

Legislating the Criminal Code
**OFFENCES AGAINST THE PERSON
AND GENERAL PRINCIPLES**



LAW COMMISSION
LAW COM No 218

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The Law Commission

(LAW COM. No. 218)

CRIMINAL LAW

LEGISLATING THE CRIMINAL CODE

**OFFENCES AGAINST THE PERSON
AND GENERAL PRINCIPLES**

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by Command of Her Majesty
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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.

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THE LAW COMMISSION

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THE PERSON AND GENERAL PRINCIPLES

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ABBREVIATIONS

In this Report the following abbreviations are used:

- “ 1861 Act ”: The Offences against the Person Act 1861 (c 100)
- “ CLRC ”: the Criminal Law Revision Committee
- “ CLRC Fourteenth Report ”: Criminal Law Revision Committee, *Fourteenth Report: Offences against the Person* (Cmnd 7844, 1980)
- “ Code Team Report ”: *Report to the Law Commission on the Codification of the Criminal Law* (Law Com No 143, 1985)
- “ Draft Code ”: the draft Bill contained in Volume 1 of *A Criminal Code for England and Wales* (Law Com No 177, 1989)
- “ Code Report ”: the remainder of Volume 1, and Volume 2, of Law Com No 177
- “ LCCP 122 ”: Law Commission Consultation Paper No 122, *Legislating the Criminal Code: Offences against the Person and General Principles* (1992)
- “ LCCP 127 ”: Law Commission Consultation Paper No 127, *Intoxication and Criminal Liability* (1993)
- “ Criminal Law Bill ” the draft Bill implementing the recommendations of this Report, contained in Appendix A to this Report.

THE LAW COMMISSION

Item 5 of the Fourth Programme: Criminal Law

LEGISLATING THE CRIMINAL CODE

OFFENCES AGAINST THE PERSON AND GENERAL PRINCIPLES

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

PART I INTRODUCTION

The history and purpose of this project

1.1 The proposals in this Report spring directly out of the work done by the Commission in the 1980s on the Criminal Code. In the Consultation Paper on which the proposals are based¹ we set out the reasons why codification of English criminal law is urgently needed,² and we also described the wide measure of support that had been attracted by our published statement of policy on the production of a Criminal Code.³

1.2 The Draft code, published in 1989, set out virtually the whole of the law relating to indictable offences in an accessible, comprehensible and consistent form. The main aim of this exercise was to restate in a rational form the complex and often antiquated and confusing mixture of common law and statute in which the criminal law is presently to be found. At the same time we took the opportunity to incorporate in the Draft Code, in the same format as the rest of the text, various proposals for the reform of the criminal law that have been made by official expert bodies in recent years, despite the fact that none of them have yet been implemented.

1.3 The Draft Code lays the foundation for our further work on the criminal law. Our objective now is to produce a series of Bills, each of which will be complete in itself and will contain proposals for the immediate reform and rationalisation of a major, discrete area of the criminal law. Each of those Bills will, like the Criminal Law Bill that accompanies this Report, be suitable for immediate enactment, and when enacted it will place the part of the law with which it deals on an accessible statutory basis. The Bills will, however, all employ the method and approach of the Draft Code, so that in the longer term it ought to be possible with comparative simplicity to combine all the different parts of the new, statutory, criminal law into the single, unified criminal code that the law of England and Wales so badly needs.

1.4 For the first step in this process we selected the law of non-fatal⁴ offences against the person, together with a substantial number of general principles and defences that apply throughout the criminal law as a whole. We picked this topic first because we believed that there was widespread agreement that the law of non-fatal offences needed

¹ Law Commission Consultation Paper No 122, *Legislating the Criminal Code: Offences against the Person and General Principles* (1992): hereafter, "LCCP 122".

² LCCP 122, paragraphs 1.4–1.8.

³ The matter is dealt with generally in *A Criminal Code for England and Wales* (Law Com No 177, 1989). In this Report we will refer to this document as the "Code Report" and the draft Bill which it contains as the "Draft Code". The public response to the Commission's initial consultation on the codification project, and the Commission's policy conclusions resulting from that response, are described in Part 2 of the Code Report: "The Case for a Criminal Code."

⁴ We explained in paragraphs 2.10–2.14 of LCCP 122 our reasons for not including homicide in the present exercise. The law of murder, including voluntary manslaughter, had recently been reviewed by the Select Committee of the House of Lords (the Nathan Committee). We see great force in the Nathan Committee's proposals, but since there continues to be no indication that government is minded to legislate to implement those, or any other, reforms of that part of the law, we were unable to justify a further consideration of the subject by this Commission so soon. That is not the case in respect of *involuntary* manslaughter (causing death by an unlawful act or by "gross negligence"), which has not recently been considered and which recent events have shown to be very badly in need of review. The law of involuntary manslaughter does not overlap with the law considered in this Report, and therefore can conveniently be addressed separately from it. We will accordingly be publishing, in the early part of 1994, a Consultation Paper on involuntary manslaughter, as the next step in the programme of criminal law reform that is described above.

urgent attention, and that a Bill putting the law on a rational and simple basis would be widely welcomed. That belief was strongly borne out on consultation.⁵ In our view such a Bill should, however, deal not only with the separate offences against the person, but also with the general principles (such as “transferred fault”) and general defences (such as duress and self-defence) that most commonly arise in connexion with offences against the person. These principles and defences, although of crucial importance in many trials, have never been put on a proper statutory basis. The Criminal Law Bill presented in this Report accordingly brings together, in one place, and in comprehensive terms, most of the rules of law, both the rules defining offences and the rules creating and limiting defences, that a court will need to refer to when it is trying charges of non-fatal offences against the person.

1.5 These objectives, and the means that we proposed for achieving them, were set out for consultation in LCCP 122. Our task in LCCP 122 was made much easier for us by two things. First, the law of offences against the person had previously been the subject of detailed consideration by the Criminal Law Revision Committee⁶ in its Fourteenth Report, published in 1980,⁷ and our own proposals were able closely to follow the recommendations of that expert and experienced Committee. Second, a published text was already available to us in the Draft Code that addressed all the issues in statutory terms. By building on that text we were able to ask for comment in LCCP 122 not merely on generalised proposals, but also on the specific terms of the draft Bill to implement those proposals. Consultation demonstrated the considerable value of that method. It succeeded in focusing the attention of commentators, and indeed our own attention, upon the precise terms and implications of the reforms we were proposing.

1.6 We have already referred to the very important role played in this exercise by the Draft Code. That Code built strongly upon the work of the original Code team, Professors Sir John Smith, Edward Griew and Ian Dennis,⁸ who continued to act as the draftsmen of the Draft Code itself.⁹ Criminal law reform in this country is, and will for many years continue to be, greatly in their debt. We have been fortunate in having the continued assistance of Professor Edward Griew, as special consultant during the preparation of this Report. He has made a major contribution to it, as he did to the formulation of LCCP 122.

⁵ See paragraphs 3.1–3.7 below.

⁶ “The CLRC.”

⁷ *Offences against the Person* (Cmnd. 7844 of 1980).

⁸ See the “Code team report”: *A Report to the Law Commission, Codification of the Criminal Law* (Law Com No 143, 1985).

⁹ See Code Report, paragraphs 1.15–1.17.

PART II

THE NEED FOR ACTION

Introduction

2.1 As we have already observed, the Criminal Law Bill presented in this Report is in two parts. Part I of the Bill contains a comprehensive reform of the law of non-fatal offences against the person. In particular, it replaces both the antique and obscure language and the irrational arrangement of the Offences against the Person Act 1861 with a set of simple offences expressed in modern and comprehensible terms. We explain later in this Report the many problems posed by the present law;¹⁰ here it may suffice to note a recent judicial observation, with which all five members of the House of Lords agreed, that the present statute governing offences against the person is “piece-meal legislation”, containing “a rag-bag of offences brought together from a wide variety of sources with no attempt, as the draftsman frankly acknowledged, to introduce consistency to as substance or as to form”.¹¹

2.2 Part II of the Criminal Law Bill puts into statutory form certain general principles and general defences that apply throughout the criminal law. The broad effect of this Part of the Bill is to build on and rationalise the present common law, without introducing substantial changes of policy.¹² Part II is, however, just as important as Part I. Even where the broad lines of the law are agreed between such lawyers as have the time and inclination to make a thorough study of the common law materials and of the various commentaries on them, the direct and efficient application of that law is unlikely to be achieved without its being immediately available in clear statutory form.

2.3 An example that came to hand during the preparation of this Report will bear that out. In the case of *Scarlett*¹³ the accused publican was convicted of unlawful act manslaughter. The alleged unlawful act was an assault constituted by his having used unreasonable force in removing a drunken man from his public house. At the trial everybody seems to have overlooked the requirement, emphasised in recent cases,¹⁴ that the reasonableness of the use of force must be judged in the circumstances as the accused believed them to be. The failure to apply that rule of law at the trial was one of the reasons why the Court of Appeal (Criminal Division) quashed his conviction. This correction of the legal position, however, only took place after Mr Scarlett had wrongly spent more than five months in prison. If the rules which should have been applied at the trial in *Scarlett* had been available in a statute that was recognised as the first point of reference in any case involving an assault or other offence against the person, as they will be when clauses 27 and 28 of the Criminal Law Bill are enacted,¹⁵ then it is very difficult to think that such a mistake would have occurred.

2.4 This one serious mistake provides a vivid illustration of the point that even where a codifying statute does not introduce far-reaching measure of reform, it nonetheless plays a vital role in making the existing law clear, accessible and easy for citizens, prosecutors, lawyers, professional judges, lay magistrates and jurors to understand and use.¹⁶ The wide range of comments that we received on the Code team’s report indicated that its approach was seen as being successful in achieving those aims.¹⁷ It is that approach that we have carried through into the Draft Code and, now, into the Criminal Law Bill. We venture to claim that that Bill not only provides an urgently needed reform of the law of offences against the person, but also puts a large part of the law of general defences for the first time on to a clear statutory footing. Both Parts of the Criminal Law Bill are in our considered opinion essential for the future health of English criminal law.

¹⁰ See paragraphs 12.1–12.13 and 12.21–12.35 below; and LCCP 122, paragraphs 7.4–7.13.

¹¹ Lord Ackner in *Savage* [1992] 1 AC 699 at p 752C.

¹² Note, however, that the Bill does deal with the major policy question of whether the defence of duress should be available in cases of murder: see paragraphs 30.1–30.22 below.

¹³ [1993] NLJ 1101.

¹⁴ *Gladstone Williams* (1983) 78 Cr App R 276, per Lord Lane CJ; *Beckford v R* [1988] AC 130, PC.

¹⁵ See further paragraphs 36.1–40.4 below.

¹⁶ We expanded on these points in paragraphs 2.1–2.6 of LCCP 122; there was in effect no disagreement on consultation on the validity of those aims.

¹⁷ See Code Report, paragraphs 1.12–2.28.

The response on consultation on LCCP 122

3.1 We appreciate that this is a bold claim. The best evidence of the need for that Bill is however provided by the response that we received on consultation to the proposals in LCCP 122, and more particularly to the Bill that was presented in LCCP 122. That response has justified us in presenting, in this Report, a Criminal Law Bill that differs only very little from that presented in LCCP 122, and in believing that legislation in the terms of those Bills is widely seen as a matter of urgency. For those reasons, it is appropriate that we should report in some detail on the consultation.

3.2 There was overwhelming support for legislation, at an early date, in the general terms of the Bill annexed to LCCP 122, and thus in the terms of the Criminal Law Bill that we recommend in the present Report. That support came in particular from many people at the “sharp end” of the criminal justice system—those who are concerned with enforcing and adjudicating upon the present law of offences against the person and in conducting trials in which that law has to be applied. The single issue that was clearly of most express concern to respondents was the need for early reform of the basic law of non-fatal offences against the person.

3.3 In that respect the view of the Council of Circuit Judges was most illuminating: “The Council of Circuit Judges would find the proposed Bill a very welcome improvement to the material with which they have to play their part in containing violence”.

3.4 Support was however also forthcoming from the Judges of Birmingham Crown Court;¹⁸ the committee of Metropolitan Stipendiary Magistrates;¹⁹ the Judge Advocate General and colleagues;²⁰ the Crown Prosecution Service;²¹ the Association of Chief Police Officers of England and Wales;²² the Metropolitan Police;²³ the Police Federation of England and Wales;²⁴ the Bar Council;²⁵ the Criminal Bar Association;²⁶ the Criminal Law Committee of the Law Society;²⁷ and the Institute of Legal Executives.²⁸ In addition a number of individuals wrote expressing support for the Bill, including, in his personal capacity, Sir James Nursaw, who had very wide experience as both Legal Adviser to the Home Office and as Treasury Solicitor before his recent retirement.²⁹

3.5 Five members of the higher judiciary submitted written comments. Rose LJ expressed a preference for the definition of intention contained in the Draft Code but in all other respects supported the reform of the 1861 Act along the lines proposed. Ian Kennedy LJ expressed doubts about the Bill’s treatment of recklessness, but suggested in this respect that the Commission should be guided by the views of the Circuit Bench.³⁰

¹⁸ “[The Bill does] a grand job in sweeping away a great deal of arcane rubbish. The need for immediate reform is long overdue. [We are] only dismayed that it is going to be so long before the changes take effect.”

¹⁹ “We agree entirely with the general thrust of the paper and the need to reform and update the law on offences against the person.”

²⁰ “A large number of offences tried by [courts martial] consist of assaults of various kinds and we generally agree that the present state of the law is highly unsatisfactory and overdue for reform . . . Such comments as we have tend to be on matters of detail rather than substance or principle.”

²¹ “The work of the Law Commission, in attempting to rationalise this area of the law, is long overdue . . . [We] trust that in exposing our slight difficulties and worries with the drafting and various other points in relation to the Bill we have not detracted in any way from our overall support for the proposal that the law in this area should be consolidated and codified.”

²² “The draft Bill is a good document which details the proposed law in simplistic terms; replaces obscure and outdated statutes which have themselves been overtaken by law based entirely on judicial interpretation.”

²³ “This proposed legislation certainly brings the law on assaults up-to-date . . . It is easy to read, understand and, hopefully, to implement practically.”

²⁴ “We would welcome the change in direction brought about by these proposals which overall we find satisfactory.”

²⁵ “The Bar welcomes the proposal that the law in relation to non-fatal offences should be revised and codified, and likewise welcomes the overall scheme of the draft Bill attached to the consultation paper.”

²⁶ “Reforms are urgently required”.

²⁷ “Due to the numerous problems of construction that have arisen recently over provisions of the 1861 Act, the Law Commission’s proposals were to be welcomed. It would be preferable if the whole of the Criminal Code were to be brought into operation but if this is not practicable the proposed Bill should nevertheless be implemented.”

²⁸ “The Institute welcomes the codification of the Criminal Law of England and Wales . . . A rationalisation and clarification of the present law [of offences against the person] is long overdue.”

²⁹ “My involvement with the issues with which the Paper is concerned goes back a very long way, even before I became Secretary of the Criminal Law Revision Committee . . . The text of the draft Bill I found admirable.”

³⁰ As to which see paragraph 3.3 above.

Schiemann J, Wright J³¹ and Curtis J³² expressed, subject to points of detail, very clear approval of the proposals. We should add that our Chairman tells us that in his informal discussions with his senior judicial colleagues many of them express their exasperation with the state of the law that they are still being required to interpret and apply.

3.6 Academic and periodical comment strongly supported the proposals. That included the Criminal Law Committee of the Society of Public Teachers of Law;³³ submissions by the criminal law groups at Cardiff and Leeds Universities; and an editorial³⁴ and a major article in the *Criminal Law Review*.³⁵ In a further article in the *Modern Law Review* Mr Simon Gardner, whilst expressing reserve about some aspects of the recommendations,³⁶ agreed that they would be clearly preferable to the present law.³⁷

3.7 In the detailed discussion later in this Report we have thought it right to pay particular attention to the views of respondents, including some of those quoted above, who disagreed with particular aspects of the proposals, or who suggested improvements upon them. Nevertheless, we would be failing in our duty if we did not report that the very predominant response on consultation was that reform is needed, now, and that the general welcome given to the Criminal Law Bill as the vehicle for that reform far outweighs any disagreements about the precise formulation of particular clauses within it. In the next section we draw together some of the general themes affecting that reform to serve as a background to the Report's detailed discussion of particular issues.

Justice and practicality

4.1 Law that is muddled, irrational, unclear, or simply difficult of access, is almost certain to produce injustice. The need to take steps to avoid such injustice is especially great if it is the *criminal* law that suffers from such defects, since this part of our law embraces the vital matter of the exercise and control of coercive state power against the citizen. In this Report we show how the present law of offences against the person suffers from all those defects. In the interests of justice it ought to be replaced by a clearer and more precise set of rules.

4.2 We were, however, also impressed by the wide range of views that were expressed to us to the effect that the present law also suffers from the serious defect that it is simply inefficient as a vehicle for controlling violence. Its inefficiency as a working tool extends to the creation of the waste of enormous amounts of valuable court, lawyer and citizen time and money simply on attempts to find out what the law is, and in correcting errors where the administration of justice has gone wrong when obscure law has been applied wrongly. It borders on the incredible that some 130 years after the Offences against the Person Act was passed there should have been a series of appeals to the Court of Appeal (Criminal Division) that displayed serious disagreement as to the basic content of the law;³⁸ and that even after the intervention of the House of Lords many aspects of the law are still obscure, and its application erratic.³⁹

4.3 A nation whose basic rules of criminal law are in this condition is sending the wrong message to those who engage in violence or who are minded to engage in it. If their conduct is addressed only by laws cast in language that was already quaint and

³¹ "The draft Bill [is] a wholly admirable simplification of the morass of statute and case-law with which we presently struggle . . . I should particularly wish to support your proposals under paragraphs 7 and 8 of [LCCP 122], as exemplified in clauses 4-10 of the Draft Bill. If nothing else gets on to the statute-book those should".

³² Curtis J, when Recorder of Birmingham, was responsible for co-ordinating the response of the Birmingham Circuit Judges, referred to in footnote 18 above.

³³ "It was agreed that the existing law in sections 18, 20 and 47 of the OAPA is a shambles, for the reasons amply described by the Commission, [and] that it should be replaced by clauses 4, 5 and 6 of the Commission's draft."

³⁴ Andrew Ashworth, Editorial [1992] Crim LR 393: The Bill proposes "an urgently needed reform of the antiquated non-fatal offences against the person".

³⁵ ATH Smith "Legislating the Criminal Code: The Law Commission's proposals" [1992] Crim LR 396 at p 400: There is "a very strong case for something to be done, and quickly, by the legislature The state of the law [in relation to offences against the person] is little short of scandalous."

³⁶ See further paragraph 14.8 and footnote 160 below.

³⁷ Simon Gardner "Reiterating the Criminal Code" (1992) 55 MLR 839 at p 839: "It is undeniable that [the Commission's proposals] would improve upon the present law on offences against the person, which is universally recognised as being devoid of any principle."

³⁸ See the complaint of the court in *Parmenter* [1992] 1 AC 699 at p 711H, cited in paragraph 12.7 below.

³⁹ See paragraphs 12.9-12.13 and 12.21-12.35 below.

dated when Parliament adopted it in 1861,⁴⁰ and which present day lawyers themselves have great difficulty in explaining, then it is hardly surprising that doubts are entertained as to whether society takes the control and punishment of violence seriously.

4.4 The second way in which the present law is objectionable is that its obscurity and uncertainty greatly impede the efficient discharge of business in the criminal courts. No law can be formulated that does not require interpretation by judges, and which sometimes gives rise to dispute as to its meaning and application. It is, however, not merely our own hope, but the opinion of those who commented both on the Draft Code and on LCCP 122, that the reformulation of this most important part of the law in modern statutory terms will carry with it two major benefits. It will greatly reduce the incidence of argument and error with which the law is at present burdened, and it will make it much easier for the law to be explained to and be applied by the laymen, lay magistrates and jurors, who play such a large part in its use in criminal courts.⁴¹ That is not only good for justice, but also good for the proper use of public resources. The huge sums of public money that now have to be expended in controlling violence are a matter of contemporary public concern. It is ridiculous that the expense to the public exchequer should be further inflated by avoidable disputes amongst lawyers about the basic terms of the law they have to use.

4.5 The significance in quantitative terms of the law of offences against the person should not be underestimated.

4.6 In 1991, 16,485 defendants were dealt with in the Crown Court for offences under sections 18, 20 and 47 of the Offences against the Person Act 1861.⁴² In addition, 532 defendants were dealt with in that Court for assault and battery,⁴³ and 36 for assault on a constable.⁴⁴ In the same year, the corresponding figures for the persons proceeded against for the same offences or groups of offences in the magistrates' courts were, respectively, 73,092,⁴⁵ 8,666⁴⁶ and 14,822.⁴⁷ Such figures confirm what is common experience, that offences of violence take up a considerable volume of the courts' work.

4.7 Equally, the cost of error in such a case is considerable. We have referred in paragraph 2.3 above to the case of *Scarlett*, where the overlooking of rules of the current law caused an incorrect conviction, which was only righted after what should have been an unnecessary appeal. We have obtained rough figures for the cost of that case, which in broad terms were as follows:

Estimated cost of trial and sentence

Court costs (Circuit Judge, staff, accommodation)	£12,360
Legal Aid costs	£11,938
Prosecution costs	£10,850

Estimated cost of Appeal

Bench costs	£1,260
Legal Aid costs	£3,262
Prosecution costs	£2,500
<i>Total</i> ⁴⁸	£42,170

⁴⁰ See LCCP 122, paragraph 7.5.

⁴¹ It should also be borne in mind that a significant proportion of the judiciary who have to hear criminal trials will have had little experience of the criminal law as practitioners. In 1992, 27% of judicial days in the Crown Court were sat by Recorders and Assistant Recorders, who each sat an average of only 21 days (Judicial Statistics of England and Wales: Annual Report for 1992, Chapter 9). A significant number of these judges will have had no substantial experience of criminal law.

⁴² Home Office Statistics.

⁴³ Home Office Statistics.

⁴⁴ Table S2.1(A) Criminal Statistics England and Wales supplementary tables, 1991, Vol 2.

⁴⁵ Home Office Statistics.

⁴⁶ Home Office Statistics.

⁴⁷ Table S1.1(A) Criminal Statistics England and Wales supplementary tables, 1991, Vol 1.

⁴⁸ The figures do not include possible police costs at trial, costs of staff of the Lord Chancellor's Department, or costs of accommodation and security on appeal.

In addition, Mr Scarlett was in prison for some 18 weeks before being released on the order of the Court of Appeal. As a category C prisoner, the costs of his imprisonment were approximately £387 per week.⁴⁹ Quite apart from the injustice and human costs involved, therefore, Mr Scarlett's imprisonment may well have cost the taxpayer something approaching £7,000 in unjustified expenditure.

4.8 This illustration is of only one case; though the costs in other cases of error are not likely to be substantially different. Nor of course can such figures take account of the cases where errors lead to wrongful acquittals, which type of error cannot even start to be measured in financial terms. Nor can we say how often it is the obscurity, complexity and inaccessibility of the law that is to blame when wrong decisions are made; though, again, experience and the general view of those replying to our consultation suggested that the problem is a substantial one. We cite these figures merely to show that, quite apart from the great importance in terms of justice and effective protection of the public that the law should be clear, well-understood and easy to use, there are very considerable potential costs in simple financial terms if the law is obscure and inefficient: as the present law of non-fatal offences against the person undoubtedly is.

⁴⁹ Prison Service Provisional Statistics.

PART III

NON-FATAL OFFENCES AGAINST THE PERSON

INTRODUCTION

5.1 We have already indicated the importance in the present law of the offences that are directed at violence against the person, and in particular of the offences of non-fatal violence contained in sections 18, 20 and 47 of the Offences against the Person Act 1861 (“the 1861 Act”). Part I of the Criminal Law Bill includes a new code to take the place of those now outdated offences, along the lines already proposed by the CLRC.⁵⁰ The Bill however also includes, within Part I, a restatement of the present law relating to assault; threats to kill or cause serious injury; torture; and detention and abduction. That will place all the major non-fatal offences against the person in the same piece of legislation, as a consistent and easily accessible source of that part of the law.

5.2 The remainder of this part of the Report is devoted to detailed exposition of the terms of the Criminal Law Bill. First, however, we must say something in general about the fault terms employed in Part I of the Bill.

FAULT TERMS

6.1 It is of the essence, not merely of a codification, but of any rational legislation on the criminal law, that the terms that it employs should be defined so that they are easily understood and consistently applied. The failure to provide definitions of the fault terms used in the 1861 Act is one of the most conspicuous weaknesses of the present law, productive of an intolerable amount of disagreement and argument.⁵¹ Clause 1 of the Criminal Law Bill remedies that defect, by providing definitions of key terms for use throughout the rest of Part I of the Bill. The need for such definition has been apparent to the Commission from the start of its work on the criminal law, and the statutory definition of fault terms in the particular context of offences against the person was regarded as “essential” by the CLRC in its own Report on those offences.⁵²

6.2 The definitions now provided in the Criminal Law Bill have been evolved as the result of a long process of review and consultation, starting, in the context of offences against the person, with the CLRC’s Report of 1980, the conclusions of which were broadly adopted in the Draft Code and in LCCP 122. However, because of the importance of this aspect of the Bill it is necessary for us to explain separately in this Report, in some detail, the terms and implications of the definitions adopted for non-fatal offences against the person in Part I of the Criminal Law Bill.

“Intention”

Introduction

7.1 Clause 1(a) of the Criminal Law Bill provides for the purposes of the offences in Part I of the Bill that:

“a person acts . . . ‘intentionally’ with respect to a result when—

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

7.2 To define “intention” by statute involves a different policy from that adopted, in the context of the law of homicide, by the House of Lords.⁵³ However, in that context the absence of definition, whether by statute or in the practice of the courts, has been productive of serious difficulty, in particular in relation to a result of conduct that, although not desired by the actor, is known by him to be the certain, or overwhelmingly likely, outcome of his actions. As the authorities stand the jury, in a case where it appears

⁵⁰ Fourteenth Report, paragraphs 151–157.

⁵¹ See for instance paragraphs 7.2 and 9.2–10.4 below.

⁵² CLRC Fourteenth Report, paragraphs 6–7.

⁵³ *Moloney* [1985] AC 905; *Hancock and Shankland* [1986] AC 455.

that the defendant did not desire the relevant result of his actions, are only told that they may nevertheless *infer* his intention to cause that result if he recognised that result to be a “virtually certain” consequence of his actions.⁵⁴ This form of direction falls short of asserting that such recognition of virtual certainty is in law a case of intention; and thus does not clarify the nature of the state of mind that the jury may “infer”.

7.3 In LCCP 122⁵⁵ we drew attention to the criticism of that position that had been made not only in the Code Report⁵⁶ but also by the Nathan Committee.⁵⁷ We therefore proposed that for the purposes of the Criminal Law Bill there should be a statutory definition of intention, and suggested a formula in terms almost identical to those set out above. There was on consultation little disagreement either with the general proposition that “intention” should be defined for the purposes of the non-fatal offences against the person dealt with in the Bill, or with the terms of the definition that we proposed. We therefore now recommend the adoption of a statutory definition in the terms of clause 1(a) of the Criminal Law Bill.

The basic definition: intention as “purpose”

7.4 In all but the most unusual case, courts and juries will only be concerned with the basic rule in clause 1(a)(i) of the Criminal Law Bill: that a person acts intentionally with respect to a result when it is his purpose to cause that result.

7.5 The concept of purpose is ideally suited to express the idea of intention in the criminal law, because that law is concerned with results that the defendant causes by his own actions. Those results are intentional, or intentionally caused, on his part when he has sought to bring them about, by making it the purpose of his acts that they should occur. It is for that reason that distinguished judges have naturally spoken of the concept of intention in the criminal law in terms of “purpose”.⁵⁸ We are confident that courts and juries will find the statutory confirmation of this central nature of intention, when that word is used in the definition of offences, both easy and helpful to use.

A special and limited case

7.6 Therefore, in almost all cases when they are dealing with a case of intention, courts will not need to look further than paragraph (i) of clause 1(a). Paragraph (ii) is however aimed at one particular type of case that, it is generally agreed, needs to be treated as a case of “intention” in law, but which is not covered by paragraph (i) because the actor does not act in order to cause, or with the purpose of causing, the result in question. Because this case is less straightforward than that just discussed it takes up more space in this part of our report than, we have to say, would be justified if the only consideration were the frequency with which the case is likely to trouble courts in practice.

7.7 The point was formulated by Lord Hailsham of St Marylebone in *Hyam*.⁵⁹ A person must be treated as intending “the means as well as the end and the inseparable consequences of the end as well as the means.” If he acts in order to achieve a particular purpose, knowing that that 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 a window behind which he knows P to be standing; or it may be a *necessary* concomitant of the first result: as where (to use a much-quoted example) D blows up an aeroplane in flight in order to recover on the insurance covering the cargo, knowing that the crew will inevitably be killed. D intends to break the window and he intends the crew to be killed.

7.8 There is, of course, no absolute certainty in human affairs. D’s purpose *might* be achieved without causing the further result; P *might* fling up the window while the brick is in flight; the crew *might* make a miraculous escape by parachute. These, however, are only remote possibilities, as D (if he contemplates them at all) must know. The further

⁵⁴ *Nedrick* [1986] 1 WLR 1025 at p 1028C–D.

⁵⁵ LCCP 122 at paragraph 5.5.

⁵⁶ Code Report, paragraph 8.16.

⁵⁷ Paragraph 69 of the Nathan Committee Report, Report of the House of Lords Select Committee on Murder and Life Imprisonment (HL Paper 78–1, 1989); hereafter referred to as the Nathan Report.

⁵⁸ Eg Lord Simon of Glaisdale in *DPP v Morgan* [1976] AC 182 at p 217C and *DPP v Majewski* [1977] AC 443 at pp 479H–480A; Lord Goff of Chieveley “The Mental Element in the Crime of Murder” (1988) 104 LQR 30 at pp 42–43.

⁵⁹ [1975] AC 55 at p 74.

result will occur, and D knows that it will occur, “in the ordinary course of events”. This expression was used in clause 18 of the Draft Code to express the near-inevitability, as appreciated by the actor, of the further result.

7.9 It is desirable to stress, because the point has been misunderstood in some quarters, that this way of defining “intention” does not have the effect of treating some cases of recklessness as cases of intention by extending liability for an offence requiring intention to every case where the actor foresees the further result as highly likely to occur. On the contrary, the definition extends the meaning of “intention” only very slightly beyond the primary meaning adopted in clause 1(a)(i) of “purpose”. The point of the phrase “in the ordinary course of events” is to ensure that “intention” covers the case of a person who knows that the achievement of his purpose will *necessarily* cause the further result in question in the absence of some wholly improbable supervening event.⁶⁰ The phrase had earlier been used by the CLRC in explaining their use of the word “intention” in the context of offences against the person.⁶¹ The Nathan Committee recommended adoption of the Draft Code definition for the purpose of the law of murder.⁶² The Lord Chief Justice expressed approval of it in the House of Lords debate on that committee’s report.⁶³

7.10 Reference to “the ordinary course of events” can, therefore, now be made with some confidence in this part of the definition of “intention”. That is the approach of clause 1(a)(ii) of the Criminal Law Bill. However, the Bill’s definition, while being fundamentally that of the Draft Code, seeks to improve on and tighten the Draft Code in three respects.

7.11 First, in order to re-emphasise that this part of the definition is not dealing with a case of recklessness, it specifically requires the actor to *know*, and not merely to be aware (of a risk), that the further result would occur in the ordinary course of events if he succeeded in his purpose of causing the result at which he was actually aiming.⁶⁴

7.12 Second, the formulation has to cater for the case in which the actor is not sure that his main purpose will be achieved—he cannot be *sure*, for example, that the bomb that he places on the plane will, as he intends, go off in flight. In such a case he does not know that the secondary result (the death of the crew) will occur. Yet he ought to be guilty of murder if the crew do die because he knows that they *will* die *if* the bomb goes off as he intends. So the definition of “intention” should treat a person as intending a result that he knows to be, in the ordinary course of events, a necessary concomitant of achieving his main purpose *if* that purpose is achieved.⁶⁵

7.13 Third, it is prudent to provide specifically that a result that it is the actor’s purpose to *avoid* cannot be intended. The definition adopted in the Draft Code was criticised on this ground in the House of Lords debate on the Nathan Report by Lord Goff of Chieveley. He argued that, since the Draft Code definition spoke in unlimited terms of results that the actor was aware would occur in the ordinary course of events, it would convict of an offence of serious injury, for instance, a man who threw a child from a burning building, knowing that the child would thereby almost inevitably be injured, even though the inevitable consequence of inaction would be the child’s death from burning.⁶⁶ It might be a matter for some argument whether this case was in fact covered by the definition in the Draft Code,⁶⁷ and a judicial commentator on LCCP 122 argued strongly that since such a case would not in practice be prosecuted the Criminal Law Bill should not seek to address it. Nevertheless it is undesirable that there should be any even arguable doubt on that point. The objection is avoided in clause 1(a)(ii) of the Criminal Law Bill, which restricts secondary results that are caused intentionally under its provisions to such results that

⁶⁰ Compare Lord Bridge’s reference in *Moloney* [1985] AC 905 at p 929, to “the idea that in the ordinary course of events a certain act will lead to a certain consequence unless something unexpected supervenes to prevent it”.

⁶¹ Fourteenth Report, paragraph 10.

⁶² Nathan Report, paragraph 71.

⁶³ Hansard (House of Lords Debates), 6 November 1989, vol 512, col 480, per Lord Lane CJ.

⁶⁴ The Criminal Bar Association, in its comments on consultation, stressed the desirability of avoiding any suggestion that the second part of the definition of “intention” might encompass cases of mere recklessness.

⁶⁵ See further J C Smith [1990] Crim LR 85.

⁶⁶ Hansard (House of Lords Debates), 6 November 1989, vol 512, cols 469–470.

⁶⁷ J C Smith [1990] 85 Crim LR at pp 88–91.

only occur if the actor succeeds in his primary purpose. In the example just cited, the father (on the assumption that his case legitimately attracts sympathy) has as his purpose to *prevent* injury to the child. He acts to achieve that purpose, however difficult or unlikely that may be in the circumstances. If, applying clause 1(a)(ii), he were to succeed in his purpose, injury to the child would, of necessity and by definition, not occur. Clause 1(a)(ii) therefore excludes any suggestion that in a (hypothetical) case of the type mentioned above injuries that in fact occur, though sought to be avoided, were inflicted intentionally.

7.14 The extended definition of “intention” employed in clause 1(a)(ii) of the Criminal Law Bill thus takes account of the above three points. It makes plain that the definition is not confined to cases where the actor is certain that he will succeed in his principal objective. However, it treats as intended any result that the actor recognises at the time that he acts as inevitable if his purpose is to be achieved; and he is treated thereafter as having intended that result whether or not the purpose at which he aimed is in fact achieved.

“Recklessness”

Introduction

8.1 The Criminal Law Bill provides, as did the Bill submitted for consultation under LCCP 122, that a substantial number of the offences that it creates may be committed “recklessly”. Those offences are

- Reckless serious injury (clause 3)
- Reckless injury (clause 4)
- Assault (clause 6)
- Unlawful detention (clause 11)
- Kidnapping (clause 12)
- Hostage-taking (clause 13).

It is therefore necessary to provide a definition of “reckless” or “recklessly”, and that is done by clause 1(b) of the Criminal Law Bill:

“For the purposes of this Part a person acts—

(b) “recklessly” with respect to—

- (i) a circumstance, when he is aware of a risk that it exists or will exist, and
- (ii) a result, when he is aware of a risk that it will occur,

and it is unreasonable, having regard to the circumstances known to him, to take that risk.”

8.2 The Criminal Law Bill’s definition of “recklessly” thus does no more than provide for the mental element in the particular offences to which that definition applies. Whether or not that definition of the mental element is appropriate for those offences is a matter to be considered in relation to each of those offences separately; and that consideration is addressed when the specific offences are discussed later in this Report. That is particularly so in respect of the new offences of unlawful violence created by clauses 2–4 of the Criminal Law Bill, which are surveyed at length in paragraphs 12.1–17.1 below.

8.3 It is, however, necessary to say a little more in general terms about the implications of the expressions “recklessness” or “recklessly”, and of their use in the Criminal Law Bill, since that has been the source of a certain amount of misunderstanding.

A brief history

9.1 “Recklessness” as a *statutory* concept has only a comparatively recent history, although the term has been common coin amongst lawyers for very many years.

9.2 With specific reference to statutory offences against the person, the antique wording of sections 18 and 20 of the 1861 Act made it necessary for the appropriate mental element for these offences to be discussed as a matter of interpreting the word “maliciously” in those sections.⁶⁸ In modern times, the governing authority on that point, although in fact decided in a case of maliciously administering poison under section 23 of the 1861

⁶⁸ Section 47 of the 1861 Act specifically requires the commission of an “assault” as, fairly obviously, does the separate common law crime of common assault. It was never in doubt that assault at common law required the defendant to be subjectively aware that he was creating a risk of the victim suffering or apprehending personal violence: see eg CLRC Fourteenth Report, paragraph 158.

Act, has always been taken to be *Cunningham*.⁶⁹ The judges in that case however made use of the concept of recklessness, in the sense of subjective awareness of risk, by holding that “malice” in a statutory definition of a crime requires:

“either (1) An actual intention to do the particular kind of harm that in fact was done; or (2) recklessness as to whether such harm should occur or not (ie, the accused has foreseen that the particular kind of harm might be done and yet has gone on to take the risk of it).”⁷⁰

9.3 The CLRC, reporting on offences against the person in 1980, did not doubt that that was the correct approach. They cited with approval the formulation in *Cunningham*,⁷¹ but stressed that since the mental element was fundamental in the definition of a crime it was essential that words used to describe that mental element should be defined by statute.⁷² In accordance with the approach adopted in *Cunningham* the CLRC therefore recommended in relation to offences against the person that

“the essential elements which in our opinion should be included in the statutory definition of recklessness are (i) that the defendant foresaw that his act might cause the particular result and (ii) that the risk of causing that result which he knew he was taking was, on an objective assessment, an unreasonable risk in the circumstances known to him”.⁷³

9.4 However, after the CLRC had reported doubt had been cast on the extent to which the *Cunningham* formulation applied throughout the criminal law as a whole by decisions of the House of Lords about the meaning of the words “reckless” or “recklessly” in section 1 of the Criminal Damage Act 1971;⁷⁴ and in section 1 of the Road Traffic Act 1972, defining the offence of reckless driving.⁷⁵ In *Caldwell* the House stated that a person was “reckless as to whether . . . property would be destroyed or damaged” under section 1(1) of the Criminal Damage Act 1971 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 nonetheless gone on to do it”.⁷⁶

The same, “*Caldwell*”, formula was applied in *Lawrence* to the *actus reus* of the offence of reckless driving: driving a vehicle in such a manner as to create an obvious or obvious and serious risk of causing physical injury to some other person who might happen to be using the road, or of doing substantial injury to property.⁷⁷

9.5 Subsequent cases went further, it being suggested in the House of Lords case of *Seymour*,⁷⁸ in 1983, that the approach in *Caldwell* should be taken to the word “recklessly” when used in any statutory or indeed other offences. That observation was, however, *obiter*;⁷⁹ and it was generally understood, though without there being any conclusive authority on the point, that the “*Caldwell*” formulation had not been intended to supplant *Cunningham* in respect of offences against the person. That issue was however the subject of detailed and specific argument before the House of Lords in *Savage*, and was subjected to lengthy analysis⁸⁰ in the leading speech of Lord Ackner, with which

⁶⁹ [1957] 2 QB 396, CCA (Byrne, Slade and Barry JJ).

⁷⁰ *Ibid.*, at p 399.

⁷¹ Fourteenth Report, paragraph 6.

⁷² *Ibid.*, paragraph 7.

⁷³ *Ibid.*, paragraph 12.

⁷⁴ *Commissioner of the Metropolitan Police v Caldwell* [1982] AC 341.

⁷⁵ *Lawrence* [1982] AC 510.

⁷⁶ [1982] AC 341 at p 354F, per Lord Diplock.

⁷⁷ [1982] AC 510 at pp 526 H–527A.

⁷⁸ [1983] 2 AC 493 at p 506, per Lord Roskill.

⁷⁹ See the Court of Appeal (Criminal Division) in *Spratt* [1990] 1 WLR 1073 at p 1082F and *Sullman* *The Times*, 2 May 1993: unrevised transcript of 20 May 1993 at p 7.

⁸⁰ See [1992] 1 AC 699 at pp 742H–751D.

the remainder of the House⁸¹ specifically agreed. The House of Lords concluded⁸² that in *Caldwell* the House had manifestly intended to accept that *Cunningham*⁸³ correctly stated the law in relation to the 1861 Act.

9.6 At the same time, however, the House of Lords has made clear that the opposite contention, that “recklessly”, used without statutory definition, *necessarily* connotes awareness of risk, was not correct either. That contention was advanced before the House in a subsequent case on reckless driving, *Reid*,⁸⁴ and was rejected, the House holding that, in the particular case of reckless driving,⁸⁵ the correct approach to “recklessness” remained that adopted in *Caldwell* and *Lawrence*.⁸⁶

The need for definition

10.1 Much of the debate in both *Caldwell* and in *Reid* was occasioned by the fact that neither in the Criminal Damage Act 1971 nor in the Road Traffic Act 1988 was the term “reckless” defined. Both courts were, therefore, led to speculate on the normal, usual or natural meaning of that word. Such investigations are, however, excluded by the Criminal Law Bill, which provides a specific definition of the term “reckless”. That will enable courts to go straight to that definition, in the context of the particular offences to which it is applied, rather than be forced to speculate upon what would be the popular or common usage of the word “reckless” if it had *not* been defined by Parliament.

10.2 Indeed, the history of attempts to expound an undefined “recklessness” that we have outlined above much reinforces our view, which was also that of the CLRC, that statutory definition of that term is essential. As the CLRC put it, discussing both intention and recklessness, “If the law is to be consistently applied, [these terms] cannot be left to a jury or magistrates as ‘ordinary words of the English language’ ”.⁸⁷ That is particularly so of the word reckless, which in its undefined form has a wide and far from generally agreed range of meanings.⁸⁸ Possible dictionary synonyms include “careless, regardless or heedless of the possible consequences of one’s act”;⁸⁹ “heedlessness of risk (non-advertence)”;⁹⁰ but also simply negligent or inattentive.⁹¹ Left to its own devices, therefore, a jury asked to think in terms of undefined recklessness might well apply nothing more than the civil, tortious, standard of liability.

10.3 We have considered whether, in view of the extensive and at times obscure speculation that has attended the meaning of undefined “recklessness”, it would be possible to demonstrate explicitly that we are making a clean break with that chapter of the law, by using a different expression to name the state of mind identified, in clause 1(b) of the Criminal Law Bill, as unreasonably taking a risk of which the defendant is aware. We have, however, concluded that there is no other word equally suitable to serve as a label for that definition; and that in any event users, armed with that definition, will readily realise that “recklessness” and cognate words are indeed used in the Bill as labels only.

10.4 Indeed, the whole point of a statutory definition, applied to a limited number of offences, is to “uncouple” those offences from other and possibly unrelated offences in which, for better or worse, the concept of recklessness is employed. Thus, there are

⁸¹ Lords Keith of Kinkel, Brandon of Oakbrook, Jauncey of Tullichettle and Lowry.

⁸² [1992] 1 AC 699 at p 751 C–D.

⁸³ Subject to the *Mowatt* “gloss” as to *what* had to be foreseen: see LCCP 122 paragraphs 7.29–7.30, and further footnote 141 to paragraph 12.26 below.

⁸⁴ [1992] 1 WLR 793. For a summary of the appellant’s argument, see [1992] 1 WLR 793 at pp 800G–801B.

⁸⁵ Various of the speeches indicated that what was said in *Reid* about “recklessness” was directed at the particular offence and statute at issue in that case: see eg Lord Ackner at p 805G–H; Lord Goff of Chieveley at p 807D; and Lord Browne-Wilkinson at pp 816H–817D. *Savage*, discussed in paragraph 9.5 above, which had been decided by the House some eight months previously, was neither cited in argument in *Reid* nor referred to in any of their Lordships’ speeches: no doubt because it was seen as relating to a different subject-matter from that instantly before the House.

⁸⁶ See paragraph 9.4 above.

⁸⁷ Fourteenth Report, paragraph 7.

⁸⁸ It may well have been previous attempts to expound the theoretical or general implications of “recklessness” that caused Lord Browne-Wilkinson, in *Reid*, to protest at the “almost metaphysical abstractions in modern criminal law”: [1992] 1 WLR 793 at p 816H. We would venture to suggest, however, that the specific definition of recklessness proposed by the CLRC and adopted in clause 1(b) of the Criminal Law Bill is the reverse of abstract or metaphysical.

⁸⁹ Lord Ackner in *Reid* [1992] 1 WLR 793 at p 803C.

⁹⁰ Lord Browne-Wilkinson, *ibid*, at p 819A.

⁹¹ Oxford English Dictionary, *sv* “reckless”.

strong policy reasons, as identified by the House of Lords in *Reid*, for the particular activity of driving, which is known to require special skills and a special exercise of self-control, to be subject to criminal sanctions on grounds that are not limited to awareness of a particular risk.⁹² There may well be other particular activities, for instance the handling of firearms or the use of dangerous machinery, that call for similar controls. Such decisions, and decisions about other offences that will eventually be dealt with in the Criminal Code, are in no way foreclosed by the decisions that we have taken in respect of the offences listed in paragraph 8.1 above, supported by a very strong weight of opinion, that their mental element should be defined in the terms used in clause 1(b) of the Criminal Law Bill and set out in paragraph 8.1 above. As we have said, those decisions are to be assessed in the context of the particular offences to which they apply; and it is the specific requirements of those offences that we discuss in the remainder of this Part of our Report.

OFFENCES COMMITTED BY OMISSION

11.1 We remain of the view, strongly supported on consultation, that it is necessary to proceed with caution in dealing with the difficult and controversial questions of whether and to what extent criminal liability should be imposed for omissions to act.

Offences subject to liability by omission

11.2 In LCCP 122 we provisionally agreed with the policy adopted by the CLRC that it is desirable to avoid imposing criminal liability in trivial and borderline cases, and that liability by omission should therefore be limited to the more serious offences. Under such a regime, for the defendant to commit a crime by omission, he would have, by failing to perform a given duty, to cause an outcome of some seriousness, and to do so with a significantly culpable state of mind. The CLRC's list included only homicide, causing serious injury, kidnapping and abduction. The draft Bill in LCCP 122 made express provision for liability by omission for the offences of intentional serious injury, torture, unlawful detention, kidnapping, abduction and aggravated abduction.

11.3 The great weight of opinion on consultation supported our cautious approach, including the range of offences which should carry this type of liability. At the same time, the extreme view that there should be no liability by omission in the criminal law at all received very little support. The Criminal Law Bill therefore continues to give effect to that approach.

Duties to act

11.4 The Code team, from their wider perspective of a *general* code, had tried to formulate in statutory terms the circumstances in which the duty to act should arise for the purposes of liability by omission. In LCCP 122 we noted that the scrutiny team that reviewed this part of the Code Team Report had expressed doubts about the accuracy of that formulation, but had not succeeded in producing a more satisfactory version. We were further influenced in LCCP 122 against attempting any such general formulation by the consideration that it would not be appropriate to do so in a context limited to offences against the person. We remain of that view, and the Criminal Law Bill accordingly does not seek to limit the common law duties breach of which would continue to give rise to liability by omission.

11.5 We also consulted on the specific question whether the Bill should include a reference to *statutory* duties. Our provisional view was that there were grave objections to such a course, beyond our general view that liability by omission should be limited to serious offences. Many of the duties arising from offence-creating statutory provisions are probably best understood as limited to obligations not to commit those specific offences.

⁹² "Driving a motor vehicle is potentially an extremely dangerous activity, requiring a high degree of self-discipline. Those who fail to display the requisite degree of self-discipline through failing to give any thought to the possibility of the serious risks they are creating may reasonably be regarded as no less blameworthy than those who consciously appreciate a risk but nevertheless go on to take it": per Lord Keith of Kinkel in *Reid* [1992] 1 WLR 793 at p 796B. In the same case Lord Goff of Chieveley commented, in similar vein, that "the unspoken premise which seems to me to underlie Lord Diplock's statement of the law in *Lawrence* (and perhaps also in *Caldwell*) is that the defendant is engaged in an activity which he knows to be potentially dangerous": *ibid.*, at p 811B.

It therefore does not follow that breach of such duties should necessarily entail liability for the serious general offences to which we provisionally recommended that liability by omission should be limited. Nothing in the consultation persuaded us that these objections were unfounded, or were of lesser weight than we feared. In particular, there appeared to be no satisfactory answer to the objection that where Parliament in creating the duty has provided a specific and limited sanction for its breach, it is not appropriate also to treat such breach as founding liability for a general offence.

11.6 Clause 19(1) of the Criminal Law Bill accordingly provides that certain of the more serious offences contained in Part I of the Bill may be committed by a person who produces their forbidden result by omitting to do an act that he is under a duty to do at common law. The offences in question are intentional serious injury (clause 2); torture (clause 10); unlawful detention (clause 11); kidnapping (clause 12); abduction (clause 14); and aggravated abduction (clause 16).

OFFENCES OF VIOLENCE

12.1 In LCCP 122 we noted that there had been recurrent criticism in recent years of the law contained in the 1861 Act relating to non-fatal violence against the person, which is there expressed in the outdated language of “grievous bodily harm”, wounding and “actual bodily harm”. That was not merely the view of commentators on the law, but also of the very experienced judges and other practitioners who signed the report of the CLRC in 1980:

“No one who has worked with the Act of 1861 will doubt that it is overdue for replacement”.⁹³

Similar criticism of the 1861 Act has continued to be made by judges of great distinction, and experience in the criminal law:

“Sections 18, 20 and 47 of the Act of 1861 . . . were not drafted with a view to setting out the various offences with which they deal in a logical or graded manner; in some cases do not create offences but merely state the punishment for what is regarded as an existing common law offence; and, above all, in so doing employ terminology that was difficult to understand even in 1861.”⁹⁴

12.2 These criticisms, allied to the conclusions of our own more detailed study of the effect of the 1861 Act,⁹⁵ convinced us, as the CLRC had been convinced, that replacement of the provisions of the 1861 Act by a modern statutory code was an urgent priority. In LCCP 122 we therefore submitted for consultation a series of statutory clauses dealing with non-fatal offences against the person, indicating that that was the most important reform element addressed in our new Bill.

12.3 Those clauses form clauses 2–4 of the Criminal Law Bill that we recommend in this Report. With very minor adjustments they implement the policy recommended by the CLRC, which we adopted in the Draft Code.⁹⁶ As we have already indicated,⁹⁷ on consultation on LCCP 122 there was overwhelming agreement that reform of the 1861 Act was an urgent priority; and a very high measure of agreement that that reform should be in the terms recommended by the CLRC, and provisionally recommended by this Commission in LCCP 122.

12.4 That response enables us now to propose, with considerable confidence, the reform of the law against personal violence in terms that commended themselves to the CLRC

⁹³ CLRC Fourteenth Report, paragraph 3.

⁹⁴ Lord Lowry in *Brown* [1993] 2 WLR 556 at p 576C, adopting the observations in paragraph 7.4 of LCCP 122. See also the observations of Lord Ackner in *Savage* cited in paragraph 2.1 above.

⁹⁵ We have endeavoured to set out in this Report no more of the detailed criticism of the 1861 Act than is required for a fair appraisal of our recommendations. Readers who seek a somewhat fuller treatment are referred to paragraphs 7.1–7.13 of LCCP 122: a survey that attracted virtually no dissent, and some significant expressions of agreement, on consultation.

⁹⁶ Draft Code, clauses 70–72. As we explained in paragraph 1.13 of the Code Report, these and other clauses in the Draft Code were checked for conformity with the policy recommended by the CLRC by a special group of judicial members of the CLRC: Lawton LJ, Waller LJ, Lloyd LJ, McCullough J, Hazan J, and Judge Lawrence.

⁹⁷ See paragraphs 3.1–3.7 above.

and to those commenting on LCCP 122. However, our Report would not be complete if we did not include an account of the main lines of argument that inform those views. Many of the points that follow are dealt with at greater length in paragraphs 7.1–7.41 of LCCP 122, to which readers who require a fuller treatment are referred.

The need for reform

12.5 The relevant sections of the 1861 Act read as follows:

Section 18:

“Whosoever shall unlawfully and maliciously by any means whatsoever wound or cause any grievous bodily harm to any person with intent to do some grievous bodily harm to any person or with intent to resist or prevent the lawful apprehension or detainer of any person, shall be guilty of [an offence], . . . and shall be liable . . . [to a maximum penalty of life imprisonment].”

Section 20:

“Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of [an offence], . . . and shall be liable . . . [to a maximum penalty of 5 years’ imprisonment].”

Section 47:

“Whosoever shall be convicted upon an indictment of any assault occasioning actual bodily harm shall be liable . . . [to a maximum penalty of 5 years’ imprisonment].”

12.6 As explained in detail in LCCP 122⁹⁸ the language of the Act is so complicated, obscure and old-fashioned; and the structure of the three sections is so complicated and technical; that mistakes by lawyers and complete unintelligibility to the layman were eventually bound to result. This is in part the predictable outcome of legislation which was never intended to be more than a consolidation of older rules and principles, and which, even as such, did not seek to alter the theory, content and arrangement of those rules and principles.⁹⁹ But with the natural aggravation of the problem through time, it has for long been plain that the failure to reform and codify these sections has caused repeated difficulty in the administration of this branch of the law.

12.7 In recent years, the attempts of the courts at appellate level to elucidate the 1861 Act have led to a series of inconsistent or contradictory decisions.¹⁰⁰ In that connection we respectfully echo the protest of the Court of Appeal (Criminal Division):

“At a time when ‘middle-rank’ criminal violence is a dismal feature of modern urban life, and when convictions and pleas of guilty on charges under section 47 occupy so much of Crown Court lists it seems scarcely credible that 129 years after the enactment of the Offences against the Person Act 1861 three appeals should come before [the Court of Appeal] within one week which reveal the law to be so impenetrable”.¹⁰¹

12.8 Although much of that particular confusion was resolved by the House of Lords in *Savage*, that process itself demonstrated the weakness of the Act, and the hazards, expense and uncertainty that can result from its application. The Act remains defective in many serious respects, only some of which we now, once again, note.

12.9 First, it remains wholly unsatisfactory that the terms of the Act have to be translated, or actually replaced by more comprehensible language, before modern juries

⁹⁸ Paragraphs 7.4 to 7.13.

⁹⁹ See further the discussion in LCCP 122 paragraphs 7.4–7.5 and the footnotes to those paragraphs.

¹⁰⁰ *DPP v K* [1990] 1 WLR 1067; *Spratt* [1990] 1 WLR 1073; *Savage* [1992] 1 AC 714. The two latter cases were decided by different divisions of the Court of Appeal on the same day. Both concerned the mental element necessary to be established in a charge under section 47 of the 1861 Act; the two courts unwittingly contradicted each other in their interpretation of that section.

¹⁰¹ *Parmenter* [1992] 1 AC 699 at p 711H–712A, per Mustill LJ.

and magistrates can use the definitions of the crimes it contains to decide cases. For example, the Court of Appeal has suggested that in *section 18* the word “maliciously” adds nothing, and that in directing a jury about an offence under that section the word is best ignored.¹⁰² Nevertheless, the House of Lords in *Savage* confirmed that in *section 20* “the *mens rea* [of the] crime is comprised in the word ‘maliciously’”;¹⁰³ though there was no suggestion that the Court of Appeal had been wrong in thinking that a judge in summing up a *section 20* case should probably not mention the word “maliciously” or try to explain to the jury what it means.¹⁰⁴

12.10 A statute in everyday use should not contain an apparently important expression that in one section has no meaning at all, and that elsewhere, where it does have meaning, still cannot safely even be mentioned to the jury when the judge is directing them as to what that meaning is. Whilst there are inevitably many statutory provisions that need explanation and expansion by the judge if the jury is to handle them properly, it cannot be right to persist with statutory language that is so misleading that it has to be ignored.

12.11 Secondly, the need for such extensive judicial interpretation has turned sections 18, 20 and 47, in effect, into common law crimes, the content of which is determined by case-law and not by statute. That result is unsatisfactory, both because the extent of these important offences ought to be determined by Parliament, and because, on a more practical level, there are needless hazards in directing a jury not on the basis of a clear statutory text, but from judicial pronouncements, however distinguished the authors of those pronouncements may be.

12.12 For example, the trial judge in *Parmenter*¹⁰⁵ directed the jury on the *mens rea* required for the offence in *section 20* (ie the meaning in that section of “maliciously”) by reading to them the very words of Diplock LJ in *Mowatt*¹⁰⁶ that:

“It is quite unnecessary that the accused should have foreseen that his unlawful act might cause physical harm of the gravity described in the section, ie, a wound or serious physical injury. It is enough that he should have foreseen that some physical harm to some person, albeit of a minor character, might result.”

The context makes it quite clear that by this statement Diplock LJ indeed formulated a test that was “subjective”, to the extent that it required actual foresight of *some* physical harm. Yet the Court of Appeal found that, although in the context in which they were actually used Diplock LJ’s words “should have foreseen” meant “did foresee”, their natural meaning as quoted out of context by the trial judge when directing the jury in *Parmenter* was “ought to have foreseen”.¹⁰⁷ The judge had thus inadvertently created a real risk that the jurors would believe that they were being directed to ask themselves, not whether the appellant *actually* foresaw that his acts would cause injury, but whether he *ought to have* foreseen it. The convictions on the *section 20* charges therefore had to be quashed for misdirection, even though the jury had been directed in the *ipsissima verba* of the then leading case on that section.

12.13 Finally, it will be seen from the treatment which follows of the present law and of the need for reform that, although the offences in sections 18, 20 and 47 have become common law crimes, their rational substantive development has continued to be distorted by the influence of the presumptions and principles that informed a statute which is now 130 years old, and whose terms survive in effect unchanged from the earlier years of the last century.¹⁰⁸ Mere antiquity would not demand or justify a review of the law; but, in the following paragraphs, we demonstrate that the provisions of the 1861 Act, as now authoritatively interpreted in *Savage*, compel a formulation of the law that cannot be justified on grounds of logic, efficacy or justice.

¹⁰² *Mowatt* [1968] 1 QB 421, at p 426B.

¹⁰³ *Savage* [1992] 1 AC 699 at p 752D.

¹⁰⁴ [1968] 1 QB 421 at pp 426C–427D.

¹⁰⁵ [1992] 1 AC 699.

¹⁰⁶ [1968] 1 QB 421 at p 426D; upheld on this point in *Savage* [1992] 1 AC 699 at p 752E–F.

¹⁰⁷ [1992] 1 AC 699 at p 706F.

¹⁰⁸ As to the origins, dating back as far as 1829, of the wording of the 1861 Act, see LCCP 122 paragraph 7.5 footnote 78.

The present law

12.14 It may be helpful to reproduce here the restatements of sections 18, 20 and 47 (together with our explanation, in particular, of the last of those sections) that we formulated in LCCP 122 in the light of the authoritative guidance given by the House of Lords in *Savage*.¹⁰⁹

A restatement of sections 18, 20 and 47 of the 1861 Act

12.15 **18.** A person is guilty of an offence, punishable by life imprisonment, if he wounds,¹¹⁰ or causes any serious¹¹¹ bodily harm to, another, intending either

- (i) to cause serious bodily harm to any person or
- (ii) to resist the lawful arrest or detention of any person.

20. A person is guilty of an offence, punishable by 5 years' imprisonment, if he wounds, or inflicts¹¹² serious bodily harm upon, another, either

- (i) intending to cause some physical harm¹¹³ to any person or
- (ii) foreseeing that some physical harm to any person may be caused.

47. A person is guilty of an offence, punishable by 5 years' imprisonment, if he causes any hurt or injury calculated to interfere with the health or comfort¹¹⁴ of another by an act¹¹⁵ by which he intended to cause, or that he foresaw might cause¹¹⁶ either

- (i) any person to fear immediate and unlawful violence¹¹⁷ or
- (ii) any physical contact with any person.¹¹⁸

Section 47: the meaning of "assault"

12.16 A pre-condition to liability under section 47 is the commission of an assault. It remains, however, to consider what is meant in this context by "assault". In paragraph 18.1 below we explain that in the general terminology of the criminal law "assault" is sometimes used to mean (physical) battery; sometimes to mean ("psychic") assault by causing another to expect such battery; and sometimes the word "assault" is used without distinguishing between its meaning as psychic assault and its meaning as battery. In *Savage* the House appears at first sight to have identified the assault referred to in section 47 as psychic assault, since they said, in relation to a section 47 case, that it was "common ground that the mental element of assault is an intention to cause the victim to apprehend immediate and unlawful violence or recklessness¹¹⁹ whether such apprehension be caused".¹²⁰ However, such, "psychic", assault cannot be the sole basis of liability under section 47.

12.17 The practical reason for thinking that psychic assault cannot be the *only* form of assault that will ground a charge under section 47 is that a person who is struck from behind, or when asleep, suffers only (physical) battery and not psychic assault. It cannot have been intended to exclude such cases from the reach of section 47. Even more pressingly, a victim who does not have developed thought processes, such as a very young child, does not apprehend (or, at least, cannot be proved to apprehend) violence as part of the experience of being struck. Such a child was the victim in *Parmenter* itself,¹²¹

¹⁰⁹ As we said then, the law so stated does not differ in any essential respect from the interpretation of the law that the CLRC thought in urgent need of reform in 1980.

¹¹⁰ Any breach of the continuity of the victim's skin: *Archbold* (45th edition, 1993), paragraph 19–217.

¹¹¹ *Metharam* [1961] 3 All ER 200.

¹¹² The CLRC, Fourteenth Report at paragraph 153, pointed out that "inflict" is, marginally, narrower than "cause". This formulation, different from that in section 18, that is adopted in section 20 of the 1861 Act, therefore requires a distinction in formulation between the two sections.

¹¹³ *Savage* [1992] 1 AC 699 at p 752F.

¹¹⁴ This is the meaning of "actual bodily harm" adopted in *Miller* [1954] 2 QB 282 at p 292. For the extent to which that expression includes *mental* harm, see paragraph 15.21 below.

¹¹⁵ Paragraph 12.16 below.

¹¹⁶ See paragraph 12.16 footnote 120.

¹¹⁷ Paragraph 12.16 below.

¹¹⁸ Paragraphs 12.17–12.19 below.

¹¹⁹ Fairly clearly meaning here actual awareness, and not merely objective recklessness.

¹²⁰ *Savage* [1992] 1 AC 699 at p 740F, citing *Venna* [1976] QB 421.

¹²¹ *Savage* [1992] 1 AC 699 at p 732C.

where the father's liability under section 47 must thus have rested on battery only. Plainly, therefore, and despite the House of Lords' apparent formulation of assault in exclusively psychic terms,¹²² battery as well as psychic assault must be included within the definition of assault under section 47.

12.18 At the same time, however, battery cannot supply the whole of the meaning of assault in section 47. Psychic assault, emphasised by the House of Lords' citation of *Venna*,¹²³ must also be included. That view is reinforced by consideration of *Roberts*,¹²⁴ the case principally relied on by the House of Lords in *Savage* as correctly setting out the proper interpretation of section 47.¹²⁵ In that case the assault relied on was a battery, attempting to take off the victim's coat. That assault came within section 47 because it caused the victim to jump out of the car in which she was travelling with the accused in order to escape his attentions, with the result that she suffered actual bodily harm. It is, however, very difficult to think that the case would have had a different result if the accused had merely threatened the victim with violence or sexual assault, thus causing the same reaction without actually laying hands on her.¹²⁶

12.19 We make these points with some caution because the House of Lords did not specifically discuss this issue, and indeed summarised the conclusion of the Court of Appeal in *Parmenter* as to the respects in which the decisions of that court in *Spratt* and *Savage* were in accord as being that "Where the defendant neither intends nor adverts to the possibility that there will be any physical contact at all, then the offence under section 47 would not be made out".¹²⁷ That formulation would seem on its face to exclude psychic assault as a ground of liability. Nevertheless, we venture to doubt whether that can have been intended. The only safe course is to assume that assault in section 47 of the 1861 Act is to be interpreted as including not only psychic assault, but also battery, in the sense of any intentional or reckless physical contact with another.

Section 47: causation

12.20 The actual bodily harm has to be "occasioned" by the assault.¹²⁸ In *Savage* the accused, who had a full pint glass in her hand, threw the contents over a Miss Beal, but also let go of the glass, which broke and cut Miss Beal's wrist. The accused claimed that the glass slipped from her hand, and was not deliberately thrown. On those facts, the Court of Appeal held that "The test is objective—was the cut on Tracey Beal's wrist a natural consequence of the appellant's deliberate action in throwing the beer?";¹²⁹ and the House of Lords analysed the causal issue by saying:

"It is of course common ground that Mrs Savage committed an assault upon Miss Beal when she threw the contents of her glass of beer over her. It is also common ground that however the glass came to be broken and Miss Beal's wrist thereby cut, it was, on the finding of the jury, Mrs Savage's handling of the glass which caused Miss Beal 'actual bodily harm'".¹³⁰

A court must therefore go through a two-stage process. First to see whether an assault has been committed, and then to determine whether actual bodily harm has been caused by, or was a natural consequence of, the act that is found to constitute the assault: in *Savage* itself, "Mrs Savage's handling of the glass".

¹²² See paragraph 12.16 above.

¹²³ *Ibid.*

¹²⁴ (1971) 56 Cr App R 95.

¹²⁵ *Savage* [1992] 1 AC 699 at pp 741A–742G.

¹²⁶ The court in *Roberts* cited with approval, on the causation point, *Beech* (1912) 7 Cr App R 197. That was a case under section 20 of the 1861 Act, and thus not directly in point. It did, however, involve only a threat of violence, and it seems likely that if the court in *Roberts* had seen an important, or any, distinction between battery and psychic assault in the context of section 47 they would have treated *Beech* with more reserve.

¹²⁷ *Savage* [1992] 1 AC 699 at p 736A. The House's formulation is not a verbatim quotation from the judgment in the Court of Appeal in *Parmenter*, but rather a statement of the effect of the remarks of that court at [1992] 1 AC 709G–711B.

¹²⁸ *Savage* [1992] 1 AC 699 at p 742F.

¹²⁹ [1992] 1 AC 699 at p 718A; cited in *Savage* [1992] 1 AC 699 at p 731E.

¹³⁰ *Savage* [1992] 1 AC 699 at p 740F–G.

The difficulties of the present law

Introduction

12.21 The analysis in paragraphs 12.14-12.20 above is in our view the very minimum that is required in order to understand the present law against violence, even after the authoritative interpretation by the House of Lords in *Savage* of sections 18, 20 and 47 of the 1861 Act. That such extensive analysis of the words of the statute is necessary, before both laymen and lawyers can know the actual terms of the law, is the very opposite of the simply expressed and immediate guidance that ought to be available to everyone concerned with this most important part of the criminal law. That alone would, in our submission, be a very strong ground for reforming the 1861 Act. However, quite apart from that point, the law as restated in *Savage* is broadly the same as that identified by the CLRC in 1980. The CLRC thought that that law was itself in urgent need of reform; and we set out in this section the respects in which the law of the 1861 Act, as restated in *Savage*, is seriously defective.

The mental element

12.22 The House of Lords in *Savage* had to consider whether the “objective” approach to “recklessness” adopted in *Caldwell*¹³¹ should be applied to the offence of “malicious” wounding in section 20 of the 1861 Act. That was because the latter expression had been analysed, albeit without direct statutory authority, in terms of “recklessness”.¹³² The House closely analysed the relationship between *Caldwell* and *Cunningham*, and concluded that, in respect of section 20 of the 1861 Act, the *Cunningham* test of actual foresight on the part of the accused remained the law.¹³³

12.23 That recognition, as it would seem to be, of the practical viability of a law of offences against the person that is based on the actual awareness of the defendant in fact did no more than confirm the long-held understanding of the 1861 Act: for it will be seen from the account of sections 18, 20 and 47 set out in paragraph 12.15 above that each of the offences created by those sections requires proof of *some* actual state of mind on the part of the defendant. Whether and to what extent that should continue to be a feature of the law of offences against the person is a separate and important question, to which we revert in paragraphs 14.10-14.13 below. So far as the present law is concerned, however, the definitions of the various offences contained in the 1861 Act caused difficulty in requiring subjective fault not as to the harm or damage that the accused has actually caused, but as to some different, and often less serious, harm.

12.24 That irrationality is a grave weakness; and one which is greatly exacerbated by the failure of sections 18, 20 and 47 to produce a reasoned scale of offences based on the seriousness of the injury intended or caused, or to distinguish properly between the seriousness of offences on that basis. We address those problems in the following sections.

Degrees of Injury

12.25 Since both section 18 and section 20 are concerned with *serious* bodily harm, the only offence that controls the infliction of “actual” (ie non-serious) bodily harm is section 47. Yet even that section does not focus directly on responsibility for the infliction of (actual) bodily harm, but rather uses the two-stage test of, first, responsibility for an *assault*, from which, second, actual bodily harm then in fact results. However, the apparent distinction in respect of prohibited results between sections 18 and 20 on the one hand, and section 47 on the other hand, is rendered largely illusory in practice by the inclusion of *wounding* as an alternative ground of liability in sections 18 and 20.¹³⁴ Thus, although section 20 is generally accepted as creating a crime that is more serious than that created by section 47,¹³⁵ the distinction between the two sections is far from clearly stated. At

¹³¹ [1982] AC 341; see paragraph 9.5 above.

¹³² *Cunningham* [1957] 2 QB 396: see paragraph 9.2 above.

¹³³ [1992] 1 AC 699 at p 751D.

¹³⁴ Even a very minor incident can amount to a wounding: the interference with the victim does not have to be in any way sufficient to count as “serious” were that interference to be analysed under the alternative categorisation of bodily harm. What may be the quite fortuitous causing of a minor wound will, therefore, radically alter the level of seriousness attributed by the law to the results of the accused’s conduct.

¹³⁵ See the Court of Appeal in *Parmenter* [1992] 1 AC 699 at p 711F.

least if the injury to the accused can be characterised as a wound, there is little difference between the forbidden consequence under section 20 and the forbidden consequence, actual bodily harm,¹³⁶ under section 47.¹³⁷

Erratic application of the accused's fault

12.26 The greatest problem of the present law is, however, the lack of coherence in sections 20 and 47 between the consequences for which the accused is punished and the mental state that is sufficient for his conviction.¹³⁸ Thus section 20 is, in a non-wounding case, directed at punishing the infliction of *serious* bodily harm; but all that the accused needs to have foreseen as the result of his actions is any minor physical harm.¹³⁹ Similarly, section 47 is directed at punishing the causing of actual bodily harm; but all that the accused needs to have foreseen as the result of his actions is either fear of violence on another's part or any "physical contact" with any person.¹⁴⁰ The House of Lords in *Savage* commented on this incoherence between the acts forbidden by the offences and the required mental state, but not from the point of view of general policy.¹⁴¹ One cannot but agree with the view expressed by the CLCR,¹⁴² that the current law is, in this respect, both unjust and ineffective.

12.27 For reasons that we expand on in paragraphs 14.14–14.16 below, it is unjust, in the absence of very pressing reasons of practicality or social protection, to punish people for results of their conduct that they neither intended nor foresaw. In the case of the 1861 Act, however, punishment for results that were neither intended nor foreseen is imposed, not for any such pressing reasons, but simply through the accident of legislative history.¹⁴³ As a result there are, for no good or rational policy reasons, wide differences between what the accused foresees, and that which he can be criminally convicted of causing.

12.28 In section 20, for example, the accused who foresees only minor physical harm is nevertheless criminally liable for causing serious harm that may have been quite unforeseeable. Thus, for instance, an accused might push someone aside roughly in the street: unknown to him, they have unusually brittle bones, and suffer a fracture; or they step on to a concealed hole in the pavement, fall through, and break their leg. Similarly in section 47, all that the accused has to foresee is any physical contact: the actual bodily harm for which he is punished may equally arise entirely unforeseeably. Thus in *Savage* itself,¹⁴⁴ Mrs Savage would have been liable even if it had been proved that the injury to Miss Beal occurred only because of an entirely unforeseeable structural weakness that

¹³⁶ "Any hurt or injury calculated to interfere with the health or comfort of the prosecutor": *Miller* [1954] 2 QB 282 at p 292.

¹³⁷ There is some distinction between the consequence that must be foreseen by the accused under section 20, "some physical harm . . . albeit of a minor character", (*Savage* [1992] 1 AC 699 at p 752F) and the fear of (mere) physical contact, foresight of which is required by section 47; but any such distinction is rendered unreal by the two sections providing for the same maximum penalty of five years' imprisonment.

¹³⁸ We also noted in LCCP 122 that under the second limb of section 18, relating to intent to resist arrest or detention, it is in terms the law that a person is liable to imprisonment for life if, in the course of resisting arrest, he wholly unintentionally causes a very minor wound to another person. Since we did not think that it could be seriously contended that that law was supportable we did not discuss it further.

¹³⁹ This is the "*Mowatt* gloss" adopted by Diplock LJ in that case, and upheld by the House in *Savage*: see footnote 106 to paragraph 12.12 above, and further footnote 141 below.

¹⁴⁰ The latter expression has, we think, the same reach as the concept of applying force to, or causing an impact on, the body of another, that we recommend as the basis of the offence of assault that is contained in clause 6 of the present Bill. It is clearly different from, and is intended to be different from, the causing of bodily *harm*, in the sense of injury.

¹⁴¹ The House was pressed with an argument that the analysis of section 20 adopted by Diplock LJ in *Mowatt* [1968] 1 QB 421 at p 426D, that all that the accused need foresee is "some physical harm to some person, albeit of a minor character", was incorrect, because of an alleged "general principle" that "a person should not be criminally liable for consequences of his conduct unless he foresaw a consequence falling into the same legal category as that set out in the indictment" (*Savage* [1992] 1 AC 699 at p 751H–752A). The House however pointed out that such a principle did not apply generally throughout the criminal law, citing murder and manslaughter as examples. The construction of section 20, and in particular the implications of the word "maliciously" as used in that section, could not, therefore, be determined by appeal to any such principle. That, however, leaves open the more general question of whether, when one is considering general policy, and not merely the irrational results of what was recognised in *Savage* itself as being piece-meal legislation, it is desirable for there to be an incoherence between the consequence for which the accused is punished and the accused's mental state with regard to that consequence.

¹⁴² *Working Paper on Offences against the Person*, 1976, paragraphs 110–117; and Fourteenth Report, paragraphs 149–152.

¹⁴³ See paragraphs 12.1–12.2 above, and paragraphs 7.4–7.6 of LCCP 122.

¹⁴⁴ See paragraph 12.20 above.

caused the glass to splinter when vigorously handled: that the injury was unforeseeable would not avail her, once it had been established that she foresaw some physical contact to Miss Beal emanating from her handling of the glass, albeit contact in the quite different form of Miss Beal having beer poured over her.

12.29 In all such cases, the accused is at most negligent (and, at least in the version of the facts of *Savage* suggested in paragraph 12.28 above, not even negligent) as to the injury for which he is punished. We do not believe that to be a justified basis for criminal liability.

The practical effect of the law

12.30 The response on consultation strengthened our view that there are no countervailing practical considerations in favour of the 1861 Act, as opposed to the regime submitted for consultation under LCCP 122, which latter would only convict the defendant for causing injury of a category that he intended or actually foresaw.¹⁴⁵ On the other hand, there remain the practical merits of such a regime.

12.31 First, in none of the examples noted in paragraph 12.28 above would the defendant become free of *all* criminal liability. If he intends or foresees actual harm, he should be punished for that; in the *Savage* case itself, pouring the beer was a common assault, punishable by six months' imprisonment, and will remain an assault, similarly punishable, under the Criminal Law Bill.¹⁴⁶ Second, recklessness would continue to extend to awareness of a *risk* that a consequence might occur. That fairly broad test certainly does not require the prosecution to prove that the accused foresaw all the details of what in fact occurred; and we believe the test to be effective against the implausible claim that the defendant did not appreciate a likely risk. Moreover, the response on consultation clearly supported our view that the law of recklessness will operate most effectively within the graded system of offences contained in the draft Bill which, unlike the 1861 Act,¹⁴⁷ distributes liability rationally according to the seriousness of the injury that the defendant consciously causes—and therefore according to the seriousness of the risk that he consciously took.

Conclusion

12.32 Consultation has strongly confirmed our view that the law under the 1861 Act is not only unjust, but also inefficient in its structure and statement. *Savage* may have removed some of the worst excesses of the statute, including the need to speculate on the meaning, in the 1990's, of "maliciously". But magistrates and juries are still faced with offences stated in complex terms, that puzzlingly use widely different concepts (eg serious bodily harm; some physical harm) within the same definition; or with the analysis of causation that, as we explained in paragraph 12.20 above, is now sometimes required under section 47 of the 1861 Act. Laymen should not be put to the trouble of understanding these mysteries, and judges and magistrates' clerks should not be put to the trouble of trying to explain them, unless there are strong practical reasons for the law to take that form. But, far from there being any positive argument in favour of the present state of the law, that law has only reached its present form through accidents of history in 1861 and before.

12.33 The injustice and the inefficiency of the law under the 1861 Act combine to make that law an inept vehicle for conveying society's disapproval of violence, and the penalties with which violence will be met. At best, the 1861 Act contains a muddled message: that the same penalty is envisaged for causing both substantial (section 20) and minor (section 47) harm; and that although the law purports to punish and control the actual, subjective, fault of the accused, that fault is not linked to the damage caused, and is irrelevant to the punishment that the law provides. Such a law does not clearly

¹⁴⁵ In particular, there was no support for the argument that we rejected in LCCP 122, that the injustice of the current law in the examples noted in paragraph 12.28 above should be accepted, but only to be mitigated at the sentencing stage. Issues of liability should not be dealt with by means of judicial sentencing discretion unless there is no alternative; and in any event it is very demeaning to the jury for them to be instructed to ignore the accused's actual intention or foresight in determining which crime he has committed, only to find that the judge relies on that very factor in deciding that the accused should not suffer the normal penalty for the crime of which the jury have just convicted him.

¹⁴⁶ See paragraphs 18.1–18.7 below, and clause 6 of the Criminal Law Bill.

¹⁴⁷ See paragraph 12.6 above.

single out those who contemplate violence as proper objects of deterrence and punishment because of the violence that they contemplate rather than the harm that they accidentally cause; nor does it distribute that punishment according to the subjective intentions, and thus the social fault, of the accused. Such a law, resting as much as it does on chance or the causing of unintended harm, does not properly convey society's message that a propensity to engage in violence is taken very seriously, and will be punished according to the seriousness of the harm that the accused consciously causes.

12.34 The interests both of justice and of social protection would be much better served by a law that was (i) clearly and briefly stated; (ii) based on the injury intended or contemplated by the accused, and not on what he happened to cause; and (iii) governed by clear distinctions, expressed in modern and comprehensible language, between serious and less serious cases.

12.35 In the Bill accompanying LCCP 122, we consulted on a new set of offences designed to meet these objectives. The new offences were based on the proposals made by the CLRC in their Fourteenth Report in 1980, which we had reviewed in the light of *Savage*. Consultation has strongly confirmed our provisional conclusions that a law based on the CLRC's proposals should be introduced as soon as possible to solve the difficulties caused by the 1861 Act, and that the structure of that law should be of the sort contained in our draft Bill. We now explain the rationale of that general structure, and set out the offences as they appear in the Criminal Law Bill that is presented in this Report.

INTENTIONAL SERIOUS INJURY, RECKLESS SERIOUS INJURY AND INTENTIONAL OR RECKLESS INJURY

13.1 The response on consultation overwhelmingly supported both the general structure of the offences which we proposed to replace sections 18, 20 and 47 of the 1861 Act, and the terms of each offence as it appeared in the Bill accompanying LCCP 122.¹⁴⁸ The final versions differ only in minor matters of technicality and arrangement, which are indicated later in this Report.

13.2 In their final form, the new offences read as follows:

2.—(1) A person is guilty of an offence if he intentionally causes serious injury to another.

(2) An offence under this section is committed notwithstanding that the injury occurs outside England and Wales if the act causing injury is done in England and Wales.

3.—(1) A person is guilty of an offence if he recklessly causes serious injury to another.

(2) An offence under this section is committed notwithstanding that the injury occurs outside England and Wales if the act causing injury is done in England and Wales.

4. A person is guilty of an offence if he intentionally or recklessly causes injury to another.

The general structure and its rationale

13.3 In LCCP 122 we accepted the basic conclusions of the CLRC that:

- (i) The distinctions in the 1861 Act between wounding and various types of "bodily harm" should be swept away, in favour of the simpler concept of "causing injury",¹⁴⁹
- (ii) there should be a distinction between serious injury and other injury;
- (iii) in respect of serious injury there should be a distinction between intentionally causing such injury and (subjectively) recklessly causing such injury.

13.4 In respect of the latter two proposals, we also agreed with the CLRC that, while the serious moral difference between intentional and reckless serious injury should be reflected in two separate offences, the same approach in relation to less serious injury

¹⁴⁸ See paragraphs 3.2–3.6 above.

¹⁴⁹ CLRC Fourteenth Report, paragraph 154.

would overcomplicate the law. Subject only to minor amendment, the scheme of offences proposed in the draft Code¹⁵⁰ and in LCCP 122 therefore followed that proposed by the CLRC, which the Committee had expressed as follows:

- (a) causing serious injury with intent to cause serious injury, punishable with a maximum penalty of life imprisonment;
- (b) causing serious injury recklessly, punishable with a maximum penalty of 5 years' imprisonment and triable either way;
- (c) causing injury recklessly or with intent to cause injury punishable with a maximum penalty of 3 years' imprisonment and triable either way.¹⁵¹

13.5 Our view remains that this approach, as now embodied in the final versions of the offences in the Bill accompanying this Report, accurately distinguishes between the more serious and the less serious offences, and ensures that, in contradistinction to the present law, the accused is consistently punished according to the type of injury that he intended or was aware that he might cause.¹⁵² The distinction in penalty between the second and third offences will also cure the present anomaly, which we understand to cause difficulties both for courts and for prosecutors, that although the conduct envisaged by section 20 of the 1861 Act purports to be more grave than that envisaged by section 47, the maximum penalty under both sections is the same.

The terms of the new offences

13.6 We now report on specific aspects of the offences on which we consulted in LCCP 122, or which have otherwise required attention since the completion of that paper.

Intention and recklessness

Introduction

14.1 The concepts of acting intentionally or recklessly that are adopted in clauses 2–4 will be interpreted according to the definitions in clause 1 of the Bill that are explained in paragraphs 7.1–10.4 above. It is one of the principal aims of the Criminal Law Bill to provide clear and workable definitions of fault terms.

14.2 The clause 1 definition of “intentionally” is therefore used in replacing the CLRC’s formula of “causing serious injury with intent to cause serious injury”¹⁵³ with the simpler language of intentionally causing serious injury. The clause 1 definition of “recklessly”, and its application to the clause 5 definition of recklessly causing serious injury, establishes by statute that liability for a type of consequence depends on the accused’s foresight of that type of consequence.¹⁵⁴

14.3 We do not think that it can be questioned that the most serious conduct consists of causing injury, and *a fortiori* serious injury, intentionally. On consultation there was little disagreement with the way in which we suggested that “intention” should be defined for this purpose, which we have already explained in detail in paragraphs 7.1–7.14 above. We do not think it necessary to add here to that exposition. It is, however, necessary to say something more about the policy behind the application to the offences created by clauses 3 and 4 of the Criminal Law Bill of the definition of “recklessly” provided by clause 1(b) of the Bill.

14.4 The effect of those two clauses is that, in respect of the causing of serious injury (clause 3) or of injury (clause 4), the accused will only be guilty of those offences if when he causes the forbidden result he is aware of a risk that serious injury (clause 3) or injury (clause 4) will occur, and nonetheless unreasonably takes that risk. The accused will accordingly not be guilty of these offences if when he caused the forbidden result

¹⁵⁰ Clauses 70–72.

¹⁵¹ CLRC Fourteenth Report, paragraphs 152 and 155–157.

¹⁵² For the erratic nature of the present law on this point, see paragraph 12.26 above.

¹⁵³ See paragraph 13.4(a) above.

¹⁵⁴ See paragraph 12.31 above.

he was not aware of the risk so specified. Although, as we indicate below, there was little dissent from that conclusion on consultation, the importance of the point requires us to treat it at some greater length.

LCCP 122 and the response on consultation

14.5 The formulation of “recklessness” in respect of offences against the person set out in paragraph 8.1 above that we adopted in the Draft Code,¹⁵⁵ and recommended in LCCP 122,¹⁵⁶ and recommend in the Criminal Law Bill; sets out in statutory form the definition of the mental element in offences against the person recommended by the CLRC. We have a substantial degree of confidence that the formulation adopted in the Draft Code and repeated unchanged in the present Bill accurately represents the policy recommended by the CLRC because, as we indicated in paragraph 12.3 above, in formulating the Draft Code we had the advantage of being advised by a special group of members of the CLRC who checked the Draft Code for consistency with the CLRC’s recommendations.

14.6 The conclusion of the House of Lords in *Savage*¹⁵⁷ as to the appropriateness of foresight of harm as the criterion of liability in offences against the person emboldened us, in LCCP 122, to maintain our recommendation of the formulation of liability adopted by the CLRC in their own Report in 1980. But we thought it right specifically to enquire whether consultees supported that approach. As we have indicated in paragraph 3.1 above, there was very strong support for legislation, at an early date, in the general terms of the Bill annexed to LCCP 122 and recommended in the present Report.

14.7 Many of these commentators did not specifically address the proposed definition of recklessness, though some expressly indicated support for that definition.¹⁵⁸ At the same time, however, consultees were specifically asked if they had objections to the formulation of recklessness contained in LCCP 122, and in view of the care with which and detail in which many of them approached their task we feel some confidence in concluding that those who supported the Bill in general without commenting on the specific question of recklessness were content with the policy adopted in LCCP 122 and in this Report.

14.8 That in its turn, however, requires us to pay special attention to the concerns of the minority of commentators who expressed reservations on this point. In LCCP 122 we pointed out that, despite some doubts having been expressed about the appropriateness of a “subjective” approach to recklessness, there had never been any worked-out demonstration of how any other approach to offences against the person might achieve both the justice and the efficiency that this part of the law demands.¹⁵⁹ In view of the generally-accepted need for early legislation in this area, we hoped that any commentator who disagreed with the formulation of recklessness suggested by the CLRC and in LCCP 122 as suitable for immediate enactment would advance and justify an alternative legislative text. In that we were disappointed, such comments as we received being of a somewhat general nature. Nor did it appear that those commentators regarded the proposals of the CLRC and in LCCP 122 as unacceptable, as opposed to being less than the best that it might be possible to achieve.¹⁶⁰ The more substantial such observations were however as follows.

14.9 The Bar Council suggested, contrary to the conclusion of the House of Lords in *Savage*,¹⁶¹ that the *Caldwell* formula should be used in directing juries in respect of recklessness in offences against the person cases. The Criminal Bar Association

¹⁵⁵ Draft Code, clause 18(c).

¹⁵⁶ LCCP 122, paragraphs 5.12–5.13.

¹⁵⁷ See paragraphs 12.22–12.23 above.

¹⁵⁸ Eg the Council of Her Majesty’s Circuit Judges; the Judges of Birmingham Crown Court; the legal committee of the Metropolitan Stipendiary Magistrates; the Criminal Law Committee of the Law Society; the Criminal Law Committee of the Society of Public Teachers of Law.

¹⁵⁹ LCCP 122, at paragraph 7.22.

¹⁶⁰ Some commentators expressly so stated. Thus, for instance, an academic critic, Mr Simon Gardner, whose view as to the need for reform is mentioned in paragraph 3.6 above, went on to argue that the Commission should have taken more account of recent academic writing about possible alternatives to “subjective” liability, stated generally. He however made plain to us that in his view the law set out in LCCP 122 was perfectly respectable, but not the only possible approach to the subject.

¹⁶¹ See paragraph 9.5 above.

acknowledged that concern had been expressed that a “subjectivist” approach to the definition of offences might lead to the public being insufficiently protected, but they were unable to say how widely such a view might be held amongst their members, or how offences against the person might be alternatively defined. The Association did however point out that a definition of offences against the person in objectivist terms would mark a radical departure from the current law of offences against the person, which departure, they considered, should not be undertaken without further detailed consultation: a consultation that our own experience with LCCP 122 suggests would not lead to any change in the law. The Metropolitan Police suggested that the definition in the Bill excluded a case of “wilful refusal” of a person to consider a consequence or risk: though the example they gave was of a person driving dangerously without considering the potential risk to others where, as we have indicated,¹⁶² different considerations arise that are not dealt with in the present Bill. The Association of Chief Police Officers queried whether the part of the test of recklessness that requires the offender’s conduct to have been unreasonable in the circumstances known to him¹⁶³ would be judged subjectively, not objectively, thus giving rise to specious claims that the offender’s conduct had been reasonable in his own eyes.¹⁶⁴ Of the academic lawyers who commented on LCCP 122 only one expressed reserve about the definition of recklessness.¹⁶⁵ It will be recalled that the Criminal Law Committee of the representative body of academic lawyers, the Society of Public Teachers of Law, strongly supported legislation in the terms adopted in LCCP 122.¹⁶⁶

Recklessness in clauses 2–4 of the Criminal Law Bill

14.10 This Report gives us the opportunity to set out more fully than was done in LCCP 122 the considerations, assumed by most commentators on LCCP 122 and by the CLRC, that point to the solutions recommended in clauses 2–4 of the Criminal Law Bill. For clarity and ease of arrangement we discuss the different policy issues separately from each other, but it is important to stress that the decision at the end of the day involves a balancing of these various considerations. Thus, for instance, it is sometimes argued that a fully subjective test might lead to some cases that the law might wish to punish not being covered; but against that must be balanced the difficulty of identifying such cases, and the ease of limiting any legislation to the particular cases that it is intended to cover. Similarly, however, what are argued to be the demands of principle have to be weighed against the practicality of, and the protection for the public afforded by, the solutions to which those principles are said to lead.

14.11 Above all, however, we have to remind ourselves that we are concerned with developing a solution to a problem of law reform that was identified as urgent by the CLRC as long ago as 1980,¹⁶⁷ a view that was repeated by our own correspondents with increased insistency.¹⁶⁸ What those correspondents seek is a solution to the problem of the vast number of routine, but nonetheless very serious and pressing, cases of personal violence, with which both the Crown Courts and the magistrates’ courts are faced day in and day out throughout the year. It is essential that the solution offered should be just, simple, workable and effective in at least the great majority of cases. It will always be possible to suggest hypothetical cases of causing injury that, because they involve carelessness and not conscious violence, would or might not be covered by a law in the terms suggested by the CLRC: any more than they would be covered by the present law. Some such cases are addressed by other criminal sanctions, for instance under the Health and Safety legislation or the Road Traffic Acts. Others are appropriate for the application of civil rather than criminal remedies. But to try to formulate statutory provisions about the general law against violence that extended to the (almost certainly very few) cases

¹⁶² See paragraph 10.4 above.

¹⁶³ “A person acts recklessly with respect to . . . 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 that risk”.

¹⁶⁴ This fear is, with respect, unfounded. The definition in the Bill makes a clear distinction between the accused’s actual awareness of the existence of the risk, and the question that, like all issues of reasonableness, has to be judged objectively, of whether it was reasonable for him to take that risk.

¹⁶⁵ See footnote 160 above.

¹⁶⁶ See footnote 33 to paragraph 3.6 above. The Committee in fact went even further, by urging the adoption of the Bill’s definition of recklessness throughout the criminal law, and not just in respect of offences against the person.

¹⁶⁷ See paragraph 12.1 above.

¹⁶⁸ See the report of the overall response on consultation that is given in paragraphs 3.3–3.6 above.

not already covered by the criminal law that were generally thought to merit *criminal* sanctions would involve difficulty, complexity and the great danger of extending the reach of the criminal law to an unacceptable degree.

14.12 It is also appropriate to repeat that a test in terms of awareness of risk of injury of the type that occurred requires only a fairly low level of awareness of risk, rather than prolonged reflection and deliberate decision-making.¹⁶⁹ Nor does it require the accused to have foreseen all the details of what occurred, but merely to have been conscious of a danger of injury of that sort occurring. Thus, in relation to the offence of causing serious injury (clause 3 of the Criminal Law Bill) the accused must have been aware of a risk of causing serious injury; in relation to the offence of causing injury (clause 4 of the Criminal Law Bill) he must have been aware of the risk of causing injury. These are essentially commonsense, everyday, enquiries, of the sort well suited to be handled by juries and magistrates.

14.13 The very considerable weight of the evidence that we have received indicates wide acceptance that the solution proposed by the CLRC in 1980, and which we adopted in LCCP 122, thus meets the criterion of a law that is workable and effective in the vast majority of cases of personal injury, and certainly in cases that would naturally be regarded as ones of violence. In particular, there are no grounds for thinking that the urgently-required reform in this area should be postponed yet again, whilst a different solution is sought, and then itself is subjected to review: a review that we are confident, for the reasons discussed below, would lead to the rejection of any alternative to the present recommendation.

Principle

14.14 We have already warned that considerations of principle cannot be dispositive if practical considerations, or the need to protect the public, point in a different direction. At the same time, however, it would be wrong to make the opposite mistake, of forgetting the important values that are enshrined in an approach to the criminal law that demands that people are only convicted of and punished for criminal offences when they are aware of what they are doing. Actions that may be thought culpable, because negligent, in terms of the law of civil liability are not necessarily enough to attract criminal liability: because principles of personal autonomy and freedom require that the state should only use its machinery to inflict punishment on those who know what they are doing, and thus could, but do not choose to, desist.

14.15 That approach cannot, for practical reasons, be followed throughout the criminal law: hence the existence of crimes of strict liability and of (a comparatively few) crimes of negligence. The principle has however characteristically been thought of importance in deciding the limits of liability for serious crimes, such as the offences against the person now under review. Nor is that attitude confined to those whose interest in the criminal law is of a theoretical nature only. *Archbold*, the practitioners' Bible, puts the point forcefully:

“The difference between knowingly taking a risk of the prohibited result following and not realising that there is any such risk is, it is submitted, fundamental. It should continue to mark the dividing line, as it did before [*Caldwell* and *Lawrence*], between guilt and innocence in all offences requiring at least ‘recklessness’ as an ingredient.”¹⁷⁰

14.16 The approach of the court in *Cunningham* directly implemented that principle. Strong reasons would be required before it is set aside.

¹⁶⁹ Ashworth, speaking of the more demanding test of intention, points out that “in many offences of violence and other crimes the events happen so suddenly and rapidly that a fleeting realization of what one is doing may be the most that time allows. Yet it is well established that this fleeting realization is enough for intention”: Andrew Ashworth, *Principles of Criminal Law* (1991), p 147.

¹⁷⁰ *Archbold* (44th edition, 1992), paragraph 17–74. And see also Ashworth, *op cit* in paragraph 14.12 above, at p 155: “A person who is aware of the risk usually chooses to create it, and therefore chooses to place his or her interests above the well-being of those who may suffer if the risk materializes. Choosing to create a risk of harmful consequences is generally much worse than creating the same risk without realizing it.”

Complexity

14.17 We have already pointed to the danger of a test expressed in terms of (undefined) recklessness leading to the application of nothing more than the civil, tortious, standards of liability.¹⁷¹ That would be an extraordinarily severe rule for *criminal* liability, and no critic, so far as we are aware, has suggested such a course. Rather, insofar as objective liability has been propounded, at the same time limitations have been formulated that are designed to constrain such liability within what are thought to be the proper bounds of the criminal law. That process is most clearly illustrated by the expositions of recklessness offered in *Caldwell* and *Lawrence*, and upheld, in respect of the offence of reckless driving, in *Reid*, where objective liability is restricted to cases of “obvious” or “obvious and serious” risk.¹⁷² Such an expository formula was forced on the courts concerned by the need, patent though not acknowledged in any of the cases, to save “objective” recklessness from degenerating into mere civil negligence. The penalty for that move is, however, the creation of a law of considerable complexity.

14.18 The formula adopted by the CLRC is, in our view, simple, very easy for a judge to explain to a jury, and very easy for the jury to understand.¹⁷³ The same cannot be said of the qualified objective formulas that were advanced in *Caldwell* and *Lawrence*. First, extensive investigation of a practical, not a merely academic, nature was necessary in an attempt to identify the exact limits and bearing of the formulas.¹⁷⁴ Even judges of the highest distinction have found that a challenging task.¹⁷⁵ Second, it should not be overlooked that all these definitions, whatever their terms, have to be expounded to a jury and be understood by them; or expounded to lay magistrates and equally be understood by them. In *Madigan*¹⁷⁶ the Court of Appeal decided that, in directing juries in reckless driving cases, the judge should use the *ipsissima verba* of Lord Diplock’s speech in *Lawrence*. That remained the law for ten years, during which time a very considerable number of juries must have been directed in those terms.¹⁷⁷ However, in *Reid* Lord Goff of Chievely subjected Lord Diplock’s formulation to lengthy analysis from the point of view of its suitability as a jury direction,¹⁷⁸ and concluded that the formulation should be used only as a guide to the general requirements of the law, and needed to be supported by an explanation of its basis in legal policy, assisted by simple illustrations which may bring the abstract principles to life.¹⁷⁹

14.19 We feel bound to comment that, even in the areas of the law where they have been thought appropriate for use, the *Caldwell/Lawrence* formulas have given rise to substantial uncertainty, and to disagreement between the Court of Appeal and the House of Lords as to how juries should be directed in pursuit of them. We cannot think that that is a happy augury for the extension of such formulas, or of other tests formulated along the same lines, to the law of offences against the person.

Justice

14.20 One of the most criticised aspects of the *Caldwell* approach is that it creates criminal liability in every case in which there is a risk of injury that is “obvious” to a reasonable prudent person, even though the risk would not have been obvious to the defendant (by reason of age, lack of experience or lack of understanding) if he had given thought to the matter. That was the position in *Elliot v C*,¹⁸⁰ where a fourteen year old girl was charged with setting fire to a shed, being reckless as to whether it would be destroyed, under section 1(1) of the Criminal Damage Act 1971, by igniting white spirit: despite the facts that she was in a remedial class at school; lacked understanding of the characteristics of white spirit; and was at the time tired and exhausted, having been out all night.

¹⁷¹ See paragraph 10.2 above.

¹⁷² See paragraph 9.4 above.

¹⁷³ It is also, in our submission, easy for a jury to *apply*, and to apply effectively. That however is a somewhat different issue, and since some doubts have been expressed on the point we deal with it separately below.

¹⁷⁴ See *Archbold* (44th edition, 1992), paragraphs 17-66-17-77.

¹⁷⁵ “[A]fter long and careful analysis of Lord Diplock’s direction [in *Lawrence*] with the help of very skilled counsel I have, I think, understood it and find it legally correct . . .”: Lord Browne-Wilkinson in *Reid* [1992] 1 WLR at p 819H.

¹⁷⁶ (1982) 75 Cr App R 145.

¹⁷⁷ In 1991 there were 1,789 “trials” for reckless driving in the Crown Court, though a substantial number of those were no doubt resolved by a guilty plea.

¹⁷⁸ See [1992] 1 WLR at pp 813G-816F.

¹⁷⁹ *Ibid*, at p 816F.

¹⁸⁰ [1983] 1 WLR 939.

14.21 The Divisional Court held that it was coerced by Lord Diplock's definition in *Caldwell* to hold her behaviour to have been reckless. Robert Goff LJ however made clear that he reached that conclusion with great reluctance, and only because *Caldwell* left no room in its definition of recklessness for consideration of whether the risk would have been obvious to the actual defendant if she had thought about the matter.¹⁸¹

14.22 It is possible to suggest versions of an objective test that avoid obvious embarrassments of this sort; but formulation of them is far from easy. Detailed and complex provisions, or alternatively provisions that leave a high degree of discretion to the jury, will be required to accommodate every case in which it is thought necessary to ameliorate a purportedly general test such as that laid down in *Caldwell*. None of that is likely to improve the simplicity or clarity of the law.

Usability and effectiveness

14.23 It is sometimes suggested that a test such as that adopted by the CLRC is difficult for a jury to handle. However, none of our own correspondents expressed that view. The question of whether the accused was aware of the risk inherent in his actions, which is the question posed by the approach to recklessness adopted by the CLRC and in the Criminal Law Bill,¹⁸² is a simple question of fact, of a kind that juries have been successfully trusted to answer throughout the modern history of the criminal law. If the jury concludes that the accused failed to identify the possibility of risk they will acquit, because the conditions for liability are not met. As was pointed out in *Reid*, it is not difficult in the context of the offence of reckless driving to give examples where a mode of driving is rightly characterised as "reckless" whilst there may nonetheless be difficulty in establishing that the driver was aware of any particular risk of harm.¹⁸³ But the position in cases of violence against the person, with which we are concerned here, is quite different. Where one person has used violence against another in circumstances that clearly carry a risk of injury it is appropriate, and safe, to leave to the tribunal of fact, magistrates or jury, the drawing of the inference that he was aware of that risk. The inference is one of common sense, with which magistrates and juries are particularly suited to deal.¹⁸⁴

14.24 A further concern, however, that formed part of Lord Diplock's reasoning in *Caldwell*, is that a subjective test might exclude from the ambit of the criminal law those who acted in a (culpable) state of rage, excitement or intoxication.¹⁸⁵ A few of our own commentators took the same view.¹⁸⁶ However, there is every reason to think that the comparatively low level of cognition required by the CLRC's test¹⁸⁷ is only rarely excluded by the presence of the factors referred to, and that courts have no difficulty in recognising that practical fact. Indeed, even in the case of intoxication, which one would expect to be the most potent agent in preventing awareness of risk on the part of the actor, it is very difficult to find cogent examples of persons with sufficient motor control to commit the *actus reus* of an offence whilst lacking, through intoxication, the modest degree of awareness that the rules of subjective liability require.¹⁸⁸

14.25 In reaching these conclusions we give considerable weight to the views of practical lawyers who have seen in the test formulated by the CLRC and followed in this Report a usable and effective way of dealing with offences against the person, in the context of jury

¹⁸¹ *Ibid*, at p 949H.

¹⁸² Bill, clause 1(b)(ii): "[A] person acts 'recklessly' with respect to . . . a result, when he is aware of a risk that it will occur" [and it is unreasonable, having regard to the circumstances known to him, to take that risk].

¹⁸³ [1992] 1 WLR at pp 795H–796A and 810E. It might be difficult for a jurymen to be sure that the reckless driver recognised that his mode of driving created a risk of injury, because it is entirely possible to be *driving* "recklessly" whilst simply not thinking at all. But, save in very unusual cases, a normal person who engages in violence that carries a risk of injury will not be able plausibly to say that that risk never crossed his mind.

¹⁸⁴ "[T]he court or jury will be entitled to take into account the probability of the result and might infer that he appreciated the risk of bringing it about by his acts": CLRC Fourteenth Report, paragraph 12.

¹⁸⁵ [1982] AC at p 352D.

¹⁸⁶ See paragraph 14.9 above.

¹⁸⁷ See paragraph 14.12 above.

¹⁸⁸ This issue is extensively discussed in the Commission's Consultation Paper No 127, *Intoxication and Criminal Liability* (1993), in particular at paragraphs 1.10–1.21.

trials. The practising lawyer members of the CLRC who adopted that test were certainly not merely theoretical observers, unaware of the need to provide effective measures against personal violence. Neither were the judges who first gave formal expression to that test in *Cunningham*.¹⁸⁹ Neither are our own correspondents who supported the CLRC's approach.

14.26 This body of opinion fully reinforces our own view that a rule as proposed by the CLRC would be an effective, simple and practical way of adjudicating upon cases of personal violence. Any other rule would threaten to introduce the uncertainty, complexity and indeed metaphysical abstraction¹⁹⁰ that has burdened other parts of the criminal law. That cannot be right in respect of an area of the law, offences against the person, that, above all others, should be clear, straightforward and practically useable. For those reasons in particular we cannot possibly recommend any deviation from the course proposed by the CLRC and subjected to further review by commentators on LCCP 122.

Injury

Introduction

15.1 Just as it is important that the mental element in serious offences should be defined by statute, so must statutory definitions be provided that, as closely as possible, indicate the nature of the harm prohibited by the criminal law. It is generally accepted that some better formulas must be found than the early nineteenth-century references to "grievous bodily harm" or "actual bodily harm". That exercise is important not only in order to produce clear legislation, but also to enable proper discussion of the policy questions affecting whether or not some unusual forms of harm, for instance the causing of disease or of merely mental injury, should be prohibited by the criminal law. Consultation on LCCP 122 enabled us to obtain a wide range of opinions on all of those, sometimes difficult, issues. In what follows we report on that consultation and set out our recommendations in the light of it.

15.2 Clause 1(6) of the draft Bill accompanying LCCP 122 defined "injury" for the purposes of the offences in Part I as:

- "(a) physical injury, including pain, unconsciousness, or any other impairment of a person's physical condition; or
- (b) impairment of a person's mental health".

After consultation, we have felt justified in maintaining the same definition in clause 18 of the Criminal Law Bill.

15.3 In LCCP 122 we invited comment on the following specific issues:

- whether the prohibited consequences of the new offences should be stated in terms of "injury", or in some other way (paragraphs 8.9–8.12);
- whether there should be a statutory provision excluding minor injuries from the offence of intentionally or recklessly causing injury (paragraphs 8.13–8.14);
- whether "serious" injury should be defined, or be left to the judgment of the jury (paragraph 8.15);
- whether the express inclusion of pain and unconsciousness, and specific reference to any other impairment of a person's physical condition in the last part of the definition of physical injury, were necessary and justified (paragraph 8.18);
- whether "injury" should include any, and if so what, injury to the mind, and whether injury to the mind would be satisfactorily limited if it were defined in terms of "impairment of mental health" (paragraphs 8.20–8.33).

In the following paragraphs, we give our final views on these matters in the light of the consultation.

¹⁸⁹ Byrne J, who delivered the judgment in *Cunningham*, was one of the most respected and experienced criminal practitioners of his generation, having been Senior Prosecuting Counsel at the Central Criminal Court before his elevation to the bench. "Those who appeared before him will know that he was a judge of the highest repute. As a criminal lawyer, there were not many to excel him in his day": per Owen J in *R v R* [1991] 1 All ER at p 749C.

¹⁹⁰ See Lord Browne-Wilkinson, cited in footnote 88 to paragraph 10.2 above.

“Injury” or “personal harm”

15.4 Although in the draft Code we substituted the expressions “personal harm” and “serious personal harm”¹⁹¹ for the CLRC’s “injury” and “serious injury”, in LCCP 122 we were sufficiently persuaded by criticisms of that change, particularly from Dr Glanville Williams,¹⁹² to revert to the latter. Specifically, we were provisionally persuaded that the word “injury” is more appropriate than “personal harm” to describe the appreciable interference with the complainant’s body or mental state to which, on any view, the criminal law should be limited. Similarly, although it cannot be said that the word “injury” inevitably excludes reference to merely economic loss,¹⁹³ we tended to agree with the CLRC that that is a shorter and more natural way of indicating the basic idea of damage to the person than is an (albeit qualified) reference to “harm”.

15.5 We emphasised that in our view the actual word used to identify the conditions referred to was less important than the way in which that word was defined, limited and referred to in the legislation. We thought that in that process of definition it was more appropriate to start from the narrower concept of “injury”, and then specifically to add to that concept particular cases that the law should cover; than to use a more all-embracing basic concept of “personal harm”, that might then have to be specifically limited, and thus might not be limited with sufficient certainty, to exclude cases that were not appropriately covered by the serious offences with which we are concerned. On consultation, support for that view was near unanimous, and it is reflected in the Criminal Law Bill.

Inclusion of minor injuries

15.6 In LCCP 122, we provisionally proposed that the offence now in clause 4 of the final draft Bill which, unlike those in clauses 2–3, is not limited to *serious* injury, should extend to all injuries. We reached that provisional view for three reasons, despite our sympathy with the suggestion by Dr Glanville Williams that the result might be to include cases that are inappropriate for an offence that carries a maximum penalty of three years’ imprisonment. First, any event that can properly be described as causing an *injury*, as opposed to the application of force or causing an impact with which the crime of assault is concerned, should be prosecutable under the more serious offences contained in the present clauses. Second, we saw no easy solution to the problems of deciding what type of injury might be sufficiently minor to be excluded from the reach of a crime that punishes the infliction of injury;¹⁹⁴ or of finding a legislative formula that would accurately encapsulate whatever conclusion was reached on that question. Third, where the injury was indeed of a minor degree we would expect that fact to be taken into account by prosecutors in deciding whether to charge the offence of causing injury in clause 4, rather than assault under clause 6; and, as in all cases, the extent of the injury would be a factor to be taken into account by a sentencing court in determining where, in the spectrum of possible penalties below the statutory maximum, the particular case should fall.

15.7 On this issue too, the response on consultation was almost unanimously in favour of our provisional conclusion; and no solutions were offered to the problems posed in paragraph 15.6 above. We therefore recommend that the offence in clause 4 should extend to all injuries, and the Criminal Law Bill reflects that view.

¹⁹¹ Clause 70. Clause 6 of the Draft Code made it clear that “personal harm” meant harm to body or mind, and included pain and unconsciousness. The CLRC had also recommended express inclusion of pain and unconsciousness but that “injury” or “serious injury” should not be further statutorily defined (Fourteenth Report, paragraph 154).

¹⁹² “Force, injury and serious injury”, [1990] NLJ 1227.

¹⁹³ See eg *Davies v Whiteways Cyder Co* [1975] QB 262: increased liability for estate duty an “injury resulting from death” under section 2 of the Fatal Accidents Act 1846.

¹⁹⁴ We illustrated the difficulty of this issue by reference to Dr Williams’ approving citation of the Canadian case of *Dupperon* (1984) 16 CCC (3d) 453, in which it was conceded that four bruises, each four inches long and one-quarter to one-half an inch wide, resulting from strapping on the bare buttocks, were not “bodily harm . . . that is more than merely transient or trifling in nature” under clause 245.1(2) of the Canadian Criminal Code. There is clearly room for substantial disagreement as to whether the injury described is properly excluded from the Canadian Code classification; and whether such injury should, indeed, be excluded from the potential reach of the sanction provided by clause 4 of the Criminal Law Bill.

“Serious” injury

15.8 The response on consultation supported, with similarly near unanimity, our provisional agreement with the CLRC¹⁹⁵ that it should be left to the jury in each case to decide whether a particular harm is serious. Accordingly, we make no attempt in the final draft Bill to define “serious” injury.

Unusual forms of physical injury

(a) “or any other impairment of a person’s physical condition”

15.9 In LCCP 122 we adverted to the breadth of this last part of the definition of injury, but provisionally concluded that it was nevertheless justified in the light of certain considerations which we think it important to repeat in this final Report.

15.10 It should first be noted that, in the vast majority of cases, there will be no dispute as to whether or not what has occurred is an “injury”. Broken bones, bruises, cuts and abrasions, which are the subject of almost all cases of offences against the person, all evidently fall within the description of physical injury. There may, however, be other conditions the causing of which should be criminally punishable, but which do not so clearly fall under that rubric. Two examples are pain and unconsciousness¹⁹⁶ which the Commission, following the CLRC, first specified in clause 6 of the Draft Code. A further case is the intentional or reckless inflicting of illness or disease.¹⁹⁷ There are other conditions the causing of which the criminal law might wish to punish: for instance, the inducement of vomiting.

15.11 The formula that we chose in LCCP 122 to accommodate these possibilities was also designed to meet the important practical consideration of simplicity. Although the definition of “injury” in terms of “physical injury”, involving repetition of the word to be defined, may appear inelegant, it is very important that in the vast majority of straightforward cases courts should be able to talk simply in terms of the basic and easily recognisable expression, “injury”, and not have to wrestle with the language that is necessary to cover the more out-of-the-way events. Consultation has confirmed our view that the definition will achieve that result, enabling the judge to tell the jury in almost all cases that they are concerned, and concerned only, with the principal case specified in the statute, of whether what was inflicted was a physical injury. We believe that to be far preferable to stating what the jury has to consider only in general terms, such as “impairment of a person’s physical condition”, that would perhaps cover all cases in one phrase, but at the expense of unnecessary difficulty in the vast majority of those cases.

(b) Pain and unconsciousness

15.12 On consultation, there was very little adverse reaction to our express inclusion of pain in the definition of injury, in which we had followed the CLRC and the Draft Code. Our view remains that the intentional or reckless infliction of pain is, as a category, no less deserving of criminal sanction than other conditions that more obviously fit the description of physical injury. Similarly, it should be a serious offence intentionally or recklessly to inflict a level of pain that a jury considers to amount to serious injury. This part of the definition of injury is therefore retained in clause 18 of the Criminal Law Bill.

15.13 It may be helpful if we also set out the following supplementary consideration:

- (1) We would expect prosecutions for pain alone to be rare, first because the victim’s pain will normally be contained within, and be an integral part of, the complaint of another (physical) injury, and secondly because pain (alone), being subjective, may sometimes be difficult to prove. We would expect the latter point also to limit prosecutions for high levels of pain as serious injury.
- (2) We see no special difficulty in relation to minor pain, or the borderline between pain and serious pain. In both cases, we believe it is right for the Bill to follow through our recommendations not to exclude minor injuries, and not to define serious injury.

¹⁹⁵ CLRC Fourteenth Report, paragraph 154.

¹⁹⁶ See paragraphs 15.12–15.14 below.

¹⁹⁷ *Clarence* (1888) 22 QBD 23; see paragraphs 15.15–15.19 below.

- (3) As we stress in paragraph 15.11 above, the definition of injury adopted in the Criminal Law Bill will prevent the jury in the ordinary case from having to hear unnecessary explanations about other unusual forms of injury, including pain.

15.14 There was no adverse reaction to the express inclusion of unconsciousness, and we retain it in clause 18 of the final draft Bill.

(c) *Illness or disease*

15.15 We noted in paragraph 8.17 of LCCP 122 that our definition of injury would include within the offences of the Criminal Law Bill the intentional or reckless inflicting of illness or disease. On consultation, there was very little response on the question whether to include infection, and hardly any criticism of the inclusion of *all* diseases. We have nonetheless reflected very carefully on this aspect of the definition of injury since completing LCCP 122.

15.16 Footnote 149 to paragraph 8.17 of LCCP 122 explained our view, in the light of *Clarence*,¹⁹⁸ that existing offences that are expressed in terms of “causing” harm (for example, section 18 of the 1861 Act) probably apply to the transmission of disease in the same way as would the new offences;¹⁹⁹ but that, on the other hand, the case also appears to suggest that the transmission of illness or disease might not amount to the “inflicting” (as opposed to “causing”) of grievous or actual bodily harm that is required by sections 20 and 47. The effect of the new offences would therefore be to remove this technical bar to conviction in cases currently otherwise falling within those sections.

15.17 We believed this result to be right as a matter of policy; and, after careful reflection, we remain of that view. We have in mind particularly the recent public concern over the possibility of the deliberate or reckless infection of others with life-threatening conditions, including the HIV virus. In this connection, we are very much aware that the criminal law is not the most obvious or principal means of addressing the problem of containing the spread of such diseases.²⁰⁰ Nonetheless, our view remains that the deliberate or reckless causing of disease should not be beyond the reach of the criminal law as restated by clauses 2 to 4 of the Criminal Law Bill. Accordingly, all the Bill does is to remove the technical bar to conviction referred to in paragraph 15.16 above, thus at least ensuring the availability of a serious sanction for a serious form of irresponsible behaviour.

15.18 In line with our general decisions not to exclude minor injuries, and to define serious injury, the Criminal Law Bill makes no attempt either to exclude minor illnesses or to define *serious* disease. Trivial cases would be weeded out not merely by prosecution discretion and difficulties of proof,²⁰¹ but by the positive requirement of the law of subjective recklessness that the risk should be an unreasonable one for the defendant to take in the circumstances known to him. In law, therefore, and not merely in practice, only seriously irresponsible conduct would be caught.

15.19 The same legal requirement would also regulate more difficult cases where the disease, or its effect on the victim, is not trivial, but the size and gravity of the risk have to be weighed against the consequences of avoiding it. For example, a nurse suffering from an infectious disease might reasonably decide in the circumstances to give emergency treatment herself rather than delay in order to avoid the risk of transmitting the disease to a patient who might otherwise die.

¹⁹⁸ (1888) 22 QBD 23.

¹⁹⁹ In *Clarence*, the accused had intercourse with his wife when he knew, but she did not, that he was suffering from gonorrhoea. He was charged under sections 20 and 47 of the 1861 Act. His conviction was, by a majority, quashed by the Court for Crown Cases Reserved, the reasons being either that (under section 47) a man could not, in these circumstances, “assault” his wife, or that (under section 20) he had not “inflicted” harm. The first of these views rests on a concept of the criminal implications of violence within marriage that is no longer the law: see our Working Paper No 116, *Rape Within Marriage*, at paragraph 2.10, and the speeches in the House of Lords in *R v R* [1992] 1 AC 599. Apart from that point, *Clarence* appears only to suggest that the transmission of illness or disease might not amount to the “inflicting” of harm.

²⁰⁰ On 15 December 1992 the Home Secretary gave a written answer to a Parliamentary Question, to the effect that he had no plans to introduce legislation on the particular issue of the deliberate transmission of AIDS: Hansard (House of Commons), 15 December 1992, vol 216, col 102. We see no conflict between, on the one hand, doubt as to the feasibility and desirability of any special new offence; and on the other, the removal of a technical bar to conviction for a *general* offence which otherwise probably already applies to the behaviour in question.

²⁰¹ Eg allegations that the defendant’s coughing in a tube train caused the victim’s cold.

Injury to the mind

15.20 LCCP 122 contains an extensive discussion of the question of the extent to which injury to the mind should be included as grounds for liability under the offences now to be found in clauses 2 to 4 of the Criminal Law Bill.²⁰² We think it may be helpful to repeat here the main lines of that discussion.

15.21 The current law is far from clear. In *Miller*²⁰³ *Lynskey J* held that an assault that caused a hysterical and nervous condition was an assault occasioning actual bodily harm because “an injury to her state of mind for the time being . . . is within the definition of actual bodily harm”. It has, however, never been determined whether *all* conditions that could arguably be described as “harm to the mind”—including conditions such as grief, anxiety or distress, that are not recognised as a ground for the recovery of damages even in the civil law of negligence,²⁰⁴—fall within the range of *criminal* injuries that are recognised by the present law.

15.22 We went on to consider whether the matter needed to be clarified in the Bill at all. Since the proposed new offences were concerned only with intentional and reckless behaviour, many of the problems associated in the law of tort with the *negligent* causing of nervous shock did not arise. For the same reason, criminal offences involving the infliction of mental injury (however defined), as opposed to physical injury, were not likely to be frequent occurrences. However, it is perfectly possible to imagine cases that demand an answer to the question of whether there should be criminal liability for inflicting harm to the mind and, if so, to what extent that liability should be limited. For example, the accused may deliberately excite the symptoms of a nervous condition from which he knows that his victim suffers. More pressingly perhaps, an attempt to cause physical injury may miscarry, but the conduct of the defendant in so acting may induce in the victim a possibly serious mental condition.²⁰⁵

15.23 In the context of our proposed new offences, it would nonetheless have been possible to leave open the question of the extent, if any, to which “injury” included injury to the mind.²⁰⁶

However, not only would that have left too much to the judgment of the jury or magistrates, but it would also have left issues of genuine doubt unresolved. It would have been unclear whether, and to what extent, the somewhat fragile authority on which, at present, liability for mental injury rests applied to the new statutory law.²⁰⁷

15.24 We accordingly considered several ways in which the Bill might provide some further guidance to the courts: ranging from the total exclusion from criminal liability of any form of mental injury; to inclusion of all “harm to the mind”; and including our provisionally preferred option that mental harm should be limited for the purposes of criminal offences against the person to “impairment of a person’s mental health”.²⁰⁸

15.25 We did not regard the first option as a serious proposition, since it would have reversed the position that has been thought to exist since at least 1954,²⁰⁹ and would have permitted the causing with impunity of injuries that on any view can be quite as harmful as injury to the physical body.

²⁰² LCCP 122, paragraphs 8.20 to 8.33.

²⁰³ (1954) 38 Cr App R 1; cited on this point in *Archbold* (45th edition, 1993), paragraph 19–197.

²⁰⁴ See, eg, *Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310 at p 315F–H (Hidden J); and at pp 401B–C (Lord Ackner) and 416F–H (Lord Oliver of Aylmerton).

²⁰⁵ By virtue of the common law doctrine of transferred fault, which is codified in clause 32 of the Criminal Law Bill, the victim who sustains the mental injury need not be the one who escapes the physical injury, so long as the mental injury falls within the definition of the results prohibited by the same offence.

²⁰⁶ The CLRC indeed did not address the issue in its Fourteenth Report, saying that—

“Injury is a word in ordinary use in the English language, is readily understood and will cause little problem of interpretation. We consider that it may not, however, be clear that injury includes unconsciousness. It should do so and we therefore recommend that there should be express provision to this end”: paragraph 154.

²⁰⁷ The fact that the CLRC thought that a special term had to be included to ensure that “injury” extended even to unconsciousness suggests strongly that the answer to that question is not self-evident, and will not be self-evident to courts that have to use such a provision. However, if a court were to conclude that mental harm was included within (undefined) injury it would have no guidance as to the limits, if any, that should be placed on the definition of such injury.

²⁰⁸ LCCP 122, paragraphs 8.31–8.33, and LCCP Bill, clause 1(6).

²⁰⁹ See paragraph 15.21 above.

15.26 On the other hand, there was the strong argument to be made for the inclusion of *all* harm to the mind, given that the Bill already extended to even the most trivial *physical* injury. However, mental harm, unlimited in its definition, could be interpreted as covering almost all forms of alarm, distress or anxiety. These are very common conditions, and it will often be easily foreseeable, and foreseen, that unreasonable, rude or anti-social conduct will evoke such a reaction in another. For instance, an occupant of a terrace house who persistently plays very loud music will usually foresee, and may sometimes even intend, anxiety or distress on the part of his neighbours; but his conduct, deplorable though it may be, did not seem to be appropriate for punishment by offences under the 1861 Act, or by the offences in what are now clauses 2–4 of the Criminal Law Bill.

15.27 Nor, for the reason just given, would it be a satisfactory solution for the offences under the Bill to be limited to the *intentional* infliction of mental harm.²¹⁰ Even where the accused deliberately causes injury, there seems a clear distinction in social and legal implications between his causing of physical bodily damage to another, and the causing of distress or anxiety.

15.28 For these reasons, we provisionally concluded that a middle way needed to be found between inclusion and exclusion of all injury to the mind. In response to the problem of finding an adequate formulation in the absence of any existing such statement in the current law, we turned to the concept of impairment of mental health, that is used, for instance, as part of the definition of “significant harm” for a wide range of purposes under the Children Act 1989.²¹¹ The requirement of impairment of mental *health* requires a court to consider, probably with the benefit of medical advice, whether the condition has passed beyond the line that divides anxiety or distress from damage to health. Such damage need not be part of a permanent condition, but it would include, for instance, conditions such as post-traumatic stress disorder, that have been medically recognised as specific disorders;²¹² and any other injury to the mind that could properly be described as injury to health.

15.29 The response on consultation strongly supported that approach. There was no support for exclusion of all injury to the mind, and almost none for its unlimited inclusion. Further, most respondents who considered the matter agreed that reference to impairment of mental health would effectively exclude conditions that were limited to anxiety or distress, although some commentators noted that its application would inevitably require expert evidence in some cases. We do not believe the latter to be a serious drawback. First, the problems of proof in this case are by no means unique, or uniquely difficult. Secondly, we would expect cases of real difficulty to be rare, even in the relatively small category of cases to which this part of the definition of injury will apply. But, more fundamentally, we believe the need to prove impairment of mental health to be an acceptable, and indeed the only practicable, way of excluding the less serious forms of mental distress.

15.30 The only further concern was expressed by a judicial commentator, who said that “impairment of mental health” might catch a person who, with foresight of the risk of that outcome, induced clinical depression by words, eg breaking off an engagement. It is not difficult to supplement the judge’s example with others, such as an oral announcement of redundancy.²¹³ However, such an alarming outcome does not follow from our proposals. Principally, for the defendant to be reckless,²¹⁴ the risk of causing impairment of the victim’s mental health must

²¹⁰ Another, and very different, offence that is dealt with in clause 10 of the Bill, torture, comprises the intentional infliction of “severe suffering”, including mental as well as physical suffering. There, however, the inclusion of mental effects is not justified by the requirement of intentionality, which applies equally to the infliction of physical harm, but by the substantial degree of seriousness with which, for a serious crime, the prohibited consequences, mental and physical, are defined.

²¹¹ See LCCP 122, paragraph 8.32, footnote 159.

²¹² See, for instance, the medical evidence given in recent tort cases involving “nervous shock”, an example of which is to be found in *Alcock’s* case, cited at footnote 204 above, [1992] 1 AC 310 at pp 317–318.

²¹³ In both cases, the words announce the ending of a state of relationship or state of affairs on the continuation of which the victim relies, where the defendant knows (or is reckless as to the matter) that impairment of mental health may follow.

²¹⁴ It is difficult to envisage any realistic case of this sort involving *intention* as opposed to recklessness as to whether mental injury will result. It would be hard to say that the defendant’s *purpose* in giving such information was to cause mental injury.

be one which it is unreasonable for the defendant to take: see the concluding requirement of clause 1(b) of the Bill. But in the circumstances suggested, if life is reasonably to go on, the fiancé or employer must be allowed to take the risk attached to informing the other party of his intentions. Further, in some cases, including the original example of breaking off the engagement, the true case of the injury in this example is not the words themselves, but the actual and continuing decision not to marry. That is properly analysed as *omission* rather than action; and since the defendant is under no common law duty (eg to continue the engagement, or actually to marry), no liability would arise.²¹⁵ However seldom such cases might actually be prosecuted, the point should be decided in each case by the tests just suggested, rather than by any attempt to exclude the relevant impairment *in limine* from the definition of injury.

15.31 The Criminal Law Bill therefore maintains, in clause 18(b), the inclusion of impairment of a person's mental health in the definition of "injury".

Power of arrest

16.1 On further consideration in the light of the consultation we are persuaded that the offence in clause 4 of the Criminal Law Bill should be an arrestable offence even though it carries a maximum sentence of less than 5 years. Clause 22(3) so provides.

Jurisdiction

17.1 We explained in LCCP 122 that, because the project was not concerned with preliminary offences, the accompanying Bill did not implement a proposal of the CLRC which recommended that it should be an offence to incite or conspire in this country to commit a serious injury abroad.²¹⁶ However, we considered that, in the spirit of that proposal, and indeed for reasons of general policy, our courts should take jurisdiction over acts committed here that are intended to cause, or done recklessly with respect to, serious injury abroad: for instance, if someone in London posts a letter bomb to Paris that causes serious injury when it is opened there. Clauses 4(2) and 5(2) of the Bill provided for such conduct to be triable in the English courts. Our provisional recommendation was well received on consultation, and is now reflected in clauses 2(2) and 3(2) of the Criminal Law Bill.

ASSAULT

Statutory definition

18.1 Against a background of considerable uncertainty and confusion in the current law of assault, we consulted in LCCP 122 on a number of aspects of our approach to the codification of that law.²¹⁷ An important feature of that background is the continuing terminological confusion whereby the word "assault" is sometimes limited to what may be called psychic assault, in the sense of causing an apprehension of violence; but sometimes encompasses also the actual physical contact that is technically known as battery. The confusion is increased by the use in statutes of other terms such as "common assault". In the second part of section 47 of the 1861 Act, for example, this expression is presumably used to differentiate the assaults to which it refers from special cases of assault (such as assault occasioning actual bodily harm, that is dealt with in the first part of the section) which attracts specific and increased statutory penalties. However, it still has to be determined whether "assault" when used in either of these contexts means simply (psychic) assault, or also includes battery.

18.2 The situation was further complicated when, in *DPP v Little*,²¹⁸ the Divisional Court adopted the view of May LJ in *Harrow Justices, ex parte Osaseri*²¹⁹ that the second

²¹⁵ See paragraphs 11.1–11.6 above.

²¹⁶ CLRC Fourteenth Report, paragraph 303.

²¹⁷ LCCP 122, paragraphs 9.1 to 9.33.

²¹⁸ [1992] 1 QB 645 at p 652.

²¹⁹ [1986] QB 589.

part of section 47 of the 1861 Act had replaced assault²²⁰ at common law with a new statutory offence; and that the effect of the subsequent replacement of that provision by section 39 of the Criminal Justice Act 1988 had been to create two separate statutory offences of assault and battery which could not, therefore, be charged in the same count of an indictment.²²¹

18.3 Taking the opportunity afforded by the present law reform exercise to look at these matters afresh, we provisionally concluded in LCCP 122 that assault ought to be statutorily defined, and should constitute a single offence encompassing both “battery” and “psychic assault”.

18.4 As to the need for definition, we disagreed with the view of a majority of the CLRC that the law relating to assault (in this case including battery) was now sufficiently well understood for it not to be necessary to provide a statutory definition of those concepts. A concept forming the substance of a criminal offence of violence ought, as a matter of principle, to be defined in any event. But, in addition, the remaining uncertainties and the undeveloped state of aspects of the current law of assault, including the exemption from that law of what we described as “trivial touchings”,²²² made the restatement and confirmation of the whole concept of assault, including those aspects, highly desirable.

18.5 Consultation revealed almost no opposition to our provisional conclusions that assault should be statutorily defined, that both battery and psychic assault should be included, and that it was feasible and appropriate for these two modes of assault to be expressed within a single offence. That policy is reflected in clause 6 of the Criminal Law Bill, which reads as follows:

- (1) A person is guilty of the offence of assault if—
 - (a) he intentionally or recklessly applies force to or causes an impact on the body of another—
 - (i) without the consent of the other, or
 - (ii) where the act is intended or likely to cause injury, with or without the consent of the other; or
 - (b) he intentionally or recklessly, without the consent of the other, causes the other to believe that any such force or impact is imminent.
- (2) No such offence is committed if the force or impact, not being intended or likely to cause injury, is in the circumstances such as is generally acceptable in the ordinary conduct of daily life and the defendant does not know or believe that it is in fact unacceptable to the other person.

18.6 Very little adverse comment was received on consultation on drafting issues, or on our incorporation of the effect of section 39 of the Criminal Justice Act 1988, which implemented the CLRC recommendation that assault should be a summary offence only.²²³ However, it may be helpful to repeat here a particular point on the formulation of the offence that we explained in LCCP 122.²²⁴

18.7 What is now clause 6(1) of the Criminal Law Bill deals with the application of force or impact to the body of another. There is no need to prove injury; if *injury* is intentionally or recklessly caused, an offence is committed under clause 4. The application need not be direct; the offence covers cases of “booby traps”, for instance if the defendant misleads the victim into falling into a pit.²²⁵ Clause 6(1)(b) covers the case where there

²²⁰ Here including battery.

²²¹ In paragraphs 9.4 and 9.5 of LCCP 122 we expressed our disagreement with this interpretation, while of course recognising its status as authority. We preferred the previously established view that section 47 and its successor were concerned only with penalties for assault and battery at common law. That view is further expounded, with great force, in *Archbold* (1992 edition, Supplement), paragraph 19–177.

²²² See paragraphs 20.1ff below and clause 6(2) of the Criminal Law Bill.

²²³ Fourteenth Report, paragraph 161.

²²⁴ LCCP 122, paragraph 9.13.

²²⁵ Cf *Martin* (1881) 8 QBD 54.

is no battery, but the defendant causes expectation of an immediate application of force: for instance if the defendant points a pistol at a person who believes it to be loaded. However, following the recommendation of the CLRC,²²⁶ the offence does not extend to threats to strike in the future: the threat must cause the person at whom it is aimed to believe that force or impact is imminent.²²⁷

The problem of consent

19.1 As we pointed out in LCCP 122, and as we explain in greater detail in paragraphs 27.1–27.3 below, existing common law defences based or arguably based on the consent of the victim are unaffected by the Criminal Law Bill. Therefore, strictly speaking, it is not necessary to mention the effect of consent in the specific provisions concerning assault, any more than it is mentioned in the definitions of other offences in the Criminal Law Bill. However, the whole essence of an assault is that it is an act done without the consent of the victim. Since *non-consensual* interference is thus so significant an element in assault it seemed helpful specifically to mention the effect of consent at common law, including the rule that in general one cannot consent to the infliction of *injury*, in the Bill's definition of assault.

19.2 The formulation adopted for this purpose in clause 6(1) of the Criminal Law Bill²²⁸ is intended to reproduce the present common law, as indicated in paragraph 19.1 above, and was specifically accepted as doing that by Lord Lowry in *Brown*.²²⁹ As explained in paragraphs 10.1–10.2 of LCCP 122, the Bill also leaves untouched the specific exceptions to liability for criminal offences generally, and not merely for assault, that have been recognised by the common law as existing in certain particular factual situations.²³⁰ Not all of these exceptions, it should be noted, can be plausibly said to rest, or at least to rest exclusively, on the consent of the victim to what is done to him.²³¹

19.3 In LCCP 122 we took the view, as we had in preparing the Draft Code,²³² that both the *general* rule as to the effect of consent, as incorporated in clause 6 of the Criminal Law Bill; and the overriding exemptions from what would otherwise be criminal liability that are provided by the common law in particular circumstances, as mentioned in paragraph 19.2 above; should be left to be worked out by the processes of the common law; and that no part of that common law should be the subject of law reform scrutiny, or of any attempt at statutory definition. We were however impressed on consultation by the number of respondents who suggested that that was not the correct approach. For instance, the Criminal Law Committee of the Law Society urged that it was inseparable from the general objective of a thorough codification of the criminal law, an objective that they strongly supported, that an attempt should be made to treat these issues in statutory form, difficult though it was recognised that that enterprise might be.

19.4 We see the force of those observations, which were further borne out, after the publication of LCCP 122, by the controversy aroused by the sado-masochism case of *Brown*.²³³ We therefore announced in March 1993 that the Commission was to put in hand a special study of the role of the consent of the victim in offences against the person. A Consultation Paper, which will invite comment in particular on whether, and if so in what terms, the law can be stated in statutory form should be ready for publication at the beginning of 1994. If as the result of consultation it should be decided that

²²⁶ Fourteenth Report, paragraph 159.

²²⁷ See Law Com No 143, at paragraph 15.47.

²²⁸ Set out in full in paragraph 18.5 above.

²²⁹ [1993] 2 WLR 556 at p 578B–C.

²³⁰ See the list set out in the judgment of Lord Lane CJ in *Attorney General's Reference (No 6 of 1980)* [1981] QB 715 at p 719E.

²³¹ Thus, any exception for "lawful correction" of children by parents or persons *in loco parentis* has nothing to do with consent; and in relation to reasonable medical treatment, the actual or implied consent of the patient may usually, and subject to the special case of the unconscious patient mentioned in paragraph 10.2 of LCCP 122, be a necessary, but it is certainly not a sufficient, condition of exemption. On these points see further Lord Mustill in *Brown* [1993] 2 WLR 556 at p 593E–H.

²³² Code Report, paragraph 12.41.

²³³ [1993] 2 WLR 556.

changes are required in the present common law, that can be done by way of amendment of that common law that is set out in or assumed by the present Criminal Law Bill. The further study that we are undertaking on this comparatively limited aspect of the law of offences against the person does not affect, and should not be allowed to delay, the publication, or implementation, of the Criminal Law Bill itself.

“Trivial Touchings”

20.1 The definition of assault in clause 6(1) of the Criminal Law Bill embraces in principle any touching, or threatened touching, by one person of the body of another. The subsection enacts what Robert Goff LJ, giving the judgment of the Divisional Court in the leading case of *Collins v Wilcock*,²³⁴ called

“[t]he fundamental principle, plain and incontestable, . . . that every person’s body is inviolate. It has long been established that any touching of another person, however slight, may amount to a battery”.

But the fundamental principle is, of course, subject to exceptions. Among them, as the judgement in *Collins v Wilcock* went on to explain, is a

“[broad] exception . . . created to allow for the exigences of everyday life . . . [M]ost of the physical contacts of ordinary life are not actionable because they are impliedly consented to by all who move in society and so expose themselves to the risk of bodily contact. So nobody can complain of the jostling which is inevitable from his presence in, for example, a supermarket, an underground station or a busy street; nor can a person who attends a party complain if his hand is seized in friendship, or even if his back is, within reason, slapped . . . Although such cases are regarded as examples of implied consent, it is more common nowadays to treat them as falling within a general exception embracing all physical contact which is generally acceptable in the ordinary conduct of daily life”.

20.2 In LCCP 122, we provisionally concluded that physical contact of the kind described in *Collins v Wilcock* should be expressly excepted from the statutory definition of assault, just as the common law, as stated in that case, provides for its exception. We invited comment both on that provisional conclusion, and on the terms of the clause reflecting it. Although we received helpful criticism of its formulation in the Bill, the response to the inclusion of such a provision was broadly favourable, and we firmly recommend its implementation.

20.3 In its final form, the provision in clause 6(2) of the Criminal Law Bill reads:

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

20.4 Clause 8(2) of the draft Bill accompanying LCCP 122 replaced the words “generally acceptable in the ordinary conduct of daily life”, taken from the judgment in *Collins v Wilcock*, with the more elaborate formulation: “acceptable as incidental to social intercourse or to life in the community”. That formulation was designed to distinguish the private and public spheres of social existence, bearing in mind that standards and expectations in the former may vary considerably; and also that the shorter formulation might not be appropriate for the encounters between police officers and citizens that (as we again observe in paragraph 20.7 below) are in practice likely to be the most common context in which the subsection has to be considered.

20.5 After further careful review in the light of consultation, we have reverted to the shorter formulation taken from the judgment quoted above. We are now persuaded that our more elaborate alternative might have appeared to require the tribunal of fact to conduct too complex an investigation of matters perhaps not sufficiently closely related

²³⁴ [1984] 1 WLR 1172 at p 1177B-C.

to the actual attitudes of the person touched; and that even encounters between police officers and citizens are rightly considered, where they actually occur, as part of daily life, and should be judged as such. In addition, the use in the Bill of the actual language adopted in *Collins v Wilcock*²³⁵ indicates clearly that clause 6(2) attracts the common law that was recognised in that case.

20.6 Our final draft also differs from its predecessor in its express limitation to cases in which the defendant “does not know or believe that [the touching] is in fact unacceptable to the other person”. Although we explained in our earlier account²³⁶ that such knowledge was likely to be seen as relevant by the court in any event in deciding whether the conduct of the defendant towards *that person* was acceptable to society, we now consider it better to put that matter beyond doubt. This point was not expressly reviewed in *Collins v Wilcock*; but it is obviously right to put beyond argument that the defendant cannot take advantage of this provision if he knows or believes that the contact, even if “acceptable” in ordinary circumstances, is not acceptable to the person actually touched.

20.7 As we explained in LCCP 122, the exemption for trivial touching is unlikely to be a frequent focus of argument or decision: in the real world, people are not prosecuted for the trivial touching of others. But sometimes, for instance, the question whether a police officer was acting in the execution of his duty will turn on the lawfulness or otherwise of the officer’s contact with the body of a citizen whose attention he wants to attract, with whom he wishes to speak, or whom he seeks to detain or restrain.²³⁷ Actual detention or physical restraint requires statutory warrant, or a purpose justifying the use of force falling within clause 27 of the Criminal Law Bill. But the lawfulness, in any particular circumstances, of less serious contact will in future fall to be decided under clause 6(2).

Assault and alternative verdicts

21.1 The general rule governing whether an accused may be convicted of an offence other than that with which he is charged is contained in section 6(3) of the Criminal Law Act 1967, as interpreted by the House of Lords in *Wilson*, and confirmed by the House in *Savage*.²³⁸ That provision does not, however, permit the court to find the accused guilty of a purely summary offence, however clear it may be that such an offence has in fact been committed. That rule even extends to conviction of a summary offence that might have been, but in the event was not, charged in the indictment.²³⁹

21.2 The view we took in LCCP 122 was that it is plainly desirable that on a charge of causing intentional or reckless injury,²⁴⁰ or of assault to resist arrest,²⁴¹ it should be open to convict²⁴² of the summary offence of assault²⁴³ if the evidence indicates that that crime has been committed, without there being any need for a specific alternative charge of assault to have been included in the indictment. None of those who commented on this provision opposed it, and clause 23(2) of the Criminal Law Bill thus makes such provision.

21.3 Clause 23(1) of the Criminal Law Bill introduces a commonsense rule to be used in trying offences under the Bill. Intention, or knowledge, is a higher degree of fault than recklessness, and an indictment that alleges that the accused possessed either intention as to a result, or knowledge in respect of a fact, necessarily alleges that he was at least

²³⁵ See the last line of the citation in paragraph 20.1 above.

²³⁶ LCCP 122, paragraph 9.18.

²³⁷ For modern cases, see *Kenlin v Gardiner* [1967] 2 QB 510; *Donnelly v Jackman* [1970] 1 WLR 562; *Ludlow v Burgess* (1971) 75 Cr App R 227; *Bentley v Brudzinski* (1982) 75 Cr App R 217; and *Collins v Wilcock* [1984] 1 WLR 1172, reviewing the earlier cases.

²³⁸ [1984] AC 242; and [1992] 1 AC 699 at p. 740D.

²³⁹ *Mearns* [1991] 1 QB 82.

²⁴⁰ See now clauses 2, 3 and 4 of the Criminal Law Bill.

²⁴¹ See now clause 8 of the Criminal Law Bill.

²⁴² Like section 7(3) of the Public Order Act 1986, on which our new provision is modelled, clause 23(2) of the Criminal Law Bill relates directly to *trial* on indictment. However, the effect of section 6(1)(b) of the 1967 Act, applied to clause 23(2), is to permit a person upon arraignment also to *plead guilty* to the summary offence of assault: *O’Brien* [1993] Crim LR 70, applying section 7(3) of the 1986 Act.

²⁴³ Under clause 6 of the Criminal Law Bill.

reckless as to the occurrence of the result or the existence of the fact. That point, that might otherwise give rise to unnecessary dispute, lies behind clause 23(1) of the Criminal Law Bill, which confirms, in applying section 6(3) of the 1967 Act to any offence under the Bill that includes an allegation of intention or knowledge, that that allegation should be taken to include an allegation of recklessness. Accordingly, the accused may be convicted of an offence under clause 3 (reckless serious injury) on an indictment that charges intentional serious injury under clause 2.

Special cases of assault

22.1 Because of its origins in many earlier statutes,²⁴⁴ the 1861 Act contains a bewildering array of special offences of assault, according to the identity of the person assaulted or the task that he had in hand when assaulted.²⁴⁵ In LCCP 122²⁴⁶ we expressed our full agreement with the view of the CLRC that such particularisation was contrary to principle, and that all such special offences should be abolished. Like that Committee, we considered that assaults on any particularly vulnerable class, for instance bus conductors or other public officials, should be recognised by the level of penalty imposed for the general offence, it being borne in mind that cases of actual injury can and should be pursued under the more serious offence of causing such injury.²⁴⁷ The Bill accompanying LCCP 122 accordingly provided for the repeal of almost all of the outstanding instances of special offences of assault.

22.2 We received no adverse comment on this approach, and the Criminal Law Bill thus reflects our unchanged view. Full details of the particular proposals, and of the reasons for those proposals, are given in Appendix B to this Report.

22.3 In LCCP 122, we also, however, went on to propose that there should be retained two special offences of assault, that had been recognised by the CLRC as continuing arguably to fulfil a valuable function as separate offences. These offences are assault on a constable and assault to resist arrest. In the following paragraphs we report on the particular considerations affecting those offences.

Assault on a constable

22.4 Consultation strongly supported our provisional conclusion, in line with the earlier recommendations of the CLRC,²⁴⁸ that the special protection that the law seeks to extend to constables justifies the retention of the separate offence of assaulting a constable, on the assumption that the defendant knows that, or is reckless as to whether, the person assaulted is in fact a constable. We here repeat the considerations that lead us to maintain that view in this Report, as reflected in clause 7 of the Criminal Law Bill.

22.5 We emphasise that clause 7 is only concerned with *assault*: that is, the application of force without injury being caused. The more serious offences (now provided by clauses 2–4 of the Criminal Law Bill) are likely to be charged in any case where the defendant causes any significant injury to a police officer. However, even though the offence of assaulting a constable may seem to overlap with the general offence of assault, there is force in the view that to abolish the special offence might be misinterpreted as the removal of one of the present protections of police officers. There is also some merit in retaining a separate offence as a measure of “labelling”, to identify a category of conduct that the law regards as particularly serious.

22.6 Following consultation, we remain of the view that the offence should, like assault itself, be summary only, and subject to a maximum of six months’ imprisonment. That outcome may appear illogical, in that an apparently more serious species of assault attracts no higher penalty than assault generally. However, we do not see justification for any offence that alleges assault, but not injury, being tried on indictment. We are fortified in that view by the recent reduction of the present crimes of assault and battery to the status of summary offences by section 39 of the Criminal Justice Act 1988.

²⁴⁴ See paragraph 12.6 above.

²⁴⁵ Eg, offering violence to a clergyman about to celebrate divine service (1861 Act, s36); assaulting a magistrate concerned in preserving a wreck (*ibid*, s37); assault with intent to obstruct the sale or free passage of grain (*ibid*, s39); assault on a seaman (*ibid*, s40). Many other similar sections of the 1861 Act have already been repealed; details of such repeals are given in Appendix C hereto.

²⁴⁶ LCCP 122, paragraphs 9.23 and 9.24.

²⁴⁷ CLRC Fourteenth Report, paragraph 162.

²⁴⁸ Fourteenth Report, paragraphs 167–176.

Assault to resist arrest

22.7 Provisionally agreeing with the views of the CLRC,²⁴⁹ we included in the Bill accompanying LCCP 122 an offence along the lines of section 38 of the 1861 Act, which makes it an offence punishable with two years' imprisonment to "assault any person with intent to resist or prevent the lawful arrest of himself or of any other person for any offence". But we particularly sought views on whether or not to retain that offence. We agreed with the CLRC that the main reason for retaining this aggravated offence, triable either way, is that the conduct at which it is aimed could be particularly serious from a public point of view, for instance if the assault were committed to prevent a police officer arresting a person suspected of murder; even though there would be available in such a case the offence of assault on a constable and, if any injury were caused, the offences now under clauses 2–4 of the Criminal Law Bill.

22.8 We were, however, more concerned than were the CLRC about the arguments against retaining the offence. That Committee had itself stressed that the offence should not be used where a summary offence, such as simple assault or assault on a constable, is more appropriate; and we were minded to think that in any other cases the offences now in clauses 2 to 4 of the Criminal Law Bill are likely in practice to be available. We also doubted whether it would be right to apply specially severe sanctions either where the arrest was unlawful, or where it would have been so had the facts been as the defendant believed them to be; yet at the same time it could be argued that to include the latter defence might be to undermine the simple effect in support of law enforcement, that appeared to be the main justification for the offence.

22.9 Those who commented on the question were fairly evenly divided as to whether or not the offence should be retained. On further consideration in the light of the consultation, and having discussed the issue further with members of the judiciary, we now recommend that it be retained, and clause 8 of the Criminal Law Bill so provides.

22.10 We continue to think that the offence should not be used in less serious cases where a charge of assault, or of assault on a police officer, will be more appropriate; and we would expect many of the more serious cases to give rise to charges under clauses 2 to 4 of the Criminal Law Bill. Moreover, we maintain our view that, because of the severity of the sanction carried by the offence, it must be made expressly subject to the defence that the arrest would have been unlawful had the facts been as the defendant believed them to be. Thus, for instance, if the defendant honestly, even if mistakenly, thinks that X is an entirely innocent bystander, who is being arrested simply out of spite or to clear the streets, he should not be in peril of *this* offence if he tries to protect X. Clause 8 of the Criminal Law Bill expressly provides for such a defence.²⁵⁰

22.11 Despite these limitations, we believe it is right to retain the aggravated offence, chiefly in order to provide what is seen to be an adequate response to attempts to frustrate arrests for serious offences, even though the defendant does not actually cause injury.

Assault with intent to rob

22.12 In LCCP 122 we provisionally concluded, despite the original transfer of this offence to the offences against the person sections of the Draft Code²⁵¹ from section 8 of the Theft Act 1968, that assault with intent to rob should not be included in the Criminal Law Bill. Our view in LCCP 122 was not dissented from on consultation, and is accordingly implemented in this report. The detailed reasoning involved can be found in LCCP 122.²⁵²

²⁴⁹ Fourteenth Report, paragraphs 181–182.

²⁵⁰ In such circumstances, the defendant may still be liable for the ordinary, clause 6, offence of assault: or (depending on the force that he uses) for the offences in clauses 2–4. That will depend on whether he can rely on the *general* defence of justified use of force in clause 27 of the Bill, which itself is subject to particular limitations when the person attacked is a constable: see paragraphs 36.1–40.4 below.

²⁵¹ Draft Code, Clause 78.

²⁵² See LCCP 122, paragraphs 9.31–9.33.

THREATS TO KILL OR TO CAUSE SERIOUS INJURY

23.1 Clause 11 of the Bill accompanying LCCP 122 was based on clause 65 of the Draft Code, which implements recommendation 63 of the CLRC.²⁵³ We explained in paragraph 11.1 of LCCP 122 that the clause extended to threats to cause serious injury as well as to threats to kill, and was thus wider than section 16 of the 1861 Act. On consultation, there was no opposition to the inclusion of the clause, or to its extension in the sense to which we have just referred. Indeed, our view was reinforced by the observation put to us that, while threats to kill are rare, threats to cause serious injury, in the course of aggravated burglary, are common and constitute conduct which should come within the scope of the criminal law. Clause 9 of the Criminal Law Bill accordingly reflects our unchanged recommendation.

OTHER NON-FATAL OFFENCES AGAINST THE PERSON

Introduction

24.1 Clauses 5, 10 and 11–16 of the Criminal Law Bill repeat various existing offences, in some cases with amendments proposed by the CLRC, without making any significant departure from the CLRC's recommendations. However, even in those cases where our proposals in effect simply reproduce the common law we think that it is appropriate that the offences should be included in this Bill. There are two reasons for following that course.

24.2 First, it should help users of the law to have as many as possible of the existing offences against the person collected in a single place. The law is thereby made more accessible. A conspicuous example of this process is the offence of torture, which is at present to be found in section 134 of the Criminal Justice Act 1988. That offence is much more appropriately located in an Act dealing specifically with offences against the person. We have therefore, following the policy adopted in the Draft Code, included in Part I (non-fatal offences against the person) of the Criminal Law Bill all of what we regard as the principal non-fatal offences against the person. The offences that are not included here, and thus remain governed by other statutory provisions, were listed in the Code Report, and a brief explanation was given there of the reasons for their omission.²⁵⁴

24.3 Secondly, inclusion of these offences in the Criminal Law Bill ensures that it will be clear to courts trying them that they are governed by the statutory definitions of intention or recklessness that are included in the Bill. We are satisfied that those definitions are appropriate for these offences, since they will not in practice make any difference to the present scope of the offences, at least if the latter are properly understood. Here again, however, we see great benefit in there being an easily accessible statement of the mental element, to save the courts from having to speculate about the precise meaning of that element of the offences.

Administering a substance without consent

24.4 The current law²⁵⁵ is contained in two offences, in sections 23 and 24 of the 1861 Act, both of which deal with “unlawfully and maliciously” administering poison or a noxious thing. Section 23 deals with so acting “so as thereby” to endanger life or cause “grievous bodily harm”; section 24 with so acting “with intent to injure, aggrieve or annoy”.

24.5 As to section 23, we agree with the CLRC²⁵⁶ that there is considerable doubt as to the mental element required for the offence, and that conduct of the type forbidden would in any event be covered by the new offences of intentionally or recklessly causing serious injury (see clauses 2 and 3 of the Criminal Law Bill). In line with the recommendation of that Committee, we therefore propose that the offence should be abolished without replacement: see Schedule 4 of the Criminal Law Bill.

²⁵³ Fourteenth Report, paragraphs 215–218.

²⁵⁴ Code Report, paragraphs 14.59–14.60.

²⁵⁵ On which see further LCCP 122, paragraph 12.4.

²⁵⁶ Fourteenth Report, paragraphs 184–191.

24.6 Clause 7 of the Bill accompanying LCCP 122 reflected our agreement with the CLRC that, as to section 24 of the 1861 Act, an offence of administering harmful substances without another person's consent was required, but that the present law could be substantially simplified, in particular by substituting, for the requirement that the defendant should act "with intent to injure, aggrieve or annoy", a provision that the defendant should know that what he administered was capable of interfering with the victim's bodily functions.

24.7 Consultation revealed almost no opposition to the retention of such an offence. We have nevertheless reconsidered the question whether it is necessary given that, in many serious cases, an offence under clauses 2 to 4 of the Criminal Law Bill will also be committed.²⁵⁷ On careful consideration, our view remains that the balance of the arguments is in favour of retaining the clause. The administration without consent of substances capable of interfering substantially with bodily functions is irresponsible and potentially highly dangerous conduct, serious enough in itself to warrant criminal sanctions, notwithstanding that in many cases a more serious offence will also often be committed. Clause 5 of the Criminal Law Bill reflects that recommendation.

24.8 In its detailed formulation, clause 5 of the Criminal Law Bill differs from clause 7 of the Bill accompanying LCCP 122 in two respects. First, sub-section (1) of the latter clause required knowledge on the part of the defendant "that the other does not consent". To that part of the formulation, we have now added the words "to what is done". This should put it beyond doubt that the defendant is guilty if he knows that the person to whom he administers the substance agrees to its administration in ignorance of its potential effect in any of the circumstances which may be relevant, including the quantity in which the substance is administered.

24.9 Secondly, clause 5(1) reflects our view on further consideration that the offence should not be committed unless the administering of the substance is intentional or reckless.

Power of arrest

24.10 On further consideration in the light of the consultation, we are persuaded that the offence in clause 5 should be an arrestable offence even though it carries a maximum penalty of less than 5 years. Clause 22(3) of the Criminal Law Bill so provides.

Torture

24.11 Clause 10 of the Bill reflects the provisions of section 134 of the Criminal Justice Act 1988, which implemented the Convention on Torture adopted by the General Assembly of the United Nations in 1984. We explained in paragraph 24.2 above why we think it desirable to take that course. Some further observations will be found in paragraph 14.40 of the Code Report. We should emphasise that, so far as the substance of this clause is concerned, our final draft Bill does no more than to reflect the form of implementation of the Convention agreed by Parliament in 1988.

Offences of detention and abduction

24.12 These offences were reviewed in detail by the CLRC in paragraphs 225–251 of its Fourteenth Report. In clauses 79–85 of the Draft Code we implemented the CLRC's recommendations, taking particular account of any legislation that had implemented part of those recommendations. Some further observations about the method of implementing these offences were made in paragraphs 14.47–14.57 of the Code Report.

24.13 Clauses 11–16 of the Criminal Law Bill implement the CLRC's recommendations, save where they have been overtaken by later legislation, which again is reproduced in substance in those clauses.

24.14 The offence of unlawful detention in clause 11 of the Criminal Law Bill differs from the earlier version in clause 14 of the Bill accompanying LCCP 122 in that it does not retain the special defence in subsection (2) of the latter clause for the person who takes or detains a child under the age of 16, and who has (or believes he has) lawful control of

²⁵⁷ We do not believe, as one commentator suggested, that the offence is unnecessary because of the availability of *attempt* to commit the offences in clauses 2 and 4. *Attempt* will not cover all the cases, since it requires *intention* to cause the kind of injury contemplated by the main offence.

the child, or the consent of another who has (or whom he believes has) such control, or believes that he would have that consent if the other were aware of all the relevant circumstances. On careful reconsideration, we are persuaded that it is both inappropriate and unnecessary to include such a special defence. To do so could suggest that it is lawful for a parent (or other person with parental responsibility) to detain a child up to the age of 16, whereas it is clear that that is not the case.²⁵⁸ To the extent that such detention is lawful as a component of reasonable parental authority and discipline, it will be covered by the defence of lawful justification and excuse. Such a defence will also cover people with care of but not parental responsibility for a child if their actions are reasonable in all the circumstances in order to safeguard or promote the child's welfare.²⁵⁹ The defence of necessity will apply where a person who does not even have care of a child detains him when it is necessary in his own best interests to do so, for example to prevent a toddler running into the road. Both defences apply, by virtue of the general saving by clause 20 of the Criminal Law Bill of those defences, in respect of all the offences in Part I of the Bill. There may also be circumstances where the detention of a child comes within the justifications for the use of force under clauses 27–30 of the Criminal Law Bill.

OTHER AMENDMENTS OF THE 1861 ACT

25.1 We have referred above to some amendments and repeals that we propose in respect of the 1861 Act. In addition to those proposals, there are various other sections of that Act that, although still on the statute book, have outlived their original justification, or are inappropriate or confusing in their present form. Because we seek in this exercise to enable the law to make a new start in respect of non-fatal offences against the person we have reviewed all such sections as fall within the ambit of the present project: that is, all parts of the 1861 Act other than those dealing with fatal offences against the person or with sexual offences. Such of our proposals as are not dealt with in the body of this Report will be found in Appendix B. They include one revision to the present law on road traffic discussed in paragraphs 11.1–11.2 of Appendix B, part of which had anomalously found its way into the 1861 Act. In one or two cases, policy issues that cannot be covered in the course of this exercise, relating principally to the law on explosives and to specific offences involving interference with transport, remain to be resolved; but we can claim now to have removed a very large part of the outstanding problems created by the 1861 Act. In Appendix C we set out, for ease of reference, the present status of each separate section of the 1861 Act and, where amendments or repeals are contained in the Criminal Law Bill, indicate where those proposals are dealt with in the Bill and this Report.

²⁵⁸ *Rahman* (1985) 81 Cr App R 349, applying and extending the decision of the House of Lords in *R v D* [1984] AC 778.

²⁵⁹ Children Act 1989, s3(5).

PART IV

GENERAL DEFENCES AND OTHER PROVISIONS INCLUDED IN THE BILL

INTRODUCTION

26.1 We explained in paragraph 1.4 above that, in order to make the present Bill a really useful and complete tool for courts trying cases of offences against the person, and for others seeking to understand the law relating to such cases, the Bill needs to deal not only with the substantive offences but also with the general principles and defences that most commonly arise in relation to offences against the person. That objective was pursued in LCCP 122, and was generally welcomed on consultation.

26.2 Part II of the Criminal Law Bill accordingly addresses a series of such defences and general principles. Part II however goes further than merely applying that part of the general law in the case of offences against the person. Rather, it legislates for the defences and principles to apply throughout the criminal law, in respect of all offences. That is made expressly clear at the start of Part II of the Criminal Law Bill, by clause 24.

26.3 We explained our reasons for proposing that step in paragraphs 14.3–14.5 of LCCP 122, reasons that were not dissented from on consultation. On an immediate practical level, it would be very inconvenient if a court trying an indictment that contained counts under Part I of this Bill and other counts alleging crimes at the common law or other statutory provisions²⁶⁰ had to direct the jury as to, for instance, the defence of duress as to some counts according to a statutory statement of that defence and as to other counts according to common law rules that may not be expressed in exactly the same terms. More generally, however, the wide acceptance, in the course of public discussion of the Draft Code, that defences and other principles should be placed on a codified basis suggested that the opportunity should be taken to express these very important parts of the law in statutory form, applying throughout the whole of the criminal law.

26.4 We have already pointed out the practical benefit of a clear and accessible statutory statement of the common law, even where the statute involves no substantial reform of that law.²⁶¹ Part II of the Criminal Law Bill offers such a statement of a substantial proportion of the “general part” of the criminal law. It also represents a significant move towards the ultimate objective of putting the whole of that part of the criminal law into statutory form, as part of the criminal code.

26.5 In this Part of our Report we review the separate aspects of the law set out in Part II of the Criminal Law Bill, and explain what is achieved by the specific statutory terms in which they are expressed. First, however, we must say something of the position at common law of defences not addressed by the Criminal Law Bill.

PRESERVATION OF COMMON LAW DEFENCES

27.1 The Criminal Law Bill reduces to statutory form, and thus replaces the existing common law in respect of, three specific common law defences: duress by threats; duress by circumstances; and the use of force in public or private defence. Clause 36(2) of the Bill makes clear that the common law in respect of those matters is abrogated, to be replaced by the provisions of the Criminal Law Bill.

27.2 That, however, is *all* that the Bill does in respect of defences; and similarly, the common law rules with regard to supervening or transferred fault are replaced²⁶² by the specific provisions of the Bill,²⁶³ but that is all that the Bill does in respect of general principles of the criminal law.

²⁶⁰ That cannot infrequently occur where, for instance, the defendant is accused of attacking a shopkeeper by assaulting the shopkeeper and also damaging his shop.

²⁶¹ See paragraphs 2.2–2.4 above.

²⁶² See clause 36(3) of the Criminal Law Bill.

²⁶³ As to which, see paragraphs 41.1–41.9 and 42.1–42.6 below.

27.3 This preservation of existing common law rules and defences gives a valuable flexibility to the operation of the law. Where, as in the three respects mentioned in paragraph 27.1 above, the law has been placed on a statutory footing, the future judicial role will be confined to the interpretation of the relevant clauses of the Act. But other defences to criminal liability exist that remain at the disposal of the courts, and which may need further judicial development before they can properly be formalised in statutory terms.

27.4 We may cite two examples. First, there is a common law principle, of uncertain scope, that “necessity” may be a defence to criminal charges,²⁶⁴ operating in some circumstances outside the limits placed on the recognised defences of duress of circumstances and justified use of force. The Commission originally recommended the abrogation of this nascent part of the criminal law, in the interests of greater certainty. We are now however entirely persuaded²⁶⁵ that the issue should be left open, for development on a case by case basis.²⁶⁶

27.5 That approach was generally welcomed on consultation, though one commentator argued strongly that necessity should now be codified as a general defence to all criminal liability. We do not think that that step would be appropriate. The present limits of the defence of necessity, and the extent to which it reaches further than other already established defences, are unclear, and any codification at this stage of the common law’s development would be liable to present the courts with very difficult problems of statutory interpretation; and very possibly, because of the general terms in which the defence would have to be expressed, the extension of excuse beyond cases in which it was justified. It will be a matter for consideration in the light of further experience whether necessity, or any other defences that the courts may identify, are sufficiently developed to make it possible and desirable to confirm their existence and limit their terms by legislation.

27.6 Another prominent part of the common law is the list of circumstances in which conduct that would or might otherwise be an assault does not attract criminal liability.²⁶⁷ We have already indicated, in paragraph 19.3 above, that in LCCP 122 we were minded not to address these common law rules, but to leave them equally to judicial interpretation and development. However, as we have also indicated, commentators on LCCP 122 urged strongly that the time was now ripe for reconsideration of at least some of these rules, to see whether they could or should be placed on a statutory basis, and if so in what terms. As a result, we have embarked on a project, quite separate from the present exercise, to review some at least of those rules. Pending the conclusion of that project (one possible recommendation of which will be that the rules should indeed remain solely a matter of common law) the present common law will remain in place, and will be applied where appropriate to the offences created by the Criminal Law Bill.

27.7 Finally, there are a number of cases in which the defendant, although in terms committing an offence, did so with lawful authority, justification or excuse, whether such is provided by a statute or at common law.²⁶⁸ The judges retain a common law power to recognise such circumstances of excuse, and have what is probably an obligation to recognise that where a specific act is so authorised or required a general criminal prohibition, even in a subsequent statute, will be read as subject to that saving. The Criminal Law Bill does not affect those principles.

27.8 The (probably rather modest) degree of uncertainty that remains in the criminal law through these common law rules is in our view acceptable; and no different view²⁶⁹ was expressed on consultation. Although it is now recognised that the courts have no

²⁶⁴ For an authoritative survey of the present position, that indicates the difficulty of stating the terms and limits of the present authorities, see J C Smith & B Hogan, *Criminal Law* (7th edition, 1992) [hereafter, “*Smith & Hogan*”], pp 245–252.

²⁶⁵ Code Report, paragraph 12.41(ii).

²⁶⁶ Clause 36(2) of the Criminal Law Bill so provides.

²⁶⁷ Most conveniently listed by Lord Lane CJ in *Attorney-General’s Reference (No 6 of 1980)* [1981] QB 715 at p 719E: “properly conducted games and sports, lawful chastisement or correction, reasonable surgical interference, dangerous exhibitions, etc”.

²⁶⁸ For instance, a constable acting in the execution of his duty to protect life or property, or someone acting under the instruction of such a constable: *Johnson v Phillips* [1976] 1 WLR 65, in particular at p 69F–H.

²⁶⁹ Save for the opinion of one commentator that the law should go further, and codify a general defence of necessity: see paragraph 27.5 above.

power to create new *offences*,²⁷⁰ it is desirable that the courts should be free to develop or to expand on new *defences* to criminal liability, either to recognise changing circumstances or to piece out unjustified gaps in the existing defences.

27.9 At the same time, however, where a particular circumstance of defence arises frequently, and its limits have been worked out by the courts and can be stated with some confidence, it is right to make the position clear and accessible by stating it in statutory terms. That is done in respect of the three important defences of duress by threats; duress of circumstances; and justified use of force; which are codified in Part II of the Criminal Law Bill, the terms of which we now explain.

DURESS BY THREATS

Introduction

Law reform background

28.1 The defence of duress by threats is well established in English law, as in other jurisdictions, as a defence applying to a wide range of offences; and its elements and limits have been elaborated in a substantial body of modern case law. The defence has also been the subject of law reform consideration during our work directed to codification of the criminal law. In 1974 we published a working paper on this and other defences, prepared by the Working Party then assisting us in our examination of the general principles of the criminal law.²⁷¹ This was duly followed in 1977 by our Report on Defences of General Application ("our 1977 report"),²⁷² in which, after consideration of responses to the working paper, we proposed the enactment of a tightly defined defence applying to all offences. A draft Criminal Liability (Duress) Bill was appended to that Report. The Code team incorporated the substance of our proposals, though with some modifications, in the clause on duress in their draft Criminal Code Bill that we published in 1985.²⁷³ The team's clause was, in its turn, amended in the light of consultation and of our own further consideration. The resulting formulation in clause 42 of the Draft Code in effect expressed our 1977 proposal in the style of the Draft Code. That formulation was the basis of the provision proposed in clause 26 of LCCP 122.

Clause 26 of LCCP 122

28.2 The statutory defence contained in clause 26 of the Bill accompanying LCCP 122 reflected, in broad terms, the defence developed at common law. A person who does an act specified for an offence with the fault required for commission of that offence, nevertheless does not commit the offence if he does the act because (as he knows or believes) another person has threatened that he or a third person will suffer death or serious injury if he does not do the act, and the threat is one which in the circumstances he cannot reasonably be expected to resist; which he has not knowingly courted; and the carrying out of which he cannot otherwise avoid. The common law regards a person as excused from liability in respect of almost any crime if he succumbs to the pressure of such a threat. However, when it came to stating with precision the elements of the defence and to specifying the range of offences in relation to which it is available, clause 26 of the Bill departed in some respects from the common law. Although the points of variance had, as explained above, been the subject of consultation on more than one previous occasion we felt it right carefully to identify them once again, and seek views upon them, before finally settling the terms of our legislative proposal. Five questions in particular seemed to need discussion:

- (a) Against whom must the threat be directed?
- (b) If the actor might resort to police or other official protection, is it relevant that such resort is likely to prove, or that the actor thinks it likely to prove, ineffective?

²⁷⁰ *Kneller v DPP* [1973] AC 435.

²⁷¹ Defences of General Application, (1974), Working Paper No 55.

²⁷² Report on Defences of General Application (1977), Law Com No 83; hereafter referred to as Law Com No 83.

²⁷³ Law Com No 143.

- (c) Must the actor's belief in the existence, or nature, or seriousness of the threat, or in the impossibility of avoiding the threatened harm, be reasonably held?
- (d) Is the defence to be denied to one who is incapable of mounting the resistance to the threat that would be put up by a person of "reasonable firmness" or "steadfastness"?
- (e) Should the defence be available on a charge of murder or attempted murder?

Further questions

28.3 We received substantial comment on all these aspects of the defence and in the following paragraphs explain our final views and recommendations on them, as reflected in clause 25 of the Criminal Law Bill. Before doing so, however, we must note two further important questions which we also address in the succeeding treatment of the defence, which are also reflected in the clause.

28.4 First, paragraph 18.4 of LCCP 122 emphasised that the clause reflected our view that duress was a true defence, and should not operate merely in mitigation of punishment. That issue receives much greater attention in this Report²⁷⁴ than it did in LCCP 122. That is because it was reopened in relation to the defence of duress generally, and not merely in relation to murder and attempted murder,²⁷⁵ in the subsequent speeches in the House of Lords in *Gotts*.²⁷⁶

28.5 The second of these questions is one on which LCCP 122 did not specifically invite views, though we were subsequently prompted, by the initial response to LCCP 122, to seek further advice. The question is whether, assuming that duress by threats remains a true defence, and not merely grounds for mitigation of sentence, the defendant should carry the persuasive burden of proving that defence.

28.6 The questions listed in paragraph 28.2 above are distinct from those just mentioned. However, they are in practice interrelated with them. We therefore think it will be helpful if we indicate at this early stage our conclusions on the two new questions. Those conclusions are that duress by threats should remain a true defence in the sense just identified; and that the defendant should in all cases bear the persuasive burden of proving it on a balance of probabilities. Our full reasons for reaching these conclusions are set out at paragraphs 31.1–31.8 and 33.1–33.12 below.

The proposed defence

The threat

29.1 As we said at paragraph 18.5 of LCCP 122, the overwhelming tendency of the authorities as of modern codes, is to limit the defence to cases where death or serious injury is threatened. Those commenting on the 1977 working paper had not dissented from that rule; and we accordingly incorporated it in clause 26(2)(a) of the Bill accompanying LCCP 122. Consultation strongly supported that limitation on the defence of duress, which is imposed by clause 25(2)(a) of the Criminal Law Bill.

The person threatened

29.2 There was very limited support for any formal limitation of the defence to cases in which the threat is to a limited class of person, such as the defendant's close relatives. We adhere to the view that the relevance of the closeness or otherwise of the relationship between the defendant and the person threatened is more appropriately catered for within the general test imposed by clause 25(2) of the Criminal Law Bill of whether "the threat is one which in all the circumstances (including any of his personal characteristics that affect its gravity) he cannot reasonably be expected to resist".

The possibility of official protection

29.3 The threat must be, or the defendant must believe that it is, one that will be carried out immediately, or before he (or the person under threat) can obtain official

²⁷⁴ Paragraphs 31.1–31.8 below.

²⁷⁵ As to which see paragraphs 30.17–30.22 below.

²⁷⁶ [1992] 2 AC 412.

protection: Criminal Law Bill, clause 25(2)(b). This provision, by allowing the defence if the defendant believes that official protection will be ineffective, differs from previous treatments of the point.

29.4 Clause 26(3) of the Bill accompanying LCCP 122 provided that it would be immaterial that, in fact or as the actor believed, any available official protection would, or might be, ineffective. As we explained at paragraph 18.7 of LCCP 122, this gave effect to the policy of the Commission's 1977 report, in which the Commission said:²⁷⁷

“ . . . [T]o leave to the jury the question of whether the defendant believed that the protection would be effective, which in itself would involve some consideration of whether the protection would be effective, would be unsatisfactory, both because of the width of the questions and because of the scope for misuse of the defence. We feel that . . . there must be a strict test of whether the defendant had, or believed he had, a real opportunity before the time when the threat would be implemented of seeking official protection. This may in some cases give rise to liability in what appear to be hard cases,²⁷⁸ but . . . we aim to provide a strictly defined defence which can be applicable over the widest possible field”.

29.5 This approach was supported by the South-Eastern Circuit (Southwark) Scrutiny Group in its comments on the first Draft Code Bill.²⁷⁹ But we noted that it had been seriously questioned on the ground of inconsistency with the rationale of the defence. Lord Griffiths, in *Howe*,²⁸⁰ observed that—

“if duress is introduced as a merciful concession to human frailty it seems hard to deny it to a man who knows full well that any official protection he may seek will not be effective to save him from the threat under which he has acted”.

Similarly, the Code team had represented to us that a person's belief that he cannot be protected “is surely relevant to the effect of the threat on his freedom of action [and cannot] properly be ignored as one of the circumstances in the light of which the question whether he could reasonably be expected to resist the threat is to be answered”.²⁸¹ We noted also that the question whether the police would be able to provide effective protection was regarded as relevant in *Hudson*.²⁸² We therefore specifically invited further views on whether clause 26(3), which we provisionally included in the Bill, ought to be preserved.

29.6 The substantial balance of opinion on consultation agreed with the doubts to which we have just referred. On careful re-examination, we are quite persuaded that no such provision as clause 26(3) should be retained. We would regard it as wholly unsatisfactory if a defendant who in every other respect qualified for the defence were to have it withheld because *ineffective* official protection was available, or because he or she had acted on the basis of an honest belief that such protection would be ineffective. The case of a wife committing perjury because subjected to duress by her husband, cited by one respondent in the context of *Hudson*,²⁸³ is an obvious example of a case in which theoretical but not actual official protection might be available.

29.7 We have therefore removed clause 26(3) as inconsistent with the general approach of the rest of the defence, which has as its guiding principle the reasonable reaction of the defendant in the circumstances as he or she believed them to be. Clause 25(2)(b) of the Criminal Law Bill puts the matter beyond doubt by its reference to “effective” official protection.

²⁷⁷ Law Com No 83, paragraph 2.31.

²⁷⁸ *Carker* [1967] SCR 114: a prisoner, then in solitary confinement, justifiably thought that official protection would in the long run be ineffective against threats from fellow prisoners; but he was not entitled to a defence of duress, based on those threats, on a charge of destroying fittings in his cell.

²⁷⁹ See Code Report, paragraph 12.14(ii).

²⁸⁰ [1987] AC 417 at p 443.

²⁸¹ Law Com No 143, paragraph 13.18.

²⁸² [1971] 2 QB 202.

²⁸³ [1971] 2 QB 202; LCCP 122 footnote 220.

The actor's view of the facts

29.8 The emphasis in clause 26(2)(a) of the Bill accompanying LCCP 122 on the actor's *knowledge or belief* that a threat has been made reflected this latter aspect of the defence of duress. The actor is excused because he acted under the pressure of a threat. It is plainly not enough that a threat has been made, for example, to kill his child: he must know that it has been made. But the defence ought therefore equally to be available if the actor mistakenly believes the facts to be such that, were his belief correct, he would have the defence. That aspect of the defence has, however, been a matter of some controversy.

29.9 In *Graham*²⁸⁴ Lord Lane CJ, on behalf of the Court of Appeal, required a mistaken belief that a person was being threatened to be "reasonable", so that the defendant had "good cause" to fear the supposedly threatened harm. The view to the contrary, which informed the Draft Code and the Bill accompanying LCCP 122, is that the reasonableness or otherwise of a person's asserted belief belongs to the domain of evidence. As Lord Lane CJ himself has said in the context of self-defence:

"If . . . the defendant's alleged belief was mistaken and if the mistake was an unreasonable one, that may be a powerful reason for coming to the conclusion that the belief was not honestly held²⁸⁵ and should be rejected. Even if the jury come to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been labouring under it, he is entitled to rely upon it".²⁸⁶

We believed this to be no less true in the case of duress, and that our proposal for that defence was consistent with the tendency of recent judicial developments in other contexts and with the tenor of our Bill as a whole. But we invited views on whether there are grounds for distinguishing in this regard between duress and other defences.

29.10 On consultation, there was almost no support for the view that the defendant's belief must be reasonable, and many respondents thought that, in accordance with other areas of the modern law, reasonableness should be a matter of evidence only. We therefore adhere to the view expressed in LCCP 122, as set out in paragraph 29.8 above, and clause 25(2)(a) of the Criminal Law Bill reflects that view.

Is the threat one which the actor should resist?

29.11 Under present law, a threat of death or serious injury excuses the actor whose resistance it overcomes only if the threat might have overcome the resistance of "a sober person of reasonable firmness, sharing the characteristics of the [actor]". The actor is required to have "the steadfastness reasonably to be expected of the ordinary citizen in his situation".²⁸⁷ In paragraph 18.10 of LCCP 122 we invited views on the question whether this requirement of "reasonable firmness" or "steadfastness" should be maintained.

29.12 We quoted from our 1977 report that: "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".²⁸⁸ The Court of Appeal in *Graham* accepted this approach in part when stating that the resistance to be expected was that of one "sharing the characteristics of the defendant". But the court added the requirement that the resistance match that of "a sober person of reasonable firmness", seeking in this way to "limit the defence . . . by means of an objective criterion formulated in terms of reasonableness".²⁸⁹ In LCCP 122 we continued to think, however, that the test should simply be whether in all the circumstances the person in question could reasonably be expected to have resisted the threat. We assumed that a person could not under this test

²⁸⁴ [1982] 1 WLR 294 at p 300G. The passage was approved in *Howe* [1987] AC 417, but *obiter* and without argument.

²⁸⁵ Ie that the defendant is not telling the truth when he says that he held the belief.

²⁸⁶ *Gladstone Williams* [1987] 3 All ER 411 at p 415F.

²⁸⁷ *Graham* [1982] 1 WLR 294 at p 300.

²⁸⁸ Law Com No 83, paragraph 2.28.

²⁸⁹ [1982] 1 WLR 294 at p 300D-E. The Court drew an analogy with the defence of provocation (which involves the question whether "a reasonable man" would have been provoked to do as the defendant did) and self-defence (was the defendant's use of force "reasonable in the circumstances"?).

rely upon his insobriety as a relevant circumstance; but at the same time, we were not convinced that a person's "characteristics" can be distinguished in the way that the *Graham* test appears to contemplate. Relative timidity, for example, may be an inseparable aspect of a total personality that is in turn part cause and part product of its possessor's life situation; and thus may itself be one of the "circumstances" in the light of which the pressure represented by the duress is to be assessed.

29.13 Clause 26(2)(b) of the Bill accompanying LCCP 122 therefore provided that the threat must be one "which in all the circumstances (including any of his personal characteristics that affect its gravity) [the actor] cannot reasonably be expected to resist". But since the *Graham* decision²⁹⁰ postdated our earlier consultation on this subject, we thought it right once again to seek views on this aspect of the defence.

29.14 On consultation, there was strong support for our view that the defence should apply where *the particular defendant in question* could not reasonably have been expected to resist the threat. We do not accept the contrary view, for which there was very little support, that the defence should be withheld from the "objectively weak". First, such an approach would be ineffectual as a means of law enforcement. If a person is in a condition that makes it unreasonable to expect him to resist, then he will not resist, and the fact that a different person in those circumstances might have resisted will not affect the matter. Second, the purpose of the defence is not to enforce unrealistically high standards of behaviour. Rather, the defence acknowledges that where the defendant could not reasonably have been expected to act otherwise he should not be convicted of a crime.²⁹¹ Our view on this question therefore remains unchanged, as does the formulation now to be found in the closing words of clause 25(2) of the Criminal Law Bill.

Voluntary exposure to duress

29.15 Clause 26(4) of the Bill accompanying LCCP 122 provided that the defence is not available to a person who has knowingly and without reasonable excuse exposed himself to the risk of a relevant threat: 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. We explained in paragraph 18.13 of LCCP 122 that that provision was consistent with recent case law²⁹² and with our own earlier recommendations.²⁹³ No commentator dissented from that view, and the provision is retained in clause 25(4) of the Criminal Law Bill.

29.16 The role of this provision in protecting society against the abuse of the defence of duress by threats, especially in the case of terrorist or other gang violence, is closely bound up with the reasons we give in paragraphs 33.1–33.12 below for recommending the reversal of the burden of proof.

Application of the defence to murder

Preliminary

30.1 We recognised in paragraph 28.6 above that in practice, there are important interrelationships between, on the one hand, the issues listed in paragraph 28.2 above—including whether duress should be a defence to murder—and, on the other hand, the questions whether duress should continue to be a true defence (as opposed to a mere ground for mitigation of sentence), and whether the defendant should bear the burden of proving that defence. As will appear in the discussion that follows, we are very much aware that the arguments on both sides of these latter questions assume especial importance, and their proponents may well feel them most acutely, in the context of the extension of the defence to murder. We return to those concerns in paragraphs 31.1–31.8 and 33.1–33.12 after dealing once again with the arguments peculiar to the latter issue.

²⁹⁰ Supported by a dictum in *Howe* [1987] AC 417.

²⁹¹ See our treatment in paragraphs 30.1–30.22 below of the question whether the defence should be available on a charge of murder.

²⁹² *Sharp* [1987] QB 853; *Shepherd* (1988) 86 Cr App R 47; and see *Fitzpatrick* [1977] NI 20.

²⁹³ Law Com No 83, paragraphs 2.35–2.38.

Statutory reform of the common law

30.2 Duress has been understood in modern times to be available as a defence to all offences except murder, attempted murder and, possibly, some forms of treason. In our 1977 report we recommended that it should apply to all offences.²⁹⁴ Since that report, however, the House of Lords has held, in *Howe*,²⁹⁵ that duress is not available as a defence to anyone charged with murder. In so deciding the House confirmed the law as it has been understood to be before the House itself decided the contrary, in relation to secondary parties, in *DPP for Northern Ireland v Lynch*.²⁹⁶ In LCCP 122, although we shared the view of our predecessors, we had obviously in the light of *Howe* to canvass opinion once again on this question, before making a final recommendation as to a future statutory rule. In doing so, we pointed out²⁹⁷ that one consideration affecting several of their Lordships in *Howe* was the undesirability of judges undertaking reform on such an important and controversial matter. Change, if change there ought to be, should be effected only by Parliament in the context of a general clarification of the law relating to the defence.²⁹⁸ That view was subsequently repeated with great force in relation to duress as a potential defence to attempted murder by the House of Lords in *Gotts*,²⁹⁹ and it reinforces us in our belief that the time has come for Parliament to be invited to turn its attention to both questions.

30.3 In LCCP 122, as in 1977 and in the Code Report, we proposed such legislation, summarising in paragraphs 18.15–18.16 of LCCP 122 the main reasons given in *Howe* for and against our provisional view that duress should become a complete defence to a charge of murder.

The decision in Gotts

30.4 In *Gotts*³⁰⁰ the House of Lords decided by a majority of three to two that duress is not a defence to a charge of attempted murder. That case, and the reasoning of the judgments in it, do not, we would suggest, radically alter the arguments of principle and policy previously debated in particular in *Howe*. In *Gotts* the bearing of such arguments was necessarily affected first by the view we noted in paragraph 30.2 above, that it was for Parliament to address those issues; and secondly by the fact that duress had been denied as a defence to the completed crime of murder in *Howe*.³⁰¹ However, we would emphasise the following two points which seem to us to emerge from the case.

30.5 First, the majority thought it correct, and not merely something forced on them by authority, to exclude the defence because of the need for the law to stand firm in the face of violence and terrorism, and to recognise the sanctity of human life, that was stressed in *Howe*.³⁰² We discuss in paragraph 30.21 Lord Jauncey's suggestion that such considerations pointed to removing the defence not merely in murder, but also in "all very serious crimes."

30.6 By contrast, Lords Keith³⁰³ and Lowry³⁰⁴ doubted whether the mere presence of an intent to kill, if formed in circumstances of duress, made the defendant so immoral as to require the withholding of the defence from him.

²⁹⁴ Law Com No 83, paragraphs 2.39–2.45.

²⁹⁵ [1987] AC 417.

²⁹⁶ [1975] AC 653. The Judicial Committee of the Privy Council, by a majority, had meanwhile denied the defence to one charged with murder as the actual killer: *Abbott v The Queen* [1977] AC 755.

²⁹⁷ In paragraph 18.14 of LCCP 122.

²⁹⁸ See per Lord Bridge [1987] AC 417 at pp 437F–438A; Lord Brandon at p 438E–F; Lord Mackay at p 455B.

²⁹⁹ [1992] 2 AC 412. See paragraph 32.1 below.

³⁰⁰ [1992] 2 AC 412.

³⁰¹ In paragraph 18.21 of LCCP 122 we took the view subsequently given effect to by the majority of the House in *Gotts* that so long as duress is not a defence to a charge of murder, it is difficult or impossible to find a satisfactory basis in logic or principle for it being a defence to attempted murder.

³⁰² See Lord Griffiths in *Howe* [1987] AC 417 at p 444A, who was cited with approval by Lord Jauncey in *Gotts* [1992] 2 AC 412 at p 426E. Lords Templeman (p 419F) and Browne-Wilkinson (p 442A) appear to agree with Lord Jauncey on this point.

³⁰³ At p 418G–H.

³⁰⁴ At p 436B–G.

30.7 The second point we would stress, and which we respectfully adopt in the substantive discussion below, is made by Lord Lowry. Since the defence could arise in a case where the defendant was seeking to avoid the implementation of threats to third parties, the simple moral equation assumed by treating a defendant as one who kills to save his own life did not necessarily apply.³⁰⁵

The consultation

30.8 Of those commentators who addressed the issue, the majority were in favour of the extension of the defence to murder, but there were a significant number who in doing so expressed some reservation. In essence the arguments for and against the extension of the defence to murder were substantially those canvassed in LCCP 122.

The arguments of principle and the practical considerations

30.9 The arguments for and against extending the defence to murder appear to us to derive, some from principle, and others from concern for the practical implications of that step. We deal first with the issue of principle.

30.10 The moral argument against extending duress to murder remains that it cannot be right for the State to excuse deliberate killing even where the will of the defendant is overborne by the threat of death or serious injury to himself or another. According to this view, as reaffirmed in *Howe*, “the special sanctity that the law attaches to human life . . . denies to a man the right to take an innocent life even at the price of his own or another’s life”.³⁰⁶ Rather than allow duress (or necessity) to excuse the taking of life, the law should “set a standard of conduct which ordinary men and women are expected to observe”: a standard, if necessary, of heroism and self-sacrifice, of which ordinary people are capable.³⁰⁷

30.11 Powerful though that argument may appear to be, and deeply felt as it clearly is by a minority of those who responded to our consultation, we cannot adopt it. In our view, it is not only futile, but also wrong, for the *criminal* law to demand heroic behaviour. The attainment of a heroic standard of behaviour will always count for great merit; but failure to achieve that standard should not be met with punishment by the State. We emphasise that under our proposed formulation of the defence, it would only be available where, in the jury’s view, the threat was such that the defendant could not reasonably have been expected to resist it. Criminal punishment, as opposed to moral exhortation, should not be used to try to achieve a standard of behaviour higher than that.

30.12 We also think it important to remember in this connection that the defence here under discussion is one of excuse and not justification. It is no part of our case for extending the defence of duress to murder to argue that deliberate killing may be, in certain circumstances, *justified*.

30.13 As we said in paragraph 30.7 above, we also respectfully agree with Lord Lowry’s observation in *Gotts* that, since the defence of duress could arise in a case where the defendant was seeking to avoid the implementation of threats to third parties, the simple moral equation assumed by treating a defendant as one who kills to save his own life does not necessarily apply.³⁰⁸

30.14 To the other arguments of principle for extending the defence of duress to murder, we would certainly add our rejection of the view that the absence of that defence can be sufficiently mitigated by exercise of executive discretion.³⁰⁹ We remain of the view expressed at paragraph 18.16(v) of LCCP 122, that reliance on executive discretion is not adequate in principle or in practice. Even if the prosecutor knows of a plea of duress, he may not be able, or think it proper, to judge its merits; and, apart from any other considerations, those responsible for considering a prisoner’s release would have to judge his claim to have been coerced without the benefit of a proper trial of the issue.

³⁰⁵ At p 436E–G.

³⁰⁶ [1987] AC 417 per Lord Griffiths at p 439C.

³⁰⁷ Per Lord Hailsham at pp 430–432.

³⁰⁸ [1992] 2 AC 412 at p 436E–G.

³⁰⁹ LCCP 122 paragraph 18.15(iv). The footnotes to that paragraph cite the judicial support in *Howe* for the view rejected in the text.

30.15 The essence of the practical concern felt by those who oppose extension of the defence to murder was expressed by Lord Lane CJ in *Howe* and was strongly influential in the House of Lords in that case:³¹⁰ duress is a defence most likely to arise in terrorist, gang or other organised crime offences and, particularly in such circumstances, “the defence of duress is so easy to raise and may be so difficult for the prosecution to disprove beyond reasonable doubt, the facts of necessity being as a rule known only to the defendant himself”.³¹¹

30.16 We feel the force of that concern, and did not lightly adopt the reply to it in LCCP 122³¹² that the defence is not available to a member of a criminal or terrorist group;³¹³ that the innocent tools of terrorists, on the other hand, should be excused if they could not have been expected to act otherwise; that such defendants should not be denied the right to raise a true defence because others may claim it falsely; and that the question whether the defendant was a terrorist or an innocent tool is a proper question for the jury and for the application of the normal burden of proof. On careful reconsideration, however, we think it important to separate within this reply the principle that the innocent should not be denied a true defence because others may abuse it from the view that the defendant should not bear the burden of proof. To the former principle we adhere. As to the latter question, we have already indicated our recognition that it is in the context of the extension of the defence to murder that the issue of burden of proof is most pressing.³¹⁴ That is by no means to say that our reasons for recommending the reversal of the burden of proof should be, or are, confined to the context of murder. However, we are satisfied that the reversal of the burden of proof, together with the stringent requirements of the defence as we have formulated it, should be accepted as meeting the concerns here under discussion, in the case of murder as in the case of all other offences.

Whether duress should reduce murder to manslaughter

30.17 In our 1977 report³¹⁵ we considered a suggestion³¹⁶ that duress might reduce murder to manslaughter (enabling the court to pass the sentence appropriate to the circumstances of the case) rather than found a complete acquittal. We rejected this suggestion, taking the view that—

“where the duress is so compelling that the defendant could not reasonably have been expected to resist it, perhaps being a threat not to the defendant himself but to an innocent hostage dear to him, it would . . . be unjust that the defendant should suffer the stigma of a conviction even for manslaughter. We do not think that any social purpose is served by requiring the law to prescribe such standards of determination and heroism”.

30.18 The Court of Appeal in *Howe*³¹⁷ expressed the view that “if it is to be permitted as a defence to murder at all, duress should . . . only reduce the offence to manslaughter and not result in an outright acquittal”. In the same case in the House of Lords, a variety of opinions was expressed. Lords Bridge and Mackay thought that it was not open to the House to introduce a change in the law to this effect.³¹⁸ But Lord Brandon did not regard it as just that duress should not afford “even a partial defence to a charge of [murder]”,³¹⁹ and Lord Mackay went further, seeing “much force” in our view that where a defence of duress is made out it would be unjust to stigmatise the defendant

³¹⁰ [1987] AC 417 Lords Bridge (at p 438B) and Griffiths (at p 444) attached particular weight to a statement to this effect by Lord Lane CJ in *Howe* in the Court of Appeal, [1986] QB 626 at p 641.

³¹¹ [1986] QB 626 at p 641D.

³¹² At paragraph 18.16(iv).

³¹³ Clause 25(4) of the final draft Bill.

³¹⁴ At paragraph 28.6. Paragraphs 33.1–33.16 deal with this question. But that discussion does not overlook its importance in other offences such as armed robbery.

³¹⁵ Law Com No 83, paragraph 2.43.

³¹⁶ In *Abbott v The Queen* [1977] AC 755 at p 768E.

³¹⁷ [1986] QB 626 at p 641F.

³¹⁸ [1987] AC 417 at pp 437H–438A and 455B.

³¹⁹ At p 438D.

with a conviction even for manslaughter.³²⁰ Lord Hailsham LC rejected the “halfway house” solution of allowing duress as a defence reducing the level of the offence: it was inconsistent with the nature of duress as, where available, affording “a clean acquittal”.³²¹

30.19 In *Howe*, therefore, there seems to have been a variety of views in the House as to the proper role for duress in relation to murder. There was general agreement that the House could not recognise duress as a defence, because to do so would be to effect a change in the law that must be left to Parliament. Any such change must occur in the context of closer definition of the defence than English law had achieved. There was support for the view that recognition of the defence would be impolitic; but also for the view that failure to recognise it, at least as reducing murder to manslaughter, was unjust.

30.20 In LCCP 122³²² we repeated our unchanged view that, the general defence being defined by statute, it should be available as a complete defence to a charge of murder. We added that if, however, it were decided that duress should not be available as a complete defence, we would regard its statutory recognition as a partial defence reducing murder to manslaughter as the second best option.

30.21 That latter suggestion, which we provisionally rejected in LCCP 122, received very little support on consultation. We have nevertheless considered the question again with great care in view of the subsequent reopening of what is effectively the same issue in a much wider context by Lord Jauncey’s suggestion in *Gotts* that duress should cease to be a defence, as opposed to a ground of mitigation, at least in all “very serious crimes”.³²³

30.22 We say the issue is the same because the effect of reducing murder to manslaughter on grounds of duress would be to enable the court, instead of passing the mandatory life sentence which follows conviction for murder, to take the duress into account as a ground for mitigation of sentence. Though the issue is of special importance in the context of murder, the arguments appear to us to be essentially the same both in that narrower context, in terms of which we have consulted, and in the wider context reopened in *Gotts*. In the next section we therefore report on the matter in both contexts.

Duress as a complete defence

31.1 In *Howe* Lord Griffiths said:

“I think myself it would have been better had [the development of the defence of duress] not taken place and that duress had been regarded as a factor to be taken into account in mitigation as Stephen suggested in his *History of the Criminal Law*, (1883), vol II, p 108. However, as Lord Morris of Borth-y-Gest said in *DPP v Lynch* [1975] AC 653, 670, it is too late to adopt that view”.³²⁴

In *Gotts* this observation, though with the omission of Lord Griffiths’ last sentence, was adopted with approval by Lord Jauncey.³²⁵ Stephen’s view, that duress should go to mitigation only, was further described as “logical” by both the judges in the minority;³²⁶ and Lord Browne-Wilkinson said that Parliament should specifically consider whether duress is not better regarded as a mitigating factor rather than as a defence.³²⁷

³²⁰ At p 456B.

³²¹ At p 435B.

³²² LCCP 122, paragraph 18.20.

³²³ [1992] 2 AC at p 424E-G. Lord Jauncey specifically doubted the Law Commission’s recommendation of 1977. It is not clear how far this, described by Lord Jauncey as a “personal”, view was shared by the rest of the majority. Lord Templeman, at p 419E-F, said that he agreed with Lord Jauncey’s speech, apparently without reservation, but in the context of an express opinion that these matters should be for Parliament and not for the courts; Lord Browne-Wilkinson did not advert to the point.

³²⁴ [1987] AC 417 at p 439D.

³²⁵ [1992] 2 AC 412 at p 424D.

³²⁶ Lord Keith at p 419A; Lord Lowry at p 439B. Both judges were concerned to point out the anomalous results of treating duress as a defence to some crimes but not to others, and it cannot be deduced from the remarks cited that they would support the statutory abolition of duress as a defence as a matter of policy free from the constraints within which the House was operating. However, at the same time, neither judge appeared to find Lord Griffiths’ view clearly unacceptable.

³²⁷ At p 442B.

31.2 Leaving aside the rules that duress is not now a defence to murder or attempted murder, the arguments for reducing duress to a mitigatory factor seem to us to proceed essentially from a combination of principle and practical concern similar to that which led to the reaffirmation of those rules in *Howe* and *Gotts*. Once again, we deal first with the issue of principle.

31.3 The argument of principle against duress as a general defence also appears to us to be that the excuse afforded by it for *any* criminal act ought to be regarded as partial rather than complete, and that the taking of life is only the strongest and most important instance. In relation to that instance, we cited in LCCP 122 the criticism in *Howe*³²⁸ of the view that duress should reduce murder to manslaughter, and reaffirmed our own view of 1977 that it would be unjust for the defendant who fell within the stringent terms of our proposed defence to suffer the stigma of a conviction even for manslaughter. We think it important to bear in mind in this connection that the proposed defence would apply only where the defendant had acted because of a threat of serious injury or death which it was not reasonable for him to resist.³²⁹ As we have said, the view that the defendant should in these circumstances be convicted of manslaughter received little support on consultation. Not only do we adhere to our original view, but we explain in the next paragraph why we believe that the same principle applies *a fortiori* to all other offences.

31.4 We believe that if it is wrong even in respect of murder to condemn the defendant for not acting heroically rather than reasonably, it would be even more unjust to condemn defendants for lesser acts done under the same conditions. To censure and punish defendants who found themselves in such circumstances would bring the law into disrepute.³³⁰ To take a recent example, it was confirmed in *Lewis*³³¹ that a threat of reprisal that it is unreasonable to expect the witness to resist is a defence to a charge of contempt in respect of a refusal to give evidence. It would, in our view, be intolerable if, for instance, a wife whose husband threatened her with serious injury or death, and who as a result reasonably refused to give evidence against him, had nonetheless to be convicted of the offence of contempt.

31.5 The *practical* concerns underlying the suggestion that duress should cease to be a complete defence might appear to be the same as those which supported the reaffirmation by the House of Lords in *Howe* of the exclusion of that defence from the exceptional case of murder. Chief amongst those considerations, as we have seen in discussion of that question,³³² was the view expressed by Lord Lane CJ in the Court of Appeal in that case, and which received considerable support in the House of Lords, that duress is a defence most likely to arise in terrorist, gang or other organised crime offences and, particularly in such circumstances, “the defence of duress is so easy to raise and may be so difficult for the prosecution to disprove beyond reasonable doubt, the facts of necessity being as a rule known only to the defendant himself”.³³³ We explain below why we do not believe that it would be a rational or effective response to those considerations to treat duress as a mitigatory factor.

31.6 If, as we believe, the considerations just mentioned are of real weight, they need to be addressed by appropriate measures. As we have indicated, after careful reconsideration, we have reached the conclusion that the appropriate response, and the one which is right in principle bearing in mind the unique nature of duress, is that the defendant should bear the burden of proving that defence. That view is fully explained in paragraphs 33.1-33.16 below. That, we suggest, is the correct approach, rather than that duress should cease to be a complete defence. We understand the concern that because allegations of duress are difficult to *disprove*, defendants who should not benefit from the defence

³²⁸ LCCP paragraph 18.18.

³²⁹ See the limits on the defence proposed in clause 25(2) of the Criminal Law Bill.

³³⁰ Powerful voices can be cited in support of that view. For instance, Blackstone, *Commentaries*, (1811), vol 4, p 26: “it is highly just and equitable that a man should be excused for those acts which are done through unavoidable force and compulsion”; and Lord Morris in *DPP v Lynch* [1975] AC 653 at p 671 C, specifically rejecting the Stephen mitigation argument: “The law would be censorious and inhumane which did not recognise the appalling plight of a person who perhaps suddenly finds his life in jeopardy unless he submits and obeys”.

³³¹ *The Times*, 19 November 1992. See also *K* (1983) 78 Cr App R 82.

³³² See paragraph 30.15 above.

³³³ [1986] QB 626 at p 641D.

may be able to do so. But if genuine duress is otherwise thought to be a proper ground for a complete defence to all offences, that conclusion should not be avoided, either in the case of murder, or in any other offence, out of the need to convict the defendant whose assertion of duress is false. The murderer who falsely asserts that he was acting under duress should be convicted of that offence and not of manslaughter. The defendant on any other charge, whose plea of duress is false, should not have his sentence reduced because of some trivial possibility that his plea might be genuine. Equally, it would not be just for the defendant who really was acting under duress merely to have his sentence reduced, and not acquitted altogether, for fear that the jury might be mistaken.

31.7 Further, and quite apart from compromise solutions adopted because of doubts about certainty of proof, we do not agree with the view that even genuine duress ought only to be a partial excuse, leading only to a reduction in sentence. Apart from its being wrong in principle, we believe this approach would be unworkable in practice. It is sometimes assumed that if the case fulfils the requirements of the defence, then no or a nominal penalty will be imposed. But judges with great experience of criminal trials have expressed scepticism that that chain of events will in fact occur.³³⁴ Nor, in logic, should it occur. If duress is rejected as a defence, that must be either because the defendant who acts under duress is in some way at fault, albeit only by not behaving heroically; or because there is some public policy reason for convicting him even though he is not at fault. If he is at fault, the law should mark his fault by a penalty, or at least should not assume that in no case will an effective penalty be imposed. If the reasons for rejecting duress as a defence are ones of public policy, it is hard to see that that policy is forwarded by a regime that assumes that convictions are to be purely nominal in nature; or, even more, that assumes that in some cases at least the law will not be enforced at all.

31.8 For all the reasons discussed above, we recommend, and clause 25 of the Criminal Law Bill provides, that duress by threats should remain a complete defence, and that it be extended to the case of murder.

Application of the defence to other offences if our recommendation as to murder is rejected

Attempted Murder

32.1 The decision in *Gotts* confirmed that duress by threats is not a defence to attempted murder. If, contrary to our recommendation, it were decided to exclude murder from the ambit of the statutory defence of duress, we accept, and recommend, that this rule about attempted murder must continue. Attempted murder requires an intention to kill, and it thus could not be logical to deny the defence for the full offence but to allow it for the attempt.

Other offences of violence

32.2 The Court of Appeal in *Gotts* said:

“One can imagine a situation where a man under duress fires a shotgun in order to kill two men standing together. He kills one and maims the other. It would seem strange if he were to be convicted as to one victim and acquitted altogether in relation to the other when the death of the one victim and the maiming of the other were caused by the very same act committed with the very same intent. We note the suggestion that if attempt is excluded the same should apply to conspiracy and other kindred offences. We consider there is a legitimate distinction to be drawn. Conspiracy, incitement and so on are, generally speaking, a stage further away from the completed offence than is the attempt. Wherever the line is drawn it would be possible to suggest anomalies”.³³⁵

This passage requires comment not only in respect of what it says about inchoate or preliminary offences other than attempt, but also in relation to its bearing on some other offences of violence.

³³⁴ Eg Lord Edmund-Davies in *DPP v Lynch* [1975] AC 653 at p707D: “Apart from the obloquy involved in the mere fact of conviction, in the nature of things there can be no assurance that even a completely convincing plea of duress will lead to an absolute discharge”.

³³⁵ [1991] 1 QB 660 at p 668A-B.

32.3 As to conspiracy and kindred offences, we respectfully agree with the Court of Appeal that to exclude the defence of duress in a case of attempted murder because the accused has done an act intending that it should cause death, thus fulfilling the *mens rea* for murder itself, does not demand, either as a matter of logic or of policy, that other offences preliminary to murder, where the accused has *not* done such an act, should also be excluded from the ambit of duress. Indeed, if the reason for excluding the defence in the completed offence of murder is that the accused had the *mens rea* for murder, that reasoning shows that the exclusion of the defence in murder is, at least so far as logic is concerned, inconsistent with the basic rationale of the law of duress. Duress is a true defence in that it only arises where the accused has fulfilled the requirements of the crime of which he is accused, including its *mens rea*.³³⁶

32.4 Second, however, in relation to other offences of violence, the *mens rea* of murder is fulfilled by an intent to cause grievous, or serious, bodily harm.³³⁷ As such, it is the same as the *mens rea* of the offence of causing grievous bodily harm with intent under section 18 of the Offences against the Person Act 1861, and will, in effect, be the same as the *mens rea* of the offence that we propose in clause 2 of the Criminal Law Bill. The Court of Appeal's remarks in *Gotts*, quoted above, might be thought to suggest that since a person who kills with that intention cannot plead duress, similarly a person who merely maims with that intention should not have the defence either. However, whilst we acknowledge the logical force of the Court of Appeal's remarks we cannot accept that that conclusion should follow from them. It has long been assumed that duress is an available defence in all cases except murder (and possibly treason) including presumably cases of wounding with intent,³³⁸ and the Court cannot, we think, have intended to disturb that position. The dilemma that the Court states rather illustrates that the exclusion of murder from the defence of duress is difficult to explain on grounds of logic. That exclusion is only justifiable, if at all, and contrary to the recommendation that we make in this Report, as a special rule demanded by considerations of policy in a case where a death has actually occurred.

Treason

32.5 We recommend, as we did in our 1977 report,³³⁹ that duress should be generally available as a defence to treason. At common law the scope of its availability is uncertain.³⁴⁰

Marital coercion

32.6 Clause 36(2)(b) of the Criminal Law Bill abolishes this common law defence, as recommended in our 1977 report.³⁴¹

The burden of proving duress

33.1 We have explained above³⁴² our view that the concerns about the operation of the defence of duress expressed by Lord Lane CJ in the Court of Appeal in *Howe*, and repeated by the House of Lords in that case and in *Gotts*, cannot justly or effectively be met by withholding duress as a defence to murder, or by reducing it, either in relation to that offence or more widely, to a mere ground for mitigation of sentence. In this

³³⁶ [1992] 2 AC 412. In the House of Lords, there appears to have been a consensus that, as Lord Jauncey put it (at p 426E): "withholding the defence in any circumstances will create some anomalies". But the judges did not pursue the policy implications of those anomalies which might result from excluding murder and attempted murder, but not the offence in section 18. Lord Lowry said at p 441D-E:

"I am not influenced in favour of the appellant by the supposed illogicality of distinguishing between attempted murder on the one hand and conspiracy and incitement to murder on the other, and I agree on this point with the view of Lord Lane CJ: short of murder itself, attempted murder is a special crime. But I am not swayed in favour of the crown by the various examples of the anomalies which are said to result from holding that the duress defence applies to attempted murder. As Lord Lane CJ said, at p 668B, it would be possible to suggest anomalies wherever the line is drawn. The real logic would be to grant or withhold the duress defence universally".

³³⁷ *Cunningham* [1982] AC 566.

³³⁸ "[I]t is clearly established that duress provides a defence in all offences including perjury (except possibly treason or murder as a principal)": *Hudson and Taylor* [1971] 2 QB 202 at p 206E, a judgment of a Court of Appeal that included Lord Parker CJ and Widgery LJ.

³³⁹ Law Com No 83, paragraph 2.45.

³⁴⁰ See *Smith & Hogan*, pp 234-235.

³⁴¹ Law Com No 83, paragraph 3.9.

³⁴² Paragraph 30.16.

section we explain why we now believe that those considerations would be met most appropriately and directly by placing on the defendant the persuasive burden of proving the defence.

33.2 Although we provisionally adopted the contrary view in LCCP 122, we noted the response to that paper from some members of the judiciary that the burden of proof ought to be reversed, or that, if the burden were reversed, they might find it easier to support the extension of the defence to murder. It was in particular suggested that the members of a criminal gang might well be capable, not only individually, but in collusion, of concocting a false defence of duress. When analysing that response to LCCP 122, we also had the benefit of knowing the views of the House of Lords in *Gotts*.

33.3 Once we had reached the provisional view that the burden of proof should be reversed, we decided to conduct a further special consultation on that issue. In response there was strong support for that provisional conclusion, especially among the judiciary and practitioners.³⁴³ Although we did not put the matter in these terms, many again indicated that if the burden of proof were to be reversed, they would find it easier to support the extension of duress as a defence to murder.

33.4 At the same time doubts were expressed, mainly by academic commentators, the Law Society and by Liberty. These centred on concern as to possible undermining of the general principle that the prosecution must prove its case, and the view that evidence was lacking of the need for the reform. We deal with the former in the paragraphs below. As to the latter, the best evidence of the need for change seems to us to be the strongly held view of judges and the majority of practitioners that, in current conditions, duress as a complete defence has become too hazardous without that change.

33.5 It is no light matter to propose that the defendant bear the persuasive burden of proof, and that, moreover, not only in the case of murder, but in relation to all other offences, to which duress is already a complete defence, with the burden now resting on the prosecution to disprove it beyond reasonable doubt. Certainly we would not be recommending the change if we thought it might appear to undermine the important general rule that the prosecution must prove its case. On the contrary, we see the arguments for the change in the case of duress as wholly exceptional, depending on factors unique to that defence which distinguish it from all others.

33.6 In our view, duress is a defence like no other in that, at the lowest, it is much more likely than any other defence to depend on assertions which are peculiarly difficult for the prosecution to investigate or subsequently to disprove. By contrast, for example, self-defence, and all the cases included in the wider defence contemplated by clause 27 of the Criminal Law Bill, depend on the immediate circumstances in which the defendant commits (what would otherwise be) the offence. In self-defence, he acts to protect himself from unlawful force;³⁴⁴ in other applications of the clause 27 defence, he acts to terminate the commission of crime,³⁴⁵ or interference with property.³⁴⁶ In all those cases, the evidence of circumstances founding the defence is part and parcel of the incident during which the offence is committed; and it is therefore reasonable to expect the prosecution, who have to prove the offence, also to disprove the existence of circumstances on which the defence might be founded.

33.7 By contrast, in the case of duress by threats the circumstances on which the defence is founded will characteristically have occurred well before, and quite separately from, the actual commission of the offence that the prosecution will know about and must prove. Thus, the threats from A, his cell-mate, that cause B to give perjured evidence; or the coercion exercised on the defendant to make him join the bank robbery; take place far away from the actual commission of the crime, and may well involve no one who is involved in the commission of that crime. That is quite different from a case of

³⁴³ Though the Criminal Law Committee of the Law Society opposed the change, arguing that an accused, to prove duress, would have to admit the commission of the offence. That, however, is already the position if an accused is to rely on duress in his defence, wherever the burden of proof may lie at the end of the day.

³⁴⁴ Criminal Law Bill, clause 27(1)(a)-(b).

³⁴⁵ *Ibid*, clause 27(1)(e).

³⁴⁶ *Ibid*, clause 27(1)(c)-(d).

self-defence, where the person on whose conduct the alleged defence is founded will (unless of course he is dead) almost certainly already be a leading witness for the prosecution.

33.8 These considerations do or may arise also in respect of the defence of duress of *circumstances*, created by clause 26 of the final draft Bill. A clear example is indeed to be found in *Dudley and Stephens*,³⁴⁷ discussed in paragraph 19.9 of LCCP 122. What happened at sea, and its effect on the defendants, was wholly within the latter's knowledge. We have therefore reached the same provisional conclusion in respect of the defence in clause 26 (duress of circumstances) as for that in clause 25 (duress by threats).

The practical effect of reversing the burden

33.9 The foregoing reasons for treating duress as an exception to the normal rule that the prosecution must prove or disprove everything, including defences, seem to us to be very strong. But the practical advantages of that course are also considerable.

33.10 First, the effect of altering the burden of proof would be to enable the court to concentrate more directly on the plausibility of the defendant's story. To place the burden, on the balance of probabilities, on the defendant would not mean that a claim by him or her of having been threatened would simply be rejected if there were no separate supporting evidence: that is important because the defendant might find it just as difficult as the prosecution to bring into court the person responsible for the threat as a witness to the truth.³⁴⁸ Rather, the court would have to decide on all the evidence whether it was more likely than not that what the defendant claimed had in fact occurred. That seems a much more reasonable exercise than to provide that in such a case the prosecution must *disprove* the unilateral claims of the defendant. Indeed, it is hardly surprising that, faced with the latter rule, judges and others should express lack of enthusiasm about the defence of duress as a whole.

33.11 Second, a shifting of the burden will be of particular importance in giving real effect to clause 25(4) of the Criminal Law Bill, which withholds the defence from one (conspicuously, a member of a criminal gang) who has without reasonable excuse exposed himself to the risk of duress. Some questions about the present form of the defence were raised on consultation, and on consideration we concede that there may be room for doubt whether, under the present rules as to burden of proof, the provision will be sufficiently effective.³⁴⁹ Mere denial by a defendant of having voluntarily joined the gang, or mere assertion of coercion to join, perhaps many years ago, are conspicuously difficult to disprove, especially where the criminal standard of proof has to be applied; whereas, if the burden were on the accused, it would simply be a question of whether his explanation was more likely than not.

33.12 We have considered in this connection the suggestion in response to LCCP 122³⁵⁰ that the members of a criminal gang might well be capable, not only individually, but in collusion, of concocting a false defence of duress. In such a case, if the burden of proof rested on the defence, proper account could be taken of the fact that others who could have supported the defendant's allegations had not done so. By this we do not mean that a defence case will necessarily, or usually, fail if it is not supported, but only that lack of evidence from other gang members can be given due weight; whereas, if the burden of disproof of the defence is on the prosecution, failure to adduce evidence in support of the defendant's case, even from his co-accused, may not be given proper significance.

³⁴⁷ (1884) 14 QBD 273.

³⁴⁸ This potential difficulty for the defendant was strongly emphasised by the Criminal Law Committee of the Law Society.

³⁴⁹ It should be noted that in both the cases where the existence of this exception has been recognised (*Sharp* [1987] QB 853; *Shepherd* (1988) 86 Cr App R 47: see LCCP 122, footnote 228) the defendant volunteered, as part of his story, information on which the exception could be based: others may be better advised.

³⁵⁰ Paragraph 33.2 above.

The European Convention on Human Rights

33.13 Two respondents raised with us the question whether reversing the burden of proof in the defence of duress would be consistent with Article 6.2 of the European Convention on Human Rights which states:

“Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law”.

33.14 Commentators of authority have concluded that Article 6.2 requires a fair hearing in general terms but that it does not lay down specific requirements as to procedure or burden of proof: provided, at least, that where burdens are placed on the accused there should be reasonable grounds for that step; the burden can be fairly discharged; and at the end of the process any doubt is resolved in favour of the accused. In particular, it would be surprising if the ECHR laid down specific requirements as to the allocation of burdens, granted that the Convention applies to many continental systems where the English machinery and procedure of evidential burdens is unknown.³⁵¹

33.15 In the light of those views, and of our own examination of the relevant jurisprudence on Article 6.2, the Commission is satisfied that if the burden of proof, on a balance of probabilities, were to be placed on the defendant, that jurisprudence would not be contravened.

Our recommendation

33.16 We repeat that in our view the reasons we have given for recommending that the defendant should bear the persuasive burden of proving duress are unique to the case of that defence. We also believe that they are sufficient to justify that step, and that it would not result in injustice to the defendant who genuinely acted under duress. The closing words of clause 25(2) and clause 25(4) of the Criminal Law Bill provide accordingly.

Notice of defence

34.1 Our draft Bill of 1977 contained a provision requiring the giving of notice of an intention to advance a defence of duress.³⁵² Although we do not doubt the desirability in principle of such notice, we do not include a similar provision in the final draft Bill. The question of whether, at which stage of the criminal process, and in what form notice should be given of defences requires general consideration, and ought not to develop in a piecemeal fashion. The placing of the persuasive burden of proof on the defendant does not give sufficient reason to displace that general view.

DURESS OF CIRCUMSTANCES

35.1 Clause 27 of the Bill accompanying LCCP 122 provided a statutory formulation of the defence of duress of circumstances: where the accused acts to avoid an imminent danger of death or serious injury to himself or another, if in the circumstances he cannot reasonably be expected to act otherwise. LCCP 122, paragraphs 19.1–19.10, explained our approach to the clause. On consultation, we received very little adverse comment. The provision is accordingly retained as clause 26 of the Criminal Law Bill. The only change of substance reflected in that clause is the placing of the persuasive burden of proving the defence, on a balance of probabilities, on the defendant. This follows, as

³⁵¹ JES Fawcett in *Application of the ECHR*, (2nd edition, 1987) at p 180:

“[I]t may be remarked that the presumption of innocence does not imply where lies the main burden of proof at the trial of the charge, that is to say, upon the prosecution to prove the guilt of the accused beyond a reasonable doubt. The presumption of innocence does not necessarily have this function; for example, in Germany there is no such distribution of the burden of proof, since it is the duty of the court to do all that is necessary to discover the truth and it is the presiding judge who conducts the trial, examines the accused, and admits all necessary evidence; nevertheless the principle *in dubio pro reo* prevails in German criminal procedure”.

Similarly Professor Francis Jacobs in *The European Convention on Human Rights* (1975), at p 113:

“The principle of the presumption of innocence is reflected in English law in the rule placing the burden of proof on the prosecution. But it cannot be equated with the rule, to which there are in any event numerous exceptions. Under the inquisitorial system of criminal procedure found in many of the Contracting Parties, it is for the court to elicit the truth in all cases. What the principle of the presumption of innocence requires here is first that the court should not be predisposed to find the accused guilty, and second that it should at all times give the accused the benefit of the doubt, on the rule *in dubio pro reo*”.

³⁵² Law Com No 83, Draft Criminal Liability (Duress) Bill, clause 2(1).

will be seen from the discussion in paragraphs 33.1–33.16 above, from our identical recommendation in relation to duress by threats. The following explanation of the clause is therefore substantially the same as that which appeared in LCCP 122.

The nature of the defence

Authority

35.2 Clause 27 of the Bill accompanying LCCP 122 provided a defence to one who acts to avoid an imminent danger of death or serious injury to himself or another, if in the circumstances he cannot reasonably be expected to act otherwise. The Court of Appeal has recently recognised the existence of such circumstances of defence on a number of occasions, in cases of reckless driving³⁵³ and of driving while disqualified.³⁵⁴ Nothing in these cases suggests that the defence is of narrower application than the defence of duress by threats. There is also impressive authority in other common law jurisdictions for a general defence.³⁵⁵

Relation to duress by threats and to necessity

35.3 *Duress by threats.* Our inclusion of the defence of duress of circumstances in the Draft Code³⁵⁶ was based on the conviction that “[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”.³⁵⁷ The effect of the situation on the actor’s freedom to choose his course of action ought equally to provide him with an excuse for acting as he does. The analogy between “threats” and other “circumstances” promising an evil unless a crime is committed likewise influenced the Court of Appeal in naming the new defence “duress of circumstances”, and in modelling it closely upon duress by threats—by limiting the harm to be avoided to death or serious bodily harm and by adopting, with necessary modifications, the model jury direction laid down in *Graham*.³⁵⁸ Clause 26 of the Criminal Law Bill is generally designed to reflect the analogy with duress by threats.

35.4 *Necessity.* The relationship between duress and necessity is a difficult matter. Duress is sometimes spoken of as if it were a species of necessity, but the law recognises a defence of “necessity” on a basis quite different from that which underlies the recognition of duress as a defence. The true basis of the duress defences, as we understand them, is that the actor has been in effect compelled to act as he does by the pressure of a human or other threat to which he himself is subject. It is the impact of that pressure on his freedom to choose his course of action that suffices to excuse him from criminal liability. In such cases, the threat must be such that he cannot reasonably be expected to resist it or (as it is put in clause 26 of the Criminal Law Bill in respect of duress of circumstances) to do otherwise than to commit the act that, absent the defence of duress, would be criminal. The gravity of the act committed may be relevant to the question whether the threat (death or serious injury for himself or another) understandably overcame the actor’s natural reluctance to commit that act; but the defences do not depend on an objective comparison between the evil threatened and the harm committed to avoid it.

35.5 By contrast with the defences of duress just discussed, there appear to be some cases, more properly called cases of “necessity”, where the actor does not rely on any allegation that circumstances placed an irresistible pressure on him. Rather, he claims that his conduct, although falling within the definition of an offence, was not harmful because it was, in the circumstances, justified. Such claims, unlike those recognised by the duress defences, do seem to require a comparison between the harm that otherwise unlawful conduct has caused and the harm that that conduct has avoided; because if the latter harm was not regarded as the greater the law could not even consider accepting that the conduct was justified. Nor, fairly clearly, does the defence depend on any claim

³⁵³ *Willer* (1986) 83 Cr App R 225; *Conway* [1989] QB 290.

³⁵⁴ *Martin* [1989] 1 All ER 652.

³⁵⁵ In particular: *People v Lovercamp* 43 Cal App 3d 823 (1974); *Loughnan* [1981] VR 443; *Perka* (1984) 13 DLR (4th) 1.

³⁵⁶ Draft Code clause 43.

³⁵⁷ Law Com No 177, paragraph 12.20, citing Law Com No 143, paragraph 13.25.

³⁵⁸ [1982] 1 WLR 294.

that the actor's will was "overborne": on the contrary, the decision to do what, but for the exceptional circumstances, would be a criminal act may be the result of careful judgment, as in the case of the kind of professional decision referred to in the next paragraph.

35.6 Although the English courts have not expressly recognised a general doctrine of "necessity", a case of high authority, *F v West Berkshire Health Authority*,³⁵⁹ provides an example of its operation in connection with the medical treatment of people who are unable to give a valid consent to it. In the circumstances of that case, the sterilisation of a mentally handicapped woman was held to be necessary in her own best interests. A perhaps more straightforward example is that given by Lord Goff in his judgment in the same case: "a man who seizes another and forcibly drags him from the path of an oncoming vehicle, thereby saving him from injury or even death, commits no wrong".³⁶⁰ In such cases there is no question of the defence depending on the actor's resistance being overcome, in the sense discussed in paragraph 29.11 above; rather, the courts decide that in all the circumstances the actor's, freely adopted, conduct was justified.

35.7 We therefore consider that, as part of the policy of retaining common law defences that we referred to in paragraphs 27.1–27.3 above, this specific defence of necessity should be kept open as something potentially separate from duress. That is provided for by clause 36(2) of the Criminal Law Bill, which expressly saves "any distinct defence of necessity" when abrogating the common law defences of duress by threats and of circumstances.

Some details of the defence

The danger

35.8 The act done must be "immediately necessary to avoid death or serious injury to [the actor] or another". The act (reckless driving) in *Conway*³⁶¹ was (allegedly) done to save the life of the defendant's passenger; in *Martin*³⁶² it was claimed that the accused had to drive whilst disqualified to prevent his wife's suicide.

Other matters

35.9 As with duress by threats, the actor's knowledge of, or belief in the existence of, relevant circumstances is crucial.³⁶³ Consistently with that defence, the circumstances that clause 26 of the Criminal Law Bill requires to be taken into account include "any of his personal characteristics that affect [the gravity of the danger]" (subsection (2)(b)). And a person who has voluntarily exposed himself to a danger cannot rely upon that danger as a ground of this defence (subsection (4)).

Application of the defence

35.10 As in the case of duress by threats, the balance of opinion on consultation was in favour of its application to murder. For the reasons we gave in LCCP 122, and which are repeat below, we remain of that view, and clauses 24 and 26 of the Criminal Law Bill so provide, by applying the defence to all offences.

35.11 The application of this defence to murder would in effect depart from the law as stated in *Dudley and Stephens*.³⁶⁴ That famous case, of the shipwrecked men adrift in a small boat without food or drink, who killed one of their number to sustain themselves on his flesh, illustrates the general category of cases in which people are in peril of death or serious harm because of "duress of circumstances". The Queen's Bench Division denied the existence of any doctrine of necessity as a defence to murder. Adoption of the clause now proposed would leave it to the jury to say whether in all the circumstances persons in the position of the defendants in *Dudley and Stephens*, assuming they believed their acts to be "immediately necessary", could reasonably have

³⁵⁹ Sub nom *In Re F* [1990] 2 AC 1.

³⁶⁰ [1990] 2 AC 1 at p 74D.

³⁶¹ [1989] QB 290.

³⁶² [1989] 1 All ER 652.

³⁶³ See above, paragraph 29.8.

³⁶⁴ (1884) 14 QBD 273.

been expected to act otherwise than as they did. This proposal would appear to stand or fall with the corresponding proposal for duress by threats; and we refer to the relevant discussion in that context.³⁶⁵

35.12 Inconvenient overlap between this defence and those provided by clause 25 (duress by threats) and clause 27 (justified use of force) is avoided by clause 26(5) of the Criminal Law Bill.

THE JUSTIFIABLE USE OF FORCE

Introduction

36.1 The Draft Code brought together for the first time various elements in the existing common law relating to the justifiable use of force, and expressed that part of the law in a rational statutory form.³⁶⁶ In LCCP 122 we provisionally proposed the statutory adoption of a similar clause, which would in effect codify the existing common law, and some related statutory additions, while at the same time eliminating some of the inconsistencies and uncertainties that have been produced by the unconnected development of different areas of the law.

36.2 It is, however, important to note that even the rationalised version of the common law that we proposed in LCCP 122, and which we recommend in this Report, does not cover all cases in which a person may use force against the person or property of another without incurring criminal liability. The law set out in the Criminal Law Bill covers a wide range of possible events, and seeks to define the circumstances in which the defence of justified use of force will apply with as much clarity as possible, in order to assist courts and other users in those cases where issues of the use of force for self-protection or cognate purposes most often arise. As indicated in paragraphs 27.1ff above, however, the Criminal Law Bill leaves untouched all other common law defences that it does not specifically abrogate, including in particular, in the present context, the defences of necessity and of lawful excuse for action. The fact, therefore, that a particular action does not fall within the limits of the defence of justified use of force does not mean that it is excluded from the application of the common law rules of, in particular, the defence of necessity. We mention below a number of cases in which those considerations apply; and in paragraphs 40.1ff below give a more extended indication of the relationship between this defence and the defence of necessity.

36.3 The most significant element in this part of the law is the present common law of self-defence. The basis of the present law of self-defence is that a person has a defence to a criminal charge if he acts to prevent the commission of an unjustifiable attack on himself or another, and the steps that he takes are reasonable in the circumstances as he believes them to be. The attack will often itself be criminal, but it need not necessarily be so in order to fulfil the requirements of the present law of self-defence. The present common law has a number of important features, which we stress here because they form the basis of the general statutory provision that we put forward in LCCP 122, and which is reproduced in substance in the Criminal Law Bill.

36.4 The essential justification of the defendant's acts is that he has acted for self-protection. No act that is done for motives of revenge, or in a spirit of informal punishment, can even potentially qualify for consideration under this defence.³⁶⁷

36.5 The question for the jury is whether the defendant's acts of self-protection were reasonable in the circumstances that he believed to exist. That question has two distinct elements.

³⁶⁵ See above, paragraphs 30.1–30.22 and see also 31.1–31.8.

³⁶⁶ Draft Code, clause 44; Code Report, paragraphs 12.24–12.37.

³⁶⁷ "If the attack is all over and no sort of peril remains then the employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may no longer be any link with a necessity of defence. Of all these matters the good sense of a jury will be the arbiter": *Palmer v R* [1971] AC 814 at pp 831H–832A, per Lord Morris of Borth-y-Gest.

36.6 First, the defendant is judged according to the facts as he believed them to be. That was clearly established in the present law by the judgment of Lord Lane CJ in *Gladstone Williams*,³⁶⁸ and further confirmed by the Privy Council in *Beckford v R*.³⁶⁹ This element, as Lord Lane pointed out, is of importance in eliminating the possibility that the accused was acting under a genuine mistake of fact.³⁷⁰ His Lordship emphasised that the reasonableness or unreasonableness of any belief alleged by the defendant is relevant to the question of whether the defendant held the belief at all:³⁷¹ because if an unreasonable belief is alleged the jury are likely to have difficulty in thinking that the accused may be telling the truth. But, again to cite Lord Lane, “If the belief was in fact held, its unreasonableness, so far as guilt or innocence is concerned, is neither here nor there”.³⁷²

36.7 In his judgment the Lord Chief Justice referred³⁷³ to the recommendation of the CLRC in its Fourteenth Report³⁷⁴ that

“The common law of self-defence should be replaced by a statutory defence providing that a person may use such force as is reasonable in the circumstances as he believes them to be in the defence of himself or any other person”.

The court considered that that proposition already represented the common law. The statutory expression of the law of self-defence that we proposed in LCCP 122, and which we repeat in the Criminal Law Bill, therefore gives effect to the CLRC’s desire that the defence should be put on a statutory footing, and incorporates the statement of the law that was considered to be correct both by the CLRC and by the court in *Gladstone Williams*.

36.8 In practice, the principle that the accused must be judged on the facts as he believed them to be is unlikely frequently to be decisive of the outcome of a case. It will not often be the case, and the jury are unlikely often to think, that the defendant may have mistakenly believed that, for instance, he or another person was about to be attacked, when a reasonable person in the defendant’s position would not have so believed. But, for instance in a confused situation of brawling or disorder in a street or public house, or where there is a heated argument between two individuals, A may genuinely mistake B’s raising of his hand as the immediate precursor of an attack on A, rather than as merely his seeking to emphasise a point or to summon help. Somewhat similarly, police officer A may wrongly and indeed unreasonably believe that B whom he is arresting is armed, and use the amount of force against him that would be reasonable if his belief were true; or he may make a mistake of identity, and think that B, an innocuous person, is C, a dangerous armed criminal. In such circumstances it would be unjust, as the Court of Appeal said in *Gladstone Williams*, if A, provided he did no more than would have been reasonably required to avoid an expected attack on himself, and not in a spirit of aggression or revenge, were to be exposed to criminal liability simply because of his mistaken or even negligent belief.

36.9 The second requirement of the present law of self-defence is that while, as emphasised in *Gladstone Williams*, the defendant is judged according to what he believed the circumstances to be, he will only be able to claim the benefit of this defence if he has acted (objectively) reasonably in the light of those circumstances. This requirement is equally as important as that just discussed. It is not for the defendant himself to adjudicate upon the reasonableness of the steps that he takes to prevent the offence, because that would unfairly and dangerously exculpate defendants who had an irresponsible, irrational or anti-social notion of the extent to which it is acceptable to react when

³⁶⁸ (1984) 78 Cr App R 276.

³⁶⁹ [1988] AC 130.

³⁷⁰ (1984) 78 Cr App R 276 at p 279.

³⁷¹ *Ibid*, at p 281.

³⁷² *Ibid*, at p 281. There is one qualification to this rule. The defendant cannot rely on any mistake caused by his being in a state of voluntary intoxication. See *O’Grady* [1987] QB 995; Law Commission Consultation Paper No 127 (1993), *Intoxication and Criminal Liability*, paragraph 2.25; and paragraphs 45.1–45.3 below.

³⁷³ *Ibid*, at p 281.

³⁷⁴ Cmnd 7844 (1980), Part IX, at paragraph 72(a).

threatened with attack. The reasonableness of the defendant's reaction is rather to be adjudicated upon by the jury, as a means of applying an external control to the conduct of persons who think themselves to be under attack.

The approach of the Criminal Law Bill

37.1 In LCCP 122 we proposed the adoption of the principles set out above, and their extension beyond the central case of self-defence to other cases where, in the present law, a defendant may be excused if he acts to protect valid personal and social interests: in particular, if he acts to protect property, or to prevent crime or in the arrest of offenders.

37.2 In these latter cases, the law is already *broadly* the same as that obtaining in the case of defence of the person. There are, however, some anomalies, and some unjustifiable gaps or uncertainties in the provision that the law currently makes. Clause 28 of the Bill that we submitted for consultation under LCCP 122 aimed to rationalise these problems, in line with the general principles of self-defence set out above. There was no significant dissent on consultation from that approach, which we have therefore felt justified in following through in the Criminal Law Bill. It may however be helpful if we summarise the gaps or illogicalities in the present law that clauses 27–30 of the Criminal Law Bill address.

37.3 The Criminal Damage Act 1971, section 5(2)(b), enables a person to rely on his purpose of protecting property as a “lawful excuse” for the destruction of, or damage to, property belonging to another. The Criminal Law Act 1967, section 3(1), has been interpreted as providing a defence to a charge of reckless driving where a driver forces another car off the road in order to effect a person's arrest, at least where the “force” used is “reasonable in the circumstances”.³⁷⁵ But no provision at present identifies as a “lawful excuse”, for an act directed against *property*, the purpose of defending a *person* against unlawful force or of releasing a person from unlawful detention. Conversely, no provision at present expressly permits, in defence of property against an attack (as opposed to prevention of the crime that that attack may constitute), a use of force other than force directed against other property. The law is thus in need of the rationalisation provided by the Criminal Law Bill, since it ought surely to be made explicit that the purpose of protecting valuable property against vandalism is a defence to a use of modest force against the vandal; as, equally, it ought to be made explicit that force against property may be excusable when used in protection of a person as well as when used in protection of other property.

37.4 The Criminal Law Bill (together with amendments to the Criminal Damage Act) aims to improve further on existing law by providing consistently for the various purposes for which force may be lawfully used. The lawfulness of force used to protect a person against a violent attack ought not to depend upon whether its purpose is described as preventing the aggressor's crime or as the defence of the victim: the same act may have both purposes. But at present the use of force in the prevention of crime, as in effecting an arrest, is governed by section 3 of the Criminal Law Act 1967, and the use of force in self-defence or the defence of another is governed by the common law; and the principles are probably not quite the same.

37.5 A further important anomaly in the present law is that, as stressed in paragraph 36.9 above, the common law only allows such force in defence of the person as is objectively reasonable; whereas section 5(2)(b) of the Criminal Damage Act 1971 permits a person to damage or destroy another's property in order to protect his own property if he *believes* the means of protection that he employs to be reasonable.³⁷⁶ That cannot

³⁷⁵ The principle in *Dadson* (1850) 2 Den 35; 169 ER 407 (see paragraph 39.11 below) probably applies to the common law defence but not to that under the Criminal Law Act.

³⁷⁶ Section 5(2)(b) of the 1971 Act provides that, in respect of most offences under that Act, a person who would otherwise be liable has a “lawful excuse” for the damage that he causes:

“if he destroyed or damaged or threatened to destroy or damage the property in question or, in the case of a charge of an offence under section 3 [of the 1971 Act], intended to use or cause or permit the use of something to destroy or damage it, in order to protect property belonging to himself or another or a right or interest in property which was or which he believed to be vested in himself or another, and at the time of the act or acts alleged to constitute the offence he believed—

(i) that the property, right or interest was in immediate need of protection; and
(ii) that the means of protection adopted or proposed to be adopted were or would be reasonable having regard to all the circumstances”.

be right. It is anomalous that different, and less stringent, standards should apply when a person is defending his property than when he is defending his person, or defending another person; and it is in any event undesirable in any case, for the reasons suggested in paragraph 36.9 above, that the reasonableness of an accused's conduct should be judged by him rather than by objective external standards supervised by the court.

37.6 The Criminal Law Bill does not propose the complete repeal of section 5 of the Criminal Damage Act, and its replacement by the general provisions of the proposed new clauses. We think that it will be easier for those who have to deal with this chapter of the law if section 5, which has stood for twenty years, is retained as a special defence in cases of damage to property, even though it will substantially overlap with the new clause. That however is subject to the important qualification that the defence provided by the Criminal Damage Act should be amended to bring it into line, in respect of the requirement that the defendant's conduct should be objectively reasonable, and not merely reasonable in his own estimation, with the common law of self-defence that is described above. That step, which was proposed in LCCP 122,³⁷⁷ and not dissented from on consultation, is therefore provided for in the Criminal Law Bill.³⁷⁸

37.7 On consultation on LCCP 122 there was no substantial disagreement with the approach contained in that Consultation Paper and outlined above. In particular, no respondent disagreed with the principle established in *Gladstone Williams*³⁷⁹ that the accused should be judged according to the circumstances that he believed to exist. We are therefore able with some confidence to put forward in the Criminal Law Bill a scheme that is in substance the scheme contained in LCCP 122 and, indeed, in the Draft Code.³⁸⁰

37.8 Respondents to consultation did, however, make some valuable comments on the detailed drafting of the Bill annexed to LCCP 122, and our own further consideration has also caused us to review that draft in some respects. That has been done principally in order to clarify the application of the law in cases where people act under a mistake as to the other party's intentions, for instance where D mistakenly thinks that P is about to attack him or steal his property, and takes what would, if he were right, be reasonable pre-emptive action. Such cases may not arise, or be prosecuted, very frequently, but prosecutors and courts require guidance when they do.

37.9 Clauses 27–30 of the Criminal Law Bill set out a statement of the law in a form that is intended to give as complete guidance as is possible to police, prosecutors and the citizen in considering this part of the law, and to the courts in applying it. As argued in the context of a particular recent case in paragraph 2.3 above, these clauses bring what is in effect the present common law immediately and clearly to the attention of all those concerned with cases where self-defence or related matters are in issue. These basic provisions are grouped in clause 27. Provisions addressing special cases, and more detailed and explanatory matter, are placed in clauses 28–30.

37.10 The rest of this part of the Report comments on the provisions of those clauses. It will be convenient in that discussion to refer to the person using the force as "D", and to the person against whom the force is used as "P".

Purposes for which the use of force can be justified

The concept of use of force

38.1 Clauses 27–30 of the Criminal Law Bill set out the circumstances in which the use of "force" against the person or property of another will not constitute a criminal offence. The clauses apply generally, to all offences, though in practice they are most likely to come into play where self-defence is relied on as a defence to charges of assault or of the more serious offences against the person that are contained in clauses 2–4 of the Criminal Law Bill; and in cases of homicide.

³⁷⁷ See LCCP 122, paragraph 20.3, at footnote 286.

³⁷⁸ For the detailed statutory amendment, see paragraph 13(2) of Schedule 3 to the Criminal Law Bill.

³⁷⁹ See paragraphs 36.6–36.8 above.

³⁸⁰ See paragraph 36.1 above.

38.2 The basic meaning of “force”³⁸¹ is not likely to cause difficulty, and the Criminal Law Bill contains no definition of this simple everyday concept. Some particular cases, including threats to use force, and the detention of a person without actually using force, are, however, dealt with in clause 29 of the Criminal Law Bill.³⁸²

Types of conduct that may justify the use of force

38.3 The purposes for which the use of force may be justified, if the force is reasonable in the circumstances that D believes to exist, are listed in clause 27(1). A further purpose, the use of force in effecting or assisting in a lawful arrest, is, for the reasons explained in paragraph 38.31 below, separately set out in clause 28 of the Criminal Law Bill. It is important to note that all these categories are not mutually exclusive: for instance, where D acts to prevent P from assaulting him he will be simultaneously protecting himself from a criminal assault; and protecting himself from a tortious trespass; and seeking to prevent the commission of a crime by P.³⁸³ The question in any case will, therefore, be whether D’s acts fall within any one of the categories listed in clauses 27 and 28.

38.4 In accordance with the basic requirement of the defence of self-defence, that was mentioned in paragraph 36.4 above, the essence of all these cases is that they should have as their motive the *protection* of persons or property, or the *prevention* of crime or breach of the peace.

38.5 We have endeavoured in the Criminal Law Bill to set out the various cases in a way that identifies for users the nature of, and justification for, the particular categories. For that reason, we have abandoned the use of the generalised concept of protection against “unlawful” force or injury, in favour of separately identifying protection against criminal and against tortious acts. We have also, acting on a suggestion made by the Recorder and Circuit Judges of Birmingham, put the central concept of self-defence first in the list: since that is the case with which courts are most likely to be concerned in practice.

38.6 Clause 27(1) of the Criminal Law Bill therefore provides:

“The use of force by a person for any of the following purposes, if only such as is reasonable in the circumstances as he believes them to be, does not constitute an offence—

- (a) to protect himself or another from injury, assault or detention caused by a criminal act;
- (b) to protect himself or (with the authority of that other) another from trespass to the person;
- (c) to protect his property from appropriation, destruction or damage caused by a criminal act or from trespass or infringement;
- (d) to protect property belonging to another from appropriation, destruction or damage caused by a criminal act or (with the authority of the other) from trespass or infringement; or
- (e) to prevent crime or a breach of the peace.”

38.7 We now comment briefly on the cases listed in clause 27(1). In accordance with the current law as explained in paragraphs 36.6–36.8 above, whether a situation falls within one of the categories in which the use of force may be justified is to be determined according to the circumstances as the defendant, D, believed them to be. That rule is stated explicitly in clause 27(5) of the Criminal Law Bill. If D knows or believes that the circumstances are such that P’s acts do not fall into any of the categories of conduct against which force may *prima facie* be legitimately used, then he cannot claim the

³⁸¹ In paragraphs 20.4–20.5 of LCCP 122 we discussed suggestions that the present defences should apply more generally than to the use of force, and should in effect be turned into a defence that justified *any* act, of any type, that was “reasonable in the circumstances”. We considered, for the reasons there set out, that there were substantial objections to taking that course, which would represent a significant departure from the present law that is incorporated in the Criminal Law Bill. No commentators on consultation on LCCP 122 sought to disagree with our judgment on that point.

³⁸² In particular, clause 29(1)(a) in one respect extends the concept of use of force by providing that a person is to be understood to be using force against another not only where he applies force to person or property, but also where he causes an impact on a person or property. This provision is mainly required to reflect the definition of “assault” in clause 6 of the Criminal Law Bill, which distinguishes between applying force to and causing an impact on a person’s body. Justifiable conduct that might otherwise amount to either form of assault must be protected by the present clause.

³⁸³ See further *Smith & Hogan*, p 255.

protection of this defence. But if he, even wrongly, believes that P's conduct is such that it would amount to a crime, or to a trespass against D, then it would seem wrong that he should be burdened with *criminal*³⁸⁴ liability if he reacts reasonably to protect person or property from a feared attack.

38.8 "*Self-defence*". Paragraphs (a) and (b) reproduce the present law of self-defence, that was described in paragraphs 36.4–36.8 above. For reasons that are explained in paragraph 38.19ff below, it is convenient to deal separately with protection against criminal and against tortious interference with the person, though in all but the most unusual cases the two categories will overlap. The Bill's extended definition of "force", as including force in relation to property,³⁸⁵ cures what might otherwise be a lacuna in the present law, where there is no explicit provision justifying acts directed at *property* for the purpose of defending a person from unlawful injury or detention.³⁸⁶

38.9 Paragraphs (a) and (b) apply, as does the present law,³⁸⁷ to the reasonable defence of others, as well as to the defence of the person actually using the force; so for that reason it is not strictly accurate to describe the paragraphs as dealing with *self-defence*. One particular aspect of the use of force by D to protect a third party should however be noted.

38.10 Paragraph (b) addresses acts by P that are trespasses to the person but which are not or may not be a *criminal* act: principally where there is or may be doubt as to whether P's attack takes place with the mental element necessary for criminal liability.³⁸⁸ In respect of the protection of others from trespass, the Criminal Law Bill confirms the proposal of LCCP 122³⁸⁹ that where an act of P directed against a third party is merely trespassory and not criminal, D should only be able to use force to prevent it with the agreement of that third party. This limitation on officious intermeddling in the affairs of others is perhaps of more practical importance in relation to acts done to protect the property of others, which we discuss in paragraph 38.15 below.

38.11 *Protection of property*. Where D is charged with criminal damage and his defence is that he was acting in defence of his own property, for instance where D kills P's dog that he claims was attacking his sheep, his liability will continue to be adjudicated on by the rules laid down under the Criminal Damage Act.³⁹⁰ The provisions of paragraphs (c) and (d) of clause 27(1) of the Criminal Law Bill are however required to confirm, what is not expressly provided in the current law, that the same principles as apply in cases of self-defence extend also to the use of force against a person to protect property.³⁹¹ What would be reasonable in such circumstances would, of course, be adjudicated upon in the light of the force having been used to protect property rather than a person: it being generally more reasonable to use serious force to protect a person than when merely property interests are at stake.

38.12 In respect of the non-criminal acts on the part of P to which the defence *prima facie* applies, we consider that "trespass" as used in paragraphs (c) and (d) will better

³⁸⁴ We emphasise that considerations of D's actual beliefs are paramount only when, as of course throughout these recommendations, questions of his criminal liability are in issue. If D uses force against P in the genuine, but incorrect and *negligently* formed, belief that P is about to attack him, then D may well find that he incurs *civil* liability to P.

³⁸⁵ See the Criminal Law Bill, clause 29(1)(a).

³⁸⁶ See paragraph 37.3 above.

³⁸⁷ *Duffy* [1967] 1 QB 63.

³⁸⁸ "Trespass to the person is a wrong committed against the personal security or personal liberty of one man by another. . . . The act complained of must be either intentional or negligent": *Halsbury's Laws* (Fourth edition), vol 45, paragraph 1308. The law is considered in great detail, and this conclusion reached, by Diplock J in *Fowler v Lanning* [1959] 1 QB 426. In *Letang v Cooper* [1965] 1 QB 232 at p 240B Lord Denning MR, while agreeing with Diplock J's analysis, expressed the view that where an injury is inflicted negligently and not intentionally the *cause of action* in tort is negligence, and not trespass. It is submitted, however, that that view does not alter the long-understood meaning of the *concept* of trespass to the person as stated by *Halsbury*: and see also *Clerk and Lindsell on Torts* (16th edition, 1989), paragraph 17–02.

³⁸⁹ LCCP 122 Bill, clause 28(2)(f).

³⁹⁰ See paragraphs 37.5–37.6 above.

³⁹¹ See paragraph 37.3 above.

focus attention on the type of case in which this defence might properly arise³⁹² than did the more general formula of “unlawful appropriation, destruction or damage” that we proposed in LCCP 122.³⁹³

38.13 Paragraphs (c) and (d) of clause 27(1) of the Criminal Law Bill do, however, refer, as did the LCCP 122 Bill, to “infringement” of property. That, together with the definition of “property” in clause 30(1) of the Criminal Law Bill as including any right, interest or privilege over property, keeps this defence in line with the Criminal Damage Act, where the defence provided by section 5(2)(b) extends to the protection of an interest in property including, by section 5(4), any right or privilege in or over land. Under the Criminal Law Bill, therefore, reasonable force may be permissibly used to prevent unlawful interference with the exercise of such a right (for instance, an easement or a right to fish) rather than merely to protect the property itself.

38.14 The interest or right protected must, however, be in or over *tangible* property. We had originally, in LCCP 122, thought that the defence of reasonable use of force could appropriately, if in practice not very frequently, be applied in relation also to interferences with intangible property. However, it has been brought to our attention that the Copyright, Design and Patents Act 1988, while providing for certain acts of self-help on the part of a copyright owner, places strict limits on such acts.³⁹⁴ The decision to place limitations on the protection of intangible property even in the case of perhaps the paradigmatic example of such property, copyright, is, we think, an indication that Parliament sees legal action rather than the direct protection of rights as the appropriate course in such cases. We do not think it appropriate that we should potentially undermine that policy by extending the present defence to cases of protection of intangible property.³⁹⁵

38.15 Clause 27(1)(d) of the Criminal Law Bill envisages the use of force by D to protect the property of a third party. Where that protection is against trespass or infringement of a non-criminal nature, D does not have the benefit of this defence unless he acts with the authority of the third party. That distinction seems to us to be a sensible one. Where D is intervening to prevent a criminal act, he should not have to seek the permission of another party; and in any event will have the protection of the defence of prevention of crime under clause 27(1)(e) of the Criminal Law Bill. Where, however, P’s interference is objectionable only because it is tortious against a third party, and not against D, D should not be encouraged to intervene in that dispute unless he does so on behalf of the third party. At the same time, however, in cases of emergency, where D judges that he has to act without the authority of the third party, and without the opportunity to warn or question P about his activities, then D will be able to rely on the defence of necessity. Cases of such a sort, where P’s activities do not constitute or threaten the commission of a crime, are likely to be rare. We think it right that before D intervenes in such non-criminal activity directed at a third party the element of urgent need that characterises the defence of necessity should be present.

³⁹² As to land, “Every unlawful entry by one person on land in the possession of another is a trespass” (*Halsbury’s Laws* (Fourth edition), vol 45, paragraph 1384); as to goods, “Trespass to goods is an unlawful disturbance of the possession of goods by seizure or removal, or by a direct act causing damage to the goods” (*ibid*, paragraph 1491; and see also *Clerk and Lindsell on Torts* (Fourteenth edition, 1989), paragraph 22–121). We appreciate that there may be room for dispute as to whether, in some perhaps unusual cases, physical contact with another’s property, without any intention to infringe the owner or possessor’s rights, is in itself enough to constitute trespass: see the learned discussion in *Halsbury, loc. cit.*, paragraph 1491, fn 4. It should be remembered, however, that whether P’s acts fall into one of the categories in respect of which the present defence is *prima facie* available is determined according to the facts as D believes them to be: Criminal Law Bill, clause 27(5); and paragraph 38.7 above. It is unlikely that the use of force by D to prevent or terminate contact with D’s property by P that D knows or believes to be non-intentional will in any event meet the other requirement of the defence, that the force used should be reasonable in those circumstances. Thus, if P strays on the D’s land, or handles D’s goods, in circumstances that indicate that he is unaware of or not seeking to challenge D’s rights, D’s reasonable and proper course will almost certainly be to inform P of those rights, and of his objections to P’s conduct, rather than immediately to use force against P. If, even in a case of the type suggested, the use of force is immediately necessary, D will be able to seek protection from criminal liability by appealing to the separate defence of necessity: see paragraph 40.1ff below.

³⁹³ LCCP 122 Bill, clause 28(2)(e).

³⁹⁴ Copyright, Design and Patents Act 1988, section 100; in particular, by section 100(3), preventing the use of force when seizing infringing copies. In addition, recourse to self-help, rather than to legal process, is only envisaged as permissible where the infringement is such as to entitle the owner to delivery up under section 99 of the Act.

³⁹⁵ A copyright owner who acted in accordance with the requirements of the 1988 Act would, in respect of any proposed criminal proceedings, be able to rely on the common law defences of lawful authority or justification, which are unaffected by the provisions of Part II of the Criminal Law Bill: see paragraphs 27.1–27.3 above.

38.16 *Prevention of crime.* Clause 27(1)(e) of the Criminal Law Bill, in respect of the prevention of crime, covers the same ground as section 3 of the Criminal Law Act 1967.³⁹⁶ It will replace that section in relation to criminal liability for the use of force for that purpose. Section 3 will continue in operation in respect of *civil* liability for the use of force.³⁹⁷

38.17 This category of excuse will often overlap with those already discussed; since, as pointed out above, one who protects himself, or his or another's property, from criminal interference will almost necessarily also be preventing or terminating the commission of a crime. However, conversely, clause 27(1)(e) is not otiose, since D may act to prevent crime in circumstances where he is not protecting the person or property of himself or another: for instance, where D restrains P, who is clearly dangerously intoxicated, from driving P's motor vehicle.

38.18 *Breach of the peace.* Specific reference to prevention or termination of a breach of the peace is required because breach of the peace is a wider concept than "crime",³⁹⁸ and prevention of such a breach of the peace is, particularly in public order situations, a common occasion for the legitimate use of force. Paragraph (e) makes it clear that it is not an offence to use reasonable force either to prevent a person's being put in fear of the kind that constitutes a breach of the peace, or to remove the cause of such fear where it already exists.

Defence against non-culpable acts: particular cases

38.19 There will occasionally arise cases where a person should have a defence of reasonable protection against the acts of another, although those acts are not in fact "criminal" because of some particular circumstance, or some characteristic of his, that exculpates him from criminal liability. That lack of criminal liability on the part of the actor does not, however, reduce the threat that his acts pose to others. For instance a person may be attacked with a dagger by a nine-year-old child, or by a person suffering from severe mental illness; or P may be forced by threats made by X that afford him a defence of duress to make a murderous attack on D.

38.20 Often such acts will or may be tortious, even if not criminal, and therefore fall under clause 27(1)(b) of the Criminal Law Bill. However, there may be difficulties of fact in establishing the state of mind necessary for tortious liability in the case of infants or persons with mental disability,³⁹⁹ and the effect on tortious liability of duress operating on the defendant is far from clear. It is not acceptable that the determination of the criminal liability of persons who protect themselves from such attacks should, even in the rare cases where that question may arise, depend on complicated enquiries into the law of tort, and the possible failure of the defence of reasonable use of force because, for reasons that are perfectly valid within the law of tort, the attacker is not subject to civil liability.

38.21 To avoid these difficulties, the Criminal Law Bill provides that the defence will be available in a number of cases where the *fact* of what would otherwise be a criminal act occurs, but for particular reasons the actor would not be subject to criminal liability. Thus, by clause 27(3):

"For the purposes of this section an act involves a 'crime' or is 'criminal' although the person committing it, if charged with an offence in respect of it, would be acquitted on the ground that—

- (a) he was under ten years of age, or
- (b) he acted under duress, whether by threats or of circumstances, or
- (c) his act was involuntary, or
- (d) he was in a state of intoxication, or
- (e) he was insane, so as not to be responsible, according to law, for the act."

³⁹⁶ Section 3 of the 1967 Act also applies to the effecting or assisting in the lawful arrest of offenders, which is separately treated in clause 28 of the Criminal Law Bill.

³⁹⁷ For the operative provision, see paragraph 9 of Schedule 3 to the Criminal Law Bill.

³⁹⁸ "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, unlawful assembly or other disturbance": *Howell* [1982] QB 416, per Watkins LJ at p 427E.

³⁹⁹ For a brief summary see *Halsbury's Laws* (Fourth edition), vol 45, paras 1225–1226.

38.22 Paragraph (c) is required to cover those cases where P, if charged, would be acquitted on grounds of “automatism”⁴⁰⁰ or involuntary act. For instance, in the perhaps not very likely case of P attacking D while in a hypoglycaemic episode, or suffering from concussion, D should not incur criminal liability if he takes reasonable steps to defend himself. The reference to possible exculpation of P from criminal liability because of his intoxication is necessary principally to account for the special case, identified by the Court of Appeal in *Kingston*,⁴⁰¹ where although P has the intent to commit the forbidden act, his conduct is not criminal because his ability to resist the desire to do that act was reduced or excluded by involuntary intoxication.⁴⁰²

38.23 It should be emphasised that, in practice, it is not often likely to be necessary for D to have recourse to the special provisions of clause 27(3) in order to establish that the case falls within one of the categories listed in clause 27(1). That is because, as we explained in paragraph 38.7 above, those categories are assessed on the facts as D believes them to be. In most cases where D is attacked by a person who is under age, insane, acting in a state of automatism, or in the very limited circumstances where intoxication makes his act non-criminal, D will not have directed his mind to those special facts. He will know no more than the facts that, if they stood alone, would make the attack on him criminal in nature. Those facts justify him in morality and common sense and, by the operation of clause 27(1) of the Criminal Law Bill, in terms of criminal liability, in defending himself against an apparently criminal act. But D may in some cases know or believe the further facts that do or may render P’s conduct non-criminal: perhaps the clearest example is likely to be where D knows that P is under ten years of age. It is only in such cases that clause 27(3) is necessary, to ensure that D can defend himself against acts that are “criminal” in all respects except that, for a particular reason⁴⁰³ that happens to be known to D, P would not be convicted if charged in respect of them.

Defence against non-culpable acts: mistaken belief or suspicion

38.24 The cases dealt with above involve specific circumstances that exempt P from criminal liability for what may, nonetheless, be an attack against which D is entitled to defend himself or another. A problem of a more general nature arises where P would, if prosecuted, escape liability because he believed in circumstances that gave him a defence: often, the defence of reasonable use of force. We may give some examples of cases that could arise, in all of which D might legitimately wish or see the need to use force against P.

- (i) P, a store-detective, wrongly thinks that D has not paid for goods that D is in the course of removing from the store. He attempts to arrest D. P has reasonable grounds for suspecting D to be committing theft, and therefore his arrest is lawful.⁴⁰⁴ D uses force to resist the arrest.
- (ii) P comes upon a fight in the street between D and X. D is in fact lawfully attempting to make a “citizen’s arrest”. P, not realising that, and thinking that D is gratuitously attacking X, intervenes to restrain D. D in turn uses force to resist P.⁴⁰⁵

⁴⁰⁰ Automatism is “a modern catchphrase which the courts have not accepted as connoting any wider or looser concept than involuntary movement of the body or limbs of a person”: *Watmore v Jenkins* [1962] 2 QB 572 at p 586, per Winn J.

⁴⁰¹ (1993) *The Times*, 10 May.

⁴⁰² In most cases where P causes the result forbidden by the definition of a particular crime while in a state of intoxication his conduct will nonetheless be criminal: for a full survey see Law Commission Consultation Paper No 127, *Intoxication and Criminal Liability* (1993), pp 10–24. To summarise, a person who forms the required mental element of an offence is guilty of that offence notwithstanding his intoxicated state: “A drunken intent is nevertheless an intent” (*Sheehan* [1975] 1 WLR 739 at p 744C). Moreover, where the offence is one that is capable of reckless commission, D’s intoxicated state cannot be taken into account in determining whether he formed the mental element of that offence. Accordingly, where (unusually) D has been prevented by his intoxication from forming the intention that is required to be proved before he can be convicted of a particular offence (for instance, intentionally causing serious injury under clause 2 of the Criminal Law Bill), he will almost always be guilty of a related offence of recklessness (for instance, under clause 3 of the Criminal Law Bill).

⁴⁰³ That aspect of clause 27(3) is emphasised by its providing that an act is deemed to be “criminal” although P would be acquitted on one of the listed grounds. If he would be acquitted also on some other ground the case simply does not arise.

⁴⁰⁴ Police and Criminal Evidence Act 1984, section 24(4)(b).

⁴⁰⁵ This example is adapted from the facts of *Gladstone Williams* (1984) 78 Cr App R 276, as to which see paragraph 36.6 above. P (the defendant in that case) would not be acting criminally if he used only reasonable force to prevent what he believed to be a crime on the part of D. The example however raises the further question of D’s liability if he reacts to the attack on him by P.

- (iii) P, a plain clothes police officer, is ordered to arrest X, a dangerous criminal. He mistakenly thinks that D is in fact X, and attempts to arrest him, using force that would be reasonable if he were arresting X. D resists, using force.
- (iv) P knows that D is a supplier of controlled drugs. He wrongly thinks that D has a load of such drugs in his car, and is about to drive the car to hand the drugs over to a customer. P is in the process of disabling D's car, to prevent the supply of the drugs, when D comes on the scene, and uses force to prevent P from completing his work on the car.
- (v) P is employed by X to demolish the garden shed at X's country cottage. P by mistake goes to the wrong house, X not being present, and starts to demolish the shed of D, X's next door neighbour. D intervenes to restrain P.
- (vi) P takes the wrong overcoat from the cloakroom at a hotel. D, the cloakroom attendant, thinking that P is stealing the coat, attempts to take the coat from him by force.

38.25 As in the cases discussed in paragraph 38.23 above, it will normally not be necessary to have recourse to a special rule in order to deal justly with D's case. In most cases of the type exemplified above, D will not know the special facts that render P's acts non-criminal. For example, in case (ii) D is most likely to think, in the confusion of the mêlée in the street, that P is intervening unlawfully to assist X; or in case (iii) that P, who he does not know to be a police officer, is a thug making a criminal attack upon him. In these circumstances D will, under the general rule laid down by clause 27(1) of the Criminal Law Bill, be judged according to the reasonableness of his reaction in those believed circumstances.

38.26 What, however, if D knows of P's mistake? Then, in the circumstances as D believes them to be, P's actions are lawful. Nevertheless, it can hardly be right that the present defence should be withheld from D if he acts reasonably to protect himself or his property. In all the cases stated P's act is lawful only because of a mistake or suspicion on the part of P that is in fact incorrect. D is nonetheless put in a position of potential peril, that is not in any way lessened by P's error, and the fact D knows of the error should not shut him out from the defence.

38.27 This case is dealt with by clause 27(6) of the Criminal Law Bill, that provides that where an act potentially falling into one of the categories set out in clause 27(1) is lawful (according, as provided by clause 27(5), to the circumstances as D believes them to be) by reason only of a mistaken belief or suspicion⁴⁰⁶ on the part of the actor, then the defence of reasonable use of force will continue to be available in respect of steps taken in response to that act.⁴⁰⁷

38.28 It should again be emphasised, however, that in none of these cases is D given *carte blanche* to use whatever force he pleases, just because the situation that he is facing comes potentially within the reach of the present defence. He must act reasonably *in the circumstances as he believes them to be*. If he knows that P is only acting as he does because of a mistake on P's part, it may often be reasonable initially not to use force at all to rectify the situation, but rather to explain to P the nature of his mistake. That would very likely be the case where P's error has caused him to interfere only with property, as in paragraph 38.24(vi) above. Where, however, P's mistake leads him to use force against D, there may not be time for, and it would not be reasonable to expect D to delay so that he can make, explanations. D should not in such circumstances find himself suffering criminal liability if all that he does is to act reasonably to secure his immediate protection.

38.29 The approach that we now recommend to these difficulties, as explained in paragraphs 38.22–38.28 above, relies on a narrower and more specific statutory formula than did the Bill presented for consultation under LCCP 122, which envisaged the acts of P being deemed to be “unlawful” for the purpose of this defence if P “lacked the fault required for the offence or believed that an exempting circumstance

⁴⁰⁶ The reference to suspicion takes account of those cases, such as that referred to in footnote 404 above, where an act otherwise criminal is rendered lawful by the presence on the part of the actor of reasonable, even if mistaken, suspicion.

⁴⁰⁷ There is one limited public policy exception to that rule, in the case of force used against a constable in the execution of his duty. That exception is explained in paragraphs 39.1ff below.

existed".⁴⁰⁸ That formula would undoubtedly cover all the cases discussed above, but it would go much wider than them: because very many perfectly innocuous acts are criminal but for the fact that the actor lacks the fault required for criminal liability. Let us cite a simple case. D may hire his motor-car to P. P in driving another person's car away would be committing a crime⁴⁰⁹ were it not for the fact that by reason of D's permission he lacks the fault (dishonesty; and an intention permanently to deprive the owner) that is required for him to be guilty of theft. To include a case where D, wanting to break his contract, uses force to reverse his previous decision to lend the car to P within even the potential ambit of the present defence would be to deprive those having to make decisions about the application of the law of much of the guidance that it is the aim of the Criminal Law Bill to provide.⁴¹⁰ It is true that in practice D would be unlikely to benefit from the defence, because where D knows that P's acts are innocent it can hardly ever be reasonable for him to use *any* force to interfere with those acts. We think, however, that the Criminal Law Bill should do as much as it can to state expressly the cases where the availability of the defence can even potentially arise, and not put all the burden on the ultimate test of whether D's action was reasonable.

Use of force in effecting or assisting in a lawful arrest

38.30 Section 3 of the Criminal Law Act 1967, referred to in paragraph 38.16 above, permits the use of reasonable force in effecting lawful arrest, as well as in the prevention of crime. That objective is, and has long been regarded as being, as much a proper occasion for the use of reasonable force as are the cases listed in clause 27(1) of the Criminal Law Bill that are discussed above.

38.31 It is, however, convenient to deal separately with this case, as is done in clause 28 of the Criminal Law Bill, because where D uses force to make a lawful arrest, the simple and single test of whether his conduct potentially falls within the present defence should be whether the arrest would have been lawful in the circumstances as he believed them to be. The somewhat elaborate provisions that are required in other cases, to elucidate those cases where D is reasonably protecting himself against acts that in fact are or may not be objectively criminal,⁴¹¹ do not arise in this case.

38.32 It will therefore make for clarity if the simple rule in the arrest case is stated separately. This will be of particular importance in cases involving police officers. Clause 28 emphasises that the general rule that the criminality of a defendant's conduct is to be judged according to the circumstances as he believed them to be extends to protecting from criminal punishment conduct that is reasonable in effecting an arrest where the officer, or citizen, believes, even if mistakenly, that circumstances exist that would make the arrest lawful.

38.33 It may also be worth repeating that the only effect of this clause is to assist in determining whether the arrestee commits a criminal offence by his use of force. Other provisions⁴¹² deal with, for instance, civil liability for that use of force.

38.34 Clause 28 of the Criminal Law Bill accordingly provides:

- (1) The use of force by a person in effecting or assisting in a lawful arrest, if only such as is reasonable in the circumstances as he believes them to be, does not constitute an offence.
- (2) The expression "use of force" in subsection (1) is defined and extended by section 29.
- (3) For the purposes of this section the question whether the arrest is lawful shall be determined according to the circumstances as the person using the force believed them to be.

⁴⁰⁸ LCCP 122 Bill, clause 28(4)(b). The same formula is used in clause 44(3)(b) of the Draft Code.

⁴⁰⁹ Because "appropriation", the prohibited act in theft, can be committed by any exercise of the rights of an owner over goods, even with the permission of the actual owner: *Gomez* [1993] AC 442.

⁴¹⁰ It should be noted that, because P has permission to remove the car, his act would not be a trespass, and therefore not fall under clause 27(1)(c) of the Criminal Law Bill.

⁴¹¹ See paragraphs 38.19ff above.

⁴¹² Including section 3 of the Criminal Law Act 1967, which continues in force in respect of civil liability: see paragraph 38.16 above.

Other features of this defence

Force against a constable in the execution of his duty

39.1 Clause 27(6) provides that, where P's acts are lawful only because of a mistaken belief or suspicion, the present defence is not available to D when he uses force against P if

- (a) he knows or believes 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.

39.2 This is a special public policy exception to the general rule, described in paragraphs 38.26–38.27 above, that, where D knows of P's mistake, D may still take reasonable steps to resist P's attack on him. The exception applies where P, although mistaken, is a police constable acting in the execution of his duty. It can be illustrated from the most usual type of case in which the exception might arise.

39.3 Various provisions, notably in the Police and Criminal Evidence Act 1984,⁴¹³ permit citizens, and in a wider range of circumstances constables, to make arrests on grounds of suspicion of commission of an offence, provided that the arrester has reasonable grounds for that suspicion. If such an arrest is attempted on D, who in fact knows that the suspicion is incorrect, he will, save where the special exception in respect of constables applies, have the defence provided by clause 27(5) and the first part of clause 27(6) of the Criminal Law Bill if he merely uses defensive force that is reasonable in the circumstances. Here again, as we suggested in paragraph 38.28 above, in many cases the reasonable reaction may be the giving of an explanation rather than the use of force: but if force is reasonably used to resist, D should not be criminally liable for so acting.

39.4 There are, however, special considerations where the arrester is a constable. If a constable making the arrest has reasonable grounds for his suspicion, even if that suspicion is mistaken, he is acting in accordance with his duty, and not unlawfully: see the provisions of the Police and Criminal Evidence Act 1984 referred to in paragraph 39.3 above. If D knows that the arrester is a constable, and for the reasons mentioned above the constable is in fact acting in the execution of his duty, the arrest may not be resisted⁴¹⁴ even though the constable's suspicion is known by the person arrested to be mistaken. This special exception, in the case of force used against a person known to be a constable, who is in fact acting in the execution of his duty, accords with existing authority.⁴¹⁵ It is usually thought to be justified or required by the need to encourage obedience to constables who are in fact (as the statement of the exception requires) acting in the execution of their duty. There was no substantial disagreement on consultation that that exception should be maintained.

39.5 Clause 27(6) further provides, however, that this principle does not hold where the person using force "believes the force to be immediately necessary to prevent injury to himself or another". For example, a constable, mistaking an innocent person for a dangerous armed criminal, may be about to use disabling or even lethal force to neutralise the imminent threat to himself or others that he believes the "criminal" to represent. In these circumstances the innocent person may use reasonable force to save himself from injury if he believes that it is immediately necessary to do so.⁴¹⁶ This rule probably coincides with existing law;⁴¹⁷ and, again, it was not the subject of substantial challenge on consultation.

Must the use of force be, or be thought to be, immediately necessary?

39.6 In LCCP 122 we discussed at some length⁴¹⁸ whether there should be a requirement that the defence is only available where the defendant fears or is subject to an immediate attack upon him. Such a requirement is in any event only appropriate for the particular

⁴¹³ See section 24(4)(b), (5)(b), (6) and (7)(b).

⁴¹⁴ Clause 27(6), in its latter parts.

⁴¹⁵ See *Fennell* [1971] 1 QB 428.

⁴¹⁶ Equally, a person may act to prevent such harm to another person so threatened.

⁴¹⁷ See *Fennell* above.

⁴¹⁸ See LCCP 122, paragraphs 20.10–20.12.

case of self-defence; and even there it adds an unnecessary element of complication and formality, since in every case where there has been an element of “pre-emptive” action by the defendant the court and jury will have to decide whether that action was reasonable in the circumstances.

39.7 We therefore provisionally proposed that no such express requirement should be contained in the Criminal Law Bill. Of those who addressed this matter on consultation the majority, including the General Council of the Bar and the Society of Public Teachers of Law, agreed with our provisional conclusion. We have therefore adopted that approach in the Bill, which includes no additional rule that the use of force by the defendant must, as a separate requirement, be shown to have been immediately necessary.

Preparatory acts

39.8 Clause 29(2) ensures that criminal liability (most obviously, under legislation prohibiting the possession of firearms and offensive weapons) will not attach to an act immediately preparatory to a use of force permitted by the clause.⁴¹⁹

“Self-induced” occasions for the use of force

39.9 The effect of the first part of clause 27(7) is that clause 27 provides no defence to a person who deliberately provokes the very attack against which he then defends himself. On the other hand, the second part of the subsection preserves 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.⁴²⁰ If he does so and is attacked, he may defend himself.⁴²¹

Opportunity to retreat

39.10 Clause 29(4) restates the law on the significance of a defendant’s having had an opportunity to retreat before using force. Although the fact that he had such opportunity is relevant to the court’s or jury’s consideration of whether his use of force was reasonable, it is not conclusive of the question and is simply to be taken into account together with other relevant evidence.⁴²²

Circumstances unknown to and unsuspected by the actor

39.11 It follows from the requirement that the defendant be judged according to the circumstances as he believes them to be that he cannot rely on circumstances unknown to him that would in fact have justified acts on his part that were unreasonable on the facts as he perceived them.⁴²³ Although opinion was not unanimous on consultation, we think it right to maintain this long-standing common law rule. Citizens who react unreasonably to circumstances should not be exculpated by the accident of facts of which they were unaware.⁴²⁴

Relation to other defences

Necessity and duress of circumstances

40.1 Cases may arise where it is felt unreasonable for a person to be put in peril of a criminal charge by doing acts to protect the person or property of himself or others, but where the circumstances do not fall even under the comparatively broadly expressed terms of the present defence. The present defence largely follows the present law by envisaging the use of force to avoid the consequences of a direct attack by another upon person or property. Cases will arise, however, where D needs to, and should properly, react to other types of danger. For instance, D may beat off, and thereby injure, a dog that is attacking him, or is attacking his or another’s small child; or he may pull down another person’s wall or fence in order to provide a fire-break against a fire that is threatening a residential area. Alternatively, the danger may accrue from another human

⁴¹⁹ See more fully, Law Com No 143, paragraph 13.44.

⁴²⁰ See *Beatty v Gillbanks* (1882) 9 QBD 308.

⁴²¹ *Field* [1972] Crim LR 435.

⁴²² *Bird* [1985] 1 WLR 816.

⁴²³ This is the “*Dadson*” principle: *Dadson* (1850) 2 Den 35, 169 ER 407.

⁴²⁴ For further discussion, see LCCP 122 at paragraph 20.9 and in particular footnote 295.

being, but not take the form of any sort of direct or deliberate interference with D: for instance, P's entirely lawful driving of his motor-car may threaten a child that has carelessly run into the road.

40.2 Other instances of legitimate action by D which however fall outside the limits of the defence of justified use of force as defined in the Criminal Law Bill can easily be imagined. We have already mentioned, in paragraph 38.15 above, intervention in an emergency to protect another person's property, from non-criminal interference, but without the authority of that person. More generally, D may in some circumstances legitimately act to save P from himself, for instance if D restrains a small child to prevent him from wandering over a cliff or going too close to a fire. Few if any such cases would be seriously considered for prosecution. But if they were, in such cases, and in the examples suggested in paragraph 40.1 above, there remains available, as a safeguard, either the defence of duress of circumstances, under clause 26(1) of the Criminal Law Bill; or the developing defence of necessity, discussed in paragraphs 35.5–35.6 above. As we have already emphasised, the Criminal Law Bill's rationalisation of the defence of Justifiable Use of Force does not in any way affect the common law on those defences, just as they already cohabit with the existing common law defence of self-defence on which the defence of Justifiable Use of Force is based.

40.3 It would not be possible to adapt the defence of justified use of force to cover all such possible cases without producing a defence expressed in unduly wide terms, which would be in danger of taking the concept and defence of necessity further than the courts have yet seen fit to do. Extension of the defence of necessity is only appropriate on a case by case basis,⁴²⁵ in the context of such cases as are actually sought to be made the subject of criminal liability. The defence in the Criminal Law Bill, rather, provides for the application of clear and consistent principles in cases of the type that experience suggests are in practice most likely to be addressed by the criminal law, and in which guidance is required as to the appropriateness of the application of criminal sanctions.

Excessive self-defence

40.4 We refer to this matter here only to avoid possible misunderstanding. In accordance with our normal policy in drawing up the Draft Code,⁴²⁶ we included in it the recommendation of the CLRC⁴²⁷ that where a person charged with murder *prima facie* would be able to rely on the defence of self-defence, but falls outside the ambit of that defence because he uses unreasonable force to defend himself, then, instead of losing the defence entirely, he should be convicted of manslaughter and not of murder.⁴²⁸ That is a special issue arising in the law of homicide, which is not covered in this Report, and on which we do not comment: the recommendation of the CLRC would clearly need thorough consideration in the context of a review of the law of homicide before it could be adopted. The issue has no effect at all on the general defence of reasonable use of force that we propose in this Report.

SUPERVENING FAULT

41.1 Clause 24 of the Bill accompanying LCCP 122 provided a statutory formulation of the common law principle of supervening fault. We said in LCCP 122 that we were persuaded that if this principle were to be stated for offences against the person, it must be stated for general purposes. We invited comment on the inclusion of the clause, and on its detailed formulation. On consultation, there was almost no opposition to the codification of the principle.

41.2 On further consideration in the light of the consultation, we have made some minor changes to the drafting that do not change the sense of the provision, but we hope do improve its clarity and intelligibility. One small substantive change is explained in paragraph 41.9 below. Otherwise, the following explanation of the provision which now appears as clause 31 of the final draft Bill is substantially the same as that which we gave in LCCP 122.

⁴²⁵ See paragraph 27.5 above.

⁴²⁶ Code Report, paragraph 3.34.

⁴²⁷ Fourteenth Report, recommendation 73.

⁴²⁸ Draft Code, clause 59; Code Report, paragraph 14.19.

The general principle

41.3 Clause 31 of the draft final Bill states a principle applying to all so-called “result crimes”. The standard case of any such offence, as its definition will invariably suggest, is the doing of a positive act that causes a specified result; for instance, “destroys or damages any property belonging to another” (Criminal Damage Act 1971, s.1(1)); “causes injury to another” (clauses 2–4 of this Bill); the actor being at the time of his act at fault in a particular way in respect of that result (“ . . . intentionally”; “ . . . recklessly”). Clause 31 provides that such a definition also covers a case where, without the required fault, a person does an act giving rise to a risk that the specified result will occur and then later becomes aware of what he has done. He is now under a duty to “take measures that lie within his power to counteract the danger that he has himself created.”⁴²⁹ If he fails to take such measures, having now the kind of fault in respect of the result that is required for the offence, and the result that he might have prevented occurs, he is guilty of the offence. In the leading case of *Miller*⁴³⁰ the defendant went to sleep on a mattress while smoking a cigarette. He woke to find the mattress on fire. He merely removed himself to another room and the fire spread to the house. He was held to have been rightly convicted of arson on the strength of his failure to take any step to limit the consequences of his original act.

Clause 31 of the Criminal Law Bill

41.4 The exact wording of the opinion of Lord Diplock in *Miller* (effectively that of the House of Lords) was heavily affected by the fact that the “supervening fault” there discussed was “recklessness” in the sense attributed to that term in *Caldwell*,⁴³¹ in the context of the Criminal Damage Act. However, clause 31 is couched in terms that are appropriate to the whole possible range of offences, fault elements and factual situations, the generality of the clause being achieved by its emphasis on the defendant’s having “the fault required” for the offence in question at the time of his failure to act:

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

- (a) being aware that he has done the act and that the result may occur or, as the case may be, has occurred and may continue, and
- (b) with the fault required,

he fails to take reasonable steps to prevent the result occurring or continuing and it does occur or continue.”

Some details

41.5 We draw attention to some particular aspects of this formulation.

41.6 The principle is not limited to a case in which the original act was blameworthy. In *Miller* the defendant’s falling asleep with a lighted cigarette was no doubt at least careless; but 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”. In the terms of clause 31, he lacked “the fault required [for the offence].” The question was answered by the House without comment on this aspect.

41.7 The original act may cause relevant harm even before the actor becomes aware of the situation. In *Miller* the mattress had already caught fire. In another well-known case the result required for an assault occurred at the outset when the defendant’s car came to rest on a policeman’s foot.⁴³² In such cases what the actor should take steps to prevent is further harm—described in the clause as the “continuing” of the specified result. In another kind of case no harm may yet have resulted from the original act, but steps should be taken to prevent harm “occurring”.

⁴²⁹ *Miller* [1983] 2 AC 161 at p 175G, per Lord Diplock.

⁴³⁰ [1983] 2 AC 161.

⁴³¹ [1982] AC 341.

⁴³² *Fagan v Metropolitan Police Commissioner* [1969] 1 QB 439.

41.8 For the principle to apply, the actor must be aware at the time of his omission of what he has done and of the risk of harm or further harm thereby created (paragraph (a)); and his omission to take steps to prevent or limit the harm must be made “with the fault required” (paragraph (b)). For example, if the offence requires intention to cause harm of the kind in question, the actor must at this stage intend such harm to occur.

41.9 We said in paragraph 41.2 above that there was one small respect in which we had changed the substance of the provision. On consultation it was pointed out to us that the principle applies to cases in which the defendant knows all along that he has done the act, though not that the result had occurred. For example, it would appear that the defendant in *Green v Cross*,⁴³³ who deliberately, but innocently, set a spring-trap which caught a dog, came under a duty to release the dog when he discovered that it had been caught. To preserve this aspect of the current law, the phrase “being aware” in paragraph (a) of clause 31 of the final draft Bill replaces “he has become aware” in the clause as it originally appeared.

TRANSFERRED FAULT

42.1 Clause 25 of the Bill accompanying LCCP 122 restated, in the most general terms and not only in relation to offences against the person, the common law doctrine known as “transferred intent” (subsection (1)), and provided a corresponding rule for “transferred” defences. We received very little comment on the clause, and are satisfied, in particular, that the formulation of subsection (1) accurately represents the current law. Both subsections appear unchanged in clause 32 of the final draft Bill. Accordingly, the following explanation of the clause repeats in substance that which we gave in LCCP 122.

42.2 Clause 32(1) provides:

“In determining whether a person is guilty of an offence, his intention to cause, or his awareness of a risk that he will cause, 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, an awareness of a risk that he will cause, that result in relation to any other person or thing affected by his conduct.”

Where a person intends to affect one person or thing (X) and actually affects another (Y), he may be charged with an attempt in relation to X; or it may be possible to satisfy a court or jury 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 adequately describing the harm done 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 the subsection overcomes these difficulties.

Transfer of fault required for “the offence”

42.3 The clause assumes that the specified result, such as serious injury, or damage to property belonging to another, is an element of a specific offence. If the actor does not cause such a result, the external elements of the offence with which he is charged are not made out. Accordingly, no question of criminal liability arises. It is only when the external elements of the offence charged have been caused by the defendant that the second question arises, of whether he acted with the fault required for that offence. This clause provides that if he acted with that fault, it can be transferred. What is required is a concurrence of fault in relation to *the result specified for the offence* and the occurrence of such a result, although not in relation to the same person or thing.

Recklessness

42.4 The equivalent clause in the Draft Code⁴³⁴ referred in terms to “recklessness” and not, like the draft in LCCP 122 or clause 32 of the Criminal Law Bill, to “awareness of a risk”. “Recklessness” will have a prescribed meaning under the Bill for the purposes of offences against the person, but will continue to have its other meaning or meanings

⁴³³ (1910) 103 LT 279.

⁴³⁴ Draft Code clause 24(1).

in other contexts.⁴³⁵ It is therefore necessary to avoid the term in a provision of general application. The only state of mind, other than intention, with which the subsection needs to deal is awareness of a risk. It is this aspect of recklessness that may call for “transfer”. The provision is not needed in relation to the limb of *Caldwell* recklessness⁴³⁶ concerned with failure to advert to an obvious risk. In order to apply that limb to (for example) the causing of damage to the property actually affected, it is sufficient to ask: was there an obvious risk that that property (or such property) would be damaged and did the defendant fail to advert to that risk? It is irrelevant that there was a risk to other property of which the defendant should have been, but was not, aware.

42.5 Awareness of a relevant risk does not alone establish recklessness. It is necessary also that the risk be one that it was unreasonable to take in the circumstances known to the actor. If a defendant unreasonably took a known risk in relation to X, the risk-taking in relation to Y that the subsection treats as having occurred must similarly be unreasonable before recklessness is established in relation to Y. Conversely if, in the circumstances known to the defendant, it was reasonable to take the risk in relation to X that he knowingly took, the taking of the risk in relation to Y that he is treated as having knowingly taken can hardly be regarded as reckless.

Transferred defences

42.6 Clause 32(2) 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. The provision will be useful for the avoidance of doubt.

THE EFFECT OF INTOXICATION

Introduction

43.1 As we explained in LCCP 122,⁴³⁷ it is necessary to make reference in the Criminal Law Bill to how certain of the Bill’s provisions are affected by the existing common law rules on the effect of intoxication on criminal liability. That is because under the present law two of the matters dealt with in the Bill apply differently in the case of intoxicated defendants from the way in which they apply when the defendant is not intoxicated. If the Criminal Law Bill were simply silent on the question of intoxication, it might be thought that the Bill had abolished the application of the present common law rules on the effect of intoxication on criminal liability in relation to these particular matters with which the Bill deals.

43.2 The two issues dealt with by the Criminal Law Bill that are affected by the issue of intoxication are as follows. First, under the present common law, offences that are expressed in terms of subjective recklessness or awareness of risk are subject to special rules when the person charged with the offence acted in a condition of voluntary intoxication. These rules are known, from the leading case on the subject,⁴³⁸ as the “*Majewski*” rules. Second, under the present law general defences that are based on a belief entertained by the accused are subject to particular rules when the accused is in a state of voluntary intoxication. It is not the intention, or the effect, of the Criminal Law Bill to alter the law on either of these two issues. The Bill retains the effect of the present common law rules, by making special provision in clause 21 for the effect of voluntary intoxication on the application of the definition of recklessness that is adopted, for the offences created by Part I of the Bill, by clause 1(b); and by making special provision in clause 33 for the effect of voluntary intoxication on the general defences that are applied, by Part II, throughout the whole of the criminal law.

43.3 However, in making those provisions for the purposes of the Bill included in LCCP 122 we experienced considerable difficulty in determining how the present common law rules on intoxication could be expressed in statutory form. That difficulty, and further study of the subject, led us to turn to consider that the whole common law on the effect of intoxication on criminal liability should be reviewed afresh. That review is contained

⁴³⁵ See paragraphs 8.1–8.2 above.

⁴³⁶ See *Caldwell* [1982] AC 341, and paragraph 9.4 above.

⁴³⁷ See LCCP 122, paragraphs 2.15–2.19.

⁴³⁸ *DPP v Majewski* [1977] AC 443: hereafter, “*Majewski*”.

in Law Commission Consultation Paper No 127, *Intoxication and Criminal Liability*,⁴³⁹ which we published for comment in February 1993. Our consideration of the helpful comments that we received from a wide range of judges, practitioners, academics and others concerned with the law has now reached an advanced stage. We hope to publish, in 1994, a report that will make final recommendations as to the future treatment of the effect of intoxication throughout the criminal law, and not merely in respect of the offences and specified general defences with which the Criminal Law Bill is concerned.

43.4 In the meanwhile, however, for the reasons indicated above that Bill has to make provision for the effect of intoxication in relation to the parts of the law with which it deals. That provision is, as indicated above contained in clauses 21 and 33, and in clause 35 that deals with various issues of definition. Those clauses will be subject to review in the light of our forthcoming recommendations as to the general law in relation to intoxication, and of any decisions that are made as to the implementation of those recommendations.

43.5 In the remaining parts of this section we explain the provisions mentioned above in relation to intoxication in the Criminal Law Bill, and how we envisage those provisions operating. Readers may find it helpful to bear in mind also the much fuller treatment of the present law on intoxication that is contained in Part II of LCCP 127.

Intoxication at common law: the *Majewski* rules

Introduction

44.1 We seek to reflect in the Criminal Law Bill the present common law as to the effect of intoxication on allegations of “recklessness”. There is, however, considerable difficulty in determining what that common law is. One formulation, that depends on the division of offences between crimes of “basic” and of “specific” intent, cannot be expressed in statutory terms, because its limits are almost impossible to specify. Another possible formulation, that applies the rules only to allegations of or cognate to recklessness, can be put into statutory terms, but it may well not represent the present law. For the purposes of the Criminal Law Bill, however, it is convenient to adopt the latter formulation, because the only purpose of this part of the Bill is to qualify, in the case of an intoxicated offender, the definition of recklessness that the Bill otherwise applies. We review these issues in the following sections.

*Majewski: basic and specific intent*⁴⁴⁰

44.2 The most common formulation of the *Majewski* rule is conveniently expressed by the CLRC:

“[It is] a rule of substantive law that where an offender relies on voluntary intoxication as a defence to a charge of a crime not requiring ‘specific’ intent, he may be convicted notwithstanding that the prosecution has not proved any intention or foresight, or indeed any voluntary act”.⁴⁴¹

Under this approach all offences have to be allocated to one of two categories: crimes of “basic” intent to which *Majewski* applies; and crimes of “specific” intent, to which it does not apply. Where *Majewski* does apply, it would seem on this view that in respect of every element of the offence the prosecution may rely on the defendant’s self-induced intoxication, rather than his actual intention or foresight, to secure a conviction.

44.3 There is, however, no agreement as to the criteria by which offences are divided between crimes of basic and of specific intent; and that fact alone makes it impossible to formulate this approach as a general legislative test.

44.4 A variant on this approach has been to suggest that, rather than classify *offences* into the arbitrary categories of crimes of basic and of specific intent, the rule may operate according to whether a particular *allegation* in a case is one of basic or of specific intent.⁴⁴² It is, however, difficult to extract any authority for that rule from

⁴³⁹ Hereafter, LCCP 127.

⁴⁴⁰ LCCP 127, paragraphs 2.5–2.14.

⁴⁴¹ CLRC Fourteenth Report, paragraph 257.

⁴⁴² LCCP 127, paragraphs 2.10–2.14.

Majewski itself; and the distinction between allegations of basic and of specific intent is just as difficult to state in principled or even in clear terms, and therefore just as impossible as the basis for a general statutory formula, as is the distinction between *crimes* of basic and of specific intent.

Majewski: limited to allegations of recklessness?⁴⁴³

44.5 These difficulties have led to serious consideration being given to the analysis that *Majewski* applies, and only applies, to allegations of “recklessness”. Thus in *Caldwell*⁴⁴⁴ Lord Diplock endorsed Lord Elwyn-Jones’ acceptance in *Majewski*, as a correct statement of English law, of section 2.08(2) of the American Model Penal Code:

“When recklessness establishes an element of the offence, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial”.

44.6 On this view, therefore, the court when addressing any allegation of “recklessness” treats the accused as if he had been aware of any risk of which he would have been aware if not intoxicated: so, for instance, a drunken man who throws a bottle across a crowded bar cannot be heard to say that, because of his intoxication, he was unaware that in so doing he might injure someone. By contrast, however, evidence of intoxication will always be taken into account in assessing any allegation relating to the defendant’s “intention”.

The policy of the Criminal Law Bill: recklessness

44.7 It is doubtful whether the formulation mentioned in paragraphs 44.5–44.6 above does reflect the full extent of *Majewski*;⁴⁴⁵ and its statutory adoption as a rule applying throughout the criminal law would give rise to some substantial difficulties.⁴⁴⁶ The formulation that confines *Majewski* to allegations of recklessness does however have the advantage, unusual in the context of the common law relating to intoxication, that it can be expressed in a comprehensible statutory form. Moreover, in the present context it would simply not be appropriate to take account of the possibility that *Majewski* may in its terms apply to allegations of intention as well as to allegations of recklessness, as we were obliged to indicate in our general summary of the law in paragraphs 44.2–44.4 above. We doubt if in practice it would, for instance, be seriously argued that *Majewski* obliged a court to find an accused guilty of the grave offence of intentionally causing serious injury created by clause 2 of the Criminal Law Bill because, and only because, he was in a state of voluntary intoxication when he caused that injury. Such a case would be addressed as one of recklessness, under clause 3 of the Criminal Law Bill.

44.8 The practical purpose of including provisions as to intoxication in the Criminal Law Bill, which we explained in paragraph 43.1 above, can therefore be fully achieved by limiting the application of *Majewski* to cases of recklessness: where there is no doubt that the rule does already apply as a matter of common law.⁴⁴⁷ Accordingly, clause 21(1) of the Criminal Law Bill provides:

- “(1) For the purposes of this Part a person who was voluntarily intoxicated at any material time shall be treated—
- (a) as having been aware of any risk of which he would have been aware had he not been intoxicated, and
 - (b) as not having believed in any circumstances which he would not have believed in had he not been intoxicated.”

44.9 The first part of this formulation repeats the rule of the Model Penal Code that was adopted by Lords Diplock and Elwyn-Jones: see paragraph 44.5 above. The second limb repeats the separate rule of the common law, explained in paragraphs 45.1ff below, that where a defence to a criminal charge is based on the defendant’s belief in the existence of certain circumstances, he is judged according to whether he would have

⁴⁴³ LCCP 127, paragraphs 2.15–2.17.

⁴⁴⁴ [1982] AC 341, at p 355D–E.

⁴⁴⁵ LCCP 127, paragraph 2.17.

⁴⁴⁶ *Ibid*, paragraphs 4.11–4.30.

⁴⁴⁷ That was the formulation adopted by the CLRC for, *inter alia*, offences against the person: Fourteenth Report, paragraph 267(2).

believed in the existence of those circumstances if not intoxicated. It may be strictly speaking unnecessary to repeat a rule directed at defences in Part I, as opposed to Part II, of the Criminal Law Bill. However, in the interests of clarity it seems desirable to make it very obvious to readers that the new offences in Part I of the Bill must be read subject not only to the existing general defences, as clause 20 provides,⁴⁴⁸ but also to the whole of the existing common law relating to the effect of voluntary intoxication.

Defences based on mistaken belief⁴⁴⁹

45.1 In applying a number of defences, both at common law and under the Criminal Law Bill,⁴⁵⁰ the defendant is judged according to the facts as he believed them to be: so that he can rely, subject to the other requirements of the defence, on a mistaken belief.

45.2 The common law rule is, however, that where the mistake arises by reason of voluntary intoxication, the defendant in those circumstances cannot rely on his mistake.⁴⁵¹ Recent authority suggests that that principle obtains whatever the offence charged, and irrespective of whether the offence is, in *Majewski* terms, one of basic or of specific intent.⁴⁵²

45.3 That rule is one of the issues raised in LCCP 127, and on which we will in due course be reporting in the light of the comments made on consultation. For the limited purpose of the Criminal Law Bill it is necessary to maintain the common law position on this issue also, to avoid any argument that a Bill that did not address the intoxication rules had thereby abolished them. Clause 33(1) of the Criminal Law Bill accordingly provides, in respect of the general defence contained in Part II of the Bill:

“For the purposes of this Part a person who was voluntarily intoxicated at any material time shall be treated as not having believed in any circumstance which he would not then have believed in had he not been intoxicated.”

45.4 On a more limited point, paragraph 13(3) of Schedule 3 to the Bill proposes an amendment of the Criminal Damage Act 1971, in furtherance of the policy of achieving consistent principles relating to the lawful use of force. Section 5(2) of that Act creates various defences of “lawful excuse”, including the defence of protection of property under section 5(2)(b), to certain offences under the Act. Each of these defences is founded on a specified belief of the defendant. At present the belief may be a belief caused by voluntary intoxication.⁴⁵³ It is desirable that the defence of protection of property under section 5(2)(b) of the 1971 Act should be consistent with the general defence of use of force provided by clause 27 of the Bill: see paragraphs 37.5–37.6 above. The amendment will therefore bring the defence under section 5(2)(b) of the Criminal Damage Act into line, in this respect, with the defence in clause 27 of the Bill.

Definition of terms

Introduction

46.1 The common law rules as to intoxication involve some detailed and complicated definitions of the terms that they employ. These definitions have to be given statutory form in the Criminal Law Bill, as we now explain.

“Intoxicant”

46.2 Clause 35 explains what is meant by “voluntary intoxication”. The explanation seeks to reflect the effect of the common law. It employs the notion of taking an “intoxicant”, a term that therefore requires definition. The common law rules relating to the effects of intoxication are the same, whether the person’s awareness, or his control of his movements or behaviour, or his understanding, is impaired by the effects of alcohol, drugs or solvents.

⁴⁴⁸ See further paragraphs 27.1–27.9 above.

⁴⁴⁹ LCCP 127, paragraphs 2.24–2.25.

⁴⁵⁰ Conspicuously, the defence of justified use of force: see clauses 27–30 of the Criminal Law Bill, and paragraph 36.6 above.

⁴⁵¹ *Woods* (1982) 74 Cr App R 312.

⁴⁵² *O’Grady* [1987] QB 995; *O’Connor* [1991] Crim LR 135.

⁴⁵³ *Jaggard v Dickinson* [1981] QB 527. That case concerned the defence under section 5(2)(a) of the 1971 Act (belief that the victim had consented or would have consented if he had known). The availability of *that* defence in a case of drunken mistake will not be affected by the amendment now proposed, but will fall to be considered in our general review of the effect of intoxication on criminal liability.

There is difficulty in finding a definition of intoxicant that would serve for all the cases covered by the common law. In respect of the offences covered by the Criminal Law Bill, however, issues of the effect of intoxicants on *control* will not arise. Clause 35(5) therefore defines “intoxicant” as meaning

“alcohol, drugs or any other thing which, when taken into the body, may impair awareness or understanding”.

This definition is wide enough to include the vapour which is inhaled by a glue sniffer as well as drugs taken orally or by injection. “Awareness” is relevant to recklessness, and “understanding” relevant to the formation of beliefs.

“*Voluntary intoxication*”

46.3 The special rules stated by clauses 21 and 33 apply to a person who is *voluntarily* intoxicated. When a person who takes an intoxicant knows that it is or may be an intoxicant his resulting intoxication⁴⁵⁴ is in general “voluntary”, as clause 35(2) provides.⁴⁵⁵

46.4 There seem to be three situations in which a person’s intoxication is not “voluntary”. The first is that in which his ingestion of the intoxicant is itself involuntary: he does not “take” the intoxicant, which is forced on him. The second is that in which he is unaware that what he is taking may be an intoxicant, as where a mischievous companion “laces” his drink with vodka, which he does not detect. Where what is tampered with contains no intoxicant, and he has taken no other intoxicant, the case is unproblematic; any resulting intoxication must be involuntary. A doubtful case might arise, however, if a person’s alcoholic drink were doctored, so that he is more powerfully affected by the combination of what he has knowingly taken and what has been surreptitiously introduced than he would have been by the former alone. It would seem to be going too far to hold that involuntary intoxication is confined to the case where a person “did not know he was taking alcohol . . . at all”.⁴⁵⁶ On the contrary, intoxication might properly be said to be “involuntary” if the knowingly taken intoxicant would not alone have had the intoxicating effect of which an intruded intoxicant was the crucial cause.⁴⁵⁷ But we believe that a provision to make this explicit would be unduly elaborate and that the right result can be reached by sensible application of the test provided by clause 35(2): was the person intoxicated by an intoxicant which he took . . . being aware that it was or might be an intoxicant?

46.5 The third case of “involuntary” intoxication is that in which the person took the intoxicant for a medicinal purpose and either did not know that it might (or might in some circumstances) affect him in a relevant way or, even if he did know that, took it on medical advice and complied with any conditions of that advice (such as avoiding alcohol or eating regularly).⁴⁵⁸ Clause 35 addresses this problem by employing, in particular, the concept of taking an intoxicant “properly for a medicinal purpose” (subsection (2)). Subsection (4) defines this negatively by explaining when an intoxicant, “although taken for a medicinal purpose, is not properly so taken”—that is, when

“the intoxicant—

- (a) is not taken on medical advice; or
- (b) is taken on medical advice but the taker fails then or thereafter to comply with any condition forming part of the advice,

and 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”.

⁴⁵⁴ Clause 35(2) treats a person as “intoxicated” if the quantity of intoxicant taken “impairs his awareness or understanding”.

⁴⁵⁵ In the interests of economy of statement, a person’s permitting an intoxicant to be administered to him is said by clause 35(3) to be a case of “taking” it.

⁴⁵⁶ Commentary on *Allen* [1988] Crim LR 698. The case itself is authority for no wider proposition than that “where an accused knows he is drinking alcohol, such drinking” (presumably a slip for: intoxication resulting from such drinking) “does not become involuntary for the reason alone that he may not know the precise nature or strength of the alcohol that he is consuming”.

⁴⁵⁷ This possibility was raised, without being decided, by the Court of Appeal (Criminal Division) in *Kingston*, *The Times*, 10 May 1993.

⁴⁵⁸ See *Bailey* [1983] 1 WLR 760; *Hardie* [1985] 1 WLR 64.

46.6 If there is evidence that the defendant was intoxicated at the material time, the question whether that intoxication was voluntary or involuntary may be crucial. It is plainly appropriate that the defendant should bear at least an evidential burden on this issue: the intoxication must be taken to have been voluntary unless there is evidence tending to show that it was involuntary. Clause 35(6) of the Criminal Law Bill so provides. But we believe, as we explained in the Code Report,⁴⁵⁹ that, if there is such evidence, the burden of proving that the intoxication was in fact voluntary should rest on the prosecution.⁴⁶⁰ This result will follow from the fact that clause 35(6) requires the defence only to adduce evidence that “might lead the court or jury to conclude that there is a reasonable possibility that the intoxication was involuntary”.

⁴⁵⁹ Paragraphs 8.50, 8.51.

⁴⁶⁰ Relevant judicial statements appear to assume that the persuasive burden is on the prosecution: *Bailey* [1983] 1 WLR 760 at p. 765; *Hardie* [1985] 1 WLR 64 at p. 69. The alternative would be to require the defendant to prove his innocence. We see no ground for so requiring. The Commission did not take the same view, however, when considering this issue in connection with offences relating to public order (*Offences relating to Public Order* (1983), Law Com No 123, paragraph 3.54); and section 6(5) of the Public Order Act 1986 places on a person charged with an offence under Part I of the Act the burden of proving that the intoxication on which he relies “was not self-induced or that it was caused solely by the taking or administration of a substance in the course of medical treatment”. However, in LCCP 127 we have provisionally proposed the repeal of this subsection.

PART V
RECOMMENDATION

For the reasons explained in this Report, we recommend legislation in the terms of the Criminal Law Bill that is contained in Appendix A hereto.

(Signed) HENRY BROOKE, *Chairman*
TREVOR M. ALDRIDGE
JACK BEATSON
RICHARD BUXTON
BRENDA HOGGETT

MICHAEL COLLON, *Secretary*
6 October 1993

APPENDIX A
Draft
Criminal Law Bill

ARRANGEMENT OF CLAUSES

PART I

NON-FATAL OFFENCES AGAINST THE PERSON

Preliminary

Clause

1. Definition of fault terms.

Offences of causing injury, assault, &c.

2. Intentional serious injury.
3. Reckless serious injury.
4. Intentional or reckless injury.
5. Administering a substance without consent.
6. Assault.
7. Assault on a constable.
8. Assault to resist arrest.
9. Threats to kill or cause serious injury.
10. Torture.

Offences of detention or abduction

11. Unlawful detention.
12. Kidnapping.
13. Hostage-taking.
14. Abduction of child by parent, &c.
15. Abduction of child by other persons.
16. Aggravated abduction.
17. Construction of references to taking, &c. and consent.

Supplementary provisions

18. Meaning of "injury".
19. Liability for omissions.
20. General defences, &c.
21. Effect of voluntary intoxication.
22. Prosecution, punishment, &c.
23. Alternative verdicts.

PART II

GENERAL DEFENCES AND OTHER PROVISIONS

Preliminary

Clause

24. Application of this Part.

Duress

- 25. Duress by threats.
- 26. Duress of circumstances.

Self-defence, prevention of crime, &c.

- 27. Justifiable use of force: protection of person or property, prevention of crime, &c.
- 28. Justifiable use of force: effecting or assisting arrest.
- 29. Meaning of "use of force" and related provisions.
- 30. Meaning of "property" and related provisions.

Supervening or transferred fault

- 31. Supervening fault.
- 32. Transferred fault and defences.

Supplementary

- 33. Effect of voluntary intoxication.
- 34. Interpretation of Part II.

PART III

SUPPLEMENTARY PROVISIONS

- 35. Provisions as to voluntary intoxication.
- 36. Abolition of certain common law offences, defences and other rules.
- 37. Minor and consequential amendments; repeals.
- 38. Extent.
- 39. Short title and commencement.

SCHEDULES:

- Schedule 1—Appropriate consent for purposes of section 14 in certain cases.
- Schedule 2—Prosecution and punishment.
- Schedule 3—Minor and consequential amendments.
- Schedule 4—Repeals.

DRAFT
OF A
B I L L
TO

Make new provision with respect to the main non-fatal offences against the person under the law of England and Wales; to enact certain defences and other rules of law applicable generally to offences under that law; and for connected purposes. A.D. 1993.

B E 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

NON-FATAL OFFENCES AGAINST THE PERSON

Preliminary

1. For the purposes of this Part a person acts—

(a) “intentionally” with respect to a result when—

10

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

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

(b) “recklessly” with respect to—

15

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

(ii) a result, when he is aware of a risk that it will occur, and it is unreasonable, having regard to the circumstances known to him, to take that risk;

20 and related expressions shall be construed accordingly.

Offences of causing injury, assault, &c.

2.—(1) A person is guilty of an offence if he intentionally causes serious injury to another.

Definition of fault terms.

Intentional serious injury.

EXPLANATORY NOTES

Clause 1

1. Paragraph (a) defines the two cases in which, for the purposes of the offences in the Bill, a person acts "intentionally" with respect to a result. First, a person acts intentionally with respect to a result when it is his purpose to cause it. Secondly, he acts intentionally with respect to a result even where it is not his purpose to cause it, but he knows that it will occur in the ordinary course of events if he succeeds in causing some other result. The definition is explained in paragraphs 7.1-7.14 of this Report.

2. Paragraph (b) defines the concept of recklessness for the purposes of the offences in the Bill. A person acts recklessly with respect to a *circumstance* when he is aware of a risk that the circumstance exists or will exist, and it is unreasonable, having regard to the circumstances known to him, to take that risk. A person acts recklessly with respect to a *result* when he is aware of a risk that it will occur, and it is unreasonable, having regard to the circumstances known to him, to take that risk. The definition is explained in paragraphs 8.1-10.4 of this Report.

Clauses 2-4

1. Paragraphs 12.1-12.35 of this Report discuss the defects of sections 18, 20 and 47 of the Offences against the Person Act 1861 and the need for reform. The rationale and structure of clauses 2-4 are explained in paragraphs 13.1-13.6.

2. Paragraphs 14.1-14.26 explain the adoption in these clauses of the terms "intentionally" and "recklessly", as those terms are defined in clause 1.

3. Clause 18 provides a definition of "injury" and paragraphs 15.1-15.31 explain the adoption of the term "injury".

Clause 2

1. Subsection (1) provides for the offence of intentionally causing serious injury.

PART I

(2) An offence under this section is committed notwithstanding that the injury occurs outside England and Wales if the act causing injury is done in England and Wales.

Reckless serious injury.

3.—(1) A person is guilty of an offence if he recklessly causes serious injury to another.

5

(2) An offence under this section is committed notwithstanding that the injury occurs outside England and Wales if the act causing injury is done in England and Wales.

Intentional or reckless injury.

4. A person is guilty of an offence if he intentionally or recklessly causes injury to another.

10

Administering a substance without consent.

5.—(1) A person is guilty of an offence if, knowing that the other does not consent to what is done, he intentionally or recklessly administers to or causes to be taken by another a 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.

Assault.

6.—(1) A person is guilty of the offence of assault if—

(a) he intentionally or recklessly applies force to or causes an impact on the body of another—

20

(i) without the consent of the other, or

(ii) where the act is intended or likely to cause injury, with or without the consent of the other; or

(b) he intentionally or recklessly, without the consent of the other, causes the other to believe that any such force or impact is imminent.

25

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

30

Assault on a constable.

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

(a) a constable acting in the execution of his duty, or

(b) anyone assisting a constable so acting,

knowing that, or being reckless whether, the person assaulted or the person being assisted is a constable.

35

(2) It is immaterial whether the person committing the assault is aware that the constable is or may be acting in the execution of his duty.

(3) In this section "assault" means the offence under section 6.

Assault to resist arrest.

8.—(1) 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.

40

EXPLANATORY NOTES

2. Subsection (2) provides that the offence is committed where the act is done in England and Wales, notwithstanding that the injury occurs abroad; this is explained in paragraph 17.1.

Clause 3

1. Subsection (1) provides for the offence of recklessly causing serious injury.

2. Subsection (2) provides that the offence is committed where the act is done in England and Wales notwithstanding that the injury occurs abroad; this is explained in paragraph 17.1.

Clause 4

1. This clause provides for the offence of intentionally or recklessly causing injury.

2. Clause 22(3) provides that the offence under clause 4 is an arrestable offence: this course is recommended in paragraph 16.1.

Clause 5

1. Subsection (1) provides for the offence of administering to another a substance capable of interfering substantially with the other's bodily functions, without that other's consent. Paragraphs 24.4-24.6 of this Report explain the clause's relationship to the offences in sections 23 and 24 of the 1861 Act. Paragraph 24.7 explains how this clause works alongside the offences of causing injury.

2. Paragraph 24.6 notes that the defendant must know that what he administered was capable of interfering substantially with the other's bodily functions. The words "knowing that the other does not consent to what is done" ensure that the defendant is guilty if he knows that the victim consents to the administration of the substance in ignorance of its potential effect; this is explained in paragraph 24.8 of this Report. Paragraph 24.9 notes that the administering of the substance must be intentional or reckless.

3. Subsection (2) provides an extended definition of "capable of interfering substantially with bodily functions" by including in that phrase the inducement of unconsciousness or sleep.

4. The offence under this clause is made an arrestable one, by virtue of clause 22(3).

Clause 6

1. Subsection (1) creates and defines a single offence of assault which encompasses both "battery" and "psychic assault" (i.e. causing an apprehension of violence); this is explained at paragraphs 18.1-18.5 of this Report.

2. Subsection (1)(a) deals with the application of force or impact to the body of another. If the other consents, then no offence is committed unless injury is intended or likely to be caused. The issue of consent is discussed at paragraphs 19.1-19.4. It should be noted that there is no need to prove injury under this clause; if injury is intentionally or recklessly caused, an offence is committed under clause 4, as explained at paragraph 18.7.

3. Subsection (1)(b) covers the case of causing fear of imminent application of force; this is explained in paragraph 18.7. Consent is a defence in this case.

4. Subsection (2) expressly excludes generally acceptable physical contact from the statutory definition of assault, as explained in paragraphs 20.1-20.7.

Clause 7

Whilst many of the special cases of assault are repealed by Schedule 4 to the Criminal Law Bill, clause 7 retains the separate offence of assault on a police constable, currently contained in section 51 of the Police Act 1964. The reasons for preserving this offence are set out in paragraphs 22.4-22.6.

Clause 8

1. This clause retains a second special offence of assault (currently contained in section 38 of the Offences against the Person Act 1861), so as to deal in particular with assaults on police officers attempting to arrest persons suspected of serious crime. The reasons for the retention of this offence are explained in clauses 22.7-22.11.

(2) For the purposes of this section the question whether the arrest is lawful shall be determined according to the circumstances as the defendant believes them to be.

(3) In this section “assault” means the offence under section 6.

5 9. A person is guilty of an offence if he makes to another a threat to cause the death of, or serious injury to, that other or a third person, intending that other to believe that it will be carried out. Threats to kill or cause serious injury.

10 10.—(1) A person commits the offence of torture if— Torture.

(a) in the performance or purported performance of his official duties as a public official, or

(b) at the instigation or with the consent or acquiescence of a public official who is performing or purporting to perform his official duties,

he intentionally inflicts severe pain or suffering on another.

15 (2) An offence under this section is committed whatever the nationality of the persons concerned and whether the conduct occurs in the United Kingdom or elsewhere.

(3) It is immaterial whether the pain or suffering is physical or mental.

20 (4) It is a defence in respect of any conduct for the defendant to prove that he had lawful authority, justification or excuse for the conduct.

(5) For this purpose “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;

25 (b) in relation to pain or suffering inflicted outside the United Kingdom by a United Kingdom official acting under the law of the United Kingdom, or any part of the United Kingdom, lawful authority, justification or excuse under that law;

30 (c) in any other case, lawful authority, justification or excuse under the law of the place where the pain or suffering was inflicted.

(6) In this section “public official” includes any person acting in an official capacity, and “United Kingdom official” shall be construed accordingly.

Offences of detention or abduction

35 11. A person is guilty of the offence of unlawful detention if he intentionally or recklessly takes or detains another without his consent. Unlawful detention.

40 12. A person is guilty of the offence of kidnapping if he takes or detains another without that other’s consent, intending to hold him to ransom or as a hostage, to send him out of the United Kingdom, or to commit an arrestable offence. Kidnapping.

13.—(1) A person is guilty of the offence of hostage-taking if he takes or detains another and, in order to compel a state, international governmental organisation or person to do or abstain from doing any act, threatens to kill or injure him or to continue to detain him. Hostage-taking.

EXPLANATORY NOTES

2. Subsection (2) provides a defence where the arrest would have been unlawful had the circumstances been as the defendant believed them to be. Paragraphs 22.8 and 22.10 explain the rationale of this defence.

Clause 9

This clause makes it an offence to threaten to cause serious injury as well as to threaten to kill. It is therefore wider than section 16 of the Offences against the Person Act 1861, which it replaces. The clause is discussed in paragraph 23.1 of this Report.

Clause 10

This clause transfers to the Bill the offence of torture, at present to be found in section 134 of the Criminal Justice Act 1988. The reason for this decision is discussed at paragraph 24.11.

Clauses 11 to 17

These clauses contain offences of detention and abduction and are discussed at paragraphs 24.12-24.14 of this Report.

Clause 11

This clause provides for the offence of unlawful detention which substantially replaces the common law offence of false imprisonment. The clause is discussed at paragraph 24.14.

Clause 12

This clause provides for the offence of kidnapping and replaces the common law offence of the same name.

Clause 13

This clause transfers to this Bill the offence of hostage-taking, at present to be found in section 1 of the Taking of Hostages Act 1982.

PART I

(2) An offence under this section is committed whatever the nationality of the persons concerned and whether the acts are done in the United Kingdom or elsewhere.

Abduction of
child by parent,
&c.

14.—(1) A person connected with a child under the age of 16 is guilty of an offence if he takes or sends the child out of the United Kingdom 5 without the appropriate consent.

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

- (a) he is a parent of the child, or
- (b) in the case of a child whose parents were not married to each 10 other at the time of his birth, there are reasonable grounds for believing that he is the father of the child, or
- (c) he is a guardian of the child, or
- (d) he is a person in whose favour a residence order is in force with respect to the child, or 15
- (e) he has custody of the child.

(3) The appropriate consent for the purposes of this section means—

- (a) the consent of each of the following—
 - (i) the child's mother,
 - (ii) the child's father, if he has parental responsibility for 20 him,
 - (iii) any guardian of the child,
 - (iv) any person in whose favour a residence order is in force with respect to the child, and
 - (v) any person who has custody of the child; or 25
- (b) the leave of the court granted under or by virtue of any provision of Part II of the Children Act 1989; or
- (c) if any person has custody of the child, the leave of the court which awarded custody to him.

1989 c. 41.

(4) A person does not commit an offence under this section in relation 30 to a child if—

- (a) he is a person in whose favour there is a residence order in force with respect to the child, and
- (b) he takes or sends the child out of the United Kingdom for a 35 period of less than one month,

unless he does so in breach of an order under Part II of the Children Act 1989.

(5) 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— 40

- (a) he does it in the belief that the other person—
 - (i) has consented, or
 - (ii) would consent if he was aware of all the relevant circumstances; or

EXPLANATORY NOTES

Clause 14

This clause provides for the offence of abduction of a child by a parent. It re-enacts the offence in section 1 of the Child Abduction Act 1984, as modified by the Children Act 1989. Schedule 1 to this Bill makes special provision with respect to children in certain cases.

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

(c) the other person has unreasonably refused to consent.

(6) Subsection (5)(c) does not apply—

5 (a) if the person whose consent is required is a person—

(i) in whose favour there is a residence order in force with respect to the child, or

(ii) who has custody of the child; or

10 (b) if the person taking or sending the child out of the United Kingdom is, by so acting, in breach of an order made by a court in the United Kingdom.

15 (7) In relation to a child who is in the care of a local authority, detained in a place of safety, remanded to local authority accommodation or the subject of proceedings or an order relating to adoption, subsections (3) to (6) above do not apply and the provisions of Schedule 1 have effect as to the appropriate consent for the purposes of this section.

(8) In this section references to the guardian of a child, and the expressions “residence order” and “parental responsibility”, have the same meaning as in the Children Act 1989.

1989 c. 41.

20 (9) For the purposes of this section a person shall be treated as having custody of a child if there is in force an order of a court in the United Kingdom awarding him (whether solely or jointly with another person) custody, legal custody or care and control of the child.

25 **15.—(1)** A person is guilty of an offence if, without reasonable excuse, he takes or detains a child under the age of 16—

Abduction of child by other persons.

(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.

30 (2) Subsection (1) does not apply—

(a) to the child’s father or mother, where the father and mother were married to each other at the time of his birth;

(b) to the child’s mother, where the father and mother were not married to each other at the time of his birth;

35 (c) to a guardian of the child;

(d) to a person in whose favour a residence order is in force with respect to the child; or

(e) to a person having custody of the child.

(3) It is a defence for the defendant to prove—

40 (a) where the father and mother of the child in question were not married to each other at the time of his birth—

(i) that he is the child’s father, or

(ii) that he believed, on reasonable grounds, that he was the child’s father; or

EXPLANATORY NOTES

Clause 15

This clause provides for the offence of abduction of a child by persons other than its parents. It re-enacts the offence in section 2 of the Child Abduction Act 1984, as modified by the Children Act 1989.

- PART I
- (b) that he believed that the child had attained the age of 16.
- (4) For the purposes of this section—
- 1989 c. 41.
- (a) “guardian of a child” and “residence order” have the same meaning as in the Children Act 1989; and
- (b) a person shall be treated as having custody of a child if there is in force an order of a court in the United Kingdom awarding him (whether solely or jointly with another person) custody, legal custody or care and control of the child. 5
- Aggravated abduction.
- 16.—(1) A person is guilty of an offence if he abducts a child under the age of 16 intending to hold him to ransom or as a hostage, to send him out of the United Kingdom, or to commit an arrestable offence. 10
- (2) For this purpose “abducts” means without reasonable excuse takes or detains the child—
- (a) so as to remove him from the lawful control of any person having lawful control of the child, or 15
- (b) so as to keep him out of the lawful control of any person entitled to lawful control of the child.
- (3) This section does not apply to a person intending to send a child out of the United Kingdom if—
- (a) that person is a parent of the child, or 20
- (b) in the case of a child whose parents were not married to each other at the time of his birth, there are reasonable grounds for believing that he is the father of the child.
- Construction of references to taking, &c. and consent.
- 17.—(1) For the purposes of sections 11 to 16 (offences of detention or abduction)— 25
- (a) a person shall be regarded as taking another if he causes the other to accompany him or a third person or causes him to be taken;
- (b) a person shall be regarded as detaining another if he causes the other to remain where he is; and
- (c) a person shall be regarded as sending another if he causes the other to be sent. 30
- (2) For the purposes of those sections a person shall be treated as acting without the consent of another if he obtains the other’s consent—
- (a) by force or threat of force, or
- (b) by deception causing the other to believe that he is under legal compulsion to consent. 35
- Supplementary provisions*
- Meaning of “injury”.
18. In this Part “injury” means—
- (a) physical injury, including pain, unconsciousness, or any other impairment of a person’s physical condition, or 40
- (b) impairment of a person’s mental health.
- Liability for omissions.
- 19.—(1) An offence to which this section applies may be committed by a person who, with the result specified for the offence, omits to do an act that he is under a duty to do at common law.

EXPLANATORY NOTES

Clause 16

This clause provides for the offence of aggravated abduction.

Clause 17

This is an interpretation clause, relating to clauses 11 to 16.

Clause 18

1. This clause defines the term "injury", as used in clauses 2, 3, 4, 6 and 9.

2. Paragraphs 15.1-15.8 explain the reasons for the choice of the term "injury". Paragraphs 15.9-15.29 explain why the definition expressly includes "pain, unconsciousness, or any other impairment of a person's physical condition" (implicitly including all illness and disease) and "impairment of a person's mental health".

Clause 19

1. Subsection (1) provides that, in respect of the offences to which it applies, a person may commit the offence if he omits to do an act that he is under a duty to do at common law and thereby causes the result specified for the offence. An analysis of the issues concerning the imposition of criminal liability for omissions to act is contained in paragraphs 11.1-11.6 of this Report. The decisions to confine the clause to common law duties and to omit any formulation of those duties are explained in paragraphs 11.4-11.6.

(2) This section applies to the offences under the following sections—

PART I

- (a) section 2 (intentional serious injury),
- (b) section 10 (torture),
- (c) section 11 (unlawful detention),
- 5 (d) section 12 (kidnapping),
- (e) section 14 (abduction of child by parent, &c.), and
- (f) section 16 (aggravated abduction).

(3) References in those sections to acts shall accordingly be construed as including omissions.

10 20. The provisions of this Part have effect subject to any enactment or rule of law providing a defence, or providing lawful authority, justification or excuse for an act or omission. General defences, &c.

21.—(1) For the purposes of this Part a person who was voluntarily intoxicated at any material time shall be treated—

Effect of voluntary intoxication.

- 15 (a) as having been aware of any risk of which he would have been aware had he not been intoxicated, and
- (b) as not having believed in any circumstance which he would not have believed in had he not been intoxicated.

20 (2) The expressions “voluntarily intoxicated” and “intoxicated” in subsection (1) shall be construed in accordance with section 35.

22.—(1) Schedule 2 shows for each offence under this Part (identified in columns 1 and 2 by reference to the provision creating the offence and its general nature)—

Prosecution, punishment, &c.

- 25 (a) in column 3, whether the offence is triable only on indictment or only summarily or either way;
- (b) in column 4—
 - (i) in the case of conviction on indictment, the maximum sentence of imprisonment that may be imposed, and
 - (ii) in the case of summary conviction, the maximum sentence of imprisonment or fine that may be imposed; and
- 30 (c) in column 5, any requirement of consent to the institution of proceedings for an offence.

35 (2) For the purposes of the rules against charging more than one offence in the same count or information, each of sections 2 to 16 creates one offence.

(3) In section 24(2) of the Police and Criminal Evidence Act 1984 (offences which are arrestable offences although the maximum penalty is less than five years imprisonment), after paragraph (e) insert— 1984 c. 60.

40 “(f) an offence under section 4 (intentional or reckless injury) or 5 (administering a substance without consent) of the Criminal Law Act 1993.”.

EXPLANATORY NOTES

2. Subsection (2) applies this clause to clauses 2 (intentional serious injury), 10 (torture), 11 (unlawful detention), 12 (kidnapping), 14 (abduction of child by parent, &c.) and 16 (aggravated abduction). Paragraphs 11.2-11.3 explain the decision to confine liability by omission to these, more serious, offences.

3. Subsection (3) makes it clear that the effect of the provision is that references in the clauses referred to in paragraph 2 to "acts" shall be read as including omissions.

Clause 20

This clause provides that the offences in Part I of the Bill are subject to any enactment or rule of the common law providing a defence, lawful authority, justification or excuse. The rationale behind this clause is explained at paragraphs 27.1-27.9.

Clause 21

1. This clause, together with clauses 33 and 35, seeks to reflect the common law on the effect of intoxication on criminal liability insofar as it affects matters dealt with in the Bill. Paragraphs 43.1-43.4 explain our reasons for adopting this course, pending the outcome of the current full review by the Commission of the law on this topic.

2. Clause 21(1)(a) treats the voluntarily intoxicated defendant as having been aware of any risk of which he would have been aware had he not been intoxicated. Paragraphs 44.1-44.9 explain how, without seeking to enact other, much less certain aspects of the equivalent common law rule, this provision ensures, in relation to *recklessness*, the continuation of the effect of that rule insofar as it excludes consideration of the effect of voluntary intoxication from the question whether the defendant acted with that fault.

3. Clause 21(1)(b) preserves, for the purposes of the offences in Part I, the separate common law rule, explained in paragraphs 44.10-44.13, that where a defence to a criminal charge is based on the defendant's belief in the existence of certain circumstances, he is judged according to whether he would have believed in the existence of those circumstances if not intoxicated. (The same rule is reproduced for the purposes of the defences in Part II of the Bill by clause 33(1).) The reason for the inclusion of this rule in Part I of the Bill is explained in paragraph 44.9.

Clause 22

1. Subsection (1) introduces Schedule 2 to the Bill, which sets out the mode of trial (in column 3), the maximum fine and sentence of imprisonment (in column 4) and restrictions on the institution of proceedings (in column 5) for each offence included in Part I of the Bill.

2. Subsection (2) provides that, for the purposes of the rule against duplicity, each of clauses 2 to 16 creates a single offence.

3. Subsection (3) amends the Police and Criminal Evidence Act 1984 so as to make the offences under clauses 4 and 5 arrestable offences.

PART I
Alternative
verdicts.
1967 c. 58.

23.—(1) For the purposes of the application of section 6(3) of the Criminal Law Act 1967 (alternative verdicts) to the trial of a person on indictment for any offence under this Part an allegation in the indictment of knowledge or intention includes an allegation of recklessness.

(2) If on the trial on indictment of a person charged with an offence under—

- (a) section 2 (intentional serious injury),
- (b) section 3 (reckless serious injury),
- (c) section 4 (intentional or reckless injury), or
- (d) section 8 (assault to resist arrest),

the jury find him not guilty of the offence charged, they may (without prejudice to section 6(3) of the Criminal Law Act 1967) find him guilty of an offence under section 6 (assault).

(3) If on the summary trial of a person charged with an offence under section 3 (reckless serious injury) the magistrates' court find him not guilty of that offence, they may find him guilty of an offence under section 4 (intentional or reckless injury) or section 6 (assault).

(4) If on the summary trial of a person charged with an offence under—

- (a) section 4 (intentional or reckless injury),
- (b) section 7 (assault on a constable), or
- (c) section 8 (assault to resist arrest),

the magistrates' court find him not guilty of that offence, they may find him guilty of an offence under section 6 (assault).

PART II

25

GENERAL DEFENCES AND OTHER PROVISIONS

Preliminary

Application of
this Part.

24. The provisions of this Part apply in relation to all offences under the law of England and Wales, including those under Part I.

Duress

30

Duress by threats.

25.—(1) No act of a person constitutes an offence if the act is done under duress by threats.

(2) A person does an act under duress by threats if he does it because he knows or believes—

- (a) that a threat has been made to cause death or serious injury to himself or another if the act is not done, and
- (b) 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 effective official protection, and
- (c) that there is no other way of preventing the threat being carried out,

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

EXPLANATORY NOTES

Clause 23

1. Subsection (1) removes any room for doubt, that for the purposes of determining the jury's ability to return an alternative verdict on an indictment for an offence under the Bill, a count that alleges intention or knowledge includes an allegation of recklessness. This is explained in paragraph 21.3 of this Report.

2. Subsection (2) provides that the jury may convict of the summary offence under clause 6 (assault) if they find the defendant to be not guilty of an offence under clause 2 (intentional serious injury), 3 (reckless serious injury), 4 (intentional or reckless injury) or 8 (assault to resist arrest), thus obviating the need to include a separate, alternative, charge of assault in the indictment. The need for this provision is explained in paragraphs 21.1 and 21.2.

3. Subsections (3) and (4) provide for alternative verdicts where an offence under clause 3, 4, 7 (assault on a constable) or 8 is tried summarily.

Clause 24

This clause provides that the provisions in Part II of the Bill apply to all offences under the law of England and Wales including those under Part I. Paragraph 26.3 explains the reasons for this general application of Part II.

Clause 25

This clause provides for a defence of duress by threats, which broadly reflects that defence as it has developed at common law. The law reform background and present form of the clause is explained at paragraphs 28.1-29.16. The proposed application of the defence to murder is discussed in paragraphs 30.1-30.22 and our recommendation that duress should remain a complete defence is discussed at paragraphs 31.1-31.8. The application of the defence to other offences if our recommendation as to murder is rejected is discussed in paragraphs 32.1-32.5. Paragraphs 33.1-33.16 explain the rationale behind our decision to place the burden of proving duress on the defendant.

It is for the defendant to show that the reason for his act was such knowledge or belief as is mentioned in paragraphs (a) to (c).

(3) This section applies in relation to omissions as it applies in relation to acts.

5 (4) This section does not apply to a person who knowingly and without reasonable excuse exposed himself to the risk of the threat made or believed to have been made.

10 If the question arises whether a person knowingly and without reasonable excuse exposed himself to such a risk, it is for him to show that he did not.

26.—(1) No act of a person constitutes an offence if the act is done under duress of circumstances.

Duress of circumstances.

(2) A person does an act under duress of circumstances if—

15 (a) he does it because he knows or believes that it is immediately necessary to avoid death or serious injury to himself or another, and

20 (b) the danger that he knows or believes to exist is such that in all the circumstances (including any of his personal characteristics that affect its gravity) he cannot reasonably be expected to act otherwise.

It is for the defendant to show that the reason for his act was such knowledge or belief as is mentioned in paragraph (a).

(3) This section applies in relation to omissions as it applies in relation to acts.

25 (4) This section does not apply to a person who knowingly and without reasonable excuse exposed himself to the danger known or believed to exist.

30 If the question arises whether a person knowingly and without reasonable excuse exposed himself to that danger, it is for him to show that he did not.

(5) This section does not apply to—

(a) an act done in the knowledge or belief that a threat has been made to cause death or serious injury to himself or another (see section 25), or

35 (b) the use of force within the meaning of section 27 or 28, or an act immediately preparatory to the use of force, for the purposes mentioned in section 27(1) or 28(1).

Self-defence, prevention of crime, &c.

40 27.—(1) The use of force by a person for any of the following purposes, if only such as is reasonable in the circumstances as he believes them to be, does not constitute an offence—

Justifiable use of force: protection of person or property, prevention of crime, &c.

(a) to protect himself or another from injury, assault or detention caused by a criminal act;

EXPLANATORY NOTES

Clause 26

This clause provides for the defence of duress of circumstances. The nature of the defence and its application to murder is discussed at paragraphs 35.1-35.12. Paragraphs 35.3-35.7 explain the relationship between this defence and those of duress by threats and necessity.

Clauses 27-30

These clauses provide in some detail for a defence of the use of force for certain stated purposes. The defence is explained in paragraphs 36.1-40.4.

Clause 27

1. Subsection (1) states the purposes for which the use of force is justifiable provided that the defendant ('D') only uses such force as is reasonable in the circumstances as he believes them to be. These purposes are discussed in paragraphs 38.3-38.18.

PART II

- (b) to protect himself or (with the authority of that other) another from trespass to the person;
- (c) to protect his property from appropriation, destruction or damage caused by a criminal act or from trespass or infringement;
- (d) to protect property belonging to another from appropriation, destruction or damage caused by a criminal act or (with the authority of the other) from trespass or infringement; or
- (e) to prevent crime or a breach of the peace.

(2) The expressions "use of force" and "property" in subsection (1) are defined and extended by sections 29 and 30 respectively. 10

(3) For the purposes of this section an act involves a "crime" or is "criminal" although the person committing it, if charged with an offence in respect of it, would be acquitted on the ground that—

- (a) he was under ten years of age, or
- (b) he acted under duress, whether by threats or of circumstances, or
- (c) his act was involuntary, or
- (d) he was in a state of intoxication, or
- (e) he was insane, so as not to be responsible, according to law, for the act. 15

(4) The references in subsection (1) to protecting a person or property from anything include protecting him or it from its continuing; and the reference to preventing crime or a breach of the peace shall be similarly construed. 20

(5) For the purposes of this section the question whether the act against which force is used is of a kind mentioned in any of paragraphs (a) to (e) of subsection (1) shall be determined according to the circumstances as the person using the force ("D") believes them to be. 25

In the following provisions of this section references to unlawful or lawful acts are to acts which are or are not of such a kind.

(6) Where an act is lawful by reason only of a belief or suspicion which is mistaken, the defence provided by this section applies as in the case of an unlawful act, unless— 30

(a) D knows or believes 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, 35

in which case the defence applies only if D believes the force to be immediately necessary to prevent injury to himself or another.

(7) The defence provided by this section does not apply to a person who causes conduct or a state of affairs with a view to using force to resist or terminate it. 40

But the defence may apply although the occasion for the use of force arises only because he does something he may lawfully do, knowing that such an occasion may arise.

Justifiable use of force: effecting or assisting arrest.

28.—(1) The use of force by a person in effecting or assisting in a lawful arrest, if only such as is reasonable in the circumstances as he believes them to be, does not constitute an offence. 45

EXPLANATORY NOTES

2. Subsection (3) provides that where D uses force to prevent a crime, he may still benefit from the defence even if the person against whom he uses the force ('P') would be acquitted of that crime on one of the grounds specified. These grounds are discussed in paragraphs 38.19-38.23.

3. Subsection (6) provides for the application of the defence where P would, if prosecuted for his own conduct, have a defence based on his mistaken belief or suspicion as to the circumstances. This is explained in paragraphs 38.24-38.29. The subsection also provides a qualified exception to this rule where D knows or believes that P is a constable or person assisting a constable and the constable is acting in the execution of his duty: this exception, which mirrors the current law, is explained in paragraphs 39.1-39.5.

Clause 28

This clause provides a defence where D uses force in effecting or assisting a lawful arrest. The provision is explained in paragraphs 38.30-38.34.

(2) The expression "use of force" in subsection (1) is defined and extended by section 29.

(3) For the purposes of this section the question whether the arrest is lawful shall be determined according to the circumstances as the person using the force believed them to be.

29.—(1) For the purposes of sections 27 and 28—

Meaning of "use of force" and related provisions.

- (a) a person uses force in relation to another person or property not only where he applies force to, but also where he causes an impact on, the body of that person or that property;
- 10 (b) a person shall be treated as using force in relation to another person if—
 - (i) he threatens him with its use, or
 - (ii) he detains him without actually using it; and
- 15 (c) a person shall be treated as using force in relation to property if he threatens a person with its use in relation to property.

(2) Those sections apply in relation to acts immediately preparatory to the use of force as they apply in relation to acts in which force is used.

(3) A threat of force may be reasonable although the actual use of force would not be.

20 (4) The fact that a person had an opportunity to retreat before using force shall be taken into account, in conjunction with other relevant evidence, in determining whether the use of force was reasonable.

30.—(1) For the purposes of section 27(1)(c) and (d) (justifiable use of force: protection of property) the expression "property" means property of a tangible nature, whether real or personal, or any right, interest or privilege in or over any such property, whether created by grant, licence or otherwise.

Meaning of "property" and related provisions.

The expression also includes—

- (a) money,
- 30 (b) wild creatures which have been tamed or are ordinarily kept in captivity, and
- (c) any other wild 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,
- 35 but not mushrooms growing wild on any land or flowers, fruit or foliage of a plant growing wild on any land.

For this purpose "mushroom" includes any fungus and "plant" includes any shrub or tree.

40 (2) Property shall be treated for the purposes of section 27(1)(c) and (d) as belonging to any person—

- (a) having the custody or control of it,
- (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

EXPLANATORY NOTES

Clause 29

This clause defines "use of force" and makes some other related provisions. Subsection (1) extends the definition to the causing of impact, detention and to the threatened use of force. Subsection (2) extends the defence to acts immediately preparatory to the use of force. Subsection (3) provides that a threat of force may be reasonable even though the actual use of force would not be. Subsection (4) provides for the taking into account, in determining whether the use of force was reasonable, of the fact that a person had an opportunity to retreat before using it. These provisions are explained at paragraphs 38.2, 39.8 and 39.10.

Clause 30

This clause provides a definition of "property" for the purposes of the justifiable use of force in its protection.

PART II

(c) having a charge on it;
and where a property is subject to a trust, the persons to whom it belongs shall be treated as including any person having a right to enforce the trust.

Property of a corporation sole shall be treated as belonging to the corporation notwithstanding a vacancy in the corporation. 5

Supervening or transferred fault

Supervening fault.

31. Where it is an offence to be at fault in causing a result and a person lacks the fault required when he does an act that may cause, or does cause, the result, he nevertheless commits the offence if— 10

- (a) being aware that he has done the act and that the result may occur or, as the case may be, has occurred and may continue, and
- (b) with the fault required,

he fails to take reasonable steps to prevent the result occurring or continuing and it does occur or continue. 15

Transferred fault and defences.

32.—(1) In determining whether a person is guilty of an offence, his intention to cause, or his awareness of a risk that he will cause, 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, an awareness of a risk that he will cause, that result in relation to any other person or thing affected by his conduct. 20

(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. 25

Supplementary

Effect of voluntary intoxication.

33.—(1) For the purposes of this Part a person who was voluntarily intoxicated at any material time shall be treated as not having believed in any circumstance which he would not then have believed in had he not been intoxicated. 30

(2) The expressions “voluntarily intoxicated” and “intoxicated” in subsection (1) shall be construed in accordance with section 35.

Interpretation of Part II.

34. In this Part—
“fault”, in relation to an offence, means an element of the offence consisting of either or both of the following— 35

- (a) a state of mind with which a person acts, or
 - (b) a failure to comply with a standard of conduct,
- and references to a person being at fault shall be construed accordingly; and

“injury” means— 40

- (a) physical injury, including pain, unconsciousness, or any other impairment of a person’s physical condition, or

EXPLANATORY NOTES

Clause 31

This clause imposes criminal liability according to the principle of supervening fault, which it restates and generalises, as explained in paragraphs 41.1-41.9 of this Report.

Clause 32

This clause gives effect to the principle of transferred fault and provides a corresponding rule for "transferred" defences, as explained at paragraphs 42.1-42.6 of this Report.

Clause 33

This clause preserves the existing common law rule qualifying defences based on mistaken belief where the defendant is intoxicated; i.e. that he must be treated as not having believed in any circumstance which he would not have believed in when sober. The retention of this rule is explained in paragraphs 44.10-44.13.

Clause 34

This clause provides for the interpretation of Part II of the Bill. The definition of "fault" operates in clause 31 which deals with supervening fault, as discussed at paragraphs 41.1-41.9 of this Report. The definition of "injury" is identical to that in clause 18. It operates in clauses 25 (duress by threats), 26 (duress of circumstances) and 27 (justifiable use of force).

(b) impairment of a person’s mental health.

PART II

PART III

SUPPLEMENTARY PROVISIONS

35.—(1) Whether a person is “voluntarily intoxicated” for the purposes of this Act shall be determined in accordance with the following provisions.

Provisions as to voluntary intoxication.

(2) A person is voluntarily intoxicated if he takes an intoxicant, otherwise than properly for a medicinal purpose, being aware that it is or may be an intoxicant and takes it in such a quantity as impairs his awareness or understanding.

(3) A person shall be treated as taking an intoxicant when he permits it to be administered to him.

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

- (a) is not taken on medical advice, or
- (b) is taken on medical advice but the taker fails then or thereafter to comply with any condition forming part of the advice,

and 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.

Accordingly, intoxication resulting from such taking or failure is voluntary.

(5) In this section “intoxicant” means alcohol, drugs or any other thing which, when taken into the body, may impair awareness or understanding.

(6) Intoxication shall be presumed to have been voluntary unless there is adduced such evidence as might lead the court or jury to conclude that there is a reasonable possibility that the intoxication was involuntary.

36.—(1) The following common law offences are abolished—

Abolition of certain common law offences, defences and other rules.

- (a) common assault;
- (b) battery;
- (c) mayhem;
- (d) false imprisonment;
- (e) kidnapping.

(2) The following common law defences are abrogated—

- (a) the defence of duress, whether by threats or of circumstances;
- (b) the defence of coercion of a wife by her husband;
- (c) any defence available in respect of the use of force within the meaning of section 27 or 28, or an act immediately preparatory to the use of force, for the purposes mentioned in section 27(1) or 28(1);

but without prejudice to any distinct defence of necessity.

EXPLANATORY NOTES

Clause 35

This clause provides for the determination of the question whether a person is or is not "voluntarily intoxicated" for the purposes of the Bill and also supplies a definition of "intoxicant". Paragraphs 45.1-45.6 explain these provisions.

Clause 36

This clause abolishes those common law offences, defences and other common law rules which are replaced by the provisions of the Bill. It also expressly saves any distinct defence of necessity. The reason for this latter provision is explained in paragraphs 35.4-35.7 of this Report.

PART III

(3) The common law rules relating to the matters provided for in sections 31 and 32 (supervening or transferred fault) shall cease to have effect.

(4) Nothing in this section applies in relation to an offence committed, or act or omission done or made, before the coming into force of this Act. 5

Minor and consequential amendments; repeals.

37.—(1) The enactments mentioned in Schedule 3 are amended in accordance with that Schedule.

(2) The enactments mentioned in Schedule 4 are repealed to the extent specified.

(3) No amendment or repeal applies in relation to an offence 10 committed, or act or omission done or made, before the coming into force of this Act.

Extent.

38.—(1) The provisions of Schedules 3 and 4 (minor and consequential amendments; repeals) which amend or repeal the following enactments—

- | | | |
|-------------|---|----|
| 1978 c.17. | (a) the Internationally Protected Persons Act 1978, | 15 |
| 1978 c. 26. | (b) the Suppression of Terrorism Act 1978, | |
| 1982 c. 36. | (c) the Aviation Security Act 1982, | |
| 1989 c. 33. | (d) the Extradition Act 1989, and | |
| 1990 c. 31. | (e) the Aviation and Maritime Security Act 1990, | |

extend to the whole of the United Kingdom. 20

(2) Otherwise, the provisions of this Act extend to England and Wales only.

Short title and commencement.

39.—(1) This Act may be cited as the Criminal Law Act 1993.

(2) This Act shall come into force at the end of the period of two months beginning with the day on which it is passed. 25

EXPLANATORY NOTES

Clause 37

1. Subsection (1) of this clause introduces Schedule 3 to the Bill, which contains consequential amendments. Further explanation of the amendments made to sections 29 and 30 of the Offences Against the Person Act 1861 is to be found in paragraphs 8.1-8.4 of Appendix C; and of sections 32, 33 and 34 of the 1861 Act at paragraphs 10.1-10.9 of Appendix C.

2. Subsection (2) introduces Schedule 4 to the Bill which repeals certain statutory offences and makes other consequential repeals. As explained in the opening notes to Appendix C to this Report, that appendix results from a critical review of all the extant provisions of the 1861 Act which fall within the ambit of this project. The abolition by Schedule 4 of certain of these offences, apart from the main ones directly replaced in the Bill, therefore takes forward the process of revision of that Act, to the extent explained in Appendix C.

Clause 38

This clause provides for the extent of the Bill.

Clause 39

This clause provides for the short title of the Bill, and for its commencement.

SCHEDULES

SCHEDULE 1

Section 14

APPROPRIATE CONSENT FOR PURPOSES OF SECTION 14 IN CERTAIN CASES

Child in care of local authority

- 5 1. Where a child is in the care of a local authority within the meaning of the Children Act 1989, the appropriate consent for the purposes of section 14(1) of this Act is the consent of the local authority in whose care the child is. 1989 c. 41.

Child in place of safety

2. Where a child is—
- 10 (a) detained in a place of safety under section 16(3) of the Children and Young Persons Act 1969, or 1969 c. 54.
- (b) remanded to local authority accommodation under section 23 of that Act,
- 15 the appropriate consent for the purposes of section 14(1) of this Act is the leave of any magistrates' court acting for the area in which the place of safety is.

Adoption and custodianship

- 3.—(1) This paragraph applies where a child is the subject of—
- (a) an order under section 18 of the Adoption Act 1976 freeing him for adoption; or 1976 c. 36.
- 20 (b) a pending application for such an order; or
- (c) a pending application for an adoption order; or
- (d) an order under section 55 of the Adoption Act 1976 relating to adoption abroad or of a pending application for such an order.
- (2) In such a case the appropriate consent for the purposes of section 14(1) of this Act is—
- 25 (a) in a case within sub-paragraph (1)(a) above, the consent of—
- (i) the adoption agency which made the application for the section 18 order, or
- 30 (ii) if the section 18 order has been varied under section 21 of that Act so as to give parental responsibility to another agency, that other agency;
- (b) in a case within sub-paragraph (1)(b) or (c) above, the leave of the court to which the application was made; and
- 35 (c) in a case within sub-paragraph (1)(d) above, the leave of the court which made the order or, as the case may be, to which the application was made.
- (3) References in sub-paragraph (2) above to a court include, in a case where the court is a magistrates' court, any magistrates' court acting for the same area as that court.

40 *Cases within paragraphs 1 and 3*

4. In the case of a child falling within both paragraph 1 and paragraph 3 above, the provisions of paragraph 3 apply to the exclusion of those in paragraph 1.

EXPLANATORY NOTES

SCHEDULES

SCHEDULE 1

This schedule is introduced by clause 14 (abduction of child by a parent). It makes special provision with respect to children in certain cases.

SCHEDULE 2

This schedule, introduced by clause 22, sets out the mode of trial (column 3), the maximum sentences (column 4) and any restriction on the institution of proceedings (column 5) for the offences in the Bill.

SCHEDULE 3

This schedule, introduced by clause 37(1), provides for the modernisation of sections 29, 30 and 31; the repeal of sections 32 and 33; and the modernisation and extension of section 34 of the Offences Against the Person Act 1861. This schedule also provides for the consequential amendment of statutes affected by these changes and by other provisions of the Bill.

SCHEDULE 4

This schedule sets out the enactments repealed by clause 37(2). The repealed provisions include the main offences in the Offences Against the Person Act 1861 which are replaced in the Bill, some further offences under that Act (the reasons for whose repeal are given in Appendix C to this Report), certain offences in other Acts transferred to the Bill and other provisions related to the foregoing.

SCH. 1

Interpretation

5. In this Schedule—

- 1976 c. 36. (a) “adoption agency” and “adoption order” have the same meaning as in the Adoption Act 1976; and
- 1979 c. 55. (b) “area”, in relation to a magistrates’ court, means the petty sessions area (within the meaning of the Justices of the Peace Act 1979) for which the court is appointed. 5

Section 22

SCHEDULE 2

PROSECUTION AND PUNISHMENT

(1) Provision creating offence	(2) Nature of offence	(3) How triable	(4) Punishment	(5) Restriction on institution of proceedings
5	Intentional serious injury	Only on indictment.	Life.	
10	Reckless serious injury	Either way.	On indictment: 5 years. Summarily: 6 months or a fine not exceeding the statutory maximum, or both.	
15	Intentional or reckless injury	Either way.	On indictment: 3 years. Summarily: 6 months or a fine not exceeding the statutory maximum, or both.	
20	Administering a substance without consent	Either way.	On indictment: 3 years. Summarily: 6 months or a fine not exceeding the statutory maximum, or both.	
	Assault	Only summarily.	6 months or a fine not exceeding level 5 on the standard scale, or both.	

(1) Provision creating offence	(2) Nature of offence	(3) How triable	(4) Punishment	(5) Restriction on institution of proceedings
5	7 Assault on a constable	Only summarily.	6 months or a fine not exceeding level 5 on the standard scale, or both.	
8	Assault to resist arrest	Either way.	On indictment: 2 years. Summarily: 6 months or a fine not exceeding the statutory maximum, or both.	
10	9 Threats to kill or cause serious injury	Either way.	On indictment: 10 years. Summarily: 6 months or a fine not exceeding the statutory maximum, or both.	
15	10 Torture	Only on indictment.	Life.	Only by or with the consent of the Attorney General.
11	Unlawful detention	Either way.	On indictment: 5 years. Summarily: 6 months or a fine not exceeding the statutory maximum, or both.	
20	12 Kidnapping	Only on indictment.	Life.	
13	Hostage-taking	Only on indictment.	Life.	Only by or with the consent of the Attorney General.

(1) Provision creating offence	(2) Nature of offence	(3) How triable	(4) Punishment	(5) Restriction on institution of proceedings
5 14	Abduction of child by parent, &c.	Either way.	On indictment: 7 years. Summarily: 6 months or a fine not exceeding the statutory maximum, or both.	Only by or with the consent of the Director of Public Prosecutions.
10 15	Abduction of child by other persons	Either way.	On indictment: 7 years. Summarily: 6 months or a fine not exceeding the statutory maximum, or both.	Only by or with the consent of the Director of Public Prosecutions.
16	Aggravated abduction	Only on indictment.	Life.	Only by or with the consent of the Director of Public Prosecutions.

Section 37(1).

SCHEDULE 3

MINOR AND CONSEQUENTIAL AMENDMENTS

Offences against the Person Act 1861 (c.100)

1. For section 29 of the Offences against the Person Act 1861 (maliciously exploding, sending, placing or throwing gunpowder or other explosive substances, &c. intending to do grievous bodily harm) substitute—

“Causing serious injury by explosives. 29.—(1) A person is guilty of an offence if, intending to cause serious injury, he—

- (a) causes an explosive substance to explode,
- (b) places an explosive substance in any place, 10
- (c) delivers or sends an explosive substance to any person, or
- (d) throws or applies an explosive substance at or to any person.

(2) A person guilty of an offence under this section is liable on conviction on indictment to imprisonment for life. 15

(3) In this section “serious injury” has the same meaning as in Part I of the Criminal Law Act 1993 and “explosive substance” has the same meaning as in the Explosive Substances Act 1883.”. 20

2. For section 30 of the Offences against the Person Act 1861 (maliciously placing gunpowder near a building, &c. intending to do bodily harm) substitute—

“Causing injury by explosives. 30.—(1) A person is guilty of an offence if, intending to cause injury, he— 25

- (a) places an explosive substance in, on or near any building, ship or vessel, or
- (b) throws an explosive substance at, on or into any building, ship or vessel.

(2) A person guilty of an offence under this section is liable on conviction on indictment to imprisonment for a term not exceeding fourteen years. 30

(3) In this section “injury” has the same meaning as in Part I of the Criminal Law Act 1993 and “explosive substance” has the same meaning as in the Explosive Substances Act 1883.”. 35

3. In section 31 of the Offences against the Person Act 1861 (setting spring guns, &c. with intent to inflict grievous bodily harm)—

- (a) for “inflict grievous bodily harm” (where first occurring) substitute “cause serious injury”, and
- (b) for “inflict grievous bodily harm upon” substitute “cause serious injury to”; 40

and at the end add—

“In this section “injury” and “serious injury” have the same meaning as in Part I of the Criminal Law Act 1993.”.

4. Sections 32 and 33 of the Offences against the Person Act 1861 (maliciously doing certain acts intending to endanger the safety of railway passengers and employees) shall cease to have effect. 45

5. For section 34 of the Offences against the Person Act 1861 (doing or omitting anything to endanger passengers and others on a railway) substitute—

“Endangering safety of railway passengers or employees.”

5

34.—(1) A person is guilty of an offence if he does any act or makes any omission which endangers the safety of any person conveyed or being in or upon a railway (whether as a passenger or as a person employed in the railway undertaking) intending to endanger the safety of such a person or being reckless whether such a person might be endangered.

(2) A person guilty of an offence under this section is liable on conviction on indictment to imprisonment for a term not exceeding two years.”

10

Children and Young Persons Act 1933 (c.12)

6. In Schedule 1 to the Children and Young Persons Act 1933 (offences against children and young persons with respect to which special provisions of that Act apply), for the words “Common assault, or battery.” (inserted by paragraph 8 of Schedule 15 to the Criminal Justice Act 1988) substitute—

1988 c. 33.

15

“Any offence under sections 6, 14 or 15 of the Criminal Law Act 1993.”

House to House Collections Act 1939 (c.44)

7. In the Schedule to the House to House Collections Act 1939 (offences justifying refusal or revocation of licence) at the end add “Offences under section 6 of the Criminal Law Act 1993.”

20

Visiting Forces Act 1952 (c.67)

8. In the Schedule to the Visiting Forces Act 1952 (offences against the person subject to restrictions on trial in the United Kingdom), in paragraph 1(b) at the end add—

25

“(xiii) Part I of the Criminal Law Act 1993.”

Criminal Law Act 1967 (c.58)

9. In section 3 of the Criminal Law Act 1967 (use of force in prevention of crime, &c.), after subsection (2) insert—

30 “(3) As from the commencement of sections 27 to 30 of the Criminal Law Act 1993 (provisions as to self-defence, prevention of crime, &c.), this section applies only in relation to civil liability.”

35 10. In section 6 of the Criminal Law Act 1967 (alternative verdicts on indictment for murder), in subsection (2)(a) for the words “causing grievous bodily harm with intent to do so” substitute “intentionally causing serious injury (within the meaning of section 2 of the Criminal Law Act 1993)”.

Firearms Act 1968 (c27)

11.—(1) Schedule 1 to the Firearms Act 1968 (offences to which provisions relating to use of firearm to resist arrest apply) is amended as follows.

(2) In paragraph 2—

- 40 (a) for the words “section 30 (laying explosive to building etc.);” substitute “section 30 (causing injury by explosives);” and
 (b) for the words “section 32 (endangering railway passengers by tampering with track);” substitute “section 34 (endangering safety of railway passengers or employees).”

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(3) For paragraph 2A substitute—

“2A. Offences under any of the following provisions of the Criminal Law Act 1993—

- section 2 (intentional serious injury);
- section 3 (reckless serious injury); 5
- section 4 (intentional or reckless injury);
- section 5 (administering a substance without consent);
- section 6 (assault);
- section 7 (assault on a constable);
- section 8 (assault to resist arrest); 10
- section 14 (abduction of child by parent, &c.);
- section 15 (abduction of child by other persons);
- section 16 (aggravated abduction).”.

Theft Act 1968 (c.60)

12. In section 9 of the Theft Act 1968 (burglary) in subsection (1)(b) for 15
“inflicts or attempts to inflict on any person therein any grievous bodily harm”
substitute “causes or attempts to cause any person therein serious injury (within the
meaning of Part I of the Criminal Law Act 1993)”.

Criminal Damage Act 1971 (c.48)

13.—(1) Section 5 of the Criminal Damage Act 1971 (which defines certain 20
lawful excuses for offences under that Act) is amended as follows.

(2) In subsection (2)(b) for the words from “and at the time of the act or
acts” to the end substitute “and the acts or acts alleged to constitute the offence
were reasonable in the circumstances as he believed them to be”.

(3) After subsection (2) insert— 25

“(2A) For the purposes of subsection (2)(b) above a person who was
voluntarily intoxicated at the time of the act or acts alleged to constitute the
offence shall be treated as not having believed in any circumstances
which he would not have believed in if he had not been intoxicated.

In this section ‘voluntarily intoxicated’ (and ‘intoxicated’) shall be 30
construed in accordance with section 35 of the Criminal Law Act 1993.”.

(4) In subsection (3) for the words from the beginning to “it is immaterial”
substitute “Except as provided by subsection (2A), it is immaterial for the
purposes of subsection (2) above”.

Domestic Violence and Matrimonial Proceedings Act 1976 (c.50) 35

14. In section 2(1) of the Domestic Violence and Matrimonial Proceedings
Act 1976 (arrest for breach of injunction) for “actual bodily harm” substitute
“injury (within the meaning of Part I of the Criminal Law Act 1993)”.

Internationally Protected Persons Act 1978 (c.17)

15. In section 1 of the Internationally Protected Persons Act 1978 (attacks 40
and threats of attacks on protected persons), in subsection (1)(a)—

- (a) after the word “abduction” insert “(not including an offence under
section 14 of the Criminal Law Act 1993)”, and
- (b) after the words “Offences against the Person Act 1861 or” insert “an
offence under section 2, 3, 4, 5 or 11 of the Criminal Law Act 1993 or”. 45

Suppression of Terrorism Act 1978 (c.26)

16.—(1) The Suppression of Terrorism Act 1978 is amended as follows.

(2) In section 4 (jurisdiction in respect of offences committed outside United Kingdom), in subsection (1)(a) after “11” insert “11ZA”.

5 (3) In Schedule 1 (list of offences), after paragraph 8 insert—

“8A. An offence under any of the following provisions of the Criminal Law Act 1993—

- (a) section 2 (intentional serious injury);
- (b) section 3 (reckless serious injury);
- 10 (c) section 4 (intentional or reckless injury);
- (d) section 5 (administering a substance without consent).”.

(4) In the same Schedule, after paragraph 11 insert—

“11ZA. An offence under any of the following provisions of the Criminal Law Act 1993—

- 15 (a) section 11 (unlawful detention);
- (b) section 12 (kidnapping);
- (c) section 15 (abduction of child by person other than parent);
- (d) section 16 (aggravated abduction).

20 11ZB. An offence under section 13 of the Criminal Law Act 1993 (hostage-taking).”.

Magistrates' Courts Act 1980 (c.43)

17. In Schedule 1 to the Magistrates' Courts Act 1980 (offences triable either way) in paragraph 5(e) for the words “section 34 (doing or omitting to do anything so as to endanger railway passengers);” substitute “section 34
25 (endangering safety of railway passengers or employees);”.

Criminal Justice Act 1982 (c.48)

18.—(1) Schedule 1 to the Criminal Justice Act 1982 (offences excluded from early release) is amended as follows.

(2) In Part II, in paragraph 8, for “causing explosions or casting corrosive
30 fluids with intent to do grievous bodily harm” substitute “causing serious injury by explosives”.

(3) At the end add, appropriately numbered—

“Criminal Law Act 1993 (c.00)

- . Section 2 (intentional serious injury).
- 35 . Section 3 (reckless serious injury).
- . Section 4 (intentional or reckless injury).
- . Section 5 (administering a substance without consent).
- . Section 9 (threats to kill or cause serious injury).
- . Section 10 (torture).”.

40 *Aviation Security Act 1982 (c.36)*

19.—(1) In section 2 of the Aviation Security Act 1982 (destroying, damaging or endangering safety of aircraft), in subsection 7(a), after the words “Offences against the Person Act 1861 or” insert “under section 2, 3, 4 or 5 of the Criminal Law Act 1993 or”.

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(2) In section 6 (ancillary offences), in subsection (1), after the words "Offences against the Person Act 1861 or" insert "under section 2, 3, 4 or 5 of the Criminal Law Act 1993 or".

(3) In section 10 (purposes to which Part II applies), in subsection (2), after the words "Offences against the Person Act 1861" insert "or under section 2, 3, 4 or 5 of the Criminal Law Act 1993". 5

Nuclear Materials (Offences) Act 1983 (c.18)

20. In section 1 of the Nuclear Materials (Offences) Act 1983 (extended scope of certain offences), in subsection (1)(b), after the words "Offences against the Person Act 1861 or" insert "section 2, 3 or 4 of the Criminal Law Act 1993 or". 10

Police and Criminal Evidence Act 1984 (c.60)

21. In Schedule 5 to the Police and Criminal Evidence Act 1984 (serious arrestable offences), in Part II at the end, add—

"Criminal Law Act 1993 (c.00) 15

10. Section 10 (torture).

11. Section 13 (hostage-taking)."

Criminal Justice Act 1988 (c.33)

22.—(1) The Criminal Justice Act 1988 is amended as follows.

(2) In section 40 (power to join in indictment count of common assault, &c.), for subsection (3)(a) substitute— 20

"(a) an offence under section 6 of the Criminal Law Act 1993 (assault);".

(3) In section 109 (criminal injuries), in subsection (3) after paragraph (k) insert— 25

"(kk) unlawful detention;".

Extradition Act 1989 (c.33)

23.—(1) The Extradition Act 1989 is amended as follows.

(2) In section 22 (extension of purposes of extradition for offences under Acts giving effect to international conventions), in subsection (4)(e) after the words "the Taking of Hostages Act 1982" insert "or section 13 of the Criminal Law Act 1993". 30

(3) In section 25 (hostage-taking), in subsection (1)(b) after the words "the Taking of Hostages Act 1982" insert "or section 13 of the Criminal Law Act 1993". 35

(4) In Schedule 1, in paragraph 15(e) (deemed extension of jurisdiction of foreign states), after the words "the Taking of Hostages Act 1982" insert "or section 13 of the Criminal Law Act 1993".

Children Act 1989 (c.41)

24. In section 51 of the Children Act 1989 (refuges for children at risk), for subsection (7)(d) substitute— 40

"(d) section 15 of the Criminal Law Act 1993."

Aviation and Maritime Security Act 1990 (c.31)

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25.—(1) The Aviation and Maritime Security Act 1990 is amended as follows.

(2) In section 1 (endangering safety at aerodromes), in subsection (9) after the words “Explosive Substances Act 1883” insert “or under section 2, 3, 4 or 5 of the Criminal Law Act 1993”

(3) In section 11 (destroying ships or fixed platforms or endangering their safety), in subsection (7) after the words “Explosive Substances Act 1883” insert “or under section 2, 3, 4 or 5 of the Criminal Law Act 1993”.

(4) In section 14 (ancillary offences), in subsection (2) after the words “Offences against the Person Act 1861” insert “and sections 2, 3, 4 and 5 of the Criminal Law Act 1993”.

(5) In section 18 (purposes to which Part III applies), in subsection (2) after the words “Offences against the Person Act 1861” insert “or under section 2, 3, 4 or 5 of the Criminal Law Act 1993”.

SCHEDULE 4

Section 37(2)

REPEALS

Chapter	Short title	Extent of repeal
20 1861 c. 100.	Offences against the Person Act 1861.	Sections 16 to 18. Sections 20 to 28. Sections 32 and 33. Sections 35 to 38. Sections 44 and 45. Section 47.
25 1933 c. 12.	Children and Young Persons Act 1933.	In Schedule 1, in the entry relating to the Offences against the Person Act, the words “twenty-seven or”.
30 1939 c. 44.	House to House Collections Act 1939.	In the Schedule, the entry for the Offences against the Person Act 1861.
1952 c. 67.	Visiting Forces Act 1952.	In the Schedule, in paragraph 1, subparagraph (b)(x).
35 1964 c. 48.	Police Act 1964.	In section 51, subsections (1) and (2).
40 1968 c. 27.	Firearms Act 1968.	In Schedule 1— (a) in paragraph 2, the words from “sections 20” to “drugs);” and the words from “section 38” to “assaults);”; (b) in paragraph 5, the words “section 51(1) of the Police Act 1964 or”.
45 1977 c. 45.	Criminal Law Act 1977.	In Schedule 12, the entry for the Offences against the Person Act 1861.

SCH. 4

Chapter	Short title	Extent of repeal	
1978 c. 26.	Suppression of Terrorism Act 1978.	In section 4(1)(a), the words "11B".	
		In Schedule 1, paragraphs 11A and 11B.	5
1980 c. 43.	Magistrates' Courts Act 1980.	In Schedule 1, paragraph 5(a) to (d) and (f) to (h).	
1982 c. 28.	Taking of Hostages Act 1982.	Section 1. Section 2(1). Section 3(2).	10
1982 c. 36.	Aviation Security Act 1982.	In section 10(2) the words from "18" to "28 or".	
1982 c. 48.	Criminal Justice Act 1982.	In Schedule 1, in Part II, paragraphs 2 to 7 and 30.	
1984 c. 37.	Child Abduction Act 1984.	Sections 1 to 5. Section 11(1) to (4). The Schedule.	15
1984 c. 60.	Police and Criminal Evidence Act 1984.	In Schedule 5, in Part II, paragraphs 7 and 9.	
1986 c. 55.	Family Law Act 1986.	Section 65.	20
1988 c. 33.	Criminal Justice Act 1988.	Section 39. Section 134.	
		In section 135, paragraph (a). In Schedule 15, paragraphs 2 to 4, 9, 91 and 102.	25
1990 c. 31.	Aviation and Maritime Security Act 1990.	In section 18(2), the words from "18" to "28 or".	

APPENDIX B

RECOMMENDATIONS IN RESPECT OF CERTAIN SPECIFIC SECTIONS OF THE OFFENCES AGAINST THE PERSON ACT 1861

NOTE:

The Commission has taken the opportunity provided by the present project of critically reviewing all of the extant provisions of the 1861 Act, apart from those which, being concerned with homicide or sexual offences, fall outside the ambit of the project. The parts of the 1861 Act that affect the central concerns of the project are discussed at length in the body of this Report. In this Appendix we make recommendations as to the retention, amendment or repeal of other still extant sections of the 1861 Act. An *aide memoire* summarising the destination of each section of the 1861 Act will be found in Appendix C to this Report.

1.1 *Section 17*, Impeding a person endeavouring to save himself from a shipwreck.

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

1.2 The CLRC sought the opinion of the Department of Trade and Industry on the repeal of this section.⁴⁶¹ The Department expressed a reluctance to recommend repeal because they felt that the alternatives which the CLRC were suggesting would not make section 17 redundant. However, the CLRC noted that there had been no prosecutions under this section in the ten years previous to their report and that it was, therefore, almost obsolete. The CLRC felt that, unless a more convincing case could be made for its retention, section 17 should be repealed without replacement.

1.3 We propose, following the conclusions of the CLRC, that section 17 should be repealed and so provide in Schedule 4.

2.1 *Section 21*, Attempting to choke, etc., in order to commit or assist in the committing of any indictable offence.

“Whosoever shall, by any means whatsoever, attempt to choke, suffocate, or strangle any other person, or shall, by any means calculated to choke, suffocate, or strangle, attempt to render any other person insensible, unconscious, or incapable of resistance, with intent in any of such cases thereby to enable himself or any other person to commit, or with intent in any of such cases thereby to assist any other person in committing, any indictable offence, shall be guilty of felony . . .”

2.2 The CLRC recommended that section 21 be repealed.⁴⁶² They considered that because “injury” should be understood to include loss of consciousness, the offences of causing injury and of administering any substance which in the circumstances is capable of interfering substantially with another’s bodily functions, which are now to be found in clauses 2–5 of the Criminal Law Bill, will cover most of the cases in section 21. The CLRC thought that special provision could be made in relation to particular types of act, as had been done in section 4 of the Sexual Offences Act 1956.

2.3 For the reasons stated by the CLRC we consider that section 21 would be overtaken by the offences in clauses 2–5 of the Bill, and so provide for its repeal in Schedule 4.

⁴⁶¹ Fourteenth Report, paragraphs 205–206.

⁴⁶² Fourteenth Report, paragraphs 207–208.

3.1 *Section 22*, Using chloroform, etc., to commit or assist in the committing of any indictable offence.

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

3.2 The CLRC considered that section 22 could be repealed without replacement for the same reasons as section 21,⁴⁶³ and we so provide in Schedule 4.

4.1 *Section 25*, If the jury be not satisfied that the person charged under section 23 is guilty of felony, but guilty of misdemeanor, they may find him guilty accordingly.

“If, upon the trial of any person for any felony in the last but one preceding section mentioned, the jury shall not be satisfied that such person is guilty thereof, but shall be satisfied that he is guilty of any misdemeanor in the last preceding section mentioned, then and in every such case the jury may acquit the accused of such felony, and find him guilty of such misdemeanor, and thereupon he shall be liable to be punished in the same manner as if convicted upon an indictment for such misdemeanor.”

4.2 This section is redundant following the repeal of section 23 that is proposed in paragraph 24.5 of this Report and we, therefore, provide for its repeal in Schedule 4. The present Bill makes general provision for alternative verdicts in clause 23.

5.1 *Section 26*, Not providing apprentices or servants with food whereby life endangered.

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

5.2 The CLRC pointed out that there was a similar provision in the Conspiracy and Protection of Property Act 1875, section 6.⁴⁶⁴ They considered that section 26 was no longer required, as it would be covered by their proposals on causing injury or serious injury, and that consideration should be given as to whether this section should be repealed. We agree that the section is now redundant, and also inappropriate in modern conditions in its language and assumptions. We provide for the repeal of section 26 in Schedule 4.

6.1 *Section 27*, Exposing children whereby life is endangered.

“Whosoever shall unlawfully abandon or expose any child, being under the age of two years, whereby the life of such child shall be endangered, or the health of such child shall have been or shall be likely to be permanently injured, shall be guilty of a misdemeanor.”

6.2 The CLRC noted that section 27 had been superseded by section 1(1) of the Children and Young Persons Act 1933,⁴⁶⁵ and considered that it could therefore be repealed.

6.3 In our Code Report we noted that the offence in section 1(1) of the Children and Young Persons Act 1933 is plainly an offence against the *person*,⁴⁶⁶ and that it would in principle be useful for this offence to be associated in a Code with other offences against the person. However, we decided against that course of action as the offence stands

⁴⁶³ Fourteenth Report, paragraphs 207–208.

⁴⁶⁴ Fourteenth Report, paragraphs 209–210.

⁴⁶⁵ Fourteenth Report, paragraph 200.

⁴⁶⁶ Code Report, paragraph 14.60.

alongside many other offences in the 1933 Act, some of which were not offences against the person.

6.4 Part I of the Children and Young Persons Act 1933 relates to the prevention of cruelty to children under sixteen years of age and the exposure of such children to moral or physical danger. It gives protection to children by the following criminal offences:

wilfully to assault, ill-treat, neglect, abandon or expose a child or to cause or procure such offences (s.1),
to allow children in brothels (s.3),
allowing children to be used for begging (s.4),
giving intoxicating liquor to children under the age of five years (s.5),
selling tobacco to children under sixteen (s.7),
punishment of vagrants who prevent children from receiving an education (s.10),
exposing children under the age of twelve to the risk of burning (s.11),
punishment of persons for failing to provide for the safety of children at entertainments (s.12).

6.5 Section 27 of the 1861 Act was not repealed by the Children and Young Persons Act 1933 but is, in practice, superseded by it. Section 1 of the 1933 Act reads:

“(1) If any person who has attained the age of sixteen years and has the custody, charge, or care of any child or young person under that age, wilfully assaults, ill-treats, neglects, abandons, or exposes him, or causes or procures him to be assaulted, ill-treated, neglected, abandoned, or exposed, in a manner likely to cause him unnecessary suffering or injury to health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement), that person shall be guilty of a misdemeanor, . . .

(2) For the purposes of this section—

(a) a parent or other person legally liable to maintain a child or young person shall be deemed to have neglected him in a manner likely to cause injury to his health if he has failed to provide adequate food, clothing, medical aid or lodging for him, or if, having been unable otherwise to provide such food, clothing, medical aid or lodging, he has failed to take steps to procure it to be provided under the enactments applicable in that behalf.”

6.6 The Children and Young Persons Act both covers and extends section 27 of the 1861 Act. It refers to the acts of abandoning and exposing a child, and, in addition, to assault, ill-treatment and neglect. It also protects children up to the age of twelve, whereas section 27 is limited to children under the age of two. However, the Children and Young Persons Act protects children against unnecessary suffering or injury to health, whilst the 1861 Act is limited to the *life* of a child being endangered or the health of a child being *permanently* injured. The Children and Young Persons Act 1933 thus provides greater protection for children than section 27 of the 1861 Act. The repeal of section 27 is therefore a sensible course, and we so provide in Schedule 4.

7.1 *Section 28, Causing bodily injury by gunpowder.*

“Whosoever shall unlawfully and maliciously, by the explosion of gunpowder or other explosive substance, burn, maim, disfigure, disable, or do any grievous bodily harm to any person, shall be guilty of felony . . .”

7.2 The CLRC considered that it was more appropriate for this section to be assessed together with the Explosive Substances Act 1883 when a general review of the explosives legislation takes place.⁴⁶⁷ They did not, therefore, deal with those sections in their report. No such review has yet taken place.⁴⁶⁸

7.3 We have reconsidered this section in the light of the general offences now proposed in clauses 2–4 of the Bill. All the *consequences* aimed at by section 28 would be covered by one or other of those offences with, in the case of intentionally causing serious injury by explosives, a maximum sentence of life imprisonment under clause 2 of the Bill. The

⁴⁶⁷ Fourteenth Report, footnote 1 on page 91.

⁴⁶⁸ Code Report, paragraph 14.59.

only distinctive feature of section 28 would, therefore, be the means whereby the injury was inflicted.

7.4 We think it generally undesirable that there should continue to be offences that exist only to identify, but not to impose greater punishment for, a particular method of causing injury; and we cannot perceive any reason why that approach should be departed from in the present case. We therefore provide for the repeal of section 28 in Schedule 4.

8.1 *Section 29*, Causing gunpowder to explode, or sending to any person an explosive substance, or throwing corrosive fluid on a person, with intent to do grievous bodily harm.

“Whosoever shall unlawfully and maliciously cause any gunpowder or other explosive substance to explode, or send or deliver to or cause to be taken or received by any person any explosive substance or any other dangerous or noxious thing, or put or lay at any place, or cast or throw at or upon or otherwise apply to any person, any corrosive fluid or any destructive or explosive substance, with intent in any of the cases aforesaid to burn, maim, disfigure, or disable any person, or to do some grievous bodily harm to any person, shall, whether any bodily injury be effected or not, be guilty of felony . . .”

Section 30, Placing gunpowder near a building, with intent to do bodily injury to any person.

“Whosoever shall unlawfully and maliciously place or throw in, into, upon, against, or near any building, ship, or vessel any gunpowder or other explosive substance, with intent to do any bodily injury to any person, shall, whether or not any explosion take place, and whether or not any bodily injury be effected, be guilty of felony . . .”

8.2 The CLRC felt that sections 29 and 30 should be considered when the explosives legislation was reviewed.⁴⁶⁹ We have however considered them anew as part of the present exercise.

8.3 These sections could arguably provide legitimate means of action against terrorist acts at a stage in their detection that would not necessarily be covered by the law of attempt. We therefore hesitate to recommend their abolition. The present form of these sections however causes a number of problems, in particular that by the use of the word “maliciously” they perpetuate all the confusion that that word causes in interpreting other sections of the 1861 Act, as we have described at length in paragraph 12 of this Report. We therefore propose that sections 29 and 30 be replaced with new versions that express in modern terms what we understand to be their essential provisions. The new sections are set out in paragraphs 1 and 2 of Schedule 3 to the Bill.

8.4 The main amendments that we propose are as follows:

- (i) For the word “maliciously” we substitute the concept of “intending to cause serious injury”. Whilst the latter concept may have a narrower application than does the word “maliciously”, by concentrating on the ulterior intent of the accused it nonetheless ensures that there is effectively retained what we regard as the essential justification for these sections, that they enable persons starting to carry terrorist or similar operations into action to be apprehended before they have actually caused injury.
- (ii) The new sections are, further, arranged in a more easily read style, and omit the archaism of references to “gunpowder”.

8.5 Since they are similarly concerned with explosives, it is convenient here to consider sections 64 and 65 of the 1861 Act.

8.6 *Section 64*, Making or having gunpowder, &c., with intent to commit any felony against this Act.

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

⁴⁶⁹ Fourteenth Report, footnote 1 on p. 91.

8.7 This offence was amplified by section 3 of the Explosive Substances Act 1883, Punishment for attempt to cause explosion, or for making or keeping explosive with intent to endanger life or property:

“Any person who within or (being a subject of Her Majesty) without Her Majesty’s dominions unlawfully and maliciously— . . .

- (b) makes or has in his possession or under his control any explosive substance with intent by means thereof to endanger life, or cause serious injury to property in the United Kingdom, or to enable any other person by means thereof to endanger life or cause serious injury to property in the United Kingdom, shall, whether any explosion does or not take place, and whether any injury to person or property has been actually caused or not, be guilty of a felony, and on conviction shall be liable to penal servitude for a term not exceeding twenty years, or to imprisonment with or without hard labour for a term not exceeding two years, and the explosive substance shall be forfeited.”

8.8 Section 3 of the 1883 Act was substituted by the Criminal Jurisdiction Act 1975, section 7, to the effect that:

“(1) A person who in the United Kingdom or a dependency or (being a citizen of the United Kingdom and Colonies) elsewhere unlawfully and maliciously— . . .

- (b) makes or has in his possession or under his control an explosive substance with intent by means thereof to endanger life, or cause serious injury to property, whether in the United Kingdom or the Republic of Ireland, or to enable any other person so to do,

shall, whether any explosion does or does not take place, and whether any injury to person or property is actually caused or not, be guilty of an offence . . .”

8.9 Section 64 of the 1861 Act therefore makes it an offence to possess, make or manufacture, a dangerous or noxious thing (including explosives) with an intent to commit or enable another to commit a felony under that Act.⁴⁷⁰ The Explosive Substances Act 1883 amplifies certain aspects of that offence by making a specific provision against the possession or making of explosives with the intent to endanger life. It also makes it an offence to make, possess or control an explosive substance with intent to cause serious injury to property. The effect of the Criminal Jurisdiction Act 1975 is to extend section 3 of the Explosive Substances Act 1883 to cases where the life or property threatened is in the Republic of Ireland.

8.10 The CLRC felt that it would be more appropriate to reconsider the sections that fall within the 1861 Act in a general review of the explosives legislation, including the Explosive Substances Act 1883, rather than address those sections in their project.⁴⁷¹

8.11 The essential nature of the offence created by section 64 of the 1861 Act is the intention with which the substance is held, including an intent to commit “felonies” within the 1861 Act. Following section 1 of the Criminal Law Act 1967, the Magistrates’ Courts Act 1980, section 17 and Schedule 1 sets out the offences within the 1861 Act which are thus referred to as those created by sections 16, 20, 26, 27, 34, 36, 38, 47, 57 and 60. Following the repeals that we recommended elsewhere, section 64 will apply only

⁴⁷⁰ Professor Glanville Williams “Wrong Turnings on the Law of Attempt” [1991] Crim LR 416 at page 420, advocates the vigorous use of section 64 to penalise the possession of any thing with intent to commit an indictable offence. His argument is based on a belief that the section had a general ambit, making it an offence for a person knowingly to “have in his possession . . . any . . . thing, with intent by means thereof to commit” a crime under the 1861 Act. However, section 64, like sections 28, 29, 30 and 65 were taken from 9 & 10 Vict. c.25, “An Act for preventing malicious Injuries to Persons and Property by fire, or by explosive or destructive substances”. As we explain in paragraph 12.6 of this Report, the consolidating statute of 1861 enacted the former law without changing the meaning. “Noxious thing” must, therefore, have the same meaning as it had in the 1846 Act, limited to explosives, despite the fact that it has a different meaning elsewhere in the 1861 Act. The difficulty of disentangling this semantic confusion merely further illustrates the unsatisfactory nature of the 1861 Act.

⁴⁷¹ Fourteenth Report, footnote 1 on p. 91. The reference in the footnote is to sections 28, 29, 30, 60 and 65. The reference to section 60 would seem to be an error for section 64, the latter being an offence within the 1861 Act addressing the causing of bodily injury by the use of explosives or possession of explosives. Section 60 creates the offence of concealing the birth of a child.

to sections 34, 57 and 60 of the 1861 Act. However, we propose that it should be retained in this attenuated state, pending a general review of explosives offences.

8.12 *Section 65*, Justices may issue warrants for searching houses, etc., in which explosive substances are suspected to be made for the purpose of committing felonies against this Act.

This section is contingent on section 64 and, therefore, retains some content with the retention of section 64.

9.1 *Section 31*, Setting spring guns, etc., with intent to inflict grievous bodily harm.

“Whosoever shall set or place, or cause to be set or placed, any spring gun, man trap, or other engine calculated to destroy human life or inflict grievous bodily harm, with the intent that the same or whereby the same may destroy or inflict grievous bodily harm upon a trespasser or other person coming in contact therewith, shall be guilty of a misdemeanor. . . ; and whosoever shall knowingly and wilfully permit any such spring gun, man trap, or other engine which may have been set or placed in any place then being in or afterwards coming into his possession or occupation by some other person to continue so set or placed, shall be deemed to have set and placed such gun, trap, or engine with such intent as aforesaid: Provided that nothing in this section contained shall extend to make it illegal to set or place any gin or trap such as may have been or may be usually set or placed with the intent of destroying vermin: Provided also, that nothing in this section shall be deemed to make it unlawful to set or place or cause to be set or placed, or to be continued set or placed, from sunset to sunrise, any spring gun, man trap, or other engine which shall be set or placed, or caused or continued to be set or placed, in a dwelling house, for the protection thereof.”

9.2 The CLRC thought that the language and substance of this section needed to be reconsidered.⁴⁷² They felt, however, that a householder must be allowed to take reasonable steps to deter unauthorised persons from entering his property, and the types of device which should be permitted must raise questions of public policy, which ought to be considered by the appropriate government departments.

9.3 The further consideration envisaged by the CLRC did not occur. The language and arrangement of the section (for instance, in its references to grievous bodily harm and to wilful behaviour) are now very obscure and confusing, and ideally we would have liked to revise the section in modern form. It would, however, be hazardous to take that step without reviewing the policy of the section, as the CLRC urged. It would unduly delay the present project to take up that (in this context, minor) matter, so we leave the section untouched, save by substituting the language of the Bill for the original expression “grievous bodily harm”.⁴⁷³ We do hope, however, that the policy review by departments envisaged by the CLRC will soon be put in hand.

10.1 *Sections 32, 33, 34*, Offences committed on the railway.

Section 32, Placing wood, etc., on a railway with intent to endanger passengers.

“Whosoever shall unlawfully and maliciously put or throw upon or across any railway any wood, stone or other matter or thing, or shall unlawfully and maliciously take up, remove, or displace any rail, sleeper, or other matter or thing belonging to any railway, or shall unlawfully and maliciously turn, move, or divert any points or other machinery belonging to any railway, or shall unlawfully and maliciously make or show hide or remove, any signal or light, upon or near to any railway, or shall unlawfully and maliciously do or cause to be done any other matter or thing, with intent, in any of the cases aforesaid, to endanger the safety of any person travelling or being upon such railway, shall be guilty of felony. . . .”

⁴⁷² Fourteenth Report, paragraphs 211–213.

⁴⁷³ See paragraph 3 of Schedule 3 to the Bill.

Section 33, Casting stone, etc. upon a railway carriage, with intent to endanger the safety of any person therein.

“Whosoever shall unlawfully and maliciously throw, or cause to fall or strike, at, against, into, or upon any engine, tender, carriage, or truck used upon any railway, any wood, stone, or other matter or thing, with intent to injure or endanger the safety of any person being in or upon such engine, tender, carriage, or truck, or in or upon any other engine, tender, carriage, or truck of any train of which such first-mentioned engine, tender, carriage, or truck shall form part, shall be guilty of felony . . .”

10.2 The CLRC pointed to the fact that sections 32 and 33 are narrowly defined in that they require an intent to endanger the safety of persons using the railway.⁴⁷⁴ They considered that many cases which could be tried under this section could also be dealt with as an attempt to commit an offence under the Criminal Damage Act 1971 or as offences of causing injury; but that the offences set out in sections 32 and 33 extended further than these alternatives.

10.3 The CLRC consulted the British Railways Board who considered that such special offences should be retained. The CLRC shared that view, but felt that the sections required modernisation and simplification and should not be limited to an intention to endanger the safety of users. Their view was that it should be an offence if the act is intentional, and the defendant negligent as to causing personal injury or damage to property.

10.4 The present offences were created when the railway was the only form of fast transport. The CLRC considered, and we agree, that the same kind of conduct should lead to criminal sanctions in respect of other forms of transport, specifically extending the offence to conduct which endangers both road and air traffic. The proviso was that the offence should be limited to specific acts like those in sections 32 and 33, so that it would not extend to cases of reckless driving.

10.5 *Section 34, Doing or omitting anything to endanger passengers by railway.*

“Whosoever, by any unlawful act, or by any wilful omission or neglect, shall endanger or cause to be endangered the safety of any person conveyed or being in or upon a railway, or shall aid or assist therein, shall be guilty of a misdemeanor, . . .”

10.6 The CLRC noted that the offence under section 34, which is a less serious offence than either section 32 or 33, is in fact charged from time to time. They felt that, if their proposals regarding sections 32 and 33 were followed, a less serious offence along the lines of section 34 would not be required. However, the British Railways Board wished to retain this offence and the CLRC, feeling that it was more appropriate to railways legislation than a general Offences against the Person Bill, suggested that it should remain unrepealed for future consultation of the responsible government department and the British Railways Board.

10.7 The Draft Code included the recommendation made by the CLRC, extending it to waterways.⁴⁷⁵ This clause was criticised as being too limited and particular for a Code, but we were conscious when preparing the Draft Code that we had been unable to undertake the discussion and consultation necessary for a general offence of deliberate endangerment.⁴⁷⁶

10.8 We consider that a general offence of the kind recommended by the CLRC would be preferable to an offence limited only to railways, but the formulation of the detailed policy for, and terms of, such an offence would involve widespread consultation and discussion that it would not be appropriate to undertake as part of the present exercise. Therefore, pending such consultation, and because the offences created by sections 32–34 deal with clearly undesirable conduct, we propose that special provision in respect of railways should remain in place.

10.9 We are, however, concerned by the overlapping provisions of sections 32–34 of the 1861 Act, and the outmoded language used within these sections. In our view, the necessary effect would be achieved by replacing the three sections by an updated

⁴⁷⁴ Fourteenth Report, paragraphs 192–198.

⁴⁷⁵ Draft Code, clause 86.

⁴⁷⁶ Code Report, paragraph 14.58.

version of section 34, that expresses in modern terms what we understand to be the sections' essential provisions. The new section is set out in paragraph 5 of Schedule 3 to the Bill.

11.1 *Section 35, Drivers of carriages injuring persons by furious driving.*

“Whosoever, having the charge of any carriage or vehicle, shall by wanton or furious driving or racing, or other wilful misconduct, or by wilful neglect, do or cause to be done any bodily harm to any person whatsoever, shall be guilty of a misdemeanor, . . .”

11.2 The Road Traffic Law Review Committee (the “North Report”)⁴⁷⁷ shared the opinion of the CLRC⁴⁷⁸ that this offence should be abolished. The North Committee's opinion was that the overlap between this offence and the offence of dangerous driving contained in the Road Traffic Acts⁴⁷⁹ had no rational basis. The CLRC's opinion was that, viewed as an offence against the *person*, section 35 was anomalous, as addressing the fact of causing harm by a particular activity in a way that was inconsistent with the principles of the general offences of harm recommended by them.

11.3 We consider that both of these objections are valid, and support the recommendations of our predecessors that section 35 be repealed. Although there is no specific provision elsewhere in the law for causing injury as opposed to death by dangerous driving, the offence of dangerous driving is sufficiently flexible to allow the results of such driving to be taken into account, if at all, by way of sentence. If *deliberate* injury is inflicted by use of a motor vehicle, the offences under clauses 2–4 of the Criminal Law Bill are available.

11.4 The Road Traffic Act offences apply only to driving on a road or “other public place”. The latter expression has been interpreted widely, to include any place to which the public in fact has access,⁴⁸⁰ to the extent that the offences under those Acts come near to being only excluded if they take place where the public, if present, would be trespassers. Even therefore if the offence created by section 35 of the 1861 Act does apply in circumstances outside those of dangerous driving under the Road Traffic Acts,⁴⁸¹ its additional ambit is likely to be very slight; and, as we have seen, the expert committee on Road Traffic Law did not allow such considerations to deflect them from their recommendation that section 35 should be repealed.

12.1 *Sections 42–45.* Sections 42 and 43 made special provision for the trial of certain types of assault. Both sections were repealed by the Criminal Justice Act 1988, with the result, as the Divisional Court pointed out in *DPP v Taylor* [1992] 1 All ER 299 at p. 305G, that such assaults are now triable by the normal process.

12.2 Sections 44 and 45 had provided that magistrates dismissing a complaint *under sections 42 and 43* should certify to that effect, which certificate should be a bar to further proceedings civil or criminal; as would be the discharge of any punishment awarded under either of those two sections. The 1988 Act did not repeal sections 44 and 45 when it repealed sections 42 and 43, but rather amended them to apply to all cases where the complaint had been preferred by the party aggrieved. Although the point is not likely to arise very frequently in practice, owing to the comparatively rare incidence of private prosecutions, we doubt the merits of such a general provision. It is almost certainly not required to control subsequent *criminal* proceedings in view of the common law rules of *autrefois acquit* and *autrefois convict*: see *Miles* (1890) 24 QBD 423 at p. 435, *per* Pollock B., and the discussion in *Archbold* (45th edition, 1993), at paragraphs 4–124–4–127. Nor does there seem any good reason for this general bar to subsequent *civil* proceedings. We therefore propose that sections 44 and 45 should be repealed now that sections 42 and 43, on which they originally depended, have similarly been repealed.

⁴⁷⁷ Report, paragraph 8.13.

⁴⁷⁸ Fourteenth Report, paragraph 144.

⁴⁷⁹ See now sections 1 and 2 of the Road Traffic Act 1988, as substituted by section 1 of the Road Traffic Act 1991.

⁴⁸⁰ See e.g. *Walters* (1960) 47 Cr App R 149; *Kane* [1965] 1 All ER 705 at p. 709.

⁴⁸¹ While section 35 of the 1861 Act might be read as applying to furious driving in *any* location, it is doubtful whether it is or was intended to have that effect. The draftsman of the 1861 Act pointed out that section 35 was taken from 1 Geo.4, c.4, which was confined to stage-coaches and public carriages and their drivers: C S Greaves, *The Criminal Law Consolidation and Amendment Act of the 24 & 25 Vict.* (Second Edition, 1862), at p. 63. It is far from clear that the extension of this clause, in section 35, to any vehicle was intended to extend the application of the offence beyond its unmistakable origins in driving in public.

APPENDIX C

OFFENCES AGAINST THE PERSON ACT 1861: CURRENT STATUS

Section 1, Murder.

Repealed by the Murder (Abolition of Death Penalty) Act 1965, s.3(2), Sch.

Section 2, Sentence for Murder.

Repealed by the Homicide Act 1957, s.17(2), Sch. 2.

Section 3, Body to be buried in Prison.

Repealed by the Homicide Act 1957, s.17(2), Sch. 2.

Section 4, Conspiring or soliciting to commit Murder.

Still in force, although repealed in part by the Statute Law Revision Act 1892, and by the Criminal Law Act 1977, ss.5(10)(a), 65(5), Sch. 13, and amended by the Criminal Law Act 1977, s.5(10)(b). Beyond the terms of the present project.

Section 5, Manslaughter.

Still in force, although repealed in part by the Statute Law Revision Act 1892 and the Criminal Justice Act 1948, s.83(3), Sch. 10 Pt. I. Beyond the terms of the present project.

Section 6, Indictment for Murder or Manslaughter.

Repealed by the Indictments Act 1915, s.9(1), Sch. 2.

Section 7, Excusable Homicide.

Repealed by the Criminal Law Act 1967, s.10(2), Sch. 3 Pt. I.

Section 8, Petit Treason.

Repealed by the Criminal Law Act 1967, s.10(2), Sch. 3 Pt. I.

Section 9, Murder or Manslaughter abroad.

Still in force, although repealed in part by the Criminal Law Act 1967, s.10(2), Sch. 3 Pt. III. Beyond the terms of the present project.

Section 10, Provision for the Trial of Murder and Manslaughter where the Death or Cause of Death only happens in England or Ireland.

Still in force, although amended by the Criminal Law Act 1967, s.10(1), Sch. 2 para. 6, and repealed in part by s.10(2) of, and Sch. 3 Pt. III to, that Act. Beyond the terms of the present project.

Section 11, Administering poison, or wounding with Intent to murder.

Section 12, Destroying or damaging a Building with Gunpowder with Intent to murder.

Section 13, Setting fire to or casting away a Ship with Intent to murder.

Section 14, Attempting to administer Poison, or shooting or attempting to shoot, or attempting to drown, &c., with Intent to murder.

Section 15, By any other Means attempting to commit Murder.

Sections 11–15 inclusive were repealed by the Criminal Law Act 1967, s.10(2), Sch. 3 Pt. III.

Section 16, Sending Letters threatening to murder.

Substituted by the Criminal Law Act 1977, s.65(4), Sch. 12, amended by the Magistrates' Courts Act 1980, s.17, Sch. 1 para. 5 and repealed in part by the Statute Law Revision Act 1892.

To be repealed by Schedule 4 of the Criminal Law Bill and replaced by clause 9: see paragraph 23.1 of this Report.

Section 17, Impeding a Person endeavouring to save himself or another from Shipwreck.

Still in force, although repealed in part by the Statute Law Revision Act 1892 and the Statute Law Revision (No. 2) Act 1893.

To be repealed by Schedule 4 of the Criminal Law Bill: see paragraphs 1.1–1.3 of Appendix B.

Section 18, Shooting or attempting to shoot, or wounding with Intent to do grievous bodily Harm.

Still in force, although repealed in part by the Statute Law Revision Act 1892, the Statute Law Revision (No. 2) Act 1893, and the Criminal Law Act 1967, s.10(2), Sch. 3 Pt. III, to the effect that the reference to shooting or attempting to shoot is superfluous.

To be repealed by Schedule 4 of the Criminal Law Bill and replaced by clause 2: see paragraphs 12–15 of this Report.

Section 19, What shall constitute loaded arms.

Repealed by the Criminal Law Act 1967, s.10(2), Sch. 3 Pt. III.

Section 20, Inflicting bodily Injury with or without Weapon.

Still in force, repealed in part by the Statute Law Revision Act 1892, amended by the Magistrates' Courts Act 1980, s.17, Sch. 1 para. 5.

To be repealed by Schedule 4 of the Criminal Law Bill and replaced by clauses 3–4: see paragraphs 12–15 of this Report.

Section 21, Attempting to choke, &c., in order to commit any indictable Offence.

Still in force, repealed in part by the Statute Law Revision Act 1892.

To be repealed by Schedule 4 of the Criminal Law Bill: see paragraphs 2.1–2.3 of Appendix B.

Section 22, Using Chloroform, &c., to commit any indictable Offence.

Still in force, repealed in part by the Statute Law Revision Act 1892.

To be repealed by Schedule 4 of the Criminal Law Bill: see paragraphs 3.1–3.2 of Appendix B

Section 23, Maliciously administering Poison, &c., so as to endanger Life or inflict grievous bodily Harm.

Still in force, repealed in part by the Statute Law Revision Act 1892.

To be repealed by Schedule 4 of the Criminal Law Bill: see paragraphs 24.4–24.5 of this Report.

Section 24, Maliciously administering Poison, &c., with Intent to injure, aggrieve, or annoy any other Person.

Still in force, repealed in part by the Statute Law Revision Act 1892 and the Statute Law Revision (No. 2) Act 1893.

To be repealed by Schedule 4 of the Criminal Law Bill and replaced by clause 5: see paragraphs 24.4–24.10 of this Report.

Section 25, If the Jury not satisfied that Person charged is guilty of Felony, but guilty of Misdemeanor they may find him guilty accordingly.

Still in force.

To be repealed, consequentially upon the repeal of section 23, by Schedule 4 of the Criminal Law Bill and replaced by the more general provisions in clause 23: see paragraphs 4.1–4.2 of Appendix B.

Section 26, Not providing Apprentices or Servants with Food, &c., whereby Life endangered.

Still in force, although repealed in part by the Statute Law Revision Act 1892 and the Statute Law Revision (No. 2) Act 1893 and amended by the Magistrates' Courts Act 1980, s.17, Sch. 1 para. 5.

To be repealed by Schedule 4 of the Criminal Law Bill: see paragraphs 5.1–5.2 of Appendix B.

Section 27, Exposing Children, whereby Life is endangered, or health permanently injured.

Still in force, although repealed in part by the Statute Law Revision Act 1892 and the Statute Law Revision (No. 2) Act 1893 and amended by the Magistrates' Courts Act 1980, s.17, Sch. 1 para. 5. This section is in effect superseded by the provisions of the Children and Young Persons Act 1933, s.1.

To be repealed by Schedule 4 of the Criminal Law Bill: see paragraphs 6.1–6.6 of Appendix B.

Section 28, Causing bodily Injury by Gunpowder.

Still in force, repealed in part by the Statute Law Revision Act 1892 and the Statute Law Revision (No. 2) Act 1893, and by the Criminal Justice Act 1948, s.83(3), Sch. 10 Pt. I.

To be repealed by Schedule 4 of the Criminal Law Bill: see paragraphs 7.1–7.4 of Appendix B.

Section 29, Causing Gunpowder to explode, or sending to any Person an explosive Substance, or throwing corrosive Fluid on a Person, with Intent to do grievous bodily Harm.

Still in force, repealed in part by the Statute Law Revision Act 1893, the Statute Law Revision (No. 2) Act 1893, the Criminal Justice Act 1948 s.83(3), Sch. 10 Pt. I.

To be amended as provided in paragraph 1 to Schedule 3 of the Criminal Law Bill: see paragraphs 8.1–8.4 of Appendix B.

Section 30, Placing Gunpowder near a Building, &c., with Intent to do bodily Injury to any Person.

Still in force, repealed in part by the Statute Law Revision Act 1892, the Statute Law Revision Act 1893, the Statute Law Revision (No. 2) Act 1893, the Criminal Justice Act 1948 s.83(3), Sch. 10 Pt. I.

To be amended as provided in paragraph 2 to Schedule 3 of the Criminal Law Bill: see paragraphs 8.1–8.4 of Appendix B.

Section 31, Setting Spring Guns, &c., with Intent to inflict grievous bodily Harm.

Still in force, repealed in part by the Statute Law Revision Act 1892.

To remain in force: see paragraphs 9.1–9.3 of Appendix B.

Section 32, Placing Wood, &c., on Railway, taking up Rails, turning points, showing or hiding signals, &c., with Intent to endanger Passengers.

Still in force, repealed in part by the Statute Law Revision Act 1892, the Criminal Justice Act 1948, s.83(3), Sch. 10 Pt. 1.

Section 33, Casting Stone, &c., upon a Railway Carriage, with Intent to endanger the Safety of any Person therein, or in any part of the same train.

Still in force, repealed in part by the Statute Law Revision Act 1892.

Section 34, Doing or omitting anything so as to endanger Passengers by Railway.

Still in force, amended by the Magistrates' Courts Act 1980, s.17, Sch. 1 para. 5.

For sections 32–34 we propose only modest amendments as provided in Schedule 3 of the Criminal Law Bill: see paragraphs 10.1–10.9 of Appendix B.

Section 35, Drivers of Carriages injuring Persons by furious Driving.

Still in force. Repealed in part by virtue of Criminal Justice Act 1948, s.1(2).

This section is effectively replaced by the Road Traffic Act 1988, s.2, and is, therefore, repealed by Schedule 4 of the Bill: see paragraphs 11.1–11.2 of Appendix B.

Section 36, Obstructing or assaulting a Clergyman or other Minister in the Discharge of his Duties in place of worship or burial place, or on his way thither.

Amended by the Magistrates' Courts Act 1980, s.17, Sch. 1 para. 5.

Section 37, Assaulting a Magistrate, &c., on account of his preserving Wreck.

Repealed in part by the Statute Law Revision Act 1892.

Section 38, Assault with Intent to commit Felony, or on Peace Officers, &c.

Repealed in part by the Police Act 1964, s.64, Sch. 10 Pt. I, and the Criminal Law Act 1967, s.10(2), Sch. 3 Pt. III and amended by the Magistrates' Courts Act 1980, s.17, Sch. 1 para. 5.

The special offences of assault set out in sections 36–38 are all still in force.

We propose that they should be repealed for the reasons given in paragraph 22.1 of this Report: see Schedule 4 of the Bill. The offences that, partly, replace them are set out in clauses 7–8 of the Criminal Law Bill.

Section 39, Assaults with Intent to obstruct the Sale of Grain, or its free Passage.

Section 40, Assaults on Seamen, &c.

Sections 39 and 40 were repealed by Statute Law (Repeals) Act 1989, s.1(1), Sch. 1 Pt. I.

Section 41, Assaults arising from Combination.

Repealed by the Criminal Law Amendment Act 1871, s.7, Sch.

Section 42, Persons committing any Common Assault or Battery may be imprisoned or compelled by Two Magistrates to pay Fine and Costs not exceeding . . .

Repealed by the Criminal Justice Act 1988, s.170(2), Sch. 16.

Section 43, Persons convicted of aggravated Assaults on Females and Boys under Fourteen Years of Age may be imprisoned or fined.

Repealed by the Criminal Justice Act 1988, s.170(2), Sch. 16.

Section 44, If the Magistrates dismiss the Complaint they shall make out a Certificate to that Effect.

Still in force. Repealed in part by s.170, Sch.15 paras. 2, 3 and Sch. 16 of the Criminal Justice Act 1988.

To be repealed by Schedule 4 of the Criminal Law Bill: see paragraphs 12.1–12.2 of Appendix B.

Section 45, Certificate or Conviction shall be a Bar to any other Proceedings.

Still in force. Repealed in part by virtue of Criminal Justice Act 1948, s.1(2) and amended by the Criminal Justice Act 1988, s.170(1), Sch. 15 paras. 2, 4.

To be repealed by Schedule 4 of the Criminal Law Bill.

Section 46, The Provisions of sections 42–45 not to apply to certain Cases.

Repealed by the Criminal Justice Act 1988, s.170(2), Sch. 16.

Section 47, Assault occasioning bodily Harm.

Still in force, amended by the Magistrates' Courts Act 1980, s.17, Sch.1 para. 5; repealed in part by the Criminal Justice Act 1988, s.170(2), Sch. 16.

To be repealed by Schedule 4 of the Criminal Law Bill and replaced by clause 6 thereof.

Section 48, Rape.

Repealed by the Sexual Offences Act 1956, s.51, Sch. 4.

Section 49, Procuring the Defilement of Girl under Age.

Repealed by the Criminal Law Amendment Act 1885, s.19, Sch.

Section 50, Carnally knowing a Girl under Ten Years of Age.

Repealed by the Offences against the Person Act 1875, s.2.

Section 51, Carnally knowing a Girl between the Ages of Ten and Twelve.

Repealed by the Offences against the Person Act 1875, s.2.

Section 52, Attempt to commit the last Two Offences.

Section 53, Abduction of a Woman against her Will, from Motives of Lucre.

Section 54, Forcible Abduction of any Woman with Intent to marry her.

Section 55, Abduction of a Girl under Sixteen Years of Age.

Sections 52–55 were repealed by the Sexual Offences Act 1956, s.51, Sch. 4.

Section 56, Child-stealing.

Repealed by the Child Abduction Act 1984, ss.11(5)(a), 13(3).

Section 57, Bigamy.

Still in force, although repealed in part by the Statute Law Revision Act 1892, the Criminal Justice Act 1925, s.49(4), Sch. 3, the Criminal Law Act 1967, s.10(2), Sch. 3 Pt. III; amended by the Magistrates' Courts Act 1980, s.17, Sch. 1 para. 5.

Section 58, Administering Drugs or using Instruments to procure Abortion.

Still in force, although repealed in part by the Statute Law Revision Act 1892, the Statute Law Revision (No. 2) Act 1893.

Section 59, Procuring Drugs, &c., to cause Abortion.

Still in force, although repealed in part by the Statute Law Revision Act 1892.

Section 60, Concealing the Birth of a Child.

Still in force, although repealed in part by virtue of the Criminal Justice Act 1948, s.1(2) and by the Criminal Law Act 1967, s.10, Sch. 2 para. 13(1)(a), Sch. 3 Pt. III; amended by the Magistrates' Courts Act 1980, s.17, Sch. 1 para. 5.

Sections 57–60 are beyond the terms of the present project.

Section 61, Sodomy and Bestiality.

Section 62, Attempt to commit an infamous Crime.

Section 63, Carnal Knowledge defined.

Sections 61–63 were repealed by Sch. 4 of the Sexual Offences Act 1956.

Section 64, Making or having Gunpowder, &c., with Intent to commit any Felony against this Act.

Still in force, although repealed in part by the Statute Law Revision (No. 2) Act 1893, the Criminal Justice Act 1948, s.83(3), Sch. 10 Pt. I, the Sexual Offences Act 1956, s.51, Sch. 4, amended by the Criminal Law Act 1967, s.10, Sch. 2 para. 8.

Section 65, Justices may issue Warrants for searching Houses, &c., in which explosive Substances are suspected to be made for the Purpose of committing Felonies against this Act.

Still in force, although repealed in part by the Sexual Offences Act 1956, s.51, Sch. 4, the Police and Criminal Evidence Act 1984, s.119(2), Sch. 7, Pt. I, amended by the Criminal Law Act 1967, s.10, Sch. 2 para. 8.

Sections 64 and 65 are not addressed in this project: see paragraphs 8.5–8.12 of Appendix B.

Section 66, A person loitering at Night, and suspected of any Felony against this Act may be apprehended.

Section 67, Punishment of Principals in the Second Degree, and Accessories.

Sections 66 and 67 were repealed by the Criminal Law Act 1967, s.10(2), Sch. 3 Pt. III.

Section 68, Offences committed within the Jurisdiction of the Admiralty.

Still in force, although amended by the Sexual Offences Act 1956, s.51, Sch. 4 and repealed in part by the Criminal Law Act 1967, s.10(2), Sch. 3 Pt. III.

Not to be repealed.

Section 69, Hard Labour in Gaol or House of Correction.

Repealed by the Statute Law Revision Act 1892.

Section 70, Solitary Confinement and Whipping.

Repealed by the Criminal Justice Act 1948, s.83(3), Sch. 10 Pt. I.

Section 71, Fine, and Sureties for keeping the Peace, in what Cases.
Repealed by the Justices of the Peace Act 1968, s.8(2), Sch. 5 Pt. II.

Section 72, No Certiorari, &c.
Repealed by the Statute Law (Repeals) Act 1976, Sch. 1 Pt. XIX.

Section 73, Guardians and Overseers may be required to prosecute in certain Cases of Offences against this Act.
Repealed by the National Assistance Act 1948, s.62(3), Sch. 7 Pt. III.

Section 74, On a conviction for Assault the Court may order Payment of the Prosecutor's Costs by the Defendant.

Section 75, Such costs may be levied by Distress.
Sections 74 and 75 were repealed by the Costs in Criminal Cases Act 1908, s.10(1), Sch.

Section 76, Summary proceedings.
Repealed by the Statute Law (Repeals) Act 1989, s.1(1), Sch. 1 Pt. 1.

Section 77, The Costs of the Prosecution of Misdemeanors against this Act may be allowed.
Repealed by the Costs in Criminal Cases Act 1908, s.10(1), Sch.

Section 78, Act not to extend to Scotland.
Still in force.
Not to be repealed.

Section 79, Commencement of Act.
Repealed by the Statute Law Revision Act 1892.

APPENDIX D

List of individuals and organisations who commented on the Law Commission's Consultation Paper No. 122, "Legislating the Criminal Code: Offences Against the Person and General Principles" (1992)

Association of Chief Police Officers
Professor Andrew Ashworth
Mr Simon Bronitt
Mr Alex Carlile QC MP
Cardiff Crime Study Group
Centre for Criminal Justice Studies, University of Leeds
Chief Metropolitan Stipendiary Magistrate
The Children's Legal Centre
The Council of Her Majesty's Circuit Judges
Judge Peter Crane
Crown Prosecution Service
Criminal Bar Association
Mr John A Deft
Judge Mark Dyer
End Physical Punishment of Children
Feminists Against Censorship
The General Council of the Bar
Mr Simon Gardner
Councillor E Goodman
The Institute of Legal Executives
Justice
Ms Kate Harrison
Home Office
Lord Justice Kennedy
The Law Society
Metropolitan Police Service
Judge Stephen Mitchell
National Council for Civil Liberties (Liberty)
Sir Michael Ogden QC
Mrs Anne Norton JP
Office of the Judge Advocate General
Mr DC Ormerod
Ms Nicola Padfield
Mr Edwin Peel
The Police Federation of England and Wales
The Recorder and Circuit Judges of Birmingham
Lord Justice Rose
Mr Alec Samuels JP
Mr Justice Schiemann
Dr ATH Smith
Professor Sir John Smith CBE, QC, FBA
The Solicitor, The Post Office
Society of Public Teachers of Law
Mrs Lynden Walters
Ms Celia Wells
Mr John White
Mr Justice Wright



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