about burden of proof, the specification of permissible sentences for offences and the various procedural matters covered in Part I, work on these parts could proceed independently. We ourselves have not yet undertaken any work on Parts III and IV.¹⁵ The enactment of Parts I and II as contained in our Bill need not await the drafting of Parts III and IV, still less their implementation.

B. The present draft Criminal Code Bill

3.8 The draft Bill appended to this Report does not comprehend all the matters which we suggest might eventually find their way into a Criminal Code Act,¹⁶ nor as we have just pointed out does it need to.¹⁷ In this section, we summarise what has been included and explain why certain matters have been omitted.

1. Part I

3.9 Part I of our draft Bill covers the following matters:

Preliminary provisions: clauses 1 to 6

Prosecution and punishment: clauses 7 to 12

Proof: clauses 13 and 14

External elements of offences: clauses 15 to 17

Fault: clauses 18 to 24

Parties to offences: clauses 25 to 32

Incapacity and mental disorder: clauses 33 to 40

Defences: clauses 41 to 46

Preliminary offences: clauses 47 to 52.

3.10 Part I is intended to give effect to the Code team's proposal to include a general part in the Code.¹⁸ As explained later, some clauses of Part I will apply to all offences whenever committed,¹⁹ other clauses will apply to all offences committed after the Criminal Code Act has come into effect,²⁰ and still others will apply to all offences except pre-Code offences²¹ — that is offences wholly or partly defined in pre-Code legislation and subsisting common law offences. The characteristic of Part I is the generality of its application. It does not create specific offences — except the offences of incitement, conspiracy and attempt to commit crime.²² They are appropriately placed in Part I because the principles of liability governing them are general in the sense that they operate on all the offences specifically defined in Part II and other legislation.²³ As explained below,²⁴ Part I also includes certain procedural and evidential matters.

3.11 The general contents of Part I are in most respects similar to those of the Code team's Bill. In the light of the detailed scrutiny of their draft clauses, there are of course some areas where we have taken a different view on policy from that originally proposed by the Code team. There have also been many drafting revisions. Any significant changes are explained in the commentary on the individual clauses (in Volume 2 of this Report). The more important omissions are considered here.

¹⁴Law Com. No. 143, para. 2.13.

¹⁵The statute law revision team of the Commission has made a preliminary study of the statute law governing criminal procedure in England and Wales in order to assess the practicability of preparing a comprehensive consolidation. Although the drafting resources which would be needed to undertake this major project are not at present available, the work already done has identified possibilities for smaller consolidations in areas where the law is particularly in need of being brought together in a coherent manner: see Twenty-Second Annual Report 1986-1987 (1988), Law Com. No. 169, para.2.79.

¹⁶See para. 3.5 and Appendix C.

¹⁷See para. 3.6 above.

¹⁸See para. 3.2 above.

¹⁹See Appendix A, cl. 2(2) and Report, Vol. 2, para. 4.4.

²⁰See *ibid.*, para. 4.3.

²¹See *ibid.*, para. 4.6 and Appendix A, cl. 2(3) below. See cl. 6 for the formal definition of "pre-Code offence".

²²See Appendix A, cl. 47 - 52.

²³See Report, Vol. 2, para. 13.2.

²⁴See para. 3.27.

2. *Matters omitted from Part I of the draft Bill*

3.12 There are only three major topics in Part I of the Code team's Bill which do not appear in the present draft Bill. The first concerns the jurisdiction of the criminal courts, the second relates to provisions dealing with the construction of the Code and the third concerns liability for omissions. The last topic is more conveniently discussed in the commentary on clause 16,²⁵ but the other two are discussed here.

(a) *Jurisdiction of the criminal courts*

3.13 The Code team thought that the Code must contain general provisions relating to the jurisdiction of the criminal courts, that is to say, the definition of the territory of "England and Wales" for criminal law purposes; and that Part I was the appropriate place for them. The team's clauses²⁶ were based on (part of) the draft Criminal Jurisdiction Bill appended to our Report on the Territorial and Extraterritorial Extent of the Criminal Law.²⁷ We have not included these provisions in the draft Bill for two reasons. First, we agree with the Working Party of the Statute Law Society that these provisions would be better placed in the procedural part of the Code (Part III). Secondly, the Home Office have consulted other Departments on the recommendations in our earlier Report and it seems likely that some changes would be required before effect could be given to them and these have yet to be fully worked out. We saw little advantage to be gained by including provisions which would inevitably require reconsideration.

(b) *Provisions dealing with the construction of the Code*

3.14 The Code team's terms of reference²⁸ required them to consider and make proposals in relation to the rules which should govern the interpretation of the Code. In response to this, their Report proposed that special provisions relating to the construction of the Code should be incorporated in the Code itself.²⁹ Clause 3 of the Code team's Bill was intended to give effect to this proposal and provided as follows:

- 3.— (1) The provisions of this Act shall be interpreted and applied according to the ordinary meaning of the words used read in the context of the Act, except insofar as a definition or explanation of any word or phrase for the purposes of the Act or any provision of it requires a different meaning.
- (2) The context of the Act includes —
- (a) the illustrations contained in Schedule 1; and
 - (b) the long title, cross-headings and side-notes.
- (3) Where a provision, read in the context of the Act, is reasonably capable of more than one meaning, regard may be had —
- (a) to the Report of the Law Commission on the Codification of the Criminal Law (Law Com. No. -) and any other document referred to therein; and
 - (b) to the law in force before the passing of this Act.

The "illustrations" in Schedule 1 were provided for by clause 4 which provided as follows:

- 4.— (1) Schedule 1 has effect for illustrating the operation of the Act.
- (2) The illustrations contained in Schedule 1 are not exhaustive.
- (3) In the case of conflict between Schedule 1 and any other provision of this Act, that other provision shall prevail.
- (4) The Secretary of State may by order amend Schedule 1 by adding further illustrations or in any other way.

These two clauses together proved to be perhaps the most contentious parts of the Code team's Bill.

²⁵See Report, Vol. 2, paras. 7.9 *et seq.*

²⁶See Law Com. No. 143, cl. 8 - 10.

²⁷(1978), Law Com. No. 91.

²⁸See para. 1.9 above.

²⁹Law Com. No. 143, Chapter 3.

(i) *Clause 3*

3.15 A number of respondents questioned the desirability of clause 3. Four main arguments were deployed against the concept of the clause. First, it was felt that provisions on interpretation were unnecessary insofar as they restate general principles of construction. The general law will apply. Some went further and suggested that the provisions were subversive because they cause issues to be raised about the drafting of other legislation which does not include such provisions. Secondly, it was suggested that, even if provisions on interpretation were desirable in a criminal code, it was unwise to attempt to draft a comprehensive set of provisions. They would unbalance the Code and produce their own difficulties of interpretation. On the other hand, it was said that the clause would cause uncertainty in practice precisely because it is an incomplete statement of the present principles of construction. It did not, for example, say anything about the principle of strict construction of penal statutes.³⁰ Thirdly, critics suggested that the clause was objectionable insofar as it introduced innovations such as clause 3(3)(a) which would be likely to arouse professional and Parliamentary opposition. A special case for including them in the Criminal Code (but not for other legislation) had not, they thought, been made out. Finally, it was said that subsection (1), which formed the basis of clause 3, would not work in the sense that it would not prevent courts from straining the meaning of provisions in the Code if they were minded to.

3.16 We asked all the scrutiny groups to examine this clause (and clause 4). So far as clause 3 was concerned, not all provided clear recommendations. Some were firmly opposed while others welcomed it. This division of opinion was reflected by other respondents.

3.17 One or two commentators thought that if rules of interpretation were to appear in the Code the rule of strict construction of penal statutes ought to be included. We are, however, sceptical whether such a principle really exists. It is of course often referred to by the courts, but it is rarely applied in practice.³¹ This is because the “principle” cannot sensibly be used as a rule for the resolution of all ambiguities. We do not think it would be acceptable for the Code to provide in effect that wherever some arguable point of doubt arose about the interpretation of an offence the point should automatically be resolved in favour of the accused.

3.18 We are not persuaded that it would be necessary or even desirable to retain the provision in clause 3(2)(b). Parliamentary procedure does not presently permit amendments to cross-headings and side-notes after a Bill has been enacted. If they were expressly made part of the enacting words of the Act this rule would have to be changed.³²

3.19 Subsection (3) of clause 3 also attracted particular criticisms. In relation to sub-paragraph (a), a majority of respondents were opposed to the provision in principle. It was pointed out that where the draft Bill scheduled to the Law Commission’s Report was amended before enactment the Report might not be a safe guide to the meaning of the Act. In such a case if reference were to be made at all it would have to be to the full Parliamentary history. Practitioners were also concerned that the provision would open the floodgates to a mass of other documents. It was clear that, even if the reference to “any other document referred to therein” were amended or deleted, substantial anxiety would remain about this departure from the present rule concerning use of such reports. This rule makes pre-Parliamentary materials admissible as evidence of the mischief against which statutory words are aimed but inadmissible as evidence of the meaning of the words in their application to the case before the court.³³

3.20 The fundamental question seems to us to be whether it would be helpful to include a power to refer to this Report, and in particular the commentary on the clauses in Volume 2, for the purpose of resolving ambiguities in provisions of the Criminal Code Act. In our view, such a provision would be unlikely to offer any significant help in many cases and we have therefore concluded that this provision should not remain in the Code. The normal rule for consulting Law Commission reports will continue to apply.

3.21 The provision in sub-paragraph (b) was criticised as unnecessary — because recourse

³⁰See further para. 3.17 below.

³¹As Professor Smith pointed out in *Codification of the Criminal Law*, The Child & Co. Lecture 1986, p.9.

³²As to the importance attached to side-notes as an aid to the reader of the Code, see para. 3.40 below.

³³See *Assam Railways and Trading Co. Ltd. v. Inland Revenue Commissioners* [1935] A.C. 445 and *Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg AG* [1975] A.C. 591.

to the previous law is usual in cases of doubt and ambiguity; as undesirable — insofar as it directs attention to the previous law and seems to invite a search for ambiguity; and as misconceived — insofar as it suggests that recourse to previous law may be had *only* in cases of ambiguity. In connection with the last comment, it was argued that it would prevent reference to earlier case law even where that law is part of the background assumed by the Code — for example, the law of property. We are unconvinced by this argument. However, we believe there is some force in the claims that the provision is unnecessary and potentially dangerous. One of the scrutiny groups commented that:

“The Code, instead of being a self-propelled vehicle bearing a minimum of new case-law, would be made to carry a larger and increasing case-load, and to draw behind it a heavy trailer of pre-Code decisions and statutes, as well as the Report and ancillary documents.”

This point can perhaps be over-stressed given that the provision does no more than restate the principle from *Bank of England v. Vagliano Bros.*³⁴ In view of the anxiety about the effect of highlighting the principle in the Code and in view of the lack of any clear advantage in including the principle, we concluded again that it may be better to leave it out of the Code.

(ii) *Clause 4*

3.22 Clause 4, together with Schedule 1, made provision for a series of illustrations of the functioning of the clauses of the Code where the Code team thought it would be helpful to the reader, in particular to practitioners. On consultation, opinion was divided over whether the illustrations should form part of the Criminal Code Act. Virtually all academic commentators were in favour of keeping the illustrations as part of the Code. The majority of members of the scrutiny groups and others who commented on them would prefer that they be left out. The practitioners who opposed the inclusion of illustrations were concerned about the likelihood of arguments from the facts of the illustrations. They were also concerned about the resolution of conflicts between the illustrations and the text of the Code. For example, if there were an irreconcilable conflict between an example and the provision exemplified, it is likely that the courts would give priority to the main text. In such a case, the example would be falsified by the judicial decision, but it would remain in the Code, a trap for any but the most expert reader. Anxiety was also expressed about the risk of the jury being distracted by the illustrations from decision of the real issues. In theory, however, the jury should not be distracted by them, because the judge should not allow the illustrations to be misused or the jury misled. There were other points raised which concerned matters likely to create difficulty in practice.

3.23 Since the illustrations were being offered by the Code team largely as an aid to practitioners in working with the Code, it would seem foolish to ignore the majority view that they are not wanted as an integral part of the Act. On the other hand, there was strong support for the inclusion of illustrations in a non-statutory document such as this Report. Several of those opposed to their appearance in the Code itself commented that they found the illustrations useful and would like to see them in a form in which they could be referred to by users in an appropriate case. We agree. We also think that there would be some educational value for all concerned by retaining them in some form, outside the Code. Appendix B of this Report accordingly sets out “examples” to illustrate the operation of clauses in Part I of the Code. (We did not think it necessary to provide examples in relation to any of the specific offences in Part II.) It should be borne in mind, however, that including the examples in the Report rather than in the Code itself will enable them only safely to be used to understand what our Report was supposed to mean, and not to illuminate the meaning of the eventual Act, unless the reader has carefully compared the statute as enacted with the Bill appended to the Report.³⁵

3.24 For all the reasons given above, therefore, our draft Bill does not reproduce any of the provisions in clauses 3 and 4 of the Code team’s Bill.

³⁴[1891] A.C. 107.

³⁵Cf. para. 3.19 above.

3. *Part II*

3.25 Part II of the present draft Bill contains clauses dealing with specific offences and is divided into the following Chapters:

- Chapter I: Offences against the Person
- Chapter II: Sexual Offences
- Chapter III: Theft, Fraud and Related Offences
- Chapter IV: Other Offences relating to Property
- Chapter V: Offences against Public Peace and Safety.

The first two Chapters are based on recommendations for reform of the existing law made by the Criminal Law Revision Committee.³⁶ The remaining three Chapters largely comprise a restatement of existing legislation incorporating changes required for consistency with the style and terminology of the Code as a whole. The contents of each Chapter are explained in the relevant parts of Volume 2 of this Report.³⁷

3.26 Comparison of these five Chapter headings with the scope of Part II of the more comprehensive Code as described in Appendix C shows that we have been selective in what we have included in Part II of our Bill. We took the view that the Criminal Code Bill would only be seen as useful if judges, practitioners and all who might have to use the Code could see how advantageous it would be to have the criminal law in one coherent piece of legislation. However, accomplishment of this aim did not seem to us to require that we provide a draft of a comprehensive code. We thought it would be sufficient if as many as possible of the indictable offences which regularly have to be considered in the Crown Court and in the Magistrates' Courts were to be included in the present Part II. The five groups of offences listed above include the most frequently encountered indictable offences and together would, we believe, encompass 90-95 per cent of the work of the criminal courts in relation to such offences.³⁸ Thus, we believe that enactment of the present draft Criminal Code Bill alone would represent a very substantial advance on the present position. We would not wish its enactment to be delayed merely to enable a more comprehensive Code Bill (which would itself probably take longer to enact) to be drafted.³⁹

4. *Procedural and evidential matters in the Bill*

3.27 In addition to enunciating the general principles of liability, Part I includes certain procedural and evidential matters. In some cases this is because they are matters without which Part II could not function at all. Into this class fall some of the matters concerning prosecution and punishment contained in clause 7. In other cases it is because they embody fundamental principles which should be stated at an early point in the Code, such as the provisions against double jeopardy (clause 11) and the burden of proof (clause 13). Other procedural provisions are conveniently placed here because they are closely related to those mentioned above (for example, clause 8, alternative verdicts, and clause 12, multiple convictions) or are particularly applicable to general principles — like the special procedural provisions relating to accessories or to preliminary offences.

C. **Restatement and reform**

3.28 In their Report to the Commission, the Code team said:⁴⁰

“An assumption underlying this project is that codification is a different process from law reform. This was the basis of the submission made to the Law Commission by the committee of the Society of Public Teachers of Law which led to our appointment. Codification does not have to wait until the whole of the criminal law has been reconsidered and, if necessary, reformed. If it did, it would never happen.”

In our Introduction to their Report, we said:⁴¹

“Codification, as the Criminal Code team points out, is a process which differs from law reform. It is essentially a task of restating a given branch of the law in a single, coherent, consistent, unified and comprehensive piece of legislation. Codification does

³⁶But see our general note of reservation in para. 3.34 below.

³⁷See Report, Vol. 2, Parts 14 to 18.

³⁸Based on statistics taken from the Criminal Statistics for England and Wales in recent years.

³⁹See paras. 3.5 and 3.6 above.

⁴⁰Law Com. No. 143, para. 1.10.

⁴¹*Ibid.*, para. 16.

not necessitate reconsideration of the relevant law with a view to reform: it may entail no more than a restatement of existing principles.”

3.29 Our introduction reflected a general view in England and Wales of codification (at least in relation to the criminal law) as the process by which common law and statute law are replaced as the mixed sources of a given branch of the law by statute law designed as a coherent whole. This is of course not the only form of codification. Sometimes, as in the case of tax law, there is no pre-existing common law to be replaced by the new statutory code. On other occasions a new code may be designed as a model to replace existing inconsistent legislation in different jurisdictions in a federal state. Where statute law does replace a body of common law rules in a single jurisdiction such as England and Wales it may aim simply to restate the principles of the law it replaces. No significant changes may be made to the common law rules. Alternatively the legislation may incorporate a substantial measure of law reform. For example, replacing the common law rules on insanity with statutory provisions could be classed as codification whether the provisions embodied the *M' Naghten Rules* or the recommendations of the Butler Committee on Mentally Abnormal Offenders.⁴² In many cases codification will be neither a total restatement nor a complete reform of the existing law. It will consist rather of statutory expression of the existing principles, modified in respect of some matters of detail in order to achieve the general aims of codification, discussed above.⁴³

3.30 A substantial part of the draft Bill appended to this Report limits itself to a restatement of existing principles. The Code team's assertion⁴⁴ that “[t]he fundamental principles of the law are well settled and it would be neither politically feasible nor desirable to depart from them” is, in our view, correct. As they argued,⁴⁵ however, there are several reasons why the proposed Code Bill cannot be a mere restatement and the draft clauses embody a substantial body of proposed reform.

3.31 The Code cannot reproduce inconsistencies. Where the inconsistency represents a conflict of policies, a choice has to be made to produce a coherent law. The controversy over the concept of “recklessness” to which we have already referred⁴⁶ well illustrates the point. This is not the place to go into the details of that controversy. Put very broadly,⁴⁷ it is between those who say that a person is reckless only if he is aware that he is taking a risk which it is in fact unreasonable to take (the “subjectivists”) and those who say that he is reckless if that risk is one of which any reasonable person would have been aware (the “objectivists”). In the law of offences against the person, the subjectivist view prevails. In the law of criminal damage, the objectivist rule has been firmly stated. Even if this distinction were to be maintained, at the very least a different term would have to be selected to express the different definitions of recklessness. In fact, we have proposed that the same rule should apply to both and that it should be the subjective rule. But, if another opinion should prevail,⁴⁸ the draft Code Bill could be amended accordingly. We agree with the Code team that codification affords the opportunity to introduce consistency and coherence instead of the current confusion.

3.32 There are in the present law a few rules of an arbitrary nature fulfilling no rational purpose and explicable, if at all, only on historical grounds. An example of such a rule is the provision that the offence of conspiracy does not extend to agreements between spouses. The effect of clause 48 of our draft Bill is to remove this exemption.⁴⁹

3.33 We have already stated our view that it is not essential that the Code be comprehensive.⁵⁰ Where there are points to which the answer is not known in the law at present, it *may* be desirable to try to answer them in the Code in *some* cases; an example of

⁴²Report (1975), Cmnd. 6244.

⁴³See Part 2.

⁴⁴Law Com. No. 143, para. 1.10.

⁴⁵*Ibid.*, paras. 1.11-1.14.

⁴⁶See paras. 2.7-2.8 above. See further Report, Vol. 2, paras. 8.17 *et seq.*

⁴⁷And ignoring for present purposes the additional complication that the concept has two other meanings in rape and in serious driving offences, although this concept would cease to be used in these cases if recommendations of the Criminal Law Revision Committee (Fifteenth Report: Sexual Offences (1984), Cmnd. 9213, Recommendation 4) and the Road Traffic Law Review (Report (1988), Recommendation 18 which has been accepted by the Government: see para. 2.8, n. 10 above) were implemented.

⁴⁸It has been suggested by some that the law is right to impose stricter requirements when convicting someone for an offence against the person than for an offence against property. An alternative view is that the law should not, as it does at present, afford a greater protection to a person's property than to his person.

⁴⁹See Report, Vol. 2, para. 13.30.

⁵⁰See para. 2.15 above.

such a case in the draft Code Bill concerns the criminal liability of corporations.⁵¹ In other cases it may be better that they be left to the common law to develop.⁵²

3.34 More importantly, we have thought it right, as the Code team did,⁵³ to incorporate into the Code recommendations for the reform of the law made in recent years by official bodies such as the Criminal Law Revision Committee and ourselves, and ad hoc committees such as the Butler Committee on Mentally Abnormal Offenders, which have not yet been implemented by legislation. Where the law has been scrutinised, found to be defective and reforms recommended, it would be wrong to recommend the perpetuation of the existing law. So, for example, we have not restated the *M'Naghten Rules* which have been accepted as laying down the law of England and Wales as to insanity at the time of the alleged offence, but have codified the recommendations of the Butler Committee which would replace them, albeit with some important modifications;⁵⁴ and we have acted on the recommendations of the Criminal Law Revision Committee in respect of intoxicated offenders, self-defence, offences against the person, sexual offences and other matters. However, inclusion of these recommendations made by other Committees implies neither assent nor dissent; we are merely recording in statutory form, in some instances with modifications, what others have recommended.

3.35 In all these respects the draft Criminal Code Bill departs from the existing law and would represent, if enacted in the form presented here, a substantial reform of the law. Particularly is this so, for example, in the case of mental disorder, offences against the person and sexual offences.

D. The Code and the common law

3.36 One of the objectives of codification is to define offences authoritatively and as precisely as possible. Hitherto, it has been the policy of the Commission to try to eliminate common law offences, a policy which has met with some success.⁵⁵ However, the abolition of *all* common law offences should not be regarded as a necessary pre-condition of the enactment of the Code. Just as the Code can co-exist with offences in other enactments, so it could co-exist with some surviving common law offences. Codes sometimes provide expressly that all offences are to be found in the Code itself or in other legislation and nowhere else. The draft Bill has not gone so far. Clause 3 provides that no offence shall be created except by, or under the authority of, an Act of Parliament, and this merely restates the accepted law.⁵⁶ Other provisions of the draft Bill allow for the possible continuation of common law offences for some time after its enactment. Many of the provisions of Part I could be applied to common law offences no less readily than to statutory crimes — for example, the law relating to proof, parties, mental disorder, intoxication and many other matters. On the other hand, provisions relating to the meaning of particular words — for example, fault terms (clause 18) assume the existence of an enactment and could not apply; but these will not apply to pre-Code statutory offences either so there is no significant difference. The abolition of common law offences has sometimes proved to be a difficult and protracted business. The fact that the process will not have been completed should not be regarded as a bar to the enactment and operation of the Code.

3.37 The draft Bill contains a number of provisions directly concerned with its impact on the common law. First, certain common law offences which are being replaced by Code offences will need to be abolished and this is provided for by clause 4(1) and Schedule 8. Secondly, it is stated that rules and principles of the common law corresponding to or inconsistent with provisions of the Code are abrogated for all purposes not relating to acts done before the commencement of the Code: clause 4(2). Thirdly, as is explained more fully in the commentary on clause 45,⁵⁷ it is impossible to specify in the Code all those circumstances which amount to defences because they justify or excuse the doing of acts that would otherwise be offences. The Code makes clear that the specification of a limited number of general defences that are well-developed or capable of being closely defined is not an exhaustive statement of defences and that other circumstances of justification and excuse continue to apply.

⁵¹See Report, Vol. 2, para. 10.3.

⁵²See further para. 3.38 below.

⁵³Law Com. No. 143, para. 1.14.

⁵⁴See Report, Vol. 2, para. 11.9.

⁵⁵See the statutes cited in para. 1.6, n.12 and para. 1.7, n.15.

⁵⁶See Report, Vol. 2, para. 4.8.

⁵⁷See *ibid.*, paras. 12.38 *et seq.*

3.38 It follows from dealing with the effect of the Code on the common law in this way that those parts of the common law not abrogated by the Code will continue to exist; this is expressly provided for in the Code in clause 4(4). We believe that this is both inevitable and right. It is inevitable because the Code could not supply all the answers to all the problems which arise in practice, and it would be foolish to pretend otherwise. The creative role of the judge will therefore continue to play a part in cases where the legislation does not provide an answer. Unless the Code is to confer expressly a power to decide such cases — in which case it might be necessary to specify relevant principles or guidelines — it is right that the judge should fall back on the common law. But in reaching his decision on a particular point, the judge will be operating within the broad framework of the Code rather than of the case-law. One example outside the area of justification and excuse (covered by clause 45) concerns the criminal liability of unincorporated associations. For reasons which we give elsewhere,⁵⁸ we do not think it would be right to devise a new statutory regime to govern this liability; the possible need eventually to develop relevant principles exemplifies the desirability of retaining a residual role for the common law.

E. The style and language of the Code

3.39 In the preparation of our draft Bill we have adopted, as to method and language, the policy which the Code team described in some detail in their Report.⁵⁹ That policy is the use of as lucid and economical a mode of statement as the subject-matter permits. It is worth stressing the care which it has been felt necessary to take to ease the task of the ordinary user of the Code in grappling with quite complex material. The Code team mentioned, as we do in our turn, the high value that they put upon clarity of lay-out, simplicity of style, and what they called “a conscious policy of communicativeness”. Among the “ordinary” users of the Code, we include the jury (who of course are not lawyers). If the words of the statute are used by the judge when instructing the jury, as in most cases we expect they will be,⁶⁰ there is a reasonable likelihood of the jury understanding the position and coming to the right conclusion. Adoption of the Code team’s policy therefore reinforces the arguments in favour of codification to which we referred earlier.⁶¹ As we have already indicated,⁶² the style and presentation of the team’s Bill attracted very favourable comment on consultation.

1. *Side-notes*

3.40 Our draft Bill, like that of the Code team, contains many marginal notes to the text — not simply conventional notes to sections (printed in roman type, as is usual), but also subsidiary notes to most subsections and even, in some cases, to paragraphs (italicised, to distinguish them visually from the principal notes). These are intended to facilitate the user’s grasp of the contents and meaning of the Code’s provisions, particularly of long sections, and to assist him in finding what he is looking for. We ourselves found this device very helpful in our work on the Bill.

2. *Communicativeness*

3.41 Side-notes are one way of communicating generously with the user of the Code. Another is the use of cross-references, commonly with a parenthetical indication of the subject-matter of the provision referred to. A third is the occasional inclusion, for the user’s convenience or for the avoidance of doubt or error, of a phrase, or even a whole provision, that could be omitted without detriment to the legal effect of the Bill.⁶³

3. *Use of the present tense*

3.42 Our draft Bill will be found to state the substantive criminal law in terms of the legal effect of a person’s conduct at the time when that conduct, or its relevant result, occurs. This may seem obvious; but the Code team were able to point to a tendency, even in modern drafting, to state substantive matters from the point of view of their effect at trial.⁶⁴ Section 2 of the Homicide Act 1957 (diminished responsibility) provides that a person “shall not be

⁵⁸See *ibid.*, para. 10.24.

⁵⁹Law Com. No. 143, paras. 2.14-2.24.

⁶⁰See further para. 3.43 below.

⁶¹See paras. 2.2 *et seq.* above.

⁶²See para. 1.16 above.

⁶³The Code team (Law Com. No. 143, para. 2.17(ii)) gave as an example the equivalent in their Bill of clause 30(1) (liability of corporations for offences not requiring fault). Another example is clause 45(c), which in relation to its subject-matter duplicates clause 4(4).

⁶⁴See Law Com. No. 143, para. 2.19.

convicted of murder if he was suffering from” an appropriate abnormality of mind, rather than that a person who kills when suffering from such an abnormality is not guilty of murder. Section 5(2) of the Criminal Damage Act 1971 states conditions under which a person “charged with an offence” is to be “treated as having a lawful excuse”, rather than providing that, those conditions being satisfied, a person has a lawful excuse when he does an act that would otherwise be an offence.⁶⁵ We accept the team’s view that “matters of substance should be kept as distinct as possible from matters of process”. A person is (subject to any defence) guilty of an offence when he behaves in a specified way or causes a specified result; he has a defence if specified circumstances exist at the time of his conduct. Accordingly, Parts I and II of the draft Bill, in stating the general principles of criminal liability and the elements of specific offences, are written in the present tense wherever that can conveniently be done.⁶⁶

F. Coping with complex provisions

3.43 In their Report, the Code team specifically drew attention to two practical implications of reducing the present law into the form of the proposed Code. One was for the need for a generous period between enactment of the Code Bill and its coming into force, so that its professional users may familiarise themselves with it. We consider the question of implementation below⁶⁷ and point out that the period for enactment may take some time. If this is the case, the Code team’s point may very likely be met (as we think it should be) in any event. The second point was put as follows:⁶⁸

“The Code, the judge and the jury. An objection to draft criminal legislation that is sometimes voiced is: “How can a jury be expected to understand that?” Another is: “That provision has many ingredients, upon all of which in every case the judge would have to direct the jury; there are too many.” If objections such as these were well-founded in principle, our draft clauses, like much other legislation, must fail. But the objections are misconceived. The answer to both of them is the same. The judge stands as mediator between the Code and the jury. He filters, translates and renders concrete the rules that the jury must apply. He filters by troubling the jury only with those ingredients of a complex provision that he identifies as raising issues for their consideration in the case in hand, having regard to the state of the evidence. He translates, partly by applying to the controlling provision any other provisions of the Code (such as an interpretation provision) that affect its meaning or application, and partly by adopting a means of expressing its concepts that will suit his particular lay audience in the context of the case. And he renders concrete by reducing abstract language (such as “omission”) to the terms of the case (as by referring to the defendant’s alleged failure to do a particular act). In the result he may or may not use in addressing the jury the very words of the controlling provisions. Most often, of course, he will; for commonly the statutory language will be simple and untechnical. But the kinds of objections mentioned at the beginning of this paragraph are not raised when such language is used; and the fact is that the technical and the complex are not always avoidable. (What is said here of judge and jury applies also to the justices’ clerk and his bench.)”

The essential points made in this passage have been urged on trial judges by the Court of Appeal on more than one occasion in recent times.⁶⁹ We think that the Code team’s reasoning in this passage is sound and we endorse it.

G. The incomplete condition of the draft Criminal Code Bill

3.44 The draft Bill is not as complete as are those which are usually included in our reports. It does not, for example, contain schedules of enactments to be repealed or amended in consequence of the enactment of the Code. The substantial task of identifying

⁶⁵For Code provisions corresponding to the Homicide Act 1957, s.2, and the Criminal Damage Act 1971, s.5(2), respectively, see Appendix A, cl. 56(1) and cl. 184 and 185.

⁶⁶It is not always convenient; see Appendix A, cl. 35, where the defence of severe mental disorder is stated in a provision requiring a particular form of verdict.

⁶⁷See paras. 3.45 *et seq.* below.

⁶⁸Law Com. No. 143, para. 2.28(ii).

⁶⁹In *Lloyd* [1985] Q.B. 829, for example, the Lord Chief Justice cited (at pp. 835-836) with approval a passage to similar effect from Glanville Williams’ *Textbook of Criminal Law* 2nd ed., (1983), at p. 719: the complex provision in question was s. 6(1) of the Theft Act 1968 (reproduced in cl. 145 of our draft Bill). See also *Shadrokh-Cigari* [1988] Crim.L.R. 465 where the court emphasised that the technical points of law concerning the right to trace and recover property are matters of legal reasoning which generally do not concern the jury. Contrast *McVey* [1988] Crim.L.R. 127.

the enactments to be listed in the Schedules has not been undertaken. If it were decided to enact a Criminal Code Bill along the lines of the Bill appended to this Report, further drafting work would be required to complete the Bill before it could be introduced into Parliament.⁷⁰ It is to the legislative process and the question of enactment that we now turn.

H. The legislative process: enacting the Criminal Code Bill

3.45 While the codification project received very considerable support on consultation, a number of consultees raised with us the question of implementation and referred to the difficulties likely to be encountered in enacting a Criminal Code Bill.

3.46 We appreciate that any Government might have difficulty in finding the necessary legislative time to introduce a Bill of the size of our draft Criminal Code Bill. The realities are such that the competing demands for new, and in some cases necessarily substantial, pieces of legislation from many different quarters are intense. The case for implementing a Criminal Code Bill therefore has to be convincing. We hope that we will have demonstrated by this Report that it is. However, we think it is possible to overstate the difficulties of enactment. Insofar as they do exist, we believe that it will be possible to overcome them without the need to devise any special Parliamentary procedure as has been suggested.⁷¹ Nevertheless, we do not think it is part of our function at this stage to offer suggestions as to precisely how the draft Bill should proceed from its present form to the stage of final enactment. Officials in the relevant Government Departments may be in a better position than us to advise Ministers on this matter.

3.47 While it is important to stress that the Criminal Code Bill appended to this Report has been drafted as a coherent whole, we believe that its contents fall into three separate and quite distinct categories. This division may have a bearing on the manner in which the Bill could be enacted. The first category is the codification of the general part (Part I): this broadly aims to state the existing mix of common law and statutory rules in a coherent statutory form, though it necessarily carries with it some element of reform. The second consists of a statement of existing statutory offences in Code style, with very little reform of the law involved (Part II, Chapters III, IV, and V). The third part, by contrast, aims to give effect to some fairly substantial reforms recommended by the Criminal Law Revision Committee (Part II, Chapters I and II).

3.48 Because of the different nature of these three parts of the Bill, it may in fact be desirable that the Bill should be enacted in stages over the course of more than one session with a view to consolidation into one enactment — the Criminal Code Act — at a later date. If this were to be done, we would regard the minimum enactment which should be undertaken as comprising the whole of Part I, together with as much as possible of Part II. We recognise, however, that it may be necessary to make decisions regarding the implementation of those parts of Part II containing a substantial element of reform separately from the other parts of the Code.

J. Machinery for monitoring and revision

3.49 It is inevitable that the construction of the Criminal Code Act will generate a new body of case-law. If this is allowed to accumulate indefinitely the relevance of the Code becomes progressively less and many of the advantages of codification are lost.

3.50 There is of course always a risk that rules developed through precedent will come to conflict with any ordinary meaning of the words used in the Code. This process can be observed in relation to modern English statutes. When it occurs, the words of the Code are misleading and a trap for the unwary or uninformed. To remedy this, it may well be necessary, as the Code team thought, to provide machinery for the regular scrutiny, up-dating and reform of the Code. The Code team suggested that a body might be established under the aegis of the Law Commission whose function it would be to propose amending legislation from time to time so as to ensure that the Code continues to be an

⁷⁰ Another area requiring further drafting work is the Schedule of Disposals after mental disorder verdict: see Appendix A, cl. 39 and Sched. 2 and Report, Vol. 2, paras. 11.34-11.36.

⁷¹ The special procedures adopted in the past in relation to the attempt to enact Stephen's draft Code of Criminal Law and Procedure in 1878-1882, and the enactment of the Sale of Goods Act 1893 drafted by Chalmers were mentioned in our Introduction to Law Com. No. 143, at para. 26 as possible precedents to follow for the purpose of enacting a draft Criminal Code Bill.

up-to-date and accurate statement of the law as applied by the courts and to remedy any defects which have emerged in its operation.

3.51 We ourselves have not considered in any detail the question of establishing machinery for monitoring and revising the Code, nor who would be responsible for the task. We think that these are not matters which it is appropriate to examine at this stage. In principle, however, we believe that some form of formal monitoring would be desirable.

3.52 In this connection, we again draw attention to the fact that Part II of our draft Bill incorporates a number of offences restated from the existing law. These have been amended, if at all, in the main only for the purpose of bringing the drafting style into line with the style of the rest of the Code. These offences have not been reconsidered from the point of view of whether their content requires to be reformed. Some of the offences included have been enacted only recently and it is unlikely that they will need to be reconsidered for some time. On the other hand, others are beginning to show signs of age and it may well be necessary that these offences should in due course be reviewed.

K. Commentary on the draft Criminal Code Bill

3.53 As we stated at the outset, our commentary on the clauses in the draft Bill is contained in a separate volume to this Report. We have divided the Report into two volumes so that the Bill itself, and the commentary on it, can be read side by side. The fact that our signatures appear immediately following this paragraph should not therefore be taken as an indication that the Report concludes here: the commentary is as much a part of our Report as is the material contained in this Volume. It is appropriate also to draw attention to the Table of Derivations preceding the draft Bill which has been provided as a convenient summary of the sources of the clauses in the draft Bill.

(Signed) ROY BELDAM, *Chairman*
TREVOR M. ALDRIDGE
BRIAN DAVENPORT
JULIAN FARRAND
BRENDA HOGGETT

MICHAEL COLLON, *Secretary*
30 December 1988

APPENDIX A

CRIMINAL CODE BILL

TABLE OF DERIVATIONS

This Table shows alongside each clause in the draft Bill (i) relevant statutory provisions, in cases where the effect of the clause is to repeat such provisions, with only minor modifications, (ii) references to relevant recommendations of the Law Commission or other bodies and (iii) references to the paragraphs in the Report discussing the source from which each clause in the draft Bill is derived.

Note: The following abbreviations are used in this Table:

Report	= A Criminal Code for England and Wales (Volumes 1 and 2) (1989), Law Com. No.177.
Law Com. No. 83	= Report on Defences of General Application (1977), Law Com. No. 83.
Law Com. No. 89	= Report on the Mental Element in Crime (1978), Law Com. No. 89.
Law Com. No. 143	= Criminal Law: Codification of the Criminal Law. A Report to the Law Commission (1985), Law Com. No. 143.
14th Report	= Criminal Law Revision Committee, Offences against the Person (1980), Cmnd. 7844.
15th Report	= Criminal Law Revision Committee, Sexual Offences (1984), Cmnd. 9213.
16th Report	= Criminal Law Revision Committee, Prostitution in the Street (1984), Cmnd. 9329.
17th Report	= Criminal Law Revision Committee, Prostitution: Off-Street Activities (1985), Cmnd. 9688.
Butler Report	= Report of the Committee on Mentally Abnormal Offenders (1975), Cmnd. 6244.

Clause of Bill

Source/Discussion

Part I. General Principles.

1	Report para.4.2.	
2	Report paras.4.3-4.7.	
3	Report para 4.8.	
4	Report paras.3.36-3.38, 4.9.	
5	Report para.4.10.	
6	Where the definition refers to a clause of the Bill see the derivation of that clause.	
	“Fault element”	see clause 20.
	“Included offence”	Criminal Law Act 1967, s.6(3). Report para.5.11.
	“Indictable offence”	Interpretation Act 1978, s.5 and Sched. 1.
	Offence triable either way”	Interpretation Act 1978, s. 5 and Sched.1.
	“Personal harm”	Report para. 14.35.
	“Pre-Code offence”	Report paras. 4.5–4.6.
	“Property”	para (a): Theft Act 1968, s.4(1), 4(4); para (b): Criminal Damage Act 1971, s.5(4).
	“Public place”	Public Order Act 1936, s.9.
	“Sentence”	Criminal Appeal Act 1968, s.50(1).
	“Summary offence”	Interpretation Act 1978, s.5 and Sched. 1.
	“Trade dispute”	Trade Union and Labour Relations Act 1974, s.29.

Clause of Bill	Source/Discussion
7	Report paras.5.3-5.7.
8(1)(a)	Report para.5.9.
(b)	Criminal Law Act 1967, s.6(3). Report paras.5.10-5.11.
(c)	Criminal Law Act 1967, s.6(3)-(4). Report para.5.12.
(d)	Criminal Law Act 1967, s.4(2).
(2)	Report para.5.14.
(3)	Criminal Law Act 1967, s.6(7). Report para.5.15.
(4)	14th Report, paras.156, 161, 177, 182. Report para 5.16.
9	Criminal Law Act 1967, s.6(4). Report paras.5.19-5.22.
10	Interpretation Act 1978, s.18. Report para.5.23.
11(1)-(2)	Law Com. No. 143, paras.5.25-5.34. Report para.5.24, 5.26, 5.27, 5.29, 5.30.
(1)(d)	Report para.5.28.
(3)	Report para.5.31.
(4)	Report paras.5.32-5.33.
(5)-(7)	Report paras.5.34-5.35.
12	Law Com. No. 143, paras.5.42-5.48. Report para.5.37.
13(1)	Report para.6.1.
(2)	Report para.6.1.
(3)	Report para.6.2.
(4)	Report para.6.3.
(5)	Report para.6.3.
(6)	Magistrates' Courts Act 1980, s.101. Report para.6.2.
14	Law Com. No. 89, para.97. Report paras.6.4.-6.5.
15	Report para.7.6.
16	Report paras.7.7-7.8.
17	Report paras.7.14-7.22.
18	Law Com. No. 89. Report paras.8.10-8.21.
19	Report paras.8.22-8.24.
20	Law Com. No. 89, para.89. Report paras.8.25-8.28.
21	Report paras.8.29-8.32.
22(1)(a)	14th Report, para.267(2). Report paras.8.25-8.36.
(b)	14th Report, para.277. Report para.8.39, 8.41.
(2)	Report para.8.40.
(3)	Report para.8.43.
(4)(a)	14th Report, para.268. Report para.8.44.
(b)	Report para.8.45.
(5)	Report para.8.46.
(6)	Report paras.8.48-8.49.
(7)	Report paras.8.50-8.51.
23	Report paras.8.52-8.55.
24	Report paras.8.56-8.61.
25	Law Commission Working Paper No. 43 (1972). Report paras.9.5-9.7.
26	Report paras.9.8-9.17.
27(1)	Report paras.9.18, 9.24-9.28.
(2)	Report para.9.20.
(3)	Report paras.9.22-9.23.
(4)	Report para.9.29.
(5)	Law Commission Working Paper No. 43 (1972), Proposition 7(2)(c). Report paras.9.30-9.31.
(6)	Law Commission Working Paper No.43 (1972), Proposition 7(1). Report paras.9.32-9.37.
(7)	Report paras.9.38-9.40.
(8)	Report paras.9.41-9.42.
28	Accessories and Abettors Act 1861, s.8. Report paras.9.43-9.46.
29	Report paras.9.47-9.50.
30	Law Commission Working Paper No. 44 (1972). Report paras.10.1-10.18.
31	Report paras.10.19-10.22.
32(1)	Children and Young Persons Act 1933, s.50(as amended by the Children and Young Persons Act 1963, s.16.). Report para.10.26.
(2)	Report paras.10.27-10.28.
33	Report paras.11.1-11.6.

Clause of Bill	Source/Discussion
34	Law Com. No. 143, para. 12.20 (ii). Butler Report, paras.18.20, 18.30-18.36. Report paras.11.17-11.19, 11.26-11.28.
35	Butler Report, para. 18.26. Report paras.11.15-11.16.
36	Butler Report, para. 18.20. Report paras. 11.23-11.25.
37	Butler Report, para.18.50. Report para.11.30.
38	Butler Report, para.18.48. Report paras. 11.31-11.33.
39	Report paras.11.34-11.36.
40	Butler Report, para.18.38. Report para. 11.37.
41	Report paras. 12.6-12.10.
42	Law Com No. 83. Report paras.12.11- 12.19.
(2)	Report para. 12.13.
43	Report paras. 12.20-12.23.
44(1)(a)	Criminal Law Act 1967, s.3(1). Report para.12.27.
(1)(c)	14th Report, paras.119-121. Report para.12.27.
44(4)	Report para. 12.32.
(5)	Law Com. No. 143, para.13.44. Report para.12.33.
45	Report paras.12.38-12.41.
46	Statutory Instruments Act 1946, s.3(2). Report paras.12.42-12.43.
47(1)	Report paras.13.4-13.11.
(2)	Report paras.13.12-13.16
(3)	Report paras.13.17.
(4)	Report para.13.18.
(5)	Report para.13.19.
48(1)	Criminal Law Act 1977, s.1(1). Report paras.13.21-13.25.
(2)	Report para.13.26.
(3)	Criminal Law Act 1977, s.1(3),1(4). Report para.13.27.
(4)	Criminal Law Act 1977, s.2(1). Report para. 13.28.
(5)	Report para.13.33.
(6)	Report para.13.33.
(7)	Report para.13.34.
(7)(b)	Criminal Law Act 1977, s.1(1). Report para.13.36.
(8)	Report paras.13.37-13.41.
(8)(c)	Criminal Law Act 1977, s.5(8).
49(1)	Criminal Attempts Act 1981, s.1(1). Report para.13.43.
(2)	Report paras.13.44-13.45.
(3)	Report para.13.46.
(4)	Criminal Attempts Act 1981, s.4(3).
(5)	Criminal Attempts Act 1981, s.1(4)(c). Report para.13.48.
(6)	Criminal Attempts Act 1981, s.1(4)(b).
(6)(a)	Report para.13.49.
50	Criminal Law Act 1977, s.1(1)(b). Criminal Attempts Act 1981, s.1(2)and(3). Report paras.13.50-13.53.
51	Report paras.13.54-13.55.
52(1)-(3)	14th Report, para.303. Report para.13.56.
(4)	Report para.13.57.

Part II. Specific Offences.

Chapter I. Offences against the Person.

53(a)	14th Report, para.35, recommendation 2. Report paras.14.2-14.3.
53(b)	14th Report, paras.39-40, recommendation 5. Report para. 14.4.
54	14th Report, paras.19-30, recommendation 1. Report paras.14.5-14.9.
55	14th Report, paras.116-123, recommendation 26. Report paras.14.10-14.14.
56(1)	14th Report, para.93. Report para. 14.15.
(2)	Mental Health Act 1983, s.1(2). 14th Report, paras.92-93, recommendation 14.
(3)	Report para.14.16.
57	Criminal Procedure (Insanity) Act 1964, s.6. 14th Report, paras.95-96, recommendation 16. Report para.14.17.

Clause of Bill	Source/Discussion
58	14th Report, paras.75, 80-83, 85-88, 90, recommendations 9-13. Report para.14.18
59	14th Report, recommendation 73. Report para.14.19.
60	14th Report, paras.298-301, recommendations 76-78. Law Com. No. 143, para.15.24, Illustration 62, p.234. Report para.14.20.
61	14th Report, para.302, recommendation 79. Report para.14.22.
62(1)-(2)	Homicide Act 1957, s.4. 14th Report, paras.129-132, 136, recommendation 29. Report para.14.23.
(3)	14th Report, para.133, recommendation 30. Report para.14.24.
63	Suicide Act 1961, s.2. 14th Report para.136, recommendation 32. Report para.14.25.
64	Infanticide Act 1938, s.1(1). 14th Report paras.36, 100-113, recommendations 18-24. Report paras.14.26-14.28.
65	Offences against the Person Act 1861, s.16. 14th Report paras.215-218, recommendation 63. Report para.14.29.
66	Offences against the Person Act 1861, s.58. Report para.14.31.
67	Offences against the Person Act 1861, s.58. Report para.14.32.
68	Offences against the Person Act 1861, s.59. Report para.14.33.
69	Infant Life (Preservation) Act 1929, s.1. Report para.14.34.
70	14th Report, paras.152-155, recommendation 39(1). Report paras.14.35-14.36.
71	14th Report, paras.152-155, recommendation 39(2).
72	14th Report, paras.152-155, recommendation 39(3). Report para.14.38.
73	14th Report, paras.185-188, recommendations 53-54. Report para.14.39.
74	Criminal Justice Act 1988, s.134. Report para.14.40.
75	14th Report, para.159, recommendation 42. Report paras.14.41-14.43.
76	14th Report, paras.170-172, recommendations 46-47. Report para.14.44.
77	14th Report, paras.181-182, recommendation 51. Report para.14.45.
78	Theft Act 1968, s.8(2). Report para.14.46.
79	Report para.14.51.
80	14th Report, paras.231-233, recommendation 65(a). Report paras.14.47-14.50 and 14.52.
81	14th Report, paras.235-238, recommendation 65(b). Report para.14.53.
82	Taking of Hostages Act 1982, s.1. Report para.14.54.
83	Child Abduction Act 1984, s.1. Report para.14.55.
84	Child Abduction Act 1984, s.2. Report para.14.56.
85	14th Report, paras.247-249, recommendation 65(c). Report para.14.57.
86	14th Report, paras.192-195, recommendation 56. Report para.14.58.

Part II

Chapter II. Sexual Offences.

87	Sexual Offences Act 1956, s.44, 46. 15th Report, paras.12.7, 2.47, 2.48, 2.85, recommendations 6, 7, 10, 63. 17th Report, para.3.13. Report paras.15.3-15.10.
88	Report para.15.11.
89(1)	15th Report, para.2.41, recommendation 4. Report para.15.12.
(2)	15th Report, paras.2.20-2.29, recommendations 2-3. Report paras.15.13-15.15.
(3)	See note on Schedule 4. Report para.15.16.
90	Sexual Offences Act 1956, s.2(1). 15th Report, para.2.107, recommendation 14. Report para.15.17.
91	Sexual Offences Act 1956, s.3(1). 15th Report, para.2.108, recommendation 15. Report para.15.18.
92	15th Report, para.2.109, recommendation 16. Report para.15.19.
93(1)	15th Report, paras.5.6, 5.17-5.18, recommendations 23, 25 and 26. Report para.15.20.
(2)	Sexual Offences Act 1956, s.25. Report para.15.21.

Clause of Bill	Source/Discussion
94(1)	15th Report, paras.5.6, 5.11-5.14, 5.18, recommendations 23-24, 26. Report para.15.22.
(2)	Sexual Offences Act 1956, s.26. Report para.15.22.
95	15th Report, paras.3.6-3.7, recommendation 18. Report para.15.23.
96	15th Report, paras.6.7, 6.10, 6.11, 6.15, 6.16, recommendations 30, 32. Report para.15.24.
97	15th Report, paras.6.7, 6.11, recommendation 31. Report para.15.25.
98	15th Report, para.6.15, recommendation 33. Report paras.15.26, 15.32.
99	15th Report, paras.6.13-6.14, recommendation 33. Report paras.15.27-15.29, 15.32.
100	Report paras.15.30, 15.26, 15.32.
101	15th Report, para.6.18, recommendation 35. Report paras.15.31-15.32.
102	Sexual Offences Act 1967, s.2. Sexual Offences Act 1956, s.12. Report para.15.33.
103(1)	15th Report, paras.8.22, 8.37, recommendations 44, 46. Report para.15.34.
(2)	15th Report, para.8.41, recommendation 47. Report para.15.36.
(3)	Criminal Law Act 1977, s.54. Report para.15.37.
(4)	15th Report para.8.28, recommendation 42. Report para.15.34.
104	15th Report, paras.8.22, 8.28, 8.37, recommendations 42, 44, 46. Report para.15.34.
105	15th Report, para.8.31, recommendation 45. Report para.15.38.
106(1)	15th Report, para.9.11, recommendation 53. Report paras.15.39, 15.40.
(2)	Sexual Offences Act 1956, s.27. 15th Report, para.9.11, recommendation 53. Report para.15.41.
107	15th Report, paras.9.6, 9.11, recommendations 50-53. Report para.15.42.
108	15th Report, paras.9.6, 9.11, recommendations 50-53. Report para.15.42.
109	15th Report, paras.13.11, 13.12, recommendations 67, 68. Report para.15.43.
110	Mental Health Act 1959, s.128 [as amended by the Sexual Offences Act 1967]. Report paras.15.44, 15.45.
111	15th Report, para.4.8, recommendation 19. Report para.15.46.
112	15th Report, paras.4.29, 4.30, recommendation 22.
113	Vagrancy Act 1824, s.4. Report para.15.48.
114	15th Report, paras.7.21-7.23, recommendation 38. Report para.15.49.
115	15th Report, paras.7.12, 7.21-7.23, 7.27, recommendations 37-39. Report para.15.50.
116	Protection of Children Act 1978, s.1. Report para.15.51.
(5)	See note on Schedule 5. Report para.15.52.
117	Criminal Justice Act 1988, s.160. Report para.15.51.
118	15th Report, para.12.7, recommendation 63. Report para.15.53.
119	15th Report, para.12.9, recommendation 64. Report para.15.53.
120	15th Report, paras.10.5, 10.21, recommendations 58, 59. Report paras.15.54-15.55.
121	Sexual Offences Act 1967, s.1(2)(b). 15th Report, para.10.26, recommendation 60.
122	16th Report, para.17 recommendation 1. 17th Report, para.1.4. Report para.15.57.
123	17th Report, paras.2.9-2.11, recommendation 2. Report para.15.58.
124	17th Report, paras.2.9-2.15, recommendation 2. Report para.15.59.
125	17th Report, para.2.18, recommendation 2(c). Report para.15.60.
126	17th Report, para.3.14. Report 15.61.
127	17th Report, para.3.13, recommendation 5(a). Report para.15.62.
128	17th Report, para.3.13, recommendation 5(b).
129	17th Report, para.3.13, recommendation 5(c). Report para.15.64.
130	17th Report, para.3.10, recommendation 6. Report para.15.65.
131	Sexual Offences Act 1956, s.22. 17th Report para.4.4 recommendation 10. Report para.15.66.
132	Sexual Offences Act 1956, s.23. 17th Report para.4.5 recommendation 11. Report para.15.67.
133	17th Report, paras.4.14-4.15, recommendations 12-13.

Clause of Bill	Source/Discussion
134	Street Offences Act 1959. Sexual Offences Act 1985. Report paras.15.70-15.72.
135	Street Offences Act 1959. Sexual Offences Act 1985. Report paras.15.70-15.72.
136	Street Offences Act 1959. Sexual Offences Act 1985. Report paras.15.70-15.72.
137	Street Offences Act 1959. Sexual Offences Act 1985. Report paras.15.70-15.72.
138	16th Report, para.55, recommendation 10. Report para 15.73

Part II

Chapter III. Theft, Fraud and Related Offences.

139	Theft Act 1968, ss.4(1), (4), 5(1), 34. Report para.16.6.
140	Theft Act 1968, s.1.
141	Theft Act 1968, s.2.
142	Theft Act 1968, s.3.
143	Theft Act 1968, s.4(2)and(3).
144	Theft Act 1968, s.5.
145	Theft Act 1968, s.6.
146	Theft Act 1968, s.8(1). Report para.16.7.
147	Theft Act 1968, s.9. Report para.16.8.
148	Theft Act 1968, s.10.
149	Theft Act 1968, s.11.
150	Theft Act 1968, s.12. Report paras.16.9–16.10.
151	Criminal Attempts Act 1981, s.9.
152	Theft Act 1968, s.13.
153	Theft Act 1978, s.3.
154	Theft Act 1968, s.21. Report para.16.11.
155	Theft Act 1968, s.15(4).
156	Theft Act 1968, s.15.
157	Theft Act 1978, s.1.
158	Theft Act 1978, s.2.
159	Theft Act 1968, s.16. Report para.16.12.
160	Theft Act 1968, s.17.
161	Theft Act 1968, s.19.
162	Theft Act 1968, s.20(1). Report para.16.13.
163	Theft Act 1968, s.20(2). Report para.16.13.
164(1)	Forgery and Counterfeiting Act 1981, s.8(1).
(2)	Forgery and Counterfeiting Act 1981, s.27(1).
(3)	Forgery and Counterfeiting Act 1981, s.8(3).
(4)	Forgery and Counterfeiting Act 1981, s.8(4).
165	Forgery and Counterfeiting Act 1981, s.9.
166	Forgery and Counterfeiting Act 1981, s.10.
167	Forgery and Counterfeiting Act 1981, s.1.
168	Forgery and Counterfeiting Act 1981, s.2.
169	Forgery and Counterfeiting Act 1981, s.3.
170	Forgery and Counterfeiting Act 1981, s.4.
171	Forgery and Counterfeiting Act 1981, s.5.
172	Theft Act 1968, s.22(1). Report paras.16.14, 16.15.
173	Theft Act 1968, s.23. Report para.16.16.
174	Theft Act 1968, s.24.
175	Theft Act 1968, s.25. Report para.16.17.
176	Theft Act 1968, s.14.
177	See note on Schedule 6, paras.1,2,4 and 5.

Part II

Chapter IV. Other Offences Relating to Property

178	Criminal Damage Act 1971, s.10(1). Report para.17.4.
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Clause of Bill	Source/Discussion
179	Criminal Damage Act 1971, s.10(2), (3), (4).
180	Criminal Damage Act 1971, s.1. Report paras.12.5, 17.5-17.8.
181	Criminal Damage Act 1971, s.2. Report paras.12.5, 17.7.
182	Criminal Damage Act 1971, s.3. Report paras.12.5, 17.7.
183	Criminal Damage Act 1971, s.5(1).
184	Criminal Damage Act 1971, s.5(2)(a). Report paras.12.5, 17.7, 17.9.
185	Criminal Damage Act 1971, s.5(2)(b). Report paras.12.5, 17.7, 17.10-17.11.
186	See note on Schedule 6, paras.3 and 5.
187	Criminal Law Act 1977, s.12(1), (2).
188	Criminal Law Act 1977, s.12(3)-(5).
189	Criminal Law Act 1977, s.12(6), (7).
190	Criminal Law Act 1977, s.6.
191	Criminal Law Act 1977, s.7.
192	Public Order Act 1986, s.39.
193	Criminal Law Act 1977, s.8.
194	Criminal Law Act 1977, s.9.
195	Criminal Law Act 1977, s.10. Report para. 17.13-17.14.
196	Protection from Eviction Act 1977, s.1. Housing Act 1988, s.29.

Part II

Chapter V. Offences against Public Peace and Safety.

197	Public Order Act 1986, ss.8, 29. Report para.18.4.
198	Public Order Act 1986, s.1. Report para.18.4.
199	Public Order Act 1986, s.2. Report para.18.4.
200	Public Order Act 1986, s.3. Report para.18.4.
201	Public Order Act 1986, s.4. Report para.18.4.
202	Public Order Act 1986, s.5. Report para.18.4.
203(1)	Public Order Act 1986, ss.17, 29.
(2)	Public Order Act 1986, s.19(3).
(3)	Public Order Act 1986, s.21(2).
204(1)	Public Order Act 1986, s.26(1).
(2)	Public Order Act 1986, s.26(2).
205	Public Order Act 1986, s.18.
206	Public Order Act 1986, s.19.
207	Public Order Act 1986, s.20.
(4)	Report para.18.7.
208	Public Order Act 1986, s.21.
209	Public Order Act 1986, s.22.
210	Public Order Act 1986, s.23.
211	Public Order Act 1936, s.9(1).
212	Public Order Act 1936, s.1.
213	Public Order Act 1936, s.2.
214	Public Meeting Act 1908, s.1(1),(3). Report para. 18.9.
215	Prevention of Crime Act 1953, s.1.
216	Criminal Justice Act 1988, s.139.
217	Restriction of Offensive Weapons Act 1959, s.1.
218	Criminal Law Act 1977, s.51.
219	Public Order Act 1986, s.38.
220	See note on Schedule 7.

Schedule of Bill.	Source/Discussion
1	[Prosecution, Punishment etc.]. Report paras.5.3-5.7.
2	[Disposal after return of mental disorder verdicts]. Report paras 11.34-11.36.
3	Child Abduction Act 1984, Schedule 1.
4	Sexual Offences (Amendment) Act 1976, ss.2-5 (as amended by Criminal Justice Act 1988, s.158).

Clause of Bill	Source/Discussion
5	Protection of Children Act 1978, ss.4-5.
6 Para.1	Forgery and Counterfeiting Act 1981, s.7.
Para.2	Theft Act 1968, s.26.
Para.3	Criminal Damage Act 1971, s.6.
Para.4	Theft Act 1968, s.27.
Para.5	Theft Act 1968, s.31(1).
7 Para.1(1)	Public Order Act 1986, ss.7(2),27(2).
Para.1(2)	Public Order Act 1986, s.7(4).
Para.2	Public Order Act 1986, s.24(1),(3),(4).
Para.3	Public Order Act 1986, s.25(1)-(3).
Para.4	Public Order Act 1936, s.1(2).
Para.5	Public Order Act 1936, s.2(5).
8	[Abolition of offences at common law]. Report para.4.9.
9	[Consequential amendments]. Report para.4.10.
10	[Repeals]. Report para.4.10.

Criminal Code Bill

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36. Case for mental disorder verdict: evidence of disorder.
37. Plea of "not guilty by reason of mental disorder".
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Schedule 8 —Abolition of offences at common law

Schedule 9 —Consequential Amendments

Schedule 10—Repeals

DRAFT
OF A
B I L L
TO

Codify and to revise in part the law of England and Wales as to A.D. 1989.
general principles of liability for offences and as to offences
against the person, sexual offences, theft, fraud and related
offences, offences of damage to property, other offences
relating to property, and offences against public peace and
safety; to repeal certain enactments relating to such principles
and to such offences; and for connected purposes.

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:—

5

PART I

GENERAL PRINCIPLES

Preliminary provisions

- 1.—(1) This Act may be cited as the Criminal Code Act 1989. Short title,
(2) This Act shall come into force on 1st January 1991. commencement
and extent.
- 10 (3) This Act does not extend to Scotland or Northern Ireland.
- 2.—(1) Unless otherwise provided— Application of
(a) the provisions of this Act; this Act and
(b) any enactment, passed or made after this Act was passed, other penal
creating or amending an offence, legislation.
- 15 shall have effect only in relation to offences committed wholly or
partly on or after the date when this Act or that enactment, as the
case may be, comes into force.
- 20 (2) The following provisions of Part I have effect in proceedings
taking place on or after the date when this Act comes into force in
respect of offences committed before such date: *Procedural
provisions.*

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PART I	section 2(4) (law determining penalties); section 8(1) (alternative verdicts); section 9 (conviction of preliminary offence when ulterior offence completed); section 10 (act constituting two or more offences); section 11 (double jeopardy); section 12 (multiple convictions); section 13 (proof); section 14 (proof or disproof of states of mind).	5
<i>Provisions not applying to pre-Code offences.</i>	(3) Pre-code offences as defined in section 6 shall be interpreted and applied as if the following provisions of Part I had not been enacted: section 18 (fault terms); section 19 (degrees of fault); section 20 (general requirement of fault); section 31 (liability of officer of corporation); section 41 (belief in circumstance affording a defence).	10 15
<i>Law determining penalties.</i>	(4) The law relating to the sentence for an offence is the law in force at the time of its commission, save to the extent that less severe penalties may be provided by the law in force at the time of conviction.	20
Creation of offences.	3. No offence shall be created except by, or under the authority of, an Act of Parliament.	
Effect on common law: <i>Replaced offences.</i> <i>Superseded or inconsistent rules.</i>	4.—(1) The offences at common law mentioned in Schedule 8 are abolished for all purposes not relating to acts done before the commencement of this Act. (2) Rules of the common law corresponding to or inconsistent with the provisions of this Act are abrogated for all purposes not relating to acts done before the commencement of this Act.	25
<i>Statutory references.</i>	(3) Except as regards offences committed before the commencement of this Act, a reference in an enactment passed or made before this Act to an offence mentioned in Schedule 8 or to a rule of the common law replaced by a provision of this Act shall be construed as a reference to the corresponding provision of this Act.	30
<i>Saving for other rules.</i>	(4) This Act does not affect any rule of the common law not abrogated by subsection (2) or limit any power of the courts to determine the existence, extent or application of any such rule.	35
Amendments and repeals.	5.—(1) The enactments mentioned in Schedule 9 shall have effect subject to the amendments provided for in that Schedule. (2) The enactments mentioned in Schedule 10 are repealed to the extent specified in column 3 of that Schedule.	

6. In this Act, unless the context otherwise requires—
- “accessory” shall be construed in accordance with section 27(1);
- “act”, “acting”, “does an act”, and related expressions, in reference to an element of an offence, shall be construed in accordance with sections 15 and 16;
- 5 “appropriate” (as a verb) and “appropriation” shall be construed in accordance with section 142;
- “assault” has the meaning given by section 75;
- “automatism” shall be construed in accordance with section 33;
- 10 “cause” and related words, in relation to a result which is an element of an offence, shall be construed in accordance with section 17;
- “controlling officer”, in relation to a corporation, has the meaning given by section 30(3);
- 15 “corporation” does not include a corporation sole;
- “duress by threats” shall be construed in accordance with section 42;
- “duress of circumstances” shall be construed in accordance with section 43;
- 20 “exempting circumstance” means a circumstance amounting to a defence or to an element of a defence;
- “fault element” means an element of an offence consisting—
- (a) of a state of mind with which a person acts; or
- (b) of a failure to comply with a standard of conduct; or
- 25 (c) partly of such a state of mind and partly of such a failure,
- and “fault”, “degree of fault”, and related expressions, shall be construed accordingly;
- 30 “included offence”, in relation to an offence charged, means an offence an allegation of which is included (expressly or by implication) in the allegations in the indictment or information;
- “indictable offence” means an offence which, if committed by an adult, is triable on indictment, whether it is exclusively so triable or triable either way;
- 35 “intentionally” and related words (such as “intention”) shall be construed in accordance with section 18;
- “intoxicant” has the meaning given by section 22(5)(a);
- 40 “knowingly” and related words (such as “knowledge”) shall be construed in accordance with section 18;
- “mental disorder” has the meaning given by section 34;
- “mental disorder verdict” shall be construed in accordance with section 35(1);
- 45 “offence triable either way” means an offence which, if committed by an adult, is triable either on indictment or summarily; and this definition shall be construed without regard to the effect of any enactment (such as section 22 of the Magistrates’ Courts Act 1980) prescribing the mode of

PART I

- trial in a particular case or class of cases;
- “personal harm” means harm to body or mind and includes pain and unconsciousness;
- “pre-Code offence” means an offence any element of which is prescribed— 5
- (a) in an Act, or in subordinate legislation made at any time under an Act, passed before this Act was passed; or
 - (b) at common law;
- “property” means—
- (a) property of every description, whether real or 10 personal including—
 - (i) money, things in action and other intangible property;
 - (ii) wild creatures which have been tamed or are ordinarily kept in captivity, and any other wild 15 creatures or their carcasses if, but only if, they have been reduced into possession which has not been lost or abandoned or are in the course of being reduced into possession; and
 - (b) any right or interest in property or any privilege 20 over land, however created;
- “public place” includes any highway and any premises or place to which the public have or are permitted to have access, whether on payment or otherwise;
- “recklessly” and related words (such as “recklessness”) shall be 25 construed in accordance with section 18;
- “return a mental disorder verdict” has the meaning given by section 34;
- “sentence” shall be construed in accordance with section 50(1) of the Criminal Appeal Act 1968 (as amended); 30
- “severe mental illness” has the meaning given by section 34;
- “severe mental handicap” has the meaning given by section 34;
- “state of automatism” shall be construed in accordance with section 33(1);
- “summary offence” means an offence which, if committed by an 35 adult, is triable only summarily;
- “trade dispute” has the meaning given by section 29(1) of the Trade Union and Labour Relations Act 1974 (as amended);
- “voluntary intoxication” has the meaning given by section 40 22(5)(b).

Prosecution and punishment

Prosecution, punishment and miscellaneous matters.

Mode of trial.

7.—(1) Schedule 1 has effect, in relation to each offence referred to in columns 1 and 2 of that Schedule, with respect to the matters mentioned in this section and in column 7 of that Schedule.

(2) Column 3 of Schedule 1 shows whether the offence is triable 45 only on indictment or only summarily or either way.

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- (3) Column 4 of Schedule 1—
- (a) in the case of conviction on indictment of an offence—
- 5 (i) specifies (except in the case of murder, to which section 54(2) applies) the longest term of imprisonment that may be imposed; and
- (ii) makes any provision relating to the imposition of a fine that is specially applicable to the offence;
- (b) in the case of summary conviction of an offence triable either way, specifies any maximum sentence of imprisonment or
- 10 fine that may be imposed, if different from the maximum specified by subsection (4); and
- (c) in the case of conviction of a summary offence, specifies the maximum sentence of imprisonment or fine that may be imposed.
- 15 (4) On summary conviction of an offence under this Act that is triable either way a person shall be liable to imprisonment for a term not exceeding six months (unless some other term is specified in column 4 of Schedule 1) or to a fine not exceeding the statutory maximum (unless some other sum is so specified) or both.
- 20 (5) Column 5 of Schedule 1 states—
- (a) any requirement of the consent of any person to the institution or conduct of proceedings for an offence; and
- (b) any time limit applicable to the institution of proceedings.
- 8.—(1) Where the jury finds a person not guilty of an offence
- 25 charged in the indictment, it may find him guilty—
- (a)—
- (i) of any offence specified in column 6 of Schedule 1 in respect of the offence charged; or
- (ii) of any offence of which any other enactment
- 30 provides that he may be convicted on that indictment; or
- (b) except where the offence charged is treason or murder, of any offence within the jurisdiction of the court—
- (i) which is an included offence; or
- (ii) of which he might be found guilty on an indictment
- 35 charging him with an included offence; or
- (c) of an attempt to commit—
- (i) the offence charged; or
- (ii) any other offence of which he might on that indictment be found guilty; or
- 40 (d) where the offence charged is an arrestable offence (as defined in section 24(1) of the Police and Criminal Evidence Act 1984) and the jury is satisfied that it (or some other arrestable offence of which he might on that indictment be found guilty) was committed, of an offence of assisting an
- 45 offender guilty of the offence charged (or that other offence) under section 4(1) of the Criminal Law Act 1967.

PART I
Penalties.

Penalties on summary conviction of either way offence.

Restriction on proceedings.

Alternative verdicts:

Specified alternatives.

Included offences.

Attempts.

Assisting an offender.

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<p>PART I <i>Jury disagreement.</i></p>	<p>(2) Where the jury is discharged, on the ground of its disagreement, from returning a verdict in respect of an offence charged in the indictment, subsection (1) applies as though the jury had found the defendant not guilty of the offence, but this subsection does not limit any discretion of the court to discharge the jury from returning any verdict in such a case. 5</p>
<p><i>Where more than one count.</i></p>	<p>(3) Subsection (1) applies to an indictment containing more than one count as if each count were a separate indictment.</p>
<p><i>Alternative conviction by magistrates.</i></p>	<p>(4) Where a magistrates' court finds a person not guilty of an offence charged in an information, it may find him guilty— 10</p> <ul style="list-style-type: none">(a) where the offence charged is an offence under section 71 (reckless serious personal harm), of an offence under section 72 (intentional or reckless personal harm) or section 75 (assault); or(b) where the offence charged is an offence under section 72 15 (intentional or reckless personal harm), 76 (assault on a constable) or 77 (assault to resist arrest), of an offence under section 75 (assault).
<p><i>Conviction of preliminary offence when ulterior offence completed.</i></p>	<p>9.—(1) Where the offence charged in an indictment or information is an incitement, conspiracy or attempt to commit, or an assault or 20 other act preliminary to, an offence, the defendant may be convicted of the offence charged although he is shown to be guilty of the completed offence.</p>
<p><i>Discretion of court.</i></p>	<p>(2) Subsection (1) does not limit any discretion of the court to discharge the jury or itself with a view to the preferment of an 25 indictment or the laying of an information for the completed offence.</p>
<p><i>Act constituting two or more offences.</i></p>	<p>10. Where an act constitutes two or more offences (whether under any enactment or enactments or at common law or both) the offender is liable, subject to sections 11 (double jeopardy) and 12 (multiple convictions), to be prosecuted and punished for any or all of those 30 offences.</p>
<p><i>Double jeopardy:</i></p>	<p>11.—(1) A person shall not be tried for an offence ("the offence now charged")—</p>
<p><i>Previous conviction or acquittal.</i></p>	<ul style="list-style-type: none">(a) of which he has been convicted or acquitted; or(b) of which he might (on sufficient evidence being adduced) have 35 been convicted on an indictment or information charging him with another offence of which he has been convicted or acquitted; or
<p><i>Previous acquittal of included offence.</i></p>	<ul style="list-style-type: none">(c) which includes—<ul style="list-style-type: none">(i) an offence of which he has been acquitted; or 40(ii) an offence of which he might (on sufficient evidence being adduced) have been convicted on an indictment or information charging him with another offence of which he has been acquitted; or(d) which includes— 45

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- (i) an offence of which he has been convicted; or
- (ii) an offence of which he might (on sufficient evidence being adduced) have been convicted on an indictment or information charging him with another offence of which he has been convicted,
- 5 except where an element of the offence now charged is alleged to have occurred after the day of the conviction; or
- (e) which a civil court is debarred from trying by section 133 of the Army Act 1955, section 133 of the Air Force Act 1955, section 129 of the Naval Discipline Act 1957, section 3 of the Visiting Forces Act 1952, or any other enactment.
- 10
- (2) The words “which includes an offence” in subsection (1) shall be construed in accordance with the definition of “included offence” in section 6.
- (3) For the purposes of subsection (1), an allegation that a person caused the death of another includes an allegation that he caused serious personal harm or personal harm to that other.
- 15
- (4)—
- (a) “Convicted” and “acquitted” in subsection (1) relate to a subsisting conviction or acquittal by a court of competent jurisdiction—
- 20
- (i) in England and Wales; or
- (ii) (subject to paragraph (b)) elsewhere, including a conviction or acquittal of an offence substantially similar to that now charged and based on the same facts.
- 25
- (b) If a person who has been convicted of an offence in his absence by a court outside the United Kingdom is not, because of his absence, in peril of suffering any punishment that that court has ordered or may order, the conviction shall be disregarded for the purposes of subsection (1).
- 30
- (5) A person is convicted of an offence when the court of trial or a court of appeal records the conviction.
- (6) A person is acquitted of an offence—
- (a) when the court of trial records the acquittal; or
- 35
- (b) when section 6(5) of the Criminal Law Act 1967 (plea of not guilty of the offence but guilty of another offence, and conviction on that plea) has effect in relation to it; or
- (c) (except where a retrial is ordered) when his conviction of it is reversed or quashed by a court of appeal or on judicial review.
- 40
- (7) This section does not limit any power of a court to stay proceedings on the ground that they constitute an abuse of the process of the court.
12. Where a person is convicted of an offence charged in an indictment or information he may not on the same occasion be convicted of—
- 45

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Previous conviction of included offence.

Previous conviction by court-martial.

“Included offence”.

“Cause death” includes “cause personal harm”.

“Convicted” and “acquitted”.

Foreign conviction in absentia.

Time of conviction.

Time of acquittal.

Abuse of process.

Multiple convictions.

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- PART I (a) an included offence, whether or not it is charged in a distinct count or information; or
 (b) an attempt to commit the offence charged or an included offence.

Proof

5

- Proof:** **13.—(1) Unless otherwise provided—**
- Burden (offences).* (a) the burden of proving every element of an offence and any other fact alleged or relied on by the prosecution is on the prosecution;
- (defences).* (b) where evidence is given (whether by the defendant or by the prosecution) of a defence or any other fact alleged or relied on by the defendant the burden is on the prosecution to prove that an element of the defence or such other fact did not exist. 10
- Evidential burden.* (2) Evidence is given of a defence or any other fact alleged or relied on by the defendant when there is such evidence as might lead a court or jury to conclude that there is a reasonable possibility that the elements of the defence or such other fact existed. 15
- Burden on defendant.* (3) The burden is on the defendant to prove any fact necessary to establish— 20
- (a) any plea made by him in bar to an indictment or any corresponding plea on summary trial;
- (b) the competence of any witness called by him; or
- (c) the admissibility of any evidence tendered by him.
- Standards.* (4) Unless otherwise provided— 25
- (a) where the burden of proof is on the prosecution the standard of proof required is proof beyond reasonable doubt;
- (b) where the burden of proof is on the defendant the standard of proof required is proof on the balance of probabilities, except where subsection (5) applies. 30
- Proof that another guilty.* (5) Where an element of a defence is the fact that another person is guilty and liable to conviction of the offence in the same proceedings, the standard required for proof of that element is proof beyond reasonable doubt.
- Defences—saving for contrary rules.* (6) This section does not affect the application in relation to any pre-Code offence of section 101 of the Magistrates' Courts Act 1980 (burden of proving exceptions, etc.) or any corresponding rule of interpretation applying on trial on indictment. 35

- Proof or disproof of states of mind.** **14.** A court or jury, in determining whether a person had, or may have had, a particular state of mind, shall have regard to all the evidence including, where appropriate, the presence or absence of reasonable grounds for having that state of mind. 40

External elements of offences

- Use of "act".** **15.** A reference in this Act to an "act" as an element of an offence refers also, where the context permits, to any result of the act, and 45

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any circumstance in which the act is done or the result occurs, that is an element of the offence, and references to a person's acting or doing an act shall be construed accordingly.

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5 16. For the purposes of an offence which consists wholly or in part of an omission, state of affairs or occurrence, references in this Act to an "act" shall, where the context permits, be read as including references to the omission, state of affairs or occurrence by reason of which a person may be guilty of the offence, and references to a person's acting or doing an act shall be construed accordingly.

Offences of omission and situational offences.

10 17.—(1) Subject to subsections (2) and (3), a person causes a result which is an element of an offence when—

Causation.

(a) he does an act which makes a more than negligible contribution to its occurrence; or

15 (b) he omits to do an act which might prevent its occurrence and which he is under a duty to do according to the law relating to the offence.

(2) A person does not cause a result where, after he does such an act or makes such an omission, an act or event occurs—

Intervening act or event.

(a) which is the immediate and sufficient cause of the result;

20 (b) which he did not foresee, and

(c) which could not in the circumstances reasonably have been foreseen.

(3) A person who procures, assists or encourages another to cause a result that is an element of an offence does not himself cause that result so as to be guilty of the offence as a principal except when—

Exception for accessories.

(a) section 26(1)(c) applies; or

(b) the offence itself consists in the procuring, assisting or encouraging another to cause the result.

Fault

30 18. For the purposes of this Act and of any offence other than a pre-Code offence as defined in section 6 (to which section 2(3) applies) a person acts—

Fault terms:

35 (a) "knowingly" with respect to a circumstance not only when he is aware that it exists or will exist, but also when he avoids taking steps that might confirm his belief that it exists or will exist;

Knowledge.

(b) "intentionally" with respect to—

Intention.

(i) a circumstance when he hopes or knows that it exists or will exist;

40 (ii) a result when he acts either in order to bring it about or being aware that it will occur in the ordinary course of events;

(c) "recklessly" with respect to—

Recklessness.

45 (i) a circumstance when he is aware of a risk that it exists or will exist;

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(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;

and these and related words (such as “knowledge”, “intention”,
“recklessness”) shall be construed accordingly unless the context 5
otherwise requires.

Degrees of fault.

19.—(1) An allegation in an indictment or information of
knowledge or intention includes an allegation of recklessness.

(2) A requirement of recklessness is satisfied by knowledge or
intention. 10

(3) This section does not apply to pre-Code offences as defined in
section 6 (to which section 2(3) applies).

**General
requirement of
fault.**

20.—(1) Every offence requires a fault element of recklessness with
respect to each of its elements other than fault elements, unless 15
otherwise provided.

*Non-application
to pre-Code
offences.*

(2) Subsection 1 does not apply to pre-Code offences as defined in
section 6 (to which section 2(3) applies).

**Ignorance or
mistake of law.**

21. Ignorance or mistake as to a matter of law does not affect
liability to conviction of an offence except—

- (a) where so provided; or 20
- (b) where it negatives a fault element of the offence.

Intoxication.

22.—(1) Where an offence requires a fault element of recklessness
(however described), a person who was voluntarily intoxicated shall be
treated—

- (a) as having been aware of any risk of which he would have been 25
aware had he been sober;
- (b) as not having believed in the existence of an exempting cir-
cumstance (where the existence of such a belief is in issue) if
he would not have so believed had he been sober.

*Standard of care
or no fault
offence.*

(2) Where an offence requires a fault element of failure to comply 30
with a standard of care, or requires no fault, a person who was
voluntarily intoxicated shall be treated as not having believed in the
existence of an exempting circumstance (where the existence of such a
belief is in issue) if a reasonable sober person would not have so
believed. 35

*Intoxication and
reasonableness.*

(3) Where the definition of a fault element or of a defence refers,
or requires reference, to the state of mind or conduct to be expected
of a reasonable person, such person shall be understood to be one who
is not intoxicated.

*Exceptional
cases: murder,
mental disorder.*

(4) Subsection (1) does not apply— 40
(a) to murder (to which section 55 applies); or
(b) to the case (to which section 36 applies) where a person’s
unawareness or belief arises from a combination of mental

disorder and voluntary intoxication.

PART I

(5)—

(a) "Intoxicant" means alcohol or any other thing which, when taken into the body, may impair awareness or control.

"Intoxicant".

5 (b) "Voluntary intoxication" means the intoxication of a person by an intoxicant which he takes, otherwise than properly for a medicinal purpose, knowing that it is or may be an intoxicant.

"Voluntary intoxication".

10 (c) For the purposes of this section, a person "takes" an intoxicant if he permits it to be administered to him.

"Takes" an intoxicant.

(6) An intoxicant, although taken for a medicinal purpose, is not properly so taken if—

"Properly for a medicinal purpose".

(a)—

(i) it is not taken on medical advice; or

15 (ii) it is taken on medical advice but the taker fails then or thereafter to comply with any condition forming part of the advice; and

(b) the taker is aware that the taking, or the failure, as the case may be, may result in his doing an act capable of constituting an offence of the kind in question;

20 and accordingly intoxication resulting from such taking or failure is voluntary intoxication.

(7) Intoxication shall be taken to have been voluntary unless evidence is given, in the sense stated in section 13(2), that it was 25 involuntary.

Intoxication presumed voluntary.

23. Where it is an offence to be at fault in causing a result, a person who lacks the fault required when he does an act that causes or may cause the result nevertheless commits the offence if—

Supervening fault.

30 (a) he becomes aware that he has done the act and that the result has occurred and may continue, or may occur; and

(b) with the fault required, he fails to do what he can reasonably be expected to do that might prevent the result continuing or occurring; and

(c) the result continues or occurs.

35 24.—(1) In determining whether a person is guilty of an offence, his intention to cause, or his recklessness whether he causes, a result in relation to a person or thing capable of being the victim or subject-matter of the offence shall be treated as an intention to cause or, as the case may be, recklessness whether he causes that result in 40 relation to any other person or thing affected by his conduct.

Transferred fault and defences:

Fault.

(2) Any defence on which a person might have relied on a charge of an offence in relation to a person or thing within his contemplation is open to him on a charge of the same offence in relation to a person or thing not within his contemplation.

Defences.

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PART I

Parties to offences

- Parties to offences. 25. Unless otherwise provided—
(a) a person may be guilty of an offence as a principal or as an accessory;
(b) defences apply to both principals and accessories. 5
- Principals. 26.—(1) A person is guilty of an offence as a principal if, with the fault required for the offence—
(a) he does the act or acts specified for the offence; or
(b) he does at least one such act and procures, assists or encourages any other such acts done by another; or 10
(c) he procures, assists or encourages such act or acts done by another who is not himself guilty of the offence because—
(i) he is under ten years of age; or
(ii) he does the act or acts without the fault required for the offence; or 15
(iii) he has a defence.
(2) A person guilty of an offence by virtue of the attribution to him of an element of the offence under section 29 (vicarious liability) is so guilty as a principal.
(3) Subsection (1)(c) applies notwithstanding that the definition of 20 the offence—
(a) implies that the specified act or acts must be done by the offender personally; or
(b) indicates that the offender must comply with a description which applies only to the other person referred to in 25 subsection (1)(c).
- Person vicariously liable. Act done by another—special cases. Accessories. 27.—(1) A person is guilty of an offence as an accessory if—
(a) he intentionally procures, assists or encourages the act which constitutes or results in the commission of the offence by the principal; and 30
(b) he knows of, or (where recklessness suffices in the case of the principal) is reckless with respect to, any circumstance that is an element of the offence; and
(c) he intends that the principal shall act, or is aware that he is or may be acting, or that he may act, with the fault (if any) 35 required for the offence.
(2) In determining whether a person is guilty of an offence as an accessory it is immaterial that the principal is unaware of that person's act of procurement or assistance.
(3) Assistance or encouragement includes assistance or encourage- 40 ment arising from a failure by a person to take reasonable steps to exercise any authority or to discharge any duty he has to control the relevant acts of the principal in order to prevent the commission of the offence.
- Principal unaware of procurement or assistance. Passive assistance or encouragement.

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- (4) Subject to subsection (5), a person may be guilty of an offence as an accessory although he does not foresee, or is not aware of, a circumstance of the offence which is not an element of it (for example, the identity of the victim or the time or place of its commission, where this is not an element of the offence). PART I
Ignorance of details.
- 5
- (5) Notwithstanding section 24(1) (transferred fault), where a person's act of procurement, assistance or encouragement is done with a view to the commission of an offence only in respect of a specified person or thing, he is not guilty as an accessory to an offence intentionally committed by the principal in respect of some other person or thing. *Principal's departure.*
- 10
- (6) A person is not guilty of an offence as an accessory by reason of anything he does— *Exceptions from liability.*
- 15
- (a) with the purpose of preventing the commission of the offence; or
- (b) with the purpose of avoiding or limiting any harmful consequences of the offence and without the purpose of furthering its commission; or
- 20
- (c) because he believes that he is under an obligation to do it and without the purpose of furthering the commission of the offence.
- (7) Where the purpose of an enactment creating an offence is the protection of a class of persons no member of that class who is a victim of such an offence can be guilty of that offence as an accessory. *Exemption for protected persons.*
- 25
- (8) A person who has encouraged the commission of an offence is not guilty as an accessory if before its commission— *Later steps to prevent offence.*
- (a) he countermanded his encouragement with a view to preventing its commission; or
- 30
- (b) he took all reasonable steps to prevent its commission.
- 28.—(1) A person may be convicted of an offence whether he is charged as a principal or as an accessory if the evidence shows that— *Parties - procedural provisions:
Evidence of participation.*
- (a) he was a principal; or
- (b) he was an accessory; or
- 35
- (c) he was either a principal or an accessory.
- (2) A person may be convicted of an offence as an accessory although— *Conviction of accessory.*
- (a) the principal has not been convicted of or charged with the offence or his identity is unknown; or
- 40
- (b) the evidence shows that he did acts rendering him guilty of the offence other than the acts alleged in the indictment or information.
- 29.—(1) Subject to subsection (3), an element of an offence (other than a fault element) may be attributed to a person by reason of an act done by another only if that other is— *Vicarious liability.*
- 45

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PART I
*Attribution of
external element.*

- (a) specified in the definition of the offence as a person whose act may be so attributed; or
- (b) acting within the scope of his employment or authority and the definition of the offence specifies the element in terms which apply to both persons. 5

*Attribution of
fault.*

(2) Subject to subsection (3), a fault element of an offence may be attributed to a person by reason of the fault of another only if the terms of the enactment creating the offence so provide.

*Delegation—
pre-Code
offences.*

(3) This section does not affect the application in relation to any pre-Code offence (as defined in section 6) of any existing rule 10 whereby a person who has delegated to another the management of premises or of a business or activity may, in consequence of the acts and fault of the other, have the elements of the offence attributed to him.

Corporations:

30.—(1) A corporation may be guilty as a principal of an offence 15 not involving a fault element by reason of—

*Liability for
offence not
requiring fault.*

- (a) an act done by its employee or agent, as provided by section 29; or
- (b) an omission, state of affairs or occurrence that is an element of the offence. 20

*Liability where
fault required.*

(2) A corporation may be guilty—
(a) as a principal, of an offence involving a fault element; or
(b) as an accessory, of any offence,
only if one of its controlling officers, acting within the scope of his office and with the fault required, is concerned in the offence. 25

*“Controlling
officer”.*

- (3)—
- (a) “Controlling officer” of a corporation means a person participating in the control of the corporation in the capacity of a director, manager, secretary or other similar officer (whether or not he was, or was validly, appointed to any such office). 30
 - (b) In this subsection “director”, in relation to a corporation established by or under any enactment for the purpose of carrying on under national ownership any industry or part of an industry or undertaking, being a corporation whose affairs are managed by the members thereof, means a member of the corporation. 35
 - (c) Whether a person acting in a particular capacity is a controlling officer is a question of law.

*“Concerned in an
offence”.*

(4) A controlling officer is concerned in an offence if he does, procures, assists, encourages or fails to prevent the acts specified for the offence. 40

*“Fails to
prevent”.*

(5) For the purposes of subsection (4), a controlling officer fails to prevent an act when he fails to take steps that he might take—
(a) to ensure that the act is not done; or
(b) where the offence may be constituted by an omission to do an act or by a state of affairs or occurrence, to ensure that the omission is not made or to prevent or end the state of affairs 45

or occurrence.

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(6) A controlling officer does not act “within the scope of his office” if he acts with the intention of doing harm or of concealing harm done by him or another to the corporation.

Controlling officer acting to harm corporation.

5 (7) A corporation cannot be guilty of an offence that is not punishable with a fine or other pecuniary penalty.

Offence not punishable with fine.

(8) A corporation has a defence consisting of or including—

Availability of defences.

(a) a state of mind only if—

10 (i) all controlling officers who are concerned in the offence; or

(ii) where no controlling officer is so concerned, all other employees or agents who are so concerned,

have that state of mind;

15 (b) the absence of a state of mind only if no controlling officer with responsibility for the subject-matter of the offence has that state of mind;

20 (c) compliance with a standard of conduct required of the corporation itself only if it is complied with by the controlling officers with responsibility for the subject-matter of the offence.

31.—(1) Where a corporation is guilty of an offence, other than a pre-Code offence as defined in section 6 (to which section 2(3) applies), a controlling officer of the corporation who is not apart from
25 this section guilty of the offence is guilty of it as an accessory if—

Liability of officer of corporation.

(a) knowing that or being reckless whether the offence is being or will be committed, he intentionally fails to take steps that he might take to prevent its commission; or

30 (b) the offence does not involve a fault element and its commission is attributable to any neglect on his part.

(2) Subsection (1) applies to a member of a corporation managed by its members as it applies to a controlling officer.

32.—(1) A child is not guilty of an offence by reason of anything he does when under ten years of age.

Children: Under ten.

35 (2) A child is not guilty of an offence by reason of anything he does when under fourteen years of age unless, in addition to doing the acts specified for the offence with any fault required, he is aware that what he does is an offence or is seriously wrong.

Under fourteen.

Incapacity and mental disorder

40 33.—(1) A person is not guilty of an offence if—

(a) he acts in a state of automatism, that is, his act—

Automatism and physical incapacity:

(i) is a reflex, spasm or convulsion; or

Automatism.

(ii) occurs while he is in a condition (whether of sleep, unconsciousness, impaired consciousness or otherwise)

PART I

depriving him of effective control of the act; and

- (b) the act or condition is the result neither of anything done or omitted with the fault required for the offence nor of voluntary intoxication.

Physical incapacity.

(2) A person is not guilty of an offence by virtue of an omission to act if— 5

- (a) he is physically incapable of acting in the way required; and
- (b) his being so incapable is the result neither of anything done or omitted with the fault required for the offence nor of voluntary intoxication. 10

Mental disorder: definitions.

34. In this Act—

“mental disorder” means—

“Mental disorder”

- (a) severe mental illness; or
- (b) a state of arrested or incomplete development of mind; or 15
- (c) a state of automatism (not resulting only from intoxication) which is a feature of a disorder, whether organic or functional and whether continuing or recurring, that may cause a similar state on another occasion;

“Return a mental disorder verdict”.

“return a mental disorder verdict” means— 20

- (a) in relation to trial on indictment, return a verdict that the defendant is not guilty on evidence of mental disorder; and
- (b) in relation to summary trial, dismiss the information on evidence of mental disorder; 25

“Severe mental illness”.

“severe mental illness” means a mental illness which has one or more of the following characteristics—

- (a) lasting impairment of intellectual functions shown by failure of memory, orientation, comprehension and learning capacity; 30
- (b) lasting alteration of mood of such degree as to give rise to delusional appraisal of the defendant’s situation, his past or his future, or that of others, or lack of any appraisal;
- (c) delusional beliefs, persecutory, jealous or grandiose; 35
- (d) abnormal perceptions associated with delusional misinterpretation of events;
- (e) thinking so disordered as to prevent reasonable appraisal of the defendant’s situation or reasonable communication with others; 40

“Severe mental handicap”.

“severe mental handicap” means a state of arrested or incomplete development of mind which includes severe impairment of intelligence and social functioning.

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35.—(1) A mental disorder verdict shall be returned if the defendant is proved to have committed an offence but it is proved on the balance of probabilities (whether by the prosecution or by the defendant) that he was at the time suffering from severe mental illness or severe mental handicap.

PART I
Case for mental disorder verdict: defence of severe disorder.

(2) Subsection (1) does not apply if the court or jury is satisfied beyond reasonable doubt that the offence was not attributable to the severe mental illness or severe mental handicap.

Offence not attributable to disorder.

(3) A court or jury shall not, for the purposes of a verdict under subsection (1), find that the defendant was suffering from severe mental illness or severe mental handicap unless two medical practitioners approved for the purposes of section 12 of the Mental Health Act 1983 as having special experience in the diagnosis or treatment of mental disorder have given evidence that he was so suffering.

Finding of severe disorder.

(4) Subsection (1), so far as it relates to severe mental handicap, does not apply to an offence under section 106(1), 107 or 108 (sexual relations with the mentally handicapped).

Exception.

36. A mental disorder verdict shall be returned if—

Case for mental disorder verdict: evidence of disorder.

(a) the defendant is acquitted of an offence only because, by reason of evidence of mental disorder or a combination of mental disorder and intoxication, it is found that he acted or may have acted in a state of automatism, or without the fault required for the offence, or believing that an exempting circumstance existed; and

(b) it is proved on the balance of probabilities (whether by the prosecution or by the defendant) that he was suffering from mental disorder at the time of the act.

37. A defendant may plead “not guilty by reason of mental disorder”; and

Plea of “not guilty by reason of mental disorder”

(a) if the court directs that the plea be entered the direction shall have the same effect as a mental disorder verdict; and

(b) if the court does not so direct the defendant shall be treated as having pleaded not guilty.

38.—(1) Whether evidence is evidence of mental disorder or automatism is a question of law.

Evidence of mental disorder and automatism.

(2) The prosecution shall not adduce evidence of mental disorder, or contend that a mental disorder verdict should be returned, unless the defendant has given or adduced evidence that he acted without the fault required for the offence, or believing that an exempting circumstance existed, or in a state of automatism, or (on a charge of murder) when suffering from mental abnormality as defined in section 57(2).

Restrictions on prosecution evidence.

(3) The court may give directions as to the stage of the proceedings at which the prosecution may adduce evidence of mental disorder.

45

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PART I
Disposal after
mental disorder
verdict.

39. Schedule 2 has effect with respect to the orders that may be made upon the return of a mental disorder verdict, to the conditions governing the making of those orders, to the effects of those orders and to related matters.

Further effect of
mental disorder
verdict.

40. A defendant shall not, when a mental disorder verdict is returned in respect of an offence and while that verdict subsists, be found guilty of any other offence of which, but for this section, he might on the same occasion be found guilty—

- (a) on the indictment, count or information to which the verdict relates; or
- (b) on any other indictment, count or information founded on the same facts.

Defences

Belief in circum-
stance affording
a defence.

41.—(1) Unless otherwise provided, a person who acts in the belief that a circumstance exists has any defence that he would have if the circumstance existed.

*Non-application
to pre-Code
offences.*

(2) Subsection (1) does not apply in respect of a defence specially provided for a pre-Code offence as defined in section 6 (to which section 2(3) applies).

*Proof or disproof
of belief.*

(3) Any requirement as to proof or disproof of a defence applies to proof or disproof of a belief mentioned in subsection (1).

Duress by
threats.

42.—(1) A person is not guilty of an offence [to which this section applies] when he does an act under duress by threats.

*Excluded
offences.*

[(2) This section applies to any offence other than murder or attempt to murder.]

*Elements of
defence.*

(3) A person does an act under duress by threats if—

(a) he does it because he knows or believes—

(i) that a threat has been made to cause death or serious personal harm to himself or another if the act is not done; and

(ii) that the threat will be carried out immediately if he does not do the act or, if not immediately, before he or that other can obtain official protection; and

(iii) that there is no other way of preventing the threat being carried out; and

(b) the threat is one which in all the circumstances (including any of his personal circumstances that affect its gravity) he cannot reasonably be expected to resist.

(4) It is immaterial that the person doing the act believes, or that it is the case, that any official protection available in the circumstances will or may be ineffective.

*Voluntary
exposure to risk
of duress.*

(5) Subsection (1) does not apply to a person who has knowingly and without reasonable excuse exposed himself to the risk of such a threat.

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	(6) A wife has no defence (except under this section) by virtue of having done an act under the coercion of her husband.	PART I <i>No separate defence of marital coercion. Duress of circumstances.</i>
	43.—(1) A person is not guilty of an offence [to which this section applies] when he does an act under duress of circumstances.	
5	(2) A person does an act under duress of circumstances if—	<i>Elements of defence.</i>
	(a) he does it because he knows or believes that it is immediately necessary to avoid death or serious personal harm to himself or another; and	
10	(b) the danger that he knows or believes to exist is such that in all the circumstances (including any of his personal characteristics that effect its gravity) he cannot reasonably be expected to act otherwise.	
	(3) This section—	<i>Application of section: Murder.</i>
15	[(a) applies to any offence other than murder or attempt to murder;]	
	(b) does not apply—	
	(i) to a person who uses force for any of the purposes referred to in section 44(1) or 185; or	<i>Use of force in public or private defence.</i>
20	(ii) to a person who acts in the knowledge or belief that a threat of a kind described in section 42(3)(a)(i) has been made; or	<i>Acts done under duress by threats.</i>
	(iii) to a person who has knowingly and without reasonable excuse exposed himself to the danger.	<i>Voluntary exposure to danger.</i>
25	44.—(1) A person does not commit an offence by using such force as, in the circumstances which exist or which he believes to exist, is immediately necessary and reasonable—	<i>Use of force in public or private defence:</i>
	(a) to prevent or terminate crime, or to effect or assist in the lawful arrest of an offender or suspected offender or of a person unlawfully at large;	<i>Prevention of crime and effecting arrest.</i>
30	(b) to prevent or terminate a breach of the peace;	<i>Prevention of breach of the peace.</i>
	(c) to protect himself or another from unlawful force or unlawful personal harm;	<i>Defence of person.</i>
	(d) to prevent or terminate the unlawful detention of himself or another;	<i>Prevention of unlawful detention.</i>
35	(e) to protect property (whether belonging to himself or another) from unlawful appropriation, destruction or damage; or	<i>Defence of property.</i>
	(f) to prevent or terminate a trespass to his person or property.	<i>Prevention of trespass.</i>
	(2) In this section, except where the context otherwise requires, “force” includes, in addition to force against a person—	<i>“Force”.</i>
40	(a) force against property;	
	(b) a threat of force against person or property; and	
	(c) the detention of a person without the use of force.	
	(3) For the purposes of this section, an act is “unlawful” although a person charged with an offence in respect of it would be acquitted on	<i>“Unlawful”.</i>
45	the ground only that—	

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PART I	(a) he was under ten years of age; or (b) he lacked the fault required for the offence or believed that an exempting circumstance existed; or (c) he acted in pursuance of a reasonable suspicion; or (d) he acted under duress, whether by threats or of circumstances; 5 or (e) he was in a state of automatism or suffering from severe mental illness or severe mental handicap.
<i>Force against a constable in the execution of his duty.</i>	(4) Notwithstanding subsection (1), a person who believes circumstances to exist which would justify or excuse the use of force under 10 that subsection has no defence if— (a) he knows that the force is used against a constable or a person assisting a constable; and (b) the constable is acting in the execution of his duty, unless he believes the force to be immediately necessary to prevent 15 personal harm to himself or another.
<i>Preparatory acts.</i>	(5) A person does not commit an offence by doing an act immediately preparatory to the use of such force as is referred to in subsection (1).
<i>Self-induced occasions for the use of force.</i>	(6) Subsection (1) does not apply where a person causes unlawful 20 conduct or an unlawful state of affairs with a view to using force to resist or terminate it; but subsection (1) may apply although the occasion for the use of force arises only because he does anything he may lawfully do, knowing that such an occasion may arise.
<i>Opportunity to retreat.</i>	(7) The fact that a person had an opportunity to retreat before 25 using force shall be taken into account, in conjunction with other relevant evidence, in determining whether the use of force was immediately necessary and reasonable.
<i>Reasonable threats.</i>	(8) A threat of force may be reasonable although the use of the force would not be. 30
<i>Saving for other defences.</i>	(9) This section is without prejudice to the generality of section 185 (criminal damage: protection of person or property) or any other defence.
Acts justified or excused by law.	45. A person does not commit an offence by doing an act which is justified or excused by— 35 (a) any enactment; or (b) any “enforceable Community right” as defined in section 2(1) of the European Communities Act 1972; or (c) any rule of the common law continuing to apply by virtue of section 4(4). 40
Non-publication of statutory instrument.	46.—(1) A person is not guilty of an offence consisting of a contravention of a statutory instrument if— (a) at the time of his act the instrument has not been issued by Her Majesty’s Stationery Office; and 45

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(b) by that time reasonable steps have not been taken to bring the purport of the instrument to the notice of the public, or of persons likely to be affected by it, or of that person.

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5 (2) The burden of proving the matter referred to in subsection (1)(a) is on the defendant.

Burden of proof.

Preliminary offences

47.—(1) A person is guilty of incitement to commit an offence or offences if—

Incitement to commit an offence.

10 (a) he incites another to do or cause to be done an act or acts which, if done, will involve the commission of the offence or offences by the other; and

(b) he intends or believes that the other, if he acts as incited, shall or will do so with the fault required for the offence or offences.

15 (2) Subject to section 52(1), “offence” in this section means any offence triable in England and Wales.

“Offence”.

20 (3) Where the purpose of an enactment creating an offence is the protection of a class of persons, no member of that class who is the intended victim of such an offence can be guilty of incitement to commit that offence.

Exemption for protected persons.

(4) A person may be convicted of incitement to commit an offence although the identity of the person incited is unknown.

Identity of person incited.

25 (5) It is not an offence under this section, or under any enactment referred to in section 51, to incite another to procure, assist or encourage as an accessory the commission of an offence by a third person; but—

Incitement and accessories.

(a) a person may be guilty as an accessory to the incitement by another of a third person to commit an offence; and

30 (b) this subsection does not preclude a charge of incitement to incite (under this section or any other enactment), or of incitement to conspire (under section 48 or any other enactment), or of incitement to attempt (under section 49 or any other enactment), to commit an offence.

35 48.—(1) A person is guilty of conspiracy to commit an offence or offences if—

Conspiracy to commit an offence.

(a) he agrees with another or others that an act or acts shall be done which, if done, will involve the commission of the offence or offences by one or more of the parties to the agreement; and

40 (b) he and at least one other party to the agreement intend that the offence or offences shall be committed.

45 (2) For the purposes of subsection (1) an intention that an offence shall be committed is an intention with respect to all the elements of the offence (other than fault elements), except that recklessness with respect to a circumstance suffices where it suffices for the offence itself.

Intention.

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PART I
"Offence".

(3) Subject to section 52, "offence" in this section means any offence triable in England and Wales; and

(a) it extends to an offence of murder which would not be so triable; but

(b) it does not include a summary offence, not punishable with imprisonment, constituted by an act or acts agreed to be done in contemplation of a trade dispute.

Exemption for protected persons.

(4) Where the purpose of an enactment creating an offence is the protection of a class of persons, no member of that class who is the intended victim of such an offence can be guilty of conspiracy to commit that offence.

Subsistence of conspiracy.

(5) A conspiracy continues until the agreed act or acts is or are done, or until all or all save one of the parties to the agreement have abandoned the intention that such act or acts shall be done.

Becoming party to conspiracy.

(6) A person may become a party to a continuing conspiracy by joining the agreement constituting the offence.

Conspiracy and accessories.

(7) It is not an offence under this section, or under any enactment referred to in section 51, to agree to procure, assist or encourage as an accessory the commission of an offence by a person who is not a party to such an agreement; but—

(a) a person may be guilty as an accessory to a conspiracy by others; and

(b) this subsection does not preclude a charge of conspiracy to incite (under section 47 or any other enactment) to commit an offence.

Conviction.

(8) A person may be convicted of conspiracy to commit an offence although—

(a) no other person has been or is charged with such conspiracy;

(b) the identity of any other party to the agreement is unknown;

(c) any other party appearing from the indictment to have been a party to the agreement has been or is acquitted of such conspiracy, unless in all the circumstances his conviction is inconsistent with the acquittal of the other; or

(d) the only other party to the agreement cannot be convicted of such conspiracy (for example, because he was acting under duress by threats (section 42), or he was a child under ten years of age (section 32(1)) or he is immune from prosecution).

Attempt to commit an offence.

49.—(1) A person who, intending to commit an indictable offence, does an act that is more than merely preparatory to the commission of the offence is guilty of attempt to commit the offence.

Intention.

(2) For the purposes of subsection (1), an intention to commit an offence is an intention with respect to all the elements of the offence other than fault elements, except that recklessness with respect to a circumstance suffices where it suffices for the offence itself.

"Act".

(3) "Act" in this section includes an omission only where the offence intended is capable of being committed by an omission.

Criminal Code

- (4) Where there is evidence to support a finding that an act was more than merely preparatory to the commission of the offence intended, the question whether that act was more than merely preparatory is a question of fact. PART I
Issues of law and fact.
- 5 (5) Subject to section 52(1), this section applies to any offence which, if it were completed, would be triable in England and Wales as an indictable offence, other than an offence under section 4(1) (assisting offenders) or 5(1) (accepting or agreeing to accept consideration for not disclosing information about an arrestable offence) of
10 the Criminal Law Act 1967. *Offences which may be attempted.*
- (6) It is not an offence under this section, or under any enactment referred to in section 51, to attempt to procure, assist or encourage as an accessory the commission of an offence by another; but— *Attempt and accessories.*
- 15 (a) a person may be guilty as an accessory to an attempt by another to commit an offence; and
- (b) this subsection does not preclude a charge of attempt to incite (under section 47 or any other enactment), or of attempt to conspire (under section 48 or any other enactment), to commit an offence.
- 20 **50.—**(1) A person may be guilty of incitement, conspiracy or attempt to commit an offence although the commission of the offence is impossible, if it would be possible in the circumstances which he believes or hopes exist or will exist at the relevant time. *Impossibility and preliminary offences.*
- (2) Subsection (1) applies—
- 25 (a) to offences under sections 47, 48 and 49;
(b) to any offence referred to in section 51(1).
- (3) Subsection (1) does not render a person guilty of incitement, conspiracy or attempt to commit an offence of which he is not guilty because circumstances exist which, under section 45 or any other
30 provision of this or any other Act, justify or excuse the act he does. *Acts justified or excused.*
- 51.—**(1) Sections 47 to 49 apply in determining whether a person is guilty of an offence, created by an enactment other than those sections, of incitement, conspiracy or attempt to commit a specified offence, with, in the case of an attempt, the substitution in section 49
35 of a reference to the specified offence for the words “an indictable offence”. *Preliminary offences under other enactments.*
- (2) Conviction of an offence—
- (a) under section 47, 48 or 49; or
- (b) under another enactment referred to in subsection (1),
40 is not precluded by the fact that the conduct in question constitutes an offence both under section 47, 48 or 49 and under that other enactment.
- 52.—**(1) A person may be guilty of incitement, conspiracy or attempt to commit an offence specified in subsection (3) although the
45 act incited, agreed upon or attempted is intended to be done outside the ordinary limits of criminal jurisdiction, provided that that act, if *Jurisdiction and preliminary offences: Ulterior offence abroad.*

PART I

done within those limits, would constitute such an offence.

*Preliminary
offence abroad.*

(2) A person may be guilty of incitement, conspiracy or attempt to commit an offence specified in subsection (3) although the incitement, conspiracy or attempt occurs outside the ordinary limits of criminal jurisdiction, provided that the act incited, agreed upon or attempted is intended to be done within those limits and, if so done, would constitute such an offence. 5

*Specified
offences for
above purposes.*

(3) The offences referred to in subsections (1) and (2) are murder (section 54), manslaughter (section 55), intentional serious personal harm (section 70), causing an explosion likely to endanger life or property (section 2 of the Explosive Substances Act 1883) and kidnapping (section 81). 10

*Conspiracy
entered into
abroad.*

(4) A person may be guilty of conspiracy to commit an offence although the agreement is made outside the ordinary limits of criminal jurisdiction, if— 15

- (a) the offence is to be committed within those limits; and
- (b) while the agreement continues an act in pursuance of it is done within those limits; and entering within those limits for any purpose connected with the agreement is an act in pursuance of it. 20

PART II

SPECIFIC OFFENCES

CHAPTER I

OFFENCES AGAINST THE PERSON

Interpretation.

53. For the purposes of this Chapter— 25

- (a) “another” means a person who has been born and has an existence independent of his mother and, unless the context otherwise requires, “death” and “personal harm” mean the death of, or personal harm to, such a person;
- (b) a person does not cause death unless the death occurs within a year after the day on which any act causing it was done by that person or on which any fatal injury resulting from such an act was sustained, or (where the fatal injury was done to an unborn child) within a year after the day on which he was born and had an independent existence. 30 35

Homicide

Murder.

54.—(1) A person is guilty of murder if he causes the death of another—

- (a) intending to cause death; or
- (b) intending to cause serious personal harm and being aware that he may cause death,

unless section 56, 58, 59, 62 or 64 applies.

*Penalty for
murder.*

(2) A person convicted of murder shall be sentenced to life imprisonment, except that, where he appears to the court to have been under the age of eighteen years at the time the offence was 45

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committed, he shall be sentenced to detention in such place and for such period and subject to such conditions as to release as the Secretary of State may determine.

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CHAPTER I

55. A person is guilty of manslaughter if—
- 5 (a) he is not guilty of murder by reason only of the fact that a defence provided by section 56 (diminished responsibility), 58 (provocation) or 59 (use of excessive force) applies; or
- (b) he is not guilty of murder by reason only of the fact that, because of voluntary intoxication, he is not aware that death may be caused or believes that an exempting circumstance exists; or
- 10 (c) he causes the death of another—
- (i) intending to cause serious personal harm; or
- (ii) being reckless whether death or serious personal harm will be caused.
- 15
- 56.—(1) A person who, but for this section, would be guilty of murder is not guilty of murder if, at the time of his act, he is suffering from such mental abnormality as is a substantial enough reason to reduce his offence to manslaughter.
- 20
- (2) In this section “mental abnormality” means mental illness, arrested or incomplete development of mind, psychopathic disorder, and any other disorder or disability of mind, except intoxication.
- (3) Where a person suffering from mental abnormality is also intoxicated, this section applies only where it would apply if he were not intoxicated.
- 25
- 57.—(1) Whether evidence is evidence of mental abnormality is a question of law.
- (2) Where on a charge of murder or attempted murder the defendant has given or adduced evidence of mental disorder, severe mental handicap or automatism, the prosecution may adduce evidence of mental abnormality; but the court may give directions as to the stage of the proceedings at which it may do so.
- 30
- (3) Where a person is charged with murder (or attempted murder) the prosecution may, with his consent, adduce evidence of mental abnormality at the committal proceedings, whereupon the magistrates’ court may commit him for trial for manslaughter (or attempted manslaughter).
- 35
- (4) Where the defendant has been committed for trial for murder (or attempted murder) the prosecution may, with the consent of the defendant, serve notice in accordance with Rules of Court of evidence of mental abnormality and indict him for manslaughter (or attempted manslaughter).
- 40
- Manslaughter.
- Voluntary manslaughter.*
- Involuntary manslaughter.*
- Diminished responsibility.
- “Mental abnormality”.*
- Mental abnormality and intoxication.*
- Evidence of mental abnormality.
- Evidence adduced by prosecution.*
- Evidence at committal proceedings.*
- Notice of evidence after committal.*

PART II
CHAPTER I
Provocation.

58. A person who, but for this section, would be guilty of murder is not guilty of murder if—

- (a) he acts when provoked (whether by things done or by things said or by both and whether by the deceased person or by another) to lose his self-control; and
- (b) the provocation is, in all the circumstances (including any of his personal characteristics that affect its gravity), sufficient ground for the loss of self-control.

5

Use of excessive force.

59. A person who, but for this section, would be guilty of murder is not guilty of murder if, at the time of his act, he believes the use of the force which causes death to be necessary and reasonable to effect a purpose referred to in section 44 (use of force in public or private defence), but the force exceeds that which is necessary and reasonable in the circumstances which exist or (where there is a difference) in those which he believes to exist.

15

Jurisdiction over murder and manslaughter.

60. A person is guilty of murder or manslaughter (where section 54 or 55 applies) if—

- (a) he causes a fatal injury to another to occur within the ordinary limits of criminal jurisdiction, whether his act is done within or outside and whether the death occurs within or outside those limits;
- (b) he causes the death of another anywhere in the world by an act done within the ordinary limits of criminal jurisdiction; or
- (c) being a British citizen, he causes the death of another anywhere in the world by an act done anywhere in the world.

25

Attempted manslaughter.

61. A person who attempts to cause the death of another, where section 56, 58 or 59 would apply if death were caused, is not guilty of attempted murder but is guilty of attempted manslaughter.

Suicide pact killing.

62.—(1) A person who, but for this section, would be guilty of murder is not guilty of murder but is guilty of suicide pact killing if his act is done in pursuance of a suicide pact between himself and the person killed.

30

“Suicide pact”.

(2) “Suicide pact” means an agreement between two or more persons having for its object the death of all of them, whether or not each is to take his own life, but nothing done by a person who enters into a suicide pact shall be treated as done by him in pursuance of the pact unless it is done while he has the settled intention of dying in pursuance of the pact.

35

Attempt to carry out suicide pact.

(3) A person acting in pursuance of a suicide pact between himself and another is not guilty of attempted murder but is guilty of attempted suicide pact killing if he attempts to cause the death of the other.

40

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63. A person is guilty of an offence if he procures, assists or encourages suicide or attempted suicide committed by another.

PART II
CHAPTER I
Complicity in
suicide.

64.—(1) A woman who, but for this section, would be guilty of murder or manslaughter of her child is not guilty of murder or manslaughter, but is guilty of infanticide, if her act is done when the child is under the age of twelve months and when the balance of her mind is disturbed by reason of the effect of giving birth or of circumstances consequent upon the birth.

Infanticide.

(2) A woman who in the circumstances specified in subsection (1) attempts to cause the death of her child is not guilty of attempted murder but is guilty of attempted infanticide.

*Attempted
infanticide.*

(3) A woman may be convicted of infanticide (or attempted infanticide) although the jury is uncertain whether the child had been born or whether it had an existence independent of her when its death occurred (or, in the case of an attempt, when the act was done).

*Conviction where
birth uncertain.*

65. A person is guilty of an offence if he makes to another a threat to cause the death of, or serious personal harm to, that other or a third person, intending that other to believe that it will be carried out.

Threats to kill or
cause serious
personal harm.

Abortion and Child Destruction

66. A person is guilty of an offence if he intentionally causes the miscarriage of a woman otherwise than in accordance with the provisions of the Abortion Act 1967.

Abortion.

67.—(1) A pregnant woman is guilty of an offence if she intentionally causes her own miscarriage otherwise than in accordance with the provisions of the Abortion Act 1967.

Self-abortion.

(2) Notwithstanding section 50 (impossibility) a woman who is not pregnant cannot be guilty of an attempt to commit an offence under this Act.

*Non-pregnant
woman.*

68. A person is guilty of an offence if he supplies or procures any article or substance knowing that it is to be used with the intention of causing the miscarriage of a woman otherwise than in accordance with the provisions of the Abortion Act 1967, whether the woman is pregnant or not.

Supplying article
for abortion.

69.—(1) A person is guilty of child destruction if he intentionally causes the death of a child capable of being born alive before the child has an existence independent of his mother, unless the act which causes death is done in good faith for the purpose only of preserving the life of the mother.

Child
destruction.

(2) The fact that a woman had at any material time been pregnant for twenty-eight weeks or more is *prima facie* proof that she was at

Proof.

PART II
CHAPTER I
*Conviction where
birth uncertain.*

that time pregnant of a child capable of being born alive.

(3) A person who is found not guilty of murder or manslaughter (or attempted murder or manslaughter) of a child by reason only of the fact that the jury is uncertain whether the child had been born or whether he had an existence independent of his mother when his death occurred (or, in the case of an attempt, when the act was done) shall be convicted of child destruction (or attempted child destruction). 5

Causing personal harm and assault

Intentional serious personal harm.

70.—(1) A person is guilty of an offence if he intentionally causes serious personal harm to another. 10

(2) A person may be guilty of an offence under subsection (1) if either—

(a) the act causing serious personal harm is done; or

(b) the serious personal harm occurs, within the ordinary limits of criminal jurisdiction. 15

Reckless serious personal harm.

71. A person is guilty of an offence if he recklessly causes serious personal harm to another.

Intentional or reckless personal harm.

72. A person is guilty of an offence if he intentionally or recklessly causes personal harm to another. 20

Administering a substance without consent.

73.—(1) A person is guilty of an offence if he administers to, or causes to be taken by, another without his consent any substance which he knows to be capable of interfering substantially with the other's bodily functions.

(2) For the purposes of this section a substance capable of inducing unconsciousness or sleep is capable of interfering substantially with bodily functions. 25

Torture.

74.—(1) A public official or person acting in an official capacity, whatever his nationality, is guilty of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties. 30

(2) A person not falling within subsection (1) is guilty of torture, whatever his nationality, if—

(a) in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another at the instigation or with the consent or acquiescence

(i) of a public official; or

(ii) of a person acting in an official capacity; and—

(b) the official or other person is performing or purporting to perform his official duties when he instigates the commission 40

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of the offence or consents to or acquiesces in it.

(3) It is immaterial whether the pain or suffering is physical or mental and whether it is inflicted by an act or an omission.

(4) A person is not guilty of an offence under this section by reason of any conduct for which he had lawful authority, justification or excuse.

(5) For the purposes of this section "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—

(i) if it was inflicted by a United Kingdom official acting under the law of the United Kingdom, or by a person acting in an official capacity under that law, lawful authority, justification or excuse under that law;

(ii) if it was inflicted by a United Kingdom official acting under the law of any part of the United Kingdom or by a person acting in an official capacity under such law, lawful authority, justification or excuse under the law of the part of the United Kingdom under whose law he was acting; and

(iii) in any other case, lawful authority, justification or excuse under the law of the place where it was inflicted.

(6) The burden of proving a defence provided by subsection (4) is on the defendant.

75. A person is guilty of assault if he intentionally or recklessly—

(a) applies force to or causes an impact on the body of another; or
(b) causes another 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.

76. A person is guilty of an offence if he assaults a constable acting in the execution of his duty, or anyone assisting a constable so acting, knowing that, or being reckless whether the person assaulted or the person being assisted is a constable, whether or not he is aware that the constable is or may be acting in the execution of his duty.

77. A person is guilty of an offence if he assaults another, intending to resist, prevent or terminate the lawful arrest of himself or a third person.

78. A person is guilty of an offence if he assaults another, intending to rob him or a third person.

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CHAPTER I

By act or omission.

Defence.

"Lawful authority, justification or excuse".

Proof.

Assault.

Assault on a constable.

Assault to resist arrest.

Assault to rob.

PART II
CHAPTER I
Interpretation.

Detention and Abduction

79. For the purposes of sections 80 to 85—

- (a) a person takes another if he causes the other to accompany him or a third person or causes him to be taken;
- (b) a person detains another if he causes the other to remain 5 where he is;
- (c) a person sends another if he causes the other to be sent; and
- (d) a person acts without the consent of another if he obtains the other's consent—
 - (i) by force or threat of force; or 10
 - (ii) by deception causing the other to believe that he is under legal compulsion to consent.

Unlawful detention.

80.—(1) A person is guilty of unlawful detention if he intentionally or recklessly takes or detains another without that other's consent.

(2) A person is not guilty of an offence under this section if the 15 person taken or detained is, or he believes him to be, a child under the age of sixteen and—

- (a) he has, or believes he has, lawful control of the child; or
- (b) he has, or believes he has, the consent of a person who has, or whom he believes to have, lawful control of the child, or he 20 believes that he would have that consent if the person were aware of all the relevant circumstances.

Kidnapping.

81. A person is guilty of kidnapping if he intentionally or recklessly takes or detains another without that other's consent, intending— 25

- (a) to hold him to ransom or as a hostage; or
- (b) to send him out of the United Kingdom; or
- (c) to commit an arrestable offence.

Hostage-taking.

82. A person, whatever his nationality, is guilty of hostage-taking if, in the United Kingdom or elsewhere, he intentionally or 30 recklessly—

- (a) takes or detains another and
- (b) in order to compel a State, international government organisation or person to do or abstain from doing any act, threatens to cause the death of, or personal harm to, that 35 other or to continue to detain him.

Abduction of child by parent etc.

83.—(1) A person connected with a child under the age of sixteen is guilty of an offence if he takes or sends the child out of the United Kingdom without the appropriate consent.

Person "connected with" child.

(2) A person is connected with a child for the purposes of this 40 section if—

- (a) he is a parent or guardian of the child; or

(b) there is in force an order of a court in England or Wales awarding custody of the child to him, whether solely or jointly with any other person; or

5 (c) in the case of an illegitimate child, there are reasonable grounds for believing that he is the father of the child.

(3) In this section "the appropriate consent", in relation to a child means—

"Appropriate consent".

(a) the consent of each person—

10 (i) who is a parent or guardian of the child; or
(ii) to whom custody of the child has been awarded (whether solely or jointly with any other person) by an order of a court in England or Wales; or

(b) if the child is the subject of such a custody order, the leave of the court which made the order; or

15 (c) the leave of the court granted on an application for a direction under section 7 of the Guardianship of Minors Act 1971 or section 1(3) of the Guardianship Act 1973.

(4) In this section—

"Guardian" and custody order.

20 (a) "guardian" means a person appointed by deed or will or by order of a court of competent jurisdiction to be the guardian of a child; and

(b) a reference to a custody order or an order awarding custody includes a reference to an order awarding legal custody and a reference to an order awarding care and control.

25 (5) In the case of a custody order made by a magistrates' court, subsection (3)(b) above shall be construed as if the reference to the court which made the order included a reference to any magistrates' court acting for the same petty sessions area as that court.

30 (6) A person does not commit an offence under this section by doing anything without the consent of another person whose consent is required under the foregoing provisions if—

Defences.

(a) he does it in the belief that the other person—

35 (i) has consented; or
(ii) would consent if he was aware of all the relevant circumstances; or

(b) he has taken all reasonable steps to communicate with the other person but has been unable to communicate with him; or

40 (c) the other person has unreasonably refused to consent, but paragraph (c) does not apply where what is done relates to a child who is the subject of a custody order made by a court in England or Wales, or where the person who does it acts in breach of any direction under section 7 of the Guardianship of Minors Act 1971 or section 1(3) of the Guardianship Act 1973.

45 (7) This section has effect subject to the provisions of Schedule 3 in relation to a child who is in the care of a local authority or voluntary organisation or who is committed to a place of safety or who is the subject of custodianship proceedings or proceedings or an

PART II
CHAPTER I

Abduction of child by other persons.

order relating to adoption.

84.—(1) A person not falling within section 83(2)(a) or (b) is guilty of an offence if, without lawful authority or reasonable excuse, he takes or detains a child under the age of sixteen—

- (a) so as to remove him from the lawful control of any person having lawful control of the child; or 5
- (b) so as to keep him out of the lawful control of any person entitled to lawful control of the child.

Defences.

(2) A person does not commit an offence under this section by reason of anything he does— 10

- (a) in the belief that the child has attained the age of sixteen; or
- (b) where the child is illegitimate, with reasonable grounds for believing himself to be the child's father.

Burden of proof.

(3) The burden of proving a defence provided by subsection (2) is on the defendant. 15

Aggravated abduction.

85. A person is guilty of an offence if he intentionally or recklessly takes or detains a child under the age of sixteen—

- (a) so as to remove him from the lawful control of any person having lawful control of the child; or
 - (b) so as to keep him out of the lawful control of any person entitled to lawful control of the child— 20
- intending—

- (i) to hold the child to ransom or as a hostage; or
- (ii) to commit an arrestable offence; or
- (iii) (except in the case of a person falling within section 83(2)(a) or (b)) to send him out of the United Kingdom. 25

Endangering traffic

Endangering traffic.

86.—(1) A person is guilty of an offence if he—

- (a) intentionally places any dangerous obstruction upon a railway, road, waterway or aircraft runway, or interferes with any machinery, signal, equipment or other device for the direction, control or regulation of traffic thereon, or interferes with any conveyance intended to be used thereon; and 30
- (b) is or ought to be aware that injury to the person or damage to property may be caused thereby. 35

“Conveyance” and “waterway”.

(2) In this section—

- (a) “conveyance” means any conveyance constructed or adapted for the carriage of a person or persons or of goods by land, water or air; 40
- (b) “waterway” means any route upon water regularly used by any conveyance.

**CHAPTER II
SEXUAL OFFENCES**

General provisions

87. In this Chapter, unless the context otherwise requires—

Interpretation.

5 “buggery” means anal intercourse between a man and another person and is complete on penetration, whether or not there is an emission of seed, and continues until the man’s penis is withdrawn; and “commit buggery” means take part in an act of buggery either as agent or as patient;

10 “man” includes boy (whether under the age of fourteen or not) and “woman” includes girl;

“premises” includes any vehicle or vessel;

15 “sexual intercourse” means vaginal intercourse between a man and a woman and is complete on penetration, whether or not there is an emission of seed, and continues until the man’s penis is withdrawn; but references to “sexual intercourse” in this Chapter are, except in section 120, references only to—

(a) sexual intercourse between a man and a woman who are not husband and wife; or

20 (b) sexual intercourse between husband and wife when—

(i) a decree of divorce or nullity or a judicial separation order in respect of the marriage subsists; or

25 (ii) an injunction granted by a court that the husband shall not, or an undertaking given by him to a court that he will not, molest his wife is in force; or

30 (iii) an injunction granted, or order made, by a court that the husband shall, or an undertaking by him to a court that he will, leave the matrimonial home or not return to it is in force; or

35 (iv) an order made by a magistrates’ court under section 16(2) of the Domestic Proceedings and Magistrates’ Courts Act 1978 is in force; or

(v) a deed of separation executed by them is in force; or

(vi) they are not living with each other in the same household.

40 88. In this Chapter, where an element of an offence is the absence of a specified belief or where belief in a specified circumstance is a defence, a person who was voluntarily intoxicated shall be treated as not having held that belief if he would not have so believed had he been sober.

Intoxication.

45 *Rape and related offences*

89.—(1) A man is guilty of rape if he has sexual intercourse with a woman without her consent and—

Rape.

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or permits a girl under the age of sixteen to resort to or be on those premises for the purpose of having sexual intercourse, unless he believes her to be aged sixteen or above.

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CHAPTER II

Buggery and gross indecency

- 5 **95.**—(1) A man is guilty of an offence if he commits buggery with any person without that person's consent and—
- (a) he knows that that person is not consenting; or
- (b) he is aware that that person may not be or does not believe that he is consenting.
- 10 (2) For the purposes of this section a person shall be treated as not consenting to buggery if he consents to it—
- (a) because a threat, express or implied, has been made to use force against him or another if he does not consent and he believes that, if he does not consent, it will be carried out immediately or before he can free himself from it; or
- 15 (b) because he has been deceived as to—
- (i) the nature of the act; or
- (ii) the identity of the man.
- 20 **96.** A man is guilty of an offence if he commits buggery with a child under the age of thirteen unless—
- (a) in the case of a girl, he believes her
- (i) to be his wife; or
- (ii) to be aged sixteen or above; or
- 25 (b) in the case of a boy, he believes him to be aged eighteen or above.
- 97.** A man is guilty of an offence if he commits buggery with a girl under the age of sixteen unless—
- (a) he believes her to be his wife; or
- (b) he believes her to be aged sixteen or above.
- 30 **98.** A man aged eighteen or above is guilty of an offence if he commits buggery with a boy under the age of eighteen, unless he believes the boy to be aged eighteen or above.
- 99.** A man is guilty of an offence if he commits buggery with another man where either man is, or both are, under the age of
- 35 eighteen unless he is aged eighteen or above and he believes the other to be aged eighteen or above.
- 100.** A man aged eighteen or above is guilty of an offence if he commits an act of gross indecency with a boy under the age of eighteen, unless he believes the boy to be aged eighteen or above.

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CHAPTER II
Indecency with
boy under
eighteen.

101. A man is guilty of an offence if he commits an act of gross indecency with another man where either man is, or both are, under the age of eighteen, unless he is aged eighteen or above and he believes the other to be aged eighteen or above.

Homosexual acts
on merchant
ships:
Buggery.

102.—(1) A man is guilty of an offence if, being a member of the crew of a United Kingdom merchant ship, he commits buggery on that ship, wherever it may be, with another man who is a member of the crew of that or any other United Kingdom merchant ship. 5

Indecency.

(2) A man is guilty of an offence if, being a member of the crew of a United Kingdom merchant ship, he commits an act of gross indecency on that ship, wherever if may be, with another man who is a member of the crew of that or any other United Kingdom merchant ship. 10

(3) In this section—

“member of the crew” in relation to a ship, includes the master of the ship and any apprentice to the sea service serving in the ship; 15

“United Kingdom merchant ship” means a ship registered in the United Kingdom habitually used or used at the time of the act charged for the purposes of carrying passengers or goods for reward. 20

Incest

Incest by a man.

103.—(1) A man is guilty of incest if he has sexual intercourse with a woman whom he knows to be—

(a) his grand-daughter or daughter; or 25

(b) his sister unless—

(i) both he and his sister are aged twenty-one or above; or

(ii) he is aged twenty-one or above and he believes her to be aged twenty-one or above; 30

or

(c) his mother (unless he is under the age of twenty-one).

*Aggravated
incest.*

(2) A man who commits incest with a girl under the age of thirteen is guilty of aggravated incest.

*Inciting
incestuous
intercourse.*

(3) A man is guilty of inciting incestuous intercourse if he incites to have sexual intercourse with him a girl under the age of sixteen whom he knows to be his grand-daughter, daughter or sister, unless he believes her to be aged sixteen or above. 35

(4) For the purposes of this section, “daughter” includes adopted daughter and “sister” includes half-sister. 40

Incest by a
woman.

104.—(1) A woman is guilty of incest if she has sexual intercourse with a man whom she knows to be—

(a) her son; or

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(b) her brother unless—

(i) both she and her brother are aged twenty-one or above; or

5 (ii) she is aged twenty-one or above and she believes him to be aged twenty-one or above;

or

(c) her father or grandfather (unless she is under the age of twenty-one).

10 (2) For the purposes of this section, “son” includes adopted son and “brother” includes half-brother.

105. A person is guilty of an offence if he has sexual intercourse with his step-child under the age of twenty-one, unless he believes the step-child to be aged twenty-one or above.

Intercourse with step-child under twenty-one.

Sexual relations with the mentally handicapped

15 106.—(1) A man is guilty of an offence if he has sexual intercourse with a woman who is severely mentally handicapped unless—

Intercourse with mentally handicapped woman.

(a) he is severely mentally handicapped; or

(b) he believes that the woman is not suffering from any mental handicap.

20 (2) A person is guilty of an offence if, being the owner or occupier of, or acting or assisting in the management of, premises, he induces or permits a woman who is severely mentally handicapped to resort to or be on the premises for the purpose of having sexual intercourse unless he believes that the woman is not mentally handicapped.

Permitting mentally handicapped woman to use premises for intercourse.

25 107. A man is guilty of an offence if he commits buggery with a person who is severely mentally handicapped unless—

Buggery with mentally handicapped person.

(a) he is severely mentally handicapped; or

(b) he believes that that person is not suffering from any mental handicap.

30 108. A person is guilty of an offence if he commits an act of gross indecency with a person who is severely mentally handicapped unless—

Indecency with mentally handicapped person.

(a) he is severely mentally handicapped; or

35 (b) he believes that that person is not suffering from any mental handicap.

40 109. A person is guilty of an offence if he takes or detains a severely mentally handicapped person so as to remove him from or keep him out of the care of his parent or guardian intending that he shall have sexual intercourse or take part in an act of buggery or gross indecency with any person unless he believes that the person taken or detained is not suffering from any mental handicap.

Abduction of mentally handicapped person.

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CHAPTER II
Sexual relations
with mentally
disordered
patient:
*Officer with
in-patient.*

110.—(1) A man is guilty of an offence if he is an officer on the staff of, or is otherwise employed in, or is one of the managers of, a hospital or mental nursing home and—

- (a) he has sexual intercourse with a woman, or
- (b) he commits buggery or an act of gross indecency with a man or a woman—

who is receiving treatment for mental disorder in that hospital or home.

(2) A man is guilty of an offence if he is an officer on the staff of, or is otherwise employed in, or is one of the managers of, a hospital or mental nursing home and, on the premises of which the hospital or home forms part—

- (a) he has sexual intercourse with a woman, or
- (b) he commits buggery or an act of gross indecency with a man or woman—

who is receiving treatment there for mental disorder as an out-patient.

*Guardian, etc.
with patient.*

(3) A man is guilty of an offence if—

- (a) he has sexual intercourse with a woman, or
- (b) he commits buggery or an act of gross indecency with a man or woman—

who is a mentally disordered patient and who is subject to his guardianship under the Mental Health Act 1983 or is otherwise in his custody or care under that Act or in pursuance of arrangements under Part III of the National Assistance Act 1948 or the National Health Service Act 1977 or as a resident in a residential home for mentally disordered persons within the meaning of Part III of the Mental Health Act 1983.

Defence.

(4) A man is not guilty of an offence under this section if he believes that the woman with whom he has sexual intercourse or the man or woman with whom he commits buggery or an act of gross indecency is not a mentally disordered patient.

(5) In this section “mental disorder”, “mentally disordered”, and “patient” are to be construed in accordance with the Mental Health Act 1983.

Indecent assault and related offences 35

Indecent assault.

111. A person is guilty of an indecent assault if he assaults another in such a manner, of which he is aware, or in such circumstances, of which he is aware, as are—

- (a) indecent, whatever the purpose with which the act is done; or
- (b) indecent only if the act is done with an indecent purpose and he acts with such a purpose.

Procurement of gross indecency by threats.

112. A person is guilty of an offence if he procures another by threats or intimidation to commit an act of gross indecency with himself or a third person.

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113. A man is guilty of indecent exposure if he exposes his penis to a woman intending, or being aware that he is likely, to cause her alarm or distress.
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CHAPTER II
Indecent exposure.
114. A person is guilty of an offence if he commits an act of gross indecency with or towards a child under the age of thirteen or if he incites a child under that age to commit such an act with him or another, unless—
- Indecency with child under thirteen.
- (a) he believes that he or that other is married to the child; or
(b) he believes the child to be aged sixteen or above.
115. A person is guilty of an offence if he commits an act of gross indecency with or towards a child under the age of sixteen or if he incites a child under that age to commit such an act with him or another unless—
- Indecency with child under sixteen.
- (a) he believes that he or that other is married to the child; or
(b) he believes the child to be aged sixteen or above.
- 116.—(1) A person is guilty of an offence if—
- Indecent photographs of children.
- (a) he takes or permits to be taken an indecent photograph of a child under the age of sixteen; or
(b) he distributes or shows such a photograph; or
(c) he has in his possession such a photograph with a view to its being distributed or shown by himself or others; or
(d) he publishes or causes to be published any advertisement likely to be understood as conveying that the advertiser distributes or shows such photographs or intends to do so.
- (2) For the purposes of this section and, so far as it is relevant, of section 117—
- (a) a person distributes an indecent photograph if he parts with possession of it to, or exposes or offers it for acquisition by, another person;
(b) a child is to be taken as having been under the age of sixteen at any material time if it appears from the evidence as a whole that he was then under the age of sixteen;
(c) “indecent photograph” includes an indecent film, a copy of an indecent photograph or film, and an indecent photograph comprised in a film;
(d) a photograph (including any comprised in a film), if it shows a child and is indecent, is an indecent photograph of a child;
(e) references to a photograph include the negative as well as the positive version; and
(f) “film” includes any form of video-recording.
- (3) A person is not guilty of an offence under subsection (1)(b) or (c) if—
- Defences.
- (a) he has a legitimate reason for distributing or showing the photograph or (as the case may be) having it in his

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PART II CHAPTER II	possession; or (b) he has not himself seen the photograph and does not know, and has no reason to suspect, it to be indecent.	
<i>Burden of proof.</i>	(4) The burden of proving a defence provided by subsection (3) is on the defendant.	5
<i>Ancillary provisions.</i>	(5) The provisions of Schedule 5 (seizure and forfeiture of indecent photographs of children) shall have effect.	
Possession of indecent photographs of children.	117.—(1) A person is guilty of an offence if he has an indecent photograph of a child under the age of sixteen in his possession.	
<i>Defence.</i>	(2) A person is not guilty of an offence if— (a) he has a legitimate reason for having the photograph in his possession; or (b) he has not himself seen the photograph and does not know, and has no reason to suspect, it to be indecent; or (c) the photograph was sent to him without any request by him or on his behalf and he does not keep it for an unreasonable time.	10 15
<i>Burden of proof.</i>	(3) The burden of proving a defence provided by subsection (2) is on the defendant.	
	<i>Bestiality</i>	20
Bestiality.	118. A person is guilty of bestiality if he has anal or vaginal intercourse with an animal.	
Procuring bestiality.	119. A person is guilty of an offence if he procures the commission of an act of bestiality by another person.	
	<i>Public decency</i>	25
Sexual acts in public.	120.—(1) In this section “sexual intercourse” means sexual intercourse between any two persons (whether married or not). (2) A person is guilty of an offence if he has sexual intercourse with, or performs an act of buggery or gross indecency with, another— (a) in a public place; or (b) in a place visible from a public place or from premises other than that place; or (c) in the premises of a club or other place of common resort, in such circumstances that the act is likely to be seen by members of the public, and he knows that the act is likely to be seen by them.	30 35
	(3) For the purposes of this section— (a) “public place” has the meaning given in section 6, except that it does not include a theatre licensed under the Theatres Act 1968; and (b) “members of the public” includes occupiers of premises referred to in subsection (2)(b) and persons admitted to a	40

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building constituting the premises of a club or other place of common resort, whether on payment or otherwise.

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121. A man is guilty of an offence if he performs an act of buggery or gross indecency with another man in a lavatory to which the public have or are permitted to have access, whether on payment or otherwise.

Acts in public lavatories.

Prostitution

122. For the purposes of sections 123 to 131 and 135 to 137, "prostitute" means a person who, for gain, offers his body for sexual purposes to others or offers to do sexual acts to their bodies, whether or not he selects those to whom he makes his services available; and "prostitution" shall be construed accordingly.

Meaning of "prostitute".

123. A person is guilty of an offence if, for gain, he organises the services or controls the activities of more than one prostitute.

Organising prostitution.

124. A person is guilty of an offence if, for gain, he controls the activities of a prostitute.

Controlling a prostitute.

125. A person is guilty of an offence if, for gain, he does any act intending thereby to facilitate a meeting between a prostitute and another person for the purpose of prostitution, unless—

Facilitating prostitution.

(a) he does so in the ordinary course of a trade, business or profession which does not include the facilitation of prostitution; and

(b) he does not charge a price exceeding that which he would charge if the meeting were not for the purpose of prostitution.

Use of premises for prostitution

126. In sections 127 to 130 "premises" includes, where parts of a building are separately occupied, any two or more of such parts as are occupied by prostitutes (whether one or more in each part) carrying on prostitution under common direction or control.

Meaning of "premises".

127. A person is guilty of an offence if he manages, or assists in the management of, premises in connection with their use, in whole or in part, for the purpose of prostitution by more than one prostitute.

Managing premises used for prostitution.

128. A person is guilty of an offence if—

Letting premises for prostitution.

(a) he lets premises knowing that it is intended to use them, in whole or in part, for the purpose of prostitution by more than one prostitute; or

(b) being the lessor of premises, he knowingly permits such use to continue.

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CHAPTER II
Permitting use of premises for prostitution.

129. A person is guilty of an offence if, being the tenant or occupier or person in charge of any premises, he knowingly permits their use, in whole or in part, for the purpose of prostitution by more than one prostitute.

Use of premises for prostitution involving personal harm.

130. A person is guilty of an offence if he provides, occupies, manages or assists in the management of, premises which he knows to be equipped for the purpose of prostitution involving the infliction of personal harm.

Procurement

Procurement of woman to become prostitute.

131. A person is guilty of an offence if—
(a) he procures a woman to become, in any part of the world, a prostitute; or
(b) he procures a woman to leave the United Kingdom, intending her to become an inmate of, or to frequent, premises used for prostitution by two or more prostitutes in any part of the world; or
(c) he procures a woman to leave her usual place of abode in the United Kingdom, intending her to become an inmate of, or to frequent, for the purpose of prostitution, premises which are used for prostitution by two or more prostitutes in any part of the world.

Procurement of woman under twenty-one.

132. A person is guilty of an offence if he procures a woman under the age of twenty-one to have sexual intercourse in any part of the world with a third person, unless he believes her to be aged twenty-one or above.

Procurement of homosexual acts.

133. A person is guilty of an offence if he procures a man to commit buggery or an act of gross indecency with another man (not being the procurer).

Soliciting for prostitution or sexual purposes

Meaning of "street".

134. For the purposes of sections 135 to 138, "street" includes any bridge, road, lane, footway, subway, square, court, alley or passage, whether a thoroughfare or not, which is for the time being open to the public; and the doorways and entrances of premises abutting on a street, and any ground adjoining and open to a street, shall be treated as forming part of the street.

Woman prostitute loitering or soliciting.

135.—(1) A woman is guilty of an offence if, being a prostitute, she loiters or solicits in a street or public place for the purpose of prostitution.

Power of arrest.

(2) A constable may arrest without warrant anyone he finds in a street or public place and suspects with reasonable cause to be committing an offence under this section.

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136.—(1) A man is guilty of an offence if he solicits a woman (or different women) for the purpose of obtaining her, or their, services as a prostitute, or prostitutes—

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CHAPTER II
Kerb-crawling.

- (a) from a motor vehicle while it is in a street or public place; or
 - 5 (b) in a street or public place while in the immediate vicinity of a motor vehicle which he has just got out of or off,
- persistently or in such manner or in such circumstances as to be likely to cause annoyance to the woman, or any of the women, solicited, or nuisance to other persons in the neighbourhood.

10 (2) In this section “motor vehicle” has the same meaning as in the Road Traffic Act 1988.

137. A man is guilty of an offence if in a street or public place he persistently solicits a woman (or different women) for the purpose of obtaining her, or their, services as a prostitute, or prostitutes.

Persistent soliciting of women for purposes of prostitution.

15 138. A man is guilty of an offence if in a street or public place he persistently solicits another man or men for sexual purposes.

Soliciting by man for homosexual purposes.

CHAPTER III

THEFT, FRAUD AND RELATED OFFENCES

20 139.—(1) In this Chapter, unless the context otherwise requires—
“goods” includes money and every other description of property except land, and includes things severed from the land by stealing;

Interpretation.
“Goods”.

“property” has the meaning given in paragraph (a) of the definition of “property” in section 6.

“Property”.

25 (2) For the purposes of this Chapter, property “belongs to” any person having possession or control of it, or having in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest).

“Belonging to”.

30 (3) For the purposes of this Chapter, “gain” and “loss” mean gain and loss (whether temporary or permanent) in money or other property, including—

“Gain” and “loss”.

- (a) a gain by keeping what one has, as well as a gain by getting what one has not; and
- 35 (b) a loss by not getting what one might get, as well as a loss by parting with what one has.

Theft

140.—(1) A person is guilty of theft if he dishonestly appropriates property belonging to another, intending to deprive the other permanently of it; and “thief” and “steal” shall be construed accordingly.

Basic definition of theft.

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(2) It is immaterial whether the appropriation is made with a view to gain, or is made for the thief's own benefit.

"Dishonesty".

141.—(1) A person's appropriation of property belonging to another is not dishonest—

- (a) if he appropriates the property in the belief that he has in law the right to deprive the other of it, on behalf of himself or of a third person; or 5
- (b) if he appropriates the property in the belief that he would have the other's consent if the other knew of the appropriation and the circumstances of it; or 10
- (c) (except where the property came to him as trustee or personal representative) if he appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps.

Willingness to pay.

(2) A person's appropriation of property belonging to another may be dishonest although he is willing to pay for the property. 15

"Appropriates".

142.—(1) Any assumption by a person of the rights of an owner amounts to an appropriation, and this includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as owner. 20

Bona fide purchaser.

(2) Where property or a right or interest in property is or purports to be transferred for value to a person acting in good faith, no later assumption by him of rights which he believed himself to be acquiring amounts to theft of the property by reason of any defect in the transferor's title. 25

Theft of land and growing things.

143.—(1) A person cannot steal land, or things forming part of land and severed from it by him or by his directions, except—

- (a) when he is a trustee or personal representative, or is authorised by power of attorney, or as liquidator of a company, or otherwise, to sell or dispose of land belonging to another, and he appropriates the land or anything forming part of it by dealing with it in breach of the confidence reposed in him; or 30
- (b) when he is not in possession of the land and appropriates anything forming part of the land by severing it or causing it to be severed, or after it has been severed; or 35
- (c) when, being in possession of the land under a tenancy, he appropriates the whole or part of any fixture or structure let to be used with the land.

Wild plants.

(2) A person who picks mushrooms growing wild on any land, or who picks flowers, fruit or foliage from a plant growing wild on any land, does not (although not in possession of the land) steal what he picks, unless he does it for reward or for sale or other commercial purpose. 40

Interpretation.

(3) For the purposes of this section— 45

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- (a) "land" does not include incorporeal hereditaments;
- (b) "mushroom" includes any fungus;
- (c) "plant" includes any shrub or tree;
- 5 (d) "tenancy" means a tenancy for years or any less period and includes an agreement for such a tenancy, but a person who after the end of a tenancy remains in possession as statutory tenant or otherwise is to be treated as having possession under the tenancy, and "let" shall be construed accordingly.

144. For the purposes of section 140(1)—

- 10 (a) where property is subject to a trust, the persons to whom it belongs include any person having a right to enforce the trust, and an intention to defeat the trust is accordingly an intention to deprive of the property any person having that right;
- 15 (b) where a person receives property from or on account of another and is under an obligation to the other to retain and deal with that property or its proceeds in a particular way, the property or proceeds belongs (as against him) to the other;
- 20 (c) where a person gets property by another's mistake, and is under an obligation to make restoration (in whole or in part) of the property or its proceeds or of the value thereof, then to the extent of that obligation the property or proceeds belongs (as against him) to the person entitled to restoration,
- 25 (d) and an intention not to make restoration is accordingly an intention to deprive that person of the property or proceeds;
- (d) property of a corporation sole belongs to the corporation notwithstanding a vacancy in the corporation.

Extended meaning of "belonging to another".

30 145.—(1) A person appropriating property belonging to another without meaning the other permanently to lose the thing itself is nevertheless to be regarded as intending to deprive the other permanently of it if he intends to treat the thing as his own to dispose of regardless of the other's rights; and a borrowing or lending of it may amount to so treating it if, but only if, the borrowing or lending is

35 for a period and in circumstances making it equivalent to an outright taking or disposal.

"Intending to deprive the other permanently".

40 (2) Without prejudice to the generality of subsection (1), where a person, having possession or control (lawfully or not) of property belonging to another, parts with the property under a condition as to its return which he may not be able to perform, this (if done for purposes of his own and without the other's authority) amounts to treating the property as his own to dispose of regardless of the other's rights.

Offences related to theft

45 146. A person is guilty of robbery if he steals, and immediately before or at the time of doing so, and in order to do so, he uses force on any person or puts or seeks to put any person in fear of being then

Robbery.

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CHAPTER III

and there subjected to force.

Burglary.

147.—(1) A person is guilty of burglary if—

- (a) he enters a building or part of a building as a trespasser, intending to commit in the building or part of a building in question an offence of—
5
 - (i) theft;
 - (ii) causing serious personal harm;
 - (iii) rape; or
 - (iv) destroying or damaging the building or any property therein; or 10
- (b) having entered a building or part of a building as a trespasser, he commits in the building or part of a building in question an offence of—
 - (i) theft or attempted theft; or
 - (ii) causing, or attempting to cause, serious personal 15 harm.

Inhabited vehicle or vessel.

(2) References in subsection (1) to a building apply also to an inhabited vehicle or vessel, and apply to any such vehicle or vessel at times when the person having a habitation in it is not there as well as at times when he is. 20

Aggravated burglary.

148.—(1) A person is guilty of aggravated burglary if he commits burglary and at the time has with him a firearm or imitation firearm, a weapon of offence, or an explosive.

Definitions.

(2) In this section—

- (a) “firearm” includes an airgun or air pistol, and “imitation 25 firearm” means anything which has the appearance of being a firearm, whether capable of being discharged or not; and
- (b) “weapon of offence” means an article made or adapted for use for causing injury to or incapacitating a person, or intended by the person having it with him for such use; and 30
- (c) “explosive” means an article manufactured for the purpose of producing a practical effect by explosion, or intended by the person having it with him for that purpose.

Removal of articles from places open to the public.

149.—(1) A person is guilty of an offence if—

- (a) without lawful authority he removes from a building or its 35 grounds the whole or part of an article displayed or kept for display to the public in the building or that part of it or in its grounds; and
- (b) the building is one to which the public have access in order to view the building or part of it, or a collection or part of a 40 collection housed in it.

“Collection”.

(2) In this section, “collection”—

- (a) includes a collection got together for a temporary purpose;
- (b) does not include a collection made or exhibited for the purpose of effecting sales or other commercial dealings. 45

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- (3) A person does not commit an offence under subsection (1) if—
- (a) he removes a thing from a building or its grounds on a day when the public do not have access to the building; and
 - (b) the thing is not in the building or grounds as forming part of, or being on loan for exhibition with, a collection intended for permanent exhibition to the public.
- (4) But the fact that the public's access to a building is limited to a particular period or occasion is otherwise immaterial.
- (5) A person does not commit an offence under this section if he believes that he has lawful authority for the removal of the thing in question or that he would have it if the person entitled to give it knew of the removal and the circumstances of it.

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*Removal when
no access to
public.*

*Belief in lawful
authority.*

- 150.—(1) A person is guilty of an offence if—
- (a) without the consent of the owner or other lawful authority he takes a conveyance for his own or another's use; or
 - (b) he drives, or allows himself to be carried in or on, a conveyance knowing that it has been taken without lawful authority.

*Taking a
conveyance or
pedal cycle
without
authority.*

- (2) A person is guilty of an offence if—
- (a) without the consent of the owner or other lawful authority he takes a pedal cycle for his own or another's use; or
 - (b) he rides a pedal cycle knowing that it has been taken without lawful authority.

*Taking a pedal
cycle.*

- (3) In this section—
- (a) "conveyance" means any conveyance (other than a pedal cycle) constructed or adapted for the carriage of a person or persons by land, water or air, except that it does not include a conveyance constructed or adapted for use only under the control of a person not carried in or on it, and "drive" shall be construed accordingly; and
 - (b) "owner", in relation to a conveyance or pedal cycle which is the subject of a hiring agreement or hire-purchase agreement, means the person in possession of it under the agreement.

Definitions.

- (4) A person does not commit an offence under this section by anything done in the belief that he has lawful authority to do it or that he would have the owner's consent if the owner knew of his doing it and the circumstances of it.

- 151.—(1) A person is guilty of vehicle interference if he interferes with a motor vehicle or trailer or with anything carried in or on a motor vehicle or trailer, intending that an offence specified in subsection (2) shall be committed by himself or some other person.

*Interference with
vehicles.*

- (2) The offences mentioned in subsection (1) are—
- (a) theft of the motor vehicle or trailer or part of it;
 - (b) theft of anything carried in or on the motor vehicle or trailer; and

*Intended
offences.*

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(c) an offence under section 150(1) (taking a conveyance without authority).

(3) If it is proved that a person charged with an offence under this section intended that one of the offences specified in subsection (2) should be committed, it is immaterial that it cannot be proved which it was. 5

Definitions.

(4) In this section—

- (a) “motor vehicle” means a mechanically propelled vehicle intended or adapted for use on roads and includes a side-car attached to a motor cycle; 10
- (b) “trailer” means a vehicle drawn by a motor vehicle.

Abstracting electricity.

152. A person is guilty of an offence if he dishonestly—

- (a) uses electricity without due authority; or
- (b) causes electricity to be wasted or diverted.

Making off without payment.

153.—(1) A person is guilty of an offence if, knowing that payment on the spot for any goods supplied or service done is required or expected from him, he dishonestly makes off without having paid as required or expected and intending to avoid payment of the amount due. 15

“Payment on the spot”.

(2) For the purposes of this section “payment on the spot” includes payment at the time of collecting goods on which work has been done or in respect of which service has been provided. 20

Transaction contrary to law or unenforceable.

(3) Subsection (1) does not apply where the supply of the goods or the doing of the service is contrary to law, or where the service done is such that payment is not legally enforceable. 25

Power of arrest.

(4) Any person may arrest without warrant anyone who is, or whom he has reasonable grounds for suspecting to be, committing or attempting to commit an offence under this section.

Blackmail

Blackmail.

154.—(1) A person is guilty of blackmail if, with a view to gain for himself or another or intending to cause loss to another, he makes an unwarranted demand with menaces. 30

“Unwarranted”.

(2) For the purposes of this section a demand with menaces is unwarranted unless the person making it does so in the belief—

- (a) that he has reasonable grounds for making the demand; and 35
- (b) that the use of the menaces is a proper means of reinforcing the demand.

(3) The nature of the act or omission demanded is immaterial, and it is also immaterial whether the menaces relate to action to be taken by the person making the demand. 40

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Fraud

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Meaning of
"deception".

155. In sections 156, 157, 158, 159 and 163, "deception" means any deception (whether deliberate or reckless) by words or conduct as to fact or as to law, including a deception as to the present intentions of
5 the person using the deception or any other person.

156.—(1) A person is guilty of an offence if by any deception he dishonestly obtains property belonging to another, intending to deprive the other permanently of it.

Obtaining
property by
deception.

(2) For the purposes of this section a person obtains property if he
10 obtains ownership, possession or control of it, and "obtain" includes obtaining for another or enabling another to obtain or to retain.

"Obtains".

(3) Section 145 applies for the purposes of this section, with the necessary adaptation of the reference to appropriating, as it applies for purposes of section 140 (theft).

"Intending to
deprive the other
permanently of
it".

157.—(1) A person is guilty of an offence if by any deception he dishonestly obtains services from another.

Obtaining
services by
deception.

(2) It is an obtaining of services where the other is induced to confer a benefit by doing some act, or causing or permitting some act to be done, on the understanding that the benefit has been or will be
20 paid for.

"Obtains
services".

158.—(1) A person is guilty of an offence if by any deception—

Evasion of
liability by
deception.

(a) he dishonestly secures the remission of the whole or part of an existing liability to make a payment, whether his own liability or another's; or

25 (b) intending to make permanent default in whole or in part on an existing liability to make a payment, or intending to let another do so, he dishonestly induces the creditor or a person claiming payment on behalf of the creditor—

30 (i) to wait for payment (whether or not the due date for payment is deferred) or

(ii) to forgo payment; or

(c) he dishonestly obtains an exemption from or abatement of liability to make a payment.

(2) For the purposes of this section "liability" means legally enforceable liability; and subsection (1) does not apply in relation to a liability that has not been accepted or established to pay compensation for a wrongful act or omission.

"Liability".

35 (3) For the purposes of subsection (1)(b) a person induced to take in payment a cheque or other security for money by way of conditional satisfaction of a pre-existing liability is not paid but is induced to wait for payment.

"Payment" by
cheque etc.

40 (4) For the purposes of subsection (1)(c) "obtains" includes obtaining for another or enabling another to obtain.

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Obtaining
pecuniary
advantage by
deception.

"Pecuniary
advantage".

159.—(1) A person is guilty of an offence if by any deception he dishonestly obtains for himself or another a pecuniary advantage.

(2) For the purposes of this section a pecuniary advantage is obtained for a person if, and only if,—

- (a) he is allowed to borrow by way of overdraft, or to take out a policy of insurance or annuity contract, or obtains an improvement of the terms on which he is allowed to do so; or
- (b) he is given the opportunity to earn remuneration or greater remuneration in an office or employment, or to win money by betting.

False
accounting.

160.—(1) A person is guilty of an offence if, dishonestly, with a view to gain for himself or another or intending to cause loss to another,—

- (a) he destroys, defaces, conceals or falsifies an account or a record or document made or required for any accounting purpose; or
- (b) in furnishing information for any purpose, he produces or makes use of an account, or such a record or document, knowing that it is or may be misleading, false or deceptive in a material particular.

"Falsifies".

(2) For the purposes of this section a person who—

- (a) makes or concurs in making in an account or other document an entry which is or may be misleading, false or deceptive in a material particular; or
- (b) omits or concurs in omitting a material particular from an account or other document,

is to be treated as falsifying the account or document.

False statements
by company
directors etc.

161.—(1) An officer of a body corporate or unincorporated association, or person purporting to act as such, is guilty of an offence if, intending to deceive members or creditors of the body corporate or association about its affairs, he publishes or concurs in publishing a written statement or account knowing that it is or may be misleading false or deceptive in a material particular.

Surety as
creditor.

(2) For the purposes of this section a person who has entered into a security for the benefit of a body corporate or association is to be treated as a creditor of it.

Body managed
by its members.

(3) Where the affairs of a body corporate or association are managed by its members, this section applies to any statement which a member publishes or concurs in publishing in connection with his functions of management as if he were an officer of the body corporate or association.

Suppression, etc.
of documents.

162.—(1) A person is guilty of an offence if, dishonestly, with a view to gain for himself or another or intending to cause loss to another, he destroys, defaces or conceals—

- (a) a valuable security; or

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- (b) a will or other testamentary document; or
(c) an original document of, or belonging to, or filed or deposited in, a court of justice or government department.
- (2) In this section “valuable security” means any document—
- 5 (a) creating, transferring, surrendering or releasing a right to, in or over property; or
(b) authorising the payment of money or delivery of property; or
(c) evidencing the creation, transfer, surrender or release of a right to, in or over property, or the payment of money or
10 delivery of property, or the satisfaction of an obligation.

“Valuable security”.

163.—(1) A person is guilty of an offence if, dishonestly, with a view to gain for himself or another or intending to cause loss to another, by any deception he procures the execution of a valuable security.

Procuring execution of valuable security.

- 15 (2) Subsection (1) applies in relation to—
(a) the making, acceptance, indorsement, alteration, cancellation or destruction in whole or in part of a valuable security; or
(b) the signing or sealing of any paper or other material in order that it may be made or converted into, or used or dealt with
20 as, a valuable security,
as if that were the execution of a valuable security.

“Execution”.

(3) In this section “valuable security” has the same meaning as in section 162.

“Valuable security”.

Forgery and kindred offences

- 25 164.—(1) In sections 167 to 171, “instrument” means—
(a) any document, whether of a formal or informal character, other than a currency note;
(b) any stamp issued or sold by the Post Office;
(c) any Inland Revenue stamp; and
30 (d) any disc, tape, sound track or other device on or in which information is recorded or stored by mechanical, electronic or other means.

Meaning of “instrument”.

- (2) In subsection (1) “currency note” means—
(a) any note which—
35 (i) has been lawfully issued in England and Wales, Scotland, Northern Ireland, any of the Channel Islands, the Isle of Man or the Republic of Ireland; and
(ii) is or has been customarily used as money in the country where it was issued; and
40 (iii) is payable on demand; or
(b) any note which—
(i) has been lawfully issued in some country other than those mentioned in paragraph (a)(i); and
(ii) is customarily used as money in that country.

“Currency note”.

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CHAPTER III
Mark denoting
payment of
postage.

"Inland Revenue
stamp".

Meaning of
"false".

Meaning of
"prejudice" and
"induce".

(3) For the purposes of sections 167 to 171, a mark denoting payment of postage which the Post Office authorise to be used instead of an adhesive stamp is to be treated as if it were a stamp issued by the Post Office.

(4) In subsection (1) "Inland Revenue stamp" means a stamp (whether adhesive or impressed by means of a die) denoting a duty or fee.

165.—(1) For the purposes of sections 167 to 171 an instrument is false if—

- (a) it purports to have been made in the form in which it is made by a person who did not in fact make it in that form; or
- (b) it purports to have been made in the form in which it is made on the authority of a person who did not in fact authorise its making in that form; or
- (c) it purports to have been made in the terms in which it is made by a person who did not in fact make it in those terms; or
- (d) it purports to have been made in the terms in which it is made on the authority of a person who did not in fact authorise its making in those terms; or
- (e) it purports to have been altered in any respect by a person who did not in fact alter it in that respect; or
- (f) it purports to have been altered in any respect on the authority of a person who did not in fact authorise the alteration in that respect; or
- (g) it purports to have been made or altered on a date on which, or at a place at which, or otherwise in circumstances in which, it was not in fact made or altered; or
- (h) it purports to have been made or altered by an existing person but he did not in fact exist.

(2) A person is to be treated for the purposes of sections 167 to 171 as making a false instrument if he alters an instrument so as to make it false (whether or not it is false in some other respect apart from that alteration).

166.—(1) Subject to subsections (2) and (4), for the purposes of sections 167 to 171, an act or omission intended to be induced is to a person's prejudice if, and only if, it is one which, if it occurs—

- (a) will result—
 - (i) in loss to him; or
 - (ii) in his being deprived of an opportunity to earn remuneration or greater remuneration; or
 - (iii) in his being deprived of an opportunity to gain a financial advantage otherwise than by way of remuneration; or
- (b) will result in somebody being given an opportunity—
 - (i) to earn remuneration or greater remuneration from him; or

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- (ii) to gain a financial advantage from him otherwise than by way of remuneration; or
- (c) will be the result of his having accepted a false instrument as genuine, or a copy of a false instrument as a copy of a genuine one, in connection with his performance of any duty.
- (2) An act which a person has an enforceable duty to do and an omission to do an act which a person is not entitled to do are to be disregarded for the purposes of those sections.
- (3) In those sections references to inducing somebody to accept a false instrument as genuine, or a copy of a false instrument as a copy of a genuine one, include references to inducing a machine to respond to the instrument or copy as if it were a genuine instrument or, as the case may be, a copy of a genuine one.
- (4) Where subsection (3) applies, the act or omission intended to be induced by the machine responding to the instrument or copy is to be treated as an act or omission to a person's prejudice.

Inducing response by machine.

167. A person is guilty of forgery if he makes a false instrument, intending that he or another shall use it to induce somebody to accept it as genuine, and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice.

Forgery.

168. A person is guilty of an offence if he makes a copy of an instrument which is, and which he knows or believes to be, a false instrument, intending that he or another shall use it to induce somebody to accept it as a copy of a genuine instrument, and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice.

Copying a false instrument.

169. A person is guilty of an offence if he uses an instrument which is, and which he knows or believes to be, false, intending to induce somebody to accept it as genuine, and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice.

Using a false instrument.

170. A person is guilty of an offence if he uses a copy of an instrument which is, and which he knows or believes to be, a false instrument, intending to induce somebody to accept it as a copy of a genuine instrument, and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice.

Using a copy of a false instrument.

171.—(1) A person is guilty of an offence if he has in his custody or under his control an instrument to which this section applies which is, and which he knows or believes to be, false, intending that he or another shall use it to induce somebody to accept it as genuine, and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice.

Offences relating to money orders, share certificates, passports, etc.

(2) A person is guilty of an offence if he has in his custody or under his control, without lawful authority or excuse, an instrument to which this section applies which is, and which he knows or believes

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to be, false.

(3) A person is guilty of an offence if he makes or has in his custody or under his control a machine or implement, or paper or any other material, which to his knowledge is or has been specially designed or adapted for the making of an instrument to which this section applies, intending that he or another shall make an instrument to which this section applies which is false and that he or another shall use the instrument to induce somebody to accept it as genuine, and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice. 5 10

(4) A person is guilty of an offence if he makes or has in his custody or under his control any such machine, implement, paper or material, without lawful authority or excuse.

(5) The instruments to which this section applies are—

- (a) money orders; 15
- (b) postal orders;
- (c) United Kingdom postage stamps;
- (d) Inland Revenue stamps;
- (e) share certificates;
- (f) passports and documents which can be used instead of 20 passports;
- (g) cheques;
- (h) travellers' cheques;
- (j) cheque cards;
- (k) credit cards; 25
- (l) certified copies relating to an entry in a register of births, adoptions, marriages or deaths and issued by the Registrar General, the Registrar General for Northern Ireland, a registration officer or a person lawfully authorised to register marriages; and 30
- (m) certificates relating to entries in such registers.

(6) In subsection (5)(e) "share certificate" means an instrument entitling or evidencing the title of a person to a share or interest—

- (a) in any public stock, annuity, fund or debt of any government or state, including a state which forms part of another state; 35 or
- (b) in any stock, fund or debt of a body (whether corporate or unincorporated) established in the United Kingdom or elsewhere.

Offences relating to goods stolen etc. 40

Handling stolen goods.

172. A person is guilty of handling stolen goods if (otherwise than in the course of the stealing) knowing or believing them to be stolen goods, he dishonestly—

- (a) receives or arranges to receive the goods; or
- (b) undertakes or arranges to undertake their retention, removal, 45 disposal or realisation for the benefit of another; or

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(c) assists or arranges to assist in their retention, removal, disposal or realisation by another.

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173.—(1) A person is guilty of an offence if he publicly advertises, or prints or publishes the public advertisement of, a reward for the return of any goods which have been stolen or lost, using words to the effect that no questions will be asked, or that the person producing the goods will be safe from apprehension or inquiry, or that any money paid for the purchase of the goods or advanced by way of loan on them will be repaid.

Advertising rewards for return of goods stolen or lost.

10 (2) Section 20 (general requirement of fault) does not apply to this section.

174.—(1) For the purposes of the provisions of this Chapter relating to goods which have been stolen, goods obtained by blackmail or in the circumstances described in section 156 (obtaining property by deception) are to be regarded as stolen; and “steal”, “theft” and “thief” shall be construed accordingly.

Scope of offences relating to “stolen” goods.

(2) Those provisions apply whether the stealing occurred—

Time and place of theft immaterial.

(a) before or after the commencement of this Act; or

20 (b) in England or Wales or elsewhere, provided that the stealing (if not an offence under this Act) amounted to an offence where and at the time when the goods were stolen; and references to stolen goods are to be construed accordingly.

(3) For the purposes of those provisions references to stolen goods include, in addition to the goods originally stolen and parts of them (whether in their original state or not),—

Proceeds of stolen goods.

30 (a) any other goods which directly or indirectly represent or have at any time represented the stolen goods in the hands of the thief as being the proceeds of a disposal or realisation of the whole or part of the goods stolen or of goods so representing the stolen goods; and

35 (b) any other goods which directly or indirectly represent or have at any time represented the stolen goods in the hands of a handler of the stolen goods or any part of them as being the proceeds of a disposal or realisation of the whole or part of the stolen goods handled by him or of goods so representing them.

(4) But no goods continue to be stolen goods—

Goods ceasing to be “stolen”.

(a) after they are restored to the person from whom they were stolen or to other lawful possession or custody; or

40 (b) after that person and any other person claiming through him otherwise cease as regards those goods to have any right to restitution in respect of the theft.

(5) References in any enactment, whenever passed, to stolen goods shall be construed in accordance with this section.

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CHAPTER III
Going equipped.

Going equipped for stealing etc.

175.—(1) A person is guilty of an offence if, when not at his place of abode, he has with him an article for use in the course of or in connection with a burglary, theft or cheat.

“Theft” and
“cheat”.

(2) For the purposes of this section—

5

(a) “theft” includes an offence under section 150(1) (taking a conveyance without authority); and

(b) “cheat” means an offence under section 156 (obtaining property by deception).

Ancillary provisions

10

Jurisdiction over
theft from mails.

176.—(1) Where a person—

(a) steals or attempts to steal a mail bag or postal packet in the course of transmission as such between places in different jurisdictions in the British postal area, or any of the contents of such a mail bag or postal packet; or

15

(b) in stealing or intending to steal any such mail bag or postal packet or any of its contents, commits a robbery, attempted robbery or assault intending to rob,

outside England and Wales, he is guilty of the offence in question as if he had done so in England and Wales.

20

(2) The “different jurisdictions in the British postal area” referred to in subsection (1) are the jurisdictions of England and Wales, of Scotland, of Northern Ireland, of the Isle of Man and of the Channel Islands, respectively.

(3) In subsection (1) “mail bag” includes any article serving the purpose of a mail bag.

25

Ancillary
provisions.

177. Paragraphs 1, 2 and 4 and, so far as it applies to offences under provisions of this Chapter, paragraph 5 of Schedule 6 (provisions ancillary to Chapters III and IV of Part II) shall have effect.

30

CHAPTER IV

OTHER OFFENCES RELATING TO PROPERTY

Offences of damage to property

Meaning of
“property”.

178.—(1) In sections 179 to 182, “property” has the meaning given in paragraph (a) of the definition of “property” in section 6, except that it does not include things in action or other intangible property, or mushrooms growing wild on any land or flowers, fruit or foliage of a plant growing wild on any land.

35

“Mushroom”
and “plant”.

(2) For the purposes of subsection (1) “mushroom” includes any fungus and “plant” includes any shrub or tree.

40

Meaning of
“belonging to
another”.

179.—(1) For the purposes of sections 180 to 182 and 185, property belongs to any person—

- (a) having the custody or control of it; or
 (b) having in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest); or
 5 (c) having a charge on it; or
 (d) having a right to enforce a trust to which it is subject.
- (2) Property of a corporation sole belongs to the corporation for those purposes notwithstanding a vacancy in the corporation. *Property of corporation sole.*
- 180.**—(1) A person is guilty of an offence if he intentionally or
 10 recklessly causes the destruction of or damage to property belonging to another. *Destroying or damaging property.*
- (2) A person is guilty of an offence if he intentionally or recklessly causes the destruction of or damage to property (whether belonging to himself or another), intending by the destruction or damage to
 15 endanger the life of another or being reckless whether the life of another will be thereby endangered. *Intention or recklessness as to endangering life.*
- (3) An offence committed under this section by causing the destruction of or damage to property by fire shall be charged as arson. *Fire.*
- 181.** A person is guilty of an offence if he makes to another a
 20 threat, intending that other to believe that it will be carried out— *Threats to destroy or damage property.*
- (a) to cause the destruction of or damage to property belonging to that other or a third person; or
 (b) to cause the destruction of or damage to his own property in a way which he knows is likely to endanger the life of that
 25 other or a third person.
- 182.** A person is guilty of an offence if he has anything in his custody or under his control, intending to use it or cause or permit another to use it— *Possessing anything with intent to destroy or damage property.*
- (a) to cause the destruction of or damage to property belonging to
 30 some other person; or
 (b) to cause the destruction of or damage to his own or the user's property in a way which he knows is likely to endanger the life of some other person.
- 183.** Sections 184 and 185 apply to— *Application of defences.*
- 35 (a) any offence under section 180(1); and
 (b) any offence under section 181 or 182 other than one involving—
- (i) in the case of section 181, a threat; or
 40 (ii) in the case of section 182, an intention to use or cause or permit the use of a thing,
 to cause the destruction of or damage to property in a way the person making the threat or having the intention knows is likely to endanger the life of another.

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CHAPTER IV
Consent or
belief in consent.

184. A person does not commit an offence to which this section applies if—

- (a) he knows or believes that the person whom he believes to be entitled to consent to the destruction or damage has so consented; or
- (b) he believes that that person would so consent if he knew of the destruction or damage and its circumstances.

5

Protection of
person or
property.

185.—(1) A person does not commit an offence to which this section applies by doing an act which, in the circumstances which exist or which he believes to exist, is immediately necessary and reasonable—

- (a) to protect himself or another from unlawful force or injury; or
- (b) to prevent or terminate the unlawful detention of himself or another; or
- (c) to protect property (whether belonging to himself or another) from unlawful appropriation, destruction or damage.

“Unlawful”.

(2) Section 44(3) (meaning of “unlawful”) applies for the purposes of this section.

Ancillary
provisions.

186. Paragraph 3 and, so far as it applies to offences under sections 180 to 182, paragraph 5 of Schedule 6 (provisions ancillary to Chapters III and IV of Part II) shall have effect.

Offences relating to entering and remaining on property

Meaning of
“premises” and
“access”.

187.—(1) In sections 188 to 191 and 193 to 195—

- (a) “premises” means any building, any part of a building under separate occupation, any land ancillary to a building, the site comprising any building or buildings together with any land ancillary thereto, and (for the purposes only of section 195) any other place; and
- (b) “access” means, in relation to any premises, any part of any site or building within which those premises are situated which constitutes an ordinary means of access to those premises (whether or not that is its sole or primary use).

“Building” and
related
expressions.

(2) References in subsection (1) to a building apply also to any structure other than a movable one, and to any movable structure, vehicle or vessel designed or adapted for residential purposes; and for the purposes of subsection (1)—

- (a) part of a building is under separate occupation if anyone is in occupation or entitled to occupation of that part as distinct from the whole; and
- (b) land is ancillary to a building if it is adjacent to it and used (or intended for use) in connection with the occupation of that building or any part of it.

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188. For the purposes of sections 189 to 191, a person who (otherwise than as a trespasser) was occupying premises as a residence immediately before being excluded from occupation by anyone who entered those premises, or any access to those premises, as a trespasser is a displaced residential occupier—

- (a) of the premises; and
- (b) of any access to the premises,

so long as he continues to be excluded from occupation of the premises by the original trespasser or by any subsequent trespasser.

189.—(1) For the purposes of sections 188, 191, 193 and 194, a person who enters, or is on or in occupation of, premises by virtue of—

- (a) any title derived from a trespasser; or
- (b) any licence or consent given by a trespasser or by a person deriving title from a trespasser,

is himself a trespasser (whether or not he would be a trespasser apart from this provision).

(2) A person who is on any premises as a trespasser does not cease to be a trespasser for the purposes of those sections by virtue of being allowed time to leave the premises; nor does anyone cease to be a displaced residential occupier of any premises by virtue of any such allowance of time to a trespasser.

190.—(1) A person is guilty of an offence if—

- (a) without lawful authority, he uses or threatens violence for the purpose of securing entry into any premises for himself or another; and
- (b) there is, to his knowledge, someone present on those premises at the time who is opposed to the entry which the violence is intended to secure.

(2) The fact that a person has an interest in, or a right to possession or occupation of, premises does not, for the purposes of subsection (1), constitute lawful authority for the use or threat of violence by him or anyone else for the purpose of securing his entry into those premises.

(3) It is immaterial for the purposes of this section—

- (a) whether the violence in question is directed against the person or against property; and
- (b) whether the entry which the violence is intended to secure is for the purpose of acquiring possession of the premises in question or for any other purpose.

(4) A person is not guilty of an offence under this section if—

- (a) he or any other person on whose behalf he is acting is a displaced residential occupier of the premises in question; or
- (b)—

(i) part of the premises in question constitutes premises of which he or any other person on whose behalf he is

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CHAPTER IV
Meaning of
“displaced
residential
occupier”.

Meaning of
“trespasser”.

Person allowed
time to leave.

Violence for
securing entry.

Interest in
premises not
lawful authority.

Purpose of
violence
immaterial.

Defences.

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CHAPTER IV

acting is a displaced residential occupier; and

(ii) the part of the premises to which he is seeking to secure entry constitutes an access of which he or, as the case may be, that other person is also a displaced residential occupier.

5

Burden of proof.

(5) The burden of proving a defence provided by subsection (4) is on the defendant.

Power of arrest.

(6) A constable in uniform may arrest without warrant anyone who is, or whom he has reasonable grounds for suspecting to be, guilty of an offence under this section.

10

Adverse occupation of residential premises.

191.—(1) A person is guilty of an offence if, being on any premises as a trespasser after having entered as such, he fails to leave those premises on being required to do so by or on behalf of—

(a) a displaced residential occupier of the premises; or

(b) an individual who is a protected intending occupier of the premises by virtue of subsection (2) or (3).

15

“Protected intending occupier”.

(2) For the purposes of this section an individual is a protected intending occupier of premises at any time when—

(a) he has in those premises a freehold interest or a leasehold interest with not less than twenty-one years still to run and he acquired that interest as a purchaser for money or money's worth; and

20

(b) he requires the premises for his own occupation as a residence; and

(c) he is excluded from occupation of the premises by a person who entered them, or any access to them, as a trespasser; and

25

(d) he or a person acting on his behalf holds a written statement—

(i) which specifies his interest in the premises; and

(ii) which states that he requires the premises for occupation as a residence for himself; and

30

(iii) which was signed by him in the presence of a justice of the peace or commissioner for oaths who has subscribed his name as a witness to the signature.

False statement offences.

(3) A person is guilty of an offence if—

(a) he makes a statement for the purposes of subsection (2)(d) which he knows to be false in a material particular; or

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(b) he recklessly makes such a statement which is false in a material particular.

Further case of “protected intending occupier”.

(4) For the purposes of this section an individual is also a protected intending occupier of premises at any time when—

40

(a) he has been authorised to occupy the premises as a residence by an authority to which this subsection applies; and

(b) he is excluded from occupation of the premises by a person who entered the premises, or any access to them, as a trespasser; and

45

(c) there has been issued to him by or on behalf of the authority referred to in paragraph (a) a certificate stating that the

authority is one to which this subsection applies, being of a description specified in the certificate, and that he has been authorised by the authority to occupy the premises concerned as a residence.

- 5 (5) Subsection (4) applies to the following authorities:—
(a) any body mentioned in section 14 of the Rent Act 1977 (landlord's interest belonging to local authority etc.);
(b) the Housing Corporation;
(c) Housing for Wales; and

Authorities within subsection (4).

- 10 (d) a housing association, within the meaning of section 1(1) of the Housing Act 1985, which is for the time being either registered in the register of housing associations established under section 3 of that Act or specified in an order made by the Secretary of State under paragraph 23 of Schedule 1 to
15 the Housing Rents and Subsidies Act 1975.

- (6) A document purporting to be a certificate under subsection (4)(c) shall be received in evidence in any proceedings for an offence under subsection (1) and, unless the contrary is proved, shall be deemed to have been issued by or on behalf of the authority stated in
20 the certificate.

Certificate as evidence.

- (7) A person is not guilty of an offence under subsection (1) if—

Defences.

- (a) he believes that the person requiring him to leave the premises is not a displaced residential occupier or protected intending occupier of the premises or a person acting on behalf of a displaced residential occupier or protected intending occupier;
25 or

(b)—

- (i) the premises in question are or form part of premises used mainly for non-residential purposes; and

- 30 (ii) he is not on any part of the premises used wholly or mainly for residential purposes; or

- (c) having been requested to leave the premises by a person claiming to be or to act on behalf of a protected intending occupier of the premises, he then asks that person, but that
35 person fails at that time, to produce to him such a statement as is referred to in subsection (2)(d) or such a certificate as is referred to in subsection (4)(c).

- (8) The burden of proving a defence provided by subsection (7) is on the defendant.

Burden of proof.

- 40 (9) Any reference in the preceding provisions of this section, other than subsections (2) and (4), to any premises includes a reference to any access to them, whether or not the access itself constitutes premises, within the meaning given by section 187(1); and a person who is a protected intending occupier of any premises is also for the
45 purposes of this section a protected intending occupier of any access to those premises.

Access to premises.

- (10) A constable in uniform may arrest without warrant anyone who is, or whom he has reasonable grounds for suspecting to be, guilty of an offence under subsection (1).

Power of arrest.

PART II
CHAPTER IV
Failure to leave
land despite
direction:

*Power to direct
persons to leave
land.*

*Failing to leave or
re-entering.*

Defences.

Burden of proof.

Power of arrest.

Interpretation.

- 192.—(1) If the senior police officer reasonably believes that two or more persons have entered land as trespassers and are present there with the common purpose of residing there for any period, that reasonable steps have been taken by or on behalf of the occupier to ask them to leave and— 5
- (a) that any of those persons has caused damage to property on the land or used threatening, abusive or insulting words or behaviour towards the occupier, a member of his family or an employee or agent of his; or
- (b) that those persons have between them brought twelve or more vehicles on to the land, 10
- he may direct those persons, or any of them, to leave the land.
- (2) A person is guilty of an offence if, knowing that such a direction has been given which applies to him— 15
- (a) he fails to leave the land as soon as reasonably practicable; or
- (b) having left, he again enters the land as a trespasser within the period of three months beginning with the day on which the direction was given.
- (3) A person is not guilty of an offence under this section if— 20
- (a) his original entry on the land was not as a trespasser; or
- (b) he has a reasonable excuse for failing to leave the land as soon as reasonably practicable or, as the case may be, for again entering the land as a trespasser.
- (4) The burden of proving a defence provided by subsection (3) is on the defendant. 25
- (5) A constable in uniform who has reasonable grounds for suspecting a person to be committing an offence under this section may arrest him without warrant.
- (6) In this section— 30
- “land” does not include—
- (a) buildings other than—
- (i) agricultural buildings within the meaning of section 26(4) of the General Rate Act 1967; or
- (ii) scheduled monuments within the meaning of the Ancient Monuments and Archaeological Areas Act 1979; 35
- (b) land forming part of a highway;
- “occupier” means the person entitled to possession of the land by virtue of an estate or interest held by him;
- “the senior police officer” means the most senior in rank of the police officers present at the scene; 40
- “trespasser”, in relation to land, means a person who is a trespasser as against the occupier of the land;
- “vehicle” includes a caravan as defined in section 29(1) of the Caravan Sites and Control of Development Act 1960; 45
- and a person may be regarded for the purposes of this section as having the purpose of residing in a place although he has a home elsewhere.

Criminal Code

- 193.—(1) A person who is on any premises as a trespasser, after having entered as such, is guilty of an offence if, without lawful authority or reasonable excuse, he has with him on the premises any weapon of offence.
- 5 (2) In subsection (1) “weapon of offence” means an article made or adapted for use for causing injury to or incapacitating a person, or intended by the person having it with him for such use.
- (3) A constable in uniform may arrest without warrant anyone who is, or whom he has reasonable grounds for suspecting to be,
10 committing an offence under this section.
- 194.—(1) A person is guilty of an offence if he enters or is on any premises to which this section applies as a trespasser.
- (2) This section applies to any premises which are or form part of—
- 15 (a) the premises of a diplomatic mission within the meaning of the definition in Article 1(i) of the Vienna Convention on Diplomatic Relations signed in 1961 as that Article has effect in the United Kingdom by virtue of section 2 of and Schedule 1 to the Diplomatic Privileges Act 1964;
- 20 (b) consular premises within the meaning of the definition in paragraph 1(j) of Article 1 of the Vienna Convention on Consular Relations signed in 1963 as that Article has effect in the United Kingdom by virtue of section 1 of the Consular Relations Act 1968;
- 25 (c) any other premises in respect of which any organisation or body is entitled to inviolability by or under any enactment; and
- (d) any premises which are the private residence of a diplomatic agent (within the meaning of Article 1(e) of the Convention
30 mentioned in paragraph (a) above) or of any other person who is entitled to inviolability by or under any enactment.
- (3) A person is not guilty of an offence under this section if he believes that the premises in question are not premises to which this section applies.
- 35 (4) The burden of proving a defence provided by subsection (3) is on the defendant.
- (5) In any proceedings for an offence under this section a certificate issued by or under the authority of the Secretary of State stating that any premises were or formed part of premises of any
40 description mentioned in paragraphs (a) to (d) of subsection (2) at the time of the alleged offence shall be conclusive evidence that the premises were or formed part of premises of that description at that time.
- (6) A constable in uniform may arrest without warrant anyone who
45 is, or whom he has reasonable grounds for suspecting to be, committing an offence under this section.

PART II
CHAPTER IV
Trespassing with
a weapon of
offence.

“Weapon of
offence”.

Power of arrest.

Trespassing on
premises of
foreign missions,
etc.

Relevant
premises.

Defence.

Burden of proof.

Certificate as
evidence.

Power of arrest.

PART II
CHAPTER IV
Obstruction of court officers executing process for possession against unauthorised occupiers.

Relevant judgments and orders.

Defence.

Burden of proof.

Power of arrest.

“Officer of a court”.

Saving.

Eviction and harassment of occupier: Eviction.

Harassment.

Harassment by landlord or landlord’s agent.

195.—(1) A person is guilty of an offence if he resists or intentionally obstructs a person who is (whether or not the person resisting or obstructing him is aware that he is or may be) an officer of a court engaged in executing any process issued by the High Court or by a county court for the purpose of enforcing a judgment or order for the recovery of any premises or for the delivery of possession of any premises. 5

(2) Subsection (1) does not apply unless the judgment or order in question was given or made in proceedings under any provisions of rules of court applicable only in circumstances where the person claiming possession of premises alleges that the premises in question are occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation of the premises without the licence or consent of the person claiming possession or any predecessor in title of his. 15

(3) A person is not guilty of an offence under this section if he believes that the person he is resisting or obstructing is not an officer of a court.

(4) The burden of proving a defence provided by subsection (3) is on the defendant. 20

(5) A constable in uniform or an officer of a court may arrest without warrant anyone who is, or whom he has reasonable grounds for suspecting to be, guilty of an offence under this section.

(6) In this section “officer of a court” means— 25

(a) a sheriff, under sheriff, deputy sheriff, bailiff or officer of a sheriff; and

(b) a bailiff or any other person who is an officer of a county court within the meaning of the County Courts Act 1984.

(7) This section is without prejudice to section 8(2) of the Sheriffs Act 1887. 30

Unlawful eviction and harassment of residential occupier

196.—(1) A person is guilty of an offence if he unlawfully deprives the residential occupier of any premises of his occupation of the premises or any part of them. 35

(2) A person is guilty of an offence if—

(a) he does acts likely to interfere with the peace or comfort of a residential occupier of any premises or members of his household; or

(b) he persistently withdraws or withholds services reasonably required for the occupation of the premises as a residence, intending to cause the residential occupier to give up the occupation of the premises or any part of them or to refrain from exercising any right or pursuing any remedy in respect of the premises or part of them. 40 45

(3) The landlord of a residential occupier of any premises or an agent of the landlord is guilty of an offence if—

Criminal Code

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CHAPTER IV

- (a) he does acts likely to interfere with the peace or comfort of the residential occupier or members of his household; or
- (b) he persistently withdraws or withholds services reasonably required for the occupation of the premises as a residence,
- 5 knowing, or having reasonable cause to believe, that that conduct is likely to cause the residential occupier to give up occupation of the premises or any part of them or to refrain from exercising any right or pursuing any remedy in respect of the premises or part of them.

(4) A person is not guilty of an offence under subsection (1) if he 10 believes, and has reasonable cause to believe, that the residential occupier has ceased to reside in the premises. *Defences.*

(5) A person is not guilty of an offence under subsection (3) if he has reasonable grounds for doing the acts or withdrawing or withholding the services in question.

15 (6) The burden of proving a defence provided by subsection (4) or (5) is on the defendant. *Burden of proof.*

(7) In this section—

“landlord”, in relation to a residential occupier of any premises, 20 means the person who, but for— *“Landlord” and “residential occupier”.*

(i) the residential occupier’s right to remain in occupation of the premises; or

(ii) a restriction on the person’s right to recover possession of the premises,

25 would be entitled to occupation of the premises and any superior landlord under whom that person derives title;

30 “residential occupier”, in relation to any premises, means a person occupying the premises as a residence, whether under a contract or by virtue of any enactment or rule of law giving him the right to remain in occupation or restricting the right of any other person to recover possession of the premises.

(8) This section is without prejudice to any liability or remedy to which a person guilty of an offence under it may be subject in civil proceedings. *Saving for civil liability.*

CHAPTER V

35 OFFENCES AGAINST PUBLIC PEACE AND SAFETY

Interpretation

197. In this Chapter—

Interpretation.

40 “dwelling” means any structure or part of a structure occupied as a person’s home or other living accommodation (whether the occupation is separate or shared with others) but does not include any part not so occupied, and for this purpose “structure” includes a tent, caravan, vehicle, vessel or other temporary or movable structure;

“violence” means any violent conduct, so that—

45 (a) except in the context of affray, it includes violent conduct towards property as well as violent conduct

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CHAPTER V

towards persons, and

(b) it is not restricted to conduct causing or intended to cause personal harm or damage but includes any other violent conduct (for example, throwing at or towards a person a missile of a kind capable of causing personal harm which does not hit or falls short). 5

Offences against public order

Riot.

198.—(1) A person is guilty of riot if—

- (a) he is one of 12 or more persons who are present together using or threatening unlawful violence for a common purpose; and 10
- (b) the conduct of those persons (taken together) is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety; and
- (c) he uses unlawful violence for the common purpose; and
- (d) he intends to use violence or is reckless whether his conduct is 15 violent.

(2) The fact that any other person is not guilty of riot in consequence of subsection (1)(d) does not affect the determination of the number of persons who use or threaten violence.

(3) It is immaterial whether or not the 12 or more use or threaten 20 unlawful violence simultaneously.

(4) The common purpose may be inferred from conduct.

(5) No person of reasonable firmness need actually be, or be likely to be, present at the scene.

(6) Riot may be committed in private as well as in public places. 25

Violent disorder.

199.—(1) A person is guilty of violent disorder if—

- (a) he is one of 3 or more persons who are present together using or threatening unlawful violence; and
- (b) the conduct of those persons (taken together) is such as would cause a person of reasonable firmness present at the scene to 30 fear for his personal safety; and
- (c) he uses or threatens unlawful violence; and
- (d) he intends to use or threaten violence or is reckless whether his conduct is violent or threatens violence.

(2) The fact that any other person is not guilty of violent disorder 35 in consequence of subsection (1)(d) does not affect the determination of the number of persons who use or threaten violence.

(3) It is immaterial whether or not the 3 or more use or threaten unlawful violence simultaneously.

(4) No person of reasonable firmness need actually be, or be likely 40 to be, present at the scene.

(5) Violent disorder may be committed in private as well as in public places.

- 200.—(1) A person is guilty of affray if—
- (a) he uses or threatens unlawful violence towards another; and
 - (b) his conduct is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety; and
 - (c) he intends to use or threaten violence or is reckless whether his conduct is violent or threatens violence.
- (2) Where 2 or more persons use or threaten the unlawful violence, it is the conduct of them taken together that must be considered for the purposes of subsection (1).
- (3) For the purposes of this section a threat cannot be made by the use of words alone.
- (4) No person of reasonable firmness need actually be, or be likely to be, present at the scene.
- (5) Affray may be committed in private as well as in public places.
- (6) A constable may arrest without warrant anyone he reasonably suspects is committing affray.

- 201.—(1) A person is guilty of an offence if—
- (a) he uses towards another threatening, abusive or insulting words or behaviour; or
 - (b) he distributes or displays to another any writing, sign or other visible representation which is threatening, abusive or insulting,
- intending to cause that person to believe that immediate unlawful violence will be used against him or another by any person, or to provoke the immediate use of unlawful violence by that person or another, or whereby that person is likely to believe that such violence will be used or it is likely that such violence will be provoked.
- (2) A person is guilty of an offence under this section only if he intends his words or behaviour, or the writing, sign or other visible representation, to be threatening, abusive or insulting, or is reckless whether it is threatening, abusive or insulting.
- (3) An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the writing, sign or other visible representation is distributed or displayed, by a person inside a dwelling and the other person is also inside that or another dwelling.
- (4) A constable may arrest without warrant anyone he reasonably suspects is committing an offence under this section.

Fear or provocation of violence.

Further fault element.

Where offence may be committed.

Power of arrest.

- 202.—(1) A person is guilty of an offence if—
- (a) he uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or
 - (b) he displays any writing, sign or other visible representation which is threatening, abusive or insulting,

Harassment, alarm or distress.

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within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby, and he intends his words or behaviour, or the writing, sign or other visible representation, to be threatening, abusive or insulting, or is reckless whether it is threatening, abusive or insulting or (as the case may be) he intends his behaviour to be or is reckless whether it is disorderly. 5

Where offence may be committed.

(2) An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the writing, sign or other visible representation is displayed, by a person inside a dwelling and the other person is also inside that or another dwelling. 10

Defences.

(3) A person is not guilty of an offence under this section if—

(a) he has no reason to believe that there is any person within hearing or sight who is likely to be caused harassment, alarm or distress; or 15

(b) he is inside a dwelling and has no reason to believe that the words or behaviour used, or the writing, sign or other visible representation displayed, will be heard or seen by a person outside that or any other dwelling; or

(c) his conduct is reasonable. 20

Burden of proof.

(4) The burden of proving a defence provided by subsection (3) is on the defendant.

Power of arrest.

(5) A constable may arrest a person without warrant if—

(a) he engages in offensive conduct which the constable warns him to stop, and 25

(b) he engages in further offensive conduct immediately or shortly after the warning.

(6) In subsection (5) “offensive conduct” means conduct the constable reasonably suspects to constitute an offence under this section, and the conduct mentioned in paragraph (a) and the further conduct need not be of the same nature. 30

Racial hatred

Interpretation (sections 205 to 210).

203.—(1) In sections 205 to 210—

“broadcast” means broadcast by wireless telegraphy (within the meaning of the Wireless Telegraphy Act 1949) for general reception, whether by way of sound broadcasting or television; 35

“cable programme service” has the same meaning as in the Cable and Broadcasting Act 1984;

“distribute”, and related expressions, shall be construed in accordance with subsection (2) (written material) and subsection (3) (recordings); 40

“play”, and related expressions, in relation to a recording, shall be construed in accordance with subsection (3);

“programme” means any item which is broadcast or included in a cable programme service; 45

- “publish”, and related expressions, in relation to written material, shall be construed in accordance with subsection (2);
- “racial hatred” means hatred against a group of persons in Great Britain defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins;
- “recording” means any record from which visual images or sounds may, by any means, be reproduced;
- “show”, and related expressions, in relation to a recording, shall be construed in accordance with subsection (3);
- “written material” includes any sign or other visible representation.

(2) References in section 206 and 210 to the publication or distribution of written material are to its publication or distribution to the public or a section of the public.

- (3) References in sections 208 and 210 to the distribution, showing or playing of a recording are to its distribution, showing or playing to the public or a section of the public.

204.—(1) Nothing in sections 205 to 210 applies to a fair and accurate report of proceedings in Parliament.

Savings for reports of parliamentary or judicial proceedings.

- (2) Nothing in sections 205 to 210 applies to a fair and accurate report of proceedings publicly heard before a court or tribunal exercising judicial authority where the report is published contemporaneously with the proceedings or, if it is not reasonably practicable or would be unlawful to publish a report of them contemporaneously, as soon as publication is reasonably practicable and lawful.

Acts intended or likely to stir up racial hatred

205.—(1) A person is guilty of an offence if—

- (a) he uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting; and
- (b)—
- (i) he intends thereby to stir up racial hatred; or
- (ii) having regard to all the circumstances racial hatred is likely to be stirred up thereby.

Use of words or behaviour or display of written material.

- (2) A person who does not intend to stir up racial hatred is guilty of an offence under this section only if he intends his words or behaviour, or the written material, to be, or is reckless whether it is, threatening, abusive or insulting.

Further fault element.

- (3) An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the written material is displayed, by a person inside a dwelling and are not heard or seen except by other persons in that or another dwelling.

Where offence may be committed.

- (4) A person is not guilty of an offence under this section if he is inside a dwelling and has no reason to believe that the words or behaviour used, or the written material displayed, will be heard or

Defence.

<p>PART II CHAPTER V <i>Burden of proof.</i></p> <p><i>Material, etc., for programme.</i></p> <p><i>Power of arrest.</i></p>	<p>seen by a person outside that or any other dwelling.</p> <p>(5) The burden of proving the defence provided by subsection (4) is on the defendant.</p> <p>(6) This section does not apply to words or behaviour used, or written material displayed, solely for the purpose of being included in a programme broadcast or included in a cable programme service.</p> <p>(7) A constable may arrest without warrant anyone he reasonably suspects is committing an offence under this section.</p>	<p>5</p>
<p><i>Publishing or distributing written material.</i></p>	<p>206.—(1) A person is guilty of an offence if—</p> <p>(a) he publishes or distributes written material which is threatening, abusive or insulting; and</p> <p>(b)—</p> <p style="padding-left: 40px;">(i) he intends thereby to stir up racial hatred; or</p> <p style="padding-left: 40px;">(ii) having regard to all the circumstances racial hatred is likely to be stirred up thereby.</p>	<p>10</p> <p>15</p>
<p><i>Defence.</i></p>	<p>(2) A person who does not intend to stir up racial hatred is not guilty of an offence under this section if—</p> <p>(a) he is not aware of the content of the material; and</p> <p>(b) he does not suspect, and has no reason to suspect, that it is threatening abusive or insulting.</p>	<p>20</p>
<p><i>Burden of proof.</i></p>	<p>(3) The burden of proving the matters referred to in paragraphs (a) and (b) of subsection (2) is on the defendant.</p>	
<p><i>Public performance of play.</i></p>	<p>207.—(1) A person is guilty of an offence if—</p> <p>(a) he presents or directs a public performance of a play which involves the use of threatening, abusive or insulting words or behaviour; and</p> <p>(b)—</p> <p style="padding-left: 40px;">(i) he intends thereby to stir up racial hatred; or</p> <p style="padding-left: 40px;">(ii) having regard to all the circumstances (and, in particular, taking the performance as a whole) racial hatred is likely to be stirred up thereby.</p>	<p>25</p> <p>30</p>
<p><i>Defences.</i></p>	<p>(2) A person who does not intend to stir up racial hatred is not guilty of an offence under this section if—</p> <p>(a) he does not know and has no reason to suspect that the performance will involve the use of the offending words or behaviour; or</p> <p>(b) he does not know and has no reason to suspect that the offending words or behaviour are threatening, abusive or insulting; or</p> <p>(c) he does not know and has no reason to suspect that the circumstances in which the performance will be given will be such that racial hatred is likely to be stirred up.</p>	<p>35</p> <p>40</p>
<p><i>Burden of proof.</i></p>	<p>(3) The burden of proving any of the matters referred to in paragraphs (a), (b) and (c) of subsection (2) is on the defendant.</p>	

- (4) This section does not apply to a performance given solely or primarily for one or more of the following purposes—
- (a) rehearsal,
 - (b) making a recording of the performance, or
 - 5 (c) enabling the performance to be broadcast or included in a cable programme service;
- but if the performance was attended by persons other than those directly connected with the giving of the performance or the doing in relation to it of the things mentioned in paragraph (b) or (c), the
- 10 burden of proving that the performance was given solely or primarily for the purposes mentioned above is on the defendant.
- (5) For the purposes of this section—
- (a) a person shall not be treated as presenting a performance of a play by reason only of his taking part in it as a performer,
 - 15 (b) a person taking part as a performer in a performance directed by another shall be treated as a person who directed the performance if without reasonable excuse he performs otherwise than in accordance with that person's direction, and
 - 20 (c) a person shall be taken to have directed a performance of a play given under his direction notwithstanding that he was not present during the performance;
- and a person shall not be treated as assisting or encouraging the commission of an offence under this section by reason only of his taking part in a performance as a performer.
- 25 (6) In this section “play” and “public performance” have the same meaning as in the Theatres Act 1968.
- (7) The following provisions of the Theatres Act 1968 apply in relation to an offence under this section as they apply to an offence under section 2 of that Act—
- 30 section 9 (script as evidence of what was performed),
section 10 (power to make copies of script),
section 15 (powers of entry and inspection).
- 208.—(1) A person is guilty of an offence if—
- 35 (a) he distributes, or shows or plays, a recording of visual images or sounds which are threatening, abusive or insulting; and
 - (b)—
 - (i) he intends thereby to stir up racial hatred; or
 - (ii) having regard to all the circumstances racial hatred is likely to be stirred up thereby.
- 40 (2) A person who does not intend to stir up racial hatred is not guilty of an offence under this section if—
- (a) he is not aware of the content of the recording; and
 - (b) he does not suspect, and has no reason to suspect, that it is threatening, abusive or insulting.
- 45 (3) The burden of proving the matters referred to in paragraphs (a) and (b) of subsection (2) is on the defendant.

PART II
CHAPTER V
Exception for rehearsal, etc.

Performers and directors.

Interpretation.

Ancillary provisions.

Distributing, showing or playing a recording.

Defence.

Burden of proof.

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Exception.

(4) This section does not apply to the showing or playing of a recording solely for the purpose of enabling the recording to be broadcast or included in a cable programme service.

Broadcasting or including programme in cable programme service.

209.—(1) Where a programme involving threatening, abusive or insulting visual images or sounds is broadcast, or included in a cable programme service, a person is guilty of an offence if—

(a)—

(i) he provides the broadcasting or cable programme service; or

(ii) he produces or directs the programme; or 10

(iii) he uses offending words or behaviour,

and—

(b)—

(i) he intends thereby to stir up racial hatred; or

(ii) having regard to all the circumstances racial hatred is likely to be stirred up thereby. 15

Further fault element.

(2) A person who does not intend to stir up racial hatred is guilty of an offence under this section only if he knows or has reason to suspect that the offending material is threatening, abusive or insulting.

Defences.

(3) A person providing the service, or producing or directing the programme, who does not intend to stir up racial hatred is not guilty of an offence under this section if—

(a) he does not know and has no reason to suspect that the programme will involve the offending material; and

(b) having regard to the circumstances in which the programme is broadcast, or included in a cable programme service, it is not reasonably practicable for him to secure the removal of the material. 25

(4) A person producing or directing the programme who does not intend to stir up racial hatred is not guilty of an offence under this section if—

(a) he does not know and has no reason to suspect that the programme will be broadcast or included in a cable programme service; or

(b) he does not know and has no reason to suspect that the circumstances in which the programme will be broadcast or so included will be such that racial hatred is likely to be stirred up. 35

(5) A person using offending words or behaviour who does not intend to stir up racial hatred does not commit an offence under this section if—

(a) he does not know and has no reason to suspect that a programme involving the use of the offending material will be broadcast or included in a cable programme service; or

(b) he does not know and has no reason to suspect that the circumstances in which a programme involving the use of the offending material will be broadcast, or so included, or in 45

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which a programme broadcast or so included will involve the use of the offending material, will be such that racial hatred is likely to be stirred up.

5 (6) The burden of proving any of the matters referred to in paragraphs (a) and (b) of subsections (3), (4) and (5) is on the defendant.

Burden of proof.

(7) This section does not apply—

Exceptions.

- (a) to the broadcasting of a programme by the British Broadcasting Corporation or the Independent Broadcasting Authority; or
10 (b) to the inclusion of a programme in a cable programme service by the reception and immediate re-transmission of a broadcast by either of those authorities.

(8) The following provisions of the Cable and Broadcasting Act 1984 apply to an offence under this section as they apply to a
15 “relevant offence” as defined in section 33(2) of that Act—

Ancillary provisions.

- section 33 (scripts as evidence),
section 34 (power to make copies of scripts and records),
section 35 (availability of visual and sound records);

and sections 33 and 34 of that Act apply to an offence under this
20 section in connection with the broadcasting of a programme as they apply to an offence in connection with the inclusion of a programme in a cable programme service.

Racially inflammatory material

210.—(1) A person is guilty of an offence if—

Possession of
racially inflam-
matory material.

25 (a) he has in his possession written material which is threatening, abusive or insulting, or a recording of visual images or sounds which are threatening, abusive or insulting, with a view to—

30 (i) in the case of written material, its being displayed, published, distributed, broadcast or included in a cable programme service, whether by himself or another; or

(ii) in the case of a recording, its being distributed, shown, played, broadcast or included in a cable programme service, whether by himself or another;

35 and—

(b)—

- (i) he intends racial hatred to be stirred up thereby; or
(ii) having regard to all the circumstances, racial hatred is likely to be stirred up thereby.

40 (2) For this purpose regard shall be had to such display, publication, distribution, showing, playing, broadcasting or inclusion in a cable programme service as he has, or it may reasonably be inferred that he has, in view.

(3) A person who does not intend to stir up racial hatred is not
45 guilty of an offence under this section if—

Defence.

- (a) he is not aware of the content of the written material or recording; and

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<i>Burden of proof.</i>	(4) The burden of proving the matters referred to in paragraphs (a) and (b) of subsection (3) is on the defendant.	
<i>Exception.</i>	(5) This section does not apply to the possession of written material or a recording by or on behalf of the British Broadcasting Corporation or the Independent Broadcasting Authority or with a view to its being broadcast by either of those authorities.	5
<i>Other offences against public peace and safety</i>		
Interpretation.	211. In sections 212 to 214—	10
	“meeting” means a meeting held for the purpose of the discussion of matters of public interest or for the purpose of the expression of views on such matters;	
	“private premises” means premises to which the public have access (whether on payment or otherwise) only by permission of the owner, occupier, or lessee of the premises;	15
	“public meeting” includes any meeting in a public place and any meeting which the public or any section thereof are permitted to attend, whether on payment or otherwise;	
	“public place” has the meaning given by section 6.	20
Wearing of uniform.	212.—(1) A person is guilty of an offence if in any public place or at any public meeting he wears uniform signifying his association with any political organisation or with the promotion of any political object.	
<i>Defence of police permission.</i>	(2) A person does not commit an offence under this section if the chief officer of police, being satisfied that the wearing of any such uniform on any ceremonial, anniversary or other special occasion will not be likely to involve risk of public disorder, has, with the consent of a Secretary of State, by order permitted the wearing of such uniform on that occasion either absolutely or subject to such conditions as may be specified in the order.	25
<i>Power of arrest.</i>	(3) A constable may arrest without warrant anyone he reasonably suspects is committing an offence under this section.	
Quasi-military organisations.	213.—(1) A person is guilty of an offence if he takes part in— (a) the control or management of an association of persons to which this section applies; or (b) the organising or training of any members or adherents of such an association for any of the purposes referred to in subsection (2).	35
<i>Associations to which section applies.</i>	(2) This section applies to an association of persons, whether incorporated or not, whose members or adherents are— (a) organised or trained or equipped for the purpose of enabling them to be employed in usurping the functions of the police or of the armed forces of the Crown; or	40

5 (b) organised and trained or organised and equipped either for the purpose of enabling them to be employed for the use or display of physical force in promoting any political object, or in such manner as to arouse reasonable apprehension that they are organised and either trained or equipped for that purpose.

10 (3) A person who takes part in the control or management of such an association does not commit an offence under this section if he neither consents to nor connives at the organisation, training or equipment of members or adherents of the association in contravention of the provisions of this section.

Defence.

(4) The burden of proving the absence of such consent and connivance is on the defendant.

Burden of proof.

15 (5) In any proceedings for an offence under this section proof of things done or of words written, spoken or published (whether or not in the presence of any party to the proceedings) by any person taking part in the control or management of an association or in organising, training or equipping members or adherents of an association is admissible as evidence of the purposes for which, or the manner in which, members or adherents of the association (whether those persons or others) were organised, or trained, or equipped.

Evidence.

25 (6) This section does not prohibit the employment of a reasonable number of persons as stewards to assist in the preservation of order at any public meeting held upon private premises or the making of arrangements for that purpose or the instruction of the persons to be so employed in their lawful duties as such stewards, or their being furnished with badges or other distinguishing signs.

Employment of stewards for certain meetings: saving.

30 **214.—**(1) A person is guilty of an offence if he acts in a disorderly manner at a lawful public meeting for the purpose of preventing the transaction for which the meeting was called together.

Endeavours to break up lawful public meetings.

35 (2) If a constable reasonably suspects a person of committing an offence under this section, he may if requested so to do by the chairman of the meeting require that person to declare to him immediately his name and address, and if that person refuses or fails so to declare his name and address or gives a false name and address he is guilty of an offence under this subsection.

Refusal to declare name and address to constable.

(3) This section does not apply as respects meetings to which section 97 of the Representation of the People Act 1983 applies.

Exception.

40 **215.—**(1) A person is guilty of an offence if, without lawful authority or reasonable excuse, he has with him in a public place an offensive weapon.

Possession of offensive weapon.

(2) The burden of proving lawful authority or reasonable excuse is on the defendant.

Burden of proof.

45 (3) Where a person is convicted of an offence under this section the court may make an order for the forfeiture or disposal of any weapon in respect of which the offence was committed.

Power of forfeiture.

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*Meaning of
"offensive
weapon".*

(4) In this section "offensive weapon" means any article made or adapted for use for causing personal harm to the person or intended by the person having it with him for such use by him or by some other person.

*Possession of
article with blade
or point in public
place.*

216.—(1) A person is guilty of an offence if he has with him in a public place any article which has a blade or is sharply pointed other than a folding pocketknife the blade of which has a cutting edge not exceeding 3 inches. 5

Defences.

(2) A person is not guilty of an offence under this section if he has good reason or lawful authority for having the article with him in a public place. 10

(3) Without prejudice to the generality of subsection (2), a person is not guilty of an offence under this section if he has the article with him—

- (a) for use at work; or 15
- (b) for religious reasons; or
- (c) as part of any national costume.

Burden of proof.

(4) The burden of proving a defence provided by subsection (2) or (3) is on the defendant.

*Manufacture etc.
of dangerous
weapons.*

217.—(1) A person is guilty of an offence if he manufactures, sells or hires or offers for sale or hire, or exposes for sale or has in his possession for the purposes of sale or hire, or lends or gives to another— 20

- (a) a knife which has a blade which opens automatically by hand pressure applied to a button, spring or other device in or attached to the handle of the knife, sometimes known as a "flick knife" or "flick gun"; or 25
- (b) a knife which has a blade which is released from its handle or sheath by the force of gravity or the application of centrifugal force and which, when released, is locked in place by means of a button, spring, lever, or other device, sometimes known as a "gravity knife". 30

*Importation
prohibited.*

(2) The importation of any such knife as is described in subsection (1) is prohibited.

Bomb hoaxes.

218.—(1) A person is guilty of an offence if— 35

- (a) he places any article or substance in any place whatever; or
- (b) he dispatches any article or substance by post, rail or any other means whatever of sending things from one place to another, with the intention (in either case) of inducing in some other person a belief that it is likely to explode or ignite and thereby cause personal harm or damage to property. 40

*Bomb hoax by
communicating
information.*

(2) A person is guilty of an offence if he communicates any information which he knows or believes to be false to another person with the intention of inducing in him or any other person a false belief that a bomb or other thing liable to explode or ignite is present 45

in any place or location whatever.

(3) For a person to be guilty of an offence under subsection (1) or (2) it is not necessary for him to have any particular person in mind as the person in whom he intends to induce the belief mentioned in that subsection.

219.—(1) A person is guilty of an offence if—

(a) he contaminates or interferes with goods; or

(b) he makes it appear that goods have been contaminated or interfered with; or

10 (c) he places goods which have been contaminated or interfered with, or which appear to have been contaminated or interfered with, in a place where goods of that description are consumed, used, sold or otherwise supplied,

with the intention of causing—

15 (i) public alarm or anxiety; or

(ii) personal harm to members of the public consuming or using the goods; or

(iii) economic loss to a person by reason of the goods being shunned by members of the public; or

20 (iv) economic loss to a person by reason of steps taken to avoid any such alarm or anxiety, personal harm or loss.

(2) A person is guilty of an offence if, with any such intention as is mentioned in paragraph (i), (iii) or (iv) of subsection (1), he threatens that he or another will do, or claims that he or another has done, any of the acts mentioned in subsection (1).

(3) A person is guilty of an offence if he is in possession of any of the following articles with a view to the commission of an offence under subsection (1)—

30 (a) materials to be used for contaminating or interfering with goods or making it appear that goods have been contaminated or interfered with; or

(b) goods which have been contaminated or interfered with, or which appear to have been contaminated or interfered with.

(4) In this section “goods” includes substances whether natural or manufactured and whether or not incorporated in or mixed with other goods.

(5) The reference in subsection (2) to a person claiming that certain acts have been committed does not include a person who in good faith reports or warns that such acts have been, or appear to have been, committed.

220. The provisions of Schedule 7 (provisions ancillary to Chapter V) shall have effect.

Contamination of or interference with goods.

Threats to contaminate or interfere with goods.

Possession of article in connection with contamination of or interference with goods.

“Goods”.

Ancillary provisions.

SCHEDULES

Sections 7 and 8.

SCHEDULE 1

PROSECUTION, PUNISHMENT AND MISCELLANEOUS MATTERS

(1) Provision creating offence	(2) Nature of offence	(3) How triable	(4) Punishment	(5) Restriction on institution of proceedings	(6) Alternative verdicts under section 8(1)(a)(i)	(7) Ancillary and miscellaneous
5	Incitement	As in the case of the offence incited, except that where the incitement is to commit two or more offences the following rules apply: (a) If one of the offences is triable only on indictment, the incitement is triable only on indictment; (b) if one of the offences incited is triable only summarily and one is triable either way, the incitement is triable either way; (c) if the incitement is to commit the summary offence on more than one occasion, the incitement is triable either way.	As in the case of the offence incited, except that — (a) where the offence or one of the offences incited is murder or any other offence the sentence for which is fixed by law, the maximum penalty is life imprisonment; (b) where the incitement is to commit the same summary offence on more than one occasion, there is no limit to the amount of the fine that may be imposed on conviction on indictment; (c) where, in any other case, two or more offences are incited, the penalty is that of the offence for which is provided the most severe penalty; (d) where the incitement amounts also to an offence of incitement referred to in section 51(1), the penalty is the same as the penalty provided for that offence.	As in the case of the offence incited, except that any time limit applicable to the institution of proceedings for the offence incited applies only to the offence incited has been committed and the time limit applicable to it has expired, proceedings shall not be instituted for incitement to commit that offence.		
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(1) Provision creating offence	(2) Nature of offence	(3) How triable	(4) Punishment	(5) Restriction on institution of proceedings	(6) Alternative verdicts under section 8(1)(a)(i)	(7) Ancillary and miscellaneous
5	48 Conspiracy	Only on indictment.	As in the case of the offence involved, except that— (a) where the offence or one of the offences involved is murder or any other offence the sentence for which is fixed by law, the maximum penalty is life imprisonment; (b) where the only offences involved are summary offences, there is no limit to the amount of the fine that may be imposed; (c) where, in any other case, two or more offences are involved, the penalty is that of the offence for which is provided the most severe penalty; (d) where the agreement amounts also to an offence of conspiracy referred to in section 51(1), the penalty is the same as the penalty provided for that offence.	As in the case of the offence involved, except that— (a) where the offence is a summary offence the prosecution of which does not require the consent of the Attorney General, proceedings for conspiracy shall not be instituted except by, or on behalf or with the consent of, the Director of Public Prosecutions; and (b) any time limit applicable to the institution of proceedings for the offence involved applies only to the extent that, where the offence involved has been committed and the time limit applicable to it has expired, proceedings shall not be instituted for conspiracy to commit that offence.		
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30	49 Attempt	As in the case of the offence attempted.	As in the case of the offence attempted, except that— (a) where the offence is murder or any other offence the sentence for which is fixed by law, the maximum penalty is life imprisonment; (b) where the attempt amounts also to an offence of attempt referred to in section 51(1), the penalty is the same as the penalty provided for that offence.	As in the case of the offence attempted.		(a) Provisions conferring power to institute proceedings for the offence attempted apply to the institution of proceedings for the attempt. (b) Provisions as to the venue of proceedings for the offence attempted apply in relation to proceedings for the
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Criminal Code

(1) Provision creating offence	(2) Nature of offence	(3) How triable	(4) Punishment	(5) Restriction on institution of proceedings	(6) Alternative verdicts under section 8(1)(a)(i)	(7) Ancillary and miscellaneous
5						
10	Part II, Chapter I - Offences against the Person					
15	54	Murder	Only on indictment.	As provided in subsection (2).	Manslaughter (s.55). Killing in pursuance of suicide pact (s.62). Complicity in suicide (s.63). Infanticide (s.64). Child destruction (s.69). Intentional serious personal harm (s.70).	attempt.
20						
25	55	Manslaughter	Only on indictment.	Life.	Killing in pursuance of suicide pact (s.62). Complicity in suicide (s.63). Infanticide (s.64). Child destruction (s.69). Reckless driving (Road Traffic Act 1988, s.2). Careless driving (Road Traffic Act 1988, s.3).	
30						
35	62	Killing in pursuance of suicide pact	Only on indictment.	7 years.	Complicity in suicide (s.63).	
40	63	Complicity in suicide	Only on indictment.	7 years.	Killing in pursuance of suicide pact (s.62).	

Criminal Code

(1) Provision creating offence	(2) Nature of offence	(3) How triable	(4) Punishment	(5) Restriction on institution of proceedings	(6) Alternative verdicts under section 8(1)(a)(i)	(7) Ancillary and miscellaneous
5	64 Infanticide	Only on indictment.	5 years.			
	65 Threats to kill or cause serious personal harm	Either way.	On indictment: 10 years.			
10	66 Abortion	Only on indictment.	Life.		Child destruction (s.69).	
	67 Self-abortion	Only on indictment.	Life.		Child destruction (s.69).	
	68 Supplying article for abortion.	Only on indictment.	5 years.			
15	69 Child destruction	Only on indictment.	Life.		Abortion (s.66). Self-abortion (s.67).	
	70 Intentional serious personal harm	Only on indictment.	Life.		Assault (s.75).	
20	71 Reckless serious personal harm	Either way.	On indictment: 5 years.		Assault (s.75).	
	72 Intentional or reckless personal harm	Either way.	On indictment: 3 years.		Assault (s.75).	
25	73 Administering a substance without consent	Either way.	On indictment: 3 years.			
	74 Torture	Only on indictment.	Life.			
30	75 Assault	Only summarily.	6 months or a fine not exceeding level 5 on the standard scale, or both.	Only by or with the consent of the Attorney General		
	76 Assault on a constable	Only summarily.	6 months or a fine not exceeding level 5 on the standard scale, or both.			

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(1) Provision creating offence	(2) Nature of offence	(3) How triable	(4) Punishment	(5) Restriction on institution of proceedings	(6) Alternative verdicts under section 8(1)(a)(i)	(7) Ancillary and miscellaneous
5	77 Assault to resist arrest	Either way.	On indictment: 2 years.		Assault (s.75).	
78	Assault to rob	Only on indictment.	Life.		Assault (s.75).	
80	Unlawful detention	Either way.	On indictment: 5 years.			
81	Kidnapping	Only on indictment.	Life.			
10	82 Hostage-taking	Only on indictment.	Life.	Only by or with the consent of the Attorney General.		
83	Abduction of child by parent etc.	Either way.	On indictment: 7 years.	Only by or with the consent of the Director of Public Prosecutions.		
15	84 Abduction of child by other persons	Either way.	On indictment: 7 years.	Only by or with the consent of the Director of Public Prosecutions.		
20	85 Aggravated abduction	Only on indictment.	Life.	Only by or with the consent of the Director of Public Prosecutions.		
86	Endangering traffic	Either way.	On indictment: 7 years.			
25	Part II, Chapter II - Sexual Offences					
30	89 Rape	Only on indictment.	Life.		Procurement of woman by threats (s.90). Procurement of woman by deception (s.91). Use of article to overpower for sexual purposes (s.92). Indecent assault	The provisions of Schedule 4 have effect in proceedings for "rape offences" as defined in paragraph 5 of that Schedule.
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Criminal Code

(1) Provision creating offence	(2) Nature of offence	(3) How triable	(4) Punishment	(5) Restriction on institution of proceedings	(6) Alternative verdicts under section 8(1)(a)(i)	(7) Ancillary and miscellaneous
5	89(3) and Schedule 4 para.3(6)	Only summarily.	A fine not exceeding level 5 on the standard scale.	Only by or with the consent of the Director of Public Prosecutions.	(s.111).	
10	90	Procurement of woman by threats	On indictment: 5 years.			
15	91	Procurement of woman by deception	On indictment: 2 years.			
	92	Use of article to overpower for sexual purposes	On indictment: 2 years.			
20	93(1)	Intercourse with girl under thirteen	Life.			
	93(2)	Permitting girl under thirteen to use premises for intercourse	Life.			
25	94(1)	Intercourse with girl under sixteen	On indictment: 2 years.	A prosecution may not be instituted more than 12 months after the alleged act of intercourse.		
30	94(2)	Permitting girl under sixteen to use premises for intercourse	On indictment: 2 years.			
35	95	Non-consensual buggery	Life.			
	96	Buggery with child under thirteen	Life.	Only by or with the consent of the Director of Public Prosecutions where (i)		

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(1) Provision creating offence	(2) Nature of offence	(3) How triable	(4) Punishment	(5) Restriction on institution of proceedings	(6) Alternative verdicts under section 8(1)(a)(i)	(7) Ancillary and miscellaneous
5						
10	97 Buggery with girl under sixteen	Only on indictment.	Life.	the child is a boy or (ii) the child is a girl and the accused is under the age of eighteen.		
15	98 Buggery by man with boy under eighteen	Only on indictment.	5 years.	Only by or with the consent of the Director of Public Prosecutions, where the accused is under the age of eighteen.		
20	99 Buggery with boy under eighteen	Only on indictment.	2 years.	Only by or with the consent of the Director of Public Prosecutions.		
25	100 Indecency by man with boy under eighteen	Either way.	On indictment: 5 years.	Only by or with the consent of the Director of Public Prosecutions.		
30	101 Indecency with boy under eighteen	Either way.	On indictment: 2 years.	Only by or with the consent of the Director of Public Prosecutions.		
35	102(1) Buggery by seamen	Only on indictment.	2 years.	Only by or with the consent of the Director of Public Prosecutions.		
35	102(2) Indecency by seamen	Only on indictment.	2 years.	Where either is under eighteen, only by or with the consent of the Director of Public Prosecutions.		
35	103(1) Incest by a man	Only on indictment.	7 years.	Only by or with the consent of the Director of Public Prosecutions.	Intercourse with girl under thirteen (s.93(1)). Intercourse with girl under sixteen (s.94(1)).	

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(1) Provision creating offence	(2) Nature of offence	(3) How triable	(4) Punishment	(5) Restriction on institution of proceedings	(6) Alternative verdicts under section 8(1)(a)(i)	(7) Ancillary and miscellaneous
5	103(2) Aggravated incest	Only on indictment.	Life.	Only by or with the consent of the Director of Public Prosecutions.	Intercourse with girl under thirteen (s.93(1)). Intercourse with girl under sixteen (s.94(1)).	
10	103(3) Inciting incestuous intercourse	Either way.	On indictment: 2 years.			
15	104 Incest by a woman	Only on indictment.	7 years.	Only by or with the consent of Director of Public Prosecutions.		
	105 Intercourse with step-child under twenty-one	Only on indictment.	7 years.	Only by or with the consent of the Director of Public Prosecutions.		
20	106(1) Intercourse with mentally handi- capped woman	Only on indictment.	2 years.	Only by or with the consent of the Director of Public Prosecutions.		
25	106(2) Permitting mentally handi- capped woman to use premises for intercourse	On indictment.	2 years.			
30	107 Buggery with mentally handi- capped person	Only on indictment.	5 years.	Only by or with the consent of the Director of Public Prosecutions.		
	108 Indecency with mentally handi- capped person	Either way.	On indictment: 2 years.	Only by or with the consent of the Director of Public Prosecutions.		
35	109 Abduction of mentally handi- capped person	Either way.	On indictment: 2 years.			
	110(1) Sexual act by officer with mentally	On indictment.	2 years.	Only by or with the consent of the Director of Public Prosecutions.		

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(1) Provision creating offence	(2) Nature of offence	(3) How triable	(4) Punishment	(5) Restriction on institution of proceedings	(6) Alternative verdicts under section 8(1)(a)(i)	(7) Ancillary and miscellaneous
5						
10	110(2) disordered in-patient Sexual act by officer with mentally disordered out- patient	On indictment.	2 years.	Only by or with the consent of the Director of Public Prosecutions.		
15	110(3) Sexual act by guardian, etc., with mentally disordered patient	On indictment.	2 years.	Only by with the consent of the Director of Public Prosecutions.		
20	111 Indecent assault	Either way.	On indictment: 10 years.			
	112 Procurement of gross indecency by threats	Either way.	On indictment: 5 years.			
25	113 Indecent exposure	Only summarily.	3 months or a fine not exceeding level 3 on the standard scale.			
	114 Indecency with child under thirteen	Either way.	On indictment: 5 years.			
	115 Indecency with child under sixteen	Either way.	On indictment: 2 years.			
30	116 Indecent pho- tographing of children	Either way.	On indictment: 3 years. On summary conviction: 6 months or a fine not exceeding level 5 on the standard scale, or both.			
35	117 Possession of indecent photo- graphs of children	Only summarily.	A fine not exceeding level 5 on the standard scale.			

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(1) Provision creating offence	(2) Nature of offence	(3) How triable	(4) Punishment	(5) Restriction on institution of proceedings	(6) Alternative verdicts under section 8(1)(a)(i)	(7) Ancillary and miscellaneous
5	118 Bestiality	Only summarily.	6 months.			
	119 Procuring bestiality	Either way.	On indictment: 5 years.			
	120(2) Sexual acts in public	Either way.	On indictment: 12 months.			
10	121 Acts in public lavatories	Either way.	On indictment: 12 months.			
	123 Organising prostitution	Either way.	On indictment: 7 years.			
	124 Controlling a prostitute	Either way.	On indictment: 3 years.			
15	125 Facilitating prostitution	Either way.	On indictment: 3 years.			
	127 Managing premises used for prostitution	Only summarily.	6 months, or a fine of £10,000, or both.			
20	128 Letting premises for prostitution	Only summarily.	6 months, or a fine of £10,000, or both.			
	129 Permitting use of premises for prostitution	Only summarily.	6 months, or a fine of £10,000, or both.			
25	130 Use of premises for prostitution involving personal harm	Only summarily.	6 months, or a fine of £10,000, or both.			
	131 Procurement of woman to become prostitute	Either way.	On indictment: 2 years.			
30	132 Procurement of woman under twenty-one	Either way.	On indictment: 2 years.			
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(1) Provision creating offence	(2) Nature of offence	(3) How triable	(4) Punishment	(5) Restriction on institution of proceedings	(6) Alternative verdicts under section 8(1)(a)(i)	(7) Ancillary and miscellaneous
5	133 Procurement of homosexual acts	Either way.	On indictment: 2 years.			
10	135 Woman prostitute loitering or soliciting	Only summarily.	A fine not exceeding level 3 on the standard scale.			
	136 Kerb-crawling	Only summarily.	A fine not exceeding level 3 on the standard scale.			
15	137 Persistent soliciting of women	Only summarily.	A fine not exceeding level 3 on the standard scale.			
20	138 Soliciting by man for homosexual purposes	Either way.	On indictment: 2 years.			
25	Part II, Chapter III - Theft, Fraud and Related Offences					The provisions of Schedule 6 relate to this Chapter. Provisions affecting particular offences only are referred to in this column.
30	140 Theft	Either way.	On indictment: 10 years.	Where the property belongs to the defendant's spouse, only by or with the consent of the Director of Public Prosecutions; but this restriction does not apply— (i) if the defendant is charged with the offence jointly with the spouse; or (ii) if by virtue of any judicial decree or order (wherever made) the defendant and the spouse are at the time of the offence under no	Taking a conveyance (s.150(1)).	Provision of Schedule 6 applying specifically to this offence: paragraph 4 (evidence on charge of theft of thing in course of transmission).
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(1) Provision creating offence	(2) Nature of offence	(3) How triable	(4) Punishment	(5) Restriction on institution of proceedings	(6) Alternative verdicts under section 8(1)(a)(i)	(7) Ancillary and miscellaneous
5						
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15						
20	146 Robbery	Only on indictment.	Life.			
25	147 Burglary	Either way, except that the following are triable only on indictment: (i) burglary comprising the commission of, or an intention to commit, an offence which is triable only on indictment; (ii) burglary in a dwelling if any person in the dwelling was subjected to violence or the threat of violence.	On indictment: 14 years.			
30						
35	148 Aggravated burglary	Only on indictment.	Life.			
	149 Removal of articles from places open to the public	Either way.	On indictment: 5 years.			
	150(1) Taking a conveyance	Only summarily.	6 months, or a fine not exceeding level 5 on the standard scale, or both.			
40	150(2) Taking a pedal cycle	Only summarily.	A fine not exceeding level 3 on the standard scale.			

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	(1) Provision creating offence	(2) Nature of offence	(3) How triable	(4) Punishment	(5) Restriction on institution of proceedings	(6) Alternative verdicts under section 8(1)(a)(i)	(7) Ancillary and miscellaneous
5	151	Interference with vehicles	Only summarily.	3 months, or a fine not exceeding level 4 on the standard scale, or both.			
	152	Abstracting electricity	Either way.	On indictment: 5 years.			
10	153	Making off without payment	Either way.	On indictment: 2 years.			
	154	Blackmail	Only on indictment.	14 years.			
	156	Obtaining property by deception	Either way.	On indictment: 10 years.			
15	157	Obtaining services by deception	Either way.	On indictment: 5 years.			
	158	Evasion of liability by deception	Either way.	On indictment: 5 years.			
	159	Obtaining pecuniary advantage by deception	Either way.	On indictment: 5 years.			
25	160	False accounting	Either way.	On indictment: 7 years.			
	161	False statements by company directors, etc.	Either way.	On indictment: 7 years.			
30	162	Suppression, etc. of documents	Either way.	On indictment: 7 years.			
	163	Procuring execution of valuable security	Either way.	On indictment: 7 years.			
35	167	Forgery	Either way.	On indictment: 10 years.			Provision of Schedule 6 applying speci-

Criminal Code

(1) Provision creating offence	(2) Nature of offence	(3) How triable	(4) Punishment	(5) Restriction on institution of proceedings	(6) Alternative verdicts under section 8(1)(a)(i)	(7) Ancillary and miscellaneous
168	Copying a false instrument	Either way.	On indictment: 10 years.			ficially to this offence: paragraph 1 (powers of search, seizure and forfeiture).
169	Using a false instrument	Either way.	On indictment: 10 years.			As for forgery (s.167).
170	Using a copy of a false instrument	Either way.	On indictment: 10 years.			As for forgery (s.167).
171(1)	Having a false instrument with ulterior intention	Either way.	On indictment: 10 years.			
171(2)	Having a false instrument	Either way.	On indictment: 2 years.			
171(3)	Having material for forgery with ulterior intention	Either way.	On indictment: 10 years.			
171(4)	Having material for forgery	Either way.	On indictment: 2 years.			
172	Handling stolen goods	Either way.	On indictment: 14 years.			Provisions of Schedule 6 applying specifically to this offence: paragraph 4(2) (indictment and trial of persons together) paragraph 4(3) (evidence).
173	Advertising rewards for return of goods stolen or lost	Only summarily.	A fine not exceeding level 3 on the standard scale.			

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(1) Provision creating offence	(2) Nature of offence	(3) How triable	(4) Punishment	(5) Restriction on institution of proceedings	(6) Alternative verdicts under section 8(1)(a)(i)	(7) Ancillary and miscellaneous
5 175 Part II, Chapter IV - Other offences relating to property	Going equipped	Either way.	On indictment: 3 years.			The provisions of Schedule 6 are ancillary to sections 178 to 196.
10 180(1)	Destroying or damaging property	Either way (but to be tried summarily where value involved does not exceed "the relevant sum": Magistrates' Courts Act 1980, s.22).	On indictment: 10 years. On summary conviction, where court proceeded to summary trial in pursuance of Magistrates' Courts Act 1980, s.22: 3 months, or a fine not exceeding level 4 on the standard scale, or both.	Where the property belongs to the defendant's spouse, only by or with the consent of the Director of Public Prosecutions; but this restriction does not apply— (i) if the defendant is charged with the offence jointly with the spouse; or (ii) if by virtue of any judicial decree or order (wherever made) the defendant and the spouse are at the time of the offence under no obligation to cohabit; and for this purpose the institution of proceedings includes, notwithstanding section 25 of the Prosecution of Offences Act 1985,— (a) an arrest (if without warrant) made by the spouse; and (b) the issue of a warrant of arrest on an information laid by the spouse.		
15 20 25 30 35	Arson	Either way.	On indictment: Life.	As in the case of destroying or damaging property (s.180(1)).		
40 180(1) and (3) 180(2)	Intentionally or	Only on indictment.	Life.	As in the case of destroying		As in the case of destroying or damaging property (s.180(1)).

(1) Provision creating offence	(2) Nature of offence	(3) How triable	(4) Punishment	(5) Restriction on institution of proceedings	(6) Alternative verdicts under section 8(1)(a)(i)	(7) Ancillary and miscellaneous
5	recklessly endangering life (or the same by fire (arson))			or damaging property (s.180(1)).		
10	181 Threats to destroy or damage property	Either way.	On indictment: 10 years.			
15	182 Possessing anything with intent to destroy or damage property	Either way.	On indictment: 10 years.			
20	190 Violence for securing entry	Only summarily.	6 months, or a fine not exceeding level 5 on the standard scale, or both.			
25	191(1) Adverse occupation of residential premises	Only summarily.	6 months, or a fine not exceeding level 5 on the standard scale, or both.			
	191(3) False statement as to intending occupier	Only summarily.	6 months, or a fine not exceeding level 5 on the standard scale, or both.			
30	192(2) Failure to leave land despite direction	Only summarily.	3 months, or a fine not exceeding level 4 on the standard scale, or both.			
	193 Trespassing with a weapon of offence	Only summarily.	3 months, or a fine not exceeding level 5 on the standard scale, or both.			
35	194 Trespassing on premises of foreign missions, etc.	Only summarily.	6 months, or a fine not exceeding level 5 on the standard scale, or both.			
	195 Obstruction of court officers executing process	Only summarily.	6 months, or a fine not exceeding level 5 on the standard scale, or both.			

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(1) Provision creating offence	(2) Nature of offence	(3) How triable	(4) Punishment	(5) Restriction on institution of proceedings	(6) Alternative verdicts under section 8(1)(a)(i)	(7) Ancillary and miscellaneous
5	for possession against unautho- rised occupiers.					
10	196(1) Eviction of residential occupier	Either way.	On indictment: 2 years.			Proceedings may be instituted by any of the following authorities: (a) councils of districts and London boroughs; (b) the Common Council of the City of London; (c) the council of the Isles of Scilly.
15						
20	196(2) Harassment of residential occupier	Either way.	On indictment: 2 years.			As for s.196(1).
25	196(3) Harassment by landlord or landlord's agent	Either way.	On indictment: 2 years.			As for s.196(1).
30	Part II, Chapter V - Offences against Public Peace and Safety					The provisions of Schedule 7 relate to this Chapter. Provisions affecting particular offences only are referred to in this column.
35	198 Riot	Only on indictment.	10 years.	Only by or with the consent of the Director of Public Prosecutions.		
40	199 Violent disorder	Either way.	On indictment: 5 years.		Behaviour etc. intended or likely to cause fear of violence (s.201).	Provision of Schedule 7 applying speci- fically to this offence: paragraph 1(2) (powers of Crown Court on conviction of

(1) Provision creating offence	(2) Nature of offence	(3) How triable	(4) Punishment	(5) Restriction on institution of proceedings	(6) Alternative verdicts under section 8(1)(a)(i)	(7) Ancillary and miscellaneous
200	Affray	Either way.	On indictment: 3 years.		Behaviour etc. intended or likely to cause fear of violence (s.201).	offence under s.201). Provision of Schedule 7 applying speci- fically to this offence: paragraph 1(2) (powers of Crown Court on conviction of offence under s.201).
201	Behaviour etc. intended or likely to cause fear of violence	Only summarily.	6 months, or a fine not exceeding level 5 on the standard scale, or both.			
202	Behaviour etc. likely to cause harassment, alarm or distress	Only summarily.	A fine not exceeding level 3 on the standard scale.			
205	Behaviour etc. intended or likely to stir up racial hatred	Either way.	On indictment: 2 years.	Only by or with the consent of the Attorney-General.		Provision of Schedule 7 applying speci- fically to this offence: paragraph 3 (power to order forfeiture of written material).
206	Publication etc. of written material intended or likely to stir up racial hatred	Either way.	On indictment: 2 years.	Only by or with the consent of the Attorney-General.		Provision of Schedule 7 applying speci- fically to this offence: paragraph 3 (power to order forfeiture).
207	Public perfor- mance of play intended or likely to stir up racial hatred	Either way.	On indictment: 2 years.	Only by or with the consent of the Attorney-General.		

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(1) Provision creating offence	(2) Nature of offence	(3) How triable	(4) Punishment	(5) Restriction on institution of proceedings	(6) Alternative verdicts under section 8(1)(a)(i)	(7) Ancillary and miscellaneous
5 208	Distribution etc. of recording intended or likely to stir up racial hatred	Either way.	On indictment: 2 years.	Only by or with the consent of the Attorney-General.		Provision of Schedule 7 applying specifically to this offence: paragraph 3 (power to order forfeiture).
10 209	Broadcast etc. of programme intended or likely to stir up racial hatred	Either way.	On indictment: 2 years.	Only by or with the consent of the Attorney-General.		
15 210	Possession of racially inflammatory material	Either way.	On indictment: 2 years.	Only by or with the consent of the Attorney-General.		Provisions of Schedule 7 applying specifically to this offence: paragraphs 2 (powers of entry and search) and 3 (power to order forfeiture).
20 212	Wearing of uniform	Only summarily.	3 months, or a fine not exceeding level 4 on the standard scale, or both.	Further proceedings after charge only with the consent of the Attorney-General except as authorised by section 25 of the Prosecution of Offences Act 1985.		Provision of Schedule 7 applying specifically to this offence: paragraph 4 (release on bail).
25 213	Management etc. of quasi-military organisation	Either way.	On indictment: 2 years.	Only with the consent of the Attorney-General.		Provision of Schedule 7 applying specifically to this offence: paragraph 5 (powers of entry, search and seizure).
30 214(1)	Endeavours to break up lawful public meetings	Only summarily.	6 months, or a fine not exceeding level 4 on the standard scale, or both.			
35 214(2)	Refusal to	Only summarily.	A fine not exceeding level 1			

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(1) Provision creating offence	(2) Nature of offence	(3) How triable	(4) Punishment	(5) Restriction on institution of proceedings	(6) Alternative verdicts under section 8(1)(a)(i)	(7) Ancillary and miscellaneous
5	declare name and address to constable at public meeting		on the standard scale.			
10	215 Possession of offensive weapon	Either way.	On indictment: 2 years. On summary conviction: 3 months, or a fine not exceeding level 5 on the standard scale, or both.			
15	216 Possession of article with blade or point	Only summarily.	A fine not exceeding level 3 on the standard scale.			
	217 Manufacture etc. of dangerous weapons	Only summarily.	6 months, or a fine not exceeding level 4 on the standard scale, or both.			
20	218(1) Bomb hoaxes	Either way.	On indictment: 5 years. On summary conviction: 3 months, or a fine not exceeding level 5 on the standard scale, or both.			
25	218(2) Bomb hoax by communicating information	Either way	On indictment: 5 years. On summary conviction: 3 months, or a fine not exceeding level 5 on the standard scale, or both.			
30	219(1) Contamination of or interference with goods	Either way	On indictment: 10 years.			
35	219(2) Threats to contaminate or interfere with goods	Either way	On indictment: 10 years			
40	219(3) Possession of article in connection with contamination of or	Either way	On indictment: 10 years			

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(1) Provision creating offence	(2) Nature of offence	(3) How triable	(4) Punishment	(5) Restriction on institution of proceedings	(6) Alternative verdicts under section 8(1)(a)(i)	(7) Ancillary and miscellaneous
	interference with goods					

SCHEDULE 2

Section 39.

DISPOSAL AFTER RETURN OF MENTAL DISORDER VERDICT

[This Schedule will contain the powers of the Courts in relation to
5 defendants found not guilty on evidence of mental disorder,
provisions relating to the exercise of these powers and the conse-
quences of their exercise, and related provisions.]

SCHEDULE 3

Section 83(7).

**MODIFICATIONS OF SECTION 83 FOR CHILDREN IN CERTAIN
10 CASES**

*Children in care of local authorities
and voluntary organisations*

1.—(1) This paragraph applies in the case of a child who is in the
care of a local authority or voluntary organisation in England or
15 Wales.

(2) Where this paragraph applies, section 83 shall have effect as
if—

- (a) the reference in subsection (1) to the appropriate consent were
a reference to the consent of the local authority or voluntary
20 organisation in whose care the child is; and
- (b) subsections (3), (5) and (6) were omitted.

Children in places of safety

2.—(1) This paragraph applies in the case of a child who is
committed to a place of safety in England and Wales in pursuance
25 of—

- (a) section 40 of the Children and Young Persons Act 1933; or
- (b) section 34 of the Adoption Act 1976; or
- (c) section 2(5) or (10), 16(3) or 28(1) or (4) of the Children and
Young Persons Act 1969; or
- 30 (d) section 12 of the Foster Children Act 1980.

(2) Where this paragraph applies, section 83 shall have effect as
if—

- (a) the reference in subsection (1) to the appropriate consent were
a reference to the leave of any magistrates' court acting for
35 the area in which the place of safety is; and
- (b) subsections (3), (5) and (6) were omitted.

Adoption and custodianship

3.—(1) This paragraph applies in the case of a child—

- (a) who is the subject of an order under section 14 of the
40 Children Act 1975 freeing him for adoption; or
- (b) who is the subject of a pending application for such an order;
or

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- (c) who is the subject of a pending application for an adoption order; or
 - (d) who is the subject of an order under section 25 of the Children Act 1975 or section 53 of the Adoption Act 1958 relating to adoption abroad or of a pending application for such an order; or
 - (e) who is the subject of a pending application for a custodianship order.
- (2) Where this paragraph applies, section 1 shall have effect as if—
- (a) the reference in subsection (1) to the appropriate consent were a reference—
 - (i) in a case within sub-paragraph (1)(a) above to the consent of the adoption agency which made the application for the order or, if the parental rights and duties in respect of the child have been transferred from that agency to another agency by an order under section 23 of the Children Act 1975, to the consent of that other agency;
 - (ii) in a case within sub-paragraph (1)(b), (c) or (e) above to the leave of the court to which the application was made; and
 - (iii) in a case within sub-paragraph (1)(d) above to the leave of the court which made the order or, as the case may be, to which the application was made; and
 - (b) subsection (3), (5) and (6) were omitted.

Cases within paragraphs 1 and 3

4. In the case of a child falling within both paragraph 1 and paragraph 3, the provisions of paragraph 3 shall apply to the exclusion of those in paragraph 1.

Interpretation

- 5.—(1) In this Schedule—
- (a) “adoption agency” has the meaning as in section 1 of the Children Act 1975;
 - (b) “adoption order” means an order under section 8(1) of that Act;
 - (c) “custodianship order” has the same meaning as in Part II of that Act; and
 - (d) “local authority” and “voluntary organisation” have the same meanings as in section 87 of the Child Care Act 1980.
- (2) In paragraph 3(1) above references to an order or to an application for an order are references to an order made by, or to an application to, a court in England or Wales.
- (3) Paragraph 3(2) above shall be construed as if the references to the court included, in any case where the court is a magistrates’ court, a reference to any magistrates’ court acting for the same petty sessions area as the court.

SCHEDULE 4

Section 89(3).

**PROVISIONS RELATING TO PROCEEDINGS FOR RAPE
OFFENCES**

Restrictions on evidence at trials for rape etc.

5 1.—(1) If at a trial any person is for the time being charged with a
rape offence to which he pleads not guilty, then, except with the
leave of the judge, no evidence and no question in cross-examination
shall be adduced or asked at the trial, by or on behalf of any
defendant at the trial, about any sexual experience of a complainant
10 with a person other than that defendant.

(2) The judge shall not give leave in pursuance of the preceding
sub-paragraph for any evidence or question except on an application
made to him in the absence of the jury by or on behalf of a
defendant; and on such an application the judge shall give leave if
15 and only if he is satisfied that it would be unfair to that defendant to
refuse to allow the evidence to be adduced or the question to be
asked.

(3) In sub-paragraph (1) “complainant” means a woman upon
whom, in a charge for a rape offence to which the trial in question
20 relates, it is alleged that rape was committed, attempted or proposed.

(4) Nothing in this paragraph authorises evidence to be adduced or
a question to be asked which cannot be adduced or asked apart from
this paragraph.

Application of paragraph 1 to committal proceedings,

25 *courts-martial and summary trials.*

2.—(1) Where a magistrates' court inquires into a rape offence as
examining justices, then, except with the consent of the court,
evidence shall not be adduced and a question shall not be asked at the
inquiry which, if the inquiry were a trial at which a person is charged
30 as mentioned in paragraph 1(1) and each of the accused at the inquiry
were charged at the trial with the offences of which he is accused at
the inquiry, could not be adduced or asked without leave in pursuance
of that paragraph.

(2) On an application for consent in pursuance of the preceding
35 sub-paragraph for any evidence or question the court shall—

(a) refuse the consent unless the court is satisfied that leave in
respect of the evidence or question would be likely to be
given at a relevant trial; and

(b) give the consent if the court is so satisfied.

40 (3) Where a person charged with a rape offence is tried for that
offence either by court-martial or summarily before a magistrates'
court in pursuance of section 6(1) of the Children and Young Persons
Act 1969 (which provides for the summary trial in certain cases of
persons under the age of 17 who are charged with indictable offences)
45 the preceding paragraph shall have effect in relation to the trial as
if—

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- (a) the words “in the absence of the jury” in sub-paragraph (2) were omitted; and
- (b) for any reference to the judge there were substituted—
 - (i) in the case of a trial by court-martial for which a judge advocate is appointed, a reference to the judge advocate, and
 - (ii) in any other case, a reference to the court.

3.—(1) Except as authorised by a direction given in pursuance of this paragraph—

- (a) after an allegation that a woman has been the victim of a rape offence has been made by the woman or by any other person neither the woman’s name nor her address nor a still or moving picture of her shall during her lifetime—
 - (i) be published in England and Wales in a written publication available to the public; or
 - (ii) be broadcast or included in a cable programme in England and Wales, if that is likely to lead members of the public to identify her as an alleged victim of such an offence; and
- (b) after a person is accused of a rape offence no matter likely to lead members of the public to identify a woman as the complainant in relation to that accusation shall during her lifetime—
 - (i) be published in England and Wales in a written publication available to the public; or
 - (ii) be broadcast or included in a cable programme in England and Wales;

but nothing in this sub-paragraph prohibits the publication or broadcasting or inclusion in a cable programme of matter consisting only of a report of criminal proceedings other than proceedings at, or intended to lead to, or on an appeal arising out of, a trial at which the accused is charged with the offence.

(2) In sub-paragraph (1) “picture” includes a likeness however produced.

(3) If, before the commencement of a trial at which a person is charged with a rape offence, he or another person against whom the complainant may be expected to give evidence at the trial applies to a judge of the Crown Court for a direction in pursuance of this sub-paragraph and satisfies the judge—

- (a) that the direction is required for the purpose of inducing persons to come forward who are likely to be needed as witnesses at the trial; and
- (b) that the conduct of the applicant’s defence at the trial is likely to be substantially prejudiced if the direction is not given,

the judge shall direct that sub-paragraph (1) shall not, by virtue of the accusation alleging the offence aforesaid, apply in relation to the complainant.

(4) If at a trial the judge is satisfied that the effect of sub-paragraph (1) is to impose a substantial and unreasonable restriction

upon the reporting of proceedings at the trial and that it is in the public interest to remove or relax the restriction, he shall direct that that sub-paragraph shall not apply to such matter relating to the complainant as is specified in the direction; but a direction shall not
5 be given in pursuance of this sub-paragraph by reason only of the outcome of the trial.

(5) If a person who has been convicted of an offence and given notice of an appeal to the Court of Appeal against the conviction, or notice of an application for leave so to appeal, applies to the Court of
10 Appeal for a direction in pursuance of this sub-paragraph and satisfies the Court—

(a) that the direction is required for the purpose obtaining evidence in support of the appeal; and

15 (b) that the applicant is likely to suffer substantial injustice if the direction is not given, the Court shall direct that sub-paragraph (1) shall not, by virtue of an accusation which alleges a rape offence and is specified in the direction, apply in relation to a complainant so specified.

(6)—

20 (i) A person is guilty of an offence if any matter is published, broadcast or included in a cable programme in contravention of paragraph 1 and he is—

25 (a) in the case of a publication in a newspaper or periodical, any proprietor, any editor or any publisher of the newspaper or periodical; or

(b) in the case of any other publication, the person who publishes it; or

30 (c) in the case of a broadcast or inclusion in a cable programme, any body corporate which transmits the programme, or includes the matter in a cable programme or any person having functions in relation to the programme corresponding to those of an editor of a newspaper.

(ii) A person is not guilty of an offence—

35 (a) if he is not aware and neither suspects nor has reason to suspect that the publication, broadcast or cable programme in question is of, or includes, such matter as is mentioned in paragraph 1(1); or

40 (b) if the woman has given written consent to the appearance of the matter in question and no person has interfered unreasonably with her peace and comfort with intent to obtain her consent.

45 (iii) The burden of proving a defence provided by this sub-paragraph is on the defendant except that the burden is on the prosecution to prove any such unreasonable interference as is mentioned in (ii)(b), above.

(7) For the purposes of this paragraph a person is accused of a rape offence if—

(a) an information is laid alleging that he has committed a rape offence; or

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- (b) he appears before a court charged with a rape offence; or
- (c) a court before which he is appearing commits him for trial on a new charge alleging a rape offence; or
- (d) a bill of indictment charging him with a rape offence is preferred before a court in which he may lawfully be indicted for the offence,

and references in this paragraph to an accusation alleging a rape offence shall be construed accordingly; and in this paragraph—

“a broadcast” means a broadcast by wireless telegraphy of sound or visual images intended for general reception, and cognate expressions shall be construed accordingly;

“complainant”, in relation to a person accused of a rape offence or an accusation alleging a rape offence, means the woman against whom the offence is alleged to have been committed; and

“written publication” includes a film, a sound track and any other record in permanent form but does not include an indictment or other document prepared for use in particular legal proceedings.

(8) Nothing in this paragraph—

(a) prohibits the publication or broadcasting, in consequence of an accusation alleging a rape offence, of matter consisting only of a report of legal proceedings other than proceedings at, or intended to lead to, or on an appeal arising out of, a trial at which the accused is charged with that offence; or

(b) affects any prohibition or restriction imposed by virtue of any other enactment upon a publication or broadcast;

and a direction in pursuance of this paragraph does not affect the operation of sub-paragraph (1) of this paragraph at any time before the direction is given.

Provisions supplementary to paragraph 3

4.—(1) In relation to a person charged with a rape offence in pursuance of any provision of the Naval Discipline Act 1957, the Army Act 1955 or the Air Force Act 1955, the preceding paragraph shall have effect with the following modifications, namely—

(a) any reference to a trial or a trial before the Crown Court shall be construed as a reference to a trial by court-martial;

(b) in sub-paragraph (1) after the word “Wales” in both places there shall be inserted the words “or Northern Ireland”;

(c) for any reference in sub-paragraph (3) to a judge of the Crown Court there shall be substituted a reference to the officer who is authorised to convene or has convened a court-martial for the trial of the offence (or, if after convening it he has ceased to hold the appointment by virtue of which he convened it, the officer holding that appointment) and for any reference in sub-paragraph (4) to such a judge there shall be substituted a reference to the court;

(d) for any reference in sub-paragraph (5) to the Court of Appeal there shall be substituted a reference to the Courts-Martial

Appeal Court; and

(e) in sub-paragraph (7) for paragraphs (a) to (d) there shall be substituted the words "he is charged with a rape offence in pursuance of any provision of the Naval Discipline Act 1957, the Army Act 1955 or the Air Force Act 1955".

(2) If after the commencement of a trial at which a person is charged with a rape offence a new trial of the person for that offence is ordered, the commencement of any previous trial at which he was charged with that offence shall be disregarded for the purposes of sub-paragraph (3) of the preceding paragraph.

(3) In relation to a conviction of an offence tried summarily as mentioned in paragraph 2(3) of this Schedule, for references to the Court of Appeal in sub-paragraph (5) of the preceding paragraph there shall be substituted references to the Crown Court and the reference to notice of an application for leave to appeal shall be omitted.

5. In this Schedule "a rape offence" means any offence of rape, attempted rape, procuring, assisting or encouraging rape or attempted rape, incitement to rape, conspiracy to rape and burglary intending to rape.

SCHEDULE 5

Section 116(5).

INDECENT PHOTOGRAPHS OF CHILDREN

Entry, search and seizure

1.—(1) The following applies where a justice of the peace is satisfied by information on oath, laid by or on behalf of the Director of Public Prosecutions or by a constable, that there is reasonable ground for suspecting that, in any premises in the petty sessions area for which he acts, there are indecent photographs of children and that such photographs—

- (a) are or have been taken there; or
- (b) are or have been shown there, or are kept there with a view to their being distributed or shown.

(2) The justice may issue a warrant under his hand authorising any constable to enter (if need be by force) and search the premises within fourteen days from the date of the warrant, and to seize and remove any articles which he believes (with reasonable cause) to be or include indecent photographs of children taken or shown on the premises, or kept there with a view to their being distributed or shown.

(3) Articles seized under the authority of the warrant, and not returned to the occupier of the premises, shall be brought before a justice of the peace acting for the same petty sessions area as the justice who issued the warrant.

(4) This paragraph and paragraph 2 below apply in relation to any stall or vehicle, as they apply in relation to premises, with the necessary modifications of references to premises and the substitution of references to use for references to occupation.

Forfeiture

2.—(1) The justice before whom any articles are brought in pursuance of paragraph 1 may issue a summons to the occupier of the premises to appear on a day specified in the summons before a magistrates' court for that petty sessions area to show cause why they should not be forfeited. 5

(2) If the court is satisfied that the articles are in fact indecent photographs of children, taken on the premises or shown there or kept there with a view to their being distributed or shown, the court shall order them to be forfeited; but if the person summoned does not appear, the court shall not make an order unless service of the summons is proved. 10

(3) In addition to the persons summoned, any other person being the owner of the articles brought before the court, or the persons who made them, or any other person through whose hands they had passed before being seized, shall be entitled to appear before the court on the day specified in the summons to show cause why they should not be forfeited. 15

(4) Where any of the articles are ordered to be forfeited under sub-paragraph (2), any person who appears, or was entitled to appear, to show cause against the making of the order may appeal to the Crown Court. 20

(5) If as respects any articles brought before it the court does not order forfeiture, the court may if it thinks fit order the person on whose information the warrant for their seizure was issued to pay such costs as the court thinks reasonable to any person who has appeared before it to show cause why the photographs should not be forfeited; and costs order to be paid under this sub-paragraph shall be recoverable as a civil debt. 25

(6) Where indecent photographs of children are seized under paragraph 1 above, and a person is convicted under section 116(1) of offences in respect of those photographs, the court shall order them to be forfeited. 30

(7) An order made under sub-paragraph (2) or (6) above (including an order made on appeal) shall not take effect until the expiration of the ordinary time within which an appeal may be instituted or, where such an appeal is duly instituted, until the appeal is finally decided or abandoned; and for this purpose— 35

(a) an application for a case to be stated or for leave to appeal shall be treated as the institution of an appeal; and 40

(b) where a decision on appeal is subject to a further appeal, the appeal is not finally decided until the expiration of the ordinary time within which a further appeal may be instituted or, where a further appeal is duly instituted, until the further appeal is finally decided or abandoned. 45

SCHEDULE 6

Sections 177

PROVISIONS ANCILLARY TO CHAPTERS III AND IV OF PART II

and 186.

Powers of search, forfeiture, etc.

- 5 1.—(1) If it appears to a justice of the peace, from information given him on oath, that there is reasonable cause to believe that a person has in his custody or under his control—
- 10 (a) any thing which he or another has used, whether before or after the coming into force of this Act, or intends to use, for the making of any false instrument or copy of a false instrument, in contravention of section 167 or 168; or
- 15 (b) any false instrument or copy of a false instrument which he or another has used, whether before or after the coming into force of this Act, or intends to use, in contravention of section 169 or 170; or
- (c) any thing custody or control of which is an offence under section 171,
- the justice may issue a warrant authorising a constable to search for and seize the object in question, and for that purpose to enter any
- 20 premises specified in the warrant.
- (2) A constable may at any time after the seizure of any object suspected of falling within sub-paragraph (1)(a), (b) or (c) (whether the seizure was effected by virtue of a warrant under that sub-paragraph or otherwise) to apply to a magistrates' court for an order
- 25 under this sub-paragraph with respect to the object; and the court, if it is satisfied both that the object in fact falls within any of those sub-paragraphs and that it is conducive to the public interest to do so, may make such order as it thinks fit for the forfeiture of the object and its subsequent destruction or disposal.
- 30 (3) Subject to sub-paragraph (4), the court by or before which a person is convicted of an offence under sections 167 to 171 may order any object shown to the satisfaction of the court to relate to the offence to be forfeited and either destroyed or dealt with in such other manner as the court may order.
- 35 (4) The court shall not order any object to be forfeited under sub-paragraph (2) or (3) where a person claiming to be the owner of or otherwise interested in it applies to be heard by the court, unless an opportunity has been given to him to show cause why the order should not be made.
- 40 2.—(1) If it appears to a justice of the peace, from information given him on oath, that there is reasonable cause to believe that a person has in his custody or possession or on his premises any stolen goods, the justice may issue a warrant to search for and seize the same; but no warrant to search for stolen goods shall be addressed to a
- 45 person other than a constable except under the authority of an enactment expressly so providing.
- (2) Where under this paragraph a person is authorised to search premises for stolen goods, he may enter and search the premises accordingly, and may seize any goods he believes to be stolen goods.

SCH. 6

(3) This paragraph is to be construed in accordance with section 174.

3.—(1) If it appears to a justice of the peace, from information given him on oath, that there is reasonable cause to believe that any person has in his custody or under his control or on his premises anything which there is reasonable cause to believe has been used or is intended for use to commit an offence—

(a) by destroying or damaging property belonging to another; or

(b) by destroying or damaging any property in a way likely to endanger the life of another,

the justice may issue a warrant authorising any constable to search for and seize that thing.

(2) A constable who is authorised under this paragraph to search premises for anything, may enter (if need be by force) and search the premises accordingly and may seize anything which he believes to have been used or to be intended to be used as aforesaid.

(3) The Police (Property) Act 1897 (disposal of property in the possession of the police) applies to property which has come into the possession of the police under this paragraph as it applies to property which has come into the possession of the police in the circumstances mentioned in that Act.

*Evidence and procedure on charge of theft
or handling stolen goods*

4.—(1) Any number of persons may be charged in one indictment, with reference to the same theft, with having at different times or at the same time handled all or any of the stolen goods, and the persons so charged may be tried together.

(2) On the trial of two or more persons indicted for jointly handling any stolen goods the jury may find any of the accused guilty if the jury is satisfied that he handled all or any of the stolen goods, whether or not he did so jointly with the other accused or any of them.

(3) Where a person is being proceeded against for handling stolen goods (but not for any offence other than handling stolen goods), then at any stage of the proceedings, if evidence has been given of his having or arranging to have in his possession the goods the subject of the charge, or of his undertaking or assisting in, or arranging to undertake or assist in, their retention, removal, disposal or realisation, the following evidence shall be admissible for the purpose of proving that he knew or believed the goods to be stolen goods:—

(a) evidence that he has had in his possession, or has undertaken or assisted in the retention, removal, disposal or realisation of, stolen goods from any theft taking place not earlier than twelve months before the offence charged; and

(b) (provided that seven days' notice in writing has been given to him of the intention to prove the conviction) evidence that he has within the five years preceding the date of the offence charged been convicted of theft or of handling stolen

goods.

(4) In any proceedings for the theft of anything in the course of transmission (whether by post or otherwise), or for handling stolen goods from such a theft, a statutory declaration made by any person
5 that he despatched or received or failed to receive any goods or postal packet, or that any goods or postal packet when despatched or received by him were in a particular state or condition, shall be admissible as evidence of the facts stated in the declaration, subject to the following conditions:—

10 (a) a statutory declaration shall only be admissible where and to the extent to which oral evidence to the like effect would have been admissible in the proceedings; and

(b) a statutory declaration shall only be admissible if at least seven days before the hearing or trial a copy of it has been given to
15 the person charged, and he has not, at least three days before the hearing of trial or within such further time as the court may in special circumstances allow, given the prosecutor written notice requiring the attendance at the hearing or trial of the person making the declaration.

20 (5) This paragraph is to be construed in accordance with section 174 of this Act; and in subparagraph (3)(b) above the reference to handling stolen goods includes any corresponding offence committed before the commencement of this Act.

Effect on civil proceedings

25 5.—(1) A person shall not be excused, by reason that to do so may incriminate that person or the wife or husband of that person of an offence to which this paragraph applies—

(a) from answering any question put to that person in proceedings
30 for the recovery or administration of any property, for the execution of any trust or for an account of any property or dealings with property; or

(b) from complying with any order made in any such proceedings; but no statement or admission made by a person in answering any such question or complying with any such order shall, in proceedings
35 for an offence to which this paragraph applies be admissible in evidence against that person or (unless they married after the making of the statement of admission) against the wife or husband of that person.

(2) This paragraph applies to any offence under sections 139 to 176
40 (other than sections 164 to 171) and sections 180 to 182.

SCHEDULE 7

PROVISIONS ANCILLARY TO CHAPTER V OF PART II

*Procedure relating to sections 198 to 202 and 205 to 210: parental
responsibility miscellaneous*

1.—(1) For the purposes of the rules against charging more than 5
one offence in the same count or information, each of sections 198 to
202 and 205 to 210 creates one offence.

(2) The Crown Court has the same powers and duties in relation to
a person who is by virtue of Sched. 1 col. 6 (alternative verdicts)
convicted before it of an offence under section 201 as a magistrates' 10
court would have on convicting him of the offence.

Powers of entry and search ancillary to section 210

2.—(1) If in England and Wales a justice of the peace is satisfied
by information on oath laid by a constable that there are reasonable
grounds for suspecting that a person has possession of written material 15
or a recording in contravention of section 210, the justice may issue a
warrant under his hand authorising any constable to enter and search
the premises where it is suspected the material or recording is
situated.

(2) A constable entering or searching premises in pursuance of a 20
warrant issued under this paragraph may use reasonable force if
necessary.

(3) In this paragraph "premises" means any place and, in particular,
includes—

- (a) any vehicle, vessel, aircraft or hovercraft, 25
- (b) any offshore installation as defined in section 1(3)(b) of the
Mineral Workings (Offshore Installations) Act 1971, and
- (c) any tent or movable structure.

Power to order forfeiture ancillary to sections 205 to 210

3.—(1) A court by or before which a person is convicted of— 30

- (a) an offence under section 205 relating to the display of written
material, or
- (b) an offence under section 206, 208 or 210,

shall order to be forfeited any written material or recording produced
to the court and shown to its satisfaction to be written material or a 35
recording to which the offence relates.

(2) An order made under this section shall not take effect in the
case of an order made in proceedings in England and Wales, until the
expiry of the ordinary time within which an appeal may be instituted
or, where an appeal is duly instituted, until it is finally decided or 40
abandoned.

(3) For the purposes of subparagraph (2)—

- (a) an application for a case stated or for leave to appeal shall be
treated as the institution of an appeal, and

(b) where a decision on appeal is subject to a further appeal, the appeal is not finally determined until the expiry of the ordinary time within which a further appeal may be instituted or, where a further appeal is duly instituted, until the further appeal is finally decided or abandoned.

Provision for bail in relation to charges under section 212

4. Where a person is charged with an offence under section 212 and is remanded in custody he shall, after the expiration of a period of eight days from the date on which he was so remanded, be entitled to be released on bail without sureties unless within that period the Attorney-General has consented to further proceedings in respect of the offence.

Powers of entry and search ancillary to section 213

5. If a judge of the High Court is satisfied by information on oath that there is reasonable ground for suspecting that an offence under section 213 has been committed, and that evidence of its commission is to be found at any premises or place specified in the information, he may, on an application made by a police officer of a rank not lower than that of inspector, grant a search warrant authorising any such officer named in the warrant together with any other persons named in the warrant and any other police officers to enter the premises or place at any time within one month from the date of the warrant, if necessary by force, and to search the premises or place and every person found therein, and to seize anything found on the premises or place or on any such person which the officer has reasonable ground for suspecting to be evidence of the commission of such an offence.

Provided that no woman shall, in pursuance of a warrant issued under this paragraph, be searched except by a woman.

30

SCHEDULE 8

Section 4(1).

ABOLITION OF OFFENCES AT COMMON LAW

Incitement
Murder
Manslaughter
35 Mayhem
Assault
Battery
False imprisonment
Kidnapping
40 Buggery

Criminal Code

Section 5(1).

SCHEDULE 9

CONSEQUENTIAL AMENDMENTS

[This Schedule will contain the amendments to existing legislation which will be required in consequence of the enactment of the Criminal Code Bill.]

5

Section 5(2).

SCHEDULE 10

REPEALS

[This Schedule will contain the enactments to be repealed, to the extent specified in column 3 of the Schedule, in consequence of the enactment of the Criminal Code Bill.]

10

EXAMPLES

Clause	Example	
8(1)(b)	8	D is charged with robbing P of his car. The jury may acquit of robbery but convict of theft (sub-paragraph (i) — an allegation of robbery includes an allegation of theft) or of taking the car without authority (sub-paragraph (ii) — on an indictment for theft the jury may convict of the offence of taking the car without authority: Theft Act 1968 s. 12(4), preserved by cl. 8(1)(a)(i) and Sched. 1 (in the entry against cl. 140 — theft)).
11(1)(a) and (b)	11(i)	D is acquitted or convicted of the murder of P. He may not be tried thereafter in respect of the same act for murder (subs. (1)(a)) or manslaughter, killing in pursuance of a suicide pact, complicity in suicide, infanticide, child destruction or intentional serious personal harm (subs. (1)(b) and cl. 8(1)(a), and Sched. 1, col. 6) or an attempt to commit any of these offences (subs. (1)(b) and cl. 8(1)(c)) because he might (on sufficient evidence being adduced) have been convicted of any of these offences on the indictment for murder.
	11(ii)	D is acquitted by a magistrates' court on an information charging him with assault on a constable. He may not thereafter be tried in respect of the same act for assault (subs. (1)(b) and cl. 8(4)(b) and Sched. 1, col. 6). If he is charged with assault to resist arrest, it is for the court to exercise any discretion it has to stay the proceedings (subs. (7)).
11(1)(c)(i) and (d) (i)	11(iii)	D is acquitted or convicted of theft. He may not thereafter be tried in respect of the same act for robbery (subs. (1)(c)(i) and (d)(i)) because an allegation of robbery includes an allegation of theft (cl. 6: "included offence").
11(1)(c)(ii)	11(iv)	D is acquitted of theft. He may not thereafter be tried in respect of the same act for burglary by entering and attempting to steal (subs. (1)(c)(ii)) because he might have been convicted of attempting to steal on the theft charge.
11(1)(d)(ii)	11(v)	D is acquitted or convicted of recklessly causing personal harm to P. He may not thereafter be tried in respect of the same act for intentionally causing personal harm (subs. (1)(c)(i) and (d)(i)), intentionally or recklessly causing serious personal harm (subs. (1)(c)(i) and (d)(i)), manslaughter or murder (subs. (1)(c)(i), (d)(i), and (3)), except where he was convicted and, on a subsequent day, the personal harm became serious or death occurred (subs. (1)(d)(ii), exception).
11(1)(c)(i)	11(vi)	D is acquitted of driving his motor-cycle in Nottingham on August 1, 1988 while disqualified. He may subsequently be tried for perjury in swearing that he did not drive his motor-cycle in Nottingham on that day because the allegations in the indictment do not include (expressly or by implication) an allegation of the offence of which he has been acquitted.

Clause	Example	
14	14(i)	D sets fire to a house in which, as he knows, P is asleep. P dies in the fire. There was an obvious risk that this would occur. But a finding either that D intended P's death or that he was aware that it might occur depends on a consideration of all the evidence, including the fact that that result was probable and any evidence given by D as to his state of mind.
	14(ii)	D buys from E, at a very favourable price, goods which E describes to him as "hot". D is charged with receiving stolen goods knowing or believing them to be stolen. The court or jury may be satisfied that most people would have realised from the use of the word "hot" that the goods were stolen. If so, they will take this into account in deciding whether D realised that fact, though they will not be bound to conclude that he did.
	14(iii)	D is charged with assaulting P. D in evidence says that he misinterpreted a gesture made by P as an act of violence and that he hit P in self-defence. The court or jury are satisfied that there were no reasonable grounds for the mistake D claims to have made. They will take this into account in deciding whether it is possible that D did make that mistake.
17(1)(a)	17(i)	D hits P who falls against Q, knocking Q down. Q suffers injuries from which she later dies. Assuming D intended to cause serious personal harm to P, but was not aware that he might kill, D is guilty of the manslaughter (cl. 55) of Q. His act has contributed to her death and, by clause 24, his intention to cause serious personal harm to P is to be treated as an intention to cause that result to Q.
17(1)(b)	17(ii)	D, E's mistress, lives with E and P, E's child by his wife. While E is away P falls seriously ill. D, wishing P to die, fails to call a doctor. P dies. P's life might have been prolonged by medical attention. If D was under a duty to obtain medical attention for P she is guilty of murder. She has caused P's death intending to cause death.
17(2)	17(iii)	D hits P during a quarrel. P is lying dazed when he is stabbed by E. P dies. D has not caused P's death because E's supervening act was the immediate cause of death, sufficient in itself to cause death, unforeseen by D and not reasonably foreseeable.
	17(iv)	D stabs P who is taken to hospital. P refuses the blood transfusion which he is told is necessary to save his life. D has caused P's death. The refusal of the transfusion may be unforeseen by D and not reasonably foreseeable, but it is not sufficient in itself to cause death. The death would not have occurred without the wound inflicted by D.
	17(v)	D stabs P who is taken to hospital. P is given negligent medical treatment which aggravates his condition and he dies. His life might have been saved by proper treatment. D has caused P's death. Negligent treatment, although unlikely, is not unforeseeable nor (save in an exceptional case) sufficient in itself to cause the result of death.

Clause	Example	
18(a)	18(i)	D is handed a packet by E. The packet contains heroin. D chooses not to open the packet and therefore does not see what it contains. If D believes it to contain heroin, he is “knowingly” in possession of heroin.
18(b)	18(ii)	D plants a bomb on an aeroplane with the purpose of destroying the aeroplane in flight and recovering the sum for which the cargo is insured. It is not D’s purpose to kill the crew but he is aware that their deaths will occur in the ordinary course of events. D “intends” to cause death and will be guilty of murder if the crew are killed by the explosion.
18(c)	18(iii)	D tries unsuccessfully to have sexual intercourse with P, who does not consent. If D is aware that P may not be consenting, he acts “recklessly” (since it is clearly unreasonable to take the risk of non-consent) and is guilty of attempted rape. (Under cl. 49(2) recklessness with respect to a circumstance (such as consent) suffices for an attempt where it suffices for the offence attempted. Recklessness includes an element of awareness and therefore suffices for the offence of rape under cl. 89).
	18(iv)	D, without justification or excuse, throws a brick at O, who is standing not far from a window belonging to P. D realises that the brick may break the window (or damage some other property belonging to another). He is guilty of recklessly destroying or damaging the window if the brick breaks it.
	18(v)	D, shooting at a bird on his estate, injured P, a poacher who was crouching in the undergrowth. D knew that poachers sometimes operated in this part of the estate and was aware that there was a risk of such injury. Whether D caused personal harm recklessly depends on whether it was reasonable for him to take the risk. That is the question for the court or jury to decide, having regard to all the circumstances that were known to D.
19(1)	19	D is indicted for intentionally causing serious personal harm to P. He may be convicted of recklessly causing serious personal harm or recklessly causing personal harm to P (see cl. 8(1)(b)); the allegation of recklessness being included in that of intention, these offences are “included offences” in relation to the offence charged.
20	20(i)	Under clause 147 a person commits burglary if he enters a building as a trespasser intending to steal in the building. Nothing is said as to any fault required in respect of the fact that the entrant is a trespasser. The offence is committed only if the entrant knows that, or is reckless whether, he is trespassing.
	20(ii)	An offence of causing polluting matter to enter a watercourse is enacted after the Code comes into force. In the absence of provision to the contrary the offence requires (a) an intention to cause the matter to enter the watercourse or recklessness whether it will do so, and (b) knowledge that the matter is a pollutant or recklessness whether it is.

Clause	Example	
21	21(i)	D, removing property from a flat at the end of his tenancy, intentionally damages a fixture. It is a landlord's fixture but D thinks that it belongs to himself. He is not guilty of intentionally damaging property belonging to the landlord.
	21(ii)	It is an offence for a person to act as auditor of a company at a time when he knows that he is disqualified from appointment to that office. D, a director of X Ltd., does not know that a director of a company is disqualified from appointment as its auditor. He acts as auditor of X Ltd. He is not guilty of the offence.
22(1)(a)	22(i)	<p>D, who is voluntarily intoxicated, tries unsuccessfully to have sexual intercourse with P, who does not consent. D is treated as having been aware of the risk of P's non-consent if he would have been aware of the risk had he been sober. He may therefore be convicted of attempted rape. (Compare example 18(iii).)</p> <p>If D succeeds in having intercourse with P believing, wrongly, that she is consenting, he will be treated as not having held that belief if he would not have held it had he been sober (cl. 88), and accordingly he may be convicted of rape.</p>
	22(ii)	D is charged with intentionally causing serious personal harm to P. He testifies that he was drunk and that he intended to break a window but was not aware of any risk that he might cause personal harm to any person. If it is found that this story may reasonably be true he must be acquitted of the offence charged; but, if he would have been aware of a risk of causing personal harm to a person had he been sober, he may be convicted of recklessly causing personal harm to P.
22(1)(b)	22(iii)	D is charged with intentionally causing serious personal harm to P. D mistakenly believed that P was making a murderous attack on him and that there was no other way in which he could save his life. He was voluntarily intoxicated and would not have made the mistake had he been sober. For the purposes of the defence under clause 44, he can rely on his belief in relation to the offence specifically charged but not in relation to the included offence of recklessly causing serious personal harm.
	22(iv)	D is charged with recklessly damaging property belonging to P. D, who was voluntarily intoxicated, damaged the property intentionally, believing that it belonged to his friend, E, who would not have objected to his doing so. If he had been sober, he would have realised that the property in question was not E's. He will be treated as if he knew that the property did not belong to E and will not be able to rely on the defence in clause 184.
22(4)(b)	22(v)	D is charged with intentionally causing serious personal harm to P. D, who suffers from brain damage, drank alcohol and then attacked P. He claims that he did not know what he was doing and the medical evidence is that his lack of awareness was due to the combined effect of the brain damage and the alcohol. If D may not have known what he was doing he must be acquitted and if, on the balance of probabilities, the medical evidence is correct, a mental disorder verdict should be returned (cl. 36).

Clause	Example	
22(5)(b) and (6)	22(vi)	D, a diabetic, having taken insulin in accordance with his doctor's instructions, omits to take food as directed. He knows from experience that this may result in his behaving in an aggressive and uncontrollable way. He loses consciousness due to hypoglycaemia and, while unconscious, strikes P. The insulin is not taken "properly for a medicinal purpose" and D is voluntarily intoxicated. If he is charged with recklessly causing personal harm, he may not rely on clause 33 (automatism and physical incapacity) and is to be treated as having struck the blow, being aware that it might cause personal harm.
	22(vii)	As in example 22(vi), except that D, though aware that failure to take food may result in loss of consciousness, is not aware that it may cause him to do any act. If charged with recklessly causing personal harm, he is regarded as having been involuntarily intoxicated and may rely on clause 33 and on clause 22(1). He could not do so if charged with careless driving, because of his awareness that failure to take food might result in unconsciousness and loss of control of a motor vehicle if he drove one.
23	23(i)	D falls asleep while smoking a cigarette. He wakes up to find that the mattress on which he is lying has caught fire from his cigarette. He realises that other property may be destroyed if the fire is not put out. He leaves the scene, taking no steps that he might take to put out the fire. The house burns down. D has recklessly caused the destruction of the house and is guilty of arson under clause 180(1) and (3).
	23(ii)	D is driving a car which, without fault on his part, comes to rest on P's foot. D realises what has happened but fails to move the car off P's foot. He is guilty of assault under clause 75(1), by allowing an application of force to P to continue.
24(1)	24(i)	D does an act by which he intends to injure O. He misses O but injures P, whom he does not intend to injure or have in mind as likely to be injured. He is guilty of intentionally causing personal harm to another. He may be convicted of this offence on an indictment or information alleging an intention to cause personal harm to P.
	24(ii)	D wishes to injure O. He aims a blow at P, believing him to be O. He is guilty of attempting to cause personal harm to P. If he hits and injures P, he is guilty of intentionally causing personal harm to P.
24(2)	24(iii)	D, under provocation, aims a shot at O with intent to kill him. The shot misses O and kills P. D may raise the plea of provocation under clause 58.
26(1)(b)	26(i)	D orders P, a security guard, to drop the money he is carrying and threatens to shoot him if he refuses. P drops the money and E, D's accomplice, takes it. D and E are guilty of robbery as principals.
26(1)(c)	26(ii)	D instructs E, aged nine, to climb through a window of a house and take some jewellery. E does so. E is not guilty of burglary because he is under ten years of age (cl. 32(1)). D is guilty of burglary as a principal.

Clause	Example	
<p data-bbox="331 613 480 674">26(1)(c) and (3)</p> <p data-bbox="331 846 448 907">26(2) and 29(1) (b)</p>	26(iii)	<p data-bbox="715 271 1390 562">D encourages E to trip up P. D knows, but E does not, that P suffers from a bone condition which makes him peculiarly vulnerable to fractures. D intends that P shall break his leg. E foresees only that P may be cut or bruised by the fall. E trips P who breaks his leg in the fall. E is guilty of recklessly causing personal harm, but is not guilty of a more serious offence of causing serious personal harm since he lacks both intention and recklessness in respect of the causing of serious harm. D is guilty as a principal of intentionally causing serious personal harm.</p>
	26(iv)	<p data-bbox="715 613 1390 815">D induces E to have sexual intercourse with P by telling E that P will consent to it despite her apparent reluctance. E has intercourse with P believing, despite her protests, that she is consenting. E is not guilty of rape because he lacks the required fault for the offence (cl. 89). D is guilty of rape as a principal notwithstanding that the definition of rape implies a personal act by the principal.</p>
	26(v)	<p data-bbox="715 846 1390 1077">An offence is created after the Code comes into force of selling to the prejudice of the purchaser any food which is not of the nature or quality demanded by the purchaser. The legislation excludes the application of clause 20 to this offence and provides that no fault is required. E, an assistant in D's shop, sells a pie to P which, unknown to D and E, is mouldy. D and E are guilty of the offence as principals.</p>
27(1)	27(i)	<p data-bbox="715 1111 1390 1341">It is an offence to use an overloaded lorry on the highway. D, a weighbridge operator at a colliery hands over a ticket to E, the driver of a lorry which has just been loaded with coal. The ticket records the weight of the load which is in excess of that permitted for the lorry. D knows that possession of the ticket will enable E to leave the colliery and drive the lorry on the highway. E does so. E is guilty of the offence as a principal. D is guilty as an accessory.</p>
	27(ii)	<p data-bbox="715 1375 1390 1637">D hears screams and the sounds of a struggle from E's room. He enters and watches silently while E has sexual intercourse with P, who is not consenting to it. E knows that P is not consenting. D is guilty of rape as an accessory if (a) his presence is an encouragement to E to have intercourse; and (b) he intends his presence to encourage E to have intercourse; and (c) he knows that P is not consenting or is reckless whether P consents; and (d) he realises that E is or may be aware that P is not consenting.</p>
	27(iii)	<p data-bbox="715 1671 1390 1872">At D's suggestion E tells P that a picture which E is selling is by Constable. Neither D nor E knows whether this statement is true. It is false. P buys the picture in reliance on the statement. E is guilty of obtaining property by (a reckless) deception. D is guilty of the offence as an accessory because he encourages E and is reckless whether E obtains the price by deception.</p>
	27(iv)	<p data-bbox="715 1906 1390 2074">D and E agree to assault P using their fists. During the assault E stabs P with a knife which D does not know E is carrying. P dies from the wound. E is guilty of murder if he intended the stabbing to kill or if he intended it to cause serious personal harm and was aware that it might cause death. D is not guilty as an accessory to murder because he</p>

Clause	Example
	<p>did not intend to assist or encourage E to do the act (stabbing) E did. He is not guilty of manslaughter as an accessory for the same reason. He is guilty of assault and an attempt to commit an offence under clause 70 or 72 if he intended to assault to cause serious personal harm or personal harm respectively.</p>
	<p>27(v) D assists E in carrying out a bank robbery, knowing that E is carrying a gun and that he may use it during the joint enterprise with the fault required for murder. E uses the gun to kill a security guard who is attempting to prevent their escape. D is guilty of murder as an accessory.</p>
27(3)	<p>27(vi) It is an offence to consume alcohol on licensed premises outside permitted hours. D, a licensee, fails to take steps to collect the drinks of customers who are drinking in his public house outside the permitted hours. D may be guilty as an accessory to the offence committed by the customers.</p>
27(4)	<p>27(vii) D lends E certain equipment, knowing that E intends to use it to break into premises. E uses it a week later to break into a bank in London. D is guilty as an accessory to burglary. He intended to assist E to do the acts constituting the offence and it is immaterial that he did not know which premises were to be entered or when.</p>
27(6)(a)	<p>27(viii) E and F agree to carry out a robbery at a warehouse. They approach D for assistance. Unknown to them D is an informer. D supplies advice in order to learn details of the plan. He subsequently passes the details to the police in the expectation that they will prevent the robbery. The police fail to arrive in time and the robbery takes place. D is not guilty as an accessory.</p>
27(6)(b)	<p>27(ix) D, a doctor, believes that sexual intercourse is very likely to take place between P, a girl aged 15, and her boyfriend Q. D prescribes contraceptive treatment for P, his only purpose being to guard P against the risk of pregnancy or sexually transmitted disease. Even if D knows that in the circumstances his act will inevitably encourage Q in having unlawful intercourse with P, D is not guilty as an accessory to the offence that Q commits when intercourse takes place.</p>
27(6)(c)	<p>27(x) D hands over an article to E on request, knowing that E intends to commit a burglary with it. The article belongs to E and D believes that he is legally obliged to return it. If D has no purpose to further the commission of burglary he will not be guilty as an accessory to any subsequent burglary committed by E.</p>
27(7)	<p>27(xi) It is an offence to have sexual intercourse with a girl under sixteen, and her consent is no defence. E has intercourse with D, a girl under sixteen, who consents to the intercourse. D is not guilty as an accessory to E's offence.</p>
27(8)	<p>27(xii) D and E agree that E shall set fire to a school. D later repents of the plan and advises E to abandon it. E sets fire to the school. D is not guilty of arson as an accessory but remains guilty of conspiracy to commit arson.</p>

Clause	Example	
28(1)	28	D and E jointly attack P with knives. P suffers serious injury. D and E are jointly charged with intentionally causing serious personal harm. The evidence shows that P suffered only one stab wound and it is uncertain which of the defendants inflicted it. Both may be convicted of the offence provided that the jury is satisfied in the case of each that he either did the act of stabbing himself or encouraged the other to do it.
29(1)(a)	29(i)	A statute provides that it is an offence for the holder of a justices' licence whether by himself, his servant or agent to supply intoxicating liquor on licensed premises outside permitted hours. No fault is required for this offence. D is the licensee of a public house. E, his barman, serves a drink to a friend outside the permitted hours. In the absence of any special defence D is guilty of the offence as a principal. Assuming fault on E's part, E is guilty as an accessory.
29(1)(b)	29(ii)	A statute provides that it is an offence for a person to sell goods to which a false trade description is applied. No fault is required for this offence. E, an assistant employed in D's shop, sells a ham as a "Scotch" ham. D has previously given instructions that such hams are not to be sold under any specific name of place of origin. The ham is in fact an American ham. Both D and E are guilty of the offence as principals.
30(1)	30(i)	It is an offence to use a motor vehicle on a road in breach of construction and use regulations. No fault is required. C, an employee of D Ltd., drives one of its lorries on a road. The lorry's condition does not comply with the regulations. D Ltd. commits the offence.
	30(ii)	If dark smoke is emitted from a chimney, the occupier of the building is guilty of an offence although he is not at fault. D Ltd. occupies a factory from the chimney of which dark smoke is emitted. It commits the offence.
30(2)–(5)	30(iii)	C, a director of D Ltd., conspires with others to obtain by deception for D Ltd. payments of a subsidy to which it is not entitled. D Ltd. is a party to the conspiracy and to any subsequent offence of obtaining the subsidy by deception.
30(8)(a)(i)	30(iv)	The carriage of a coach party without a special licence is an offence if, as the carrier knows or ought to know, the trip has been publicly advertised. A theatre club books a coach trip with D Ltd. The club then advertises spare seats in the local newspaper. C, a director of D Ltd., sees the advertisement and realises that it may relate to a company trip. He takes no action. The trip goes ahead without a special licence. If C ought to have discovered the facts, D Ltd. is guilty of the offence.
30(8)(a)(i)	30(v)	D Ltd. owns a sheep farm. C, a director, acting as such, orders the killing of a neighbouring farmer's dog. D Ltd. is not guilty of an offence of destroying or damaging property if C believes the circumstances to be such that the killing would be justifiable for the protection of the company's sheep (see cl. 44).

Clause	Example	
30(8)(a)(ii)	30(vi)	The manager of a store belonging to D Ltd. finds a controlled drug among groceries which have just been delivered to the store. He takes possession of it, intending to deliver it to the police. D Ltd. may rely upon this intention on a charge under the Misuse of Drugs Act 1971, s. 5(1), of possessing the drug (see s. 5(4)(b) of that Act).
30(8)(b) and (c)	30(vii)	D Ltd. has a parcel of heroin in its warehouse. It is guilty of having a controlled drug in its possession, unless it neither knows nor suspects nor has reason to suspect that the parcel contains such a drug (see Misuse of Drugs Act 1971, s. 28(2)). No director of D Ltd. with responsibility for warehousing operations knows or suspects or has reason to suspect that fact. D Ltd. is not guilty.
30(8)(c)	30(viii)	Goods are supplied in a store belonging to D Ltd., although safety regulations prohibit their supply. This is an offence under the Consumer Protection Act 1987, s. 12(1), unless D Ltd. can prove that it took all reasonable steps and exercised all due diligence to avoid committing the offence. This requires the company to prove that no fault on the part of controlling officers was involved in failing to maintain effective systems designed to avoid such an offence.
31	31	As in example 30(iii). D, the managing director of D Ltd., is not a party to the conspiracy, but he knows of it and could take steps to thwart it. He turns a blind eye to it and does nothing. He is guilty as an accessory to any offence of obtaining the subsidy by deception.
33(1)	33(i)	D, driving a car, has a sudden "black-out", as a result of which the car mounts the kerb and comes to rest against a wall. D is not guilty of driving without due care and attention.
33(1)(b)	33(ii)	D, driving a car, feels himself becoming drowsy. He continues driving and in due course falls asleep at the wheel. He is guilty of driving without due care and attention both before and after falling asleep.
33(2)	33(iii)	D is charged with recklessly causing personal harm to P when in a condition of impaired consciousness caused by alcohol, drugs or medicine. He cannot rely on his "state of automatism" if he was "voluntarily intoxicated".
33(2)	33(iv)	As in example 33(i). The car also passes a red traffic light. D is not guilty of failing to comply with a traffic sign.
35(1)	35	D intentionally sets fire to P's house when suffering from a mental illness having one or more of the severe features listed in clause 34. On a charge of arson he is entitled to a mental disorder verdict unless the jury is satisfied beyond reasonable doubt that the offence was not attributable to the illness.

Clause	Example	
36	36(i)	D is charged with intentionally causing serious personal harm to P. He was unaware of his violent act. It occurred when he was in a state of impaired consciousness during an epileptic episode of a kind to which he is prone. The impairment of consciousness was a feature of a disorder that may cause a similar state on another occasion. A mental disorder verdict must be returned. The court has power to make any of a number of orders or to discharge D (cl. 39 and Sched. 2).
	36(ii)	The same charge as in example 36(i). A similar explanation of the attack is given. The medical evidence leads the court or jury to think that the explanation may be true; D must therefore be acquitted. But they are not satisfied (on the whole of the medical evidence, including any adduced by the prosecution) that it is in fact true; so there will not be a mental disorder verdict, mental disorder not having been proved.
	36(iii)	The same charge as in example 36(i). There is evidence that D, who suffers from diabetes, had taken insulin on medical advice. This had caused a fall in his blood-sugar level which deprived him of control or awareness of his movements. If D is acquitted, a mental disorder verdict is not appropriate. His "disorder of mind" was caused by the insulin, an "intoxicant" (see cl. 26(5)(a)). It was therefore a case of "intoxication" and not of "mental disorder" (cl. 34).
41	41	An offence is created after the Code comes into force of knowingly supplying liquor to a child. An exception is made for liquor in a properly corked and sealed vessel. A supplier has a defence if he believes the liquor to be in a properly corked and sealed vessel. But if it were provided that the offence is not committed if the supplier believes on reasonable grounds that the liquor is in a properly corked and sealed vessel, subsection (1) would not apply.
42(1)-(3)	42(i)	D takes part in a terrorist attack on a public house. He does so because E, the leader of the terrorist group, has told him that he (D) will be "severely punished" if he does not. D knows E's reputation for extreme violence and believes that E is threatening serious injury to himself or a member of his family. He does not believe that he has time to put himself under police protection before he must take part in the attack or suffer his "punishment". If clause 42(5) does not apply (see example 42(iv)), whether D has the defence of duress in respect of offences to which he is a party depends on a question to be answered by the jury: could D reasonably be expected to resist the threat as he understood it? The jury must have regard to all the circumstances, some of which would be: (a) the nature of the offences; (b) the part played by D; (c) D's age and any other personal characteristics affecting the gravity of the threat; (d) current attitudes to what may properly be expected of citizens facing threats from terrorists.
	42(ii)	As in example 42 (i), except that E communicates no threat to D. D is falsely told by F, and believes, that E will "severely punish" him if he does not take part in the raid. The result is the same as if the threat were actually made — that is, the same as in example 42(i).

Clause	Example	
42(1)–(4)	42(iii)	As in example 42(i), except that D realises that he has time to put himself under police protection. He believes, however, that the police cannot effectively protect him and his family from E. This belief, even if justified, is immaterial. The defence of duress is not available to D.
42(1)–(5)	42(iv)	As in example 42(i), except that D is himself a member of the terrorist group. When he joined he knew that the group sometimes violently punished its members for disobedience. If he had no reasonable excuse for joining the group (see example 42(v)), the defence of duress is not available to him.
	42(v)	As in example 42(iv). D is a police officer. He joined the group in that capacity, posing as a committed terrorist. If this constituted a “reasonable excuse” for joining the group, the defence of duress may be available to him. If it is, the jury may wish to take the fact that he is a police officer into account in deciding whether he could reasonably have been expected to resist the threat.
43(1) and (2)	43(i)	It is an offence to drive a motor vehicle on a road with a proportion of alcohol in the blood in excess of a prescribed limit. “Driving” for this purpose includes steering. The proportion of alcohol in D’s blood is above the limit. Having gone to sleep in the passenger seat of E’s car, he wakes to find himself alone in the car, which is running out of control down a steep hill towards children playing on the street. D, to avoid serious injury to himself or the children, steers the car into a wall, damaging the car. The defence of duress of circumstances may be available to him on a charge of the driving offence or of damaging property. It is a question for the tribunal of fact whether he could reasonably have been expected to act otherwise than as he did.
	43(ii)	D’s child, P, is a passenger in D’s car. P is taken ill. D exceeds the speed limit in order to get P to hospital as quickly as possible. If D believed that it was immediately necessary to drive at that speed in order to save P from death or serious harm, and if in the circumstances he could not reasonably have been expected to do otherwise, he is not guilty of the speeding offence.
44(1)(a)	44(i)	D shoots P who is about to attack him with a knife. If this action is necessary and reasonable to prevent P from killing or causing serious personal harm to D, D commits no offence. (It would be immaterial that D was unaware that P was armed with a knife, or was about to attack.)
	44(ii)	D shoots P whom he believes to be about to attack him with a knife. If this action would have been necessary and reasonable to prevent P killing, or causing serious personal harm to D, had D’s belief been true, D commits no offence, even if P was unarmed, or was not in fact about to attack.
44(3)(a)	44(iii)	D, a shopkeeper, sees P, whom he knows to be under the age of 10, take a watch from the counter and run off with it. D seizes P and takes the watch from him by force. If it is necessary to use force to prevent P from appropriating the watch and the force used is reasonable, D commits no offence.

Clause	Example	
44(3)(b)	44(iv)	D's tenant, P, is about to destroy certain fixtures in the leased premises. P wrongly believes that the fixtures belong to him. Although P lacks the fault for the offence of causing damage to property belonging to another, D may use reasonable and necessary force to protect his property.
	44(v)	Wrongly believing that D is about to attack him, P makes what he believes to be a counter-attack on D. If P is using no more force than would be necessary and reasonable if the circumstances were as he believed them to be, he is not committing any offence; but D may use necessary and reasonable force to repel P's attack.
44(3)(c)	44(vi)	P, a police officer, reasonably but wrongly believing D to be an armed, dangerous criminal, X, points a revolver at him. D, believing that he is about to be shot, strikes P and causes him serious personal harm. If in the light of D's belief this action is necessary and reasonable to prevent personal harm to D, he commits no offence, even though he knows that P is a police officer acting lawfully.
44(4)	44(vii)	P, a constable, is arresting Q. D, who believes that P has no grounds for making the arrest, uses force against P to free Q. In fact P has reasonable grounds for suspecting that Q has committed an arrestable offence. D has no defence under this section to a charge of assault or causing personal harm.
	44(viii)	As in example 44(vii), but D also believes that P is about to cause Q personal harm. If the force used by D would have been necessary and reasonable to prevent the apprehended personal harm to a person wrongfully arrested, D commits no offence.
44(5)	44(ix)	P, an armed criminal, shoots a policeman who drops his revolver. D, a bystander, fearing that P is about to shoot him, picks up the revolver to use it in self-defence. D is not guilty of being in possession of a firearm without a firearm certificate or of having with him an offensive weapon.
44(6)	44(x)	A gang of youths (the A group) shout taunts at a rival gang (the B group) until the latter attack them. D, a member of the A group, is attacked by P, a member of the B group, with a knife. D, who also has a knife, stabs P and kills or injures him. D has no defence under subsection (1) to a charge of murder, manslaughter or causing personal harm.
	44(xi)	Members of a political group, X, hold a lawful meeting. They know from experience that they are almost certain to be attacked by members of the rival group, Y. They are so attacked, and D, a member of the X group, kills or injures P, a member of the Y group. D may rely on subsection (1).
45	45(i)	A statute provides that local authorities may seize and destroy counterfeit goods. D, the properly-appointed official for this purpose, seizes and destroys P's counterfeit watches. D is not guilty of theft or criminal damage.
	45(ii)	D, a professional boxer taking part in a fight conducted in accordance with the rules of boxing, seriously injures P by a blow allowed by those rules. If the blow is lawful at common law D will not be guilty of an offence. (The Code

Clause	Example
47(1)	<p>does not limit any power of the courts to determine the existence, extent or application of any rule of the common law not abrogated by the Code: cl. 4(4).</p> <p>47(i) D tells E, aged nine, to put a certain powder in P's drink "to make him feel ill". D is not guilty of inciting E to administer a substance without consent (cl. 73); even if E does this act with the fault required (knowledge that the substance is capable of interfering substantially with the other's bodily functions) he will not commit the offence because he is under ten (cl. 32(1)). D may be guilty of attempting to commit the offence by an innocent agent.</p> <p>47(ii) D suggests to E that E should purchase a gold watch for £5 from F who is offering it for sale in a public house. D knows that the watch is stolen and believes that E knows this also. D is guilty of inciting E to handle stolen goods.</p>
47(2)	<p>47(iii) D requests E to persuade F to kill P. D is guilty of an incitement to incite, and, if the request to E were that E and F should act jointly to kill P, D would be guilty of an incitement to conspire. If the request is in a note delivered to E by X, who knows its contents, X is guilty of incitement as an accessory.</p>
47(3)	<p>47(iv) D, a girl aged fifteen, proposes to E that he should have sexual intercourse with her. D is not guilty of inciting the commission of an offence by E. If intercourse does take place she will not be an accessory to E's offence (cl. 27(7)).</p>
47(4)	<p>47(v) D, the secretary of an animal welfare organisation, writes an article in the organisation's newsletter describing methods of breaking into laboratories in order to release animals used for research into the wild. D is guilty of incitement to burglary if his article is an encouragement to its readers to commit that offence and if he intends that one or more of them shall do so.</p>
47(5)	<p>47(vi) D, who knows that F intends to commit a burglary, suggests to E that E should leave a ladder at a convenient place so as to facilitate F's entry to the building. D is not guilty of inciting E to commit an offence as he does not incite E to commit burglary as a principal. If E does place the ladder as suggested and F uses it to effect an entry D and E will be guilty of burglary as accessories (cl. 27(1) and (2)).</p>
48(1)	<p>48(i) D and E agree that E shall shoot P. Both wish to cause P serious personal harm and both realise that the shot may cause death. They are guilty of conspiring intentionally to cause serious personal harm. If P dies as a result of the shooting they will be guilty of murder. They are not guilty of conspiracy to murder because they do not intend that that offence shall be committed.</p> <p>48(ii) D, a controlling officer of a limited company, agrees with E, the company's accountant, to write a letter to P, a supplier, containing false representations as to the company's creditworthiness in order to induce P to supply goods to the company on credit. D and E are guilty of conspiracy with the company to obtain property by deception. The result would be different if there were no agreement between D and E. D could not then be guilty of</p>

Clause	Example	
		conspiracy with the company because the ordinary meaning of agreement requires a meeting of two minds and only one would be involved in this case.
48(1) and (2)	48(iii)	D and E agree to have sexual intercourse with P. They hope that she will consent but both are aware that she may not. They are guilty of conspiracy to rape. (Awareness of the risk of non-consent suffices for rape; therefore D's and E's recklessness (recklessness includes awareness of risk) as to the circumstance of non-consent suffices for conspiracy.)
48(5) and (6)	48(iv)	D and E agree that an armed robbery shall be carried out by a person to be recruited by E. E subsequently hires F to carry out the robbery. D, E and F are guilty of conspiracy to rob.
	48(v)	D and E know that F intends to burgle the house where they are employed. Without F's knowledge they agree to leave a ladder positioned so as to facilitate F's entry to the house. They are not guilty of conspiracy to be accessories to the commission of burglary by F.
48(1) and (7)	48(vi)	It is an offence to escape from prison. E and F agree to effect the escape of G, a prisoner. D agrees to supply a car to be used in the escape and is paid £500. He does not intend to supply the car or that the agreement to effect the escape should be carried out. Assuming that D's conduct amounts to encouragement, D is guilty as an accessory to the conspiracy of E and F.
48(8)(c)	48(vii)	The facts are as in example 48(iv). D, E and F are charged with conspiracy to rob. There is some circumstantial evidence against all three and a confession admitted only against F. D and E are acquitted and F is convicted. F's conviction is not inconsistent in the circumstances with the acquittal of D and E. If the evidence against D and E were substantially the same, and D were convicted and E acquitted, D's conviction would be inconsistent in the circumstances with E's acquittal.
48(8)(d)	48(viii)	D agrees with E, aged nine, that E shall act as lookout while D carries out a burglary. D is guilty of conspiracy to commit burglary. He has agreed with E that acts shall be done which will involve the commission of burglary by D, and they both intend that the offence shall be committed.
49(1) and (2)	49(i)	The facts are as in example 48(iii). If D tries unsuccessfully to have intercourse with P, who does not consent, D is guilty of attempted rape. It would make no difference if, as a result of voluntary intoxication, he believed that she was consenting (cll. 22(1) and 88, and see example 22(i)).
49(1) and (3)	49(ii)	D has custody of P, her mentally handicapped child by her divorced husband. E moves in to live with D and P. The police visit the house some weeks later and find P emaciated and very ill. D and E confess that, hoping P would die, they had agreed not to feed P or to call medical attention when P fell ill. Murder is an offence capable of being committed by an omission, therefore an attempt to commit murder by omission is within the scope of the section. D would have a duty to feed and obtain medical

Clause	Example	
49(6)	49(iii)	<p>care for her child; if her failure to discharge this duty was more than merely preparatory to the causing of death she would be guilty. E would also be guilty, either as a principal if he owed a similar duty himself or as an accessory to D's offence.</p> <p>D, knowing that E intends to burgle the house where D is employed, leaves a ladder positioned so as to facilitate E's entry to the house. D is not guilty of an attempt to be an accessory to burglary. If E uses the ladder to effect an entry, D will be guilty of burglary as an accessory.</p>
50(1)	50(i)	<p>D proposes to E that E should store a consignment of cigarettes which both believe are to be stolen by F. Unknown to them the cigarettes have been destroyed in a fire. D is guilty of inciting E to handle stolen goods, since the commission of the offence would be possible in the circumstances which D hopes will exist, namely that the cigarettes will be stolen by F.</p>
	50(ii)	<p>It is an offence to produce a controlled drug without a licence. Cocaine is a controlled drug. D and E agree to produce cocaine from a substance which, unknown to them, contains no cocaine and from which cocaine cannot be produced. Neither D nor E has the relevant licence. They are guilty of conspiracy to commit the offence, since the commission of it would be possible in the circumstances which they believe exist, namely that the substance is capable of yielding cocaine.</p>
50(3)	50(iii)	<p>D sells to P goods which he represents as being of a certain weight but which he believes to be underweight. In fact D has miscalculated and the goods are of the weight described. D is guilty of an attempt to obtain the price of the goods by deception, since the commission of this offence would have been possible in the circumstances which D believed to exist at the relevant time.</p>
50(3)	50(iv)	<p>D, unaware that P is about to attack him with a knife, shoots P. If this action is necessary and reasonable to prevent P from killing or causing serious personal harm to D, D commits no offence involving the use of force (cl. 44(1)) and is not guilty of an attempt to commit such an offence.</p>
52(1) and (3)	52(i)	<p>D and E agree in England to kill P in France. They are guilty of conspiracy to murder.</p>
52(2) and (3)	52(ii)	<p>D in France, tries to persuade E that E should plant a bomb in the centre of London. D is guilty of inciting E to cause an explosion likely to endanger life or property.</p>
52(4)	52(iii)	<p>It is an offence to import cannabis into England without a licence. D and E agree in Morocco to import cannabis into England. Neither D nor E has the relevant licence. E travels to London to make arrangements for the importation. D and E are guilty of conspiracy to commit the offence.</p>

APPENDIX C

A COMPREHENSIVE CRIMINAL CODE

Part I

General Principles of Liability

Clauses 1 to 52 of the draft Criminal Code Bill

Part II

Specific Offences

The following offences should in due course be collected in Part II of the Criminal Code Act. The list assumes: (a) the enactment of offences to give effect to existing recommendations of the Law Commission and the Criminal Law Revision Committee; and (b) otherwise the modernisation, in conformity with the style of the Code, of statutory offences. It is also assumed that some extant common law offences will be replaced by statutory offences and that the latter will find their places in Part II.

Chapter I: Offences against the person

Clauses 53 to 86 of the draft Criminal Code Bill
Offences against the personal security of the sovereign
Cruelty to children¹
Criminal defamation²

Chapter II: Sexual offences

Clauses 87 to 138 of the draft Criminal Code Bill

Chapter III: Theft, fraud and related offences

Clauses 139 to 177 of the draft Criminal Code Bill
[Conspiracy to defraud³]

Chapter IV: Other offences relating to property

Clauses 178 to 196 of the draft Criminal Code Bill

Chapter V: Offences relating to public peace and safety

Clauses 197 to 220 of the draft Criminal Code Bill
Offences under the Unlawful Drilling Act 1819⁴
Offences under the Explosive Substances Act 1883⁵

Chapter VI: Offences against the international community

Genocide
Piracy⁶
Offences under the Aviation Security Act 1982
Hijacking ships⁷

Chapter VII: Offences against the State

Treason etc.
Incitement to disaffection
Offences under the Foreign Enlistment Act 1870
Offences under the Official Secrets Acts

¹See Report, Vol. 2, para. 14.60(a).

²See (1985), Law Com. No. 149, Cmnd. 9618, draft Criminal Defamation Bill.

³See (1987) Working Paper No. 104, and Report, Vol. 2, para. 16.2.

⁴See Report, Vol. 2, para. 18.11(a).

⁵See *ibid.*, para. 18.11(b).

⁶See (1978), Law Com. No. 91, paras. 99 *et seq.*, and draft Criminal Jurisdiction Bill, cl. 7.

⁷*Ibid.*, paras. 106 *et seq.* and cl. 5.

Offences under Part II of the Forgery and Counterfeiting Act 1981
Offences relating to public stores

Chapter VIII: Offences relating to the administration of justice

Offences recommended in the draft Administration of Justice (Offences) Bill⁸
Contempt of Court

Chapter IX: Offences against public morals and decency

Offences under the Public Bodies Corrupt Practices Act 1889 and the Prevention of
Corruption Act 1906
Offences under the Honours (Prevention of Abuses) Act 1925
Bigamy
Offences against religion and public worship⁹

Offences excluded from Part II would include offences under:

- 10 Insolvency Act 1986
- 1 Companies Acts
- 5 Financial Services Act 1986
- 3 Customs and Excise legislation
- 6 Firearms Act 1968
- 7 Food and Drugs legislation
- 8 Health and Safety legislation
- 9 Immigration Act 1971
- 11 Licensing Act 1974
- 12 Misuse of Drugs Act 1971
- 4 Drug Trafficking Offences Act 1986
- 14 Representation of the People Act 1983
- 15 Road Traffic Act 1988
- 18 Legislation concerned with the protection of the environment
- 19 Legislation concerned with public registers
- 17 Legislation concerned with the protection of animals
- 16 Trade Descriptions Act 1968
- 13 Obscene Publications Act 1959
- 2 Copyright, Designs and Patents Act 1988

Part III

Evidence and Procedure

Part IV

Disposal of Offenders

We have not undertaken even any preliminary work on Parts III and IV.¹⁰ It is therefore too early to set out a possible structure for these projected parts of the Code.

⁸See (1979), Law Com. No. 96.

⁹See (1985), Law Com. No. 145.

¹⁰See para. 3.7 above.

APPENDIX D

**ORGANISATIONS AND INDIVIDUALS WHO COMMENTED ON
"CODIFICATION OF THE CRIMINAL LAW: A REPORT TO THE LAW
COMMISSION" (1985) LAW COM. NO. 143**

His Honour Judge Francis Allen
Mr Anthony Arnull
Dr Andrew Ashworth
The Hon. Mr Justice Bingham
Ms Diane Birch
Mr Rodney Brazier
Mr Richard Buxton Q.C.
Dr K. Campbell
Professor S. M. Cretney
Sir William Dale K.C.M.G.
The Rt Hon. The Lord Denning
The Rt Hon. Sir John Donaldson M.R.
Mr Richard Du Cann Q.C.
Mr R.A. Duff
The Rt Hon. The Lord Edmund-Davies
The Rt Hon. The Lord Elwyn-Jones CH
The Rt Hon. Lord Justice Goff
Dr Harrison
Mr David Hopkin
JUSTICE
Justices' Clerks' Society
Mr H. Keating
The Rt Hon. Lord Justice Kerr
The Rt Hon. Lord Justice Lawton
The Hon. Mr Justice Leggatt
Professor L.H. Leigh
The Rt Hon. Lord Justice Lloyd
Mr R.D. Mackay
Mr N.A. McKittrick
The Hon. Mr Justice McNeil
The Hon. Mr Justice Mann
Sir David Napley
The Hon. Mr Justice Pain
The Rt Hon. Lord Justice Parker
Mr Philip Parry
Prosecuting Solicitors' Society of England and Wales
The Hon. Mr Justice Rose
The Rt Hon. The Lord Roskill
Sir Henry Rowe K.C.B., Q.C.
The Rt Hon. The Lord Scarman O.B.E.
The Rt Hon. The Lord Simon of Glaisdale
Professor A.T.H. Smith
Society of Public Teachers of Law
Mr John Stannard
Statute Law Society (Working Party)
The Hon. Mr Justice Staughton
The Hon. Mr Justice Steyn
Mr Eric Taylor
Mr Dimitry Tolstoy Q.C.
The Rt Hon. Lord Justice Waller O.B.E.
Mr Martin Wasik
Ms Celia Wells
The Hon. Mr Justice Woolf

APPENDIX E

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Mr Michael Boland, Chief Prosecuting Solicitor
Mr John Curran, Barrister
Mr Hugh Jones, County Court Registrar
Mr Michael Jones, Solicitor
Mr J.A. Emlyn-Jones, J.P., Chairman, Cardiff Justices
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Mr Christopher Green, Solicitor
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Mr Ralph Lownie, Stipendiary Magistrate
Miss Jennifer Temkin, London School of Economics

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Professor Brian Hogan, Leeds University
Mr John Richman, Justices' Clerk
Mr N.J. Rose, Prosecuting Solicitor
Mr W. Scott, retired Clerk
Mr Peter Seago, Leeds University
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Mr Robin Stewart Q.C., Recorder of the Crown Court

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Mr Christopher Carr, Barrister
Mr Paul Firth, Deputy Justices' Clerk
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Mr C.P.L. Openshaw, Barrister

Mr Richard Taylor, Lancashire Polytechnic*
Mr Martin Wasik, Manchester University
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The Rt Hon. Lord Justice Lloyd
The Hon. Mr Justice McCullough
The Rt Hon. Sir George Waller O.B.E.
Miss Isabel Gurney, Law Commission (*Secretary*)

*Mr Berg resigned during the course of the scrutiny and was replaced by Mr Taylor.

The Law Commission

(LAW COM. No. 177)

CRIMINAL LAW A CRIMINAL CODE FOR ENGLAND AND WALES

VOLUME 2 COMMENTARY ON DRAFT CRIMINAL CODE BILL

*Laid before Parliament by the Lord High Chancellor
pursuant to section 3(2) of the Law Commissions Act 1965*

*Ordered by The House of Commons to be printed
17th April 1989*

LONDON

HER MAJESTY'S STATIONERY OFFICE

The Law Commission

(LAW COM. No. 177)

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LONDON
HER MAJESTY'S STATIONERY OFFICE

The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Commissioners are —

The Honourable Mr. Justice Beldam, *Chairman*

Mr. Trevor M. Aldridge

Mr. Richard Buxton, Q.C.

Professor Brenda Hoggett, Q.C.

The Secretary of the Law Commission is Mr. Michael Collon and its offices are at Conquest House, 37-38 John Street, Theobalds Road, London, WC1N 2BQ.

A CRIMINAL CODE FOR ENGLAND AND WALES

VOLUME 2: COMMENTARY ON DRAFT CRIMINAL CODE BILL

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THE LAW COMMISSION

Item XVIII of the Second Programme

CRIMINAL LAW

A CRIMINAL CODE FOR ENGLAND AND WALES

VOLUME 2: COMMENTARY ON DRAFT CRIMINAL CODE BILL

Introduction to Volume 2

Parts 4 to 18 of our Report, contained in this Volume, take the form of a commentary upon the draft Criminal Code Bill (set out in Volume 1, Appendix A) which we have discussed in general terms in Part 3 of Volume 1.

The draft Bill is in two parts.

Part I is concerned with “General Principles” — with introductory matters and with the so-called “general part” of the criminal law. It includes a specification of the “preliminary” offences of incitement, conspiracy and attempt to commit other offences.

Part II contains a statement of “Specific Offences” in five Chapters. The recommendation of these Chapters for inclusion in the Code as first promulgated, and the general criterion of user convenience employed to justify the omission of some offences, have been explained in Volume 1 at paras. 3.3 — 3.6 and 3.25 — 3.26.

Report relating to Part I of the Draft Bill

The immediately following pages (Parts 4 to 13) concern Part I of the draft Bill. Many passages in this section of our Report draw freely upon corresponding passages in the Code team’s commentary on their draft Bill in Law Com. No. 143.

PART 4

PRELIMINARY PROVISIONS

Introduction

4.1 *Location of these provisions.* Some of the provisions in the opening clauses (interpretation; repeals, amendments and effect on existing law; short title, commencement and extent) are of a kind normally found at the end of a statute rather than at the beginning. This statute, however, will be of a somewhat special kind. It is hoped that its enactment will be but a first step in the creation of a more complete Criminal Code, containing further offences in Part II and additional Parts dealing with procedure, evidence and the disposal of offenders. It would therefore be unsatisfactory to create a Part III at this stage simply to receive some of the matter in clauses 1 to 5. Moreover, there is a positive case for having near the beginning of the Code both the general interpretation clause (clause 6) and the provisions concerning the relationship of the Code to the common law (clause 4).

Clause 1: Short title, commencement and extent

4.2 This clause does not require comment.

Clause 2: Application of this Act and other penal legislation

4.3 *Provision against retrospective operation.* Subsection (1) applies to the Code, and states for subsequent legislation, the important general presumption in English law against the retrospective operation of penal legislation. The Code in general applies only to offences committed wholly or partly after it comes into force; and similarly with subsequent legislation creating or amending an offence. The reference to offences “partly” committed is to allow for cases where a result which is an element of an offence occurs after the commencement of the Code (or other legislation), but the act causing it was done before that date. For example, a

person may shoot his intended victim who dies some time later. If in the interval the common law of homicide has been replaced by the relevant provisions of Part II, Chapter I, of the Code, his liability will be determined by those provisions, as being the law in force at the time when the result occurred.¹

4.4 *Exception for adjectival provisions.* Matters of procedure and evidence are in principle regulated by the law in force at the time of the proceedings in which they are relevant. Subsection (2) therefore provides that most of the provisions in Part I dealing with such matters will have effect in proceedings in respect of offences committed even before the Code comes into force. The provisions listed in subsection (2) include those concerning alternative verdicts (clause 8), double jeopardy (clause 11) and proof (clauses 13 and 14—though cl. 13 (6) provides an exception in this respect). They do not, however, include the procedural provisions relating to liability as an accessory (clause 28), because these are drafted in the terminology of the Code and could not easily be applied to secondary participation in an offence committed before the Code comes into effect and governed by the common law principles of secondary liability.

4.5 *Subsection (3): provisions not applying to “pre-Code offences”.* Part I of the Code provides a “general part” of the criminal law, applicable to all offences. In addition to the procedural and evidential matters referred to in the preceding paragraph, the general principles of substantive law governing liability should be the same for all offences committed after that law comes into force. For example, the law governing the effect of intoxication or mental disorder, participation in an offence as an accessory, or the availability of general defences, should not vary according to whether the offence was created by the Code or by subsequent legislation or already existed when the Code was enacted.

4.6 To this principle, however, there have to be some exceptions. There are a few provisions in Part I which, if allowed universal application, might improperly affect the interpretation or operation of very many existing offences. Subsection (3) therefore provides that “pre-Code offences” — that is, offences wholly or partly defined in pre-Code legislation (or in subordinate legislation made under pre-Code legislation) and subsisting common law offences² — shall continue to apply as if the provisions in question had not been enacted. So, for example, if one of the fault terms defined by clause 18 is used in an enactment defining a pre-Code offence, it will continue to have its former meaning in that context, rather than its meaning under clause 18 if that is different; and existing offences of strict liability will not be converted by clause 20 into offences requiring fault.³

4.7 *Law determining penalties.* Subsection (4) is the counterpart to subsection (1) in relation to the penalties which may be imposed on conviction of an offence. It is clear in existing law that the presumption against retrospective operation is applicable to enactments increasing penalties,⁴ although the presumption may be rebutted by the clear and unambiguous words of the enactment. Where penalties for an offence are decreased between the commission of an offence and conviction of it we think it is right that the offender should receive the benefit of the change in the law. The subsection so provides.

Clause 3: Creation of offences

4.8 This clause provides that no offence shall be created except by, or under the authority of, an Act of Parliament. It confirms the views expressed by members of the House of Lords in *Kneller v. D.P.P.*⁵ that there is no longer any power in the courts to create new offences, despite certain dicta apparently to the contrary in the earlier case of *Shaw v. D.P.P.*⁶ The existence of such a power, with the resulting uncertainty as to the scope of the criminal law, is incompatible with the fundamental aims of a criminal code.⁷

¹Clause 2(1) follows in this respect the precedent of the Theft Act 1968, s. 35(1).

²See clause 6 for the formal definition of “pre-Code offence”.

³A similar exception to the general application of Part I is created by clause 13 (6), which concerns the burden of proving some statutory defences.

⁴See, e.g., *D.P.P. v. Lamb*[1941] 2 K.B. 89; *Oliver*[1944] K.B. 68.

⁵[1973] A.C. 435, at 457-458, 464-465, 490, 496.

⁶[1962] A.C. 220, at 267-268.

⁷See Report, Vol. 1, para. 2.11.

Clause 4: Effect on common law

4.9 The relationship of the proposed Code to the common law has been considered earlier.⁸ This clause makes the necessary provision. Subsection (1) abolishes common law offences (listed in Schedule 8)⁹ replaced by new offences created by the Code.¹⁰ Subsection (2) abrogates common law rules corresponding to or inconsistent with Code provisions. Subsection (3) ensures that existing statutory references to replaced common law offences and common law rules will hereafter be understood to be references to corresponding Code offences and rules. Subsection (4) expressly preserves other rules of the common law and the power of the courts to determine their existence, extent or application.¹¹

Clause 5: Amendments and repeals

4.10 This clause provides for repealing and amending Schedules.¹² Work on identifying the enactments to be listed in these Schedules would be premature and we have not undertaken it:

Clause 6: General interpretation

4.11 This clause provides for the interpretation of words and phrases requiring explanation or partial explanation for the purposes (i) of two or more clauses in Part I, or (ii) of provisions in Part I and Part II, or (iii) of provisions in two or more Chapters of Part II. It provides those explanations or cross-refers to the provisions in which they are to be found.

⁸*Ibid.*, paras. 3.36-3.38.

⁹A consequence of our decision (see para. 4.1 above) to put these provisions in the opening clauses is that the Schedule abolishing the common law offences, together with the amending and repeal Schedules, would appear as Schedules 1, 2 and 3 respectively. We think that these Schedules should appear (in their usual position) at the end of the Bill (as Schedules 8, 9 and 10).

¹⁰The common law offences in question and the provisions which replace them are: incitement (replaced by clause 49); murder (clause 54); manslaughter (clause 55); mayhem (clause 70); assault and battery (clause 75); false imprisonment (clause 80); kidnapping (clause 81); and buggery (clauses 95-99).

¹¹For examples of matters left to the common law, see below, paras. 7.9 (duties to act creating liability for omission to act), 10.24 (unincorporated bodies—principles of liability) and 12.40 (justification and excuse other than those expressly provided by the Code or by enactments concerned with particular offences).

¹²See Schedules 9 and 10 (and see further n. 9 above).

PART 5

PROSECUTION AND PUNISHMENT

Introduction

5.1 It is necessary to prescribe for each offence included in the Code its classification so far as concerns mode of trial; the maximum penalties that may be imposed; any restrictions on proceedings; any special power to convict of other offences; and any other matters peculiar to the offence. We have adopted the Code team's suggestion that all this material should be relegated to a comprehensive Schedule.¹ This will enable the user to see at a glance how these matters are dealt with by the Code for any offence or group of offences with which he is concerned; and it will avoid cluttering Part II with material that would make it unduly difficult to use.

5.2 The enacting clause giving effect to the Schedule cannot conveniently be placed at the beginning of Part II. For, first, the Schedule will refer to the preliminary offences of incitement, conspiracy and attempt, and these, we propose, will appear in Part I (see clauses 47 to 49). Secondly, special provisions for conviction of other offences are part of the larger topic of "alternative verdicts", which ought, we think, to be stated in full in the Code for offences generally; and it is convenient to associate the provisions on that topic with others on double jeopardy and multiple convictions, if only because they share the concept of "included offences". The result is a group of clauses in Part I which, although procedural, ought to be of considerable assistance to users of Part II of the Code and of other criminal legislation.

Clause 7: Prosecution, punishment and miscellaneous matters

5.3 *Schedule 1* contains for each offence stated in the Code the matters referred to in paragraph 5.1 above. We contemplate that, as future legislation adds offences to Part II of the Code, the Schedule will be enlarged accordingly. Clause 7, together with clause 8 (1)(a)(i), gives effect to the Schedule.

5.4 *Mode of trial* for each offence is stated in column 3 of the Schedule (subsection (2)).

5.5 *Maximum penalties* for each offence are the concern of subsections (3) and (4).

Paragraph (a) of subsection (3) provides for a case where an offence is tried on indictment (whether it is only so triable or is triable either way). It refers to column 4 of the Schedule, which states (except for murder²) the maximum sentence of imprisonment and any provision regarding a fine which is specially applicable — e.g., where there is some variation from the provision of section 30 of the Powers of Criminal Courts Act 1973 (general power of Crown Court to fine offender convicted on indictment).

Paragraph (b) concerns offences triable either way which are tried summarily. It provides for column 4 to state any variations from the normal powers of the magistrates' court to imprison or fine. Those normal powers are provided for Code offences by subsection (4).³

Paragraph (c) provides for column 4 to state the maximum sentence of imprisonment or fine for an offence that is triable only summarily.

5.6 *Restrictions on proceedings* (any consent required or time limit) are stated in column 5 of the Schedule (subsection (5)).

5.7 *Ancillary and miscellaneous matters* relating to particular offences are stated or conveniently cross-referenced in column 7 of the Schedule.

¹Cf. Sexual Offences Act 1956, Sched. 2; Companies Act 1985, Sched. 24; Road Traffic Offenders Act 1988, Sched. 2.

²Murder requires special provisions that are more conveniently carried in the clause stating that offence (cl. 54). There is an informative cross-reference in column 4.

³Imprisonment not exceeding six months or a fine not exceeding the "statutory maximum" (defined in Criminal Justice Act 1982, s. 74(1) and currently £2,000) or both. These are the powers provided by Magistrates' Courts Act 1980, s. 32(1), in relation to offences listed in Schedule 1 to that Act, and commonly provided by other enactments creating offences triable either way.

Clause 8: Alternative verdicts

5.8 There are various circumstances under the present law in which an accused person on trial on indictment may be convicted of an offence other than that with which he is specifically charged. Magistrates at present have no such power; but the Criminal Law Revision Committee has proposed that it should be given them in respect of certain offences against the person,⁴ and our draft Bill, which in Chapter I of Part II implements the recommendations of the Committee's Fourteenth Report, provides accordingly. Clause 8 and column 6 of Schedule 1 codify the present law on the subject, restating the general principles and providing authority under the Code for special cases. Subsections (1)-(3) provide for trial on indictment and subsection (4) for summary trial.

5.9 *Subsection (1)(a)*. Paragraphs (b), (c) and (d) of this subsection state principles applying to offences generally. Paragraph (a) deals with particular cases (not falling within those general principles) where the law allows conviction of an alternative offence on trial on indictment.

Sub-paragraph (i) of paragraph (a) refers to column 6 of Schedule 1 which specifies, in relation to any offence included in Part II of the Code, any other offence of which a jury may convict when acquitting a person of the offence itself. Some of the entries in column 6 reproduce the effect of statutory provisions re-enacted in Part II.⁵ Some follow corresponding provisions of the Sexual Offences Act 1956. (The Criminal Law Revision Committee, whose recommendations on sexual offences are in general implemented in Chapter II of Part II, made no reference to alternative verdicts in its relevant reports.) And some, relating to offences against the person, give effect to recommendations in the Fourteenth Report of the Criminal Law Revision Committee.⁶

Sub-paragraph (ii) simply refers, for completeness, to cases in which alternative verdicts are permissible under legislation other than the Code.

5.10 *Subsection (1)(b)* reproduces the law currently stated in section 6(3) of the Criminal Law Act 1967. A person acquitted on indictment of the offence charged⁷ may be found guilty of an offence within the jurisdiction of the court⁸ (i) which is (in Code language) "included" in the offence charged; or (ii) of which he might be found guilty on an indictment charging him with an included offence.⁹

5.11 "Included offence" is defined in clause 6:

"included offence", in relation to an offence charged, means an offence an allegation of which is included (expressly or by implication) in the allegations in the indictment or information."¹⁰

This employs the language of the Criminal Law Act 1967, section 6(3). But it abandons as otiose that provision's separate reference to the case where the actual allegations "amount to" an allegation of another offence; for it seems plain that an allegation of one offence cannot "amount to" an allegation of another offence without "including" an allegation of that other offence.¹¹ It is true that in *Wilson*¹² Lord Roskill assumed that the words "amount to" must have a separate function. But it is not clear from his opinion what that function is; and it has to be said that the analysis of the subsection in *Wilson* has been the subject of exceptionally severe criticism.¹³

⁴Fourteenth Report (1980), Cmnd. 7844, recommendations in paras. 156, 161, 177 and 182.

⁵See the entries in column 6 against the offences created by clauses 140 (theft), 199 (violent disorder) and 200 (affray).

⁶Some additions to, and departures from, those recommendations are explained by the Code team in Law Com. No. 143, paras. 5.8-5.10.

⁷Other than treason and murder. These exceptions follow s. 6(3) of the 1967 Act. Manslaughter, though an included offence in relation to murder, is therefore listed against murder in column 6.

⁸Not, therefore, of an offence triable only summarily.

⁹See Appendix B, Example 8.

¹⁰The words "or information" are necessary for the purposes of clauses 11 (double jeopardy) and 12 (multiple convictions). But for this the definition would be more conveniently located in clause 8, as some critics of the Code team's Bill suggested.

¹¹The same phrase in the Criminal Law Act 1977, s. 1 (1), is abandoned in clause 48(1) (conspiracy), where "involve" suffices.

¹²[1984] A.C. 242 at 258.

¹³See J.C. Smith [1984] Crim. L.R. 37 and [1987] Crim. L.R. 473; C. Emmins [1984] Crim. L.R. 152; Glanville Williams [1984] C.L.J. 290.

5.12 *Subsection (1)(c)* continues the re-enactment of provisions of the Criminal Law Act 1967 by permitting a jury, when acquitting a person of an offence, to find him guilty of an attempt to commit either that offence or any other offence of which it has power to find him guilty.¹⁴

5.13 *Subsection (1)(d)* reproduces the effect of section 4(2) of the Criminal Law Act 1967 by providing for conviction of assisting an offender guilty of the offence charged. It is right to transfer this provision to the Code alongside other alternative verdict provisions of general application.

5.14 *Jury disagreement.* Subsection (2) applies subsection (1) to a case in which the jury cannot agree and is therefore discharged from returning a verdict in respect of the offence charged. It appears to be a proper generalisation from the decision of the House of Lords in *Saunders*.¹⁵ But the court will wish to discharge the jury from returning any verdict if there ought to be a retrial on the major charge on which the jury has failed to agree; and the subsection expressly preserves the court's power to do so.

5.15 *More than one count.* Subsection (1) assumes acquittal of "an offence charged in the indictment". Subsection (3) states that each count in an indictment is an "indictment" for this purpose.¹⁶

5.16 *Summary trial.* Subsection (4) implements the recommendations of the Criminal Law Revision Committee relating to conviction of alternative offences on summary trial of some offences against the person.¹⁷

5.17 *Abolition of alternative verdicts?* Before leaving clause 8 we ought to mention some general views on alternative verdicts that were advanced on consultation. The Western Circuit Scrutiny Group argued for the abandonment of all powers to return alternative verdicts (other than the power to convict of an attempt to commit the offence charged). All alternatives which the prosecution might wish to be considered ought, in the Group's view, to be expressly charged. We do not think that it is necessary to debate the merits of this view, for even if we were attracted by it we could not properly adopt it without prior consultation.

5.18 *Scheduling all possible alternative verdicts.* Some commentators, alarmed by the complexity of this clause in the Code team's Bill and no doubt seeking maximum clarity in the Code, proposed that all alternative verdicts available on a charge of an offence should be listed against that offence in the Schedule. This, as we understand the proposal, would mean applying the concept of an "included offence", as it were in the abstract, to every offence in Part II. The application of that concept, however, depends in some cases on the factual allegations in the indictment; the job cannot be completely done in the abstract. For that reason alone we have not been able to adopt the proposal. But in any case a full statement of the general principles on alternative verdicts is needed for the purposes of existing offences not carried into Part II ("pre-Code offences") and, if the proposal were adopted, would probably also be needed for the guidance of those drafting future offences. So a relatively complex clause codifying those principles cannot be avoided.

Clause 9: Conviction of preliminary offence when ulterior offence completed

5.19 This clause permits conviction of a "completed offence" on a charge of incitement, conspiracy or attempt to commit, or an assault or other act preliminary to, that offence. It is based upon the second part of section 6(4) of the Criminal Law Act 1967. That is a provision that the Criminal Law Revision Committee¹⁸ included for the avoidance of doubt in the draft Bill which became the 1967 Act. The comprehensive nature of the Code requires a similar but substantially wider provision.

5.20 Section 6(4) applies to attempts but not to incitement or conspiracy. This was probably because there was no doubt that incitement and conspiracy to commit an offence did not merge in the completed offence whereas there was a view that an attempt to commit a

¹⁴Criminal Law Act 1967, s. 6(3) and (4) (part). This provision is needed in addition to subsection (1)(b)(i) because an allegation of an attempt (involving the intention to cause a result which is an element of the full offence) is not necessarily included in an allegation of the full offence (which may not involve that intention).

¹⁵[1988] A.C. 148.

¹⁶Cf. Criminal Law Act 1967, s. 6(7), in its application to s. 6(3).

¹⁷See para. 5.8 above.

¹⁸Seventh Report, Felonies and Misdemeanours (1965), Cmnd. 2659, para. 51.

felony merged in the completed felony.¹⁹ Section 6 (4) made it clear that that rule (if it ever existed) had no application after the abolition of felonies by the 1967 Act. The Code, however, should state the whole law; so clause 9 applies to incitement, conspiracy and attempt. Like section 6 (4), it also applies to an assault or other offence preliminary to some ulterior offence — such as an assault intending to rob.

5.21 Section 6 (4) applies only to trials on indictment but a similar rule of the common law applies to summary trial.²⁰ Clause 9 therefore applies to summary trial as it does to trial on indictment.

5.22 *Discretion.* Subsection (2) preserves the discretion of the Crown Court (referred to in section 6 (4)) to discharge the jury with a view to the preferment of an indictment for the completed offence and also any discretion of a magistrates' court to discharge itself with a view to the laying of an information for the completed offence.

Clause 10: Act constituting two or more offences

5.23 This clause is based upon section 18 of the Interpretation Act 1978 (duplicated offences). The purpose of that section was probably merely to ensure that new criminal legislation would not impliedly repeal earlier legislation or make common law offences inoperative. The modified wording used in clause 10 still fulfils that purpose; but it states more clearly the present law, as established in *Bannister v. Clark*²¹ and *Thomas*,²² that where an act constitutes two or more offences the offender may be prosecuted for any or all of those offences, subject to the common law rules against double jeopardy and multiple convictions. The words of section 18, "but [the offender] shall not be liable to be punished more than once for the same offence", are apparently interpreted to incorporate those rules.²³ So clause 10 is made expressly subject to those rules, which are now codified by clauses 11 and 12.

Clause 11: Double jeopardy

5.24 *A fundamental principle.* The principle of no double jeopardy — that a person ought not to be twice put in peril of suffering conviction of, and punishment for, the same offence — is stated in clause 11 in the form of a rule that a person is not to be tried for an offence in respect of which he has formerly been convicted or in peril of conviction. It has the appearance of a rule of procedure. But we are sure that the Code team were right to regard it as a fundamental principle of English criminal law that ought to be included in Part I of the Code. Clause 11 substitutes a reasonably simple statutory statement for a mass of common law materials. It replaces the special pleas in bar of *autrefois acquit* and *autrefois convict* and associated rules, including the analogous rules which apply to summary trial.

5.25 *The Code team's Report.* The subject of double jeopardy is somewhat technical and the Code team were at pains to defend in some detail the clause that they proposed for its statutory expression. As that clause escaped substantial criticism on consultation and forms the basis of our clause 11, we do not think that it is necessary here to repeat the whole of the Code team's treatment of the subject.²⁴ In the following paragraphs we content ourselves for the most part with a summary of the clause now proposed.

5.26 *Previous conviction or acquittal.* The basic rule is stated by subsection (1)(a) and (b): a person shall not be tried (a) for an offence of which he has been convicted or acquitted, or (b) for an offence of which he has been in peril of being convicted.²⁵ Paragraph (b) has thus to be read with clause 8 on the subject of alternative verdicts. The rule applies to summary trial as well as to trial on indictment.

5.27 *Previous acquittal or conviction of "included offence".* Paragraphs (c) and (d) of subsection (1), read with subsection (2), prohibit the trial of a person for an offence if the allegations in the indictment or information include the allegation of an offence of which he has been acquitted (paragraph (c)(i)) or convicted (paragraph (d)(i)), or of which he might

¹⁹ *Russell on Crime* 12th ed., (1964), 193-195.

²⁰ *Webley v. Buxton* [1977] Q.B. 481.

²¹ [1920] 3 K.B. 598.

²² [1950] 1 K.B. 26.

²³ "Certainly it adds nothing and detracts nothing from the common law": *per* Humphreys J. in *Thomas* [1950] 1 K.B. 26 at 30.

²⁴ See Law Com. No. 143, especially at paras. 5.25-5.34.

²⁵ See Appendix B, Examples 11(i) and (ii).

have been convicted on an indictment or information charging him with an offence of which he has been acquitted (paragraph (c)(ii)) or convicted (paragraph (d)(ii)).²⁶

5.28 To this rule there is one exception, applying only to paragraph (d), that is best explained by means of an example. A person who has been convicted of causing serious personal harm to another may be tried for homicide if the victim subsequently dies,²⁷ even though the indictment for homicide includes an allegation of an offence of intentional or reckless serious personal harm.²⁸ The exception to paragraph (d) to cater for this case is stated in general terms, because cases other than homicide where an element of the offence charged occurred after the previous conviction are not inconceivable.

5.29 *An exception for perjury?* The Western Circuit Scrutiny Group suggested that trial for perjury should be excepted from the operation of subsection (1)(c). The Group regarded it as unacceptable that a person who commits perjury when giving evidence on his own behalf on a criminal charge, and is acquitted, should then escape trial for that perjury. Paragraph (c) does indeed protect him where the perjury alleged is the false denial of all the elements of the offence previously charged. This is an application of the proposition that the prosecution cannot, at a later trial, take steps to challenge the correctness of a verdict of acquittal.²⁹ It can, on the other hand, be argued that some members of the House of Lords in *D.P.P. v. Humphrys*³⁰ appear to have considered that principles of double jeopardy do not bar a subsequent trial for perjury. Whatever the position on the present authorities (which is not an easy question to determine), we do not think that it is appropriate or necessary to make an express exception for perjury in paragraph (c). To do so might be inappropriate as an act of controversial law reform. And it is unnecessary because a prosecutor may in almost all conceivable circumstances avoid the effect of paragraph (c) by careful drafting of the perjury charge — that is, by alleging perjury in respect of one or some, but not all, of the elements of the offence of which the defendant was acquitted at his former trial. If this is done the allegation of perjury will not involve the allegation that the defendant actually committed that offence.³¹

5.30 *Previous conviction by court-martial.* For the sake of completeness, subsection (1)(e) refers to the prohibition under other legislation of the trial of an offence after conviction by court-martial.

5.31 “Cause death” includes “cause personal harm”. Subsection (3) makes clear, for the avoidance of doubt, that a conviction or acquittal of an offence of causing personal harm or serious personal harm bars a trial for homicide arising out of the same facts (unless the exception to subsection (1)(d) applies).

5.32 “Convicted” and “acquitted”. These words in subsection (1) refer to a “subsisting” conviction or acquittal: subsection (4)(a). So, for example, if a conviction of causing serious personal harm is quashed it is no longer subsisting. If the victim subsequently dies, the case comes within paragraph (c) of subsection (1) (previous acquittal), not paragraph (d) (previous conviction), and the defendant cannot be tried for homicide. When a *venire de novo* is ordered there is no subsisting conviction or acquittal as the case may be.

5.33 *Courts outside England and Wales.* Such authority as there is supports the general application of the principles stated in subsection (1) to prior convictions and acquittals by courts of competent jurisdiction outside England and Wales³² and subsection (4)(a)(ii) so applies them. It does so with two modifications.

- (i) The criminal law of the foreign jurisdiction will almost inevitably differ from that of England and Wales. It must therefore suffice, for the purposes of a double jeopardy rule, that the prior conviction or acquittal (or the conviction of which the defendant was in peril) was, in the language of subsection (4)(a)(ii),

²⁶See Appendix B, Examples 11(iii)-(v).

²⁷*Thomas* [1950] 1 K.B. 26.

²⁸See para. 14.5 below.

²⁹See *Sambasivam v. Public Prosecutor of Malaya* [1950] A.C. 458, per Lord MacDermott at 479.

³⁰[1977] A.C. 1: see especially per Viscount Dilhorne at 21-22; per Lord Hailsham at 31-32. This case concerned issue estoppel rather than double jeopardy and does not constitute direct authority on the point under consideration.

³¹See Appendix B, Example 11(vi). Cf. *D.P.P. v. Humphrys* itself.

³²For the authorities relied on by the Code team, see Law Com. No. 143, para. 540, n. 28.

“of an offence substantially similar to that now charged and based on the same facts.”³³

- (ii) Subsection (4)(b) provides that conviction by a court outside the United Kingdom cannot bar a subsequent trial in England and Wales if the foreign conviction occurred in the absence of the defendant and, because of his absence, the defendant is not in peril of suffering any punishment that the foreign court has ordered or may order. That was the situation in *Thomas*³⁴, where the defendant’s plea of *autrefois convict* failed. Paragraph (b) states a slightly wider principle than any actually enunciated by the Court of Appeal in its judgment in *Thomas*, where the *ratio decidendi* is expressed³⁵ in a manner more precisely fitting the exact facts of the case before the court. No narrower generalisation than that in paragraph (b) would, we think, be appropriate in a codification of the law.

5.34 *Time of conviction or acquittal.* A conviction is stated to occur, for the purposes of this section, when it is recorded by the court of trial or by a court of appeal: subsection (5). An acquittal of an offence occurs when it is recorded by the court of trial; when the defendant is convicted without trial on his plea of guilty of some other offence of which he might be found guilty (for this has the effect of an acquittal of the offence charged by virtue of section 6(5) of the Criminal Law Act 1967); or when a person’s conviction of it is reversed or quashed by a court of appeal or on judicial review (unless a retrial is ordered): subsection (6).

5.35 *Abuse of process.* Subsection (7) makes clear, for the avoidance of doubt, that a court’s power to stay proceedings on the ground that they constitute an abuse of the process of the court is unaffected by the section.

5.36 *Offences taken into consideration.* It was suggested to us on consultation that this clause might expressly prohibit trial for any offence which has been taken into consideration (“t.i.c.”) in sentencing the defendant for another offence. This, however, would be a departure from appellate statements in *Nicholson*³⁶ and in *North*.³⁷ Although it was said in the latter case that no additional penalty should be imposed on conviction of an offence that had formerly been t.i.c., even the impossibility of imposing a penalty, and *a fortiori* a bar on trial, might not be uncontroversial in a case where the original conviction was quashed and no part of the sentence had taken effect. We are satisfied that it would not be right, otherwise than in the context of a wider review of the t.i.c. procedure, to propose the extension of the double jeopardy rule in the way suggested.

Clause 12: Multiple convictions

5.37 This clause prohibits conviction on the same occasion both of the offence charged and of (a) an included offence³⁸ or (b) an attempt to commit the offence charged or an included offence. The clause is in all essentials as proposed by the Code team. As it was not the subject of any doubt or criticism on consultation, we do not burden this Report with repetition of the team’s arguments for it (or for limiting paragraph (a) to included offences).³⁹

³³In *Thomas* [1985] Q.B. 604, D pleaded *autrefois convict* in bar of an indictment for theft, relying on a conviction in Italy of an offence of fraud based on substantially the same facts. The plea failed on another ground (see text, next paragraph); nothing was made of the fact that the Italian conviction was, inevitably, not for the same offence as that now charged. See also *Lavercombe and Murray* [1988] Crim. L.R. 435.

³⁴[1985] Q.B. 604.

³⁵At 611.

³⁶(1947) 32 Cr.App.R. 98 and 127 (two divisions of the Court of Criminal Appeal).

³⁷C.A., 9 July 1971; unreported, but extracted in *Thomas*, *Current Sentencing Practice*, L3.1(b).

³⁸Cf. *Haddock* [1976] Crim.L.R. 374.

³⁹See Law Com. No. 143, paras. 5.42-5.48.

PART 6

PROOF

Clause 13: Proof

6.1 *Burden of proof: the general rule.* Subsection (1) states the general rule in *Woolmington v. D.P.P.*¹ The burden is on the prosecution to prove every fact which it alleges or relies on. When the defendant wishes to set up a defence or to rely on any other fact, he bears, at most, an “evidential burden”. When the evidential burden is satisfied, the burden is on the prosecution to disprove the fact in question. The nature of the evidential burden is described in subsection (2). Unless such evidence is already before the court, the defendant must adduce evidence which might lead a court or jury to conclude that there is a reasonable possibility that the fact alleged existed.

6.2 *Exceptions to the general rule.* The general rule applies “unless otherwise provided”, whether expressly or by necessary implication, and subject to subsections (3) and (6). Subsection (3) provides for three cases where, under the present law, the burden of proof is, or probably is and, in our opinion, ought to be, on the defendant: to establish any fact necessary to prove (a) a plea in bar,² (b) the competence of a witness called by him,³ (c) the admissibility of evidence tendered by him.⁴ The House of Lords in *Hunt*⁵ has confirmed that section 101 of the Magistrates’ Courts Act 1980 imposes the burden of proving certain defences on the defendant at a summary trial and that there is a corresponding common law rule of interpretation which achieves the same effect at a trial on indictment. Subsection (6) preserves these rules.

6.3 *Standard of proof.* Subsection (4) states the general rule for standard of proof — for the prosecution, proof beyond reasonable doubt and, for the defendant, proof on the balance of probabilities. The general rule applies “unless otherwise provided”, whether expressly or by necessary implication, and subject to subsection (5). This is concerned with the rare case of a special defence of the kind found in the Food Act 1984, section 100. An element of the defence is that a third person is guilty and liable to conviction in the same proceedings. The third person ought not to be convicted of the offence unless his guilt is proved beyond reasonable doubt and it is therefore necessary that that should be the standard of proof for this element of the defence.

Clause 14: Proof or disproof of states of mind

6.4 This clause implements our recommendation that —

“the general principle, of which section 8 of the Criminal Justice Act 1967 and section 1(2) of the Sexual Offences (Amendment) Act 1976 are particular applications, should be given statutory formulation.”⁶

The principle is expressed in shorter and simpler terms than in clause 18 of the Code team’s Bill but the effect is the same. Our clause uses the words “had or may have had” because a party with the burden of proof must prove that the person in question *had* the state of mind⁷ whereas it will be sufficient for the defendant, except where he bears the burden of proof, to show that the person *may have had* the state of mind.⁸

6.5 The clause states a truism and is therefore strictly unnecessary to the functioning of the Code. Nevertheless, in view of the history of English law in this matter,⁹ it is desirable to include the provision, both as a reminder to the courts and as a reassurance to the public that it is not sufficient for a defendant simply to assert that he held a particular belief — e.g., that a woman was consenting to sexual intercourse when she was not.

¹[1935] A.C. 462.

²*Coughlan and Young* (1976) 63 Cr. App. R. 33.

³R. Cross and C. Tapper, *Cross on Evidence* 6th ed., (1985), pp. 162-163.

⁴*Ibid.*

⁵[1987] A.C. 352.

⁶Report on the Mental Element in Crime (1978), Law Com. No. 89, para. 97.

⁷See Appendix B, Examples 14(i) and (ii).

⁸Example 14(iii).

⁹See *D.P.P. v. Smith* [1961] A.C. 290; the Law Commission’s report (1967) Law Com. No. 10, Imputed Criminal Intent (Director of Public Prosecutions v. Smith); Criminal Justice Act 1967, s. 8; *Hyam v. D.P.P.* [1975] A.C. 55; *D.P.P. v. Morgan* [1976] A.C. 182; Sexual Offences Act 1976, s.1(2); *Frankland v. R.* [1987] A.C. 576, P.C.

PART 7

EXTERNAL ELEMENTS OF OFFENCES

Introduction

7.1 *External and fault elements of offences.* The phrase “fault element” (which is defined in clause 6) is useful at a number of points in Part I of the Code. The phrase “external elements” merely matches it as a cross-heading under which to collect two clauses concerned with elements of offences other than fault elements. It is not used as a technical term in the Code.

7.2 *Offences and defences.* It is convenient to remark at this point that the Code makes a distinction between an offence (in the sense of the elements of “act”¹ and “fault” that must be proved if a person is to be convicted of it) and any defence that may be provided in the enactment defining it. This distinction, although controversial on theoretical grounds, is in practice indispensable in the statement of existing principles. For example, the prosecution has the burden of proving all the elements of an offence² but disproves a defence by disproving any element of it.³ Moreover, to refuse to admit a distinction between “definitional elements” and defences would have unhappy drafting consequences both for the codifier and for the user of the Code.

7.3 Whether a particular circumstance is a matter of definition or of defence may occasionally be uncertain, and require judicial decision as a matter of statutory interpretation, especially if offences are not carefully drafted with an eye to the distinction. But we believe that the problem should arise only rarely (as it can do at present); for the Code is so drafted that very little will turn on this point of classification. Two matters deserve special mention.

(i) *Mistake.* Until recently a mistaken belief in the existence of a circumstance affording a defence (such as self-defence) would not generally avail a defendant unless it was a belief held on reasonable grounds. A person who foolishly believed that his victim was attacking him was in a different position from one who foolishly believed that the victim was consenting to what would, but for consent, be an assault.⁴ Something therefore turned (and, exceptionally, does so still⁵) on whether a matter was a definitional element — such as absence of consent in assault — or a defence. The Code, however, follows recent Court of Appeal⁶ and Privy Council⁷ authority, as well as recommendations of our own⁸ and of the Criminal Law Revision Committee,⁹ in no longer requiring beliefs as to matters of defence to be reasonably held.¹⁰

(ii) *Evidential burden and burden of proof.* Clause 13 (1)(b) places upon the prosecution in general the burden of disproving defences as well as of proving the elements of offences. But in relation to a defence that burden does not arise until there is evidence of the defence before the court; the defendant bears the “evidential burden”. This makes it desirable for the draftsman of a new offence to decide into which category (offence or defence) a particular matter is to fall and to draft accordingly. It is not a ground for dispensing with the distinction between elements and defences at all costs.

External elements

7.4 *A problem of terminology.* The only substantive Code provision relating to the external elements of offences is clause 17, on the subject of causation. That subject apart, the main problem has been to settle upon a consistent and economical language by which to refer

¹See clauses 15 and 16.

²Clause 13 (1)(a).

³*More* (1987) 86 Cr. App.R. 234 at 247.

⁴*Albert v. Lavin* [1982] A.C. 546 (Divisional Court; decision affirmed by House of Lords on another ground).

⁵See, as to the defence of duress, para. 12.15 below.

⁶See especially *Gladstone Williams* (1983) 78 Cr.App.R. 276.

⁷*Beckford v. The Queen* [1988] A.C. 130.

⁸Report on Defences of General Application (1977), Law Com. No. 83, para. 2.27; Report on the Mental Element in Crime (1978), Law Com. No. 89, paras. 90-91.

⁹Fourteenth Report: Offences against the Person (1980), Cmnd. 7844, para. 283; cf. Fifteenth Report: Sexual Offences (1984), Cmnd. 9213, paras. 5.12-5.16.

¹⁰See clauses 41 (belief in circumstance affording a defence), 42 (duress by threats), 43 (duress of circumstances), 44 (use of force in public or private defence). The Code departs from this policy only where it reproduces existing legislation expressly requiring a belief to be held on reasonable grounds; see, e.g., cl. 196(4) (eviction and harassment of occupier).

to the varied elements of different kinds of offences. A person may commit an offence by doing something; or (less often) by omitting to do something. Or he may be guilty of an offence because a state of affairs arises, or because something occurs and he occupies a given position; examples are possession offences, or being the parent of a truanting child,¹¹ or being the owner of a ship from which oil is discharged.¹² The definition of an offence commonly refers to circumstances that must exist if there is to be liability, or to a result that the person's act or omission must cause or fail to prevent, or to both. The Code team recommended, for the sake of economy of drafting, the use of a single term that could be understood to refer, where the context permitted, to omissions, states of affairs and occurrences as well as to physical acts; and not only to these bases of liability but also to their relevant results and attendant circumstances. The term that they adopted was "act", which, as they pointed out, is an adaptable word in ordinary use¹³ and has the advantage for drafting purposes of being both noun and verb.¹⁴

7.5 Some reservations were expressed on consultation about this proposal and the way in which it was executed in the Code team's Bill.¹⁵ We are persuaded, however, of the general convenience of having a term by which to refer both to the "*actus reus*" of the common law and to its constituent elements; and of being able to provide without repetition for offences requiring positive action, for offences of omission and for "status" and "situational" offences. And we are satisfied that the adaptability of the word "act" makes it the best available. The word is accordingly employed in the Code as a shorthand expression which is to be understood in context in the light of the guidance given by clauses 15 and 16. We hope that any difficulties attending the Code team's use of the method may have been reduced by drafting changes that have taken place in the preparation of the present Bill.

Clause 15: Use of "act"

7.6 This clause, then, is an interpretation clause. It does not define "act". It simply explains that where the Code refers to "an act" or to a person's "acting" or "doing an act", the reference embraces whatever relevant results and circumstances the context permits. This clarification of the use of the word "act" is not in fact essential; for we believe that no provision of the Code is on a fair reading truly ambiguous in its use of the term. But the clause may prove useful for the avoidance of doubt in those inexperienced in the reading of criminal statutes and as a protection against perverse reading or hopeless argument.

Clause 16: Offences of omission and situational offences

7.7 This also is an interpretation clause. In effect, it instructs the user of the Code that, when he is concerned with an offence of omission or with a situational offence, he should substitute a reference to the omission or situation in question (or to making that omission or being in that situation) for a Code provision referring to an act (or to acting or doing an act). He should do so, to be more precise, "where the context permits".

7.8 For example, clause 26 (1)(a) provides that a person is guilty of an offence as a principal if (with any fault required) he "does the act or acts specified for the offence." This includes making a specified omission where there is a duty to act; being in possession of something it is an offence to possess; or being the owner of a ship from which oil is discharged. Thus clause 16 permits clause 26 (to take but one example) to apply to exceptional classes of offence without resort to elaborate drafting or to excessive repetition. On the other hand, in clause 17 (1) (causation) a distinction is made between a person's act contributing to the occurrence of a result (paragraph (a)) and his failure, in breach of duty, to do something to prevent the occurrence of a result (paragraph (b)). Here the context does not permit "act" to be read as referring to an omission.

Omissions

7.9 *No Code provision.* Criminal liability for failing to act is exceptional. Parliament sometimes makes it an offence to fail to do something (as with wilful neglect of a child, the failure of a motorist to exchange particulars after an accident or the failure of a company to

¹¹Education Act 1944, s. 39(1).

¹²Oil in Navigable Waters Act 1955, s. 1(1).

¹³Law Com. No. 143, para. 2.24(iii): the word may describe a physical action (firing a gun), that action and its direct result (killing a person) or the action, the result and a relevant circumstance (killing a British citizen). This does not exhaust the versatility of the word.

¹⁴*Ibid.*, para. 7.3.

¹⁵See Buxton, "Codifying Action and Inaction" in Dennis (ed.), *Criminal Law and Justice* (1987), 87.

make an annual return). Most other instances of liability for omissions depend upon judicial construction of statutory language as referring to omissions as well as to acts, or upon common law (that is, judicial) recognition, in limited and rather ill-defined circumstances, of a duty to act to prevent a particular kind of harm (notably certain harms to the person) or to prevent the commission of an offence.¹⁶ The Criminal Law Revision Committee, in its Report on Offences against the Person, identified the offences against the person that should be capable of being committed by omission — that is, by failure to act despite a duty to do so — but preferred to leave the scope of the duty to act undefined.¹⁷ It was against this background that the Code team included in their Bill an elaborate clause on liability for omissions. The clause provided that criminal liability for omitting to do an act could not arise except in certain categories of case specified by the clause. One such category, referred to only because of the negative character of the primary proposition, was that of certain cases for which other clauses in the team's Bill provided; no more need be said of this category. The other categories are mentioned in the following paragraphs, in which we explain why we have found ourselves unable to include a provision relating to omissions in our draft Bill.

7.10 *Express provision for liability for omission.* The Code team first provided for liability for omitting to do an act where “the enactment creating the offence specifies that it may be committed by such an omission”. But Professor Glanville Williams, in a detailed commentary on the Code team's clause from which we have derived much assistance,¹⁸ has referred to a number of decisions holding offences to be capable of being committed by omission although the relevant enactments do not so provide in express terms. They include decisions on offences of “causing”¹⁹ and “obstructing”.²⁰ A requirement that the enactment “specify” the possibility of liability for omission might well be held to reverse these decisions. That would be a measure of law reform on which there has been no consultation and which could not be justified.

7.11 Nor would this difficulty be met by confining the effect of a Code provision on omissions to offences created by the Code and by subsequent legislation. We are proposing that the Code should incorporate a reformed law of offences against the person as recommended by the Criminal Law Revision Committee.²¹ If liability for omissions depended upon express “specification”, it would be necessary at least to specify the offences against the person that could be committed by omission. But to do so would seem to imply the need to decide what other offences in Part II of the Code are capable of commission by omission and to specify accordingly. This would require a multitude of decisions of a law reform character without the opportunity for appropriate study and consultation. An obvious and striking example of the difficulty is presented by the offences of damage to property.²² We cannot assert that no such offences can be committed by omission²³; nor can we specify what offences of that kind can be so committed.

7.12 *Offences against the person.* The Code team, secondly, listed the offences against the person specified by the Criminal Law Revision Committee as capable of commission by breach of a duty to act; and they proposed a definition of the cases in which a duty to act would exist. Both the Committee's recommendation and the team's definition of duties are controversial. But it is not necessary for us to review either of these matters here. For the reasons just given we decided to make no attempt to define which offences in Chapter I (Offences against the Person) or elsewhere in Part II of the Code (other than offences so defined as to consist in an omission) should be capable of commission by omission. This must remain a matter of construction and, so far as duties to act are concerned, of common law.²⁴

7.13 *Drafting implications.* This has implications, however, for the drafting of some offences, most obviously of murder and manslaughter. At common law homicide may be

¹⁶For a useful summary, see Criminal Law Revision Committee, Fourteenth Report: Offences against the Person (1980), Cmnd. 7844, paras. 252-253.

¹⁷*Ibid.*, paras. 254-255.

¹⁸Glanville Williams, “What should the Code do about omissions?”, (1987) 7 *Legal Studies* 92.

¹⁹Referring to Williams, *Criminal Law: The General Part* 2nd ed., (1961), 5.

²⁰Referring to Williams, *Textbook of Criminal Law*, 2nd ed. (1983), 202-205; see, e.g., *Stunt v. Bolton* [1972] R.T.R. 435, [1972] Crim. L.R. 561 (“obstructing” constable by refusing, in spite of duty to do so, to hand over car keys). See also *Yuthiwattana* (1985) 80 Cr.App.R. 55 (failure to supply key to lodger as an “act” calculated to interfere with his peace and comfort; referred to by Professor Williams as a decision on the word “harass”).

²¹See Part 14 below; draft Bill, Part II, Chapter I.

²²Criminal Damage Act 1971, s. 1; draft Bill, cl. 180.

²³The point is uncertain and controversial. See the Code team's Report, para. 7.9; Schedule I to their Bill included provocative illustrations of the effect of the Criminal Law Revision Committee's recommendations as compared with the law relating to offences of damage to property.

²⁴As preserved by clause 4 (4) of the draft Bill.

committed by omission. Under the Code murder and manslaughter will be defined by statute for the first time. It is essential that they should not be so defined as to exclude liability for omission. The courts have in the past had no difficulty in holding the words “kill” and “slay” in an indictment capable of satisfaction by proof of an omission to act; but it does not necessarily follow that they would reach the same conclusion when construing the word “kill” in a statute. Clause 17 (1) makes it clear that, under the Code, results may be “caused” by omission. The draft Bill therefore defines homicide offences in terms of “causing death” rather than of “killing”; and other offences against the person similarly require the “causing” of relevant harms. It seems to us to be desirable to draft some other offences at least (most obviously, offences of damage to property) in the same way, in order to leave fully open to the courts the possibility of so construing the relevant (statutory) provisions as to impose liability for omissions. For to prefer “cause death” to “kill” while retaining “destroy or damage property” might be taken to imply an intention to exclude all liability for omissions in the latter case.

Clause 17: Causation

7.14 Some crimes are defined so as to penalise the causing of certain harmful results (whether by act or omission) and problems can arise concerning the notion of causation for which the Code should make provision. The subject has not undergone law reform consideration, either by ourselves or by the Criminal Law Revision Committee. Clause 17 is therefore designed to restate the principles to be found in the common law. These principles are reasonably well settled and can be stated quite shortly.

7.15 *Factual causation.* Under existing law a person’s act need not be the sole, or even the major, cause of a harmful result. It is enough that the act is a “substantial”²⁵ or “significant”²⁶ cause of the result, and in this context this means merely that the defendant’s contribution must be outside the *de minimis* range.²⁷ Accordingly it is wrong, for example, to direct a jury that the defendant is not liable if he is less than one-fifth to blame.²⁸ Clause 17 (1)(a) states this requirement in terms that the defendant’s act must make a “more than negligible” contribution to the occurrence of the result.²⁹ It is of course possible on this test for there to be more than one cause of a result, two persons being independently liable in respect of the same harm. As under the existing law, this test will take no account of a victim’s peculiar susceptibility to harm.³⁰

7.16 *Omissions.* It is impossible to apply paragraph (a) of subsection (1) satisfactorily in the case of an omission to act. *Ex hypothesi* the harmful result has been brought about by a factor, such as injury, disease or lack of food, the effects of which the defendant has failed (perhaps along with many others) to take steps to prevent. Accordingly, paragraph (b) of subsection (1) provides that a person “causes” a result if, being under a duty to do an act which might prevent the occurrence of the result, he omits to do that act.³¹

7.17 *Supervening causes.* Subsection (2) provides that a person does not cause a result if, after his own act or omission, an act or event occurs which satisfies three conditions: (i) it is the immediate and sufficient cause of the result; (ii) he did not foresee it; and (iii) it could not in the circumstances reasonably have been foreseen.³² This appears to restate satisfactorily for criminal law the principles which determine whether intervening acts or events are sufficient to break the chain of causation between the defendant’s conduct and the result, or as it is sometimes put, whether in the circumstances the defendant’s conduct is a cause in law of the result. According to this provision a person will still be liable if his intended victim suffers injury in trying to escape from the threatened attack unless the victim has done something so improbable that it can properly be said not to have been reasonably foreseeable.³³ Equally, liability for homicide will be unaffected if the victim refuses medical treatment for a wound caused by the defendant. Even if the refusal could be said to be unforeseeable, it is not sufficient in itself to cause the victim’s death — in such a case, to use

²⁵Smith [1959] 2 Q.B. 35; cf. *Malcherek* [1981] 1 W.L.R. 690, [1981] 2 All E.R. 422.

²⁶Page (1983) 76 Cr.App.R. 279.

²⁷Hennigan [1971] 3 All E.R. 133; *Cato* [1976] 1 W.L.R. 110, [1976] 1 All E.R. 260.

²⁸Hennigan, above.

²⁹See Appendix B, Example 17(i).

³⁰See, e.g., *Hayward* (1908) 21 Cox C.C. 692.

³¹See Appendix B, Example 17(ii). A duty to act, relevant to criminal liability, may appear from the terms of the enactment creating the offence or may exist at common law. See para. 7.9 above.

³²Example 17(iii).

³³Cf. *Roberts* (1971) 56 Cr.App.R. 95.

the language of the cases, the original wound is still the “operating and substantial cause” of death.³⁴

7.18 *Improper medical treatment.* A particular instance of an intervening act is improper medical treatment of a person injured by a wrongdoer. There has been some controversy over the extent to which, if ever, such treatment, when itself a cause of the harmful result, can relieve the original wrongdoer of liability. No special rule appears to be needed for such cases, which can be accommodated under the provision described in the preceding paragraph.³⁵ Only in the most exceptional cases will improper treatment satisfy the two conditions of not being reasonably foreseeable and of being an immediate and sufficient cause of the relevant result; but if it does so the wrongdoer will be held not to have caused the result.³⁶ Under the clause proper medical treatment can never be a supervening cause sufficient to absolve the defendant.³⁷

7.19 *Exception for accessories.* Subsection (3) makes a necessary exception for accessories who participate in a result-crime. But for this provision subsection (1) might have the effect of turning them all into principal offenders with consequential difficulties for clauses 26 and 27. However, this exception must itself be subject to exceptions for cases of innocent agency and offences the elements of which consist of the procuring, assisting or encouraging another to cause a result.

7.20 *Should the Code contain a provision on causation?* Some commentators on consultation questioned the necessity or wisdom of including in the Code a provision such as clause 17. They offered two kinds of objection: that such a provision is unnecessary, because the issue of causation is one of fact for the jury and rarely presents a problem; and that it is undesirable, because it will tend to generate unproductive argument among the jury and because it is in any case too complex to be read to a jury. We have given these objections careful consideration; but in the end we offer the clause in spite of them, for the following reasons.

7.21 Like any other legal issue, causation involves questions of fact and of judgment for the jury (did an act of the defendant contribute to the occurrence of the result? Was the third party’s or the victim’s intervening act reasonably foreseeable?). But this does not make causation wholly a question of fact. The questions for the jury to answer derive from principles of law, which appellate courts sometimes take occasion to state³⁸ and to which resort may be required in some, admittedly unusual, cases. An obvious example is the case of improper medical treatment following a wrongful act causing injury. If the Code does not state the relevant principles, it will be necessary for trial judges and others to go back to the common law to discover them. One of the main aims of codification — to state the known law clearly in a modern statute — will thereby be defeated.

7.22 Only, of course, where causation is in issue will the jury need to be troubled with clause 17. In the great majority of cases it will not be in issue and no direction on it will be required. Nor, when it is in issue, will the jury inevitably be troubled with the whole of the provision or with the provision verbatim. The judge, in language suitable to the jury’s needs, will trouble them only with such aspects of the provision as are relevant in the light of the evidence. He will, for instance, if the point requires attention, express in appropriate language the idea of an intervening event being itself “an immediate and sufficient cause of the result”.³⁹ The jury may exceptionally, therefore, have to be directed on the law codified in the clause; but its experience ought to be no different in principle from that of a jury applying the corresponding common law rule on which the judge has had to direct them.

³⁴*Smith*, above; *Blaue* [1975] 1 W.L.R. 1411, [1975] 3 All E.R. 446; Appendix B, Example 17(iv).

³⁵See Example 17(v).

³⁶See *Jordan* (1956) 40 Cr.App.R. 152; *Smith*, above.

³⁷As where doctors discontinue the use of a respirator to “keep alive” a person who has suffered irreversible brain damage at the hands of the defendant, and thereby bring about the victim’s death (that is, assuming he is not already dead). See *Malcherek* [1981] 1 W.L.R. 690, [1981] 2 All E.R. 422.

³⁸For a recent example, see the judgment of Robert Goff L.J. in *Page* (1983) 76 Cr.App.R. 279.

³⁹For this point more generally, see Report, Vol. 1, para. 3.43.

PART 8

FAULT: PRINCIPLES OF INTERPRETATION AND LIABILITY

Introduction

8.1 *Meaning of "fault"*. The sense in which the word "fault" is used in the Code is indicated by the definition of "fault element" in clause 6. "Fault element" means —

"any element of an offence consisting

- (a) of a state of mind with which a person acts; or
- (b) of a failure to comply with a standard of conduct;
- or
- (c) partly of such a state of mind and partly of such a failure."

The "fault" required for an offence will depend upon the definition of the offence (and that definition may prescribe more than one "fault element"). A "state of mind" may be required: e.g. "knowledge" that a circumstance exists, or the "intention" to cause a result. A "failure to comply with a standard of conduct" may suffice: e.g. a failure to take reasonable care to know of relevant circumstances or to avoid some result. Or a fault element may be complex, involving both a state of mind and a failure to comply with a standard: e.g. "recklessness" (being aware of a risk and unreasonably taking it: see clause 18(c)) or "dishonesty" (which involves consideration of the actor's state of mind and an assessment of his conduct—of which that state of mind is a part—in relation to prevailing standards¹).

8.2 A person does not necessarily commit an offence if with any fault required he does the act specified for it; he may be able to rely on a defence which renders his conduct entirely blameless. The word "fault" is therefore not ideal. But its use as a rough translation of the traditional Latin phrase "*mens rea*" is perfectly familiar; and the neutral expression "mental element" will not do, because it does not embrace non-compliance with standards as well as states of mind.

8.3 *Clauses 18 to 24* contain provisions of two kinds relating to the fault elements of offences.

- (i) *Principles of interpretation*. Clauses 18 and 20 establish *prima facie* rules for the interpretation of offences (other than pre-Code offences). They aim to avoid, for all offences to be declared in the Code or after its enactment, serious features of uncertainty and inconsistency that have marred English criminal law hitherto. They define three important kinds of fault (clause 18) and declare a minimum fault requirement in the absence of other statutory provision (clause 20). These clauses therefore give effect to the policy we recommended in 1978 in our Report on the Mental Element in Crime.²
- (ii) *Principles of liability*. Clauses 21 to 24 restate some principles of the present law, slightly modified in clause 22 (intoxication) in the light of law reform proposals.

Clause 18: Fault terms

8.4 *Towards certainty and consistency*. This clause gives effect to two main features of the policy declared in our Mental Element Report:³

- (i) to encourage consistency in the language of the criminal law, by providing a standard vocabulary of key fault terms; and
- (ii) to promote certainty as to the meaning of that language. The absence of agreement about the meanings of commonly-used terms has been a particular source of difficulty.

¹See *Ghosh* [1982] Q.B. 1053.

²(1978), Law Com. No. 89. But the drafting method of the present clauses is much simpler than that adopted in cl. 1-5 of Draft Criminal Liability (Mental Element) Bill appended to that Report. See also cl. 41 of the present draft Bill and cl. 6 of the 1978 Bill.

³See n. 2 above. Cf. Criminal Law Revision Committee, Fourteenth Report: Offences against the Person (1980), Cmnd. 7844, paras. 6-7, adopting the same policy as "essential" in relation to the terms "intention" and "recklessness".

8.5 The basic vocabulary of fault provided by clause 18 is not, of course, either exclusive or binding. Future legislation, like the Code itself, can use fault terms other than those defined by the clause; Parliament can continue to create offences requiring no fault or a lower degree of fault than that specified by clause 20; and the meaning of any of the Code terms can be modified for the purpose of any offence. Clauses 18 and 20 require the draftsman of any future offence to give active consideration to the question of fault but do not dictate the outcome of that consideration.

8.6 Those who commented on the Code team's Bill offered a variety of criticisms of the clause (clause 22) corresponding to clause 18, to some of which the present redraft responds. But we believe that there was general support for the proposal to provide definitions of a limited number of fault terms that would be used as key terms in the Code itself and would be likely to be used in defining future offences.

8.7 *The vocabulary of fault terms.* No less than seven terms were defined in clause 22 of the Code team's Bill. Only three of them ("knowledge", "intention" and "recklessness") find a place in the present draft; we comment on them below. If the concept intended to be conveyed by any of the others ("purpose", "heedlessness", "(criminal) negligence" and "carelessness") had been needed for a number of offences in Part II of the Code, we should very likely have wished to include a Code definition, in pursuance of our general policy of promoting certainty and consistency. But none of them has proved to be required for the definitions of offences proposed for inclusion in the Code as first enacted. We have therefore excluded them; and we are aware that this will give satisfaction to a number of critics of the Code team's Bill.⁴ On the other hand, the list of terms defined in clause 18 is not a closed one and we contemplate that it may come to be added to in the future if that would be useful for the purposes of the Code as a whole.

8.8 *Application of the clause.* Clause 18 does not apply to "pre-Code offences"—that is, existing offences which survive the enactment of the Code. The terms here defined may have been used in other senses in defining such offences. To apply the Code definitions to them might work unconsidered changes in the law and affect in particular the operation of specialised regulatory legislation. The clause therefore applies only for the purposes of offences defined in the Code itself and, in the absence of contrary provision, in subsequent legislation. As pre-Code offences come to be re-enacted in the future, the opportunity can be taken to express them as far as possible in the standard language of the Code.

8.9 *Method of the clause.* The degrees of fault defined by clause 18 (knowledge, intention and recklessness) relate always to particular elements of offences. "Intention", for example, is always a state of mind in relation to something done or to be done, or to a result of something done, or (more often under the name of "knowledge") to an aspect of the circumstances in which something is done. Clause 18 explains the three types of fault by answering the question: when is a person said to act "knowingly", "intentionally" or "recklessly" with respect to a circumstance or a result that is an element of an offence? The fault terms are explained by definition of their adverbial forms.

8.10 *"Knowingly": knowledge and "wilful blindness".* In the draft Bill appended to our Report on the Mental Element in Crime⁵ we proposed that a person should be regarded as knowing of a circumstance if either (i) he actually knows, or (ii) he has no substantial doubt, that the circumstance exists. This proposal, however, was open to two possible objections of form and one of substance. It was questionable in point of form, first, because it defined knowledge partly in terms of itself, and secondly, because it threatened the tribunal of fact with the confusing question "Are you satisfied beyond reasonable doubt that the defendant had no substantial doubt that such and such was the case?" The possible objection of substance is one that could also be taken to the question "Was the defendant almost certain?" that was preferred by the Code team. Neither formula, it may be said, makes sufficiently clear that the state of mind which is to be assimilated to "actual knowledge" for the purposes of criminal liability is that of so-called "wilful blindness".⁶ English criminal law has commonly treated a person as knowing something if, being pretty sure that it is so, he deliberately avoids making an examination or asking questions that might confirm the fact—he avoids taking advantage of an available means of "actual knowledge". It is this state of

⁴For further reference to the concept of "heedlessness", see below, para. 17.6.

⁵(1978), Law Com. No. 89; Draft Criminal Liability (Mental Element) Bill, cl. 3(1).

⁶Called "knowledge of the second degree" by Devlin J. in a famous passage: *Roper v. Taylor's Central Garages (Exeter)* [1951] 2 T.L.R. 284.

mind which, we believe, has to be captured by a short form of words. Clause 18 (a) therefore treats a person as acting “knowingly” with respect to a circumstance “not only when he is aware that it exists or will exist, but also when he avoids taking steps that might confirm his belief that it exists or will exist.”⁷

8.11 *Knowing the future.* In the strictest sense of the word one cannot “know” that something will be the case in the future. Nevertheless, in case an offence should be defined in terms requiring a state of mind, called knowledge, with respect to future facts,⁸ the present definition includes reference to knowledge that a circumstance “will exist”.

8.12 *“Intentionally”.* We have given careful consideration to comments made upon earlier attempts to prescribe a meaning for “intention” as a key term in the Code, in particular those in the draft Bill appended to our Mental Element Report⁹ and in the Code team’s Bill.¹⁰ Despite differences of wording, those two drafts and clause 18(b) of the present draft Bill aim to express essentially the same conception.

8.13 *Intention with respect to circumstances.* A person intentionally damages property belonging to another if, most obviously, he intentionally damages property that he knows belongs to another. His knowledge, for the purpose of an offence so worded, is intention with respect to the circumstance that the property belongs to another. But one damaging property without actually knowing that it belongs to another rather than to himself nevertheless acts intentionally with respect to that circumstance if he hopes that it is so. Clause 18(b)(i) provides accordingly; and in that sub-paragraph the word “knows” has the meaning given by paragraph (a), discussed above.

8.14 *Intention with respect to results.* Clause 18(b)(ii) provides that for Code purposes, and for the interpretation of offences subsequently enacted, a person acts intentionally with respect to a result “when he acts either in order to bring it about or being aware that it will occur in the ordinary course of events.”¹¹ Acting in order to bring about a result is, as it were, the standard case of “intending” to cause a result. But we are satisfied that a definition of “intention” for criminal law purposes must refer, as Lord Hailsham of St. Marylebone L.C. expressed it in *Hyam*¹² to “the means as well as the end and the inseparable consequences of the end as well as the means.” Where a person acts in order to achieve a particular purpose, knowing that this cannot be done without causing another result, he must be held to intend to cause that other result. The other result may be a pre-condition — as where D, in order to injure P, throws a brick through the window behind which he knows P to be standing; or it may be a necessary concomitant of the first result — as (to use a much quoted example) where D blows up an aeroplane in flight in order to recover on the insurance covering its cargo, knowing that the crew will inevitably be killed. D intends to break the window and he intends to kill the crew. But there is no absolute certainty in human affairs. P *might* fling up the window while the brick is in flight. The crew *might* make a miraculous escape by parachute. D’s purpose *might* be achieved without causing the second result — but these are only remote possibilities and D, if he contemplates them at all (which may be unlikely), must know that they are only remote possibilities. The result will occur, and D knows that it will occur, “in the ordinary course of events ... unless something supervenes to prevent it.”¹³ It is, and he knows it is, “a virtual certainty.” We have adopted the phrase, “in the ordinary course of events” to ensure that “intention” covers the case of a person who knows that the achievement of his purpose will necessarily cause the result in question, in the absence of some wholly improbable supervening event.¹⁴

8.15 A person’s awareness of any degree of probability (short of virtual certainty) that a particular result will follow from his acts ought not, we believe, to be classed as an “intention” to cause that result for criminal law purposes. This accords with the general

⁷See Appendix B, Example 18(i).

⁸See, for an example, Criminal Law Act 1977, s. 1(2).

⁹(1978), Law Com. No. 89: Draft Criminal Liability (Mental Element) Bill, cl. 2(1).

¹⁰Cl. 22(a).

¹¹See Appendix B, Example 18(ii).

¹²[1975] A.C. 55 at 74.

¹³The language of Lord Bridge of Harwich in *Moloney* [1985] A.C. 905 at 929.

¹⁴Cf. the C.L.R.C.’s Fourteenth Report (above, n. 3), para. 10, proposing a similar definition of “intention”. The Committee put the example of “a person conceal[ing] a bomb under a seat in a pub knowing that it was timed to explode at a time when the seat was invariably occupied by a group of soldiers...In the unlikely event of a jury believing [his] story that all he wanted to do was damage property, they would...have little difficulty in finding that he knew (and therefore, on the second part of the...definition, intended) that the explosion would cause death or at least serious bodily harm”.

tendency of modern decisions on offences defined in terms of intention.¹⁵ Liability based on the awareness of a probable result can be provided for by casting the offence in terms of recklessness.

8.16 “*Intention*” as a term of art. The proposal to define “intention” involves a departure from recent statements of the House of Lords on the law of murder. In *Moloney*¹⁶ the House discouraged attempts by trial judges, in directing juries, to define the “intention” (to cause death or serious bodily harm) required for that offence. Instead, their lordships offered guidance, which was soon afterwards modified in *Hancock and Shankland*,¹⁷ on the evidence from which the jury may infer that that intention existed. Where it is proved that the defendant’s purpose was to cause a particular result, he intended it and it is immaterial whether the result was, or was believed by the defendant to be, certain, probable or merely possible. The guidance given by the House of Lords, as explained by the Court of Appeal in *Nedrick*,¹⁸ relates to the case where the result was not “the primary desire or motive” of the defendant. In *Nedrick* –

“if the jury are satisfied that...the defendant recognised that death or serious harm would be virtually certain (barring some unforeseen intervention) to result from his voluntary act, then that is a fact from which they may find it easy to infer that he intended to kill or do serious bodily harm, even though he may not have had any desire to achieve that result.”

In short, foresight of the virtual certainty of the result is not intention but evidence from which intention may be inferred. The concept of a state of mind that falls short of “desire or motive” that the result be caused but is something more than foresight that the result is a virtual certainty is difficult to grasp. A judge, who was asked by a perceptive juror to tell him what that state of mind is, would be in some difficulty. The practical effect seems to be to leave the jury to characterise the defendant’s foresight of the virtual certainty of result as “intention”, or not, as they think right in all the circumstances of the case. We remain of the opinion that it is in the interest of clarity and the consistent application of criminal law to define intention; and that justice requires the inclusion of the case where the defendant knows that his act will cause the relevant result, “in the ordinary course of events”, as explained above. It is possible that, under the Code, juries will, in a few cases, find intention to be proved where, under the existing law, they might not have done so.

8.17 “*Recklessly*”. Clause 18(c) provides that a person acts “recklessly” with respect to a circumstance when he is aware of a risk that it exists or will exist, and with respect to a result when he is aware of a risk that it will occur, it being, in either case, “in the circumstances known to him, unreasonable to take the risk”.¹⁹ The use thus proposed for “reckless” and related words is the same as that which we proposed in our Mental Element Report.²⁰

8.18 Recent House of Lords’ decisions have given “reckless” and “recklessly” a wider meaning than that proposed by clause 18(c). The leading case of *Caldwell*²¹ concerned the Criminal Damage Act 1971. It was held that a person is “reckless as to whether or not any property would be destroyed or damaged” (within the meaning of section 1 (1) of the Act) if—

“(1) he does an act which in fact creates an obvious risk that property will be destroyed or damaged and (2) when he does the act he either has not given any thought to the possibility of there being any such risk or has recognised that there was some risk involved and has none the less gone on to do it”;

and similarly (under section 1 (2)) as to recklessness whether life would be endangered.²² *Lawrence*²³ applied *Caldwell* in interpreting the offence of driving recklessly. It was indeed soon afterwards declared in a manslaughter case that “reckless” should be given “the same meaning” (that is, the *Caldwell* meaning) “in relation to all offences which involve ‘recklessness’ as one of the elements unless Parliament has otherwise ordained”;²⁴ but the

¹⁵ *Moloney* [1985] A.C. 905; *Belfon* [1976] 1 W.L.R. 741, [1976] 3 All E.R. 46; *Pearman* (1985) 80 Cr.App.R. 259.

¹⁶ [1985] A.C. 905.

¹⁷ [1986] A.C. 455.

¹⁸ [1986] 1 W.L.R. 1025 at 1028.

¹⁹ See Appendix B. Examples 18(iii)-(v).

²⁰ Draft Criminal Liability (Mental Element) Bill, cl. 4 (employing a very different drafting technique); see also the Code team’s Bill, cl. 22(a).

²¹ [1982] A.C. 341; see also *Miller* [1983] 2 A.C. 161.

²² [1982] A.C. 341 at 354-355, per Lord Diplock.

²³ [1982] A.C. 510.

²⁴ *Seymour* [1983] 2 A.C. 493 at 506, per Lord Roskill.

contrary view prevailed in the Court of Appeal²⁵ in relation to the statutory definition of rape, in the light of the modern history of that offence.

8.19 *Explanation of the narrower definition.* If the *Caldwell* concept of giving no thought to the possibility of there being a risk, where the risk is in fact obvious, is to be a basis of liability for some offences governed by the Code, the Code ought to have a term to express it.²⁶ But the question that must first be faced is whether “reckless” should be used in the Code to express this concept as well as that of the actor’s recognising “that there [is] some risk involved and...nevertheless [going] on to do” the act which creates the risk. We are sure that it should not and we adhere to the narrower meaning for the term which we recommended in our Mental Element Report and which seemed to have become the judicially accepted meaning before *Caldwell*.²⁷ Our reasons are as follows:

- (i) The Code needs a term, for use as necessary in the specification of offences, which refers only to the unreasonable taking of a risk of which the actor is aware. Such conscious risk-taking is the preferred minimum fault element for most serious modern offences. This appears, for example, from recommendations of the Criminal Law Revision Committee on offences against the person²⁸ and on sexual offences;²⁹ from the recently enacted public order offences;³⁰ and from the modern history of the law of rape.³¹
- (ii) Before *Caldwell*, “reckless” had become the conventional term by which to refer to this narrower type of fault. We do not know of an acceptable alternative.
- (iii) We understand that trial courts have experienced considerable difficulties in using the complex *Caldwell* definition of recklessness. That definition in effect describes two kinds of fault. Even if both kinds were to be needed for some offences, they need not be conveyed by a single Code expression. We believe, indeed, that it may be of advantage to prosecutors and to sentencing courts to be able to distinguish, by means of a discriminating language, between different modes of committing the same offence.

8.20 *The “subjectivist” approach to criminal liability.* “Knowledge”, “intention” and “recklessness” (and cognate words) are terms used throughout the draft Bill with the meanings given by clause 18. The modern English criminal law tradition tends to require a positive state of mind with respect to the various external elements of an offence of any seriousness; and the three key terms are the obvious terms, because of their familiarity in criminal law usage, by which to refer to some of the most common states of mind required. Although this “subjectivist” tradition is not without its critics, we are proposing a Code that stays within the mainstream of English criminal law. But in doing so we do not exclude the possibility that Parliament may hereafter wish to create offences constructed upon a different foundation of liability. The group of House of Lords’ cases led by *Caldwell*³² can, indeed, be interpreted as having placed some serious offences upon such a different foundation. It will, of course, be open to Parliament to pursue the line followed by those cases by rejecting or modifying the fault requirements proposed for particular offences in Part II of our draft Bill and by providing further key terms to supplement the three that we have defined.

8.21 The Code team, in their Bill,³³ did in fact provide a term (“heedlessness”) to convey the extended sense of recklessness laid down in *Caldwell*. We have not found occasion to use that expression in the definitions of offences in Part II of our Bill;³⁴ but it remains available if there should prove to be a use for it.

²⁵*Satnam S. and Kewal S.* (1983) 78 Cr.App.R. 149; *Breckenridge* (1983) 79 Cr.App.R. 244.

²⁶As to this, see para. 8.21 below.

²⁷*Cunningham*[1957] 2 Q.B. 396; *Stephenson* [1979] Q.B. 695.

²⁸Fourteenth Report: Offences against the Person (1980), Cmnd. 7844; see Part II, Chapter I, of our draft Bill.

²⁹Fifteenth Report: Sexual Offences (1984), Cmnd. 9213; see Part II, Chapter II.

³⁰Public Order Act 1986, s. 6(1)-(4), requiring, for an offence under any of ss. 1-5, that the actor at least be aware that his conduct may have the character required for the offence in question; following our Report on Offences Relating to Public Order (1983), Law Com. No. 123, paras. 3.41-3.54; see c11. 198 to 202 of our draft Bill.

³¹*D.P.P. v. Morgan* [1976] A.C. 182; Report of the Advisory Group on the Law of Rape (1975), Cmnd. 6352; Sexual Offences (Amendment) Act 1976, s. 1(1). Cf. Criminal Law Revision Committee, Fifteenth Report (see n. 29 above), para. 2.41.

³²[1982] A.C. 341; see above, para. 8.18.

³³Cl. 22(a); see their Report, para. 8.22.

³⁴See in particular para. 17.6 below, as to the fault element of the offence of destroying or damaging property.

Clause 19: Degrees of Fault

8.22 Knowledge or intention is a higher degree of fault than recklessness. This yields two useful propositions stated in clause 19.

8.23 *Subsection (1)*. An allegation of knowledge or intention includes an allegation of recklessness. This is relevant to the provisions on alternative verdicts (clause 8), double jeopardy (clause 11) and multiple convictions (clause 12); it should be read with the definition in clause 6 of the Code expression “included offence”.³⁵

8.24 *Subsection (2)* allows an allegation of recklessness to be made good by proof of knowledge or intention.

Clause 20: General requirement of fault

8.25 *The need for the clause*. An enactment creating an offence should ordinarily specify the fault required for the offence or expressly provide that the offence is one of strict liability in respect of one or more identified elements. It is necessary, however, to have a general rule for the interpretation of any offence the definition of which does not state, in respect of one or more elements, whether fault is required or what degree of fault is required. The absence of a consistent rule of interpretation has been a regrettable source of uncertainty in English law. Clause 20 provides such a rule. It would implement a policy that we recommended in our Report on the Mental Element in Crime,³⁶ though in a manner a good deal less complex than that suggested in the draft Bill appended to that Report.³⁷ The proposal to include this provision was well supported on consultation.

8.26 *Application of the clause*. Clause 20 (like clause 18, defining fault terms) will apply only to offences in the Criminal Code Act and to offences subsequently created: subsection (2). Thus the settled interpretation or understanding of existing legislation will not be disturbed.

8.27 *Presumed fault requirement*. Clause 20(1) imposes a presumption that the commission of an offence requires recklessness with respect to each of its external elements.³⁸ Some will regard this as more controversial now than it was in 1978, when we made the same proposal in our Mental Element Report. For since that time some offences requiring at least “recklessness” for their commission have been so interpreted that fault of a lower degree than “recklessness” as our clause 18(c) would define it suffices for their commission.³⁹ If Parliament should consider that that interpretation achieved an appropriate scope for serious offences such as those to which it applied, it might wish to modify the present clause to provide a presumed requirement of such a lower degree of fault. This could be done either by defining “recklessness” in clause 18(c) so as to embrace that lower degree of fault (we have already given reasons for rejecting that course⁴⁰) or by adding to clause 18 an additional fault term⁴¹ to which, instead of to recklessness, the present clause could refer. Our recommendation, however, is that recklessness in the “subjective” sense should remain the presumed minimum requirement for criminal liability.

8.28 *Displacing the presumption*. We considered a suggestion that the clause should seek to make the presumption displaceable only by *express* provision requiring some fault other than recklessness, or stating that no fault is required, with respect to an element of an offence. We do not think that this would be appropriate. We are mindful of the “constitutional platitude” pointed out by Lord Ackner in *Hunt*⁴² that the courts must give effect to what Parliament has provided not only “expressly” but also by “necessary implication”. If the terms of a future enactment creating an offence plainly implied an intention to displace the presumption created by clause 20 (1), the courts would no doubt feel obliged to give effect to that intention even if the present clause were to require express provision for the purpose.

³⁵See Appendix B, Example 19.

³⁶(1978), Law Com. No. 89.

³⁷Draft Criminal Liability (Mental Element) Bill, cl. 5; cf. the Code team’s Bill, cl. 24.

³⁸See Appendix B, Examples 20(i) and (ii). “A requirement of recklessness is satisfied by knowledge or intention”: cl. 19 (2); so that clause 20 (1) effectively lays down a presumed requirement of intention or recklessness with respect to results and of knowledge or recklessness with respect to circumstances, as the Examples illustrate.

³⁹See para. 8.18 above.

⁴⁰See para. 8.19 above.

⁴¹See the reference to “heedlessness” in para. 8.21 above.

⁴²[1987] A.C. 352 at 380.

Clause 21: Ignorance or mistake of law

8.29 *Ignorance of the law is no defence.* There is abundant authority that the accused's ignorance of the offence he is alleged to have committed,⁴³ or his mistake as to its application,⁴⁴ will not relieve him of liability. This principle appears to be an absolute one.⁴⁵ So it seems appropriate to make explicit in the Code one of the best known maxims of the common law. The effect will be to preclude any attempt to stimulate judicial recognition of exceptions to the general rule by reliance on clause 45(c), under which common law defences can be developed, but only if they are not inconsistent with other Code provisions.⁴⁶

8.30 The Code team in their Report drew attention to the case for the recognition of a defence of excusable mistake of law, particularly where the act that constitutes an offence has been done in reliance upon a statement of law made by a competent court or a responsible official.⁴⁷ Such a defence, as the team acknowledged, could only be introduced in the light of a major law reform exercise involving detailed consideration and extensive consultation. We have not been able to undertake such an exercise in the context of the present project.

8.31 *Express defence of ignorance or mistake of law.* Paragraph (a) contemplates the possibility that such a defence might be provided in relation to a particular offence. Examples are likely to be rare.

8.32 *Ignorance or mistake negating a fault element.* "Ignorance of the law is no defence" is a popular aphorism with a good deal of power to mislead. It therefore seems worthwhile to state, in paragraph (b), the truth that a mistake as to the law, equally with one as to fact, can be the reason why a person is not at fault in the way prescribed for an offence. A simple example occurs where a person destroys property in the mistaken belief that it is his own to do with as he wishes. He does not intentionally or recklessly destroy property belonging to another within the meaning of clause 180.⁴⁸

Clause 22: Intoxication

8.33 This clause provides for the effect of intoxication upon the liability of a person who causes the external elements of an offence. It aims to reproduce the present law on this topic with modifications recommended by the Criminal Law Revision Committee.⁴⁹ It is a somewhat complex clause because it restates relatively complex law. We have kept it as simple as possible by omitting aspects of the corresponding clause in the Code team's Bill that we regarded as strictly speaking redundant (as we explain below). The provision of a simpler clause on intoxication could only result from a major law reform exercise. That was not in question as an aspect of the present project. But, like the majority of the Criminal Law Revision Committee,⁵⁰ we are not in any case persuaded that the law as stated in clause 22 would be seriously unsatisfactory.

8.34 *Involuntary intoxication; offences requiring intention, knowledge, etc.* The legal position in relation to situations not referred to by clause 22 is to be deduced from the rest of the Code, read with the enactment creating the offence charged. Thus, the clause has

⁴³*Bailey* (1800) R. & R. 1; 168 E.R. 651; *Esop* (1836) 7 C. & P. 456; 173 E.R. 203; *Barronet and Allain* (1852) Dears. 51; 169 E.R. 633; *Grant v. Borg* [1982] 1 W.L.R. 638 (a "fundamental" principle: *per* Lord Bridge at 646).

⁴⁴*Johnson v. Youden* [1950] 1 K.B. 544.

⁴⁵In *Surrey County Council v. Battersby* [1965] 2 Q.B. 194 at 203, reliance upon a public official's advice as to the law was acknowledged to be "very strong mitigation".

⁴⁶See clause 4 (4), to which clause 45(c) refers.

⁴⁷Law Com. No. 143, paras. 9.4-9.6.

⁴⁸*Cf. David Smith* [1974] Q.B. 354; Appendix B, Example 21(i). See also Example 21(ii). The Code team included in the corresponding clause of their Bill the proposition that "ignorance or mistake ... of fact ... may negative a fault element of an offence." But the real point of this statement was that even a mistake for which there are no reasonable grounds may be the reason why a person lacks the fault required for an offence. That this has not always been obvious is apparent from modern decisions in which it has had to be pointed out that if, to constitute an offence, a person's conduct must be intentional with respect to a given circumstance, it is inconsistent to demand that, to exclude liability, a mistake with respect to the circumstance must be based on reasonable grounds: *D.P.P. v. Morgan* [1976] A.C. 182; *Kimber* [1983] 1 W.L.R. 1118, [1983] 3 All E.R. 316; see also *Wilson v. Inyang* [1951] 2 K.B. 799 ("wilfully"). We do not think it appropriate to state at this point in the Code what is in fact a truism. The point is made in a different form in clause 14: a court or jury is to have regard to *all* the evidence in determining whether a person had a particular state of mind. That evidence may include the defendant's evidence that he made a relevant, though unreasonable, mistake. The present clause is therefore confined to ignorance or mistake of law.

⁴⁹Fourteenth Report: Offences against the Person (1980), Cmnd. 7844, Part VI.

⁵⁰Fourteenth Report, para. 274.

nothing to say about evidence of *involuntary* intoxication, which is accordingly to be treated like any other evidence tending to show that the defendant lacked the fault required for the offence charged. If the evidence shows no more than that the defendant more readily gave way to passion or temptation than he would have done if he had been sober, it may be a mitigating factor but it will not be a defence. Again, when the offence charged requires proof of intention, knowledge or belief, evidence of *voluntary* intoxication is to be treated like any other evidence tending to show that the defendant lacked the state of mind in question. This is presently the position in relation to any offence classified as an offence of “specific intent”. And once again, with such an offence as with any other, intoxication will have no bearing on liability to conviction if it merely affected the defendant’s emotional reaction or reduced his inhibitions. There is no need for express provision on these matters.⁵¹

8.35 *Offences of recklessness.* So far as proof of the fault element of an offence is concerned, the law at present has a special rule for the effect of voluntary intoxication where the offence charged is one of so-called “basic intent”. We agree with the view of the Criminal Law Revision Committee that this should be replaced by a rule, modelled upon the corresponding provision of the American Law Institute’s Model Penal Code,⁵² relating to any offence requiring a fault element of recklessness. Subsection (1)(a) provides that a person who was voluntarily intoxicated is to be treated, for the purposes of such an offence, as having been aware of any risk of which he would have been aware had he been sober.⁵³ Subsection (1) applies to an offence requiring recklessness “however described”.⁵⁴ So, for example, if any offences requiring “malice” survive the enactment of the Code, they will be governed by the subsection since “maliciously” is satisfied by proof of recklessness, as defined in clause 18(c);⁵⁵ and the same will be true of any offences enacted after the Code which employ the concept of recklessness but use different terminology to describe it.

8.36 Subsection (1) applies to an offence requiring a fault element of recklessness even where it also requires, expressly or by implication, an element of intention or knowledge. So, for example, any charge of rape no doubt implies an allegation of an intention to have sexual intercourse; but paragraph (a) nonetheless applies to an alleged “fault element of recklessness” constituted by the defendant’s having been aware that the woman was not consenting to the intercourse.⁵⁶

8.37 A defendant who was intoxicated may, however, deny that he intended to do any act at all, having no control over, or awareness of, his movements. Charged with recklessly causing serious personal harm by beating a woman, he says that because of his drugged condition he was unconscious. Clause 33 (1)(b) makes it clear that he cannot rely on his condition as a “state of automatism” if it arose from voluntary intoxication. He is to be treated as having beaten the woman, being aware of any risk of causing harm of which he would have been aware had he been sober.

8.38 *Belief in exempting circumstances.* Just as a person may, because of intoxication, lack the state of mind required for an offence, so he may have the state of mind required for a defence — as when, being drunk, he mistakenly believes that P is making a murderous attack on him and retaliates, as he supposes, in self-defence. As with the fault elements of offences, we believe that it is unnecessary to refer in this clause to the relevant effect of involuntary intoxication. Evidence of involuntary intoxication will, without special provision, be treated like any other evidence tending to show that the defendant held any belief or had any other state of mind which is an element of a defence.

⁵¹In this we depart from the view taken by the Code team (cl. 26(1) and (2) of their Bill) and in part, apparently, by the Criminal Law Revision Committee: Fourteenth Report, para. 267. In addition, we do not regard it as necessary to make express provision for the improbable case of the person who, having resolved to kill, takes drink to give himself “Dutch courage” and then kills in such a drunken condition that he does not know what he is doing: see *Attorney-General for Northern Ireland v. Gallagher* [1963] A.C. 349, *per* Lord Denning at 382; Code team’s Bill, cl. 26(5).

⁵²Proposed Official Draft, s. 2.08(2); cf. *Majewski* [1977] A.C. 443, *per* Lord Elwyn-Jones L.C. at 475; *Caldwell* [1982] A.C. 341, *per* Lord Diplock at 355.

⁵³Sec Appendix B, Examples 22(i) and (ii). Exceptionally, taking account of some special characteristic of the defendant, the court or jury may have a doubt as to whether he, if sober, would have been aware of the relevant risk, although there would have been no such doubt in the case of a person without that characteristic.

⁵⁴Sec also clause 88, (explained in para. 15.11 below) for a similar rule applying to aspects of some sexual offences closely related to recklessness.

⁵⁵*W. (A Minor) v. Dolbey* (1989) 88 Cr. App. R. 1, [1983] Crim.L.R. 681; *Grimshaw* [1984] Crim. L.R. 108.

⁵⁶See note 54, above. Rape is defined in clause 89.

8.39 Where intoxication is voluntary, its effect depends on the fault element of the offence charged. Subsection (1)(b) follows the recommendation of the Criminal Law Revision Committee:⁵⁷

“...in offences in which recklessness constitutes an element of the offence, if the defendant because of a mistake due to voluntary intoxication holds a belief which, if held by a sober man, would be a defence to the charge but which the defendant would not have held had he been sober, the mistaken belief should be immaterial.”

8.40 A slightly stricter rule must apply to offences not requiring a fault element of recklessness. Subsection (2) therefore provides that, where the offence charged involves a fault element of failure to comply with a standard of care, or requires no fault, the defendant is to be treated as not having believed in the existence of an exempting circumstance if a reasonable sober person would not have so believed.

8.41 In *Jaggard v. Dickinson*⁵⁸ the defendant was allowed to rely on a drunken belief that she was damaging property belonging to a person who would consent to her doing so. The effect of subsection (1)(b) is to reverse this decision. This is justified, not only on the ground that it follows from the Committee's recommendations, but also because that decision creates an anomalous distinction (between mistake as to the non-existence of an element of an offence and mistake as to the existence of a circumstance affording a defence) which it would be wrong to perpetuate in the Code.

8.42 *Mistake and offences requiring intention.* The same anomaly would be introduced if the Code were to adopt a dictum of the Court of Appeal in *O'Grady*⁵⁹ to the effect that a defendant, on a charge of an offence of “specific intent” equally with one of “basic intent”, would not be able to rely upon evidence of an intoxicated mistaken belief in an occasion for self-defence. The court was concerned that one who kills because of a drunken mistake should not be “entitled to leave the court without a stain on his character”. But a conviction of manslaughter will of course be available (and similarly, in a case of serious personal harm, a conviction of an offence of recklessly causing such harm); and it would, we believe, be unthinkable to convict of murder a person who thought, for whatever reason, that he was acting to save his life and who would have been acting reasonably if he had been right. Moreover, the Code should if possible provide consistently for all defences; it would not be appropriate to try to devise a special rule for self-defence alone, or generally for the use of force in public or private defence (clause 44) or in defence of property (clause 185). In all the circumstances we are satisfied that the dictum referred to must be ignored in framing the present clause. The result is consistent with the view of the Criminal Law Revision Committee on this topic.⁶⁰

8.43 *Intoxication and reasonableness.* It would seem obvious that, when the law prescribes a standard of reasonable behaviour, this must relate to the standard to be expected of a sober person. But the fact that the point has been argued in the Court of Appeal in two modern cases⁶¹ suggests the desirability of including in the Code the principle that those cases establish, to avoid the matter being reopened. The principle is stated in subsection (3). In *Young*⁶² the Court of Appeal thought that, in determining whether a person “has reason to suspect”, it is “an unnecessary gloss to introduce the concept of the reasonable man”. It is, however, impossible to state a principle concerning intoxication or sobriety without a reference to a person. It does not necessarily follow that the judge need refer to such a person in directing the jury, though it may sometimes be convenient to do so.

8.44 *Exceptions from subsection (1): (a) murder.* Murder has to be excepted (by subsection (4)(a)) from the application of subsection (1) because the fault required by clause 54(b) (“A person who causes the death of another...intending to cause serious personal harm and being aware that he may kill”) is a variety of recklessness. If murder were not excepted, a person who, because of intoxication, was unaware that he might kill might be treated as being aware of that risk and so liable to conviction of murder. This would be a

⁵⁷Fourteenth Report, paras. 276-278; cf. *O'Grady* [1987] Q.B. 995; *Fotheringham* [1988] Crim. L.R. 846. See Appendix B, Examples 22(iii) and (iv).

⁵⁸[1981] Q.B. 527.

⁵⁹[1987] Q.B. 995 at 999.

⁶⁰Fourteenth Report, paras. 276-278.

⁶¹*Woods* (1981) 74 Cr.App.R. 312; *Young* [1984] 1 W.L.R. 654, [1984] 2 All E.R. 164.

⁶²[1984] 1 W.L.R. 654, [1984] 2 All E.R. 164.

departure from long established law and from the recommendation of the Criminal Law Revision Committee.⁶³ The exception reproduces existing law in accordance with that recommendation. It is justified because manslaughter, being punishable with life imprisonment, is sufficient to protect the public interest.

8.45 (b) *Voluntary intoxication and mental disorder in combination*. The courts have accepted that a person's unawareness or mistaken belief may be due to a combination of voluntary intoxication and mental disorder. In *Burns*⁶⁴ where the defendant's unawareness may have been due partly to brain damage and partly to drink and drugs taken otherwise than on medical advice, the Court of Appeal held that he was entitled to an absolute acquittal. Yet neither of the concurrent causes alone would have entitled him to an absolute acquittal of the offence of "basic intent" with which he was charged. Some such cases would be better dealt with by a mental disorder verdict under clause 36: the defendant is acquitted but made amenable to the special disposal powers available to the court. A mental disorder verdict will be returned (so long as clause 22 (1) does not apply) where the defendant was suffering at the time of the act from "mental disorder" as defined in clause 34. The kind of mental disorder relevant in practice⁶⁵ would be a state of automatism (not resulting only from the intoxication itself) that is associated with an underlying condition and likely to recur. A mental disorder verdict would be more satisfactory than an "insanity" verdict under the present law because the court will have wide powers of disposal under the recommendations of the Butler Committee⁶⁶ instead of being obliged to order indefinite detention of the offender. Subsection (4)(b) therefore provides that subsection (1) shall not apply in a case of combined intoxication and mental disorder.⁶⁷

8.46 *Definitions*. (a) *"Intoxicant"*. It is desirable to define "intoxicant" (and, by implication, "intoxication") for the purposes of the Code because the meaning it has to bear, like its meaning under the existing law, is probably wider than that attributed to it in ordinary speech. There is only one aspect of intoxication which is relevant for present purposes and that is its effect on a person's awareness of circumstances and of the possible results of his conduct and on his ability to control his movements. Subsection (5)(a) therefore defines an intoxicant as anything which, when taken into the body, may impair awareness or control. The paragraph makes specific reference to alcohol, not only because it is the most common intoxicant but also in order to direct the reader's mind more readily to the kind of effect envisaged. The definition is wide enough to include the vapour which is inhaled by a glue sniffer as well as drugs taken orally or by injection.

(b) *"Voluntary intoxication"*. When a person who takes an intoxicant knows that it is or may be an intoxicant his resulting intoxication is in general "voluntary", as subsection (5)(b) provides. But it seems to be accepted in the present law that intoxication arising from the proper use of drugs for medicinal purposes does not have the consequences in the criminal law of voluntary intoxication; and this is clearly right in principle. A person who becomes voluntarily intoxicated may, without any further fault on his part, become guilty of serious crime. It would be entirely wrong that such a consequence should follow from acting either on medical advice or without medical advice but in all respects properly for a medicinal purpose.

(c) *"Takes" an intoxicant*. In the interests of economy of statement, a person's permitting an intoxicant to be administered to himself is said by subsection (5)(c) to be a case of "taking" it.

8.47 *When an intoxicant is not taken "properly for a medicinal purpose"*. When drugs are taken on medical advice that advice may include conditions as to the circumstances in which the drug is to be taken. The effect of taking drugs and failing to comply with the conditions may be that the taker becomes intoxicated. If, in consequence of something he then does, he is charged with an offence requiring recklessness or a lower degree of fault, or with an offence of strict liability, the question arises whether the intoxication is "voluntary" so as to attract the operation of subsection (1) or (2).

⁶³Fourteenth Report, para. 268.

⁶⁴(1973) 58 Cr.App.R. 364; cf. *Stripp* (1978) 69 Cr.App.R. 318.

⁶⁵"Mental disorder" as defined in clause 34 also includes "severe mental illness", which would produce a mental disorder acquittal under clause 35 even if the fault element of the offence were proved, and "a state of arrested or retarded development of mind".

⁶⁶See para. 11.34 below.

⁶⁷See Appendix B, Example 22(v).

8.48 The same question arises where drugs are taken without specific medical advice but for a medicinal purpose and with similar results. As stated in the preceding paragraph, the answer is that it depends, in both types of case, on whether the drugs were taken “properly” for a medicinal purpose (subsection (5)(b)). Subsection (6) explains that drugs taken on medical advice are properly taken unless (i) the taker fails to comply with the conditions of the advice *and* (ii) he is aware that he may as a result do an act capable of constituting an offence of the relevant kind. Drugs taken without medical advice but for a medicinal purpose are properly taken unless the taker is aware he may as a result do such an act.

8.49 Subsection (6) is based on the decisions of the Court of Appeal in *Bailey*⁶⁸ and *Hardie (Paul Deverall)*.⁶⁹ It appears from these decisions⁷⁰ that what the taker of the drugs must be aware of in order to incur liability varies according to the nature of the offence charged. If he is charged with an offence of violence he must have been aware that he might behave aggressively. If he is charged with reckless driving it is sufficient that he was aware that his conscious control of what he was doing might be affected. This is expressed as a general principle that the defendant should be regarded as voluntarily intoxicated only if he was aware that his taking of the drugs (if not on medical advice), or his failure to comply with a condition of the advice under which he took them, might result in his doing an act capable of constituting an offence of the kind in question.⁷¹

8.50 *Evidential burden as to nature of intoxication.* It would, we believe, be arguable, in the absence of special provision, that whenever there is evidence of the defendant’s having been so intoxicated that he did not form the intention required for the offence charged, the burden lies on the prosecution to prove that the intoxication was “voluntary” within the meaning of subsection (5)(b) (see clause 13 (1)(a)). We do not think that such a burden should rest on the prosecution in the absence of any evidence tending to show that the intoxication was involuntary. Subsection (7) therefore puts an evidential burden to that effect upon the defence.

8.51 The subsection does not go so far as to require the defence to prove that the intoxication was involuntary. The Code team included a provision imposing such a requirement in their Bill⁷² (in square brackets in view of their doubts about its correctness). They had regard in doing so to a recent provision to the same effect in section 6(5) of the Public Order Act 1986, based on a Law Commission recommendation.⁷³ The question whether intoxication was involuntary, whenever it is relevant, will in effect be the question whether the defendant acted without the fault required for the offence charged or had a defence based on a belief that an exempting circumstance existed. We do not now think that it would be appropriate to place on the defence a burden of proving absence of fault or to distinguish, in respect of the incidence of the burden of proof, between a defence of mistaken belief that involuntary intoxication may exceptionally provide and other defences of general application. There was some support on consultation for abandonment of the Code team’s bracketed provision; and relevant judicial statements appear to assume that the burden is on the prosecution.⁷⁴

Clause 23: Supervening fault

8.52 This clause restates and generalises the principle applied by the House of Lords in *Miller*.⁷⁵ The definition of an offence may suggest as the standard case the doing of a positive act that causes a specified result (e.g. “cause the destruction of or damage to property...” (see cl. 180); or “cause personal harm to another...” (see cl. 71)), the actor being at the time of his act at fault in a particular way in respect of that result (“...intentionally”; “...recklessly”). Such language may also be satisfied where a person without the required fault does an act giving rise to a risk that the specified result will occur and later becomes aware of what he has done. He is now under a duty to “take measures that lie within his

⁶⁸[1983] 1 W.L.R. 760, [1983] 2 All E.R. 503.

⁶⁹[1985] 1 W.L.R. 64, [1984] 3 All E.R. 848.

⁷⁰They are analysed in the Code team’s Report, para. 9.20.

⁷¹See Appendix B, Examples 22(vi) and (vii).

⁷²Cl. 26(10).

⁷³Offences relating to Public Order (1983), Law Com. No. 123, para. 3.54.

⁷⁴*Bailey* [1983] 1 W.L.R. 760 at 765, [1983] 2 All E.R. 503 at 507; *Hardie* [1985] 1 W.L.R. 64 at 69, [1984] 3 All E.R. 848 at 853.

⁷⁵[1983] 2 A.C. 161.

power to counteract the danger that he himself has created.”⁷⁶ Failure to take such steps will constitute the offence if the omission to act is made with the kind of fault in respect of the result that is required for the offence.

8.53 The principle was applied in *Miller* to a case of arson.⁷⁷ We believe that it must apply to all “result crimes”,⁷⁸ although the courts may since *Miller* have seemed disinclined to apply it. The offence in question in *Wings Ltd. v. Ellis*,⁷⁹ in which Lord Hailsham of St. Marylebone L.C. expressed the view⁸⁰ that *Miller* turned on the fact that it concerned a fault requirement of recklessness, was an offence of making a statement known to be false (Trade Descriptions Act 1968, s. 14 (1)(a)).⁸¹ This is not a “result crime” and the scope of the *Miller* principle did not call for consideration in that case.⁸² In *Ahmad*⁸³ D, P’s landlord, was charged with doing acts calculated to interfere with P’s peace or comfort with intent to cause P to give up occupation. D’s only offending “acts” were done without that intent; but when he came to have the intent D took no steps to rectify what he had done. The Court of Appeal held that this omission could not, in spite of *Miller*, satisfy the requirement of “doing acts” with the required intent. This case, again, did not concern a “result crime”; neither actual interference with health or comfort nor an actual giving up of occupation was an element of the offence. Both *Wings Ltd. v. Ellis* and *Ahmad*, we believe, would be decided in the same way under the Code.

8.54 *Some details.* The drafting of the clause takes account of the following points:

- (i) Nothing in *Miller* limits the principle to a case in which the original act is blameworthy. Although the original act in that case (falling asleep with a lighted cigarette) was no doubt at least careless, the certified question answered in the affirmative by the House of Lords concerned liability for failure to take steps to extinguish, or prevent damage by, a fire started “accidentally”—which must mean (in the terms of clause 23) “[lacking] the fault required [for the offence]”. The question was answered without comment upon this aspect.
- (ii) For the principle to apply, the actor must become aware of what he has done and of the risk thereby created (paragraph (a)); the act that he then fails to do must be one that might prevent the occurrence or continuance of the result (paragraph (b)); and the result specified for the offence must occur, or (if it has already occurred) must continue, after the failure to act (paragraph (c)).

8.55 *States of affairs offences.* The Code team’s Bill contained a further subsection applying a similar principle to an offence involving a state of affairs. The example they gave was an offence of unlawful possession. We believe that such a provision is unnecessary. Suppose that D is charged with knowingly possessing, or knowingly being concerned in dealing with, contraband goods. It appears that he did not at the outset know the nature of the goods; but it is proved that in due course he came to know of their nature and that he did not then get rid of them (although he could have done so), or that he nevertheless continued to take part in the transaction. His commission of the offence is thus clearly established without resort to a “supervening fault” provision.

Clause 24: Transferred fault and defences

8.56 Subsection (1) restates the doctrine known as “transferred intent” and subsection (2) provides a corresponding rule as to “transferred” defences.

8.57 *Transferred fault.* A general statement on transferred fault has the following practical justifications:

⁷⁶*Ibid.*, at 175.

⁷⁷The facts were those of Appendix B, Example 23(i); see also Example 23(ii).

⁷⁸*Wings Ltd. v. Ellis* [1984] 1 W.L.R. 731 at 739; decision reversed on another ground, [1985] A.C. 272.

⁷⁹[1985] A.C. 272.

⁸⁰*Ibid.*, at 286.

⁸¹The company had put out a brochure containing a false statement but only learnt of the falsity later. The brochure was used after knowledge of the falsity was acquired and without correction of the offending statement. The company’s conviction was upheld on the ground that the false statement was made when a customer read it after the company learnt of its falsity.

⁸²See especially *per* Lord Scarman, [1985] A.C. 272 at 297.

⁸³(1987) 84 Cr.App.R. 64.

- (i) Where a person intends to affect one person or thing (X) and actually affects another (Y), he may be charged with an offence of attempt in relation to X; or it may be possible to satisfy a court or jury, without resort to the doctrine, that he was reckless with respect to Y. But an attempt charge may be impossible (where it is not known until trial that the defendant claims to have had X and not Y in contemplation); or inappropriate (as not describing the harm done adequately for labelling or sentencing purposes). Moreover, recklessness with respect to Y may be insufficient to establish the offence or incapable of being proved. The rule stated by this subsection overcomes these difficulties.
- (ii) The drafting of particular offences is simplified. This may be seen by comparing section 1 of the Criminal Damage Act 1971 with its Code equivalent in clause 180, which is written with the present subsection in mind.

8.58 *Transfer “only within the same crime”*.⁸⁴ If an offence can be committed only in respect of a particular class of person or thing, the actor’s intention or recklessness, to be “transferred”, must relate to such a person or thing—that is, in the words of the subsection, to “a person or thing capable of being the victim or subject-matter of the offence”.⁸⁵ If, on the other hand, the person or thing actually affected is not so capable, the external elements of the offence are not made out and the question of transferring the actor’s fault does not arise.

8.59 *Wording of offences and charges*. The subsection treats an intention to affect X as an intention to affect Y (who is actually affected). So where an offence requires an affecting of a person with intention to affect *him* (as opposed to “any person”), there can still be a conviction; and a charge of an offence committed against Y with the intention of affecting Y can be proved by evidence of an intention to affect X.⁸⁶ Case law on these points is not consistent; but the results achieved by the subsection are convenient and are in keeping with the best authority.⁸⁷

8.60 *Mistake as to victim*. Clause 24 (1) is so worded as to deal also with the case of an irrelevant mistake about the identity of the victim or subject-matter of an offence. The argument, “I thought Y was X; I intended to hit X; therefore I did not intend to hit Y”, hardly needs a statutory answer; but this provision incidentally provides one.⁸⁸

8.61 *Transferred defences*. Subsection (2), providing for the transfer of defences, will be useful for the avoidance of doubt. It enables a person who affects an un contemplated victim to rely on a defence that would have been available to him if he had affected the person or thing he had in contemplation.⁸⁹

⁸⁴Cf. Williams, *Criminal Law, The General Part* 2nd ed., (1961), 128.

⁸⁵Cf. *Pembliton* (1874) L.R. 2 C.C.R. 119.

⁸⁶See Appendix B, Example 24(i).

⁸⁷See the comment on *Monger* [1973] Crim. L.R. 301 at 302.

⁸⁸See Appendix B, Example 24(ii).

⁸⁹See Example 24(iii).

PART 9

PARTIES TO OFFENCES (1): PRINCIPALS, ACCESSORIES AND VICARIOUS LIABILITY

Introduction

9.1 *Clauses 25 to 29* are concerned with the ways in which a person may be liable in respect of the commission of an offence. The common law relating to participation in crime is partly expressed in an ancient technical language which is haphazardly used and variously interpreted. Its principles have to be distilled from a large, complex and not entirely consistent case law. This is an outstanding example of an aspect of the common law of crime that is overdue for modern statutory restatement.

9.2 *Working Paper No. 43*. The Code team, in preparing their draft clauses on this subject, took as their point of departure the proposals made in 1972 by the Working Party then assisting the Law Commission in connection with the criminal law codification project.¹ The Working Paper yielded a helpful body of comments from correspondents, and, although no Report followed, it is appropriate that both the Working Paper and the consultation upon it should be taken into account in framing the relevant Code provisions. Many of the Working Party's proposals in fact amounted to restatement and clarification of the existing law; and the same is generally true of the revised versions of the Code team's clauses to be presented in this Part.

9.3 *Restatement of the law*. The draft Bill adheres, in this area as in most others, to the familiar structure and concepts of the criminal law. It provides for the liability of the actual perpetrator of an offence and for that of one who, in the traditional language, aids, abets, counsels or procures its commission. The liability of such a secondary party will depend upon the occurrence of the offending conduct, as it does under existing law. A person who encourages another to commit an offence which is not in fact committed will, as at present, be guilty of the separate offence of incitement (clause 47). On the other hand, an act tending, and even intended, to facilitate the commission of an offence will not in general attract criminal liability if no such offence happens in the result to be committed.

9.4 This structure has been subjected to searching criticism in modern times; and suggestions have been made for creating, and even for absorbing incitement and complicity into, a new offence of "facilitation", liability for which would not depend upon commission of the offence facilitated.² Such a radical approach, however, could not be pursued without elaborate study of the arguments for and against the suggested offence³ or without wide consultation. There has been no question of undertaking such a project in connection with the present exercise.

Clause 25: Parties to offences

9.5 *Paragraph (a)* restates the present law by providing that a person may be guilty of an offence either as a "principal" or as an "accessory".⁴ The enactment creating an offence will invariably specify the conduct (the acts and fault) that will entail liability as a principal; but the present clause makes clear that a person whose conduct falls within that specified by clause 27 for an accessory will equally be guilty of the offence. Being so guilty, he is of course liable to the same penalties.

9.6 *Separate provision for principals and accessories*. The proposal to maintain the distinction between classes of participant, although generally accepted on consultation, did not pass without question. It might in theory be possible to collapse the distinction by producing a uniform set of conditions of liability applying to all participants in an offence. This, however, would involve a major change in the law. It would have the effect, for example, of extending strict liability to accessories and of abolishing certain defences available to accessories but not to principals.⁵ The distinction is unavoidable in a code that seeks to restate the law; and we have no doubt that it is right in principle.

¹Working Paper No. 43 (1972), Parties, Complicity and Liability for the Acts of Another.

²Buxton, "Complicity in the Criminal Code", (1969) 85 L.Q.R. 252 (and in comments on Law Commission Working Papers at [1973] Crim.L.R. 223 and 656); Spencer, "Trying to Help Another Person to Commit a Crime" in Peter Smith (ed.), *Criminal Law: Essays in Honour of J.C. Smith* (1987), 148.

³The arguments are summarised in our Working Paper No. 104, Conspiracy to Defraud (1987), Appendix C.

⁴The use of these terms was proposed in Working Paper No. 43: see Proposition 1.

⁵Accessory liability is always fault based (see cl. 27 (1)); for defences, see cl. 27 (6)-(8).

9.7 *Application of defences.* Paragraph (b) makes clear that defences apply equally to principals and to accessories. This facilitates the drafting of provisions creating defences, which it may be convenient to express, as offences themselves are commonly expressed, in terms referring to the act of the principal. The common law (which governs the liability of accessories) undoubtedly assumes such defences to be generally applicable although we are unaware of explicit authority on the point. Paragraph (b) means merely that a person may rely on a defence to avoid liability as an accessory if he himself satisfies its requirements. It does not mean, as clause 27 (1)(c) makes clear, that he can take the benefit of a defence the requirements of which are satisfied by another who would but for the defence be guilty as a principal. Indeed, by assisting or encouraging such another he may himself be guilty as a principal.⁶

Clause 26: Principals

9.8 *Persons who are principals.* In summary, this clause declares that a person is guilty of an offence as a principal if he commits it entirely by his own act (subsection (1)(a)); or if he commits it in part by his own act and is party to another's doing whatever else is required to complete it (subsection (1)(b)); or if he commits it by an "innocent agent" (subsections (1)(c) and (3)); or if he is guilty of it on a basis of "vicarious liability" (subsection (2), referring to clause 29).

9.9 Subsection (1)(a) and (b) reflect existing law. Paragraph (a) needs no comment. Paragraph (b) is necessary to cover the case of joint commission of an offence by two or more persons, where each of them does some of the specified acts.⁷ The paragraph does not include a conspirator who is present at the commission of the offence but does not himself do any of the specified acts. He will be liable as an accessory. It would unduly complicate the present clause, without practical advantage, to designate him a principal, as was suggested to us. On the other hand, the wording of paragraph (b) does respond to the advice that it should clearly be restricted to joint participation. It is not enough that D does one act (say, striking P with the object of stealing his bag), that E happens to do another (E, who is an opportunist thief not acting in concert with D, steals the bag that P has dropped) and that thus all the acts specified for an offence (robbery in this example) are done. To be guilty of the offence D must procure, assist or encourage E's act. In the example given, D will of course be guilty of attempted robbery.

9.10 *Acting through an "innocent agent".* The topic of liability for an offence committed through the instrumentality of a person who is himself not guilty of it presents a difficult technical problem to the codifier; but there is no serious controversy about the results to be achieved. If D procures E (a child under ten) to steal, or F (a mentally disordered person) to commit an assault, or G to have sexual intercourse with a woman whom G believes to be consenting but whom D knows not to be, D must be guilty of theft, assault or rape although the person whom he procures to act is not guilty.

9.11 *Liability as principal or accessory?* The technical problem is whether persons acting through innocent agents are to be guilty as principals in all cases, or as accessories in all cases, or as principals in some cases and as accessories in others. The problem is partly doctrinal and partly one of drafting. Although it has proved troublesome to resolve, it can be briefly summarised.

- (i) *Principal?* It is plainly acceptable to regard as principals most persons who commit offences through innocent persons. It is D who "steals" or "assaults" by using the child under ten or the mentally disordered adult as his instrument. A designation of "principal", however, is somewhat artificial where the offence requires personal conduct on the part of the perpetrator (as with offences involving sexual intercourse or driving) or where the definition of the offence requires the offender to comply with a description (such as "licensee") with which the innocent agent but not the guilty party complies.
- (ii) *Accessory?* An alternative, to meet this difficulty, would be to designate the guilty party an accessory in all cases. But this course is open to serious objections. First, it might well be difficult for lay persons to understand the description as an "accessory" to murder of someone who, for instance, killed another by causing an innocent nurse to administer poison or a postman to deliver a letter bomb. Secondly, the special fault requirements and defences applying to accessories

⁶See para. 9.12 below.

⁷See Appendix B, Example 26(i).

would apply inappropriately in innocent agency cases, unless their application was excluded by drafting of unacceptable complexity.

- (iii) *A mixed solution?* The solution proposed by the Code team was to declare most persons acting through innocent agents to be principals but to designate as accessories those whom it is, or might seem, artificial so to describe (see paragraph (i) above).⁸ The resulting draft was criticised on consultation as complex and it was pointed out that the draft did not deal with the problem presented by the application of accessorial fault requirements and defences. We are not able to adopt this solution.

9.12 *The solution proposed* achieves, we believe, the maximum available of clarity, simplicity and consistency. It is to treat all persons acting through innocent agents as principals (subsection (1)(c)) and to make clear for the avoidance of doubt that this includes those in the troublesome exceptional cases (subsection (3)) — thereby incidentally acknowledging by implication that the designation of principal is somewhat odd in those cases. But in truth the oddity is one of nomenclature and not of substance.

9.13 *The categories of “innocent agent”*. The phrase “innocent agent” is not used in clause 26. It does not accurately describe all the cases with which subsection (1)(c) is concerned and is used here only for convenience as familiar shorthand. Paragraph (c) identifies three groups of cases. (i) The case of the child under ten requires no comment.⁹ (ii) Secondly, there is the person who, although he acts in the way specified for the offence, is not guilty because he lacks the fault required for the offence. Included in this category are the person who lacks the required fault because of a mistake,¹⁰ a “state of automatism”¹¹ or mental disorder;¹² and the “semi-innocent” agent, who has the fault required for a less serious offence but not “the fault required for the offence” in question.¹³ (iii) Thirdly, there is the person who “has a defence”. This phrase covers a variety of cases, including a person acting under duress by threats (paragraph (c) ensures that the duressor is guilty of the offence;¹⁴) one who believes in the existence of a circumstance that would afford a defence;¹⁵ one who, although having the fault required for the offence, is not guilty because of mental disorder;¹⁶ and one whose “state of automatism” prevents liability for an offence not requiring fault.

9.14 *Application to assisting and encouraging*. A doubt was raised on consultation as to whether subsection (1)(c) should apply where D does not procure the innocent person’s act but merely assists it or encourages it (the encouragement not amounting to procuring). In the absence of authority on the point, we regard it as desirable for the sake of consistency and simplicity to provide similarly for acts of procurement, assistance or encouragement.

9.15 *Subsection (1)(c) and an offence of negligence*. In *Thornton v. Mitchell*¹⁷ D, a bus conductor, negligently directed E, the driver of the bus, in a reversing manoeuvre and an accident occurred. E, not being at fault, was not guilty of driving without due care and attention. It was held that D could not be convicted of aiding and abetting an offence that had not been committed. Nor would D be guilty as an accessory under the Code: see clause 27 (1)(a), which requires a guilty principal for that purpose. Would D himself be guilty as a principal under clause 26 (1)(c)? The better view, we believe, is that a failure of due care and attention is, in the context of this offence, an aspect of “the act specified for the offence”, as well as being “the fault required for the offence”.¹⁸ If that is so, E has not done that act, as paragraph (c) requires, and the result in *Thornton v. Mitchell* is preserved. But the point is not entirely clear and may require to be resolved by the courts. The offence in question, as an

⁸See Law Com. No. 143, para. 10.9; cl. 30(2)(b) and (3) of the team’s Bill. This solution for the exceptional cases followed a suggestion of the Criminal Law Revision Committee in their Working Paper on Sexual Offences (1980), para. 26.

⁹See Appendix B, Example 26 (ii).

¹⁰E.g., *Cogan and Leak* [1976] Q.B. 217; Appendix B, Example 26(iv).

¹¹See cl. 33 (1).

¹²See cl. 36; cf. *Tyler and Price* (1838) 8 Car. & P. 616, 173 E.R. 643.

¹³See Appendix B, Example 26(iii). Liability of the other person for the more serious offence, at least where that person was not present assisting at the time, was denied in *Richards* [1974] Q.B. 776; but this decision was overruled by the House of Lords in *Howe* [1987] A.C. 417.

¹⁴Cf. *Bourne* (1952) 36 Cr.App.R. 125.

¹⁵See cl. 41.

¹⁶See cl. 35 (1).

¹⁷[1940] 1 All E.R. 339.

¹⁸Cf. Lord Diplock’s account, in *Lawrence* [1982] A.C. 510 at 525, of the double role of “recklessly” in reckless driving. To the same effect is the argument that “the fault required for the offence”, which D must have to be guilty under clause 26 (1)(c), is failure to exercise due care in the act of driving and not in some other act.

offence of negligence, is exceptional; general propositions such as those in clauses 26 and 27 have difficulty in catering plainly for it without an undue sacrifice of general clarity.

9.16 *Person vicariously liable.* Subsection (2) refers to clause 29, which enables an element of an offence to be attributed to a person in certain circumstances by reason of the act or (exceptionally) the fault of another. It makes clear that the person who is on this basis “vicariously” liable for the offence is liable as a principal.¹⁹ This accords with existing law.

Clause 27: Accessories

9.17 *Contents of the clause.* This clause states the law on accessory liability.²⁰ Subsection (1) identifies the acts and the fault required. Subsections (2) to (5) restate existing law on some subsidiary points by way of elaboration of the principles stated in subsection (1). Subsections (6) to (8) provide defences available to accessories but not to principals.

9.18 *Acts specified for an accessory.* Subsection (1)(a) restates the present law in non-technical language. Subject to subsections (2) and (3), the words “procure”, “assist” and “encourage” are used in their ordinary meanings. We do not believe that attempts to define them are either necessary or desirable. *Procuring* connotes the idea of deliberately causing.²¹ A person *assists* another to commit an offence when, for example, he supplies tools or labour or information to the principal, or when he does any other act which facilitates the offence. A person *encourages* another to commit an offence when, for example, he incites the principal, or joins in a conspiracy with him to commit the offence, or when his presence is in itself an incentive to the principal to commit the offence.

9.19 These terms are familiar and avoid the difficulties of interpretation of the traditional language of aiding, abetting and counselling. The Working Paper suggested the use of “inciting” and “helping” to describe modes of participation as an accessory. But we think that “inciting” is too narrow to encompass satisfactorily all the cases envisaged by the concepts of procuring and encouraging; and we prefer “assisting” to “helping” on the grounds that it is a more formal expression, has a useful associated noun (“assistance”) and has been used elsewhere in penal statutes with success (for example, in the offence of handling stolen goods²²).

9.20 *Principal's ignorance of procurement or assistance.* Subsection (2) provides that the principal need not be aware of the accessory's act of procurement or assistance. This is stated largely for the avoidance of doubt. It restates, so far as procuring is concerned, the ruling of the Court of Appeal in *Attorney-General's Reference (No. 1 of 1975)*²³, that a person may be guilty of procuring an offence of driving with excessive alcohol in the blood although the driver was unaware of the act of lacing his drinks which brought about the offence. And it is clear that a person may be assisted to commit an offence although he is unaware of the assistance given. The Working Party gave the example of a person who, knowing that the principal is seeking to murder X, takes steps unknown to the principal to prevent X receiving a warning.²⁴ He should be an accessory to the offence if the principal does murder X, despite the absence of a conspiracy between them and despite the principal's ignorance of the assistance.

9.21 The case of encouragement is somewhat different. The ordinary meaning of the verb to encourage is “to inspire with courage ... to embolden ... to incite ... to stimulate”. It would be odd to hold that one person encouraged another if the other was unaware of the former's expression of support. The Courts-Martial Appeal Court appears to have reached the same conclusion in *Clarkson*.²⁵

9.22 *Passive assistance or encouragement.* Subsection (3) states a more controversial principle, which is, however, well supported by authority.²⁶ A person does not ordinarily become an accessory to an offence merely by omitting to take steps to prevent it. But he may

¹⁹See Appendix B, Example 26(v).

²⁰Another case of accessory liability is stated by cl. 31 (liability of officer of corporation).

²¹“To procure means to produce by endeavour”: *per* Widgery L.C.J. in *Attorney-General's Reference (No. 1 of 1975)* [1975] Q.B. 773 at 779.

²²Theft Act 1968, s. 22; cl. 172.

²³[1975] Q.B. 773.

²⁴Working Paper No. 43, p. 37.

²⁵[1971] 1 W.L.R. 1402.

²⁶*Du Cros v. Lambourne* [1907] 1 K.B. 40; *Rubie v. Faulkner* [1940] 1 K.B. 571; *Harris* [1964] Crim. L.R. 54; *Tuck v. Robson* [1970] 1 W.L.R. 741, [1970] 1 All E.R. 1171; *Bland* [1988] Crim. L.R. 41.

incur accessory liability through failure to exercise some special authority or duty that he has to control the act of another that constitutes an offence. Having such an authority, for example, by virtue of his management of premises²⁷ or his ownership of a chattel,²⁸ he may fail to take steps to prevent an offence taking place on those premises or through use of the chattel. This failure to act may in the circumstances constitute assistance, or be a source of encouragement, to the principal. This seems to be the effect of the case law, although the language of the judgments is not always easy to interpret.

9.23 The principle has been criticised by the Working Party, who proposed its abolition,²⁹ by Professor Glanville Williams³⁰ and by the Society of Public Teachers of Law in its submission to us on the Code team's Bill. But most commentators on the Working Paper and on the Bill found nothing objectionable in the principle, although some concern was expressed about the width of what is now clause 27(3). As that provision is an attempt to state a principle of the common law which we are satisfied does exist, its inclusion is consistent with our general restatement aim. As regards the statement of the principle, we believe, first, that on the authorities it is rightly stated in terms of a person's having either an authority or a duty to control the conduct of the principal; and, secondly, that it is not possible to express it more narrowly by any formula limiting the range of cases in which a relevant authority or duty arises.

9.24 *Fault required for accessory liability.* Subsection (1) states three separate aspects of the fault required if a person is to be guilty of an offence as an accessory. This reflects the complexity of the common law.³¹

9.25 *Subsection (1)(a): with respect to accessory's own act.* Paragraph (a) requires the procurement, assistance or encouragement of the principal's act to be intentional. In the case of procuring the point might be adequately conveyed by the verb itself.³² But it is as well to make clear that it is not enough to do an act that in fact assists or encourages the principal; the act must be done with the intention of having that effect. Intention here has its Code meaning, given by clause 18(b). D will intend his act to assist E if he does the act in order to assist E or if he knows that its effect in the ordinary course of events will be to assist him (and similarly with encouragement). A motive to assist or encourage the principal is not necessary.³³

9.26 *Acts within accessory's contemplation.* The accessory's intention may, of course, be conditional in the sense that he may intend to assist the principal to act in a certain way *if* the principal decides to act in that way. It is enough that the accessory has such an act in contemplation as an act that the principal may do.³⁴ On the other hand, one who assists or encourages another in an enterprise cannot be guilty of an offence constituted by the other's doing an act of a kind that is not foreseen as a part of that enterprise, for he does not, even conditionally, intend to assist or encourage such an act. Under the present law, for example, if two people agree to assault a third with their fists and one of them in the course of the attack kills the victim by using a knife, the other, who did not anticipate the use of a knife, is not an accessory to any offence of homicide.³⁵ We believe that paragraph (a) (together with paragraph (c), concerning the accessory's awareness of the principal's state of mind) will preserve the effect of the cases on the scope of a "joint enterprise" or "common purpose".

9.27 *Subsection (1)(b): with respect to circumstances.* Even if the offence is in some respects one of strict liability in the case of a principal, there is no question of strict liability for an accessory. It is commonly said that an accessory must know the facts that make the principal's conduct an offence. But there is some authority suggesting that recklessness suffices where strict liability obtains for the principal;³⁶ and we believe that there is strong ground for providing that recklessness suffices whenever it suffices in the case of the principal. It should suffice for liability as an accessory to rape, for example, that D is aware that the victim may not be consenting to the intercourse that he is encouraging. Provision to this effect will clarify the law rather than clearly change it. Of course, if the offence requires

²⁷See *Tuck v. Robson*, above; Appendix B, Example 27(vi).

²⁸e.g. a motor car: *Du Cros v. Lambourne*, above (dangerous driving).

²⁹Working Paper No. 43, Proposition 6(4).

³⁰Glanville Williams, "What Should the Code do about Omissions?", (1987) 7 *Legal Studies* 92.

³¹See Appendix B, Examples 27(i)-(v).

³²See n. 21 above.

³³*National Coal Board v. Gamble* [1959] 1 Q.B. 11; *D.P.P. for Northern Ireland v. Lynch* [1975] A.C. 653.

³⁴*D.P.P. for Northern Ireland v. Maxwell* [1978] 1 W.L.R. 1350, [1978] 3 All E.R. 1140.

³⁵*Davies v. D.P.P.* [1954] A.C. 378; *Anderson and Morris* [1966] 2 Q.B. 110.

³⁶*Carter v. Richardson* [1974] R.T.R. 314, [1974] Crim. L.R. 190; *Smith v. Mellors and Soar* [1987] R.T.R. 210.

knowledge in the principal, the accessory must equally know the relevant fact. Paragraph (b) provides accordingly.

9.28 *Subsection (1)(c): with respect to principal's act and fault.* Paragraph (c) provides that the accessory must intend that the principal shall act, or be aware that he is or may be acting, or that he may act, with the fault (if any) required for the offence. The accessory will usually know perfectly well the criminal state of mind with which the principal is acting or may act. In many cases, indeed, it is his intention that the principal shall act with that state of mind. This is obviously so in most cases of procuring another to commit an offence; and it is no doubt also true in most joint enterprise cases. But such knowledge or intention is not necessary; recklessness with respect to the principal's fault will suffice. This has recently been made clear by decisions of the Judicial Committee of the Privy Council and of the Court of Appeal on secondary liability for murder. The Judicial Committee held in *Chan Wing-siu v. The Queen*³⁷ that where D embarks with E upon a criminal enterprise (in that case, robbery) aware of the possibility that in the course of it E may commit another offence (aware, in the instant case, that E may kill with the fault required for murder), D is guilty of that other offence if E does commit it. The point was confirmed for English law in *Ward*.³⁸

9.29 *Accessory's ignorance of details.* Subsection (4) restates existing law. An accessory need not know such details, appearing in the indictment under the heading "Particulars of offence", as the date of the offence, place of commission, identity of property stolen and so on.³⁹ He may even be mistaken about these details as long as he knows the kind of act which the principal proposes to do or contemplates such an act as one of a number that the principal may do. It is otherwise, however, where a particular person or thing is specifically referred to as the intended victim or object of an offence. This case is dealt with by subsection (5), to which subsection (4) is subject.

9.30 *Principal's change of plan.* The "common purpose" doctrine applies to relieve an accessory from liability where the principal does an act of the kind contemplated by the accessory but does it deliberately against a victim other than one who has been specifically referred to. An early example is *Saunders and Archer*.⁴⁰ Archer advised Saunders, who wanted to kill his wife, to give her a poisoned apple. Saunders did so, but his wife passed the apple to their child in Saunders' presence (Archer not being present). Saunders remained silent, not wishing to reveal his criminal intention, while the child ate the apple. The child died. Archer was not guilty as an accessory to murder.⁴¹ Under subsection (4) an accessory need not generally know the identity of the victim, so that he would still be guilty, for example, if the plan accidentally miscarried and took effect against an unintended victim. This would have been the position in *Saunders and Archer* if Saunders had been absent when his wife passed on the apple; the case would have been one of "transferred intention" (see clause 24) and Archer would have been liable as an accessory to the murder of the child. The common law, however, has consistently taken the view that it is different when the principal takes a deliberate decision to let the plan miscarry. Subsection (5) gives effect to this and so qualifies subsection (4).

9.31 This result is sometimes criticised as being unduly favourable to an accessory who has demonstrated his willingness to assist in the commission of just such an offence as is in the result committed; and the corresponding provision in the Code team's Bill was objected to by some critics on consultation. The principle is well-established, however, and the Working Party proposed that it should continue.⁴² The subsection has only a limited area of operation. It would not apply, for example, to the facts in the South African case of *S. v. Robinson*.⁴³ In that case D1, D2 and E agreed with P that P should be killed by E to procure insurance money on P's life and avoid P's prosecution for fraud. At the last moment P withdrew his consent to die but nevertheless E killed him. E had deliberately acted outside the scope of the agreement but had not committed the offence against a different person. Whether in such a case D1 and D2 are guilty as accessories depends therefore on the application of clause 27 (1). They encourage E in the commission of murder; but do they (within the meaning of subsection (1)) intentionally encourage the act that E does? Is killing P without

³⁷[1985] A.C. 168.

³⁸(1986) 85 Cr.App.R. 71. This case was cited and discussed in argument, although, not mentioned in the judgment, in *Smith* [1988] Crim.L.R. 616, which required an accessory to have the same intention as the principal with respect to the prohibited result (there an intention to do grievous bodily harm). See also [1989] Crim. L.R. 236.

³⁹*Bainbridge* [1960] 1 Q.B. 129; Appendix B, Example 27(i).

⁴⁰(1576) 2 Plowden 473; 75 E.R. 706.

⁴¹He would, of course, be guilty under clause 48 (1) of conspiracy to murder E's wife.

⁴²Working Paper No. 43, Proposition 7(2)(c).

⁴³1968 (1) S.A. 666.

his consent in the circumstances a different act from killing him with his consent? The point is not one which the present clause can resolve without descending to a quite unacceptable degree of particularity. The Code, here as elsewhere, attempts to restate the essentials of the common law but inevitably leaves a potential for judicial development of the law in the interpretation of concepts having an irreducible minimum of uncertainty in their application.

9.32 *Exceptions from liability.* A person who does an act in the knowledge that it will inevitably assist or encourage another in the commission of an offence that he knows the other is proposing, or is likely, to commit does not always become guilty of the offence if the other goes on to commit it. In particular, subsection (6) makes express provision for three kinds of case in which the apparent accessory is protected against liability by the purpose or motive with which he acts.

9.33 *Law enforcement defence.* Subsection (6)(a) provides for the case of the police informer or undercover agent who does acts that in fact assist the commission of an offence but whose purpose is to frustrate its commission. If his plan fails and the offence is committed before the police can intervene he is not guilty as an accessory.⁴⁴ Subsection (6)(b) similarly protects one whose act is designed to avoid or limit the harmful consequences of an offence — for example, by enabling the police to intervene after a theft or similar offence to recover the stolen property and arrest the participants. He is not guilty as an accessory if he acted without the purpose of forwarding the commission of the offence. Paragraphs (a) and (b) in these applications follow a proposal made in Working Paper No. 43.⁴⁵ They ought not to be read as an exclusive statement on the immunity of undercover agents. It is not difficult to think of cases outside the terms of the paragraphs in which persons, most obviously police officers, working bona fide in the interest of law enforcement, ought arguably to be protected against liability for offences with which they become involved. But such liability is in any case likely to be theoretical only: and the common law on this topic, perhaps for this reason, is not fully developed. It can be further developed under clause 45(c).⁴⁶

9.34 *Purpose of limiting harmful consequences.* Another example of an act of assistance done only to limit the harmful consequences of an offence was contemplated in some of the speeches in *Gillick v. West Norfolk and Wisbech Area Health Authority*:⁴⁷ that of the doctor who provides contraceptive advice or treatment to a girl under sixteen.⁴⁸ Lords Fraser of Tullybelton and Scarman agreed that whether the doctor would be guilty as an accessory to an offence of unlawful sexual intercourse subsequently committed by the girl's boyfriend would depend on the doctor's "intention".⁴⁹ Lord Fraser thought it unlikely that a doctor giving such advice or treatment with the intention of acting in the best interests of the girl would commit an offence.⁵⁰ Lord Scarman referred to circumstances in which "[t]he bona fide exercise by a doctor of his clinical judgment must be a complete negation of the guilty mind which is an essential ingredient of the criminal offence of aiding and abetting the commission of unlawful sexual intercourse."⁵¹ It is plain that their lordships were using the word "intention" in the sense of "purpose", which is the word employed in subsection (6)(b).

9.35 We believe that the conduct contemplated as innocent in *Gillick* must be seen, although it was not in that case expressed, as an example of a more general category of accessory acts done for the sole purpose of containing the harm done by the principal. The generalisation that such acts do not attract criminal liability seems plainly right although, perhaps unsurprisingly, authority for it is lacking. We should perhaps refer to some topical examples. The supply of condoms to prisoners, or of sterile hypodermic needles to drug abusers, if done solely for the purpose of limiting the risk that the prisoners or addicts will be infected by the AIDS virus as a result of anticipated acts of buggery or injection, would, on that ground alone if on no other, not attract accessory liability for any offences that those acts might involve.

9.36 *Belief in legal obligation.* There has been some controversy over cases where a person in possession of an article hands it over to another knowing that the other intends to

⁴⁴See Appendix B, Example 27(viii).

⁴⁵Proposition 7(1).

⁴⁶Referred to more generally below, para. 9.37.

⁴⁷[1986] 1 A.C. 112.

⁴⁸See Appendix B, Example 27(ix).

⁴⁹At 174-175 (Lord Fraser), 190 (Lord Scarman). This assumes that the doctor's act will, to his knowledge, assist or encourage that of the boyfriend, which is no doubt unlikely (see *per* Woolf J. at first instance, [1984] 1 Q.B. 581 at 593-595, in a passage adopted by Lord Bridge of Harwich, [1986] A.C. 112 at 194) but not impossible.

⁵⁰At 175.

⁵¹At 190.

commit an offence using the article. The question is whether there should be accessory liability even where the recipient has or may have a legal claim to the article. The point is covered in subsection (6)(c), which makes the answer depend on the state of mind of the transferor. If he hands over the article because he believes that he is under a legal obligation to do so and not for the purpose of furthering commission of an offence involving the article, he should not be liable for such an offence when it is committed.⁵² The case is analogous to a claim of right. It would be going too far to impose a positive duty to resist the transfer, particularly where the transferor could not be certain that an offence would be committed.

9.37 *Other possible defences.* Subsection (6) is not necessarily an exhaustive statement of the cases in which a person's act in assisting or encouraging the commission of an offence is regarded by the law as justified or excused in the circumstances, whether because (or in part because) of an acceptable purpose with which the act is done or otherwise. The preservation by clause 4(4) (referred to by clause 45(c) in the context of defences⁵³) of common law defences, whether existing or still to be developed, of course applies to defences peculiarly available to accessories as it does to any others.

9.38 *Protected persons.* Subsection (7) exempts from liability as an accessory a victim of an offence who is a member of a class of persons whom it is the purpose of the enactment creating the offence to protect. This principle is well established in the context of sexual offences, from which the leading illustration derives.⁵⁴ Continuation of the principle in that context was recommended by the Criminal Law Revision Committee in their Fifteenth Report.⁵⁵ Its incorporation in a wider proposition was proposed in Working Paper No. 43.⁵⁶

9.39 We have had some difficulty in deciding whether to give effect to that proposal. It can be argued that the principle leads to anomalies, at least in the field of sexual offences;⁵⁷ that the existing authorities do not justify the statement of a general rule; and that the application of the rule in any particular context ought to be left to ad hoc declaration of parliamentary intention or to the discovery of that intention by judicial interpretation. On balance, however, we favour the enactment of a general rule. We are influenced in part by the enactment in the Criminal Law Act 1977, section 2(1), of a similar rule for conspiracy; and we in fact propose rules for all the preliminary offences in terms closely corresponding to that in clause 27 (7). We think that it is right in principle to exempt even from theoretical liability a person whom it was the very purpose of the legislation to protect so long as the definition of the offence does not describe his or her conduct as that of a principal. The exemption ought not to depend upon the courts' divining the existence of implicit meanings in the legislation creating the offence. The principle, although expressed as a generalisation, will be of very narrow application if the word "victim" is understood as we intend. A person upon whose body a sexual offence is committed is plainly a "victim" of that offence. Not so, as we understand the word, a factory worker who happens to be injured by an unfenced dangerous machine; the failure to fence, although against the interests of the group of which the worker is a member, is not directed against that worker as a "victim".

9.40 *Incidental participation.* Working Paper No. 43 suggested a wider principle than that just discussed. The Working Party proposed that a person should not become an accessory to an offence "if the offence is so defined that his conduct in it is inevitably incidental to its commission and such conduct is not expressly penalised".⁵⁸ It was noted that English law at present only applies such a rule where the party whose conduct is "incidental" is a victim of an offence created for his or her protection. The spectator who pays to watch an obscene performance and the knowing buyer of goods from an unlicensed seller are (probably) not exempt from accessory liability. It appears that the balance of opinion on consultation on the Working Paper was against extending immunity in these cases. The spectator or buyer who incites the commission of the offence should not be protected from prosecution. The passive

⁵²See Appendix B, Example 27(x). Cf., on being knowingly concerned in a prohibited exportation of goods with intent to evade the prohibition, *Garrett v. Arthur Churchill (Glass) Ltd.* [1970] 1 Q.B. 92 at 100, *per* Parker L.C.J.: "Did he ... only hand over because he felt that he had to, or did he ... lend himself ... to the idea of [the prohibited exportation]?"

⁵³See paras. 12.40, 12.41 below.

⁵⁴*Tyrell* [1894] 1 Q.B. 710; Appendix B, Example 27(xi).

⁵⁵Fifteenth Report: Sexual Offences (1984), Cmnd. 9213, Appendix B.

⁵⁶See para. 9.40 below.

⁵⁷Criminal Law Revision Committee, Fifteenth Report, above. For example, it will protect against liability a girl who initiates a sexual offence against herself, while leaving vulnerable to prosecution a younger boy whose role, according to the definition of the offence, is that of principal offender.

⁵⁸Proposition 8.

spectator may not be liable in any event if he does nothing to encourage the offence. Other cases of “incidental” participation can be dealt with by prosecutorial discretion. On these grounds, and in view of the response to the Working Paper, the Code team’s Bill made no provision for the suggested immunity. Nor does our draft Bill.

9.41 *Withdrawal from participation.* Subsection (8) provides a defence to one kind of accessory who seeks to undo the effect of an earlier act of participation. The proposed defence is limited to one who has encouraged the commission of an offence. Recent Court of Appeal authority recognises such a defence based on the countermanning of encouragement formerly given so as to show that the encourager no longer supports the enterprise.⁵⁹ This is narrowly restated in paragraph (a): the encourager may escape liability by countermanning his encouragement “with a view to preventing [the commission of the offence]”.⁶⁰ Paragraph (b) provides for a case which, it seems clear, cannot be less generously treated — namely, where the encourager has taken all reasonable steps to prevent commission of the offence.

9.42 The Code team proposed to extend the defence to any accessory who takes such steps. This was by way of attempting to resolve the undoubted obscurity of this area of the law with a compromise between denying any defence of withdrawal and allowing a more generous defence which had been proposed in Working Paper No. 43⁶¹ but which had not been well received on consultation. In view, however, of the unclear state of the authorities and of some lingering disquiet expressed on consultation concerning the Code team’s proposal, we do not feel able to recommend any broader statement than that made in subsection (8). The subsection will not rule out further judicial development of the defence of withdrawal under clause 45(c).

Clause 28: Parties — procedural provisions

9.43 This clause deals with some procedural matters which have an important bearing on the practical operation of the substantive rules about parties. Their appearance alongside clauses 25 to 27 will be helpful although in due course they may be expected to figure in that part of the Code dealing with procedure and evidence.

9.44 *Evidence of participation.* Subsection (1), which is the procedural counterpart of clause 25, makes it clear that a party to an offence, whether he is a principal or an accessory, may be convicted of the offence irrespective of the capacity in which he is charged. This is the existing law. In *D.P.P. for Northern Ireland v. Maxwell*⁶² the defendant was charged with the offences as a principal, the particulars in the indictment alleging in effect that he had done the acts forbidden by the offences. The evidence, however, showed that the real case against him was that he had done acts (driving the car) sufficient for aiding and abetting the commission of the offences. This did not prevent his conviction, although members of the House of Lords commented that it was good practice to draft the particulars of the offence so as to show with greater clarity the real nature of the case which the defendant has to meet.

9.45 Paragraph (c) enables the court to convict both defendants of the offence in a case such as *Ramnath Mohan v. R.*⁶³

9.46 *Conviction of accessory.* Subsection (2)(a) restates existing law. Subsection (2)(b) is a corollary of subsection (1); a person may properly be convicted of an offence where he is charged with doing acts as a principal but the evidence shows that he did other acts rendering him liable as an accessory. Similarly, a person should be convicted of an offence where he is charged, for example, with having assisted the commission of an offence by providing information, but the evidence shows that he assisted in a different way or did acts of encouragement. Provided that the offence is the same, an error in charging, perhaps induced by a misleading statement to the police, should not affect liability to conviction.

Clause 29: Vicarious liability

9.47 *Liability for the act of another.* A person may sometimes be held to have committed an offence not by reason of anything he himself has done, but by reason of an act done by another. Such liability is often called, somewhat loosely, “vicarious liability”. It may arise either (paragraph (a) of subsection (1)) because the statute creating the offence expressly so

⁵⁹*Whitefield* (1984) 79 Cr.App.R. 36.

⁶⁰See Appendix B, Example 27(xii).

⁶¹Proposition 9.

⁶²[1978] 1 W.L.R. 1350, [1978] 3 All E.R. 1140.

⁶³[1967] 2 A.C. 187; see Appendix B, Example 28.

provides, or (paragraph (b)) as a result of an extended interpretation given by the courts to a word or phrase in the definition of the offence. Among the words commonly so interpreted are verbs like “sell”, “use”, “possess”. They are interpreted as applying both to the person who actually sells, uses or possesses and to the principal on whose behalf he does so.⁶⁴ There is no principle underlying these cases. Their existence is simply the product of statutory interpretation. There are, however, certain limits to the interpretative process involved and these are set out in paragraph (b).

9.48 *Limits of vicarious liability.* Subsection (1)(b) provides for two conditions to be satisfied before an offence may be interpreted as applying to a person who did not himself do the prohibited act. The relevant element of the offence must be expressed in terms which are apt for the defendant as well as for the person who in fact acted; some well-known examples are given in the preceding paragraph. Secondly, the person who in fact acted must have done so within the scope of his employment or authority (that is, as the defendant’s agent). These conditions are in accordance with the results reached in the great majority of cases. In their absence there can be no justification for imposing vicarious liability (unless, of course, Parliament has expressly provided for it). Under existing law an employee may disobey an express instruction from his employer and yet still be held to be acting within the scope of his employment.⁶⁵

9.49 *Independent contractors.* The reference in paragraph (b) to a person’s “acting within the scope of his authority” extends, of course, to a case in which the person who does the prohibited act is acting for the defendant not as an employee but as an independent contractor. It was proposed in Working Paper No. 43 to exclude such persons from the range of agents whose acts may give rise to vicarious liability. As this proposal would change the law⁶⁶ without a clear case being made for doing so, clause 29 does not adopt it. The clause does not distinguish between the person who “uses” the defendant’s vehicle as his employee and the person who “uses” the defendant’s vehicle on a single occasion because the defendant has asked him to do so, whether or not for payment.⁶⁷ This does not mean that a person will necessarily be liable for the act of his independent contractor even where the offence employs a verb like “uses”. The matter remains one for judicial interpretation. It is one thing to hold that a person carrying on a business of supplying milk⁶⁸ or heavy building materials⁶⁹ “uses” a vehicle if he employs an independent contractor to supply those things in the contractor’s vehicle. It would be quite another thing to hold that a householder “uses” the removal van owned by the firm of removers whom he engages to carry his furniture to a new residence. Paragraph (b) also leaves open the possibility that, where an independent contractor does an act incidental to the act he was engaged to do, he will be held not to have acted within the scope of his authority.

9.50 *The delegation principle.* The courts have interpreted some offences requiring knowledge (notably licensees’ offences) so as to permit a person’s conviction on the basis of the act and knowledge of one to whom he has delegated management of premises or of an activity. This “delegation principle” was regarded as anomalous by members of the House of Lords in *Vane v. Yiannopoulos*⁷⁰ and our Working Party proposed its abolition.⁷¹ Subsection (2) gives effect to this proposal so far as concerns offences created by the Code itself or by subsequent legislation. Parliament will have to provide clearly for the attribution to one person of the fault of another if it wishes this to occur. There can be no question, however, of proposing the abolition of the delegation principle as it has been held to apply to existing legislation. Some legislation is so drafted that abolition would seriously affect its enforceability. Subsection (3) therefore expressly preserves the application of the principle to pre-Code offences.

⁶⁴See Appendix B, Example 29(i).

⁶⁵See, e.g., *Coppen v. Moore (No. 2)* [1898] 2 Q.B. 306; Appendix B, Example 29(ii), which anticipates that the same result will be reached under the Code.

⁶⁶See, e.g., *Quality Dairies (York) Ltd. v. Pedley* [1952] 1 K.B. 275 and *F.E. Charman Ltd. v. Clow* [1974] 1 W.L.R. 1384, [1974] 3 All E.R. 371.

⁶⁷We accept the Code team’s view (Law Com No. 143, para. 10.27) that a member of the defendant’s family or a friend who performs the relevant act gratuitously for the defendant at his request should be covered by the reference to persons acting with the defendant’s “authority” rather than being artificially treated “as if he were...employed by him”, as was proposed in Working Paper No. 43 (Proposition 4).

⁶⁸As in *Quality Dairies (York) Ltd. v. Pedley*, above, n.66.

⁶⁹As in *F.E. Charman Ltd. v. Clow*, above, n.66.

⁷⁰[1965] A.C. 486.

⁷¹Working Paper No. 43, pp. 29-31.

PART 10

PARTIES TO OFFENCES (2): CORPORATIONS, UNINCORPORATED ASSOCIATIONS AND CHILDREN

Clause 30: Corporations

10.1 *Working Paper No. 44.* The Code team, in considering how the criminal liability of corporations should be provided for in the Code, took as their point of departure a Working Paper on the subject prepared by our Working Party.¹ As that Working Paper was not followed by a Report, the team had no Law Commission recommendations to follow and were bound to attempt a restatement of the existing law as they understood it. Our following them in this is, of course, in keeping with the general policy of this codification project; but the point is worth stressing here for two reasons.

10.2 *A controversial subject.* One reason is the controversial character of corporate criminal liability. The subject is a relatively recent judicial development² and was not fully discussed in authoritative judgments before the House of Lords' decision in *Tesco Supermarkets Ltd. v. Nattrass* in 1971.³ We are conscious that we are here proposing the restatement of principles whose underlying theory and rationale remain strangely uncertain. It is comforting to note, however, that, although the Working Party did review other possible approaches to the subject (including that of abolishing corporate liability altogether), its discussion plainly tended towards the preservation of a slightly modified version of the status quo. Clause 30 incorporates some of those modifications.

10.3 *An undeveloped subject.* The second observation to be made upon the application to corporate criminal liability of our general restatement policy concerns the relatively undeveloped state of the subject. Although its essentials are reasonably clear, the Code team expressed surprise at the number of points at which, in drafting their suggested clause, they had to fill in gaps in the law for want of authority.⁴ It has therefore been encouraging that the team's clause largely escaped criticism on consultation, and in particular that their proposals for the filling of gaps were not questioned. We have been able to adopt that clause with very minor amendments.

10.4 *Offences of strict liability.* Vicarious liability for offences of strict liability may attach to corporations as to other persons. Or a corporation may, for example, be the occupier of a building from a chimney of which dark smoke is emitted; or its activities may cause polluting matter to enter a stream. Then, like any other person, it can be liable for the emission or for causing the pollution, without fault on its part.⁵ These propositions are confirmed by subsection (1).⁶ Since the rest of the law relating to corporate liability certainly needs to be stated, subsection (1) is included for the avoidance of any doubt that might arise if it were not.

10.5 *Offences involving fault.* The attribution to a corporation of criminal liability for an offence involving fault is achieved by identifying the corporation with its "directing mind and will" — that is, with those of its human agents whose acts and states of mind are (in law) its acts and states of mind.⁷ This metaphysical notion of the common law has to be translated into legislative terms without resort to puzzling or misleading metaphor and with as much definition as the subject-matter will allow. The translation is made by subsections (2)-(5). The primary statement is in subsection (2): what is required to make a corporation liable, in any case in which fault is an element,⁸ is that "one of its controlling officers, acting within the scope of his office and with the fault required, is concerned in the offence".⁹ There are several phrases here which require elaboration.

¹Working Paper No. 44 (1972), Criminal Liability of Corporations.

²The modern law on the subject is usually regarded as dating from a group of cases in 1944, especially *D.P.P. v. Kent and Sussex Contractors Ltd.* [1944] K.B. 146; *I.C.R. Haulage Ltd.* [1944] K.B. 551.

³[1972] A.C. 153.

⁴Law Com. No. 143, para. 11.2 (referring by way of example to the subject-matter of paras. 10.12, 10.17 and 10.18 below). ⁵See, respectively, Clean Air Act 1956, s. 1; Control of Pollution Act 1974, s. 31(1)(a).

⁶See Appendix B, Examples 30(i) and (ii).

⁷*Tesco Supermarkets Ltd. v. Nattrass* [1972] A.C. 153.

⁸This includes any case of liability as an accessory, since all such liability is fault-based.

⁹See Appendix B, Examples 30(iii) and (iv). A case apparently inconsistent with this requirement is *Yugotours Ltd. v. Wadsley* [1988] Crim. L.R. 623 (Trade Descriptions Act 1968, s. 14 (1)(b): "recklessly" making a false statement).

10.6 “Controlling officer”. This key phrase is defined in subsection (3):

“a person participating in the control of the corporation in the capacity of a director, manager, secretary or other similar officer (whether or not he was, or was validly, appointed to any such office).”

This (subject to what is said in the following paragraph) is intended to capture the meaning of “directing mind and will” as explained in the opinions in the *Tesco* case. The phrase “director, manager, secretary or other similar officer” is taken from the common-form provision for the imposition of liability on company officers, which was recognised by members of the House of Lords as providing a useful indication of the persons concerned.¹⁰ Viscount Dilhorne referred to the person or persons “in actual control of the operations of the company”.¹¹ Any of them “participates” in such control. He may do so as a member of the board of directors, as managing director, or perhaps as some other superior officer (to adapt the language of Lord Reid); or by virtue of a delegation of directors’ powers.¹²

10.7 *Invalid appointment or no appointment*. The Code team followed a hint in Working Paper No. 44 in not requiring the controlling officer to be validly appointed.¹³ They took the view, with which we agree, that an over-constitutional test for the identification of “controlling officers” would put a premium on disregard of the formalities of appointment and delegation. This aspect of their definition, and now of our own, rebels against some dicta in *Tesco*.¹⁴ The definition treats as a controlling officer any person who in fact participates in the control of a corporation by exercising the functions of a relevant office, whether as the result of appointment (valid or not) or *de facto*. It will, for example, include a kind of case about which the Northern Circuit Scrutiny Group was concerned: that of the bankrupt who runs a company of which members of his family are the nominal directors and shareholders.

10.8 “Shadow directors”. We considered going further. It was suggested to us that the category of “controlling officer” should be declared to include a “shadow director” within the meaning of section 741(2) of the Companies Act 1985: “a person in accordance with whose instructions the directors of a company are accustomed to act”.¹⁵ This would be a more radical extension of the notion of the “directing mind and will” as it has been judicially explained, for it would not be limited to persons involved in the control of a corporation through the exercise of the functions of officers. Although we have some sympathy for the suggestion, the case for it seems to us to depend upon the existence of a clearer rationale for corporate criminal liability than English law has yet developed. It is a law reform suggestion and we ought not to adopt it in advance of detailed consideration and appropriate consultation.¹⁶

10.9 *Question of law*. It is the judge’s duty to direct the jury as to the facts necessary to identify a particular person with a defendant company.¹⁷ For it is “a question of law whether...a person in doing particular things is to be regarded as the company....”¹⁸ Subsection(3)(c) declares accordingly.

10.10 “One of its controlling officers acting...with the fault required....” This formula in subsection (2) gives effect to the provisional view of the Working Party that “a corporation should not be taken as having any required mental element unless at least one of its controlling officers has the whole mental element required for the offence.”¹⁹

10.11 “...is concerned in the offence.” This shorthand expression in subsection (2) is explained in subsection (4), as elaborated in subsection (5). A controlling officer may render a corporation guilty of an offence by doing the acts specified for the offence; by being a party to the acts of others — procuring, assisting or encouraging those acts; or by failing to prevent

¹⁰*Ibid.*, at 180, 187-188, 190-191, 201.

¹¹*Ibid.*, at 187.

¹²*Ibid.*, at 171.

¹³Working Paper No. 44, para. 40.

¹⁴[1972] A.C. 153 at 199-200, *per* Lord Diplock.

¹⁵This might include a controlling company, as it does for some purposes of the Companies Act but not for others: Companies Act 1985, s. 741(3).

¹⁶The Companies Act use of the concept of “shadow director”, which concerns the position of individuals rather than the liability of the company, does not in itself provide a compelling reason to augment the definition of “controlling officer” in clause 30(3).

¹⁷*Andrews Weatherfoil Ltd.* [1972] 1 W.L.R. 118; applying a dictum of Lord Reid in *Tesco Supermarkets Ltd. v. Natrass* [1972] A.C. 153 at 173.

¹⁸[1972] A.C. 153 at 170, *per* Lord Reid.

¹⁹Working Paper No. 44, para. 39d.

relevant acts (of other controlling officers or of subordinates) or relevant events. Only the last of these possibilities needs elaboration.

10.12 *“Fails to prevent.”* It seems clear that a company must be guilty of a fraud offence if its managing director knows that company personnel are defrauding customers and turns a blind eye to what is going on. The perpetrators are not “encouraged” by his inactivity unless they know of his knowledge. An additional expression is needed. “Fails to prevent” will cover this kind of case and also some cases involving offences of omission or “situational offences”. Some positive duty of a company may be entrusted to a subordinate; but he omits (and therefore the company omits) to do what is required; or a subordinate’s actions give rise to a state of affairs capable of constituting an offence on the company’s part. If in either case the offence requires fault, the company’s liability depends upon some culpable failure on the part of a controlling officer. Subsection (5) explains that the failure required is a failure “to take steps that he might take” to ensure (in effect) that the offence is not committed. The subsection must of course be read together with the reference to “the fault required” in subsection (2).

10.13 *“Acting within the scope of his office.”* This phrase in subsection (2) embraces a number of limitations on corporate liability.

- (i) *The officer must be acting as such.* A corporation is not liable for what is done by any of its officers in a personal capacity.²⁰
- (ii) *The officer must be acting within his sphere.* If only some of the functions of management are delegated to a controlling officer, the criminal liability of the corporation on the basis of identification with him should be limited to his activities in connection with those functions.²¹
- (iii) *Subsection (6): the officer must not be acting against the corporation.* Subsection (6) declares that an act done by an officer with the intention of harming the corporation is not done “within the scope of his office”. This will lay to rest the “inequitable”²² decision of *Moore v. I. Bresler Ltd.*²³

10.14 *Offences that a corporation cannot commit.* Subsection (7) reflects the traditional view that there can be no question of criminal liability if there can be no punishment. It declares that a corporation cannot be guilty of an offence that is not punishable with a fine or other pecuniary penalty.²⁴

10.15 *Defences.* The leading case of *Tesco Supermarkets Ltd. v. Natrass*²⁵ was concerned with a statutory defence of a particular type — namely, a defence under the Trade Descriptions Act 1968 that the offence charged was due to the act or default of another person and that the defendant took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control.²⁶ The manager of the Tesco store where the infringement of the Act occurred was held to be “another person” within the first limb of this defence. The company brought itself within the second limb by showing that there had been no failure in the matter of precautions or diligence on the part of those in control of its operations; the company had established an effective system of command and control. Defences are of many kinds, however, and the *Tesco* case is not capable of direct application to all of them. It appears to be necessary to distinguish, as subsection (8) does, between three classes of defence.

10.16 *Defence involving a state of mind (subsection (8) (a)).* A rule is required as to who must entertain a belief, or have any other state of mind, that affords a defence to an offence charged against a corporation. The possible cases fall into two groups.

- (i) *Controlling officers concerned.* There are those in which controlling officers are “concerned in the offence”, in the sense established by subsections (4) and (5). In such cases the corporation must be able to rely on the states of mind of those

²⁰Cf. Working Paper No. 44, para. 39b.

²¹*Ibid.*

²²*Ibid.*, para. 39c.

²³[1944] 2 All E.R. 515.

²⁴For discussion of some other offences (those requiring natural persons as principals; perjury; conspiracy) see the Code team’s Report, para. 11.12 (ii)-(iv). We accept the team’s view that no provision relating specially to corporate liability is required in respect of any of these.

²⁵[1972] A.C. 153.

²⁶Trade Descriptions Act 1968, s. 24(1).

officers, and it cannot matter that other persons concerned in the transaction do not have the belief or intention required for the defence.²⁷ Such a rule derives readily enough from the *Tesco* case by analogy.

- (ii) *No controlling officer involved.* But that case is not adequate authority for denying a corporation a defence when everyone concerned in the transaction has the required state of mind. It should not matter that no controlling officer is so concerned and that therefore none has the state of mind.²⁸

10.17 *Defence involving the absence of a state of mind (subsection (8)(b)).* The Misuse of Drugs Act 1971, section 28 (2), usefully illustrates this class of defence as well as the third class.²⁹ On a charge of possessing a controlled drug, it is a defence that the possessor neither knew nor suspected nor had reason to suspect that the thing possessed was a controlled drug. The burden of proving this defence is on the defendant. It would be oppressive to require every director of a company to be called as a witness to deny knowledge or suspicion. It should be enough that no controlling officer with relevant responsibilities knew or suspected that the company was in possession of a controlled drug.

10.18 *Defence involving compliance with a standard of conduct (subsection (8)(c)).* The fact that no relevant controlling officer has reason to suspect that the company is in possession of a controlled drug will complete the defence under section 28 of the 1971 Act. This is an example of “compliance with a standard of conduct”. Some such expression is needed if the Code is not at this point to become impossibly particularistic. The *Tesco* decision has to be codified by way of a succinct answer to the very general question: what, in the case of a corporation, constitutes compliance with a standard of conduct? Not that a defendant employer (corporate or otherwise) must always show that his own conduct fell within the terms of a statutory exception to liability; a corporation (like any other defendant) may be able to rely on the conduct of the very person for whose act it would otherwise be liable.³⁰ All depends upon the terms of the defence in question. But if a specified standard must, on the true interpretation of the statute, be complied with by the defendant personally, what does this require of a defendant corporation? The *Tesco* case is authority for the proposition that such a defence is made out if the standard is complied with by the corporation’s controlling officers. This means in practice that relevant controlling officers (which may in some contexts mean the board of directors as a whole) did not fall below the stipulated standard in connection with the matter in question. Subsection (8)(c) states the rule accordingly.³¹

Clause 31: Liability of officer of corporation

10.19 *The case for a general provision.* Parliament often provides, by so-called “directors’ liability clauses”, for the criminal liability of an officer of a corporation³² with whose “consent or connivance” an offence by the corporation has been committed. There are good reasons for including in Part I of the Code a provision of this kind of general application. This will avoid the need for repeated provision in the different Chapters of Part II, including Chapters that may come to be included in the future, and indeed in other subsequent legislation. It also enables the liability in question to be stated in Code language and to be understood in its proper relationship to other Code principles.

10.20 *The basis of liability.* The liability of a corporate officer for “consent or connivance” must in many cases duplicate his liability at common law for aiding, abetting or counselling the offence. The Code should avoid such duplication. Subsection (1)(a) therefore merely provides for the liability, as an accessory, of a controlling officer who intentionally fails to take steps that he might take to prevent the commission of an offence by the corporation where he knows that, or is reckless whether, the offence is being or will be committed.³³ This appears to cover all situations of consent and connivance that are not already caught by clause 27, the main provision on accessories.³⁴ But many statutes also provide for the liability

²⁷See Appendix B, Example 30(v).

²⁸Example 30(vi).

²⁹Example 30(vii).

³⁰See, e.g., Road Traffic Act 1988, s. 42(2)(a): defence that the driver of an overweight vehicle was proceeding to the nearest available drawbridge.

³¹See Appendix B, Example 30(viii).

³²Or of a member of a corporation managed by its members: see clause 31 (2).

³³See Appendix B, Example 31.

³⁴Cf. Law Com. No. 143, para. 11.18.

of a corporate officer to whose neglect an offence is attributable. Subsection (1)(b) imposes such liability in relation to strict liability offences only. It is something of a departure from principle to provide for a kind of accessory liability in the absence of fault; and it would be wrong to do so where the offence itself requires fault in the case of the principal.

10.21 *Application of the clause.* We do not think that it is appropriate to apply the clause to existing (“pre-Code”) offences to which directors’ liability clauses do not already apply. To do so would change the law affecting many offences without consultation with the government departments having responsibility for that law.

10.22 A very different question is whether to apply the clause to all offences contained in Part II of the Code or created by subsequent legislation. In modern times directors’ liability has commonly been declared in relation to offences in regulatory legislation and sometimes, but not consistently, in relation to more general offences. Section 18 of the Theft Act 1968, for example, applies only to certain offences of deception³⁵ and to false accounting, apparently on the ground that these offences are “of a kind to be committed by bodies corporate”.³⁶ Almost any offence might be so committed, however. We are not able to find any clear basis for distinguishing in this respect between different classes of offence. We therefore recommend that clause 31(1) should be of general application (subject, of course, to the power of Parliament, if it thinks fit, to provide that it does not apply in the case of any particular offence).

Unincorporated bodies

10.23 *Criminal liability.* Clause 30 concerns incorporated bodies only; the Code has no provision relating to the criminal liability of unincorporated bodies. This is not because an unincorporated body cannot commit criminal offences. Unless the contrary appears, “person” in an Act includes a body of persons corporate or unincorporate.³⁷ This includes an Act, including of course the Code itself, providing for the criminal liability of a “person”. Some modern Acts expressly create offences that may be committed by unincorporated bodies.³⁸ Others assume the liability of unincorporated bodies or associations as “persons” for offences under the Acts and include procedural and other provisions to cater for offences alleged to have been committed by them.³⁹

10.24 *Principles of liability.* The reason for the silence of the Code is that neither case law nor legislative practice justifies the framing of provisions, equivalent to clause 30, on the principles of liability. If the offence requires a fault element,⁴⁰ who must be proved to have been at fault in the way specified if the body or association is to be liable? What is the equivalent of the “directing mind and will” doctrine of corporate liability?⁴¹ What principles govern the availability of defences?⁴² There is no English judicial authority on these questions and there are no adequate statutory models. It would be wrong for us, without prior consultation, to attempt to devise a regime to suit the wide variety of types of unincorporated body. We recommend that this matter be left for the time being to the common law.⁴³

10.25 *Liability of officers and members.* Nor have we felt justified in including in our draft Bill an equivalent of clause 31 (liability of officer of corporation). Some statutes provide for the liability of partners, officers or committee members for offences committed by associations or bodies to which they belong;⁴⁴ but the inclusion of such provisions is much less general than in the case of corporations and the provisions vary greatly in their effects.

³⁵Offences under ss. 15, 16 and 17 of that Act and ss. 1 and 2 of the Theft Act 1978 (but not s. 20(2) of the 1968 Act). Cf. Forgery and Counterfeiting Act 1981, s. 25, relating to offences under ss. 18 and 19 only of that Act.

³⁶Criminal Law Revision Committee, Eighth Report: Theft and Related Offences (1966), Cmnd. 2977, para. 104.

³⁷Interpretation Act 1978, s. 5, Sched. 1.

³⁸See, e.g., Representation of the People Act 1983, s. 202 (1) (express provision that “person” includes “an association...unincorporate”); Surrogacy Arrangements Act 1985, s. 2(5).

³⁹See, e.g., Insurance Companies Act 1982, s. 92; Companies Act 1985, s. 734; Banking Act 1987, s. 98.

⁴⁰See, e.g., Insurance Companies Act 1982, s. 73; Representation of the People Act 1983, ss. 60(1), 61(5), 75(5).

⁴¹Cf. clause 30(2) and para. 10.5 above.

⁴²Cf. clause 30(8).

⁴³See clause 4 (4).

⁴⁴See, e.g., Representation of the People Act 1983, s. 75(6); Banking Act 1987, s. 98(6),(7).

Clause 32: Children

10.26 *Child under ten*. Subsection (1) restates the present law⁴⁵ — without expressing the matter, as the present law does, in terms of a conclusive presumption of incapacity.

10.27 *Child over ten but under fourteen*. Subsection (2) specifies an additional fact to be proved in any prosecution of a child under fourteen — namely, that he knew that what he was doing was “an offence or...seriously wrong.” The phrase “seriously wrong” reflects the most recent judicial statement of what must be proved in order to rebut the traditional presumption that the child was *doli incapax*, that he lacked the “mischievous discretion” necessary for criminal liability.⁴⁶ A requirement of knowledge that the act is seriously wrong seems inapt, however, in the case of very minor offences; yet it has never been suggested that a child over ten cannot commit such offences. Knowledge that the act is an offence would seem to suffice.⁴⁷

10.28 *Should the present rule be preserved?* As the Code team pointed out, the *doli incapax* presumption has been said to “[reflect] an outworn mode of thought” and to be “steeped in absurdity”⁴⁸ and it has long been recognised as operating capriciously. Its abolition was proposed in 1960 by the Ingleby Committee on Children and Young Persons.⁴⁹ For these reasons the team recommended that it should not survive in the Code.⁵⁰ We do not feel able to adopt this suggestion. Parliament did not take the opportunity to implement the Ingleby Committee’s proposal in the Children and Young Persons Act 1969 but chose rather to reduce the incidence of criminal proceedings against children and young persons. The recommendation made in 1960 is no longer adequate warrant for a reform on which there has been no recent consultation and which is bound to be controversial. We would add that, while we are alive to the criticisms of the present law, we should in any case be loth to recommend an isolated change in the law that might be interpreted as encouraging greater use of the criminal process as a means of dealing with children.

⁴⁵Children and Young Persons Act 1933, s. 50, as amended by the Children and Young Persons Act 1963, s. 16.

⁴⁶*McC. v. Runeckles* [1984] Crim. L.R. 499. In *J.B.H. and J.H. (minors) v. O’Connell* [1981] Crim. L.R. 632 it was said that it must be proved that the child knew his act to be “morally wrong”; but the court in the later case regarded “seriously wrong” as embracing “morally wrong” and preferred the wider expression. Cf. *Gorrie* (1919) 83 J.P. 136.

⁴⁷Cf. Glanville Williams, *Textbook of Criminal Law* 2nd ed., (1983), 639.

⁴⁸Glanville Williams, *The Criminal Law, The General Part* 2nd ed., (1961), 820.

⁴⁹(1960), Cmnd. 1911, para. 94.

⁵⁰Law Com. No. 143, para. 11.22.

PART 11

INCAPACITY AND MENTAL DISORDER

Incapacity

Clause 33: Automatism and physical incapacity

11.1 “*Automatism*” has been referred to as “a modern catch-phrase” to describe “an involuntary movement of the body or limbs of a person.”¹ In general a person is not criminally liable for such a movement or its consequences. On one analysis an “involuntary movement” is not an “act”. In Code terms, however, even an unconscious movement of a person is an “act”, but one done “in a state of automatism”. This permits flexible use of the word “act” as a key term in the Code and makes “a state of automatism” also available as a Code expression. The word “involuntary” is not needed — happily, in view of the variable use to which it tends to be put.²

11.2 *Limited function of subsection (1)*. The main function of clause 33 (1) is to protect a person who acts in a state of automatism from conviction of an offence of strict liability. It is conceded that he does “the act” specified for the offence; but the clause declares him not guilty. One charged with an offence requiring fault in the form of failure to comply with a standard of conduct may also have to rely on the clause.³ On the other hand, a state of automatism will negate a fault requirement of intention or knowledge or (normally) recklessness; so a person charged with an offence of violence against another, or of criminal damage, committed when he was in a condition of impaired consciousness, does not rely on this clause for his acquittal but on the absence of the fault element of the offence.

11.3 *Conditions within the subsection*. Subsection (1)(a) refers to acts of two kinds:

- (i) an act over which the person concerned, although conscious, has no control: the “reflex, spasm or convulsion”. Such an act would rarely, if ever, be the subject of a prosecution.
- (ii) an act over which the person concerned does not have effective control because of a “condition” of “sleep, unconsciousness, impaired consciousness or otherwise”. We believe that the references to “impaired consciousness”⁴ and to deprivation of “effective” control are justified both on principle and by some of the leading cases. The governing principle should be that a person is not guilty of an offence if, without relevant fault on his part, he cannot choose to act otherwise than as he does. The acts of the defendants in several cases have been treated as automatous although it is far from clear, and even unlikely, that they were entirely unconscious when they did the acts and although it cannot confidently be said that they exercised no control, in any sense of that phrase, over their relevant movements.⁵

11.4 The case law, however, is not consistent. In *Broome v. Perkins*⁶ D drove five miles home, very erratically, in a hypoglycaemic state. The evidence was that he may well not have been conscious of what he was doing. The Divisional Court directed a conviction of driving without due care and attention, on the ground that D’s mind must have reacted to stimuli, made decisions (to swerve, brake, restart after stopping) and given directions to his limbs. His actions were regarded as not “involuntary” or “automatic”. Yet it seems clear that D’s condition was such that he could not choose to behave otherwise than as he did. Cases such as those we have mentioned above appear not to have been referred to. Finding it necessary to choose between the authorities, we propose a formula under which we expect (and indeed hope) that a person in the condition of the defendant in *Broome v. Perkins* would be acquitted (subject to the question of prior fault).

11.5 *Prior fault*. Subsection (1)(b) excepts from the protection of the subsection cases in which the state of automatism itself is the result of relevant fault on the part of the person

¹*Watmore v. Jenkins* [1962] 2 Q.B. 572 at 586, per Winn L.J.

²See, e.g., the discussion of *Broome v. Perkins* (1987) 85 Cr.App.R. 321 in para. 11.4 below.

³See Appendix B, Example 33(i).

⁴*Pace Neill J.* in *Roberts v. Ramsbottom* [1980] 1 W.L.R. 823, [1980] 1 All E.R. 7 (a civil case).

⁵See *Charlson* [1955] 1 W.L.R. 317, [1955] 1 All E.R. 859; *Kemp* [1957] 1 Q.B. 399; *Quick* [1973] Q.B. 910 (acts of violence when consciousness and effective control impaired by, respectively, cerebral tumour, arteriosclerosis, hypoglycaemia).

⁶(1987) 85 Cr.App.R. 321.

affected or of voluntary intoxication.⁷ A person charged with an offence that may be committed by negligence can be convicted if his state of automatism was the result of his own negligent conduct. Under clause 22 (1)(a) a person who was unaware of a risk by reason of voluntary intoxication is credited, when charged with an offence of recklessness, with the awareness that he would have had if sober; and clause 33 (1)(b) ensures that he cannot escape liability for the offence by a plea of automatism. Paragraph (b) is intended to produce the same results as the common law.⁸

11.6 *Physical incapacity.* Subsection (2) provides the necessary corresponding rules for a case in which physical incapacity prevents the doing of that which there is a duty to do.⁹ The law does not condemn a person for not doing what cannot possibly be done — unless, once again, it is in a relevant way his fault that he cannot possibly do it.

Mental disorder

Disability in relation to the trial

11.7 *Reform proposals.* The defendant's mental disorder (or his being a deaf-mute) may operate as a bar to his trial on indictment or to the progress of his trial beyond the end of the prosecution case.¹⁰ If the defendant is found to be "under disability" the court will order his admission to a hospital to be specified by the Secretary of State.¹¹ The Committee on Mentally Abnormal Offenders (chairman: Lord Butler; hereafter called "the Butler Committee") gave elaborate consideration to the law and procedure relating to disability and made important recommendations for reform.¹² The Committee made a cogent case for change on a number of issues, including the extension of a disability procedure to the magistrates' court and the provision of flexible disposal powers in relation to a defendant under disability. But some of the Committee's procedural proposals were controversial. A consultative document issued by the Home Office in April 1978 referred in particular to serious doubts as to the practicability of a recommendation that if the defendant is found to be under disability there should nevertheless be a "trial of the facts" — at once if there is no prospect of the defendant's recovering, or as soon (during periods of adjournment not exceeding six months in total) as he may prove unresponsive to treatment.

11.8 *Location in the Code.* We hope that the important matter of disability will be further considered as soon as possible with a view to reform. We do not, however, share the Code team's preference for including provisions on disability in Part I of the Code.¹³ It is true that the Butler Committee proposed that a finding of disability and an acquittal based on a mental disorder verdict should give rise to similar disposal powers. But compatibility between the two disposal regimes can be achieved without enacting the relevant provisions side by side. Those relating to disability are procedural in nature and in due course their proper place will be in the projected Part III of the Code.

Code provisions on mental disorder

11.9 *Butler Committee.* The Butler Committee proposed substantial reform of the law and procedure relating to the effect of mental disorder on criminal liability and the disposal of persons acquitted because of mental disorder.¹⁴ The necessity of incorporating in the projected Criminal Code an appropriate provision to replace the outdated "insanity" defence was one justification given by the Committee for its review of the subject. We ourselves are persuaded that implementation of the Committee's proposals would greatly improve this area of the law. We have, however, found it necessary to suggest some important modifications of those proposals. Clauses 34 to 40 therefore aim to give effect to the policy of the Butler Committee as modified by us in ways that will be explained in the following paragraphs.

⁷See Appendix B, Examples 33(ii) and (iii).

⁸There may be one trivial departure from the common law. A driver who falls asleep at the wheel is presently regarded as guilty of careless driving in the period before he falls asleep; he ought to stop at that time: *Kay v. Butterworth* [1945] L.T. 191. Under the Code he might be convicted even in respect of any period after he falls asleep during which he can be said to be still "driving". Clause 33 (1), read as a whole, implies that he continues "driving" until his vehicle comes to rest.

⁹See Appendix B, Examples 33(iv) and (v).

¹⁰Criminal Procedure (Insanity) Act 1964, s. 4.

¹¹*Ibid.*, s. 5 (1).

¹²Report (1975), Cmnd. 6244 (hereafter referred to as "the Butler Report"), Chapter 10.

¹³See Law Com. No. 143, para. 12.2.

¹⁴Butler Report, Chapter 18.

11.10 *The present "insanity defence"*. Before considering the structure of the proposed law, it will be convenient to refer to that of the present law. The *M'Naghten Rules*,¹⁵ together with statutory provisions, produce a "special verdict" ("not guilty by reason of insanity")¹⁶ and the automatic committal of the acquitted person to a hospital to be specified by the Secretary of State,¹⁷ in two kinds of case.

- (i) The first case is that where it is proved (rebutting the so-called "presumption of sanity") that, because of "a defect of reason, from disease of the mind", the defendant did not "know the nature and quality of the act he was doing". If the defendant "did not know what he was doing",¹⁸ he must have lacked any fault required for the offence charged; so, in modern terms at least, this first element in the *M'Naghten Rules* has the appearance of a rule, not about guilt, but about burden of proof and disposal. The defendant should in any case be acquitted, but he must prove that he should be; and his acquittal is to be treated as the occasion for his detention as a matter of social defence.
- (ii) The second case is that where, because of "a defect of reason, from disease of the mind", the defendant "did not know he was doing what was wrong."¹⁹ This is a case, then, in which the Rules afford a defence properly so called: a person who would otherwise be guilty is not guilty "by reason of insanity". But, once again, social defence requires his detention in hospital.

11.11 *Structure of the proposed provisions*. Clauses 35 and 36, following the structure proposed by the Butler Committee, are similarly concerned with two kinds of case, in each of which there is to be a verdict of acquittal in special form ("not guilty on evidence of mental disorder"). On the return of a mental disorder verdict the court would have flexible disposal powers,²⁰ the availability of which would undoubtedly give clauses 35 and 36 greater practical importance than the insanity defence now has.

- (a) *Clause 35 (1)*. In one case all the elements of the offence are proved but severe mental disorder operates as a true defence. This is equivalent to case (ii) above.
- (b) *Clause 36*. In the other case an acquittal is inevitable because the prosecution has failed to prove that the defendant acted with the required fault (or to disprove his defence of automatism or mistake); but the reason for that failure is evidence of mental disorder, and it is proved that the defendant was indeed suffering from mental disorder at the time of the act. This differs from case (i) above in casting no burden on the defendant of proving his innocence.

11.12 *Summary trial*. The Butler Committee recommended that a magistrates' court should acquit on evidence of mental disorder in the same circumstances as a jury.²¹ Our clauses so provide. The general principles of the substantive criminal law applicable to offences triable either way must be the same whatever the mode of trial in the particular case. A defendant who lacked the fault required for the offence charged will of course be entitled to an acquittal wherever he is tried.²² And if severe mental illness or severe mental handicap at the time of the offence entails an acquittal on trial on indictment, it must do so also on summary trial. A defence of severe mental illness may, of course, make summary trial inappropriate. That is a consideration that could be taken care of by procedural provisions. But, assuming that mental disorder is capable of arising as an issue on summary trial, the Code must clearly provide for the same substantive consequences as on trial on indictment.

Clause 34: Mental disorder: definitions

11.13 "*Mental disorder*"; "*severe mental illness*"; "*severe mental handicap*". These terms are considered below, in the context of the provisions in which they are crucial.²³ The Butler scheme renounces the outdated terms "insanity" and "disease of the mind".

¹⁵(1843) 10 Cl. & F. 200; 8 E.R. 718.

¹⁶Trial of Lunatics Act 1883, s. 2 (as amended by Criminal Procedure (Insanity) Act 1964, s. 1).

¹⁷Criminal Procedure (Insanity) Act 1964, s. 5 and Sched. 1 (as amended by the Mental Health Act 1983).

¹⁸Lord Diplock's modern translation in *Sullivan* [1984] A.C. 156 at 173.

¹⁹Interpreted in *Windle* [1952] 2 Q.B. 826 to mean legally wrong.

²⁰See para. 11.34 below.

²¹Butler Report, para. 18.19.

²²Subject at present, it may be, to the possibility in the magistrates' court of a hospital order made on the basis simply that he did the act charged and is now suffering from mental illness or severe mental impairment that would justify the making of the order if he were convicted: Mental Health Act 1983, s. 37 (3).

²³See paras. 11.26, 11.17 and 11.19, respectively.

11.14 *“Return a mental disorder verdict”*. Each of the situations defined in clauses 35 (1) and 36 calls for the return of “a mental disorder verdict”.²⁴ The word “verdict” is strictly speaking inapt to refer to the determination of a magistrates’ court. But it greatly simplifies drafting to refer to the “return” of a “mental disorder verdict” as the relevant outcome of summary trial as of trial on indictment, and to explain that language in the definition section: a jury will declare that the defendant “is not guilty on evidence of mental disorder”; the magistrates will “dismiss the information on evidence of mental disorder.”

Clause 35: Case for mental disorder verdict: defence of severe disorder

11.15 Subsection (1) provides that even though he has done the act specified for the offence with the fault required, a defendant is entitled to an acquittal, in the form of a mental disorder verdict, if he was suffering from severe mental illness or severe mental handicap at the time. This implements the Butler Committee’s conception²⁵ with some modifications.

11.16 *Attributability of offence to disorder: a rebuttable presumption*. One aspect of the Committee’s recommendation has proved controversial. The Committee acknowledged that —

“it is theoretically possible for a person to be suffering from a severe mental disorder which has in a causal sense nothing to do with the act or omission for which he is being tried”;

but they found it “very difficult to imagine a case in which one could be sure of the absence of any such connection”.²⁶ They therefore proposed, in effect, an irrebuttable presumption that there was a sufficient connection between the severe disorder and the offence. This proposal is understandable in view of the limitation of the defence to a narrow range of very serious disorders; and its adoption would certainly simplify the tasks of psychiatric witnesses and the court. Some people, however, take the view that it would be wrong in principle that a person should escape conviction if, although severely mentally ill, he has committed a rational crime which was uninfluenced by his illness and for which he ought to be liable to be punished. They believe that the prosecution should be allowed to persuade the jury (if it can) that the offence was not attributable to the disorder.²⁷ We agree. Subsection (2) provides accordingly. We believe that it must improve the acceptability of the Butler Committee’s generally admirable scheme as the basis of legislation.

11.17 *“Severe mental illness”* is defined in clause 34 in the terms proposed by the Butler Committee. Severe mental illness, for the purpose of this exemption from criminal liability, ought, in the Committee’s view, to be closely defined and restricted to serious cases of psychosis (as that term is currently understood). The Committee recommended, as the preferable mode of definition, the identification of “the abnormal mental phenomena which occur in the various mental illnesses and which when present would be regarded by common consent as being evidence of severity”.²⁸ We believe that this symptomatic mode of definition has much to commend it. The psychiatric expert will give evidence in terms of strict “factual tests”,²⁹ rather than of abstractions (such as “disease of the mind” or “severe mental illness” itself) or diagnostic labels. The method allocates appropriate functions to the law itself (in laying down the test of criminal responsibility), to the expert (in advising whether the test is satisfied) and to the tribunal of fact (in judging, by reference to the whole of the case, whether that advice is soundly given).

11.18 *Content of the definition*. We are grateful to the Section for Forensic Psychiatry of the Royal College of Psychiatrists for responding to our request for advice on the content of the definition of “severe mental illness”. We are told that there was a suggestion, at the time of the Butler Committee’s Report, that the list of symptoms in the definition might not be sufficiently comprehensive, but that this suggestion had had little support. Our advisers expressed their own satisfaction with the proposed criteria of severe mental illness and with the way in which they are expressed.

²⁴The Butler Committee, following tradition, used the phrase “special verdict”; but we share the Code team’s preference for “mental disorder verdict” as more informative and unambiguous: see Law Com. No. 143, para. 12.20 (ii).

²⁵Butler Report, paras. 18.26 *et seq.*

²⁶*Ibid.*, para. 18.29.

²⁷If such a person were to remain ill at the time of his conviction (of any offence other than murder), he could of course be made the subject of a hospital order.

²⁸*Ibid.*, paras. 18.30-18.36.

²⁹*Ibid.*, para. 18.36 (where the Committee fully explained the virtues of the definition).

11.19 “*Severe mental handicap*” is defined in clause 34. The expression used by the Butler Committee was “severe subnormality”, which was defined in the Mental Health Act 1959, section 4, in terms apt for the Committee’s purpose. But the expression “severe mental impairment” has since replaced “severe subnormality” in mental health legislation (the latter term having fallen out of favour). “Severe mental impairment” has the following meaning:

“a state of arrested or incomplete development of mind which includes severe impairment of intelligence and social functioning and is associated with abnormally aggressive or seriously irresponsible conduct on the part of the person concerned”.³⁰

This definition is not a happy one for present purposes; exemption from criminal liability on the ground of severe mental handicap ought not to be limited to a case where the handicap is associated with aggressive or irresponsible conduct. We therefore propose that the expression “severe mental handicap” be used, with the same definition as “severe mental impairment” down to the word “functioning”.³¹ This will give effect to the Butler Committee’s intentions and has the approval of our Royal College advisers.

11.20 *Burden of proof.* Subsection (1) permits proof of severe disorder by either prosecution or defendant. Normally it will be for the defendant to prove it, as his defence to the charge. This is as proposed by the Butler Committee.³² But there may be a case in which the defendant adduces evidence of mental disorder on an issue of fault or automatism and the prosecution responds with evidence of severe disorder³³ and in such a case it may be the prosecution evidence (or a combination of prosecution and defence evidence) which results in a mental disorder verdict under clause 35 (1).

11.21 *Evidence of severe disorder.* Subsection (3) provides that such evidence must be given by two appropriately qualified doctors, as recommended by the Butler Committee.³⁴

11.22 *Exception.* A severely mentally handicapped person cannot commit an offence under clause 106(1), 107 or 108 involving sexual relations with another such person. Subsection (4) ensures that such a person, if charged with one of those offences, receives an unqualified acquittal.

Clause 36: Case for mental disorder verdict: evidence of disorder

11.23 *Broad effect of the clause.* Evidence of mental disorder may be the reason why the court or jury is at least doubtful whether the defendant acted with the fault required for the offence. The Butler Committee recommended that, although in such a case there must be an acquittal, this acquittal should be in the qualified form “not guilty on evidence of mental disorder” where it is proved that the defendant was in fact suffering from mental disorder at the time of his act.³⁵ Clause 36 gives effect to this recommendation, significantly modified by the adoption of a narrower meaning of “mental disorder” than that proposed by the Committee.

11.24 *Cases covered by the clause.* The clause adapts the Committee’s proposal to the conceptual structure of the Code. First, it provides that the mental disorder verdict is not to be returned unless evidence of mental disorder is the only reason for an acquittal. The provision must not affect a case in which the defendant is entitled to an acquittal on some additional ground having nothing to do with mental disorder. Secondly, it refers not only to absence of fault but also (a) to automatism and (b) to a belief in a circumstance of defence. (a) Automatism is mentioned because the acquittal of one who acted in a state of automatism is not grounded only in absence of “fault” (see clause 33). (b) A person may commit an act of violence because of a deluded belief that he is under attack and must defend himself. Within the scheme of the Code — which draws a distinction between elements of offences (including fault elements) and defences — such a person would not, when relying on his delusion, be denying “the fault required for the offence”. His mentally disordered belief must therefore be separately mentioned in the paragraph.

³⁰Mental Health Act 1983, s. 1 (1).

³¹Cf. the definition of “mental handicap”, referring to “significant” rather than to “severe” impairment, in Police and Criminal Evidence Act 1984, s. 77 (confessions by mentally handicapped persons); and the definition of “defective” in Sexual Offences Act 1956, s. 45, as amended.

³²Butler Report, paras. 18.39, 18.40.

³³See clause 38 (2); and cf. Criminal Procedure (Insanity) Act 1964, s. 6.

³⁴Butler Report, para. 18.37. We note that only one of the medical practitioners giving evidence or making reports for various purposes under Part III of the Mental Health Act 1983 need be a practitioner approved under section 12 of that Act: s.54 (1).

³⁵Butler Report, para. 47 of Summary of Recommendations.

11.25 The clause deals also with the case where the defendant lacked the required fault because of the combined effects of mental disorder and intoxication. We have discussed this case in our comments on clause 22 (intoxication).³⁶

11.26 *“Mental disorder”: the Butler Committee’s proposal.* The Butler Committee proposed to adopt in principle the Mental Health Act definition of “mental disorder” — namely, “mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability of mind”³⁷ — subject only to the exclusion of “transient states not related to other forms of mental disorder and arising solely as a consequence of (a) the administration, maladministration or non-administration of alcohol, drugs or other substances or (b) physical injury.”

11.27 We are surprised that such an extremely wide definition, designed for the very different purposes of the Mental Health Act, should have been thought suitable as the basis of a qualified acquittal, subject only to the exclusion of certain “transient states not related to other forms of mental disorder”. If this proposal were followed, the result might be to subject too many acquitted persons to a possibly stigmatising or distressing verdict and to inappropriate control through the courts’ disposal powers.³⁸ The cases attracting a mental disorder verdict under this clause should, we think, be strictly limited. We therefore exclude “mental illness” (not being “severe”) and “any other disorder or disability of mind” from our definition. We also exclude “psychopathic disorder” as being, we believe, irrelevant to the existence of “fault” in the technical sense.

11.28 *“Mental disorder”: the proposed definition.* We define “mental disorder” in clause 34 to include (only):

- (a) “severe mental illness” (as defined in the same section): the defendant who lacked fault, or believed in the existence of an exempting circumstance, because of a psychotic distortion of perception or understanding, will receive a mental disorder verdict and be amenable to the court’s powers of restraint.
- (b) “arrested or incomplete development of mind”: this category from the Mental Health Act definition of “mental disorder” survives our amendment of the Butler Committee’s proposal. We must, however, express a doubt as to whether it should do so. Some persons against whom fault cannot be proved might receive mental disorder verdicts, and become subject to the protective powers of the criminal courts, although under the present law they would receive unqualified acquittals. It may be thought more appropriate to leave any acquitted persons within this category who represent a danger to themselves or others to be dealt with under Part II of the Mental Health Act 1983.
- (c) (in effect) pathological automatism that is liable to recur:³⁹ it would not, we think, be acceptable to propose that the courts should lose all control over a person acquitted because of what is now termed “insane automatism”. Paragraph (c) of our definition requires the “state of automatism” (see clause 33 (1)) to be “a feature of a disorder...that may cause a similar state on another occasion”. This qualification confines the mental disorder verdict to those possibly warranting some form of control that the court can impose. It may nevertheless be felt by some that the paragraph includes too much. The Butler Committee wished, in particular, to protect from a mental disorder verdict a diabetic who causes a harm in a state of confusion after failing to take his insulin. We do not think, however, that there is a satisfactory way of distinguishing between the different conditions that may cause repeated episodes of disorder; nor do we think it necessary to do so. There is not, so far as we can see, a satisfactory basis for distinguishing between (say) a brain tumour or cerebral arteriosclerosis⁴⁰ on the one hand and

³⁶See para. 8.45 above.

³⁷Mental Health Act 1959, s. 4 (1); re-enacted in Mental Health Act 1983, s. 1 (2).

³⁸For example: D’s defence to a charge of shoplifting is that she took the goods in a state of absent-mindedness caused by depression; she denies the intention required for theft. The depression may be a “mental illness” or some “other disorder...of mind” within the Mental Health Act definition; but D, if the court thinks that she may be telling the truth, should enjoy a plain acquittal rather than an acquittal “on evidence of mental disorder”. Cf. *Clarke* [1972] 1 All E.R. 219, where the Court of Appeal took the same view under the present law.

³⁹See cl. 34 for the definition of this category. “Intoxication” is expressly excluded; a mental disorder verdict is not intended to be available in a case of automatism caused by the taking of drugs for an illness: cf. *Quick* [1973] Q.B. 910. See Appendix B, Example 36(iii).

⁴⁰Cf. *Kemp* [1957] 1 Q.B. 399.

diabetes or epilepsy⁴¹ on the other. If any of these conditions causes a state of automatism in which the sufferer commits what would otherwise be an offence of violence, his acquittal should be “on evidence of mental disorder”. Whether a diabetic so affected has failed to seek treatment, or forgotten to take his insulin, or decided not to do so, may affect the court’s decision whether to order his discharge or to take some other course. What is objectionable in the present law is the offensive label of “insanity” and the fact that the court is obliged to order the hospitalisation of the acquitted person, in effect as a restricted patient. With the elimination of these features under the Butler Committee’s scheme, the verdict should not seem preposterous in the way that its present counterpart does.

11.29 *Burden of proof.* A mental disorder verdict under clause 36 will not be appropriate unless the court or jury is satisfied that the evidence of mental disorder that has prevented proof of fault — to take the most likely example — in fact establishes that he was suffering from such disorder. If the court or jury is not so satisfied, there will be an ordinary acquittal.⁴² As in the case of clause 35 (1), proof may derive from prosecution or defence evidence, or indeed from a combination of the two.⁴³ Clause 36 follows the Butler Committee in requiring the mental disorder to be proved on the balance of probabilities: but, since the defendant is *ex hypothesi* entitled to an acquittal, there is an obvious argument for requiring proof beyond reasonable doubt of the case for exposing him, through a mental disorder verdict, to the disposal powers of the court.

Clause 37: Plea of “not guilty by reason of mental disorder”

11.30 This clause gives effect (with a verbal amendment) to the Butler Committee’s recommendation that a defendant should be allowed to plead “not guilty on evidence of mental disorder”.⁴⁴

Clause 38: Evidence of mental disorder and automatism

11.31 *Question of law.* Subsection (1) puts it beyond doubt that it is the function of the court (and not, in particular, of medical witnesses) to interpret the definitions of “automatism” and “mental disorder” in clauses 33 (1) and 34 respectively. The allocation of this function to the court is important for the purposes of clauses 33 (1) and 36 as well as of subsection (2) of the present clause.

11.32 *Prosecution evidence.* The Butler Committee proposed that the prosecution should, as at present, be restrained from adducing evidence of mental disorder until the defendant raises an issue that justifies its doing so; but the Committee thought that, “[i]f the defendant admits doing the act and contests the case solely on his state of mind, it is right that all the evidence as to his state of mind can be given, and if the evidence is that he was mentally disordered when he did the act there should be a [mental disorder] verdict rather than an ordinary acquittal.”⁴⁵ Subsections (2) and (3) give effect to these views.⁴⁶

11.33 *Notice of defence.* The Butler Committee proposed that the defence should be required to give notice of an intention “to adduce psychiatric or psychological evidence on the mental element — whether in relation to the [mental disorder] verdict or the defence of automatism”; and the Code team included in their Bill a provision to give effect to this proposal in a modified form.⁴⁷ Since then the Crown Court (Advance Notice of Expert

⁴¹Cf. *Sullivan* [1984] A.C. 156.

⁴²Compare Appendix B, Examples 36(i) and (ii).

⁴³Cf. para. 11.20 above. The Code team (Law Com. No. 143, para. 12.18) postulated two cases: “In Case 1 the defendant leads evidence, including some evidence of mental disorder, which raises a doubt as to whether he acted with the fault required for the offence charged. But it is not compelling evidence and might not justify a positive finding that he lacked the fault required or that he actually suffered from mental disorder. The prosecution, not risking an absolute acquittal for failure of proof of fault, adduces evidence” (see cl. 38 (2)) “that establishes on the balance of probabilities that the defendant was indeed suffering from mental disorder at the time of the act. In Case 2 the defendant leads evidence plainly demonstrating that he lacked the fault required for the offence (or acted in a state of automatism) because he was suffering from mental disorder. The prosecution unsuccessfully tries to undermine this evidence rather than to reinforce it. A mental disorder verdict is required in both cases.”

⁴⁴Butler Report, para. 18.50. The Committee referred to circumstances in which the court would not accept, or would hesitate before accepting, such a plea.

⁴⁵Butler Report, para. 18.48.

⁴⁶Subsection (2), in its reference to murder cases, partially replaces the Criminal Procedure (Insanity) Act 1964, s. 6 (see also cl. 57 (2)); and subsection (3) is based on that section.

⁴⁷*Ibid.*, para. 18.50; Law Com. No. 143, para. 12.27 and draft Bill, cl. 40 (2) and (3).

Evidence) Rules 1987⁴⁸ have been made. The Code team's provision, in its application to trial on indictment, would substantially duplicate those Rules. In any case, we have elsewhere in our Bill forborne to offer rules requiring advance notice of defences.⁴⁹ The subject merits further consideration in the present context, as does the Code team's further suggestion⁵⁰ that the prosecution should (subject to judicial direction) be able to give evidence of mental disorder as part of its case in chief if a relevant defence has been notified.

Clause 39: Disposal after mental disorder verdict

11.34 *Proposal for flexible powers.* By far the most important aspect of the Butler Committee's scheme of reform was the proposal as to the consequences of a mental disorder verdict. The Committee recommended that the court be given quite flexible powers, including the power to order in-patient treatment in hospital (with or without a restriction order), out-patient treatment, certain forfeitures, or a driving disqualification, and the power to discharge the acquitted defendant without any order.⁵¹

11.35 The details of this proposal no doubt still require consideration by the government departments concerned and it would not be realistic for us, without the benefit of necessary consultation, to offer a complete set of relevant provisions. We can only express the hope that this important reform will be undertaken without further delay. It should be clear that enactment of our clauses 35 and 36, providing for mental disorder verdicts, depends upon abolition of the mandatory consequences of the present equivalent verdict.

11.36 Clause 39 provides for a Schedule of provisions concerning the disposal of persons found not guilty on evidence of mental disorder.

Clause 40: Further effect of mental disorder verdict

11.37 This clause gives effect to a subsidiary recommendation of the Butler Committee.⁵²

⁴⁸Under the Police and Criminal Evidence Act 1984, s. 81: see S.I. 1987, No. 716 (L.2).

⁴⁹Cf. para. 12.19 below.

⁵⁰Law Com. No. 143, para. 12.28; draft Bill, cl. 40 (4)(a) and (5).

⁵¹Butler Report, paras. 18.42-18.45. We ought to express a doubt as to whether the Committee's proposals include orders appropriate for cases in which physical rather than mental conditions give rise to mental disorder verdicts under clause 36. In particular, the Committee's only proposal for supervision in the community is based on the model of conditional discharge under a Mental Health Act hospital order: para. 18.45.

⁵²*Ibid.* para., 18.38. The clause is in general terms although the Committee referred to indictments only.

PART 12

DEFENCES

Introduction

12.1 *Clauses 41 to 46* bring together a disparate collection of matters under the heading “Defences”. These matters by no means exhaust the topic of defences as that word is understood in the Code.¹ Many defences are, of course, stated in relation to particular offences or groups of offences by the enactments creating them and they require no mention in Part I of the Code, except for the proposition (clause 41) that a mistaken belief in the existence of circumstances which would afford any defence is in general itself a defence.² Code defences specially available to accessories are conveniently stated in the clause dealing with that subject.³ Where mental disorder is not simply the reason why a person does not have the fault required for an offence, but excludes liability even though all the elements of the offence are present (clause 35), it is, in Code terms, properly speaking a defence; and similarly with automatism and physical incapacity (clause 33). These topics are presented in their own group of clauses, immediately preceding those headed “Defences.”

12.2 *Defences not specified in the Code.* As the Code team explained in their Report,⁴ it is impossible to specify in the Code all those circumstances which amount to defences because they justify or excuse the doing of acts that would otherwise be offences. For, first, the full statement of some defences would involve reducing doctrines of the civil law to statutory form for the purpose of their application in criminal cases, a task which it would not be appropriate for us to undertake even if it were in principle desirable that it should be done. Secondly, the exact specification or application, or even the existence, of some defences cannot be stated with confidence in the present state of the law. Such defences, of which necessity is the most obvious example, must be left to develop at common law. The Code can state a limited number of general defences that are well-developed (see clauses 41, 42 and 44) or capable of being closely defined (see clause 43). Having done so, it cannot do more than make clear that that is not an exhaustive statement of defences and that other circumstances of justification and excuse continue to apply. We are persuaded by the team’s arguments and, with the exception of the clause mentioned in the following paragraph, we have in general adopted their proposals as to the appropriate contents of this part of the Code.

12.3 *Acts authorised by law.* The Code team’s Bill employed two clauses for the purpose of preserving defences. The first was their clause 48, which was based on a provision in the American Law Institute’s Model Penal Code. This would have provided, in effect, that a person does not commit an offence by doing an act that is sanctioned by certain kinds of legal authority or by the existence of a public duty. The team acknowledged that this clause contained nothing that would not be covered by their more general clause 49. They included it out of a desire that the Code should be informative. We do not think that the case for including clause 48 was made out and we have not reproduced it.

12.4 *Acts justified or excused by law.* The Code team’s clause 49 forms the basis of our own clause 45(c). The paragraph may be said to have two functions. On the one hand, as already said, it preserves known defences not specified in the Code. Examples are given in the commentary on clause 45, below.⁵ On the other hand, it will permit the development of existing defences and even the emergence of defences not at present known to the law. Common law principles of justification and excuse are not static. They are developed by the judges as occasion arises and attitudes change. The history of duress by threats in recent years is a striking example of the development of a known defence. Our comment on clause 43⁶ refers to recent cases revealing the existence of an analogous defence of duress of circumstances. Clause 45(c), or rather clause 4 (4) to which it refers, preserves the power of

¹For the Code distinction between offences and defences, see para. 7.2 above.

²And see clause 22 (1)(b) and (3) as to intoxicated beliefs of this kind.

³See clause 27(6) and (8).

⁴See Law Com. No. 143, paras. 13.8 *et seq.*

⁵Para. 12.41.

⁶Para. 12.21 below.

the courts to determine the existence, extent and application of any justification or excuse provided by the common law.⁷

12.5 “Unlawfully” and “without lawful excuse” not employed in the Code. Parliament has sometimes qualified the statement of offences with the words “unlawfully” or “without lawful excuse”. There has been no consistency in this usage, however, and the use of such words does not seem to have been necessary for the purpose of importing general defences. The Code provisions on general defences, including clause 45(c), ensure that they are unnecessary in the statement of offences in Part II.⁸

Clause 41: Belief in circumstance affording a defence

12.6 *A statutory presumption.* If knowledge of a particular circumstance is an element of an offence, a belief that that circumstance does not exist means that the offence is not committed.⁹ Subsection (1) provides a presumption in favour of a corresponding rule for defences, namely, that a person who acts in the belief that a circumstance exists has any defence that he would have if it existed.¹⁰ The Code thus gives general effect to the *prima facie* principle that a person is to be judged, for purposes of criminal liability, on the facts as he believed them to be. This is the tendency, though not the universal effect,¹¹ of recent judicial developments in the field of defences. It is desirable that the Code should provide consistently for offences and defences, leaving it to Parliament in particular contexts, if it thinks fit, to exclude the application of this subsection or to limit a defence of belief in the existence of an “exempting circumstance”¹² to a case of a belief based on reasonable grounds. Where a defendant relies on this subsection, the absence of reasonable grounds for the belief he claims to have held is, of course, relevant in determining whether he did hold it.¹³

12.7 *Mistake as to one element of a defence.* A defence may have two or more elements, each of which is, in the language of the Code, an “exempting circumstance”,¹⁴ and a person’s mistaken belief may be as to the existence of one such circumstance. Subsection (1) places him in the position that he would be in if his belief were true. For example, a person may be guilty of manslaughter rather than murder if he kills under provocation — that is, if something done or said causes him to lose his self-control (clauses 55(a) and 58). If he mistakenly believes that just such a thing has been done or said, the supposed provocation is treated as actual provocation, and other elements of this special defence to murder (the alleged loss of self-control and the question whether the provocation was sufficient ground for the loss of self-control) are then considered on that basis.

12.8 *Voluntary intoxication.* Subsection (1) has to be read subject to clause 22 (1)(b) and (3). A person who was voluntarily intoxicated is credited, in the case of an offence requiring a fault element of recklessness, with the understanding of the relevant matter that he would have had if he had been sober. Similarly, in the case of an offence requiring a fault element of failure to comply with a standard of care, or requiring no fault, a person who was voluntarily intoxicated is treated as not having believed that an exempting circumstance existed if a reasonable sober person would not have done so.

12.9 *Application of the clause.* Subsection (2) ensures that subsection (1) does not affect the law relating to “pre-Code offences”—those created by or under pre-Code legislation.

⁷Similar provisions are to be found in s. 7(3) of the Canadian Criminal Code and s. 20 of the New Zealand Crimes Act 1961. The power to determine the existence of a defence was used by the New Zealand Court of Appeal in *Finau v. Department of Labour* [1984] N.Z.L.R. 596, holding that a defence of impossibility was available to an immigrant who had overstayed her leave if no airline would carry her because of the advanced state of her pregnancy. Stephen J.’s defence of the corresponding provision in the Draft Code of 1879 was cited by Professor Glanville Williams in a comment on our Report on Defences of General Application (Law Com. No. 83): [1978] Crim. L.R. 128 at 129.

⁸For a fuller statement see Law Com. No. 143, paras. 13.13, 13.14.

⁹This truism is discussed in n. 48 to para. 8.32 above.

¹⁰See Appendix B, Example 41. Compare clause 6 of the draft Criminal Liability (Mental Element) Bill appended to our Report on the Mental Element in Crime (1978), Law Com. No. 89. That clause (and the Code team’s clause 44) proposed to specify the ways in which the presumption might be displaced. For our reason for not now adopting this proposal, see para. 8.27 above, relating to the presumption of a requirement of fault established by clause 20 (1); that paragraph, appropriately modified, applies here.

¹¹See, e.g., para. 12.15 below.

¹²Defined in clause 6 as “any circumstance amounting to a defence or any element of a defence”.

¹³See clause 14.

¹⁴See n. 12 above.

Whether a principle equivalent to that stated by subsection (1) applies in relation to a defence specially provided for a pre-Code offence will depend on the application and interpretation of the relevant legislation as though the Code had not been enacted (clause 2 (3)) or on any relevant rule of the common law (clauses 4 (4), 45(c)).¹⁵

12.10 *Burden of proof.* Subsection (3) puts the burden of proof in relation to a belief in a defence where it lies in relation to the defence itself.¹⁶

Clause 42: Duress by threats

12.11 This clause provides a defence of duress by threats similar to that available at common law. We draw attention below to certain proposed departures from the common law position. The subject is one upon which we made recommendations, with a draft Bill, in 1977.¹⁷ The present clause benefits, in its content, from the further consideration which we have been able to give to the subject in the light of the Code team's work and of recent consultation, and, in method, from clause 1 of our earlier draft Bill as modified in clause 47 of the Code team's Bill.

12.12 *Nomenclature.* We call the defence "duress by threats" to distinguish it from the related defence of duress of circumstances which we propose in clause 43. Subsection (1) makes available the phrase "acting under duress by threats" for use elsewhere.¹⁸

12.13 *Availability of the defence.* In our earlier Report we recommended that duress should be a defence to all crimes.¹⁹ This was noticed by members of the House of Lords in *Howe*,²⁰ where, however, it was held that duress is not a defence to murder. Lord Bridge of Harwich expressed the view that if duress is to be made a defence to murder "the proper means to effect such a reform is by legislation such as that proposed by the Law Commission." It is only by legislation, Lord Bridge observed, "that the scope of the defence of duress can be defined with the degree of precision which, if it is to be available in murder at all,²¹ must surely be of critical importance."²² The topic is, of course, a controversial one; and the decision in *Howe* has itself proved controversial.²³ In the circumstances we have thought it right that our draft clause should reflect that decision by providing (in subsection (2)) that the defence does not apply to murder or attempt to murder.²⁴ Exceptionally, we place this aspect of the clause within square brackets, as an indication that our recommendation on the point has not been abandoned.

12.14 *Elements of the defence: (a) what the actor must know or believe.* Subsection (3) sets out the circumstances in which a person does an act under duress by threats.²⁵ The first requirement is that he must know of, or believe in the existence of, a threat to himself or another if he does not do the act. Paragraph (a) lays down three conditions:

- (i) The threat, following the prevailing judicial view and that of most modern codes,²⁶ must be one of death or serious personal harm to himself or another.²⁷
- (ii) The threat must be, or he must believe that it is, one that will be carried out immediately or before he or the other can obtain official protection. In this connection subsection (4) provides that it is immaterial that, in fact or as he believes, any available official protection will or may be ineffective.²⁸ This gives effect to our earlier proposal which, although questioned by the Code team,²⁹ was

¹⁵Cf. clauses 18 and 20 (2): paras. 8.8 and 8.26 above.

¹⁶Cf. Criminal Liability (Mental Element) Bill (n. 10 above), cl. 6 (5).

¹⁷Report on Defences of General Application (1977), Law Com. No. 83.

¹⁸See clause 44 (3)(d).

¹⁹Law Com. No. 83, paras. 2.39-2.45.

²⁰[1987] A.C. 417.

²¹The words "at all" refer to the fact that, before the decision in *Howe*, duress had been held to be available to an accessory to murder (House of Lords in *Director of Public Prosecutions for Northern Ireland v. Lynch* [1975] A.C. 653) but not to a principal (Judicial Committee of the Privy Council in *Abbott v. The Queen* [1977] A.C. 755).

²²[1987] A.C. 417 at 437-438.

²³See J.C. Smith, [1987] Crim. L.R. 481; I.H. Dennis, (1987) 51 J. Cr. L. 463 at 464-474; H.P. Milgate, [1988] C.L.J. 61; L. Walters, (1988) 8 L.S. 61.

²⁴As to attempt, see [1987] A.C. 417 at 445, *per* Lord Griffiths, *obiter*.

²⁵See Appendix B, Examples 42(i) and (ii).

²⁶See Law Com. No. 83, para. 2.25.

²⁷For "personal harm", see clause 6.

²⁸See Appendix B, Example 42(iii).

²⁹Law Com. No. 143, para. 13.18.

strongly supported on consultation by the South-Eastern Circuit (Southwark) Scrutiny Group.

- (iii) There must be, or he must believe that there is, no other way of preventing the threat being carried out.

12.15 “*Knows or believes*”. The emphasis in subsection (3)(a) on the actor’s knowledge or belief reflects the fact that a defence of duress depends essentially upon a state of mind. In this respect the clause somewhat departs from the prevailing judicial view, according to which a person’s belief in the existence of a threat must be “reasonably” held if it is to found the defence.³⁰ This requirement would, we believe, be inconsistent with the tendency of judicial developments in other contexts.³¹ It would also be at odds with the general policy of the Code, in keeping with those developments, of assigning the reasonableness of a person’s asserted belief to the domain of evidence.³²

12.16 *Elements of the defence: (b) actor cannot be expected to resist threat.* The threat must be one which the actor cannot reasonably be expected to resist; and the circumstances to be considered for this purpose include his personal circumstances as they affect the gravity of the threat. This follows our earlier recommendation of a test of what can reasonably be expected “of the defendant in question ... Threats directed against a weak, immature or disabled person may well be much more compelling than the same threats directed against a normal healthy person”³³. This was quoted by the Court of Appeal in *Graham*,³⁴ where the resistance to be expected was held to be that of “a sober person of reasonable firmness”, though one “sharing the characteristics of the defendant”. A person’s “firmness”, however, is itself one of his characteristics that may affect the gravity of the threat to him; and we are not convinced that personal characteristics can be separated in the way that the *Graham* test appears to contemplate. The test stated in subsection (3)(b) therefore departs in one respect from that of the Court of Appeal.

12.17 *Voluntary exposure to duress.* Subsection (5) provides that the defence is not available to a person who has voluntarily and without reasonable excuse exposed himself to the risk of a relevant threat³⁵ — as, for example, by joining a criminal group which he knows may threaten with violence a member who is reluctant to commit offences in its service. This is the effect of recent case law³⁶ and is consistent with our own earlier recommendation on the point.³⁷

12.18 *Marital coercion.* Subsection (6) abolishes this common law defence.³⁸

12.19 *Notice of defence.* The Code team included in their Bill a provision requiring notice of an intention to advance a duress defence. This was in accordance with a recommendation of our own,³⁹ but that recommendation was not made in the context of the preparation of a Code Bill. We do not seek to implement it in the present clause. The subject of notice of defences requires general consideration and ought not to develop in a piecemeal fashion.⁴⁰

Clause 43: Duress of circumstances

12.20 *Analogy with duress by threats.* Clause 43 adopts with minor amendments a clause which the Code team included in their Bill under the title “defence of necessity”. It provides a defence to one who acts in order to avoid an imminent danger of death or serious personal harm to himself or another if in the circumstances he cannot reasonably be expected to act otherwise.⁴¹ The defence is modelled, so far as appropriate, on the defence of duress by

³⁰*Graham* [1982] 1 W.L.R. 294, [1982] 1 All E.R. 801; approved, but *obiter* and without argument on the point, in *Howe* [1987] A.C. 417.

³¹See especially, in the context of defences, *Gladstone Williams* (1983) 78 Cr. App. R. 276; *Beckford v. The Queen* [1988] A.C. 130.

³²See para. 12.6 above.

³³Law Com. No. 83, para. 2.28.

³⁴[1982] 1 W.L.R. 294 at 300, [1982] 1 All E.R. 801 at 805-806.

³⁵See Appendix B, Examples 42(iv) and (v).

³⁶*Sharp* [1987] Q.B. 853; *Shepherd* (1988) 86 Cr. App. R. 47; and see *Fitzpatrick* [1977] N.I. 20.

³⁷Law Com. No. 83, paras. 2.35-2.38; the principle was more elaborately stated in clause 1 (5) of the draft Criminal Liability (Duress) Bill.

³⁸As previously recommended: Law Com. No. 83, para. 3.9.

³⁹Law Com. No. 83, para. 2.33; draft Criminal Liability (Duress) Bill, cl. 2 (1).

⁴⁰Cf. Law Com. No. 143, para. 13.21.

⁴¹See Appendix B, Examples 43(i) and (ii).

threats. The Code team, who observed that the kind of situation covered by their clause is sometimes called “duress of circumstances”, were critical of our failure, in the Report on Defences of General Application,⁴² to recognise the force of the analogy with duress by threats. We are now persuaded that, as the team put it, “[t]he impact of some situations of imminent peril upon persons affected by them is hardly different in kind from that of threats such as give rise to the defence of duress”;⁴³ and we are satisfied that the proposed defence should be provided by the Code.

12.21 *Authority.* We are fortified in this conclusion by the fact the Court of Appeal has twice recently, in the context of the offence of reckless driving, recognised a defence of this kind—though without having occasion to consider all its details or to give it general application.⁴⁴ In *Conway*, the later of the two cases, the defence was said to be conveniently called “duress of circumstances”. We agree. It is appropriate thus to emphasise the analogy with the case of threats.

12.22 *Elements of defence.* Subsection (2) states the elements of the defence. Like duress by threats, it is limited to cases where death or serious personal harm is threatened. The danger must be imminent. Like duress by threats, the defence is limited “by means of an objective criterion formulated in terms of reasonableness”;⁴⁵ but once again the standard of conduct required is that applicable to one having the actor’s personal characteristics so far as they affect the gravity of the danger.

12.23 *Application of defence.* Subsection (3) excludes murder and attempt to murder from the scope of the defence (but in square brackets, as with clause 42 (2))⁴⁶ (para. (a)); avoids any inconvenient overlap between this and certain other defences (para. (b)(i) and (ii)); and sustains the analogy with duress by threats by excluding the case where the actor has knowingly and without reasonable excuse exposed himself to the danger (para. (b)(iii)).

Clause 44: Use of force in public or private defence

12.24 *Function of the clause.* This clause, together with clause 185 (protection of person or property by acts causing destruction of or damage to property), would replace existing statutory and common law principles defining the circumstances in which a person has a defence to a charge of committing a crime involving the use of force. The clause could be invoked, for example, on a charge of murder or any violent offence against the person or an offence of criminal damage to property. But the clause states principles of the criminal law only. It does not (as section 3 of the Criminal Law Act 1967 does) affect civil liability in any way. A person may have a defence under the section yet remain liable in damages for assault or negligence.

12.25 *Eliminating inconsistency.* The clause seeks in principle to restate existing law and does so in as much detail as the authorities reasonably permit. But the law should also be consistent and the present law relating to the use of force varies according to the circumstances in indefensible ways. For example, if a person is charged with damaging property belonging to another and his defence is that he was defending his own property, section 5 (2) of the Criminal Damage Act 1971 applies and the test is whether he *believed* that what he did was reasonable; but if his defence is that he was defending his person, or that of another, the test at common law is whether what he did *was* reasonable. If he is charged with criminal damage by killing or injuring an aggressive dog, the result will vary according to whether he was defending his trousers or his leg—and he is likely to have a better chance of acquittal if it was his trousers. Clause 44 (together with clause 185) will eliminate such insupportable distinctions.

12.26 *The form of subsection (1).* Subsection (1) is stated in slightly more complex terms than might be expected. It provides that a person does not commit an offence by using such force as, “in the circumstances which exist or which he believes to exist”, is immediately necessary and reasonable to (in brief) prevent crime, effect a lawful arrest, prevent or terminate a breach of the peace, or protect person or property from unlawful acts. The reference to circumstances which the person using force *believes to exist* would ideally be

⁴²(1977), Law Com. No. 83.

⁴³Law Com. No. 143, para. 13.25.

⁴⁴*Willer* (1986) 83 Cr. App.R. 225; *Conway* [1988] 3 W.L.R. 1238. See also *Martin* [1989] 1 All E.R. 652, C.A. (driving while disqualified).

⁴⁵*Graham* [1982] 1 W.L.R. 294 at 300, [1982] 1 All E.R. 801 at 806.

⁴⁶See para. 12.13 above.

omitted, leaving the case of mistaken belief to be catered for by clause 41 (belief in circumstance affording a defence). It is included, however, in order to bring out the force of the words “circumstances *which exist*” (meaning, which actually exist, whether or not the person using force is aware of the fact). These words are themselves included because the powers of arrest without a warrant granted by the Police and Criminal Evidence Act 1984 apply where a person “is in the act of committing”, or “is guilty of”, or “is about to commit”, an arrestable offence, as well as when the arrestee has reasonable grounds for suspecting one of these things to be the case.⁴⁷ It has seemed necessary, for the sake of consistency, to apply clause 44 for all purposes, and not only that of arrest, to the case where as a matter of fact justifying circumstances exist. For an arrestee may also be preventing crime and, in doing so, protecting himself or another person from attack or some property from damage. It would be unacceptable to apply different principles to the same use of force in relation to its different purposes.⁴⁸

12.27 *Permitted purposes of use of force.* The several paragraphs of subsection (1) require little comment:

- (a) *Prevention of crime; arrest.* This paragraph reproduces the effect in criminal law of section 3(1) of the Criminal Law Act 1967.
- (b) *Prevention of breach of peace.* In *Howell*⁴⁹ it was said that a breach of the peace occurs

“whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, an unlawful assembly or other disturbance.”

It is clear from this that prevention of a breach of the peace, which is a common occasion for the use of force, is a wider concept than prevention of crime and requires separate protection. The effect of paragraph (b) is that it is not an offence to use force which is immediately necessary and reasonable to prevent a person being put in fear of the kind mentioned in the *Howell* dictum or to remove the cause of such fear where it already exists.⁵⁰

- (c) *Defence of person.* This paragraph states the law as proposed by the Criminal Law Revision Committee.⁵¹ The Committee’s recommendation that the defence should be available to anyone who mistakenly believes in the existence of facts justifying the use of force in defence of himself or another anticipated a spate of decisions to the same effect.⁵²
- (d), (e) and (f) *Prevention of unlawful detention; defence of property; prevention of trespass.* These paragraphs restate existing law.

12.28 “*Force*”. Subsection (2), by giving an extended meaning to the word “force”, ensures that subsection (1) permits the use of force against property, a threat of force against person or property and the detention of a person without the use of force (as well, of course, as force against a person).

12.29 “*Unlawful*”. Paragraphs (c), (d) and (e) of subsection (1) permit the use of force against “unlawful” acts. An act (for example, a trespass) may be unlawful under the civil law although not criminal. Subsection (3), a somewhat technical provision, is concerned with cases in which, to avoid any uncertainty, the Code needs to declare that for the purposes of the section the behaviour of a person against whom force is used is “unlawful” although, if it were the subject of a criminal charge, that person would be acquitted. For example, it ought to be clear, without the need to resort to what may be uncertain principles of the law of tort, that one who is attacked with a dagger by a nine-year-old or by a person suffering from severe mental illness may use reasonable and necessary force in self-defence although his attacker is immune from criminal liability (clauses 32 (1) and 35 (1)).⁵³

⁴⁷Police and Criminal Evidence Act 1984, s. 24 (4)-(6); cf., formerly, Criminal Law Act 1967, s. 2 (2), (3) and (5).

⁴⁸For fuller treatment of this matter, see Law Com. No. 143, paras. 13.34-13.36.

⁴⁹[1982] Q.B. 416, *per* Watkins L.J. at 427.

⁵⁰*Pace* the Code team (see Law Com. No. 143, para. 13.39), we do not think it necessary to include in the Code a definition of “breach of the peace”.

⁵¹Fourteenth Report: Offences against the Person (1980), Cmnd. 7844, paras. 119-121.

⁵²Especially the landmark decision in *Gladstone Williams* (1983) 78 Cr.App.R. 276 and *Beckford v. The Queen* [1988] A.C. 130 P.C.

⁵³See also Appendix B, Examples 44(iv)-(vi).

12.30 Where a person properly using force for a purpose mentioned in subsection (1) (c), (d) or (e) is unaware of the facts that would ground the acquittal of the person against whom he uses it, he will be protected by subsection (1) (without resort to subsection (3)) because of his belief in circumstances rendering the other's conduct "unlawful" in the sense of criminal. Resort to subsection (3) is therefore necessary only when the person using force is aware of the special facts.

12.31 It is sometimes lawful to arrest and to use reasonable force against a person because he is reasonably, though perhaps quite wrongly, suspected of some wrongdoing. For example, under the Police and Criminal Evidence Act 1984, any person may arrest without a warrant anyone whom he has reasonable grounds for suspecting to be committing an arrestable offence; and, under the Criminal Law Act 1967, the arrestee may use reasonable force to make the arrest. Subsection (3)(c) relates to the position in the criminal law of the wrongly (though reasonably) suspected person who resists arrest or uses force to defend himself against force reasonably used by the arrestee. The effect of subsection (3)(c) is that, with one important qualification, he does not commit an offence by using reasonable force to resist that arrest. Whatever the position in the civil law (which is unaffected by the subsection) a person should not, in our opinion, be guilty of an offence merely because he resists, and uses reasonable force to resist, an arrest which is not justified by the actual facts.⁵⁴ For the purposes of the subsection, the arrestee's conduct is "unlawful"; but neither the arrestee nor the resister is guilty of any offence. The same principle applies to an innocent person's defence of his property and for the other purposes of the section.

12.32 *Exception for lawful act of constable.* Subsection (4) states the important qualification referred to in the preceding paragraph. Where the person making the arrest is a constable acting in the execution of his duty, the suspected person must submit to arrest even if he is perfectly innocent and the constable's suspicion, though reasonable, is in fact mistaken. The suspect will commit an offence if he resists arrest and further offences if he uses force, whether against the constable or a person assisting him to carry out his duty. This is so even if he believes the arrest to be unlawful, unless he also believes there is "imminent danger of injury."⁵⁵ It is one thing to require the wrongly suspected person to submit to arrest. It is quite another to say that he must submit to the infliction of personal harm or even death. The effect of the subsection is that he does not commit an offence by using force which he believes to be immediately necessary to prevent such harm to himself or another innocent person. This is so even in the case where he is aware of the circumstances giving rise to the policeman's reasonable suspicion, that is to say, he knows that he is resisting the lawful, though mistaken, use of force.⁵⁶ The subsection in no way limits the present right to resist an unlawful arrest, whether by a constable or not.

12.33 *Preparatory acts.* Subsection (5) ensures that criminal liability (most obviously, under legislation prohibiting the possession of firearms or offensive weapons) will not attach to an act immediately preparatory to a use of force permitted by subsection (1).⁵⁷

12.34 *Self-induced occasions for the use of force.* The effect of the first part of subsection (6) is that subsection (1) provides no defence to a person who deliberately provokes the very attack against which he then defends himself.⁵⁸ On the other hand, it is important to preserve the liberty of the citizen to go about his lawful business even if he knows that he is likely to be met by unlawful violence from others.⁵⁹ If he does so and is attacked he may defend himself.⁶⁰ The second part of subsection (6) so provides.

12.35 *Opportunity to retreat.* Subsection (7) restates the law, only recently clarified by the Court of Appeal in *Bird*,⁶¹ on the significance of the defendant's having had an opportunity to retreat before using force. Although the fact that he had such an opportunity is relevant to the court's or jury's consideration of whether his use of force was immediately necessary and reasonable, it is not conclusive of the question and is simply to be taken into account together with other relevant evidence.

⁵⁴For example: P, a police officer, reasonably but wrongly suspecting D to be an armed, dangerous criminal, X, points a revolver at him. D seizes P's wrist and twists it until he drops the revolver. If D believes that he is in danger of personal harm his act should not be an offence, although P's act is lawful in every sense. (See, however, a dictum to the contrary of Lowry L.C.J. in *Browne* [1973] N.I. 96 at 107.)

⁵⁵ *Fennell* [1971] 1 Q.B. 428.

⁵⁶See Appendix B, Examples 44(vi), (vii) and (viii).

⁵⁷See Appendix B, Example 44(ix). The subsection is convincingly defended in Law Com. No. 143, para. 13.44.

⁵⁸See Appendix B, Example 44(x). Cf. *Browne* [1973] N.I. 96, per Lowry L.C.J. at 107.

⁵⁹See *Beatty v. Gillbanks* (1882) 9 Q.B.D. 308.

⁶⁰*Field* [1972] Crim. L.R. 435. See Appendix B, Example 44(xi).

⁶¹ [1985] 1 W.L.R. 816, [1985] 2 All E.R. 513.

12.36 *Reasonable threats*. Subsection (8), which provides that a threat of force may be reasonable although the use of the force would not be, states the effect of *Cousins*.⁶²

12.37 *Saving for other defences*. Subsection (9) preserves the full effect of other defences (particularly that provided by clause 185 (protection of person or property by damage to property)) which overlap the general defence provided by clause 44.

Clause 45: Acts justified or excused by law

12.38 *Defence provided by an enactment*. The self-evident proposition that, if a statutory provision justifies or excuses the doing of any act, that act does not amount to an offence is stated by paragraph (a) for the sake of completeness.⁶³

12.39 *Defence provided by an “enforceable Community right”*. We were advised on consultation that this clause should expressly protect from criminal liability any act justified or excused by an “enforceable Community right” as defined in the European Communities Act 1972, section 2 (1); and paragraph (b) does so. As s. 2(1) is an “enactment” and requires courts in the United Kingdom to give effect to Community law, this paragraph may not strictly be necessary; but, in view of the advice we received, we include it from abundance of caution.

12.40 *Defence provided by common law*. Clause 4 (4) preserves common law rules that are not replaced by corresponding rules of the Code or inconsistent with the Code; and it expressly ensures that the Code does not limit “any power of the courts to determine the existence, extent or application” of any rule so preserved. We have referred above⁶⁴ to the application of this principle to defences. Its importance is so great in this context that, to avoid its being missed, it receives a cross-reference in paragraph (c) of clause 45.

12.41 *Application of paragraph (c) (defences preserved by cl. 4(4))*. We referred above to two broad functions of clause 4(4) as applied by paragraph (c):

- (i) *Preserving known defences not specified by the Code*. This is perhaps sufficiently illustrated by a reference to offences against the person. It is to the common law that a person will resort for his defence on a charge under Chapter I of Part II if he claims that his act was done in the exercise of his right as a parent to chastise a child; or his right as a doctor to render medical aid to, or to practise surgery on, an unconscious patient; or his right to use force against another person within the rules of a lawful game.⁶⁵ These rights are not stated in Chapter I; but the offences in that Chapter must be understood to be subject to common law defences just as they are subject to the defences stated in clauses 41 to 43.⁶⁶
- (ii) *Developing defences*. Clause 4(4) permits the judicial development of defences. We have already pointed to recent activity of the courts in “determin[ing] the...extent or application” of the defence of duress by threats. Another obvious topic amenable to judicial development is the defence of necessity, if it is indeed to be regarded as a general defence of uncertain scope. The role of necessity as a defence to criminal charges is a much disputed matter. We examined the subject in our Report on Defences of General Application,⁶⁷ where we concluded that any common law defence of necessity should be abolished and that there should be no general defence of necessity in the Criminal Code. This recommendation was not well received by commentators and we accept the Code team’s recommendation that the defence should be “left open-ended, to be developed or not as the courts may decide”.⁶⁸ If necessity is properly to be regarded not as a general defence but as the common basis for the recognition of a variety of circumstances of justification or excuse, clause 4(4) will equally enable the courts to declare that the common law accords that recognition to appropriate circumstances coming before them.⁶⁹

⁶²[1982] Q.B. 526.

⁶³See Appendix B, Example 45(i).

⁶⁴Paras. 12.2, 12.4.

⁶⁵See Appendix B, Example 45(ii).

⁶⁶See also para. 9.37 above, as to common law defences of accessories.

⁶⁷(1977), Law. Com. No. 83, Part IV.

⁶⁸Law Com. No. 143, para. 13.11.

⁶⁹Cf. the recognition of “duress of circumstances” in cases of reckless driving: above, para. 12.21.

Clause 46: Non-publication of statutory instrument

12.42 *The Statutory Instruments Act 1946* provides a defence in section 3 (2) for a person charged with an offence consisting of a contravention of a statutory instrument. The defence is that at the date of the alleged contravention the instrument had not been issued by Her Majesty's Stationery Office. The defence may be rendered ineffective by proof that at the relevant date reasonable steps had been taken to bring the purport of the instrument to the notice of the public or of persons likely to be affected by the instrument or of the accused himself. This is a general defence, and it is therefore appropriate to include it in Part I of the Code. Subsection (1) accordingly reproduces the defence in Code style.

12.43 *Burden of proof.* The 1946 Act lays on the defendant the burden of proving that the instrument had not been issued by H.M.S.O. This is restated by subsection (2). It is unnecessary to make special provision for the burden of proof in relation to the matters referred to in paragraph (b) of subsection (1). Since these are facts relied on by the prosecution the burden of proving them is on the prosecution.⁷⁰

⁷⁰Clause 13 (1)(a).

PART 13

PRELIMINARY OFFENCES

Introduction

13.1 *Clauses 47 to 52* are concerned with the offences of incitement, conspiracy and attempt. These are referred to in the Code as preliminary offences; “inchoate” offences is an alternative description. All three were originally common law offences. Proposals for their codification were published by our Working Party in 1973 in Working Paper No. 50. The Working Paper was followed by two Reports. The first,¹ published in 1976, dealt only with conspiracy. The recommendations in the Report formed the basis for the statutory restatement of conspiracy in Part I of the Criminal Law Act 1977. The second,² published in 1980, dealt with attempt and with the issue of impossibility in relation to attempt, conspiracy and incitement. The Criminal Attempts Act 1981 subsequently restated the law of attempt substantially in accordance with our recommendations. We have not reported on the offence of incitement, which remains a common law offence.

13.2 The Code team noted in their Report³ that the preliminary offences are traditionally regarded as part of the general principles of criminal liability. They apply in respect of all substantive offences (except that attempt is restricted to attempts to commit indictable offences⁴) and have close links with the law of complicity. The team recommended that the offences be included in Part I of the Code. This attracted no adverse comment on consultation. The Justices’ Clerks’ Society stated that in their view these offences should appear in Part I. We agree.

13.3 *Consistency between the offences.* The recent statutory restatements of conspiracy and attempt form the basis of most of the provisions relating to these offences in our draft Bill. We are, however, recommending certain changes to the specification of conspiracy and attempt in the light of developments since those statutes were passed and in the light of certain comments made to us in the consultation on the Code team’s draft Bill. Apart from these changes, the existing statutory language has had to be modified in some respects in the interest of maintaining consistency of expression in the draft Bill. Several of the issues arising in respect of conspiracy and attempt arise also in the context of incitement. We believe that as far as possible there should be consistency between these offences. They share a common rationale concerned with the prevention of substantive offences⁵ and they frequently overlap. When two or more persons engage in conduct preliminary to a substantive offence more than one of these offences may well be involved. It would be illogical and confusing to a court or jury if similar problems were provided with significantly different solutions. Therefore we have regarded the policy concerning those issues in the offence of incitement which arise also in conspiracy and attempt as generally having been settled in the way recently provided by Parliament for conspiracy and attempt. On issues peculiar to incitement we have followed the general principle of restatement of the existing law, having regard also to the comments made to us on consultation on the Code team’s draft Bill.

Clause 47: Incitement to commit an offence

13.4 *Form of the offence.* The clause deals only with incitement of a person to commit an offence. It does not deal with statutory offences of incitement to certain conduct which may not itself be an offence.⁶ We share the view of our Working Party that such offences should be considered under the class of specific offences to which they relate.⁷

13.5 *Incitement and facilitation.* From time to time it has been suggested that the offence of incitement should be enlarged so as to embrace those who facilitate the commission of offences (for example, by providing assistance for their commission), but who do not seek to persuade (“incite”) others to commit offences. The enlarged offence would follow the existing law in not requiring proof that a substantive offence was committed; the offence would be complete on performance of the act of facilitation. This suggestion is similar to a

¹Conspiracy and Criminal Law Reform (1976), Law Com. No. 76.

²Attempt, and Impossibility in relation to Attempt, Conspiracy and Incitement (1980), Law Com. No. 102.

³Law Com. No. 143, para. 14.2.

⁴Criminal Attempts Act 1981, s. 1(4).

⁵See Law Com. No. 76, paras. 1.1-1.5.

⁶See, e.g., Incitement to Mutiny Act 1797, s.1.

⁷Working Paper No. 50, para. 92.

proposal to enlarge the law of complicity to which we have already referred.⁸ As we said in that other context, such a radical approach, involving complex issues and an extension of criminal liability, cannot be pursued in the present project.

13.6 "*Encourage*" or "*incite*"? The Code team proposed the verb "encourage" to describe the act necessary to make a person guilty of incitement.⁹ This was criticised by the South-Eastern Circuit (Maidstone) Scrutiny Group dealing with preliminary offences. They acknowledged that "incite" is one of the dictionary meanings of "encourage", but were concerned that the latter word might suggest a need for proof of actual encouragement. They pointed out that a person may be liable for incitement even though the person incited is not in fact encouraged. The incitee may have no intention of acceding to the incitement, or, conversely, may have made up his mind to commit the offence and have no use for encouragement from another. These comments persuade us that "encourage" is not the best word to use in this context. The familiar term "incite" is in our view preferable. This sufficiently conveys, without the need for an explanatory provision, that the person incited need not be influenced by whatever it is that constitutes the incitement.

13.7 *Other external elements.* The remaining part of paragraph (a) of subsection (1) restates the nature of the conduct that the other is incited to perform. He may be incited to do acts personally which will involve the commission of an offence by him as a principal, or he may be incited to procure their performance by an innocent agent. In the latter case the incitee would still commit the offence as a principal by virtue of clause 26(1)(c). It follows that if the person incited could not as a matter of law commit the substantive offence there can be no liability for incitement to commit it. This restates the common law rule that there is no liability for the incitement of a child under the age of criminal responsibility or of a victim in relation to an offence created for his or her protection.¹⁰ Incitement of children may, as both the Working Party¹¹ and the Code team¹² envisaged, be dealt with as attempts to commit offences by means of innocent agents.¹³ Incitement of victims has occasionally presented problems in relation to sexual offences. One gap in the law, revealed in the case of *Whitehouse*,¹⁴ was filled by section 54 of the Criminal Law Act 1977, whereby it is an offence for a man to incite to have sexual intercourse with him a girl under sixteen whom he knows to be his granddaughter, daughter or sister. This offence now appears in clause 103(3) of our draft Bill. Other gaps, concerning the incitement of children under sixteen to acts of gross indecency, are covered by clauses 114 and 115, which give effect to recommendations of the Criminal Law Revision Committee.¹⁵

13.8 Subsection (1) provides that an incitement may be to commit more than one offence. This restates existing law.¹⁶

13.9 *The fault requirement.* This is a matter of some complexity. The ordinary meaning of the verb "incite" connotes an element of intention; the notion of "inciting" recklessly would be odd. But this is referring only to intention as to the act which constitutes the act of inciting. The ordinary meaning of "incite" does not yield a clear answer to the question of what further fault, if any, is required. The Code team proposed that the incitor should be guilty if "he intends that the other person shall commit the offence or offences".¹⁷ We agree that in the interests of consistency with conspiracy and attempt, for which the policy has been settled recently by Parliament,¹⁸ intention should be the principal fault requirement. But the team's form of words seems to us to be unduly compressed and, in one respect, too limited. The essence of incitement, and the point which helps to distinguish it from attempt, is the incitor's state of mind in relation to the state of mind of the incitee. It is undoubtedly sufficient if the incitor intends that the incitee shall act with the fault required for the substantive offence. This is helpfully spelt out in terms in subsection (1)(b). It should also be sufficient if the incitor believes that the person incited, if he acts at all, will do so with the fault required. For example, if D seeks to persuade E to have sexual intercourse with Mrs.

⁸See para. 9.4 above.

⁹Law Com. No. 143, para. 14.5.

¹⁰*Whitehouse* [1977] Q.B. 868; Glanville Williams, *Textbook of Criminal Law* 2nd ed., (1983), 444.

¹¹Working Paper No. 50, para. 102.

¹²Law Com. No. 143, para. 14.6.

¹³See Appendix B, Example 47(i).

¹⁴[1977] Q.B. 868.

¹⁵Fifteenth Report: Sexual Offences (1984), Cmnd. 9213, paras. 7.12 and 7.23.

¹⁶*Most* (1881) 7 Q.B.D. 244 (article in newspaper inciting readers to commit murders).

¹⁷Law Com. No. 143, para. 14.6.

¹⁸Criminal Law Act 1977, s. 1(1); Criminal Attempts Act 1981, s. 1(1).

D, D believing that E knows that Mrs. D does not consent to it, there seems to be a clear case of incitement to rape. It should not be necessary to prove that it was D's intention that E should have such knowledge.¹⁹ Whenever the fault required for a substantive offence includes knowledge of or recklessness as to circumstances (such as the absence of consent), it is likely to be more appropriate for the purposes of incitement to refer to the incitor's belief that such knowledge or recklessness exists rather than to his intention that it should.

13.10 *Incitement and attempt.* If the incitor does not intend or believe that the person incited shall or will act with the fault required, but nonetheless intends that the external elements of the substantive offence shall occur, he may be guilty not of incitement but of an attempt to commit the substantive offence by means of an innocent agent. An example given by the Working Party was of a person who incites a child under ten to steal.²⁰ Such an incitement will usually amount to a more than merely preparatory act for the purposes of attempt because there will usually be no further acts which it is necessary for the incitor to do to procure the agent to commit the offence.²¹ Assuming that the requisite intent for an attempt is present, the attempt will be complete.

13.11 In *Curr*²² the Court of Appeal quashed convictions for inciting women to commit offences under the Family Allowances Act 1945 because the prosecution failed to prove that the women (who had done the acts incited) had the mental element required for such offences. We share the view of the Working Party²³ and the Code team that the decision stated the wrong test. As the Code team put it, "it is not necessary that any offence should be committed or even intended by the person incited, therefore it is irrelevant and confusing to ask whether that person had the mental element for the offence." We propose to depart from the decision in *Curr* in favour of the rule stated in subsection (1)(b).

13.12 *Offences which can be incited.* At common law incitement to commit an indictable or a summary offence is itself an offence.²⁴ Subsection (2) restates the general principle. However, it should be noted that in this respect the draft Bill departs from the principle of consistency among the preliminary offences. There is no liability for attempting to commit a summary offence (Criminal Attempts Act 1981, section 1(4)) but there is liability for conspiracy to commit a summary offence (Criminal Law Act 1977, section 1). Parliament, in enacting the rule for attempt, rejected our recommendation that an attempt to commit a summary offence should itself be an offence.²⁵ The view was taken that there was no need to extend the ambit of attempt to summary offences. Any such extension might, it was felt, result in more time being taken up in magistrates' courts with complicated questions of attempts to commit minor offences than would be justified by any advantage of the extra reach of the law. In the absence of evidence of any need to extend the criminal law on this point we accept the decision. We maintain, nevertheless, that a different rule can be justified for conspiracy and incitement. These offences, which *ex hypothesi* concern more than one person, enable the promoters and organisers of large-scale minor offences to be brought within the reach of the law. Admittedly prosecutions may be appropriate in practice only on rare occasions.²⁶ It was for this reason that we recommended in our Report on conspiracy that prosecutions for conspiracy to commit summary offences should only be brought with the consent of the Director of Public Prosecutions. We now make a similar recommendation in respect of incitement to commit a summary offence. The requirement of the Director's consent will ensure that the offence is not misused while keeping open the possibility of using such a charge to deal with cases where an element of social danger is involved in the deliberate promotion of offences on a widespread scale.²⁷

13.13 *Incitement to incite and incitement to conspire.* A number of problems arise concerning the use of preliminary offences in combination. In relation to incitement the present law has reached the point of absurdity. Incitement to conspire was abolished as an offence known to the law by section 5(7) of the Criminal Law Act 1977. Recently the Court of Appeal has twice held that incitement to incite is an offence known to the law.²⁸ It seems,

¹⁹See also Appendix B, Example 47(ii).

²⁰Working Paper No. 50, para. 102.

²¹Criminal Attempts Act 1981, s. 1(1), discussed by Smith and Hogan, *Criminal Law* 6th ed., (1988), pp.291 *et seq.*

²²[1968] 2 Q.B. 944.

²³Working Paper No. 50 para. 93; Law Com. No. 143, para. 14.6.

²⁴Smith and Hogan, *op. cit.*, p.254.

²⁵Law Com. No. 102, para. 2.105.

²⁶Law Com. No. 76, para. 1.85.

²⁷*Ibid.*

²⁸*Sirat* (1985) 83 Cr. App. R. 41; *Evans* [1986] Crim. L.R. 470.

however, that this is so only when the first person incited is to incite, but not to agree with, a second person to commit an offence. If the evidence shows that D incited E to agree with F to wound G, section 5(7) of the Criminal Law Act 1977 apparently prevents a charge against D of incitement to conspire or of incitement to incite. But if D incites E to incite F (perhaps by a command, or a letter not requiring an answer) to wound G, D can be charged with incitement to incite. Such an absurd distinction cannot be restated in the Code.

13.14 Unlike other provisions of Part I of the Criminal Law Act 1977, section 5(7) was not based on a recommendation in our Report, which did not deal with the point. Abolition of incitement to conspire had, however, been recommended by the Working Party. They had argued that to allow an offence of incitement to conspire would be to take the law “further back in the course of conduct to be penalised than is necessary or justifiable”.²⁹ The Working Party did not make any express reference to possible charges of incitement to incite, although it may be presumed that logically they would have wished to exclude this possibility also. The Code team’s draft Bill followed the Criminal Law Act 1977 in excluding conspiracy from the scope of incitement, but did not exclude incitement itself thereby allowing for the possibility of charges of incitement to incite. The Scrutiny Group on preliminary offences invited us to look again at this problem, indicating that in their view it should be possible to indict for inciting to conspire.

13.15 The recent Court of Appeal decisions that incitement to incite is an offence known to the law have produced a clear anomaly. It would be illogical, and would bring the law into disrepute, to restate both the effect of these cases and section 5(7) of the Criminal Law Act 1977. It would not be right, within the scope of this project, to attempt to overturn the recent decisions. Such a course would require much fuller discussion and consultation. We therefore recommend that neither incitement nor conspiracy should be excluded from the scope of incitement. In this way the anomaly will be eliminated without, we believe, a significant increase in the scope of criminal liability.³⁰

13.16 *Incitement to attempt.* It is unclear whether an offence of incitement to attempt is known to the law. Virtually all possible instances of incitement are incitements to commit substantive offences, and it is difficult to conceive of a case where a charge of incitement to attempt (to commit an indictable offence) would not be inept. Smith and Hogan, however, suggest one possibility, namely where in the circumstances known to the incitor, but not to the person incited, the completed act will amount only to an attempt.³¹ The existence of this, admittedly, rare case, together with the general principle we referred to above of consistency of approach to the preliminary offences, persuade us that it would be preferable not to exclude attempt from the scope of incitement. Accordingly, our draft Bill makes no special provision with regard to incitement to attempt.

13.17 *Victims.* Subsection (3) exempts from liability for incitement a victim of an offence who is a member of a class of persons whom it is the purpose of the enactment creating the offence to protect. The terms of the rule correspond closely to that in clause 27(7) which exempts such a victim from liability as an accessory. We have already set out the arguments supporting the rule.³² It only remains to add at this point that it would be illogical to exempt the victim from liability as an accessory (arising perhaps from acts of incitement) but to retain liability for the offence of incitement. In the leading case of *Tyrrell*³³ a girl under sixteen could not be convicted of aiding and abetting unlawful sexual intercourse with herself or of inciting the commission of that offence. As we explained earlier the draft Bill applies the rule to liability as an accessory and to liability for incitement and conspiracy.

13.18 *Identity of person incited.* Subsection (4) complements subsection (1) by providing, in effect, that the identity of the person incited is immaterial. This will further the successful prosecution of those who insert incitements into newspapers, periodicals etc. addressed to the public or a section of the public at large.³⁴

13.19 *Incitement and accessories.* Under existing law it is probable that a person may aid, abet, counsel or procure another to incite a third person to commit an offence,³⁵ and

²⁹Working Paper No. 50, paras. 44, 45.

³⁰See Appendix B, Example 47(iii).

³¹*Op. cit.*, p.254.

³²Para. 9.38 above.

³³[1894] 1 Q.B. 710; Appendix B, Example 47(iv).

³⁴See, e.g., *Most* (1881) 7 Q.B.D. 244; Appendix B, Example 47(v).

³⁵J.C. Smith, *Crime, Proof and Punishment* (ed. Tapper, 1981), 21 at p. 27.

subsection (5)(a) restates this position for the Code. However, it appears that the incitement of another to aid, abet, counsel or procure (in other words, to make himself an accessory to) the commission of an offence by a third person is not an offence known to the law.³⁶ The reason for this is that aiding and abetting is not in itself an offence. It attracts liability only on the commission of the substantive offence. Until that offence is committed the incitement is only to do acts which may or may not turn out to be criminal. The logic of this rule, which is restated in the opening three lines of subsection (5),³⁷ has been undercut to some extent by the decisions that incitement to incite is an offence known to the law. As explained above, we support those decisions for the purpose of the Code, but they lead to the saving made by paragraph (b) of subsection (5) which embodies a distinction that might be thought by some to be purely technical.

Clause 48: Conspiracy to commit an offence

13.20 *Codification of conspiracy.* The clause restates relevant provisions of Part I of the Criminal Law Act 1977 with some modifications and additions. It does not, however, deal with the offences at common law, preserved by section 5(2) and (3) of the Criminal Law Act 1977, of conspiracy to defraud, conspiracy to corrupt public morals and conspiracy to outrage public decency. We recently issued a Working Paper on conspiracy to defraud setting out a range of options regarding the future of this offence and inviting views thereon.³⁸ A Report containing the results of the consultation and our conclusions is in the course of preparation. No work is being undertaken at the present time on conspiracy to corrupt public morals and conspiracy to outrage public decency.³⁹ Nevertheless we remain committed to the principle that all common law offences should eventually be abolished in accordance with the general aims of codification and replaced by appropriate offences in statutory form. For the present these types of conspiracy will continue to exist as common law offences.

13.21 *The external elements of conspiracy.* Subsection (1)(a) sets out the external elements of conspiracy in line with section 1(1) of the Criminal Law Act 1977. The wording of the paragraph draws on but does not exactly reproduce the language of section 1(1) for the reasons given by the Code team in their Report.⁴⁰ The Code team's draft escaped criticism on scrutiny and appears here virtually unchanged.

13.22 *The fault element.* Subsection (1)(b) restates the effect of section 1(1) of the Criminal Law Act 1977, which provided:

“If a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out *in accordance with their intentions*, will necessarily amount to or involve the commission of any offence by one or more of the parties to the agreement, he is guilty of conspiracy to commit the offence or offences in question.”

13.23 It appears from the emphasised words that the section seeks to express a conception of conspiracy as involving agreement between two or more people both or all of whom intend that the offence shall be committed. That is what we intended when we recommended the creation of the statutory offence.⁴¹

13.24 In *Anderson*⁴² the accused agreed to assist in the escape of a prisoner from prison. The House of Lords held that he was guilty of conspiracy to effect the escape because he intended to play some part in the agreed course of conduct, even if he neither intended the escape plan to succeed nor believed that it could do so. He was treated by the House of Lords as a principal offender, not simply as an accessory to a conspiracy between the others involved. Their Lordships did not require by way of *mens rea* for any conspirator more than an intention to play some part in the agreed course of conduct. The implication of this is that there may be a conspiracy although no conspirator actually intends that the offence agreed upon shall be committed. This implication is, in our view, at odds with the plain meaning of the section. We think, with respect, that the conviction in *Anderson* is better supported on

³⁶*Bodin and Bodin* [1979] Crim. L.R. 176 (Judge Geoffrey Jones); Smith and Hogan, *op. cit.*, p.255.

³⁷See Appendix B, Example 47(v).

³⁸Working Paper No. 104 (1987).

³⁹Our recommendations concerning these offences, set out in Part III of Law Com. No. 76, were not enacted in the Criminal Law Act 1977 or subsequently.

⁴⁰Law Com. No. 143, para. 14.18.

⁴¹Law Com. No. 76, para. 1.39.

⁴²[1986] A.C. 27.

the ground that the accused was an accessory to a conspiracy between others. He clearly assisted and encouraged the plan, knowing of the circumstances (that the plan was to effect an escape from prison) and of the conspirators' intention to commit that offence. A similar analysis can be applied to the hypothetical case put by Lord Bridge in *Anderson*.⁴³ The proprietor of a car hire firm who agrees to supply a car to a gang for a robbery is equally an accessory to the gang's conspiracy even though he may have no interest in whether the robbery is in fact committed.

13.25 A further point arises concerning a dictum in *Anderson* that each conspirator should intend to play some part in furtherance of the agreed course of conduct.⁴⁴ This contradicts the traditional view of conspiracy that it is necessary, and also sufficient, that each conspirator should intend that the agreed course of conduct be carried out whether by himself or other members of the conspiracy. If A and B agree that B shall murder C, A taking no part in the killing, the law has always taken the view that that is a conspiracy to murder. But, following this dictum, A would not be guilty of conspiracy and therefore B could not be guilty of conspiracy either since no other parties are involved. This seems to us to be contrary to public policy. Our clause does not therefore give effect to the dictum.⁴⁵

13.26 *Recklessness as to circumstances*. Subsection (2) states for conspiracy a rule in similar terms to that stated in clause 49(2) for attempt. The effect is that where an offence includes as one of its elements a circumstance in respect of which recklessness is sufficient fault, recklessness as to that circumstance will suffice also for a charge of conspiracy to commit the offence. Thus if A and B agree to have sexual intercourse with C being aware that she may not consent they are guilty of conspiracy to rape. Because their awareness of the risk of her non-consent is sufficient fault in respect of that element of rape it is also sufficient for conspiracy to rape. The rule qualifies the general principle that intention is the characteristic fault requirement of the preliminary offences. We deal in detail with its justification in the context of attempt, where the point is most likely to arise in practice.⁴⁶ If the justification for the rule as it applies to attempt is accepted it would be inconsistent in principle not to apply it to conspiracy also.

13.27 *Scope of conspiracy*. Subsection (3) deals with the substantive offences which may be the object of a conspiracy. It restates section 1(3) and (4) of the Criminal Law Act 1977.

13.28 *Victims*. Subsection (4) states for conspiracy the equivalent rule to those stated in clauses 27(7) and 47(3) which protect from ancillary criminal liability victims of offences designed for their protection.⁴⁷

13.29 *Exemptions*. Section 2(2) of the Criminal Law Act 1977 provided exemptions from liability for conspiracy for a person who agreed only with his spouse or a child under the age of criminal responsibility or an intended victim of the substantive offence involved. Clause 48 does not provide for the continuation of these exemptions. We deal separately with the three types of case.

13.30 (a) *Agreements with spouses*. At common law the offence of conspiracy did not extend to agreements between spouses. The origins of this rule lay in the ancient notion of the unity of husband and wife. Because husband and wife were deemed to be one person they could not form the agreement which is the essence of the offence. It hardly needs to be said that in view of changed attitudes to marriage in modern society this "antique fiction"⁴⁸ cannot sustain the rule. In our earlier Report on conspiracy, we recommended⁴⁹ retention of the exemption for alternative reasons, principally the importance of maintaining the stability of marriage by non-interference with the confidential relationship of husband and wife. We are now persuaded, particularly having regard to subsequent developments in the law, that this argument is insufficient to sustain the rule. First, the exemption is an anomaly. Husbands and wives are capable in law of being accessories to each other's offences. Where, say, a wife agrees that her husband shall commit an offence, that agreement cannot ground

⁴³*Ibid.*, at 38.

⁴⁴*Ibid.*, at 39.

⁴⁵See Appendix B, Example 48(i).

⁴⁶See para. 13.44 below.

⁴⁷See paras. 9.38 and 13.17 above.

⁴⁸The phrase is that of Oliver J. in *Midland Bank Trust Co. Ltd. v. Green (No. 3)* [1979] 2 All E.R. 193 at p. 215. In that case Oliver J. held that the exemption from criminal conspiracy of agreements between spouses did not extend to tortious conspiracy. His decision was affirmed on appeal: [1981] 3 All E.R. 744 (C.A.).

⁴⁹Law Com. No. 76, para. 1.49.

liability for conspiracy by either party, but it will ground liability in the wife for aiding and abetting if the husband actually commits the offence. The distinction makes no sense. Secondly, as a result of section 80 of the Police and Criminal Evidence Act 1984, husbands and wives are now competent witnesses for the prosecution against each other in all cases and the privilege against disclosure of marital communications has been abolished. Thirdly, the exemption was criticised on consultation. The Scrutiny Group on preliminary offences said that they saw no reasons of social policy for maintaining the rule relating to spouses. In the light of these considerations we recommend that the exemption for agreements with spouses should not be retained.

13.31 (b) *Agreements with children*. In our conspiracy Report we proposed that a person agreeing with a child under the age of criminal responsibility to commit an offence should not be liable for conspiracy.⁵⁰ This reflected the majority view on consultation on our Working Paper No. 50 which had expressed the opinion that the law did permit a conviction for conspiracy in such a case.⁵¹ We are inclined to think now that the exemption is unjustified. The justification of conspiracy as a means of enabling early intervention to prevent crime applies as much to this case as to any other. We would now prefer to leave such cases to be dealt with according to general principles of conspiracy in the same way as cases of agreements with mentally disordered persons. That is, if the child understands the nature of the agreement and intends that the offence be committed, his own immunity from prosecution should not affect the liability for conspiracy of the person who is over the age of criminal responsibility. Accordingly, we recommend that the exemption for agreements with children should not be retained.

13.32 (c) *Agreements with intended victims*. In our conspiracy Report, we recommended that neither the protected person nor the non-exempt party should be liable for conspiracy in respect of an agreement to commit the offence of which the protected person would be the victim.⁵² This recommendation again reflected a majority view on consultation on Working Paper No. 50. But we think now that this exemption also is unjustified. It would be preferable, as in the cases of agreements with spouses and agreements with children, to allow the general principles of conspiracy to apply. We recommend accordingly.

13.33 *Conspiracy as a continuing offence*. In *Director of Public Prosecutions v. Doof*⁵³ the House of Lords held that although the offence of conspiracy is complete on the making of an agreement, the conspiracy continues to exist thereafter until, as Lord Pearson put it, "it is discharged (terminated) by completion of its performance or by abandonment or frustration or however it may be."⁵⁴ Subsection (5) restates this principle. Subsection (6) spells out the corollary that a person may become a party to a subsisting conspiracy by joining the agreement which constitutes the offence.⁵⁵

13.34 *Conspiracy and complicity*. Subsection (7) sets out for conspiracy a provision corresponding to clauses 47(5) (incitement and accessories) and 49(6) (attempt and accessories). The opening four lines resolve a point on which the law is not at present clear. Smith and Hogan have argued that an agreement to aid and abet the commission of an offence by a person who is not a party to the agreement is not a conspiracy under section 1(1) of the Criminal Law Act 1977.⁵⁶ That argument was accepted by the Court of Appeal in *Hollinshead*,⁵⁷ a case in which the accused agreed to sell to X "black boxes", devices for attaching to electricity meters to show that less electricity had been consumed than was the fact. The accused expected X to re-sell the devices to consumers of electricity for use in defrauding electricity boards. Thus the accused had clearly agreed to aid and abet such consumers to commit offences under the Theft Act 1978, section 2, against the electricity boards. If such an agreement were capable of amounting to a conspiracy under section 1(1) of the Criminal Law Act 1977, it would have followed under the doctrine enunciated in *Ayres*⁵⁸ that that agreement could not have been a conspiracy to defraud at common law. The upholding by the House of Lords of convictions for conspiracy to defraud would appear

⁵⁰*Ibid.*, paras. 1.51 and 1.58.

⁵¹Working Paper No. 50, para. 43.

⁵²Law Com. No. 76, paras. 1.55 and 1.58.

⁵³[1973] A.C. 807.

⁵⁴At p. 827.

⁵⁵See Appendix B, Example 48(iv).

⁵⁶*Op. cit.*, p.265.

⁵⁷[1985] A.C. 975 at 985-6 (C.A.). The decision of the House of Lords is reported *ibid.* beginning at 987.

⁵⁸[1984] A.C. 447. Since reversed by the Criminal Justice Act 1987, s. 12.

to imply⁵⁹ that there was no statutory conspiracy on the facts, and therefore that an agreement to aid and abet the consumers to commit offences against the electricity boards was not a statutory conspiracy. In our recent Working Paper on conspiracy to defraud we drew attention to the possibility of creating a new offence of conspiracy to aid and abet and invited views thereon.⁶⁰ Pending the outcome of this consultation, clause 48 restates the position we believe to have been established by *Hollinshead*.⁶¹ This position is consistent with the corresponding rules for incitement and attempt, the latter having been settled by Parliament in section 1(4)(b) of the Criminal Attempts Act 1981.

13.35 Subsection (7)(a) makes clear that a person may be an accessory to a conspiracy by others. He may, like the defendant in *Anderson*,⁶² intentionally assist or encourage the conspirators' plan even though he does not himself intend the offence to be committed and is thus not a principal in the conspiracy.

13.36 Subsection (7)(b) confirms that an agreement to incite a person not a party to the agreement to commit an offence as a principal is a conspiracy under clause 48(1) and (3). This reproduces existing law under section 1(1) of the Criminal Law Act 1977. We commented in our conspiracy Report that conspiracy to incite was a potentially useful offence,⁶³ and a reminder of its existence was recently given by the Court of Appeal in *Hollinshead*.⁶⁴ We do not find it necessary to make any express provision concerning charges of conspiracy to conspire and conspiracy to attempt. We cannot envisage any circumstances in which it would be necessary to bring such charges in preference to charges of conspiracy to commit a substantive offence.

13.37 *Conviction*. Subsection (8) makes provision for a number of matters relating to the conviction of a person for conspiracy.

13.38 Paragraph (a) restates existing law whereby it is immaterial that the defendant is the only person who has been charged. As long as the elements of conspiracy can be proved as against him he may be convicted of the offence. The provision is consistent with clause 28(2)(a), which states an equivalent rule for an accessory. Because a conspirator will invariably be an accessory to the substantive offence when committed, consistency is highly desirable.

13.39 Paragraph (b) restates existing law whereby a person may be charged with conspiracy with a person or persons unknown and convicted accordingly if the elements of conspiracy can be proved as against him.

13.40 Paragraph (c) restates in simpler language section 5(8) of the Criminal Law Act 1977.⁶⁵

13.41 Paragraph (d) provides for the avoidance of doubt that it is immaterial that the only other party to the agreement cannot be convicted of conspiracy. The latter may, for example, have a defence or be immune from prosecution. As long as the other party made the agreement with the requisite intention the existence of his defence or immunity does not preclude proof of the elements of conspiracy against the defendant.⁶⁶

Clause 49: Attempt to commit an offence

13.42 The Criminal Attempts Act 1981 provided for the abolition of the common law of attempt and its replacement by a statutory offence of attempt created by section 1. The specification of the statutory offence was largely based on the recommendations contained in our Report on attempt.⁶⁷ With the exception of two matters on which we now recommend a change of policy our draft Bill restates the law set out in the Act.

⁵⁹Although it was said that the point was being left open.

⁶⁰Working Paper No. 104, Appendix C.

⁶¹See Appendix B, Example 48(v).

⁶²[1986] A.C. 27. See Appendix B, Example 48(vi).

⁶³Law Com. No. 76, para. 1.44.

⁶⁴[1985] A.C. 975 at 987 (C.A.).

⁶⁵See Appendix B, Example 48(vii).

⁶⁶Example 48(viii).

⁶⁷Law Com. No. 102.

13.43 *The elements of attempt.* Subsection (1) is closely modelled on section 1(1) of the Criminal Attempts Act 1981. The only change of substance is the use of the word “indictable” to indicate directly the type of offence to which the section applies. Other changes of wording have been made only in the interest of consistency of style in the draft Bill.

13.44 *Recklessness as to circumstances.* Subsection (2) states for attempt a rule corresponding to that stated in clause 48(2) for conspiracy.⁶⁸ The rule represents a change from the policy we formerly recommended of requiring for attempt an intention to bring about each of the constituent elements of the offence attempted.⁶⁹ That recommendation was at least partly based on the belief that the decision of the Court of Appeal in *Mohan*,⁷⁰ to the effect that attempt is a crime of specific intent, applied equally in respect of consequences and circumstances specified in the definition of the offence attempted. However, in *Pigg*,⁷¹ a case on the common law decided after the Criminal Attempts Act 1981 had come into force, the Court of Appeal upheld a conviction for attempted rape on the basis that the accused was reckless whether the woman consented to intercourse. It was subsequently argued that the principle involved — that where recklessness as to a circumstance suffices for the substantive offence it should suffice for the attempt — should apply to the statutory offence of attempt also.⁷² In their Report the Code team expressed the view that “this would be contrary to the considered proposal of the Law Commission and inconsistent with the fault requirements proposed for the other preliminary offences”.⁷³ Accordingly they sought to clarify the point by providing expressly that the intention required for an attempt was an intention in respect of all the elements of the offence attempted. An illustration was included of the application of the requirement to a case of attempted rape. On consultation the requirement and the illustration were strongly attacked by the Scrutiny Group on preliminary offences. The Group argued with force that the policy involved was undesirably narrow in relation to circumstantial elements of substantive offences, particularly in cases where intoxication was involved. They recommended that the Code should make clear that the principle of *Pigg* applied to the statutory offence of attempt.

13.45 In view of the decision in *Pigg* it is plain that some clarification is required. Section 1(1) of the Criminal Attempts Act 1981 leaves the matter in doubt.⁷⁴ We ourselves have no doubt that the criticisms expressed by the Scrutiny Group reflect widely-held social judgments about the need to protect potential victims against certain types of drunken and violent offender. We find the Group’s criticisms persuasive and take the view that we should depart from our previous recommendation to the extent provided for in the subsection. A minor complication of the proposed rule is that it erects a distinction between “circumstances” and other elements of the substantive offence attempted. This distinction may occasionally be difficult to apply. We are prepared to tolerate the difficulty because in the mainstream cases where the rule is likely to operate, namely, rape and obtaining property by deception, the rule appears to work well. The distinction between act (sexual intercourse) and circumstance (non-consent) or between result (obtaining) and circumstance (the falsity of the representation) is plain on the face of the definitions of the offences.

13.46 *Attempt by omission.* The extended meaning given to the word “act” by clause 16 allows for the possibility of an attempt being committed by an omission. It is generally believed that the interpretation of “act” in section 1(1) of the Criminal Attempts Act 1981 does not extend to omission, although it was the intention of the Government that in certain cases an attempt by omission could be charged under the Act.⁷⁵ Where a substantive offence, such as murder or manslaughter, can be committed by omission, it seems right to provide for the possibility of an attempt to commit such an offence by omission. Subsection (3) so provides.⁷⁶

13.47 *Issues of law and fact.* Subsection (4) restates section 4(3) of the Criminal Attempts Act 1981 with some simplification of wording but no change of substance.

⁶⁸See Appendix B, Example 49(i); cf. Example 48(iii).

⁶⁹Law Com. No. 102, para. 2.14.

⁷⁰[1976] Q.B. 1.

⁷¹[1982] 1 W.L.R. 762, [1982] 2 All E.R. 591.

⁷²Glanville Williams, *op. cit.*, 409 and in [1983] Crim. L.R. 365. *Contra*, Buxton, [1984] Crim. L.R. 25.

⁷³Law Com. No. 143, para. 14.30.

⁷⁴The point was raised but not decided in *Millard and Vernon* [1987] Crim. L.R. 393.

⁷⁵See Dennis, [1982] Crim. L.R. 5 at pp. 7-8.

⁷⁶See Appendix B, Example 49(ii).

13.48 *Offences which may be attempted.* Subsection (5) restates paragraph (c) of section 1(4) of the Criminal Attempts Act 1981. Paragraph (b) of that section has been taken over to subsection (6). Paragraph (a) is not restated. This is because we have recommended that incitement to conspire should be restored as an offence,⁷⁷ and in the interest of consistency we now make a similar recommendation for attempted conspiracy. An example of a case appropriately covered by such a charge would be where D agrees with E to commit an offence, but E is a police informer who intends to frustrate the commission of the offence. There is no completed conspiracy because E lacks the required intention. But D has done everything he can to conspire and does intend the offence to be committed. There seems no reason why he should not be guilty of attempted conspiracy.

13.49 *Attempts and complicity.* Section 1(4)(b) of the Criminal Attempts Act 1981 provided that it is not an offence to attempt to aid, abet, etc., the commission of an offence. This wording was unhappy in its context because aiding, abetting, etc., is not as such an offence in the same sense as the offences referred to in paragraphs (a) and (c). In *Dunnington*⁷⁸ the Court of Appeal was faced with the argument that the provision had in fact achieved the quite different effect of abolishing liability for aiding and abetting an attempt. It was held that as a matter of construction section 1(4) did not have the effect contended for, and that it continued to be possible for a person to be liable as an accessory to an attempt. The opening lines of subsection (6) restate more aptly the intended effect of section 1(4)(b) while paragraph (a) confirms the decision in *Dunnington*.⁷⁹ Paragraph (b) makes it clear that nothing in the subsection precludes the use of charges of attempt to commit the other preliminary offences of incitement and conspiracy. A charge of attempt to attempt would of course be inept.

Clause 50: Impossibility and preliminary offences

13.50 *A single, consistent provision.* We reviewed the law on this matter in our Report on Attempt, and Impossibility in relation to Attempt, Conspiracy and Incitement. We concluded that the fact that it was not possible to commit a particular substantive offence should not preclude conviction for a preliminary offence intended to result in the commission of that substantive offence, provided of course that the accused had done the relevant act required for the preliminary offence with which he was charged.⁸⁰ In the cases of conspiracy and attempt legislation was necessary to achieve this objective. Effect was given to our proposals in the Criminal Attempts Act 1981. Impossibility was ruled out as a defence to attempt by subsections (2) and (3) of section 1, and as a defence to conspiracy by section 5(1), inserting a paragraph (b) into the definition of conspiracy in section 1(1) of the Criminal Law Act 1977. In *Shivpuri*⁸¹ the House of Lords confirmed that under the Act the impossibility of committing the offence intended did not preclude a conviction for an attempt to commit the offence. In relation to incitement we had taken the view that legislation was unnecessary. It appeared that the common law, as stated in *McDonough*⁸² and *D.P.P. v. Nock*⁸³ was already in accordance with the position recommended for conspiracy and attempt. Subsequently, however, the Court of Appeal held in *Fitzmaurice*⁸⁴ that the common law principles relating to impossibility, which it had been our concern to reverse as regards conspiracy and attempt, applied to the offence of incitement. The result, therefore, is that impossibility may in some cases be a defence to incitement but not to conspiracy or attempt.

13.51 We agree with the Code team that it would be absurd to perpetuate this distinction.⁸⁵ The same principle should apply to all the preliminary offences. This means that the position for incitement must be brought into line with that for conspiracy and attempt. We accept the Code team's view that it is unnecessary to make separate provision for each offence. Only one provision is needed to rule out impossibility as a defence to any of the preliminary offences. Subsection (1) has been drafted accordingly. Its effect is that for the purposes of all the offences the defendant is to be treated as if the circumstances were as he believed or hoped them to be (or as he believed or hoped they would be at the relevant

⁷⁷See para. 13.15 above.

⁷⁸[1984] Q.B. 472.

⁷⁹See Appendix B, Example 49(iii).

⁸⁰Law Com. No. 102, paras. 2.100, 3.8 and 4.1.

⁸¹[1987] A.C. 1, reversing the previous decision of the House of Lords in *Anderton v. Ryan* [1985] A.C. 560.

⁸²(1962) 47 Cr. App. R. 37.

⁸³[1978] A.C. 979 at p. 999.

⁸⁴[1983] Q.B. 1083.

⁸⁵Law Com. No. 143, para. 14.40.

time). If in those supposed circumstances he would be guilty of the preliminary offence charged, the impossibility of achieving his intention is immaterial.⁸⁶

13.52 *Application.* Subsection (2) provides that subsection (1) applies both to the offences created by clauses 47 to 49 and to any other statutory offence of incitement, conspiracy or attempt to commit a specified offence.

13.53 *Acts justified or excused.* Subsection (3) provides a necessary qualification to the generality of the principle embodied in subsection (1). If, as a matter of interpretation, a defendant can take advantage of a statutory defence to a substantive offence although he was unaware of the circumstances of justification or excuse, it would not be right to convict him of a preliminary offence on the basis that he intended to commit or believed that he was committing an offence. An example of such a defence appears in clause 44(1).⁸⁷

Clause 51: Preliminary offences under other enactments

13.54 A number of statutes create specific offences of incitement, conspiracy or attempt to commit other offences. Most of these offences are already unnecessary because the conduct referred to is covered by the existing general law. These can safely be repealed when the relevant statutes are revised after the Code comes into force. Nonetheless it is clearly essential to state the rules which govern liability for such offences. Subsection (1) provides that clauses 47 to 50 shall apply for this purpose. Similar provisions already exist as regards conspiracy and attempt in section 5(6) of the Criminal Law Act 1977 and section 3 of the Criminal Attempts Act 1981 respectively.

13.55 *No rule of exclusivity.* Subsection (2) makes clear that the offences under clauses 47, 48 and 49 and the offences created by other enactments are not mutually exclusive. If conduct constitutes a preliminary offence both under the Code and under another enactment, there may be a conviction of either offence. This is a departure from the rule of exclusivity set out in section 5(6) of the Criminal Law Act 1977 and section 3 of the Criminal Attempts Act 1981. That rule was challenged on consultation by the Society of Public Teachers of Law, who argued that it was without merit and could cause a good deal of trouble. We agree; the present rule for conspiracy and attempt opens the way for unmeritorious technical submissions that the indictment charges or the evidence discloses a preliminary offence under another enactment and therefore that the defendant cannot be convicted of the relevant Code offence. The only virtue of exclusivity that we can discern is that it ensures that the penalties prescribed by Parliament for the offence under the other enactment are not exceeded by those for the equivalent Code offence. This matter can be specifically addressed by provisions concerning the penalties for the preliminary offences under the Code. Thus Schedule 1, col. 4 provides in respect of incitement, conspiracy and attempt that where the offence amounts also to an offence referred to in clause 51 the penalty is the same as that provided for the latter offence.

Clause 52: Jurisdiction and preliminary offences

13.56 The first three subsections of this clause give effect to recommendations of the Criminal Law Revision Committee in their Fourteenth Report.⁸⁸ Subsection (1) deals with incitement, conspiracy or attempt in this country to commit an offence abroad, subsection (2) with the converse case of incitement, conspiracy or attempt abroad to commit an offence in this country.⁸⁹ Subsection (3) sets out the offences to which these provisions, which have the effect of extending the jurisdiction of the English courts, apply.

13.57 *Conspiracy entered into abroad.* Subsection (4), which applies only to conspiracy, states a principle of the common law laid down by the House of Lords in *D.P.P. v. Doot*.⁹⁰ The House held that an agreement made outside the ordinary limits of criminal jurisdiction to commit an unlawful act within those limits was a conspiracy triable in England but left it unclear whether this was only so if any act was done in England in pursuance of the agreement. Entering the jurisdiction for any purpose connected with the agreement should

⁸⁶See Appendix B, Examples 50(i)-(iii).

⁸⁷See paras. 12.24 *et seq.* above; and Appendix B, Example 50(iv).

⁸⁸Offences against the Person (1980), Cmnd. 7844, para. 303.

⁸⁹See Appendix B, Examples 52(i) and (ii).

⁹⁰[1973] A.C. 807; Appendix B, Example 52(iii).

be regarded as such an act, and the subsection so provides.⁹¹ If an act in pursuance of the agreement is done in England, all the conspirators, including those who remain abroad, will under this provision be triable in England. If, however, the only conspirators to enter the jurisdiction do so for purposes unconnected with the agreement, subsection (4) will not apply. The conspirators will not then be triable in England unless the case falls within subsections (2) or (3).

Prosecution and punishment

13.58 Provisions relating to prosecution and punishment of the preliminary offences appear in Schedule 1. This is one respect in which we have found it helpful to treat these offences in the same way as the offences in Part II of the Bill. The nature and scope of Schedule 1 has already been explained in Part 5 of this Report. The provisions of the Schedule relating to the preliminary offences were explained fully by the Code team in their Report.⁹² They attracted no adverse comment on consultation and are reproduced with no substantial change.

Withdrawal

13.59 We have previously recommended that there should be no defence of withdrawal in relation to the preliminary offences of attempt and conspiracy.⁹³ The Code team accepted this view and made no provision for such a defence for any of the preliminary offences. The Society of Public Teachers of Law urged that such a defence should be included in the Code. They argued that there is no justification for making any distinction between what the defendant must do to be guilty of incitement and what he must do to be guilty as an accessory. In respect of liability as an accessory a kind of defence of withdrawal is provided by clause 27(8), which restates the common law concerning a person who countermands his encouragement of the commission of an offence. We are not persuaded by this argument which, among other things, seems to us to overlook the important distinction that *ex hypothesi* the preliminary offence has already been committed but the substantive offence has not. Interests of crime prevention justify the defence in the second case but not the first. In any event the proposal is intimately connected with the larger issue of facilitation and reform of the law of complicity. As we have indicated, it has not been possible to address that issue in the present exercise.

⁹¹In *Jurisdiction over Fraud Offences with a Foreign Element* (December 1987), we provisionally proposed that every party to a conspiracy formed abroad to commit certain offences of fraud, or to defraud, in England and Wales should be triable here, *whether or not anything is done in this country to further the conspiracy*: see para. 3.4. Our final Report on this subject will be published shortly.

⁹²Law Com. No. 143, paras. 14.13-14.16 (incitement); 14.27 (conspiracy); 14.36-14.39 (attempt).

⁹³Law Com. No. 102, para. 2.133.

Report relating to Part II of the Draft Bill

The following pages (Parts 14 to 18) concern Part II of the draft Bill. The material in this section of our Report is of two rather different kinds.

The commentary on *Chapters I and II* (Offences against the Person: Sexual Offences) explains the source of most of the offences stated by these Chapters in recommendations of the Criminal Law Revision Committee. This is new law and requires relatively full explanation. The part of the Report dealing with Offences against the Person also explains the omission of some offences that might have been looked for in this Chapter.

The commentary on *Chapters III, IV and V* on the other hand, is relatively brief. These Chapters (Theft, Fraud and Related Offences: Other Offences relating to Property: Offences against Public Peace and Safety) restate existing offences. The Report identifies the sources from which the offences are taken, refers to any amendments of substance found necessary in the process of incorporating the offences in the Code and explains the omission of some offences and other provisions that might be looked for in these Chapters.

PART 14

PART II, CHAPTER I

OFFENCES AGAINST THE PERSON

Introduction

14.1 Chapter I of Part II incorporates, with a few modifications, the recommendations of the Criminal Law Revision Committee (in this Part of this Report called “the Committee”) in their Fourteenth Report.¹ The corresponding clauses of the Code team’s Bill were scrutinised by a special group chaired by Lord Justice Lawton and including Sir George Waller, Lord Justice Lloyd, Mr. Justice McCullough, Judge Hazan (all members of the Committee) and Mr. Timothy Lawrence. We have been greatly assisted by their comments. The Committee’s recommendations concerning false imprisonment, kidnapping and child stealing were not included in the Code team’s Bill because the Child Abduction Bill was then being considered by Parliament. Those recommendations, with the modifications required by the Child Abduction Act 1984, are included in the present draft Bill, as is the new offence of torture created by the Criminal Justice Act 1988, section 134.

Clause 53: Interpretation

14.2 *The person against whom the offences may be committed.* The definition of “another” in clause 53(a) effectively defines “the person” against whom the offences in this Chapter may be committed. Though, following Coke,² the definition of a person “in being” is traditionally discussed only in relation to homicide, it is clear that, in principle, the same definition must apply to offences against the person generally. This is achieved by paragraph (a). That paragraph also makes it clear that a person who intends to cause the death of, or serious personal harm to, an unborn child does not intend to commit murder and is not, by reason of that intention, guilty of murder if the child is born alive and then dies of the injury. This settles a matter of doubt in the present law³ in accordance with, as we think, sound principle. A person who intended to kill the mother would be guilty of murder of the child if the injuries he inflicted with that intent caused the child to die after it had been born alive: see clause 24(1) (transferred fault).

14.3 The requirement that the child should have “an existence independent of its mother” has been criticised; but it is used in the Infant Life (Preservation) Act 1929, section 1(1), the Committee recommended that it be preserved (Report, para. 35) and a proposal to eliminate or modify it would require consultation, particularly with medical opinion, that we have not been able to undertake.

14.4 *Causing death.* Clause 53(b) preserves the common law “year and a day” rule as recommended by the Committee. The rule will apply to murder, manslaughter, suicide pact killing, complicity in suicide and infanticide.⁴

Clause 54: Murder

14.5 Subsection (1) implements recommendation 1 of the Committee’s Report. It does not include the third variety of fault (“intending to cause fear of death or serious injury and being aware that he may kill”) which was included in square brackets in the draft clause in the Code team’s Bill. The Committee did not recommend its inclusion. They said only that, “if Parliament favours a provision” of this type, it should be on these lines. We do not regard it as a satisfactory provision. Moreover, we note that the House of Lords has appointed a Select Committee to consider, inter alia, “the scope and definition of the crime of murder in England and Wales and in Scotland.”⁵ The proposals of the Criminal Law Revision Committee will undoubtedly require reconsideration in the light of the Select Committee’s recommendations. In the meantime, we think it right to retain the proposals to which the Criminal Law Revision Committee gave such lengthy and careful consideration.

¹Offences against the Person (1980), Cmnd 7844.

²3 Inst. 47.

³See Jennifer Temkin, “Pre-natal Injury, Homicide and the Draft Criminal Code”, [1986] C.L.J. 414.

⁴*R. v. Coroner for Inner West London, ex parte De Luca* [1988] Crim. L.R. 541.

⁵*Hansard* (H.L.), 21 July 1988, Vol. 499, col. 1491.

14.6 The proposals modify the present law in two respects. (i) An intention to cause serious personal harm is at present a sufficient fault for murder. Under the clause, this will not be so unless the defendant is also aware that he may cause death. (ii) At present, the defendant's awareness that it is "virtually certain" that his conduct will cause death or serious personal harm is only evidence that he intended such a result. Under the Code, that state of mind will be intention.⁶ The judge will direct the jury that, if the defendant was aware that, in the ordinary course of events, his act would cause death or serious personal harm, he intended death or serious personal harm.

14.7 The clause uses the phrase, "causes death", instead of "kills", which was used in the Code team's Bill. This change of language has been explained earlier in this Report.⁷

14.8 A person who causes death with one of the two specified states of mind will be guilty of murder unless one of the defences provided by clauses 56, 58, 59, 62 and 64 applies, reducing the offence to manslaughter or infanticide.

14.9 Because of the exceptional nature of the mandatory penalty for murder, provision is made for it in subsection (2), with a cross-reference in Schedule 1.

Clause 55: Manslaughter

14.10 "*Voluntary manslaughter*". As at common law, manslaughter under the clause is a complex crime. It may take any one of five forms. Three of these, designated by the Criminal Law Revision Committee "voluntary manslaughter" (the traditional phrase) would be murder but for the existence of a defence — diminished responsibility, provocation or that the force which caused death, though excessive, was used in public or private defence. The clause makes it clear that clauses 56, 58 and 59 provide defences to murder, thus attracting the operation of other Code provisions relating to defences. Since, by clause 25(b), "defences apply to both principals and accessories", clauses 56, 58 and 59, though expressed only in terms of the principal, apply equally to accessories.

14.11 "*Involuntary manslaughter*" takes two forms. The first is where the defendant lacks the fault required for murder because he is voluntarily intoxicated. At common law, he is not guilty of murder but guilty of manslaughter. The Committee proposed the retention of this rule. It is desirable to state it expressly rather than leave the matter to the general provisions of clause 22 because of the danger that "being aware that he may cause death" might be construed as a form of recklessness, leaving the defendant who was unaware through voluntary intoxication liable by virtue of clause 22(1) to conviction for murder. Subsection (1)(b) makes it clear that he is guilty only of manslaughter.

14.12 The second form of involuntary manslaughter covers the defendant who intends to cause serious personal harm — who is guilty of murder under the present law — and he who is reckless whether death or serious personal harm be caused.

14.13 *Manslaughter a single offence*. Whatever the form of manslaughter, the defendant will be convicted simply of manslaughter, contrary to clause 55. This is so even if four jurors think that a defendant, charged with murder, intended to kill but was acting under provocation, four that he intended to kill but was using excessive force in self-defence, and four that he intended only to cause serious personal harm. There is a disagreement on the murder charge but, if the jury are discharged in respect of that charge, they may return a verdict of guilty of manslaughter because they are unanimous that he intended to cause at least serious personal harm.⁸

14.14 The Code team's Bill provided that a jury which found a defendant guilty of manslaughter by reason of diminished responsibility should return a verdict to that effect. We think that such a provision is unnecessary and might cause difficulties in a case of the kind envisaged above, where the jurors are agreed on a verdict of manslaughter but on different grounds. The matter is adequately dealt with by the present practice of the judges to direct the jury that, if they find a verdict of manslaughter on a murder charge, they should state whether it is on the ground of diminished responsibility to assist the judge in imposing sentence.

⁶Clause 18(b); see para. 8.14 above.

⁷Para. 7.13 above.

⁸See J.C. Smith, "Satisfying the Jury", [1988] Crim. L.R. 335 at 341.

Clause 56: Diminished responsibility

14.15 As in the corresponding clause in the Code team's Bill, this clause adopts the Committee's preferred definition of diminished responsibility (which was also favoured by the medical advisers to the Department of Health and Social Security). The phrase, "at the time of his act" — which may be the act of causing death or of procuring, assisting or encouraging that act — has been included to make it clear beyond doubt that the jury must look to that time and not to the time of trial.

14.16 The definition of "mental abnormality" in subsection (2) is the definition of "mental disorder" in section 4 of the Mental Health Act 1959 (now section 1(2) of the Act of 1983) which the Committee, after some hesitation, was persuaded was appropriate for this purpose.⁹ Intoxication (the state of being disordered or stupefied by alcohol or other drugs) is excluded. We note that in *Tandy*¹⁰ the Court of Appeal held that intoxication may found diminished responsibility if the defendant is suffering from alcoholism which renders the taking of "the first drink" involuntary. As we are implementing the recommendations of the Committee rather than codifying the present law, we have not thought it right to attempt to include this rather difficult concept in the clause.

Clause 57: Evidence of mental abnormality

14.17 Subsection (1) corresponds to clause 38(1). Subsection (2) corresponds to clause 38(2), together with which it replaces section 6 of the Criminal Procedure (Insanity) Act 1964. Subsections (3) and (4) give effect to recommendations of the Committee.¹¹

Clause 58: Provocation

14.18 This clause gives effect to recommendations 9 to 13 of the Committee's Report. The defendant will be judged on the facts as he believed them to be (clause 41) and, as the Committee recommended, "with due regard to all the circumstances, including any disability, physical or mental, from which he suffered...". We believe that this is adequately summed up in the phrase, "any of his personal characteristics that affect its [sc. the provocation's] gravity." The same words are used in clauses 42 (duress by threats) and 43 (duress of circumstances). A characteristic which is relevant for the purpose of one defence will not necessarily be relevant for the purpose of another. If the alleged provocation consisted in an assault with intent to rob, the fact that the defendant was sexually impotent would not affect its gravity; but, if it consisted in taunts of sexual impotence, that personal characteristic would be highly relevant.

Clause 59: Use of excessive force

14.19 This clause implements the Committee's recommendation 73 which adopted a principle then accepted in some parts of the Commonwealth, particularly Australia.¹² Recently, however, the High Court of Australia, in *D.P.P. v. Zekevic*,¹³ has overruled its previous decisions on the use of excessive force and followed *Palmer v. R.*,¹⁴ bringing Australian law into line with the present law of England: the intentional use of deadly force in self-defence or the prevention of crime is either justified, in which case no crime is committed, or it is not, in which case the killer is guilty of murder. The Australian High Court overruled its previous decisions, not because they thought the principle applied was unsound but because of the complexity which had arisen from the courts' attempts to state the law in a form which took account of the burden of proof. The Australian law was changed not because it was thought to be wrong in principle, but because it was too difficult for juries to understand and apply. We do not believe that these difficulties will arise under the Code. Applying clauses 13 (proof) and 44 (use of force in public or private defence), the judge should be able to direct the jury in readily comprehensible terms. *D.P.P. v. Zekevic* does not, in our opinion, affect the soundness of the Committee's recommendation.

Clause 60: Jurisdiction over murder and manslaughter

14.20 This clause implements the Committee's recommendations 76 to 78. The question was raised on scrutiny whether "British citizen" is the appropriate term in this context. We

⁹Fourteenth Report, para. 92. The term "mental disorder" is not used here, because it is used with a narrower meaning elsewhere in the Code: see clauses 34 and 36.

¹⁰[1989] 1 All E.R. 267.

¹¹Fourteenth Report, paras. 95 and 96.

¹²See particularly *Howe* (1958) 100 C.L.R. 448.

¹³[1987] 61 A.L.J.R. 375.

¹⁴[1971] A.C. 814.

are satisfied, after consultation with the Home Office, that it is. The operation of the clause is fully explained and illustrated in the Code team's Report.¹⁵

14.21 The Committee's recommendations 80 and 81, concerning jurisdiction over preliminary offences, are dealt with in relation to those offences in clause 52.

Clause 61: Attempted manslaughter

14.22 This clause, creating a new offence of attempted manslaughter, implements the Committee's recommendation 79, extended, as consistency requires, to include the case of a person who attempts to cause death when using excessive force in public or private defence. The clause will operate as a defence to a charge of attempted murder and, by virtue of clause 25(b), will apply to accessories to the killing.

Clause 62: Suicide pact killing

14.23 This clause implements the Committee's recommendation 29 that killing in pursuance of a suicide pact should not be manslaughter but a particular offence, which we have designated "suicide pact killing", punishable with a maximum of seven years' imprisonment. It applies to the case of a party to a suicide pact who kills another party to the pact or who procures, assists or encourages a third person to kill a party to the pact. It does not apply to the case of a person who procures the other to take his own life. He is not a person "who, but for this section, would be guilty of murder", because suicide is no longer self-murder, or any offence. He will, however, be guilty of an offence under the next clause.

14.24 Subsection (3), implementing the Committee's recommendation 30, provides that it is a defence to a charge of attempted murder that the defendant attempted to kill in pursuance of a suicide pact; but the defendant will be guilty of an attempt to commit the offence.

Clause 63: Complicity in suicide

14.25 This clause reproduces the effect of section 2 of the Suicide Act 1961 but with the reduced maximum penalty of seven years' imprisonment recommended by the Committee.¹⁶ It is made clear that the offence is committed only when the suicide is committed or attempted. A person who attempts to procure the suicide of another will be guilty of an offence under clause 49(1); clause 49(6) does not apply because this is not a case of an attempt to procure the commission of an offence.

Clause 64: Infanticide

14.26 This clause implements the Committee's recommendations 18 to 24. It provides a defence to a charge of murder or manslaughter or an attempt to commit either offence. The defence applies also to a woman who is charged as an accessory to murder or manslaughter committed by others: see clause 25(b).

14.27 Subsection (3) provides for the case where the jury is satisfied that the defendant is guilty of either infanticide or child destruction but not satisfied that it was the one rather than the other. If the jury was uncertain, either whether the child had been born, or whether he had an existence independent of the defendant when his death occurred, it would be bound to acquit of murder or manslaughter and it would be impossible to say whether the defendant was guilty of infanticide or of child destruction. Though satisfied that it was either the one offence or the other, the jury would be bound, at least in theory, to acquit of both offences. The Committee thought that there should be provision for cases of this kind.¹⁷ The subsection enables the jury to convict of infanticide. Infanticide is chosen rather than child destruction because, under the Code, infanticide is the less serious offence. We have followed the recommendation of the Committee to reduce the maximum penalty for infanticide to five years but, like the Committee, propose no change in the penalty for child destruction. To do so would inevitably involve reconsideration of the penalty for abortion which would be controversial and could not be undertaken without consultation. If the penalties for the three offences were rationalised,¹⁸ this subsection might require reconsideration.

¹⁵Law Com. No. 143, para. 15.24, and Illustration 62, p. 234.

¹⁶Fourteenth Report, para. 136.

¹⁷*Ibid.*, para. 36.

¹⁸If the life penalty for infanticide were retained, the Committee wished child destruction to be regarded as the more serious offence.

14.28 The subsection provides only for the case where the jury is uncertain. If the jury is satisfied, either that the child had not been born at the material time, or that he did not then have an existence independent of his mother, it would have to acquit of murder, manslaughter and infanticide. The defendant would be guilty of child destruction but it would be wrong to allow conviction of an offence punishable with life imprisonment on a charge of an offence punishable only with a maximum of five years.

Clause 65: Threats to kill or cause serious personal harm

14.29 This clause implements the Committee's recommendation 63, extending the scope of the present section 16 of the Offences against the Person Act 1861. The word "believe" is substituted for "fear" as more appropriate and consistent with other Code provisions.

Clause 66: Abortion

14.30 The Committee made no recommendations regarding offences of abortion and child destruction and we have to assume the continuance of the present law. Clause 66 replaces section 58 of the Offences against the Person Act 1861 except that part of it which relates to a woman attempting to procure her own miscarriage. This is dealt with separately in clause 67.

14.31 The offences in the 1861 Act are framed in terms of doing certain acts with intent to procure miscarriage. This is an inappropriate method in the Code and clause 66 simply makes it an offence to procure the miscarriage of a woman otherwise than in accordance with the provisions of the Abortion Act 1967. It then becomes an offence under clause 49 to attempt to procure such a miscarriage, whether or not the woman is in fact pregnant (clause 50). The corresponding clause in the Code team's Bill used the phrase "terminate the pregnancy", the language of the Abortion Act 1967. It was pointed out to us that this was inappropriate for the definition of the offence because an obstetrician who induces birth "terminates the pregnancy". We have therefore reverted to the language of the 1861 Act. The word "intentionally" has been introduced so as to exclude the application of clause 20 which would change the law by making it an offence recklessly to cause a miscarriage.

Clause 67: Self-abortion

14.32 This clause codifies the present law.

Clause 68: Supplying article for abortion

14.33 This clause reproduces the effect of section 59 of the Offences against the Person Act 1861 in Code style.

Clause 69: Child destruction

14.34 Subsections (1) and (2) reproduce the effect of section 1 of the Infant Life (Preservation) Act 1929 in Code style. Subsection (3) makes further provision for the situation discussed above in relation to clause 64(3).¹⁹

Clause 70: Intentional serious personal harm

14.35 This clause implements the Committee's recommendation 39(1) and replaces section 18 of the Offences against the Person Act 1861. The Committee proposed no definition of "injury" or "serious injury". We prefer the terms "personal harm" and "serious personal harm". Clause 6 states that "'personal harm' means harm to body or mind and includes pain and unconsciousness"; but no definition of "serious" personal harm is proposed. This will be as at present a matter for the judgment of the court or jury on the facts of the particular case.

14.36 *Jurisdiction*. Subsection (2) provides for an extension of the ordinary limits of criminal jurisdiction in respect of this crime which is logically required by the implementation of the Committee's recommendation 80 by clause 52.²⁰

¹⁹Para. 14.27.

²⁰See para. 13.56 above. Illustrations of the operation of the clause, derived from Law Com. No. 143, p. 236, are as follows:

- (i) D, in England, despatches a letter bomb to France. When P opens the letter in France, two of his fingers are blown off. If this is serious personal harm and D intended to cause such harm, he is guilty of an offence under clause 70 and may be tried in England.
- (ii) D, in France, despatches a letter bomb to P in England. When P opens the letter two of his fingers are blown off. If this is serious personal harm and D intended to cause such harm, D is guilty of an offence under clause 70 and may be tried in England.

Clause 71: Reckless serious personal harm

14.37 This clause implements the Committee's recommendation 39(2).

Clause 72: Intentional or reckless personal harm

14.38 This clause implements the Committee's recommendation 39(3). As the offence will carry a maximum penalty of three years' imprisonment, a special provision will be required to make it an arrestable offence (as the Committee recommended). This could be done by the addition of a subsection to the present clause or by amendment of section 24(2) of the Police and Criminal Evidence Act 1984, which lists offences that are arrestable although the maximum term of imprisonment available is less than five years.

Clause 73: Administering a substance without consent

14.39 This clause implements the Committee's recommendations 53 and 54.

Clause 74: Torture

14.40 The offence of torture was created by section 134 of the Criminal Justice Act 1988 and, as a serious offence against the person, it is appropriately included in this Chapter of the Code. The drafting of the clause is exceptional in two respects. First, express reference to justification or excuse is retained. These matters cannot here be left to the operation of clause 4(4), which is confined to justification or excuse under the law of England and Wales whereas section 134 refers to justification or excuse under the law of the United Kingdom or any other place where the alleged torture was inflicted. Second, express reference to liability for omissions is also retained. The word "inflict" which is used in the definition of the offence has been held²¹ to have a narrower meaning than "cause" and to imply the direct application of force. If, in accordance with the general principle of the Code, the matter were left as a question of construction for the courts, there would be a serious risk that omissions might be excluded and the scope of the offence narrowed so as not to satisfy the United Kingdom's international obligations in the matter.

Clause 75: Assault

14.41 *A single offence.* We note that common assault and battery are treated as distinct offences by the Criminal Justice Act 1988, section 38; but the clause implements the recommendation of the Committee that "there should be a single offence of assault, whether or not there is a battery". For this reason we felt unable to adopt a suggestion made on consultation, that the clause be redrafted as two subsections.

14.42 *Consent* will be a defence to some other offences in this Chapter where its absence is not stated to be an element of the offence. A boxer who tries to knock out his opponent clearly intends to cause at least personal harm and, possibly, even serious personal harm. If, as is generally thought, this is not an offence, it is because of a rule of the common law that justifies or excuses blows struck in the course of properly conducted boxing. The other boxer's consent that such blows should be aimed at him is effective. Such rules are preserved under the Code by clause 4(4) (and see clause 45(c)). Consent as a defence to an assault could have been left to clause 4(4). It seems, however, desirable to state it expressly as an element of the offence because the whole essence of the assault is that the act is done without the consent of the victim. The definition would look very odd without it.

14.43 Some applications of force are, prima facie, assaults even if the victim consents. This is recognised by the concluding words of the clause — "where the act is likely or intended to cause personal harm". This however, is subject to important and well-known exceptions, of which the case of the boxer mentioned above is an example. The corresponding clause in the Code team's Bill stated some of the recognised justifications for acts intended or likely to cause personal harm; but it is impossible to produce a comprehensive and closed list, so that clause referred to acts otherwise justified or excused by the clause corresponding to the present clause 4(4). Some, at least, of the specified justifications would be equally applicable to charges under clauses 70, 71 and 72, where they were not mentioned. That seemed inconsistent and unsatisfactory and we considered whether the justifications should be specified in the case of these offences also. On balance, however, we concluded that the preferable course is to leave the whole matter to the operation of clause 4(4) in respect of all these offences. The Code, in this respect, is less informative but it has the merit of consistency.

²¹*Wilson* [1984] A.C. 242 at 260, construing "inflict any grievous bodily harm".

Clause 76: Assault on a constable.

14.44 This clause implements the Committee's recommendations 46 and 47. It requires intention or recklessness as to the fact that the person assaulted or assisted is a constable, but no fault is required with respect to the fact that he is acting in the execution of his duty.

Clause 77: Assault to resist arrest

14.45 This clause implements the Committee's recommendation 51.

Clause 78: Assault to rob

14.46 The offence of assault with intent to rob under section 8 of the Theft Act 1968 is reproduced here rather than in Chapter III because it is essentially an offence against the person.

Offences of detention and abduction

14.47 *Introduction.* The Committee recommended (recommendation 65) the creation of two offences of detention and two offences of abduction to replace the common law crimes of kidnapping and false imprisonment and the statutory offence of child stealing (Offences against the Person Act 1861, section 56) and the abduction of an unmarried girl under the age of sixteen (Sexual Offences Act 1956, section 20). The Child Abduction Act 1984, in substance, enacted the first of the two proposed abduction offences and created a second offence, going beyond the recommendations of the Committee, which may be committed by a person exempted from liability under the first child abduction offence who takes or sends a child under the age of sixteen out of the United Kingdom without the "appropriate consent".

14.48 The codification of the Child Abduction Act and the implementation of the Committee's proposals thus require the enactment of five offences, the two offences under the 1984 Act and the three recommended offences. In addition, the Taking of Hostages Act 1982 requires codification and finds its proper place in this group of offences. We have not taken into account in our draft Bill any changes to the Child Abduction Act 1984 which will be required in consequence of the enactment of the Children Bill currently before Parliament. Consideration will need to be given to up-dating and amending the relevant provisions of the draft Criminal Code Bill (in particular clauses 83 and 84), once the Children Bill becomes law.

14.49 *Children.* For the purposes of offences involving children, the Committee proposed fourteen as the relevant age. Parliament, however, when considering the Child Abduction Bill, decided that the more appropriate age was sixteen and that is the age adopted in the Act. As consistency requires, sixteen is specified as the relevant age throughout this group of offences.

14.50 *Omissions.* The Committee recommended that each of its proposed four offences should be capable of commission by omission. The Child Abduction Act, however, makes no express provision for liability for omissions and, following the general principle of the Code,²² in this group of clauses as in others, the matter is left as a question of construction for the courts.

Clause 79: Interpretation

14.51 This clause provides for the interpretation of "takes", "detains", "sends" and acting "without the consent" of another, for the purposes of this group of offences.

Clause 80: Unlawful detention

14.52 This clause substantially replaces the common law offence of false imprisonment. The definition follows the Committee's recommendations closely.

Clause 81: Kidnapping

14.53 This clause replaces the common law offence of the same name and again follows the recommendations of the Committee closely.

²²See para. 7.11 above.

Clause 82: Hostage-taking

14.54 This clause replaces the offence under section 1 of the Taking of Hostages Act 1982. The offence is given the name of “hostage-taking”. The words, “intentionally or recklessly” are introduced for the sake of consistency with the definitions of other offences in this group.

Clause 83: Abduction of child by parent

14.55 This clause re-enacts, in Code style, the offence in section 1 of the Child Abduction Act 1984 which is additional to the Committee’s recommendations.

Clause 84: Abduction of child by other persons

14.56 This clause re-enacts, in Code style, the offence in section 2 of the Child Abduction Act 1984. It is, in substance, the third offence recommended by the Committee.

Clause 85: Aggravated abduction

14.57 This is the fourth offence recommended by the Committee and follows their recommendations closely.

Clause 86: Endangering traffic

14.58 This clause implements the Committee’s recommendation 56 and extends it to include waterways.²³ The provision has been criticised as being too limited and particular for a Code. It is argued that the Code should include a general offence of deliberate endangerment. We acknowledge the force of this argument but the creation of a general offence would be a substantial measure of law reform, requiring discussion and consultation which we have not been able to undertake.

Offences in the Offences against the Person Act 1861 not included

14.59 There are provisions in the 1861 Act that the Committee did not propose for repeal. The Committee appears to have intended that they should all remain in the 1861 Act rather than to be transferred to the modern statute contemplated. We agree with this view in every case except one: the abortion offences in sections 58 and 59 have been included.²⁴ The provisions in question, with a summary of the Committee’s observations on them, are as follows:

- (a) *Section 26*: Neglecting to provide food etc. for, or doing bodily harm to, apprentice or servant. A similar summary offence is contained in section 6 of the Conspiracy and Protection of Property Act 1875. The Committee suggested that consideration should be given in consultation with the responsible government departments to their repeal.²⁵ We have not been able to undertake this consultation in the present exercise.
- (b) *Sections 28-30, 64 and 65*: Explosive substances offences: making or having gunpowder etc. with intent; power to issue search warrant. The Committee thought that these offences should survive pending a general review of explosive substances offences.²⁶
- (c) *Section 31*: Setting spring guns etc. with intent to inflict grievous bodily harm. The Committee thought that this offence required re-examination as to its substance (but not by a committee of lawyers) as well as modernisation; and that it should be considered by the appropriate government departments.²⁷ Again, we have not been able to take this forward here.
- (d) *Section 34*: Doing or omitting anything to endanger railway passengers. This offence would not be required if the Committee’s proposed endangering offence were enacted (see clause 86). The Committee accepted that it should be left

²³We note that the Government has accepted the need to create a new offence of intentionally obstructing a road or interfering with devices for the regulation of traffic, and intends to include a “modified version” of the offence recommended by the Criminal Law Revision Committee in forthcoming legislation: see the Report of the Road Traffic Law Review (the North Report) (1988), paras. 7.5 and 7.6 and *The Road User and the Law: The Government’s Proposals for Reform of Road Traffic Law* (1989), Cm. 576, paras. 3.2 – 3.3.

²⁴See clauses 66-68.

²⁵Fourteenth Report, para. 210, Recommendation 61.

²⁶Fourteenth Report, para. 205, n.1. See further para. 18.11 below.

²⁷Fourteenth Report, paras. 211 – 213, Recommendation 62.

unrepealed at the request of the British Railways Board and the British Transport Police.²⁸ This provision belongs, if anywhere, in railway legislation.

- (e) *Section 57: Bigamy.* The Committee said that this offence was outside their terms of reference.²⁹ Eventually this offence might go into the Chapter of Part II (which we have not drafted) concerned with offences against public morals and decency.³⁰
- (f) *Section 60: Concealment of birth.* The Committee thought that this should be retained, pending its review by the departments responsible for the law relating to burials and the registration of births and deaths, on the ground that it does not belong in a statute on offences against the person.³¹

Other offences not included

14.60 We also omit from this Chapter the following offences, which, but for the considerations which we mention against each, would have been candidates for inclusion:

- (a) Cruelty to children and the tattooing of minors. Section 1 of the Children and Young Persons Act 1933 (cruelty to persons under 16) is plainly an important offence against the person. Although for criminal law purposes it would be useful to have this offence (suitably re-expressed) in the Code, it stands alongside many other offences in the 1933 Act, some of which are not offences against the person. The offence under the Tattooing of Minors Act 1969 stands or falls with the cruelty offence so far as its inclusion in the Code is concerned.
- (b) Causing death by reckless driving. This offence is to be replaced by an offence of causing death by dangerous driving following the recommendations of the Road Traffic Law Review.³² We recognise that it is a very serious offence, but we have already explained that we do not think any of the offences in road traffic legislation should be incorporated, even in a complete Code.³³
- (c) Causing bodily harm by wanton or furious driving. The C.L.R.C. proposed that this offence should be abolished.³⁴
- (d) Offences against the personal security of the Sovereign. Section 2 of the Treason Act 1842 (attempts to injure or alarm the Sovereign) was considered by us in our earlier Working Paper on Treason.³⁵ However, work on that project has been suspended for the time being.³⁶
- (e) Criminal defamation. This offence was recommended by us in place of the common law offence of criminal libel.³⁷ When implemented, this offence could be placed in this Chapter of the Code, but we did not think that the principles governing our selection of offences for the present draft Bill required its inclusion now.

²⁸Fourteenth Report, para. 197.

²⁹Fourteenth Report, para. 1.

³⁰See Report, Vol. 1, Appendix C.

³¹Fourteenth Report, para. 33, n.3.

³²See the North Report (1988), Chapter 6 and *The Road User and the Law: The Government's Proposals for Reform of Road Traffic Law* (1989), Cm. 576, paras. 2.2-2.13.

³³See para. 3.5 above.

³⁴Fourteenth Report, para. 144. See also the North Report (1988), para. 8.16.

³⁵(1977) Working Paper No. 72, Treason, Sedition and Allied Offences.

³⁶See Seventeenth Annual Report 1981-1982 (1983), Law Com. No. 119, para. 2.25.

³⁷(1985) Law Com. No. 149, Cmd. 9618, Report on Criminal Libel.

PART 15
PART II, CHAPTER II
SEXUAL OFFENCES

Introduction

15.1 This Chapter incorporates the recommendations of the Criminal Law Revision Committee (in this Part of this Report called the “Committee”) in their Fifteenth,¹ Sixteenth² and Seventeenth³ reports, with the exceptions mentioned, and otherwise restates the present law.

15.2 We have sought to draft clauses to give effect to the recommendations of the Committee. We have done so in pursuance of our policy stated earlier.⁴ We recognise that in the area of sexual offences opinions as to what conduct should be criminal are likely to differ. Some of us do not agree with the Committee’s recommendations in every respect. We point out in the following paragraphs some of the respects in which some of us have the strongest reservations. We have, however, followed our policy and the fact that we have drafted offences as recommended by the Committee is not to be taken as an expression of our agreement or disagreement with their recommendations.

Clause 87: Interpretation

15.3 It is convenient to define a number of terms some of which are, and some of which are not, defined in existing legislation.

15.4 “*Buggery*” is not at present defined in any statute but it is desirable to include a definition because, following the Committee, buggery will not, in the Code, include intercourse with an animal.⁵ The definition incorporates the effect of section 44 of the Sexual Offences Act 1956 as interpreted by the Privy Council in *Kaitamaki*⁶ and the ruling in that case that heterosexual intercourse continues until the man withdraws. It seems legitimate to assume that the same principles apply to buggery. By implication, the definition makes it clear that buggery is confined to penile intercourse and does not include the insertion of an instrument.

15.5 “*Man*” and “*woman*”. These definitions are taken from section 46 of the Sexual Offences Act 1956 with the addition of the bracketed words which eliminate the presumption that a boy under the age of fourteen is incapable of sexual intercourse, following the Committee’s recommendation 7.⁷

15.6 “*Premises.*” The Committee recommended,⁸ for the purpose of offences relating to prostitution, that “premises” should include other accommodation, “for instance, a boat or caravan”, and, in the interests of consistency, the extended definition is applicable to other offences consisting in the use of premises for sexual purposes.

15.7 “*Sexual intercourse.*” Section 44 of the Sexual Offences Act 1956 uses this term to include “unnatural” as well as natural intercourse. As unnatural intercourse is defined in the Code as buggery, it is convenient to define sexual intercourse as intercourse between a man and a woman. The Committee recommended⁹ that rape should be limited to penile-vaginal intercourse. If this recommendation is accepted for rape, as to which some of us have reservations, we think the same definition should be applied to offences involving sexual intercourse generally. The first part of the definition in the clause (referring to the physical act of intercourse) provides accordingly.

¹Sexual Offences (1984), Cmnd. 9213 (hereafter called the “Fifteenth Report”).

²Prostitution in the Street (1984), Cmnd. 9329 (hereafter called the “Sixteenth Report”).

³Prostitution: Off-Street Activities (1985), Cmnd. 9688 (hereafter called the “Seventeenth Report”).

⁴Report, Vol. 1, para. 3.34.

⁵Fifteenth Report, para. 12.7, Recommendation 63.

⁶[1985] A.C. 147.

⁷Fifteenth Report, para. 2.48.

⁸Sixteenth Report, para. 3.13.

⁹Fifteenth Report, para. 2.47, Recommendation 6.

15.8 The second part of the definition of “sexual intercourse” is broadly intended to provide a definition of what is currently termed “unlawful sexual intercourse”. We have dropped the word “unlawful”, because to have included it might have given an appearance to the definition at odds with reality. Paragraph (a) states the accepted meaning of the expression in current legislation while paragraph (b), (i) (ii) and (v) states the circumstances in which sexual intercourse between husband and wife is at present “unlawful” for the purposes of the law of rape. Sub-paragraphs (iii) and (iv) may also represent the present law. Sub-paragraph (vi), however, goes farther than the present law. The Committee, though much divided on the question of marital rape,¹⁰ were unanimous that rape should be extended to the case of a husband and wife who are not cohabiting.¹¹ They considered various formulae including that in section 2(6) of the Matrimonial Causes Act 1973 — “a husband and wife shall be treated as living apart unless they are living with each other in the same household.” The Committee found difficulties with every formula and it is, of course, true that no form of words will provide a clear-cut answer to the question in all circumstances. This, however, is not uncommon in the law, even the criminal law, and we believe that the language of section 2(6) provides a workable test. It is accordingly adopted in paragraph (b) (vi).

15.9 The adoption of this meaning of “sexual intercourse” for the purposes of the whole Chapter (other than clause 120 (sexual acts in public) which includes intercourse between husband and wife) makes it clear that a husband may be guilty, in the specified circumstances, of other sexual offences against his wife — procuring her to have sexual intercourse by threats or deception and using an article to overpower for sexual purposes (clauses 90, 91, and 92). There is at present no authority on this question and the Committee made no recommendation about it, but consistency in principle and policy requires the step proposed.

15.10 “*Gross indecency*”. The Code does not provide a definition of this term. The Committee were opposed to providing one.¹² Some of us would have preferred to see either the term defined in the legislation or some other expression used.¹³

Clause 88: Intoxication

15.11 This rather technical clause supplements the general provision in clause 22(1)(a), that a person who was voluntarily intoxicated is to be treated, for the purpose of proof of a fault element of recklessness, “as having been aware of any risk of which he would have been aware had he been sober.” Some offences in this Chapter include a fault element of not believing in a particular circumstance (for example, in rape, not believing that the woman is consenting to the sexual intercourse). Such an absence of belief is not necessarily recklessness, as defined in clause 18(c), because absence of a belief that a circumstance exists does not entail awareness of the risk that it may not. So a provision corresponding to clause 22(1)(a) is needed to deal with a defendant’s claim to have been so drunk that he believed the woman was consenting. Clause 88 refers not only to the absence of a belief as a fault element, but also to a specified belief as a defence; this is because some provisions in the Chapter may be regarded as providing defences rather than as specifying fault elements when they declare a person to be guilty of an offence *unless* he holds a specified belief (for example, in sexual intercourse with an under-age girl, the belief that she is over sixteen).

Clause 89: Rape

15.12 The definition of rape is based upon the recommendations of the Committee. They recommended¹⁴ that the mental element in rape should cover –

- “(a) the man who knew that the woman was not consenting, and
- (b) the man who either was aware that she might not be consenting or did not believe that she was consenting.”

¹⁰We stress that, if we had been charged with formulating the policy for reform of the law on this issue, it is unlikely that our recommendation would have been the same as that of the Committee.

¹¹Fifteenth Report, para. 2.85, Recommendation 10.

¹²Fifteenth Report, paras. 7.14 to 7.20.

¹³See, e.g., commentary on clause 115 (para. 15.50) below.

¹⁴Fifteenth Report, para. 2.41, Recommendation 4.

It is arguable that any man who is aware that a woman might not be consenting does not believe that she is consenting so that all the cases in recommendation (b) could be covered by a provision that a man is guilty of rape if he does not believe that the woman is consenting. Indeed, such a provision covers everything in recommendation (a) as well but it is desirable to state (a) expressly so as to facilitate the useful practice of having two counts,¹⁵ one for “intentional”, and one for “reckless”, rape in appropriate circumstances. We also think it useful to state expressly that awareness is a sufficient mental element. “Is aware” and “does not believe” are coupled in the same paragraph because they are both appropriate to describe a reckless rape but the clause avoids the use of the word “reckless”. There is no requirement that it be unreasonable for a man who is aware that a woman is not consenting, or does not believe that she is consenting, to take the risk that the woman may not be, the premise being that it is never reasonable to take such a risk.¹⁶

15.13 *Consent and threats.* The Policy Advisory Committee were concerned about “cases where men are acquitted seemingly because some juries do not consider that a woman is raped when she submits to sexual intercourse through fear.” Following the Committee,¹⁷ subsection (2) makes it clear that a man is guilty of rape where he obtains the woman’s consent by a threat to use force against her or another. The Committee thought that “it should not be rape if, taking a reasonable view, the threats were not capable of being carried out immediately.” The Committee made no recommendation to require the woman’s belief to be based on reasonable grounds. Detention, in itself, would not negative the effect of consent but the Committee thought that it should be rape where a woman is confined by a man for the purpose of sexual intercourse and there is an express or implied threat to use force against her should she try to escape. But, if the woman knows that she can free herself from the effect of the threat and does not do so, her consent to sexual intercourse will negative rape. The effect of the subsection is that consent obtained by other threats — for example, to break off an engagement or to dismiss from employment — will negative rape but the man will be guilty of an offence under clause 90.

15.14 Although we have given effect to the Committee’s majority recommendation in subsection (2)(a), some of us feel strongly that it is wrong to confine the threats which can negative consent in rape not only to those which the woman believes will be carried out “*immediately* or before she can free herself” but also to threats to use *force*. The test appears to be stricter than that applying in the case of the defence of duress by threats (clause 42) and might be stricter than the present law relating to rape. Moreover, it is not difficult to think of examples of equally potent threats which would destroy any real consent (probably under the present law), such as to abduct her baby without the use of force.

15.15 *Consent and deception.* Subsection (2), again following the Committee,¹⁸ specifies the circumstances in which it will be rape if consent is obtained by deception. There is authority at common law¹⁹ that it is rape if the woman is deceived as to the nature of the act and the Sexual Offences Act 1956, section 1(2), provides that a man who induces a woman to have sexual intercourse with him by impersonating her husband commits rape; but it is by no means clear that intercourse obtained by other deceptions as to identity constitutes rape. The subsection provides that it does. The effect is that consent obtained by any other deception — for example, that the man is not married or that he intends to marry the woman — will negative rape, as under the present law, but the man will be guilty of an offence under clause 91.

15.16 *Proceedings for “rape offence”.* Subsection (3) gives effect to Schedule 4, which reproduces, with the minimum of modification, the relevant provisions of the Sexual Offences (Amendment) Act 1976, as amended by section 158 of the Criminal Justice Act 1988. The Schedule includes an offence of publishing or broadcasting any matter in contravention of paragraph 3 of the Schedule, which provides for the anonymity of complainants.

¹⁵*Mohammed Bashir* (1983) 77 Cr. App. R. 59 where the judge “very wisely” (*per* Watkins L.J. at 62) amended the indictment by introducing a second count for “reckless” rape; *Satnam S, Kewal S* (1983) 78 Cr. App. R. 149.

¹⁶Notwithstanding the recommendation of the Committee and the points raised in this paragraph, some of us think it would be simpler and clearer to state that a man is guilty of rape “if he does not believe that the woman is consenting”.

¹⁷Fifteenth Report, paras. 2.26–2.29.

¹⁸Fifteenth Report, paras. 2.20 to 2.25, Recommendation 2.

¹⁹*E.g. Flattery* (1877) 2 Q.B.D. 410; *Williams* [1923] 1 K.B. 340.

Clause 90: Procurement of woman by threats

15.17 This clause restates section 2(1) of the 1956 Act in Code style. Threats and intimidation are left undefined as in the present law.

Clause 91: Procurement of woman by deception

15.18 This clause restates section 3(1) of the 1956 Act, substituting “deception” for “false pretences or false representations” as recommended by the Committee.²⁰

Clause 92: Use of article to overpower for sexual purposes

15.19 This clause replaces section 4 of the 1956 Act. That section is limited to obtaining sexual intercourse. The Committee recommended its extension to buggery and gross indecency.²¹ “Drug, matter or thing” is replaced by “article or substance”. The clause clarifies two issues on which the section is unclear: (i) that the defendant must act in order to cause the result, whether he in fact causes it or not; and (ii) that he is guilty if he intends the sexual intercourse, etc., to be with himself. In a sense the clause is unnecessary in that anything within it is covered by clause 73 (administering a substance without consent) but the Committee recommended its continuance. Its function is to provide a specifically sexual offence. The sexual nature of the crime will appear on the offender’s record, as it would not if the conviction were a conviction under clause 73.

Clause 93: Intercourse with girl under thirteen

15.20 Subsection (1) of this clause replaces section 5 of the 1956 Act. It introduces new defences — that the defendant believed the girl to be his wife or to be over sixteen — as recommended by the Committee.²² As with the Committee’s recommendations generally, the onus of proof would be on the prosecution once the defendant had satisfied the evidential burden.²³ Provision of the defence of belief that the girl was over sixteen appears to be a significant departure from the existing law. Although the Committee thought that there would be very few cases where such a defence would be available on a charge of this offence, we are nonetheless concerned that the effect of the provision may diminish the protection to under-age girls because of the ease with which the defence could be claimed. We therefore doubt whether this defence should be available under clause 93. The same criticism applies to the availability of this defence elsewhere in this Chapter.²⁴

15.21 *Permitting girl to use premises for intercourse.* Surprisingly, the Committee made no recommendation relating to the provisions of the 1956 Act concerning the permitting of the use of premises for sexual intercourse with a girl under 13 (section 25) or a girl under 16 (section 26) or a woman who is a defective (section 27). There is no suggestion that these offences should cease to exist. The first of these offences is located here because of its close connection with the offence in subsection (1). There is some doubt whether the three offences require fault, or admit of a defence of mistake, with respect to the age of the girl or (in the case of the offence in section 27) the condition of the woman.²⁵ Consistency suggests that the principle applicable should be the same as that in subsection (1). Subsection (2) provides accordingly.

Clause 94: Intercourse with girl under sixteen

15.22 Subsection (1) replaces section 6 of the 1956 Act and subsection (2), section 26 of the Act. As with clause 93, subsection (1) follows the recommendations of the Committee²⁶; and subsection (2) is drafted on the same principles as clause 93(2).

²⁰Fifteenth Report, para. 2.108, Recommendation 15.

²¹Fifteenth Report, para. 2.109, Recommendation 16.

²²Fifteenth Report, paras. 5.17 and 5.18, Recommendations 24 and 25.

²³Fifteenth Report, para. 5.18, Recommendation 26.

²⁴See, e.g., clauses 93 (2) and 96.

²⁵See Smith and Hogan, *Criminal Law* 6th ed. (1988) pp.444-445.

²⁶Fifteenth Report, paras. 5.6, 5.11 to 5.14 and 5.16, Recommendations 23 and 24.

Clause 95: Non-consensual buggery

15.23 This follows the recommendation of the Committee that there should be a distinct offence of non-consensual buggery with a man or a woman, with the same mental element as for rape.²⁷ The Committee made no recommendation as to the nature of consent but it seems obviously right that the same principles should apply as in the case of rape and the clause provides accordingly. However, the reservations which some of us have expressed in relation to rape apply equally to the offence under this clause.²⁸

Clause 96: Buggery with child under thirteen

15.24 The Committee recommended that there should be a single offence of buggery with a child under thirteen and that the defence recommended in relation to unlawful sexual intercourse with girls under 13 and under 16 should apply.²⁹ In the case of a boy, however, the minimum age for homosexual intercourse is to be eighteen so it follows that the belief must be that the boy is 18 or above. In the case of buggery with a boy, the offence will be committed whether the man is the agent or the patient.³⁰

Clause 97: Buggery with girl under sixteen

15.25 This follows the form of the offence of unlawful sexual intercourse with a girl under sixteen as recommended.³¹

Clause 98: Buggery by man with boy under eighteen

15.26 This is the first of a series of new offences which are required because of the combination of (i) a recommendation of the Committee that an offence should carry a higher penalty in particular circumstances³² and (ii) the decision of the House of Lords in *Courtie*³³ that the provision for a higher penalty makes the offence in those circumstances a distinct offence. The effect is to produce pairs of offences, the one of which in the case of each pair includes the other. The model is the existing pair of offences of sexual intercourse with girls under thirteen and under sixteen respectively. These offences were formerly mutually exclusive and were redrafted in their present form by the Criminal Law Act 1967 because of the difficulties that this created. In this clause the circumstance which aggravates the offence under clause 99 is that the defendant is eighteen or over. The effect is that, if a person charged with the graver offence is acquitted because the prosecution fail to prove the aggravating fact, the defendant may be convicted of the lesser "included offence" under clause (8)(1)(b)(i).

Clause 99: Buggery with boy under eighteen

15.27 This implements the recommendation that it should be a separate offence of buggery for two males to engage in an act of anal intercourse where either is or both are under 18; and that a male aged 18 or over should have a defence if he believed his partner was aged 18 or over.³⁴

15.28 *Buggery between males aged over 18.* It is at present an offence for men over the age of twenty-one to commit buggery unless it is done "in private" as narrowly defined in section 1(2) of the Sexual Offences Act 1967. In future such acts will be an offence only if done in public as defined in clause 120.

15.29 Following the Committee's recommendations, there is a discrepancy between the age at which a man or a woman may lawfully consent to anal intercourse: while the minimum age would be 16 for females, it would be 18 for males. Our own preference would have been a policy which did not discriminate between the sexes in this way.

²⁷Fifteenth Report, paras. 3.6 to 3.7, Recommendation 18.

²⁸See paras. 15.12, 15.14 above.

²⁹Fifteenth Report, paras. 6.7, 6.10, 6.11, 6.15 and 6.16. Cf. our criticism at para. 15.20.

³⁰See clause 87.

³¹Fifteenth Report, paras. 6.7 and 6.11, Recommendation 31.

³²Fifteenth Report, para. 6.15.

³³[1984] A.C. 463.

³⁴Fifteenth Report, paras. 6.13 to 6.14, Recommendation 33.

Clause 100: Indecency by man with boy under eighteen

15.30 See the note on clause 98. This is an aggravated form of the offence under clause 101.

Clause 101: Indecency with boy under eighteen

15.31 This replaces the offence under section 13 of the 1956 Act, but limits it to the case where at least one of the parties is under 18, as recommended.³⁵ Gross indecency between males aged over 18, at present an offence unless done “in private” as defined in section 1(2) of the Sexual Offences Act 1967, will be an offence only if done in public as defined in clause 120.

15.32 In our view, one unsatisfactory result of the Committee’s recommendations is that in relation to clauses 100 and 101, and also clauses 98 and 99, a man of 18 would not be guilty of an offence if he believed the boy to be over 18 whereas a boy of 17 would be guilty of an offence notwithstanding this belief. This seems to us to be unjust. Although the draft clauses reflect the policy of the Committee, we would not wish to lend our support to implementation of them in their present form.

Clause 102: Homosexual acts on merchant ships

15.33 This provision replaces section 2 of the Sexual Offences Act 1967, which preserves the offence of buggery at common law and under section 12 of the Sexual Offences Act 1956 for certain acts on merchant ships. The offence would be an offence under the Code but no change of substance is involved.

Clauses 103 and 104: Incest

15.34 These clauses replace sections 10 and 11 of the 1956 Act with the modifications recommended by the Committee, that is to say, (i) that the offence should extend to adoptive as well as blood relationships between father and daughter and mother and son; (ii) that it should cease to be an offence for brother and sister to have intercourse where they have both reached the age of 21; and (iii) that daughters, granddaughters and sons under the age of 21 should be exempted from liability.³⁶ Some of us are uneasy about the rationale for extending the offence of incest beyond blood relationships. If it is felt necessary to impose special penalties for those who abuse a *de jure* or *de facto* parental relationship with another person, then it might be better to consider them altogether under the new offence in clause 105.

15.35 *Defence.* The Committee made no recommendation as to whether there should be a defence for a person who believes his partner to be of such an age that the intercourse would be lawful. Where, *ex hypothesi*, the parties are in a close relationship, such cases are likely to be rare but they could occur and it would be inconsistent with the general principle applied by the Committee in the other parts of the Report if the defence were not available. It is accordingly provided by the draft clauses.

15.36 *Aggravated incest.* The recommendation that incest by a man with a girl under the age of thirteen should carry a higher penalty³⁷ requires the creation of a separate offence and this seems to be conveniently designated “aggravated incest” by clause 103(2).

15.37 *Incitement of incestuous intercourse.* Clause 103(3) replaces section 54 of the Criminal Law Act 1977.

Clause 105: Intercourse with step-child under twenty-one

15.38 The Committee recommended that this should be a separate offence analogous to incest.³⁸ Consistently with clauses 103 and 104, provision is made for a defence of belief that the step-child is over twenty-one. We think it would be more consistent to extend this

³⁵Fifteenth Report, para. 6.18, Recommendation 35.

³⁶Fifteenth Report, paras. 8.28, 8.22, 8.37, Recommendations 42, 44 and 46.

³⁷Fifteenth Report, para. 8.41, Recommendation 47.

³⁸Fifteenth Report, para. 8.31, Recommendation 45.

offence to children treated as children of the family, rather than simply to step-children who may or may not have been so treated.³⁹

Clause 106: Intercourse with severely mentally handicapped woman

15.39 Subsection (1) replaces section 7 of the 1956 Act, but exempts from liability a man who is himself severely mentally handicapped and one who believes that the woman is not suffering from any mental handicap, as recommended by the Committee.⁴⁰ The definition of “severe mental handicap” in clause 6, which will apply to offences in this Chapter, is the same as that of “defective” in the 1956 Act, as amended. It is not thought necessary to provide any definition of “any mental handicap.” For our part, however, we think it would be more rational to exempt from liability a person who believes that the woman is not suffering from *severe* mental handicap (which is in effect the existing law).⁴¹

15.40 *Defence.* A man charged with an offence under clauses 106(1), 107, or 108 may raise the defence that he is severely mentally handicapped. Clause 35(4) makes it clear that this is not a defence of mental disorder and that, when successfully raised, it should result in an acquittal. No offence has been committed; so others, particularly medical staff, will not be in peril of conviction as accessories.

15.41 *Permitting mentally handicapped woman to use premises for intercourse.* Subsection (2) replaces section 27 of the 1956 Act.⁴²

Clauses 107 and 108: Buggery and indecency with severely mentally handicapped person

15.42 These clauses follow the Committee in creating specific offences of buggery and gross indecency with a male or female person suffering from severe mental handicap and provide the same exemptions as clause 106.⁴³

Clause 109: Abduction of severely mentally handicapped person

15.43 This clause replaces section 21 of the 1956 Act, with the defence recommended by the Committee.⁴⁴ We have used the term “care” in our clause in place of “possession” in the present legislation; the former seems more appropriate, but it is not meant to effect a change of substance. It is convenient to place the offence here because the other abduction offences in the 1956 Act will disappear with the recommendations of the Committee and the Child Abduction Act 1984, which is to be incorporated in the Chapter on offences against the person.⁴⁵

Clause 110: Sexual relations with mentally disordered patient

15.44 The Committee considered that the offences under section 128 of the Mental Health Act 1959 were outside their terms of reference but thought they should continue to be law and that the Committee’s recommendations in relation to section 7 of the 1956 Act (see clause 106 above) as to defences, penalties and mode of trial “could well have relevance” to these offences.⁴⁶ The fact that section 128 provides (in subsection (5)) that it is to be construed as one with the Sexual Offences Act 1956 and the omission of section 128 from the consolidation of mental health law in the Mental Health Act 1983 strongly suggest that the proper place for these offences is in the Code. Clause 110 accordingly restates the offences in Code style. The provisions of section 128 were extended by the Sexual Offences Act 1967 to include buggery or acts of gross indecency with a man. No provision was made in the 1967 Act for such acts with a woman, no doubt because buggery with a woman continued, and continues, to be unlawful at common law. It will cease to be unlawful under the recommendations of the Committee incorporated in the Code, except where specific

³⁹See para. 15.34 above.

⁴⁰Fifteenth Report, para. 9.11, Recommendation 53.

⁴¹Consistency would require a similar change in relation to the defences provided in clauses 107, 108 and 109.

⁴²See para. 15.21 above.

⁴³Fifteenth Report, paras. 9.6 and 9.11, Recommendations 50-53.

⁴⁴Fifteenth Report, paras. 13.11 and 13.12, Recommendations 67, 68.

⁴⁵See clauses 82-85.

⁴⁶Fifteenth Report, para 9.4.

provision is made. The offences in clause 110 therefore extend to buggery or gross indecency with a man or woman.

15.45 *Defence.* Subsection (4), in accordance with the general policy of this Chapter, provides a defence where the defendant believes that the woman with whom he has sexual intercourse, or the man or woman with whom he commits buggery or gross indecency, is not a mentally disordered patient.

Clause 111: Indecent assault

15.46 This clause implements the recommendation of the Committee that indecent assault should be the same offence whether committed against a male or female.⁴⁷ It also incorporates the effect of the decision of the House of Lords in *Court*.⁴⁸ The rule that children under 16 cannot consent to indecent assault disappears; but if the indecency is gross there will be an offence under clause 115 or (if the child is under thirteen) both clauses 114 and 115.

Clause 112: Procurement of gross indecency by threats

15.47 The Committee recommended the creation of this new offence.⁴⁹

Clause 113: Indecent exposure

15.48 This clause is intended to reproduce the effect of the offence under section 4 of the Vagrancy Act 1824⁵⁰ using modern and plain language. No attempt is made to codify the common law offence of indecent exposure which is an aspect of the common law offence of outraging public decency and which may be repealed in due course.⁵¹ However, we think there is a case for widening the offence in clause 113 to cover indecent exposure to another male, since cases involving exposure to a boy could be equally alarming and undesirable.

Clause 114: Indecency with child under thirteen

15.49 This aggravated offence is required by the recommendation of the Committee that a higher penalty should be available where the act is done with a child under thirteen.⁵²

Clause 115: Indecency with child under sixteen

15.50 This replaces the offence under section 1 of the Indecency with Children Act 1960 but raises the age of the child protected by the provision from 14 to 16. Children below the age of sixteen will be able to give effective consent to indecency but not to gross indecency. It is for this reason that some of us think that clauses 114 and 115 are good examples of instances where a statutory definition of "gross indecency" would have been helpful.⁵³ The defences, recommended by the Committee, are new.⁵⁴

Clauses 116 and 117: Indecent photographs of children

15.51 Clause 116 derives from section 1 of the Protection of Children Act 1978 and clause 117 from the Criminal Justice Act 1988, section 160. We have removed some inconsistencies in the 1978 Act (which refers to a single "photograph" in one offence and to "photographs" in others) and as between that Act and the 1988 provision ("photograph" throughout). Unlike other offences in this Chapter, it is not a defence that the defendant believes the child to be aged sixteen or above.

⁴⁷Fifteenth Report, para. 4.8, Recommendation 19.

⁴⁸[1988] 2 All E.R. 221.

⁴⁹Fifteenth Report, paras. 4.29 to 4.30, Recommendation 22.

⁵⁰Cf. Smith and Hogan, *Criminal Law* 6th ed., (1988) p.470.

⁵¹See our Report on Conspiracy and Criminal Law Reform (1976), Law Com. No. 76, para. 3.143.

⁵²Fifteenth Report, paras 7.21 to 7.23, Recommendation 38.

⁵³See para. 15.10 above.

⁵⁴Fifteenth Report, paras. 7.12, 7.21 to 7.23, 7.27, Recommendations 37-39.

15.52 *Ancillary provisions.* Subsection (5) gives effect to Schedule 5, which reproduces, with the minimum of modification, sections 4 and 5 of the Protection of Children Act 1978 which relate to powers of entry and search, seizure and forfeiture of indecent photographs of children.

Clauses 118 and 119: Bestiality

15.53 Following the recommendations of the Committee, buggery with an animal is in future to be known as bestiality and to be only a summary offence.⁵⁵ But procuring an act of bestiality by another person is to be a much more serious offence, triable either way and punishable with 5 years imprisonment.⁵⁶ Some of us disagree with the Committee (although not as to the criminality of procuring) and think that an offence of bestiality is outdated and should not be retained: conduct harming an animal is punishable under the law of criminal damage and cruelty to animals.

Clause 120: Sexual acts in public

15.54 This clause replaces the present law under which it is an offence for men to commit buggery or gross indecency otherwise than “in private”. The offence extends to heterosexual intercourse and acts of gross indecency by two or more persons. The Committee’s recommendation⁵⁷ that the offence should require the participation of two persons is clear. That is the reason why our clause does not apply to a single person committing an act of gross indecency in public or to one person committing an act of bestiality with an animal. It may be that the latter case was an oversight and should be included, although this would open the way to argument that other acts of gross indecency by a single person with an inanimate instrument, or without, should also be included.

15.55 “*In public*”. “Public place” is intended to be more narrowly defined than a place which is not “in private”. The Committee did not propose any definition of “public place” but it is desirable that there should be one and that provided by clause 6 is the definition commonly used in legislation. The Committee recommended that the offence should be extended to “clubs and places of common resort” by broadening the definition of “members of the public”⁵⁸ but this would not seem to be effective unless such a place is a place in which the offence can be committed. Subsection (2)(c) makes it clear that it is. The act committed on the club premises in view of the members will thus be an offence even though, but for these provisions, the club would not be a public place nor its members “members of the public.” The Committee did not offer any definition of “place of common resort”, presumably taking the view that this is a phrase with a generally known meaning. It appears to be intended to cover a place which is something like a club, but the *eiusdem generis* rule of construction would not apply. The phrase, “club *or other* place of common resort,” is intended to achieve the same effect.

Clause 121: Acts in public lavatories

15.56 This clause preserves the effect of section 1(2)(b) of the Sexual Offences Act 1967, as recommended by the Committee.⁵⁹

Clause 122: Meaning of “prostitute”

15.57 The Committee recommended that the epithet “common” be no longer used in respect of prostitutes.⁶⁰ But, as *Morris-Lowe*⁶¹ decides, the performance of a single act of “lewdness” for reward on one occasion does not make a person a common prostitute for the purposes of the present law. A prostitute is one who offers her or himself commonly for lewdness. On the other hand, the Committee stated that they did “not believe that, even theoretically, it should be open to a defendant in the offences we propose below to attempt

⁵⁵Fifteenth Report, para. 12.7, Recommendation 63.

⁵⁶Fifteenth Report, para. 12.9, Recommendation 64.

⁵⁷Fifteenth Report, para. 10.5, Recommendation 58.

⁵⁸Fifteenth Report, para. 10.21, Recommendation 59.

⁵⁹Fifteenth Report, para. 10.26, Recommendation 60.

⁶⁰Sixteenth Report, para. 17, Recommendation 1.

⁶¹[1985] 1 W.L.R. 29, [1985] 1 All E.R. 400.

to escape liability by arguing that the prostitutes working for him are in fact discriminating in their choice of clients.”⁶² The definition deals expressly with this point while the element of commonality is dealt with by requiring that the prostitute offers himself “to others.” The definition applies to both male and female prostitutes. “Lewdness” is an old-fashioned term and is replaced by “sexual purposes.” The clause makes clear the present law that prostitution extends to the case in which the prostitute is paid to do sexual acts, such as masturbation, to the body of his client.

Clause 123: Organising prostitution

15.58 The Committee recommended⁶³ the replacement by three new offences of the offences under section 30 (man living on earnings of prostitution) and 31 (woman exercising control over prostitute) of the 1956 Act and section 5(1) (living on earnings of male prostitution) of the Sexual Offences Act 1967. Clauses 123 to 125 give effect to the recommendations. Like the other clauses, clause 123 applies equally to males and females and to male and female prostitution.

Clause 124: Controlling a prostitute

15.59 The Committee recommended⁶⁴ that it should be an offence to “control or direct” the activities of a prostitute, but it does not appear that “direct” adds anything to “control” and the inclusion of both words might create a needless problem of construction for a court which would feel obliged to give each word some effect.

Clause 125: Facilitating prostitution

15.60 This definition is intended to achieve the effect described by the Committee.⁶⁵ It makes clear that the offence is complete when the act intended to facilitate prostitution is done, even though the meeting never in fact takes place; but the act must be more than a merely preparatory act because it must be intended “thereby” to facilitate the meeting.

Clause 126: Meaning of “premises”

15.61 The Committee,⁶⁶ for the purposes of offences relating to the use of premises for prostitution, wanted “premises” to include a boat or caravan and this is effected by the provision for the purposes of the whole Chapter in clause 87. Clause 126 implements the recommendation of the Committee⁶⁷ that the legislation should apply to a “nest of prostitutes”, each in separate occupation of part of a single building but under direct or indirect common control — as at common law. “A landlord should not be free to install and directly or indirectly control a number of prostitutes in one building and the word ‘premises’ should be defined so as to cover this situation.” The definition would not therefore cover a “co-operative” of prostitutes, each in occupation of a separate flat in a building but not “under common direction or control”.

Clause 127: Managing premises used for prostitution

15.62 This replaces the offence of brothel-keeping under section 33 of the 1956 Act.⁶⁸ The requirement that there be two or more prostitutes reflects the common law definition of a brothel. In one respect the offence is narrower than brothel-keeping, which applied whether the women required payment for their services or not.

Clause 128: Letting premises for prostitution

15.63 This replaces section 34 of the 1956 Act (landlord letting premises for use as a brothel) in accordance with the Committee’s recommendation.⁶⁹

⁶²Seventeenth Report, para. 1.4.

⁶³Seventeenth Report, paras. 2.9 to 2.11, Recommendation 2.

⁶⁴Seventeenth Report, para. 2.12 to 2.15, Recommendation 2(b).

⁶⁵Seventeenth Report, para. 2.18, Recommendation 2(c).

⁶⁶Seventeenth Report, para. 3.13.

⁶⁷Seventeenth Report, para. 3.14.

⁶⁸Seventeenth Report, para. 3.13, Recommendation 5(a).

⁶⁹Recommendation 5(b).

Clause 129: Permitting use of premises for prostitution

15.64 This replaces section 35 of the 1956 Act (tenant permitting premises to be used as brothel) in accordance with the Committee's recommendations.⁷⁰

Clause 130: Use of premises for prostitution involving personal harm

15.65 This is the offence proposed by the Committee⁷¹ to replace the aspect of the law concerning disorderly houses applied in *Tan*⁷² on the assumption that the offence of keeping a disorderly house will be abolished as recommended by us.⁷³ The Committee were concerned with "pain or injury". The Code term "personal harm" includes pain (clause 6).

Clause 131: Procurement of woman to become prostitute

15.66 This replaces section 22 of the 1956 Act.⁷⁴

Clause 132: Procurement of woman under twenty-one

15.67 This replaces section 23 of the 1956 Act. The Committee thought that the age limit should be reduced to 18 but that this would have to await revision of our international obligations in this respect.⁷⁵

Clause 133: Procurement of homosexual acts

15.68 The offence under section 4 of the Sexual Offences Act 1967 can be committed only by a man. This clause extends it so that it may be committed by a woman, as recommended by the Committee.⁷⁶

15.69 We agree with the Committee that there is a continuing need to penalise procurement for the purposes of prostitution. However, we are concerned that the effect of clauses 131 to 133 is to perpetuate a number of anomalies which exist in the present law. For example, we wonder whether there is any valid reason for limiting the offence in clause 131 to the procurement of a *woman* to become a prostitute. Why should the offence not apply to both women and men? A similar question arises in relation to clause 132. We note also that, while it is an offence to procure a woman to become, *in any part of the world*, a prostitute, there is no comparable extension of jurisdiction in the case of the conduct penalised by clause 133. Moreover, some of us question, in relation to the last clause, whether it should remain an offence, where there is no question of prostitution, and where two persons committing the homosexual act are not themselves guilty of any criminal offence.

Clauses 134 to 137: Soliciting for prostitution or sexual purposes

15.70 This part of the Chapter incorporates the Street Offences Act 1959 and the Sexual Offences Act 1985.

15.71 Following these Acts, we have retained in the draft clauses specific references to both the singular and plural: for example, clause 136(1) refers to the soliciting of "a woman (or different women) for the purpose of obtaining her, or their, services as a prostitute, or prostitutes". By including the plural, it is possible that this may lead to wrong inferences being drawn in relation to other clauses where only the singular form is used. It is not our intention that the normal presumption that, unless the context otherwise requires, the singular includes the plural should be displaced elsewhere.

⁷⁰Recommendation 5(c). The Committee made the further recommendation (para. 3.21, Recommendation 9) that section 35(2) and (3) of, and Schedule 1 to, the 1956 Act should be replaced with a new statutory provision for a covenant against use of the premises for the purposes of prostitution by two or more prostitutes to be implied in all leases. We think that such a provision falls outside the scope of the present exercise and we have not included it in the Criminal Code Bill.

⁷¹Seventeenth Report, para. 3.10, Recommendation 6.

⁷²[1983] Q.B. 1053.

⁷³Report on Conspiracy and Criminal Law Reform (1976), Law Com. No. 76, para. 3.143.

⁷⁴Seventeenth Report, para. 4.4, Recommendation 10.

⁷⁵*Ibid.*, para. 4.5.

⁷⁶Seventeenth Report, paras. 4.14 and 4.15, Recommendations 12 and 13.

15.72 The recommendation of the Committee for the creation of an offence of soliciting by a man of a woman for sexual purposes in a manner likely to cause her fear has not been implemented.⁷⁷ A clause incorporating that proposal was included in the Bill which became the Sexual Offences Act 1985 but was rejected by Parliament. Mr. David Mellor said⁷⁸ that a number of members at all stages of the Bill had expressed reservations as to whether the mischief met by the clause sufficiently outweighed the doubts about the way that it was drafted and its underlying thinking. Recommending the deletion of the clause, he said that he and those whom he had consulted were not saying that there was not a problem of women being placed in fear but they were not satisfied that the clause in the Bill was the right way to deal with it.

Clause 138: Soliciting by man for homosexual purposes

15.73 This replaces section 32 of the 1956 Act as recommended by the Committee.⁷⁹

Proof of sexual offences

15.74 The Sexual Offences Act 1956 includes an express requirement of corroboration in respect of several offences.⁸⁰ The Committee in their Eleventh Report recommended that these provisions should be replaced by a clause in their draft Bill requiring the judge to warn the jury of the special need for caution before convicting the defendant on the uncorroborated evidence of the victim of any sexual offence.⁸¹ The Committee reiterated this recommendation in their Seventeenth Report.⁸² In the light of recent developments in the common law relating to corroboration, we do not think it appropriate to adopt the Committee's draft clause in this part of the Code. We have followed them in eliminating the statutory requirements of corroboration.⁸³ The effect is that the common law principles (at present applicable to rape and other sexual offences where there is no statutory requirement) will apply to all sexual offences in the Code.⁸⁴

⁷⁷Sixteenth Report, para. 46, Recommendation 8.

⁷⁸*Hansard* (H.C.), 10 May 1985, Vol. 78, cols. 1038-1039.

⁷⁹Sixteenth Report, para. 55, Recommendation 10.

⁸⁰Sexual Offences Act 1956, ss. 2(2), 3(2), 4(2), 22(2) and 23(2).

⁸¹Eleventh Report: Evidence (General) (1972), Cmnd. 4991, paras 186-188 and draft Criminal Evidence Bill, cl. 17(1).

⁸²Para. 2.110.

⁸³Eleventh Report, para. 188 and clause 19(4).

⁸⁴We have the law concerning the corroboration of evidence in criminal proceedings under review following a reference to that effect made by the Lord Chancellor in November 1988: see Twenty-Third Annual Report 1987-1988, (1989) Law Com. No. 176, para. 2.13.

PART 16

PART II, CHAPTER III

THEFT, FRAUD AND RELATED OFFENCES

Subject-matter and method

16.1 *Subject-matter.* Chapter III of Part II of the Code contains the offences currently to be found in the Theft Act 1968, the Theft Act 1978, Part I of the Forgery and Counterfeiting Act 1981 and section 9 of the Criminal Attempts Act 1981 (vehicle interference). It brings together, that is to say, those statutory offences which share (in broad terms) an element of dishonest conduct or intention and which will be conveniently located in the Code.¹ The two Theft Acts obviously belong in this Chapter. Vehicle interference (cl. 151) is defined, in effect, as conduct preliminary to an offence of theft (cl. 140) or taking a conveyance without authority (cl. 150). Forgery and kindred offences (cll. 164 to 171) supplement the law of fraud and are placed immediately after the group of fraud offences from the Theft Acts (cll. 155 to 163).

16.2 *Conspiracy to defraud.* One important offence of dishonesty is missing from the Chapter. Conspiracy to defraud, although recently given a maximum penalty by statute,² remains in substance a common law offence. We cannot in the present project either propose its abolition without replacement, or replace it (whether by a new general offence of fraud, or by supplementation and amendment of existing offences, or by a combination of those methods), or attempt a statutory restatement of it. The last of these courses might be thought to be in keeping with the general aim of reducing existing law to consistent statutory form. But (even if it had merit) it would be premature in view of the consultation on conspiracy to defraud on which we have been currently engaged. In December 1987 we published a Working Paper on the subject in which we canvassed all of the above courses as options for consideration.³

16.3 *Method.* Unlike Chapters I and II, which for the most part implement modern law reform proposals, Chapter III offers no new law. It consists of a restatement of the existing offences, with (in general) only such changes as are required for consistency with the general content and style of the Code. The result, we believe, is that some of the offences are stated a good deal more simply and clearly. Very few amendments with more than merely stylistic significance — and these only minor ones — have been thought to be justifiable. They have been made in order to eliminate manifest error or inconsistency in the existing statutes or to improve clarity without risk of substantive change.

16.4 *Theft Acts unreformed.* Some will be disappointed by such restraint in the treatment of the Theft Acts. The law penalising dishonest conduct is of central importance and offences under these Acts account for a very large proportion of all the indictable offences with which the courts have to deal. It is a matter for some concern that both the Acts themselves (especially that of 1968) and the substantial case law that they have generated are regarded by some critics as seriously defective. This is not, however, a matter that it would be appropriate to pursue here. Our task at this point is to include in the draft Code the law of criminal dishonesty in its existing statutory condition.

Notes on draft clauses

16.5 *Introduction.* As said above, the offences collected in this Chapter of Part II are in general reproduced without reform. The aim has been to achieve consistency with Code style and method in point of language, presentation and clarity of statement, without affecting substance. The following paragraphs draw attention only to marked departures from the method or language of the enactments replaced.

16.6 *Clause 139: interpretation.* In keeping with the method of the Code, this clause gathers together definitions of terms used at various points in the Chapter.⁴ Any term used only in one section or group of sections is defined where it is used.

¹For the applicable principle of convenience, see Report, Vol. 1, para. 3.3.

²Ten years' imprisonment: Criminal Justice Act 1987, s. 12(3).

³Working Paper No. 104, Conspiracy to Defraud (1987). We hope to complete our final Report during 1989.

⁴The general definition of property is to be found in clause 6 (general interpretation).

16.7 *Clause 146: robbery.* We propose that the offence of assault with intent to rob, currently contained in section 8(2) of the Theft Act 1968, should appear with other assaults in the Chapter on offences against the person, where it will be found at clause 78.

16.8 *Clause 147: burglary.* This clause takes the opportunity to correct a plain and unintended error in section 9 of the Theft Act 1968. Section 9 (1)(a) expressly requires entry as a trespasser with intent to commit an “offence”. But section 9 (1)(b) does not expressly require the infliction of grievous bodily harm, which may convert a trespassory entry into burglary, to be an offence; if paragraph (b) were taken literally, burglary could be committed accidentally by someone in a building as a trespasser. This anomaly is an accident of the parliamentary proceedings on the Theft Bill.⁵ Our draft eliminates the error, consistently with known parliamentary intention and, we believe, uncontroversially.

16.9 *Clause 150: taking a conveyance or pedal cycle without consent.* This restatement of section 12 of the Theft Act 1968 takes pedal cycles out of the category of “conveyances”, for the sake of simplification and without alteration of the law.⁶

16.10 The words “or other lawful authority” in subsections (1) and (2) and the reference to belief in lawful authority in subsection (4) might be thought not to be strictly necessary in view of the general Code provisions in clauses 41 (belief in circumstance affording a defence) and 45 (acts justified or excused by law). But to omit them would, we think, put comprehensive grasp of the Code at an unwarrantable premium. In any case, “without lawful authority”⁷ may differ from “unlawfully” and “without lawful excuse” (expressions generally renounced for the purpose of stating Code offences⁸) in indicating to the courts that they may recognise types of authority and excuse that are special to the offence in question and do not constitute general defences. For these reasons it seems clear that this aspect of the language of section 12 of the Theft Act should be preserved.⁹

16.11 *Clause 154: blackmail.* In the Theft Act 1968 this offence appears (in section 21) immediately after the offences of fraud, with which it shares the cross-heading “Fraud and blackmail”. It is here removed from that position, so that a group of offences headed “Fraud” can begin with a definition of “deception”¹⁰ (irrelevant to blackmail) and be immediately followed by the related group of clauses dealing with forgery and kindred offences.

16.12 *Clause 159: obtaining pecuniary advantage by deception.* We propose in subsection (2) a minor amendment of section 16(2) of the Theft Act 1968 for the sake of clarification only. Section 16(2) begins:

“The cases in which a pecuniary advantage within the meaning of this section is to be regarded as obtained for a person are cases where —....”

Our equivalent passage (in the style of the Code) is:

“For the purposes of this section a pecuniary advantage is obtained for a person if, and only if, —....”

We draw attention to the words “and only if”. The supposition that “pecuniary advantage” means anything that can be regarded as such an advantage and that subsection (2) merely gives examples is quite common. That this is erroneous might be thought to be quite plain but experience shows that it needs to be made plainer.

16.13 *Clauses 162 and 163: suppression, etc. of documents; procuring execution of valuable security.* Section 20 of the Theft Act 1968 is here divided into two sections because the section contains two quite different offences, one involving deception and one not. What they have in common is the technical term “valuable security”, which is defined in clause 162(2).

⁵The matter is explained by Professor J.C. Smith in a comment on *Jenkins* at [1983] Crim. L.R. 386.

⁶Compare cl. 150 (1) and (2) with Theft Act 1968, s. 12 (1) and (5).

⁷And, in other contexts, “without reasonable excuse”.

⁸See above, para. 12.5.

⁹Cf. clause 149, where the phrase “without lawful authority” also includes a reference to the absence of the consent of the owner.

¹⁰See clause 155 reproducing Theft Act 1968 s. 15(4). In our Working Paper No. 104, *Conspiracy to Defraud* (1987), para. 10.9 and our Working Paper No. 110, *Computer Misuse* (1988), para. 5.3 we have proposed an extension of the existing definition of “deception” to cover the deception of a machine (including a computer).

16.14 *Clause 172: handling stolen goods.* It might be argued that the Code definition of “knowledge” as in effect embracing “wilful blindness”¹¹ renders otiose the words “or believing” in section 22 (1) of the Theft Act 1968. But the courts do not in this context equate belief with wilful blindness, which they treat only as evidence of belief¹²; “believing” may cover some cases that “knowing”, as defined in clause 18(a), will not cover; and no harm seems to be done by its inclusion.

16.15 Our restatement of this offence proposes one piece of clarification. As the offence is currently drafted, a person may commit handling “if he...dishonestly undertakes or assists in [the] retention, removal, disposal or realisation [of stolen goods] by or for the benefit of another” or “if he arranges to do so” (where “do so” also refers to receiving them). This clumsy expression has caused much unnecessary trouble. It seems clear that what is meant is that one may either (i) *undertake* a relevant act *for the benefit of* another or (ii) *assist in* the doing of a relevant act *by another*.¹³ Clause 172 is drafted accordingly.

16.16 *Clause 173: advertising rewards for return of goods stolen or lost.* It has been held that this offence in section 23 of the Theft Act 1968 is an offence of strict liability; it may be committed by a printer or publisher who is unaware of the offending advertisement.¹⁴ Hence clause 173(2), excluding the application of clause 20, which, if it applied, would reverse that interpretation.

16.17 *Clause 175: going equipped.* This restatement of section 25 of the Theft Act 1968 omits section 25 (3), which provides:

“(3) Where a person is charged with an offence under this section, proof that he had with him any article made or adapted for use in committing a burglary, theft or cheat shall be evidence that he had it with him for such use.”

Such a provision seems to us to be inappropriate in a Code. It is merely an example of a wider general proposition that the tribunal of fact may draw a reasonable inference in the absence of evidence raising a doubt about the safety of the inference. Compare, for instance, the inference, to which the Theft Act 1968 (and, accordingly, Chapter III) does not refer, that may be drawn from possession of recently stolen goods.

16.18 *Clause 177 and Schedule 6: ancillary provisions.* Schedule 6 reproduces sections 26 (except as already repealed), 27 and 31 (1) of the Theft Act 1968, which are concerned with law enforcement, evidence and procedure.¹⁵

16.19 *Provisions not reproduced.* The following provisions of the Theft Act 1968¹⁶ are not reproduced:

- (i) Section 28: orders for restitution. This concerns the powers of criminal courts on conviction. It belongs in a Powers of Criminal Courts Act (or in a future Part IV of the Code). We recommend that it remain in the Theft Act for the time being.
- (ii) Section 30(1): application of Act between spouses. The criminal law generally applies to spouses. So, for example, the Criminal Damage Act 1971 found no need for a provision to the effect that one spouse can be guilty of damaging the other’s property. The Theft Act provision was from abundance of caution or for the avoidance of doubt, in view of the contrary rule at common law in the case of larceny.¹⁷ There is no need for section 30(1) to be repeated.
- (iii) Section 30(2): spouses as prosecutors and witnesses. This subsection provides that one spouse can¹⁸ bring proceedings against the other “for any offence (whether under this Act or otherwise)” and can give evidence for the prosecution at any stage of such proceedings. As this relates to all offences, it has no place in a particular Chapter of Part II. It might perhaps be repealed, for it seems that repeal would not revive any pre-existing rule to the contrary.¹⁹ Or it could stay where it is (pending preparation of Part III of the Code).

¹¹See clause 18(a); above, para. 8.10.

¹²See especially *Griffiths* (1974) 60 Cr.App.R. 14; *Moys* (1984) 79 Cr.App.R. 72.

¹³Cf. *per* Lord Bridge in *Bloxham* [1983] 1 A.C. 109 at 113.

¹⁴*Denham and Scott* (1983) 77 Cr.App.R. 210.

¹⁵See Report, Vol. 1, para. 3.27.

¹⁶Other than provisions which are spent, already repealed or replaced by more general provisions in Part I.

¹⁷Preserved in part by the Larceny Act 1916, s. 36.

¹⁸Subject to s. 30(4), which is reproduced in column 5 of Schedule 1, in the entries relating to clauses 140 and 180.

¹⁹Interpretation Act 1978, s. 16(1)(a); Bennion, *Statutory Interpretation* (1984), p. 436.

- (iv) Section 31(2): this provision is concerned exclusively with title to property “stolen or obtained by fraud or other wrongful means”.
- (v) Section 32(1) and Schedule 1: preservation of pre- Theft Act offences. Schedule 1 of the 1968 Act preserved with modifications existing offences of taking or killing deer and taking or destroying fish. Paragraph 1 of the Schedule has been superseded by the Deer Act 1980, section 1, creating some summary offences not appropriate for transfer to the Code. Paragraph 2 contains a summary offence of taking or destroying fish in water which is private property or in which there is a private right of fishery. This offence also we propose should be omitted from the Code.

PART 17

PART II, CHAPTER IV

OTHER OFFENCES RELATING TO PROPERTY

Subject-matter and method

17.1 *Subject-matter.* Chapter IV of Part II of the Code contains offences currently to be found in the Criminal Damage Act 1971 (cl. 178-186: offences of damage to property), in Part II of the Criminal Law Act 1977 and section 39(2) of the Public Order Act 1986 (cl. 187-195: offences relating to entering and remaining on property) and in section 1 of the Protection from Eviction Act 1977 as amended by section 29 of the Housing Act 1988 (cl. 196: unlawful eviction and harassment of residential occupier). These are the offences which, applying the test of user convenience,¹ we judge suitable for transfer to the Code.

17.2 *Method.* In principle, the aim in this Chapter, as in Chapter III, has been to restate the existing offences in Code style and otherwise consistently with the Code as a whole. Achieving this aim in the case of offences of damage to property involves some proposals for change in the law to which we draw attention in the notes that follow.

Notes on draft clauses

17.3 *Introduction.* These notes, like those in the preceding Part on the clauses in Chapter III, are mainly concerned with points of substance rather than of style and presentation.

17.4 *Clauses 178 and 179: interpretation.* The effect of these definitions of terms for the purposes of the offences of damage to property is, except in one respect, the same as that of the corresponding provisions of the Criminal Damage Act 1971. The exception is a small one. Under the 1971 Act the exclusion from the meaning of “property” of certain things growing wild (section 10(1)(b)) applies for all purposes of the Act. This is unsatisfactory; the fruits and flowers of wild shrubs must surely be “property” within the meaning of the rule that reasonable steps can be taken in the protection of property (clause 185). Clause 178(1) slightly limits the meaning of “property” for the purposes only of the definition of offences, leaving the full definition in clause 6 to apply for the purposes of the clause 183 defence.

17.5 *Clause 180: destroying or damaging property.* Subsection (1) is simpler in form than its original, section 1 (1) of the Criminal Damage Act 1971. The language of section 1 (1) incorporates the effect of the common law rules on “transferred intent”, ensuring that D commits the offence created by the subsection if, having the required fault with respect to property belonging to O, he does an act causing damage to property belonging to P. This result is achieved under the Code by the general provision on transferred fault in clause 24 (1), with the gain in simplicity referred to. The substitution of “causes the destruction of or damage to” for “destroys or damages” (in subsections (1) and (2)) has already been explained.²

17.6 *The fault required* for any offence under this section is stated as intention or recklessness. This repeats the language of section 1, but not its effect as explained by the House of Lords in *Caldwell*.³ For recklessness as defined for the purposes of the Code by clause 18(c) is narrower, for reasons we have given above,⁴ than recklessness in section 1 as explained in *Caldwell*. To reproduce the effect of section 1 since *Caldwell* it would be necessary to add a third alternative fault element to the offences in clause 180. This could of course be done; the Code team provided the term “heedlessness” for the purpose.⁵ We agree with the team, however, in thinking that, if it were done, it would be necessary to make a similar extension of the offence of intentional or reckless personal harm (clause 72), and perhaps of some other offences against the person. Without such a corresponding change a

¹See Report, Vol. 1, para. 3.3 above.

²See para. 7.13 above.

³[1982] A.C. 341. See para. 8.18 above.

⁴Para. 8.19.

⁵Defined, in effect, as giving no thought to whether there is a risk (which would be obvious to any reasonable person) that a relevant circumstance exists or will exist, or to whether a relevant result will occur, the risk being one that it is in the circumstances unreasonable to take: cf. cl. 22(a) of the Code team’s Bill.

person who by the same act damaged both the eye and the spectacles of another would be more readily convicted of criminal damage to the spectacles than of recklessly causing personal harm. A similar anomaly exists at present, in a case of wounding or inflicting grievous bodily harm, because of the different minimum fault requirements under section 1 of the Criminal Damage Act and section 20 of the Offences against the Person Act 1861.⁶ Nor at present could there be a conviction of assault occasioning actual bodily harm, under section 47 of the 1861 Act, without proof of intention or recklessness in respect of the assault;⁷ and recklessness here appears to have the narrower sense adopted in clause 22.⁸ To include heedlessness as a mode of committing offences against the person would be to depart from the existing law as well as from the recommendations of the Criminal Law Revision Committee upon which the offences in Chapter I are based. It is not appropriate for us to propose that course. Nor would we wish to do so. Like the Criminal Law Revision Committee, we have consistently recommended that the fault elements of serious criminal offences be drafted in terms of intention or recklessness (in the clause 18 sense). We are fortified in maintaining that position now by our knowledge that the *Caldwell* interpretation of section 1 of the Criminal Damage Act has been, to say the least, controversial and that the direction to the jury recommended in that case has caused practical difficulties.

17.7 “Without lawful excuse”. This phrase occurs in the definitions of the offences in sections 1, 2 and 3 of the 1971 Act (with a partial explanation in section 5) We have already explained why it is not used in the Code.⁹ The cases of “lawful excuse” provided by section 5 are reproduced in clauses 184 and 185. An “excuse” that no doubt excludes an offence under section 1 (1) of the 1971 Act (clause 180(1)) is the consent of the owner of property to its destruction or damage.¹⁰ This is worth referring to explicitly and is stated by clause 184. All other matters of defence covered by the phrase “without lawful excuse” in the 1971 Act are taken care of by the provision of general defences in Part I of the Code and by the general saving of any justification or excuse available by statute or at common law (clause 45).

17.8 *The entries in Schedule I* are set out in such a way as to make clear that clause 180, according to the principle stated by the House of Lords in *Courtie*,¹¹ creates three offences: 1. an offence under subsection (1), committed otherwise than by fire, and punishable with a maximum of ten years’ imprisonment on conviction on indictment; 2. an offence under subsection (1), committed by fire (arson), with a maximum of life imprisonment; 3. an offence under subsection (2), whether arson or not, also punishable with life imprisonment.

17.9 *Clause 184: consent or belief in consent*. This clause goes a little further than section 5 (2)(a) of the 1971 Act, for a reason already given.¹² It applies where the actor *knows* that he has the owner’s consent as well as where he mistakenly believes that the owner has consented or would consent if he knew of the circumstances. It does not, however, apply where the owner in fact consents (or would consent) if the actor is unaware that this is so.

17.10 *Clause 185: protection of person or property*. This clause replaces section 5 (2)(b) of the 1971 Act, but not without significant amendment. The need to achieve consistency between the treatment of persons and of property and between defences permitting the use of protective measures has been mentioned elsewhere in this Report.¹³ This explains the differences of substance between the 1971 provision and the present clause. The changes are as follows:

- (i) The protection of the person from force, injury or imprisonment is permitted, as well as the protection of property.
- (ii) Property may be protected from appropriation as well as from destruction or damage.

⁶As to s. 20, see *W. (A Minor) v. Dobey* (1989) 88 Cr. App. R. 1, [1983] Crim. L.R. 681; *Grimshaw* [1984] Crim. L.R. 108; *Morrison*, *The Times* 12 November 1988.

⁷*Venna* [1976] Q.B. 421.

⁸Smith and Hogan, *Criminal Law* 6th ed., (1988), 379; Glanville Williams, *Textbook of Criminal Law* 2nd ed., (1983), 171.

⁹See para. 12.5 above.

¹⁰Cf. *Denton* [1981] 1 W.L.R. 1446.

¹¹[1984] A.C. 463; that is, the principle that, where greater punishment can be imposed if a particular factual ingredient can be established than if it is not, two distinct offences exist.

¹²See para. 17.7 above.

¹³See para. 12.25 above.

- (iii) The word “unlawful”¹⁴ qualifies the acts against which protective measures may be taken. This means that the clause does not extend to the defence of property against an attack by an animal (such as an attack by a dog on sheep) that involves no crime or tort on the part of its owner. For this purpose, as for others,¹⁵ the clause has to be eked out by resort to surviving common law defences (clause 45(c)).
- (iv) Action immediately necessary and reasonable in the circumstances which exist (even unknown to the actor) is permitted, and not only action called for in the circumstances which he believes to exist.
- (v) The test of the immediate necessity for, and the reasonableness of, the action taken is made objective.

17.11 *Relationship to clause 44* (use of force in public or private defence). The result is harmony between clauses 44 and 185 in all the respects just listed. But there is one difference between them. Clause 185 is not limited to the use of force; property might exceptionally be destroyed or damaged by means not involving force.

17.12 *Clauses 187-194: offences relating to entering and remaining on property*. These offences have undergone a good deal of reorganisation and rewriting to make them compatible with the Code but do not in general require comment.

17.13 *Clause 195: obstruction of court officers*. It seems appropriate to transfer this specialised obstruction offence to the present Chapter along with the other offences from Part II of the Criminal Law Act 1977. In due course the Code should contain a Chapter dealing with offences relating to the administration of justice,¹⁶ to which it would then no doubt be appropriate to transfer this offence.

17.14 *Strict liability*. The parenthesis in subsection (1) replaces the words “in fact” in the original. Subsection (3) gives a defence of belief that the person being obstructed is not an officer of the court. For the rest, “in fact” appears to mean the offence is one of strict liability in respect of the status and function of the person being resisted or obstructed. The parenthesis in subsection (1) makes this clear, excluding the fault requirement that would otherwise be implied by clause 20 (1).

¹⁴Subsection (2) gives this word the same meaning here as it has in clause 44 (use of force in public or private defence).

¹⁵It is clear that neither s. 5 (2) of the Criminal Damage Act nor clause 185 covers all the circumstances in which protective measures causing damage to property are “justified or excused by law” (to use the language of clause 45). Not all justified acts, for example, protect property “in immediate need of protection” (s. 5 (2)) or are “immediately necessary” (cl. 185). See Smith and Hogan, *Criminal Law* 6th ed., (1988), 690-692, 695-696.

¹⁶See our Report on that subject (1979), Law Com. No. 96; and Report, Vol. 1, Appendix C.

PART 18

PART II, CHAPTER V

OFFENCES AGAINST PUBLIC PEACE AND SAFETY

Subject-matter and method

18.1 *Subject-matter.* Chapter V of Part II of the Code contains offences currently to be found in the Public Order Acts 1936 and 1986, the Public Meeting Act 1908, the Prevention of Crime Act 1953, the Criminal Justice Act 1988, the Restriction of Offensive Weapons Act 1959 and section 51 of the Criminal Law Act 1977. The Chapter thus brings together those statutory offences concerned with the preservation of public order and safety which will conveniently be located in the Code.

18.2 *Method.* This Chapter, like Chapters III and IV, restates existing law. In general the only changes proposed are those required for consistency with the style and terminology of the Code as a whole.

Notes on draft clauses

18.3 *Introduction.* These notes, like those relating to the clauses in Chapters III and IV, are largely concerned with points of substance rather than matters of style and presentation. We do, however, draw attention to any marked departures from the method or language of the enactments replaced.

18.4 *Clauses 198 — 202: the fault element.* These clauses restate in Code style the offences contained in sections 1 to 5 of the Public Order Act 1986. The references to a person being “reckless” whether, for example, his conduct is violent or his behaviour threatening, replace the corresponding references to “awareness” in section 6 of the Public Order Act 1986. We had previously recommended the use of awareness as an alternative to recklessness in view of the different meanings of that term in different offences.¹ Now that the Code provides a uniform definition of recklessness in subjective terms it is appropriate to use it here. A minor change in the law is involved in that recklessness requires in addition to awareness of the relevant risk that it be unreasonable to take it. The burden will be on the prosecution to prove this, but in practice the issue will virtually never arise. It is not easy to see how in this context a person could claim that it was reasonable for him to take the risk that his conduct might be violent or his behaviour threatening. The change in wording will have the advantage that where public order offences are charged with offences against the person or offences against property, for which recklessness is frequently the fault element, fewer fault terms will need to be explained to the jury.

18.5 *Involuntary intoxication: burden of proof.* The Code does not restate section 6(5) of the Public Order Act 1986. That provision, which has effect in relation to the offences in sections 1 to 5 of the Public Order Act 1986, places on the defendant the burden of proving that his intoxication was involuntary. The provision is inconsistent with the general principle contained in clause 22(7).² Having regard to this general principle, we think that the small group of public order offences corresponding to those in the Public Order Act 1986 should not be treated as anomalous by placing on the defendant such a burden of proof. If the Code were to be enacted, we believe that the law on this point should be changed in order to achieve the necessary consistency and simplicity for use with juries.

18.6 *Clauses 203 - 210: racial hatred.* Clause 203(1) sets out the definitions contained in sections 17 and 29 of the Public Order Act 1986. The definitions of “distribute”, “publish” and “recording” have been amended slightly in consequence of our decision to include in clause 203 the interpretation provisions formerly in sections 19(3) and 21(2) of the Public Order Act 1986. We have also taken the opportunity to add entries for “play” and “show” to the list.

18.7 *Clauses 204 — 209* restate in Code style the offences set out in sections 18-23 of the Public Order Act 1986. In clause 207(4) there is substituted an express statement that the burden of proof is on the defendant in place of the words in section 20 (3) of the Act, “the

¹ Offences relating to Public Order (1983), Law Com. No. 123, paras. 3.41-3.52.

² See para. 8.51 above.

performance shall, unless the contrary is shown, be taken not to have been given solely or primarily for the purposes mentioned above.” It is clearer, and more in keeping with Code style, to use the language of burden of proof rather than that of presumptions.

18.8 *Directors’ liability.* Section 28 of the Public Order Act 1986, which contains the standard provisions relating to the liability of directors and members of corporations in respect of offences by the corporations, is not reproduced in this Chapter. The matters covered by the section are dealt with in the Code in clause 31.

18.9 *Clause 214: disturbances at public meetings.* This clause restates in Code style the offences contained in section 1(1) and (3) of the Public Meeting Act 1908. Section 1(2) of that Act (incitement to commit offences under section 1) is not reproduced in this Chapter because its effect is preserved by clause 47 (the general offence of incitement, which includes incitement to commit summary offences).

18.10 *Obstruction of constable.* The Chapter does not include, although it might have done, the offence under section 51(3) of the Police Act 1964 of obstruction of a constable in the execution of his duty. The reason for its exclusion is the requirement that the obstruction be done “wilfully”. This is a term used in a number of offences in existing law, but the differing interpretations it has been given in different contexts³ have caused difficulty and render it unsuitable for use as a fault term in the Code. Moreover its appearance in the Code in the context of obstruction might cause embarrassment in view of the terms of the offence under clause 195(1) of obstruction of court officers executing process for possession. This clause restates section 10 of the Criminal Law Act 1977 which refers to “intentionally” obstructing etc. We prefer the latter term which is of course used throughout the Code. However, we do not feel that we can alter the definition of the offence in the Police Act 1964 without further review and consultation. Pending such a review it would be better to leave this offence out of the Code, although it is to be hoped that it will in due course be included.

18.11 *Other offences not included.* We also omit from this Chapter the following offences, which, but for the considerations which we mention against each, would have been candidates for inclusion:

- (a) Offences under the Unlawful Drilling Act 1819. We have not felt it appropriate to undertake, as part of the present exercise, the modernisation of this ancient legislation.
- (b) Offences under the Explosive Substances Act 1883. These offences also require, before they can be introduced into the Code, more radical amendment than we have felt it proper to undertake without consultation.⁴
- (c) Offences under sections 16-25 of the Firearms Act 1968 (headed “Prevention of crime and preservation of public safety”) . The inclusion of clauses 215 and 216 (possession of offensive weapon or article with blade or point) may make the exclusion of these offences, including that of carrying a firearm in a public place, seem hardly logical. But the offences are part of a more general code for the control of firearms from which, we believe, it would be artificial and probably inconvenient to detach them.
- (d) Entering a football ground in breach of an exclusion order (Public Order Act 1986, section 32(3)). This belongs rather with the body of law on the control of sporting events.

³ See Smith and Hogan, *Criminal Law* 6th ed. (1988), 122-124 and 395-396.

⁴ See also para. 14.59(b) above.

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