



The Law Commission

Consultation Paper No. 122

Legislating the Criminal Code

Offences against the Person and General Principles

A Consultation Paper

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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This consultation paper and draft Bill, completed on 5 February 1992, are circulated for comment and criticism only. They do not represent the final views of the Law Commission.

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It may be helpful for the Law Commission, either in discussion with others concerned or in any subsequent recommendations, to be able to refer to and attribute comments submitted in response to this consultation paper and draft Bill. Whilst any request to treat all, or part, of a response in confidence will, of course, be respected, if no such request is made the Law Commission will assume that the response is not intended to be confidential.

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First published 1992

ISBN 0 11 730204 X

THE LAW COMMISSION
LEGISLATING THE CRIMINAL CODE
OFFENCES AGAINST THE PERSON AND GENERAL PRINCIPLES
A CONSULTATION PAPER
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PART I

INTRODUCTION

FOREWORD

In this Consultation Paper the following abbreviations are used:

“CLRC”: the Criminal Law Revision Committee.

“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.

A. THE PURPOSE OF THIS CONSULTATION PAPER

Summary

1.1 By this Consultation Paper the Commission asks for comment on and criticism of the law reform proposals set out in the Criminal Law Bill that is to be found at Appendix A. That Bill deals with two main subjects: non-fatal offences against the person; and certain general principles and defences that affect all crimes. The Bill is the first of a series that will be produced to further the Commission’s project for the codification of the whole of the criminal law of England and Wales.

1.2 The Bill is complete in itself as a law reform measure; but it also draws very heavily upon, and is written in the terms and language of, our Draft Code that was published in 1989.¹ Most of the parts of the Draft Code dealt with in this Consultation Paper followed, and built upon, extensive consideration in the past, most notably by the CLRC in its Fourteenth Report on *Offences against the Person*,² and we believe, in the light of that earlier law reform work, that there is substantial agreement upon the form that the law on non-fatal offences against the person and general defences ought to take. For that reason, we have not simply issued another Consultation Paper; but have drafted a full Bill, based upon the relevant parts of the Draft Code, that shows in detail how these proposals might be legislated. The Consultation Paper explains the background to, and implications of, the various parts of the Bill; and in Appendix B we provide Explanatory Notes, much more extensive than the usual Notes on Clauses, that identify in respect of each clause of the Bill its origin, and where in the Consultation Paper its implications, and the law that it enacts, are fully explained.

1.3 However, even on a subject that has already received as much discussion as has offences against the person, the Commission would not wish to propose specific legislation without giving the opportunity for further comment and criticism both of the principles of our approach and, in particular, of the detailed terms of the Bill that springs from those principles. That is why the present Bill forms part of a Consultation Paper and not of a final Report. Whilst we will welcome expressions of opinion on any aspect of the Consultation Paper, we are particularly anxious to receive comment based on the terms of the Bill, and on its suitability as a vehicle for early legislation. Further, in the course of our work a number of particular questions have been identified, not all of which were dealt with in the Draft Code or in other earlier work on this subject. We have summarised those

¹ A Criminal Code for England & Wales, Law Com. No. 177.

² Cmnd. 7844 of 1980. The CLRC had the benefit of advice from the judiciary at all levels, and from other bodies. Its recommendations were the subject of further extensive, and broadly favourable, discussion: see for instance [1980] Crim. LR 542.

questions at the end of the Consultation Paper; but we emphasise that we hope for comment on the whole of the Bill, and not merely on those particular issues that we have separately listed.

The Draft Code

1.4 The Draft Code sought to set out in an accessible, comprehensible and consistent form virtually the whole of the law relating to indictable offences. The Draft Code in fact had two major objectives: to restate in a rational form the complex and often antiquated and confusing mixture of common law and statutory provisions in which the criminal law is at present to be found; and to incorporate, in the same format and with the same drafting policy as was used for the rest of the Code, various proposals for the reform of the present criminal law that have been made by official bodies in recent years.

1.5 The clarification and rationalisation of the criminal law is an important objective, not least because of the burden that an obscure and unnecessarily complicated law places on the courts. Some parts of the criminal law will always, necessarily, be difficult; but a law that even the judges find hard to administer threatens not merely waste of time and excessive cost, but also positive injustice. We emphasised these considerations in paragraph 2.5 of the Introduction to Volume 1 of the Code report, which we venture to repeat here:

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

1.6 Quite apart from the need to improve the certainty and accessibility of the criminal law, there is an important constitutional argument in favour of codification. Criminal law controls, by means of state coercion and punishment, the freedom of the citizen to act as he wishes. The terms of that criminal law should therefore, as far as possible, be democratically determined, by Parliament. Judicial application of what Parliament provides will, of course, be necessary as well; but the aim should be to provide a legislative text that enables courts to apply, directly and with certainty, the intentions of Parliament, without the need for recourse to extensive judicial interpretation and discretion. Nowhere are these considerations more apparent than in the law of non-fatal offences against the person where, as we explain in paragraph 7 below, the statutory background is so obscure and outdated that the statutes themselves have been in effect overtaken by a law based entirely on judicial interpretation of those statutes.

1.7 The Commission remains fully committed to the attainment of these benefits of codification, the importance of which has been widely acknowledged since the Com-

mission commenced its codification exercise.³ That would be achieved by the passing into law of a complete criminal code for England and Wales. We recognise, however, that from a practical point of view the legislation of a Bill as large and wide-ranging as a Criminal Code would be very demanding of Parliamentary time. It would clearly be imprudent to assume that it will be practicable to achieve the enactment of a complete code in the reasonably near future.

The way forward

1.8 The Commission's responsibility for the reform and improvement of the criminal law demands that the need to view the enactment of a complete code as a matter for the longer term should not prevent the achievement of shorter-term objectives. Two such shorter-term steps are, in our view, urgently needed.

1.9 First, it is important to take advantage of the general acceptance of the style, approach and vocabulary of the Draft Code, as set out in Law Com. No. 177, as the method by which reform of the criminal law should be pursued in the future. These principles, first formulated by the Commission's Code team under the leadership of Professor J. C. Smith Q.C., are closely followed in the Bill annexed to this Consultation Paper. Quite apart from the specific reforms that that Bill incorporates, it gives an opportunity for those concerned with determining policy about the criminal law to pass judgement on the application of Code principles, and of the general Code approach, to a specific part of the substantive criminal law.

1.10 Second, there are a number of areas of the criminal law where reform, whether or not as part of a general codification, is a matter of urgent necessity. One of the areas most in need of comprehensive reform is the law of non-fatal offences against the person. It would clearly be wrong to allow uncertainty as to the eventual future of the Code to delay such particular, and urgently required, reforms.

1.11 At the same time, however, such reforms can now be proposed with more confidence, and on a more rational basis, than was possible before the Draft Code was formulated. The Draft Code, by putting the whole of the criminal law, including all the general principles, into one document has simplified the task of understanding how reforms in one area would fit in to the rest of the law. It has also, and in particular, made it possible to decide how much of the "general part" of the criminal law, that deals with principles that are potentially applicable to all substantive offences, should be incorporated in a Bill that reforms a particular part of those substantive offences.

1.12 We are therefore now able to put forward, with some confidence, a Bill that, if enacted, would put a substantial part of the criminal law on a codified basis. In our view, enactment of a Bill along those lines would not only secure immediate and valuable reforms of the law, not least in making the law easier and simpler, and thus more effective and economic, to use; but would also be a major step towards a complete codification.

1.13 In the present exercise the Commission has been fortunate enough to have the assistance, as a special consultant, of Professor Edward Griew, a member of the original Code team. He has made a major contribution to this Consultation Paper.

³ These aims were set out in Chapter 1 of the Code team's *Report*, Law Com. No. 143 of 1985, and attracted wide support during the extensive consultation exercise that we conducted on the basis of that report. The outcome of that consultation, and the Commission's policy conclusions resulting from it, are set out in Part 2 of Volume 1 of Law Com. No. 177: "The Case for a Criminal Code".

B. THE SCOPE OF THE PRESENT EXERCISE

General policy

2.1 In this section we indicate the extent of the criminal law that is covered in this Bill, and our reasons for selecting that part of the law for treatment in the present exercise. We first explain the overall reach and strategy of the exercise, and then refer in more detail to two policy decisions that have caused us particular difficulty.

2.2 We have already stressed that the present Bill is intended to be complete in itself, and to be suitable for immediate enactment as a measure of law reform in its own right. In this Bill we have, therefore, included such of the general principles of the criminal law as we consider to be necessary for a proper understanding and application of the rules about offences against the person. The general principles included in the Bill, and the reasons for selecting them, are set out below, when we explain in detail the policy behind each part of the Bill. However, we can here summarise our approach as follows.

2.3 The first object of the present exercise is to provide courts trying cases of non-fatal offences against the person with a rational guide to the main issues of law that they are likely to have to decide. That means that the project should cover not only the definitions of the offences involved, but also the major defences, and some other issues of general principle that commonly arise in offences against the person cases.

2.4 Second, however, we have had to decide whether the rules of law set out in Part II of the Bill should apply only in respect of the offences against the person created by Part I of the Bill, or should apply throughout the criminal law. In each case we have concluded that it is right, and indeed necessary, that the law set out in Part II should apply generally. That law (for instance, as to duress, or as to supervening fault) is expressed in terms that are broadly, but only broadly, the same as the law that can be deduced from the rules presently governing those topics. A court might well find itself trying a case in which, for instance, a defence of duress was raised in relation both to an offence in Part I of our Bill and to another offence not dealt with in the Bill. If the Part II provisions are not applied generally, a court in such a case might find itself having to apply the statutory law of duress to one count, and then having to decide to what extent the common law of duress, to be applied to the other counts, differed from the law stated in Part II of our Bill.

2.5 However, although we have been strongly influenced towards the view that the rules in Part II should apply to all offences by the considerations just mentioned of the ease of administration of the law, that is not the only, or even the main, reason for our proposing this part of the legislation. In our view, the administration of the criminal law generally will be made materially easier and simpler by the restatement of general defences in clear and consistent terms. That is what we have sought to achieve for the defences included in this Bill.

2.6 Although we describe this process as one of “restatement”, it involves not merely reproduction of the present common law but, where necessary, its clarification and the rationalisation of difficulties. That is particularly so of the treatment of the use of force in public and private defence in clause 28 of the Bill, which is discussed in paragraph 20 below. And, in one respect, our treatment of defences in the Bill goes beyond restatement. The law of duress, in relation to the crime of murder, is difficult and controversial, and has been recognised as suitable for reconsideration of the type that this Commission and the legislature, but not the courts, can best undertake.⁴ We have therefore dealt with that matter, and make a provisional recommendation upon it, in paragraphs 18.14 to 18.21 below. We invite comment on whether those recommendations should be followed and, if not, as to how the matter should be dealt with. It is a matter of legislative policy whether our proposal as to the scope of the duress defences is eventually adopted. Failure to adopt that proposal would not have any effect on the viability of any other part of the Bill.

⁴ See the remarks of Lord Bridge in *Howe* [1987] AC 417 at pp. 437–438; and also Lord Brandon at p. 438 and Lord Mackay at p. 455.

2.7 By contrast, we have limited the application of some important provisions, most notably the definition of fault terms, to the offences set out in the Bill. The Commission considers that the definitions of fault terms adopted in the Bill are the most accurate and useful definitions of those terms not merely for the specific offences dealt with in the Bill, but for the criminal law generally. Since, however, the offences created by the Bill are limited to offences against the person, it would not be appropriate to use the Bill as a vehicle for extending the definitions that it provides to other offences. So to do would be at least potentially to alter the definitions of those other offences without a full consideration of the implications of that step.

2.8 For those reasons, therefore, although the definitions of fault terms adopted in the Bill are based on those proposed, in the Draft Code, as suitable for use throughout the criminal law, they are at present intended to apply only to offences against the person. If, as the Commission expects, those definitions prove acceptable in that context, there will be strong arguments, in terms of consistency, to support their adoption in legislation relating to other offences. That step must however await such further legislation; which, we hope, can be undertaken with the benefit of experience gained in the present exercise.

2.9 We do not expect this limitation of the application of fault terms to cause significant difficulty in practice. It should be noted, however, that under the present law the definitions of “recklessness” in respect of offences against the person and in respect of offences against property are different, and that difference (which we do not believe to cause practical problems) will remain even after the enactment of the Bill. That is because, putting the matter shortly, this Bill incorporates the “subjective” approach to recklessness that has long been considered to be appropriate in the law of offences against the person.⁵ It leaves untouched the “objective” approach of the present law of offences against property.

Homicide

2.10 We have also given careful consideration to whether the present Bill should extend to homicide as well as to non-fatal offences against the person. There are many aspects of the law of homicide that require attention from the point of view of law reform; and undoubted arguments for saying that as a matter of practicality the same definition of fault terms, and in particular the same definition of “intention”, should operate in murder and in non-fatal offences. To take a perhaps rare practical example, but one that would cause undoubted difficulty were it to arise, a court trying an indictment with separate counts of murder and of causing serious injury should not have to direct the jury differently as to the meaning of intention to be applied in adjudicating upon the different counts.

2.11 We have however concluded that the more prudent course, at this stage of the process of implementing the Code approach and principles, is to confine the present exercise to the already substantial task of reforming the law of non-fatal offences and putting into statutory form a significant proportion of the “general part”. That is because the addition to these tasks of a review of the law of homicide would involve a considerable extension of the necessary process of consultation and debate, that might delay our objective of early statutory implementation of Code principles.

2.12 We say that for the following reasons. The law of murder has recently been reviewed by a Select Committee of the House of Lords,⁶ the Nathan Committee, which concluded that the law should be recast broadly in the terms recommended by the CLRC in its report of 1980.⁷ However, there has been no indication of support by government for putting the law of murder on that, or any other, statutory basis.⁸ We see great force in the

⁵ See paragraphs 7.22–7.24 below.

⁶ Report of the Select Committee on Murder and Life Imprisonment (Chairman, the Rt. Hon Lord Nathan), HL Paper 78–I, July 1989.

⁷ CLRC Fourteenth Report, *Offences against the Person*, Cmnd. 7844.

⁸ See the observations of Earl Ferrers, *Hansard* (Lords) vol. 512 col. 452 (30 November 1989).

Nathan Committee's proposals, which included the adoption for the law of murder of the definition of intention set out in the Commission's Draft Code, but in the absence of any support for the implementation of those proposals we see little point in reiterating them as part of this exercise. We hope that those proposals may more immediately demonstrate their value once the merits of codification have been subjected to scrutiny in the more limited area represented by the present Bill.

2.13 There is also a major, and difficult, policy question awaiting determination in the law of manslaughter, namely whether and in what terms there should be a crime of "gross negligence" manslaughter. The CLRC recommended the abolition of this crime, which punished killing with a high degree of negligence with regard to the causing of death or serious injury.⁹ The CLRC thought that that crime, as then defined, might be committed by someone who was merely extremely foolish; and that that should not be sufficient to convict of manslaughter in the absence of actual advertence to the risk of death or serious injury.¹⁰ However, since the CLRC reported in 1980 a number of serious accidents on various forms of public transport, involving numerous deaths, have reawakened public interest in the possibility of charging with manslaughter (and not just with some regulatory offence) operators of such services whose gross carelessness or inattention to the safety of their passengers¹¹ causes loss of life. This possibility is closely connected with consideration of whether corporate bodies, and not merely individuals, can be convicted of this type of manslaughter.¹²

2.14 It is clear that to include in the present exercise the many issues arising from gross negligence manslaughter would require very extensive consultation, on matters that have not previously been the subject of consideration by the Commission. Such an exercise would seriously delay the present Bill, which deals with areas of the law that are in urgent need of reform, and which can be perfectly coherently dealt with independently of the law of manslaughter.

Intoxication

2.15 We would ideally have wished to include in the Bill a statement of the law that we could recommend as to the effect on criminal liability of the intoxication of the accused, since such issues very frequently arise in connection with offences against the person. However, the Draft Code provisions as to intoxication, set out in clause 22 thereof, seek broadly to reproduce the common law; and further study of the present law since the Code was published has led us to doubt whether we can properly recommend the adoption of that law without further consideration of whether that law should be reformed. That consideration would cause unwarranted delay if it took place as part of the present exercise. The Commission has therefore instituted a full review of the law as to the effect of intoxication on criminal liability, in order to formulate proposals for the future law on the subject. It is accordingly not possible to formulate proposals for the reform of that law in the present Bill.

2.16 The decision that the law of intoxication required further study however raises questions in relation to the treatment of intoxication in the present Bill. At the moment, intoxication is almost entirely a matter of common law. Its two most important effects upon criminal liability are (very broadly stated) that, first, where recklessness on the

⁹ The law, never easy to formulate with certainty, is to be found in *Bateman* (1925) 19 Cr App R 8 and *Andrews v DPP* [1937] AC 576.

¹⁰ CLRC, Fourteenth Report, para. 121.

¹¹ If such a person was actually aware that his conduct was exposing the passengers to the risk of serious injury, he would be guilty under a limited form of manslaughter that the CLRC recommended, and that we embodied in clause 55(c)(ii) of the Draft Code. The further concern is with cases where it is alleged that, although the operator was not aware of the risk, he ought to have been so aware and thus ought to have taken precautions against that risk.

¹² See in particular *R v HM Coroner for East Kent ex p. Spooner* (1987) 88 Cr App R 10, in which the court left open the possibility, previously doubted in *R v Cory Bros* [1927] 1 KB 810, that a corporate body can be indicted for manslaughter. In *P & O European Ferries (Dover) Limited* (1990) 93 Cr App R 72 (the "Zeebrugge" case) Turner J held that an indictment for manslaughter could lie against a corporation. The prosecution failed on the facts.

accused's part has to be established, a person who was voluntarily intoxicated will be treated as having been aware of a risk of which he would have been aware had he not been intoxicated; and, second, where a defence is based upon a belief held by the accused, a person who was voluntarily intoxicated will be treated as not having held a belief that he would not have held had he not been intoxicated. It will be seen that these two rules have important implications for many of the matters dealt with in this Bill. Thus, recklessness forms part of the definition of many of the offences created by Part I of the Bill, and a definition of the term, as used in those offences, is provided by clause 2 of the Bill; and belief on the part of the accused is a possible element in all three of the general defences created by clauses 26–28 of the Bill.

2.17 In respect of these matters, our intention is that the Bill should be read subject to the present law of intoxication, pending our full review of the latter topic. In that review we will make recommendations about, and Parliament will thus have an opportunity to consider, what part should properly be played by intoxication in the definition of criminal liability. The law determined by Parliament, if it differs from the present law as to the effect of intoxication, will then abrogate the provisions as to intoxication contained in the present Bill or in any legislation on the lines of the Bill.

2.18 That, in its turn, has two implications. First, the present Bill, and consideration of the policy issues that it raises, does not need to await action in respect of the law of intoxication. The Bill is self-contained in the sense that it can be enacted in advance of any decision about intoxication. Second, however, it is important that it should be clear beyond dispute that the law as stated in the Bill is subject to the existing rules on intoxication. It might be argued that that could be achieved without specific reference to intoxication in the Bill, the rules on intoxication being amongst the rules of the common law to which, by clause 1(3), the provisions of the Bill are subject. However, we have to bear in mind that in the Bill, recklessness, and the defences to which we have referred above, are for the first time subject to express common law definition; and there is a substantial danger that those definitions, if not expressly qualified in the case of the intoxicated defendant, might be thought to prevail over the common law definitions of the same subject-matter: those common law definitions having been qualified in cases of intoxication in the manner described above.¹³

2.19 Accordingly, we have concluded that specific provision should be made to reproduce in this Bill the common law on intoxication, insofar as it affects matters dealt with in the Bill. The relevant provisions will be found in clauses 1(5), 23(3) and 29, and since there are various considerations common to all the provisions they are explained together, in some detail, in section H of Part III of this Consultation Paper. Those clauses seek to apply the common law on intoxication, with some very minor adjustments. The formulation of the clauses draws heavily on the clause on intoxication, clause 22, of the Draft Code. It must be reiterated, however, that the clauses by no means necessarily represent the Commission's view of what the criminal law should ideally say in respect of intoxication and, in the event of any proposals for the reform of the present law on intoxication finding acceptance, those clauses will have to be replaced. As we explained in the Code Report,¹⁴ restatement of the present law in accurate statutory form produces a somewhat complex formulation; that such complex statement is necessary, and that the complexity has to be explained to juries and be applied by those juries, has reinforced our opinion that the present law is in need of critical reassessment.

¹³ In our report on *Offences Relating to Public Order* (Law Com. No. 123, 1983) we drew attention, at paragraph 3.53, to a somewhat similar danger that might arise if a statutory offence expressed in terms of "awareness" were not expressly qualified by rules as to the effect of intoxication as that is understood in the common law. Parliament accepted that view when it provided, in section 6(5) of the Public Order Act 1986, that where awareness of stated circumstances had been made an element of offences under the Act, "a person whose awareness is impaired by intoxication shall be taken to be aware of that of which he would be aware if not intoxicated."

¹⁴ Code Report, paragraph 8.33.

C. THE BILL AND THE EXISTING LAW

3.1 Part I of the Bill deals, as comprehensively as possible, with non-fatal offences against the person. Part II of the Bill codifies, *for the criminal law as a whole*, various defences and other elements of the “general part”. The Bill draws heavily upon the terms of, and the approach and principles adopted in, the Draft Code. The remainder of this Consultation Paper is devoted to an extended explanation of and commentary upon the terms of the Bill.

3.2 In recommending the terms of the present Bill we have been concerned, as we were in drawing up the Draft Code, to ensure that the law set out in the Bill does effectively replace the common law and existing statutory provisions in relation to those matters with which it deals; but that, at the same time, valuable parts of the common law that are intended to be retained, at least for the moment, are indeed kept in being.

3.3 Because the present Bill has a limited subject-matter, and does not purport to be a complete codification, the first of these objectives can be achieved by a simple process of repeal or amendment of statutory provisions inconsistent with the Bill’s provisions; the abolition of the common law offences that the offences created by Part I of the Bill replace; and the abrogation of the rules of the common law that at the moment govern the defences and other general matters dealt with in clauses 23–28 of Part II of the Bill. These steps are taken in clause 31 of the Bill.

3.4 Second, in the Code Report we thought it important to make clear that although it is now recognised that the courts do not have power to create new *offences*,¹⁵ it is desirable that the courts should be free to develop new *defences* to criminal liability, either to recognise the demands of changing circumstances or to piece out unjustified gaps in the existing defences. It was in order to leave the courts free to achieve those objectives, as well as to ensure that existing defences not specifically dealt with in the Draft Code remained in existence, that we included clauses 4(4) and 45 in the Draft Code.¹⁶ The present Bill, however, does not purport to be a complete statement of the criminal law, or even of the defences to criminal liability provided by that law, and thus does not pose what we perceived to be the potential problem of the Draft Code, of appearing to exclude, by substitution by positive legislation, the existing common law. The present Bill clearly and on its face deals with the subject-matter as to which it makes specific provision, and in respect of which the common law is expressly abrogated by clause 31. All other areas of the common law remain untouched.

3.5 Nevertheless, we think that it will be helpful to users of the Bill if that aspect of its operation is made more explicit than, strictly speaking, is necessary. Clause 1(3) of the Bill, in addition to negating any implication in clause 1(2) that Part I is subject only to Part II, reminds readers that;

The application of the defences and rules of law contained in Part II does not exclude the application of other defences under or rules of the common law.

3.6 For somewhat similar reasons, clause 1(3)(b) provides that the offences contained in the Bill are also subject to any enactment or rule of the common law providing or allowing a justification or excuse for any act or omission; and it is provided by clause 1(6) that “justification” includes authority.

3.7 So far as lawful authority is concerned, the Code team suggested that a general statement should be included in the Code to the effect that it is not criminal to do an act that is authorised by law.¹⁷ They considered such a rule to be “uncontroversial, indeed largely self-evident”.¹⁸ We agree with that latter view, to the extent that we did not think it

¹⁵ *Kneller v DPP* [1973] AC 435; see Code Report, paragraphs 2.11 and 2.19.

¹⁶ For further explanation, see paragraphs 12.38–12.41 of the Code Report.

¹⁷ Law Com. No. 143, paragraphs 13.58–13.63 and draft Bill, clause 48.

¹⁸ *Ibid.*, paragraph 13.60.

necessary to include any such provision in the Draft Code. However, having reconsidered the matter, we think that it might cause unnecessary uncertainty if our new statutory provisions, by making no reference to any exculpation provided by lawful authority, could be read as excluding any such considerations from the rules determining an accused's criminal liability. The Code team's account showed, however, that such savings are difficult to list in any definitive form, and may be subject to some degree of judicial judgement. The same is true, perhaps to an even greater degree, of defences or exemptions from the provisions of criminal statutes that may be described as matters of excuse rather than of authority. Clause 1(3)(b) therefore in effect retains the present power of the judiciary to recognise circumstances of excuse; and what is perhaps an obligation on the part of the judges to recognise that, where a specific act is authorised, or required, either by statute or by common law,¹⁹ a general criminal prohibition, even in a subsequent statute, will be read as subject to that saving.

3.8 We recognise that this approach leaves open a degree of judicial judgement, but that would appear to be a valuable feature of the present law, and one not therefore to be removed in this Bill, and particularly one not to be removed for want of specific saving. However, we specifically invite comment on this issue, and in particular on whether we have correctly assessed the impact of the present law, and adequately conveyed that impact in the Bill.

3.9 In four clauses of the Bill, and notwithstanding clause 1(3)(b), specific reference is made to justification, authority, or excuse.²⁰ We explain that aspect of those clauses briefly here.

3.10 Clause 12 (torture) provides that the availability of authority, justification or excuse as a defence shall be judged according to the law of the place where the torture took place; this offence, unusually, being prosecutable in England wherever the conduct complained of occurs. The particular implications of this clause, appealing as it may do to defences or excuses other than those provided by the law of England and Wales, make it necessary to make specific reference to such provisions. In clause 14 (unlawful detention) it seems helpful to make specific reference to cases where detention is justified, authorised or excused by law, the most obvious example perhaps being the powers, and indeed duties, of prison officials administering sentences imposed by the courts. We are fortified in that view by the fact that the CLRC, whose proposed definition is closely followed by clause 14, recommended that the offence should specifically be one of detention without lawful excuse.²¹ Clause 18 (abduction) repeats the reference to lawful authority or excuse that is found in the statute from which it is taken, section 2 of the Child Abduction Act 1984. It therefore seems prudent that clause 19 (aggravated abduction), being simply the commission of the clause 18 offence with a particular ulterior intent, should repeat the formulation of clause 18; however unlikely it is that a court could discern a reasonable excuse for the conduct referred to in clause 19.

3.11 We should also draw attention to one further specific provision of a somewhat similar nature. The common law defence of "necessity" is at present of uncertain nature and extent. It would be premature to attempt a statutory codification; so the development of the defence, for the moment at least, is left in the hands of the judges.²² However, the relationship between this defence, so far as it exists, and other defence that is codified in the Bill, duress of circumstances, is a matter of some complexity. We seek to explain the present law on that matter, and in particular that necessity remains a separate issue from duress of circumstances, in paragraphs 19.3–19.5 below. In order to avoid any misapprehension on the part of users of the Bill that our provisions as to duress of circumstances might have taken up and overridden the law as to necessity, we insert specific guidance in

¹⁹ e.g. the powers of a constable: see *Johnson v Phillips* [1976] 1 WLR 65.

²⁰ For the avoidance of doubt, clause 1(4) provides that such references are not to be read as excluding the application of clause 1(3)(b) in other cases.

²¹ Fourteenth Report, para. 231.

²² See the Code Report, paragraph 12.41(ii).

clause 31(3)(b)(i). That provides, in relation to the abrogation of defences available under the common law, that the common law defences of duress by threats and duress of circumstances are abrogated, “but not any distinct defence of necessity.” Necessity is thus left open for any further development that the courts may think desirable.

3.12 The above are respects in which the limited content of the Bill, when compared with that of the Draft Code, requires some alteration of the method and terms of the latter document. Generally speaking, however, the Bill follows closely the terms of the Draft Code.

PART II

NON-FATAL OFFENCES AGAINST THE PERSON

A. INTRODUCTION

4.1 At present, the most important non-fatal offences against the person are those in sections 18, 20 and 47 of the Offences against the Person Act 1861 (“the 1861 Act”). These sections deal respectively with wounding or causing grievous bodily harm with intent; maliciously wounding or inflicting grievous bodily harm; and assault occasioning actual bodily harm. With the regrettable increase in prosecutions for serious violence, these offences occupy a very considerable part of the time of the courts.²³ It is therefore important that the law governing such behaviour should be clear and well-understood, to ensure that trials of cases of violence can be conducted efficiently and justly.

4.2 Reform of the present law has already been strongly urged by the CLRC in 1980,²⁴ the substance of the CLRC’s proposals having been adopted by us in the Draft Code. As we indicated in paragraph 1.13 of the Code Report, a special group headed by Lord Justice Lawton, who was Chairman of the CLRC at the time of its Fourteenth Report, reviewed those parts of the Draft Code that embodied the proposals made in that Report. We first however deal with the definitions of fault terms employed in the law of offences against the person, and explain the reasoning behind the definitions that are set out in the present Bill. We regard this step as of crucial importance, since unless there is agreement on the meaning of terms used in the definitions of offences some of the present uncertainty, and thus potential injustice, is in danger of being perpetuated. We then demonstrate how that terminology can be used in a new set of offences that would replace the most criticised parts of the present law; and also use that terminology to codify and express in consistent and uniform terms the remainder of the law of non-fatal offences against the person.²⁵

B. FAULT TERMS

5.1 It is of the essence of the codification proposal, to which the Bill will give partial effect, that the criminal law should employ a consistent vocabulary and that the meanings of key terms should be as clear as possible. That would correct a notable weakness in English criminal law. That weakness has nowhere been more productive of difficulty and uncertainty than in the language used to express modes of fault. Clause 2 of the Bill therefore defines the terms “intention” and “recklessness”, and related terms, as they are used throughout the definitions of the offences set out in Part I of the Bill. The clause gives effect to the policy of the Commission as first stated in its *Report on the Mental Element in Crime* in 1978.²⁶ The same policy was regarded as “essential” by the CLRC in its Fourteenth Report on *Offences against the Person*²⁷ and was adopted (in respect of the intention required for murder) by the Nathan Committee²⁸ in its Report in 1989.

5.2 Definitions of “intention” and “recklessness” were supplied in clause 18 of the Draft Code. This was done by explaining what is meant, in the context of offences, by a reference to a person’s acting “recklessly” or “intentionally” with respect to a circum-

²³ In 1988, 17,167 cases under these sections were dealt with in the Crown Court alone: *Criminal Statistics 1988*, Supplementary Tables, Vol. 2, p. 8.

²⁴ Fourteenth Report, paras. 149–157.

²⁵ That law has recently been reviewed by the House of Lords in the important cases of *R v Savage* and *DPP v Parmenter*. The cases were heard together and reported together at [1991] 3 WLR 914. The House of Lords’ decision is referred to in this Consultation Paper as “*Savage*”. In *Savage* the accused, in throwing a glass of beer over the complainant, also cut the latter’s wrist. The jury found that (at least) the glass must have slipped from her grasp and done the damage, but without any intention on her part that that should happen. In *Parmenter* the accused caused injury to his young child, his case being that he did not realise that what he did would cause any injury. In both cases the question as to the construction of the 1861 Act was whether, on such assumed facts, the accused was guilty of an offence under section 20, or alternatively section 47.

²⁶ Law Com. No. 89, 1978.

²⁷ Paras. 6–7.

²⁸ Paras. 69–71. For the Nathan Committee, see paragraph 2.12, n. 6, above.

stance or a result. The method and the detailed wording took account of criticisms of earlier drafts.²⁹ The Code definitions are used in the present Bill, with the omission of some features not needed for the purposes of offences against the person, and subject to amendment of the definition of “intention” to correct some defects to which attention has been drawn since publication of the Code Report.³⁰

5.3 Unlike the “general part” provisions to be included in the Bill, the definitions of fault terms will not be given general application throughout the criminal law. They will apply only for the interpretation of the offences against the person defined in the Bill. This means, for example, that the expression “reckless(ly)” in existing statutory offences, to which the decision in *Caldwell*³¹ applies, will continue to be governed by that rule.³²

“Intention”

5.4 Clause 2(a) 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 is aware that it would occur in the ordinary course of events if he were to succeed in his purpose of causing some other result.”

5.5 It is in relation to intention that the proposal to define key words has been most controversial, not least because it involves a departure from the position recently taken, in the context of the law of homicide, by the House of Lords.³³ It is in that context that the absence of definition, whether by statute or in the practice of the courts, has been most productive of 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 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.³⁴ This form of direction falls short of asserting that such recognition of virtual certainty is in law of case of intention; and thus does not clarify the nature of the state of mind that the jury may “infer”. We criticised this position in the Code Report,³⁵ and that criticism was endorsed, in the context of murder, by the Nathan Committee.³⁶ We are clear that equally in any legislation for non-fatal offences these difficulties must be disposed of by a statutory definition of intention.

5.6 In most cases courts will be concerned only with paragraph (i) of the proposed definition: it is usually appropriate to describe a person as intending a result of his actions only if it is his purpose to bring that result about. Reference to paragraph (ii) will rarely be necessary. That sub-paragraph is needed, however, because “intention” requires in the criminal law a meaning slightly extended beyond its primary meaning of “purpose”. A person must sometimes be treated as intending a result of his actions although he does not act in order to cause it, or act with the “purpose” or “desire” of causing it. As Lord Hailsham of St. Marylebone expressed it in *Hyam*,³⁷ a person must be treated as intending

²⁹ See Code Report, paras. 8.6, 8.10, 8.12; also Law Com. No. 143, para. 8.18.

³⁰ See para. 5.9, below.

³¹ [1982] AC 341.

³² Under the interpretation of “reckless” in *Caldwell*, a person is reckless whether a result will occur “if (1) he does an act which in fact creates an obvious risk that [the result will occur] and (2) when he does this 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.” ([1982] AC 341, 354 per Lord Diplock.)

³³ *Moloney* [1985] AC 905; *Hancock and Shankland* [1986] AC 455.

³⁴ *Nedrick* [1986] 1 WLR 1025 at p. 1028.

³⁵ Para. 8.16.

³⁶ Nathan Committee Report, para. 69.

³⁷ [1975] AC 55 at p. 74.

“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.

5.7 There is, of course, no absolute certainty in human affairs. D’s purpose *might* be achieved without causing the second 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 result will occur, and D knows that it will occur, “in the ordinary course of events.” This expression was used in the Draft Code clause 18 to express the near-inevitability, as appreciated by the actor, of the secondary result.

5.8 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 relevant 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 2(a)(i) of “purpose”. The point of the phrase “in the ordinary course of events,” as commentary on the definition made clear, was to ensure that “intention” covered the case of a person who knows that the achievement of his purpose will necessarily cause the result in question in the absence of some wholly improbable supervening event.³⁸ 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.³⁹ The Nathan Committee recommended adoption of the Draft Code definition for the purpose of the law of murder.⁴⁰ The Lord Chief Justice expressed approval of it in a House of Lords debate on that committee’s report.⁴¹ It would seem that this aspect of the definition can now be presented afresh with some confidence.

5.9 However, the definition in clause 2(a) of the present Bill, while implementing this approach of the Draft Code, differs in two respects from the detailed wording of the Code. Since publication of the Code Report Professor J. C. Smith, who was chairman of the Code team, has pointed to two possible defects in the Draft Code definition.⁴² That definition, as put forward in clause 18(b)(ii) of the Draft Code, read (in the relevant part):

“a person acts . . . ‘intentionally’ with respect to . . . a result when he acts either in order to bring it about or being aware that it will occur in the ordinary course of events.”

The first suggested defect may be thought to be of some concern. The definition treats a person as intending a secondary, perhaps undesired, result of his act if, but only if, he knows that that result is virtually bound to occur. But that formulation does not 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 go off. 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

³⁸ 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.”

³⁹ Fourteenth Report, para. 10.

⁴⁰ Report, para. 71.

⁴¹ H.L. Debates, vol. 512, col. 480.

⁴² “A Note on ‘Intention’” [1990] Crim LR 85.

off. 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 purpose.

5.10 Professor Smith suggests, secondly, that so providing would also make clear “that a result which it is the actor’s purpose to avoid cannot be intended,”⁴³ an example would be where a man tries to save a baby’s life by escaping from a burning building across a dangerous beam, knowing, however, that it is virtually certain that both will fall and be killed. That such a case is excluded is not wholly clear in the Code draft, which is perhaps defective on that ground also.

5.11 The definition of “intention” employed in clause 2(a) of the present Bill takes account of both the above 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 that purpose is in fact achieved.

“Recklessness”

5.12 The Bill employs the definition of “recklessness” proposed in clause 18(c) of the Draft Code. This provides that:

“a person acts . . . ‘recklessly’ with respect to—

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

and it is, in the circumstances known to him, unreasonable to take the risk.”

5.13 This was the use which we proposed for “reckless” and related words in our earlier *Report on the Mental Element in Crime*, with the subsequent support of the CLRC.⁴⁴ The definition restates existing law in respect of the offences with which the Bill deals, because non-fatal offences against the person at common law, and statutory offences against the person employing the fault term “maliciously,” are interpreted as requiring that the actor knowingly take the risk of the occurrence of the relevant type of harm.⁴⁵ In this respect, as generally, the Bill gives effect to recommendations of the CLRC.

Other fault terms

5.14 In a number of places the Bill uses the terms knowledge and awareness, which are not defined.

5.15 In clause 18(a) of the Draft Code we put forward a definition of acting “knowingly” with respect to a circumstance, which definition covered not only the case when the actor is aware that the circumstance exists but also the case when he avoids taking steps that might confirm a belief that that circumstance exists. We considered that the last element of the definition was necessary to capture the concept of “wilful blindness” which, we suggested, was commonly treated as an aspect of “knowledge” in English criminal law.⁴⁶ It is right to say that we are no longer sure that the latter suggestion was correct, in that wilful blindness appears more commonly to appear as an *alternative* to

⁴³ *Ibid.*, p.88.

⁴⁴ Fourteenth Report, paras. 11 and 12.

⁴⁵ See further on this point, paragraphs 7.22–7.23 below.

⁴⁶ Code Report, paragraph 8.10

knowledge in considering whether an element of *mens rea* should be supplied in relation to statutory offences that are, on their face, offences of strict liability.⁴⁷ However, for the purposes of the present exercise it is not necessary to resolve this issue, since within this exercise we simply have to consider whether there are uses of “knowledge” within the Bill that require definition if they are to be correctly interpreted. As at present advised, we are satisfied that there is no place in the Bill where “knowing”, or any cognate word, need to be interpreted other than in their ordinary meaning of actual knowledge. Briefly to summarise, knowledge is usually used in the Bill either in relation to *future* events,⁴⁸ where the concept of wilful blindness is simply inept; or as an alternative to belief⁴⁹ or recklessness,⁵⁰ where it is well established, and in any event it would seem to us to be a matter of common sense, that there is no room or justification for construing knowledge to include wilful blindness.⁵¹ In the one other case of knowledge, in clause 7, we would expect “knowing” to be understood as referring to actual knowledge.

5.16 So far as “aware” is concerned, there is no reason to think that as used in this Bill the word will be construed in anything other than its ordinary and natural meaning, as indicating, on the part of the person described as being so aware, a subjective realisation of the state of affairs referred to.

C. OFFENCES COMMITTED BY OMISSION

Background

6.1 The question of whether and to what extent criminal liability should be imposed for an omission to act has long been recognised as difficult and controversial. Recent exchanges between two of the country’s leading criminal law scholars⁵² suggest that a generally agreed view as to policy on this subject for the criminal law as a whole is still very far away. Against this background of difficulty and disagreement, we are clear that, particularly in view of the limited nature of the present exercise, we need to proceed with circumspection. That was, rightly, the approach of the CLRC in its Fourteenth Report; and, indeed, the approach that we ourselves took in the Draft Code.

6.2 The CLRC⁵³ discussed at some length whether it should remain possible to commit any offences against the person by mere omission, bearing in mind that under the present law liability for omission can arise on a charge of murder, manslaughter, wounding, causing grievous bodily harm or false imprisonment. They concluded that, whilst it should remain possible to commit some crimes by omission, it was desirable to limit such liability to the more serious offences, including homicide, causing serious injury, kidnapping and abduction; since, without such a limitation, comparatively trivial failures of duty, or failures with comparatively trivial results, would become criminal. The CLRC also recommended that no attempt should be made to codify in legislation the circumstances that give rise to such a duty: that should continue to be determined by the existing rules of the common law.⁵⁴

6.3 The Code team were faced with what we have already indicated is the extremely difficult and controversial problem of producing a *general* rule for liability for omissions, applicable throughout the criminal law as a whole. They determined, as set out in clause

⁴⁷ See e.g. Lord Hewart CJ in *Evans v Dell* (1937) 53 Times LR 301 at p. 313; Devlin J in *Roper v Taylors Central Garages* [1951] 2 TLR 284 at p. 287; Parker J in *James & Son Ltd. v Smeed* [1955] 1 QB 78 at p. 91; Lord Reid in *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256 at p. 279.

⁴⁸ See clauses 26(4); 27(3)(c); and 28(7).

⁴⁹ See clauses 26(2)(a); 27(2)(a); and 27(3)(a).

⁵⁰ Clause 9.

⁵¹ *Griffiths* (1975) 60 Cr App R 14; *Smith (Albert)* (1977) 64 Cr App R 217.

⁵² Professor Andrew Ashworth, “The Scope of Criminal Liability for Omissions”, (1989) 105 LQR 424; Professor Glanville Williams, “Criminal Omissions—the Conventional View”, (1991) 107 LQR 86.

⁵³ Fourteenth Report, para. 35.

⁵⁴ *Ibid.*, paras. 252–255.

20 of the Bill annexed to the Code team report,⁵⁵ that offences should not be committable by omission unless the enactment creating them specifically so provided; and that, within offences against the person, such provisions should be made in respect of the offences identified by the CLRC, as indicated in paragraph 6.2 above. However, in relation to the circumstances in which a duty to act (and therefore the possibility of liability by omission) should arise, the Code team, pursuing their mission of codification, considered that it would not be satisfactory simply to refer to the common law as the source of the duty to act.⁵⁶ The team believed that it was possible to state those established common law principles in a form suitable for codification, and in clause 20(2) of their Bill they produced a fairly elaborate rationalisation and generalisation of the common law as referred to by the CLRC.⁵⁷

6.4 The scrutiny team that considered on our behalf that part of the Code team's report expressed doubts about the accuracy of the formulation in the Code team's Bill, though without finding it possible to put any improved version before us. That exercise suggested that it might be better to revert to the CLRC's view, that codification of the existing duties relevant to criminal liability was neither necessary nor advisable.

6.5 The first part of the Code team's recommendation, that there should be a *general* rule that liability for omissions should only attach where there was a specific statutory provision to that effect, was also criticised, in this case in a powerful article by Professor Glanville Williams.⁵⁸ Those criticisms led us, as we explained in paragraph 7.10 of the Code Report, to conclude that there should be no express provision at all in the Draft Code as to the circumstances in which liability should attach for omissions, that task in effect being left to judicial construction. It appears⁵⁹ that we may have misunderstood Professor Williams' position on the general question referred to above, since he would wish severely to limit the cases in which liability can be imposed for omissions, and thus would not allow latitude for judicial extension of such cases without specific Parliamentary approval.⁶⁰ This question of the form in which a *complete* Code should make provision for liability for omissions is clearly both important and interesting, as well as being one of considerable difficulty. It would in our view be a mistake to attempt to resolve it in the course of the present exercise, since we are here concerned only with which, if any, of the particular offences created by the present Bill should be subject to liability by omission to act.

6.6 In the Draft Code, as we have said, we made no specific provision as to liability for omissions. We also recognised that, under the Draft Code, identification of the situations in which a relevant duty to act exists would remain a matter of common law.⁶¹ In the present exercise, however, it is appropriate, and indeed necessary, that we should review both those decisions insofar as they affect the offences dealt with in the present Bill.

Offences subject to liability by omission

6.7 As we have indicated above, this question was considered with some care by the CLRC, who considered that, in the interests of avoiding the imposition of criminal liability in trivial or borderline cases, liability for omission should only extend to serious crimes. We are, as at present advised, minded to agree with that view. It means that, before a crime can be committed by omission, the prosecution will have to prove that the accused, by failing to perform a given duty, caused an outcome of some seriousness, and did so with a significantly culpable state of mind.

6.8 In the present Bill, therefore, we apply the approach of the CLRC that we summarised in paragraph 6.2 above. Clause 3 of the Bill explains how liability for an

⁵⁵ Law Com. No. 143, p. 182.

⁵⁶ Law Com. No. 143, paras. 7.11–7.12.

⁵⁷ *Ibid.*, pp. 182–183.

⁵⁸ (1987) 7 *Legal Studies* 92.

⁵⁹ See (1991) 107 *LQR*, especially at pp. 96–97.

⁶⁰ See further on this point the exchanges referred to in n. 52 above.

⁶¹ Code Report, para. 7.12.

omission will operate in respect of any specific offence. That liability is then, in accordance with the CLRC's recommendations, extended by the specific clauses in question to the offences under clause 4 (intentional serious injury); clause 12 (torture); clause 14 (unlawful detention); clause 15 (kidnapping); clause 17 (abduction); and clause 19 (aggravated abduction). In the case of torture, as we indicated in the Code Report,⁶² specific reference to omission is required in order to ensure that we fulfil the United Kingdom's international obligations. The detention and abduction offences in this Bill are in effect the offences recommended by, and in the terms recommended by, the CLRC;⁶³ but the general policy that we adopted for the Draft Code, as explained in paragraphs 6.5–6.6 above, precluded us from explicitly implementing in the Draft Code that part of the CLRC's recommendations that made those offences committable by omission.⁶⁴ In this Bill, with its different circumstances, we are able to make that provision; and we consider that in the interests of clarity and certainty it is desirable that the policy adopted should be thus specifically expressed.

6.9 We invite comment on this decision to make express provision for liability for omissions; and, in particular, on the range of offences selected as subject to liability by omission, including comment on whether such liability should be extended to any other of the Bill offences.

Duties to act

6.10 As mentioned in paragraph 6.6 above, we took the view in the Draft Code that the cases in which a duty to act was recognised should be, and should be limited to, those recognised at common law. Those duties were listed by the CLRC in paragraph 252 of its Fourteenth Report, and include the duty of a parent to his young children; of members of a household who assume the care of a fellow member who becomes infirm or helpless;⁶⁵ and of a police officer not deliberately to neglect his duty to enforce the law.⁶⁶

6.11 We have now reconsidered two questions: whether there should be a statutory rationalisation and restatement of the duties, along the lines suggested by the Code team;⁶⁷ and whether, even if the law is not codified in that respect, there should be added to our previous reliance on duties created at common law a specific reference to duties created by statute.

6.12 So far as the first question is concerned, we continue to find persuasive the arguments that were pressed on us in the course of the Code exercise.⁶⁸ We would add to those arguments the consideration that, even if it were thought desirable to reconsider the possibility and desirability of formulating a general rule as to liability for omissions, it would not be appropriate to address that general question in the context of an exercise like the present, that is limited to offences against the person. Such a step may or may not appear appropriate, and prove possible, when something more resembling a general Code passes into legislation: that, of course, having been the context in which the Code team were working.

6.13 So far as the second question is concerned, it will be noted that clause 3 of the present Bill, following our decision in respect of the Draft Code,⁶⁹ is limited to acts "that [the accused] is under a duty to do at common law". That, however, is only a provisional conclusion on or part, since we appreciate both that there may be duties, not so far recognised by the common law, that it may be wished to specify now as suitable to ground

⁶² Para. 14.40.

⁶³ See paragraph 12.9 below.

⁶⁴ Code Report, para. 14.50.

⁶⁵ *Stone and Dobinson* [1977] QB 354.

⁶⁶ *Dytham* [1979] QB 722.

⁶⁷ See paragraph 6.3 above.

⁶⁸ See paragraphs 6.4 and 6.6 above.

⁶⁹ Code Report para. 7.12, and paragraph 6.6 above.

criminal liability; and that there may be existing duties, created not by common law but by statute, that should similarly ground criminal liability.

6.14 We ask for comment on both of those issues, and generally on whether a simple statement relying on the common law is sufficient for present purposes. It may, however, be helpful if, without in any way limiting consultees, we make some observations on the points raised in paragraph 6.13.

6.15 First, as to the identification of further duties, the list of common law duties set out in paragraph 6.10 above is already substantial, and the common law referred to in clause 3 is susceptible of extension by the same process of judicial activity as created it in the first place. In that process, however, we would expect the judges to have in mind that they are dealing with criminal liability, and that it is therefore necessary to proceed with caution. We think that the same cautious approach is appropriate to the process of legislation, particularly if (as we are at present minded to think) liability for omission should only apply to serious offences.⁷⁰ Nonetheless, we do ask for comment on whether there is any duty that should be specified in the Bill as an addition to the common law duties to which clause 3 of the Bill is at present limited.

6.16 We similarly wish to consider further whether there should be any general reference in the Bill to duties created by statute as well as by common law. We have not found this an easy question, but our reasons for, provisionally, adopting in clause 3 of the Bill the limitation adopted by the CLRC⁷¹ are as follows.

6.17 Whilst there are many statutory provisions that can be described, in general terms, as dealing with the obligations of a class of persons towards their fellow citizens, it does not necessarily follow that those statutory provisions create a “duty” of the same type as those discussed above. To take two examples, section 1 of the Children and Young Persons Act 1933 creates an offence of, *inter alia*, wilful neglect of a child or young person under the accused’s charge; and section 127 of the Mental Health Act 1983 creates an offence of neglecting patients who are under the accused’s charge. These provisions certainly place obligations on the persons subject to them. However, it is less clear that the obligation thereby created is a general duty, similar to those at common law, that in itself can ground liability for the serious offences dealt with in the present Bill; as opposed to being the obligation not to commit the limited and specific statutory offences created by the provisions referred to above.

6.18 This difficult issue has, perhaps, never previously been thoroughly analysed because in the case of those “statutory” obligations where one instinctively thinks that liability for serious offences should be possible if the performance of the obligation is culpably omitted, that step has often already been taken by the common law. Thus, in the two cases mentioned in paragraph 6.17 above, the persons subject to the statutory obligations are almost certainly subject also to the common law duties binding those who are obliged to care for, or undertake the care of, children and vulnerable persons.⁷² But if the law were to go further, and seek to create a duty founding liability for serious offences in every case where a statute appeared to create or assume a duty towards others, that might very considerably widen this branch of the law.

6.19 This point can be further illustrated by referring to some of the many statutory provisions that, unlike those referred to in paragraph 6.17 above, are expressly formulated in terms of “duty”: examples are the duties of employers, manufacturers and employees created by sections 2–7 of the Health and Safety At Work Act 1974; and the duty of an owner of a ship to ensure that it is operated in a safe manner, created by section 31(1) of the Merchant Shipping Act 1988. The breach of such statutory duties is, however, specifically punished by offences that are created by those same statutes: in the case of Health and

⁷⁰ See paragraphs 6.7–6.9 above.

⁷¹ Fourteenth Report, para. 256(b).

⁷² See paragraph 6.10 above.

Safety by the offence of failing to discharge a duty under sections 2–7 that is created by section 33(1)(a) of the 1974 Act, and in the case of merchant shipping by the offence of failing to discharge the section 31(1) duty that is created by section 31(3) of the 1988 Act. Here again, there would seem to be serious objections to treating breach of these duties as the ground for offences of omission under the present Bill when Parliament in creating the duty has provided a specific and limited sanction for its breach: yet that would seem to be what would follow from basing liability for omission on breaches not only of common law but also of (any) statutory duty.

6.20 We have indicated that we do not find these issues easy. We therefore invite comment as to whether, in addition to the provision in clause 3 of the Bill relating to duties at common law, there should be a reference to duties created by statute. If it is thought desirable that there should be such reference, should the reference be to statutory duties generally, or should there be reference to specific statutes? And, in the latter case, are there any specific statutory provisions to which consultees would wish to draw our attention as particularly requiring this treatment?

D. GRIEVOUS BODILY HARM, WOUNDING AND ACTUAL BODILY HARM

Introduction

7.1 We explained in paragraph 4.2 above that the law contained in the 1861 Act, relating to non-fatal violence to the person, has been the subject of recurrent criticism in recent years. 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].”

7.2 Criticism of these provisions has taken two forms, both of which were voiced by the CLRC in its Fourteenth Report in 1980.⁷³ First, the statute is expressed in complicated, obscure and old-fashioned language, which needs almost complete translation before these offences can be applied by a court or jury; and the structure of the three sections is complicated and technical. The law is thus difficult to use; productive of mistakes and misunderstandings by lawyers; and virtually incomprehensible to laymen. On those grounds alone there would be an overwhelming case for its replacement by a code written in simple, modern language. Second, however, even when the lawyers have translated the 1861 Act into modern language, the law that that Act lays down is irrational, unjust, and an ineffective instrument for the important task of punishing and deterring violent conduct. The need is, therefore, not merely for a restatement of the law in modern

⁷³ CLRC, Fourteenth Report, para. 3.

terms but for its substantial reform, as the CLRC recommended. Since the CLRC made that recommendation in 1980 there have been a number of developments in the law, commented on below, all of which have strongly reinforced the need for reform along the lines proposed by the CLRC.

7.3 In this part of the Consultation Paper we therefore first explain the structural defects of the 1861 Act, and why it should in any event be replaced by a new code; then set out in more comprehensible language what we believe the present law on non-fatal offences against the person to be; and then indicate the weaknesses of that law and why and how it should be reformed.

The need for a new code

7.4 Sections 18, 20 and 47 of the 1861 Act are not part of a comprehensive legislative code; 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. The sections are virtually the only significant part of the extensive series of criminal law statutes passed in 1861⁷⁴ that still remains on the statute book. Those Acts as a whole attracted early criticism, not least from Sir Fitzjames Stephen:

“Their arrangement is so obscure, their language so lengthy and cumbrous, and they are based upon and assume the existence of so many singular common law principles that no-one who was not already well acquainted with the law would derive any information from reading them”.⁷⁵

More recent critics have agreed with these strictures, describing the 1861 Act as “piecemeal legislation”, which is “a rag-bag of offences brought together from a wide variety of sources with no attempt, as the draftsman frankly acknowledged, to introduce consistency as to substance or as to form”.⁷⁶

7.5 That last statement, however, fairly observes that the Acts of 1861 were in effect intended to be consolidations of the existing law, without seeking to alter its theory, content or arrangement, and even without any of the rationalisation of language and structure that would, today, be thought a necessary part of a consolidation Bill.⁷⁷ This process thus ensured that the 1861 Act repeats without critical review the assumptions and the terminology of an even earlier age; but the draftsman thought that to be necessary in order to ensure enactment of the consolidation:

“The fact that a clause contained the existing law in its very terms carried a weight with it that no reasoning would have obtained in the minds of those who are opposed to legal reforms”.⁷⁸

7.6 Such legislation is usually a precursor to, and indeed demands, a more far-reaching reform. Such reform has been effected, admittedly at a somewhat leisurely pace, in respect

⁷⁴ These were, apart from the Offences against the Person Act itself, the Accessories and Abettors Act; the Larceny Act; the Malicious Injuries to Property Act; the Forgery Act; and the Coinage Offences Act.

⁷⁵ Letter to Sir John Holker, 20 January 1877, cited by Sir Rupert Cross in *Reshaping the Criminal Law* (ed. Glazebrook, 1978), at p. 10.

⁷⁶ Lord Ackner in *Savage* [1991] 3 WLR at p. 939E, citing, as to the second quotation, Professor J. C. Smith in [1991] Crim LR 43.

⁷⁷ “They are chiefly re-enactments of the former law, with amendments and additions. Each bill contains divers enactments taken from different statutes, and generally in the terms used in those statutes”: C. S. Greaves Q.C., *The Criminal Law Consolidation and Amendment Acts of the 24 & 25 Vict.* (2nd edition, 1862), p. xxvi.

⁷⁸ Greaves, *op. cit.*, pp. 52–53 and 76. In the 1861 Act, s. 18 is taken from s. 4 of the Offences against the Person Act 1837; s. 20 indirectly from s. 29 of the (Irish) Offences against the Person Act of 1829; and s. 47 from s. 29 of the Administration of Criminal Justice Act 1851. The latter statute however simply regulated the punishment and mode of trial of what was regarded as a common law offence: see Greaves, *Lord Campbell's Acts* (1851), p. 32.

of most of the 1861 legislation, but that reform has so far stopped short of those parts of the 1861 Offences against the Person Act that deal with basic offences of personal violence. Their age alone would not, of course, be a reason for seeking the reform of sections 18, 20 and 47 of the 1861 Act. However, the arcane language of these sections, using concepts that were technical and obscure even in the nineteenth century, and their complex and overlapping arrangement, has caused repeated difficulty in the administration of a branch of the law that has to be considered literally thousands of times each year not only in the Crown Courts but also, in the case of sections 20 and 47, in the magistrates' courts, in which forum, staffed largely by lay judges, there is a particular need for the law to be clear and easy to handle.

7.7 In recent years, the attempts of courts at appellate level to elucidate the 1861 Act have led to a series of inconsistent or contradictory decisions,⁷⁹ causing the Court of Appeal (Criminal Division) to protest that "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] which reveal the law to be so impenetrable".⁸⁰

7.8 Much of this particular, and intolerable, confusion has eventually been resolved by the speeches of the House of Lords in *Savage*. However, that that process had to be gone through at all demonstrates the weakness of the 1861 Act, and the hazards, expense and uncertainty that can result from the use of complex legislation the purposes of which cannot now be properly understood. The 1861 Act is, and continues to be, unsatisfactory in very many respects. We mention here a few of the more pressing reasons why it is wholly unsuitable as the defining authority for a major part of English criminal law.

7.9 We have already emphasised that the statute cannot be directly used as a statement of that law, because it contains terms that have to be translated into other language comprehensible to modern juries and magistrates, or even be entirely replaced, before the definitions of the crimes that it contains can be used to decide cases. Thus, the word "maliciously" is used in both section 18 and section 20 of the 1861 Act. 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.⁸¹ However, the House of Lords in *Savage* confirmed that in *section 20* "the *mens rea* [of the] crime is comprised in the word 'maliciously'";⁸² 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.⁸³

7.10 It is in our view highly undesirable that a statute in everyday use should contain an apparently important expression that in one section has no meaning at all; but, where the expression does have meaning, the actual words of the statute cannot be safely even 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.

7.11 This need for courts interpreting these sections to concentrate to such a large extent on previous judicial exposition means that the offences under sections 18, 20 and 47 of the 1861 Act have become in effect common law crimes, the content of which is

⁷⁹ *DPP v K* [1990] 1 WLR 1067; *Spratt* [1990] 1 WLR 1073; *Savage* [1991] 2 WLR 418. 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.

⁸⁰ *Parmenter* [1991] 2 WLR 408 at p. 416.

⁸¹ *Mowatt* [1968] 1 QB 421, at p. 426B.

⁸² *Savage* [1991] 3 WLR at p. 939F.

⁸³ [1968] 1 QB at pp. 426C–427D.

determined by case-law and not by statute. There are two objections to that. First, as a matter of principle, the terms and proper extent of the criminal law of offences against the person should be determined by Parliament and not by the judges, and should be easily accessible by reference to statutory texts.⁸⁴ Second, 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.

7.12 A graphic illustration of the latter point is to be found in the trial judge's handling in *Parmenter*⁸⁵ of the authority binding him as to the meaning to be attached by the jury to section 20 of the 1861 Act. In *Mowatt*⁸⁶ Diplock LJ said that in section 20 the word "maliciously" indicated that the *mens rea* required for an offence under the section was subjective, but only to the extent that the accused must be aware that his act may have the consequence of causing *some* physical harm to some other person: "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, i.e., 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. In *Parmenter* the trial judge directed the jury on the charges under section 20 by reading to them the passage just quoted from Diplock LJ's judgment. The Court of Appeal however commented that

"in *Mowatt* the words 'should have foreseen' were, we believe, intended to bear the same meaning as 'did foresee' or simply 'foresaw'. Read out of context, however, the ordinary meaning of the words 'should have' is 'ought to have'. By reading the passage to the jurors in isolation from its context the judge 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".⁸⁷

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.

7.13 However, although the present state of the law owes much to judicial development, that development has not been the unconfined development of the common law, but rather an attempt to make intelligible the provisions of the 1861 Act. That in its turn means that the law continues to be influenced by 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. As we have said, mere antiquity would not demand or justify a review of the law; but the provisions of the 1861 Act, as now authoritatively interpreted in *Savage*, compel a formulation of the law that it is difficult to justify on grounds of logic, efficacy or justice.

The present law

7.14 The guidance given by the House of Lords in *Savage* enables us to state with some certainty the content of the law under sections 18, 20 and 47 of the 1861 Act. For ease of reference we set those sections out below, translated so far as possible into modern language, and as interpreted by the courts. In most cases it is possible to explain the terms used in footnotes, but some following paragraphs deal with cases where more extensive explanation is required.

⁸⁴ Those principles, that inform all our work on codification, are expounded more fully in paragraphs 2.2–2.7 of the Code Report. We believe them to be very widely accepted.

⁸⁵ [1991] 2 WLR 408.

⁸⁶ [1968] 1 QB p. 421 at p. 426D; upheld on this point in *Savage* [1991] 3 WLR at p. 939G.

⁸⁷ [1991] 2 WLR at p. 412A.

7.15 Despite the uncertainties of recent years, the law stated below does not differ in any essential respect from the interpretation of the 1861 Act that was current in 1980. It was the law as so interpreted that the CLRC thought to need urgent reform. In the concluding part of this section of the Consultation Paper we explain, with reference to our statement of the law, why we fully share the CLRC's view.

A restatement of sections 18, 20 and 47

7.16 **18.** A person is guilty of an offence, punishable by life imprisonment, if he wounds,⁸⁸ or causes any serious⁸⁹ 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 inflicts⁹⁰ serious bodily harm upon, another, either

- (i) intending to cause some physical harm⁹¹ 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 comfort⁹² of another by an act⁹³ by which he intended to cause, or that he foresaw might cause⁹⁴ either

- (i) any person to fear immediate and unlawful violence⁹⁵ or
- (ii) any physical contact with any person.⁹⁶

Section 47: the meaning of "assault"

7.17 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 9 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 without distinguishing those two senses. 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 recklessness⁹⁷ whether such apprehension be caused".⁹⁸ It is, however, unlikely that such, "psychic", assault can be the sole basis of liability under section 47.

7.18 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

⁸⁸ Any breach of the continuity of the victim's skin: *Archbold* (44th edition, 1992), para. 19–127.

⁸⁹ *Metharam* (1961) 45 Cr App R 304.

⁹⁰ The CLRC, Fourteenth Report at para. 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.

⁹¹ *Savage* [1991] 3 WLR at p. 939H.

⁹² This is the meaning of "actual bodily harm" adopted in *Miller* [1954] 2 QB at p. 292. For the extent to which that expression includes *mental* harm, see paragraphs 8.20–8.33 below.

⁹³ Paragraph 7.21 below.

⁹⁴ See paragraph 7.17, n. 97 below.

⁹⁵ Paragraph 7.17 below.

⁹⁶ Paragraphs 7.18–7.20 below.

⁹⁷ Fairly clearly meaning here actual awareness, and not merely objective recklessness.

⁹⁸ *Savage* [1990] 3 WLR at p. 928F, citing *Venna* [1976] QB 421.

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,⁹⁹ 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,¹⁰⁰ battery as well as psychic assault must be included within the definition of assault under section 47.

7.19 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*,¹⁰¹ must also be included. That view is reinforced by consideration of *Roberts*,¹⁰² the case principally relied on by the House of Lords in *Savage* as correctly setting out the proper interpretation of section 47.¹⁰³ 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.¹⁰⁴

7.20 We make these points with some caution because the House of Lords does not specifically discuss this issue, and indeed summarises 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",¹⁰⁵ a formulation that 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

7.21 The actual bodily harm has to be "occasioned" by the assault.¹⁰⁶ 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. She 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?";¹⁰⁷ 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

⁹⁹ *Savage* [1991] 3 WLR at p. 920H.

¹⁰⁰ See n. 98 above.

¹⁰¹ *Ibid.*

¹⁰² (1971) 56 Cr App R 95.

¹⁰³ *Savage* [1991] 3 WLR at pp. 928H–930E.

¹⁰⁴ 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.

¹⁰⁵ *Savage* [1991] 3 WLR at p. 924D. 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 [1991] 2 WLR 414H–415C.

¹⁰⁶ *Savage* [1990] 3 WLR at p. 930E.

¹⁰⁷ [1991] 2 WLR 418 at pp. 421–422; cited in *Savage* [1990] 3 WLR at p. 920C.

finding of the jury, Mrs. Savage's handling of the glass which caused Miss Beal 'actual bodily harm'.¹⁰⁸

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".

The need for reform

The subjectivist approach

7.22 The long-standing assumption of English criminal law, at least in respect of offences against the person, has been that citizens should only be convicted of serious crimes, imposing serious punishment, on a "subjective" basis: that is, that it should be necessary to prove actual intention or foresight on the accused's part. The CLRC never thought it appropriate even to question that that was the proper approach to the law of offences against the person; and although there have in recent years been doubts expressed, some of them from weighty sources,¹⁰⁹ as to whether subjectivism can best solve all of the law's problems, there has 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.

7.23 Further questions of this sort have arisen as a result of the abandonment of subjective recklessness, in respect of offences of damage to property, by the House of Lords in *Caldwell*;¹¹⁰ it was indeed the suggestion¹¹¹ that the "objective" approach of *Caldwell* should apply to all offences of which "recklessness" forms part of the *mens rea* that gave rise to serious doubts as to the proper approach to offences of "malice" under the 1861 Act, which latter concept had been analysed, albeit without direct statutory authority, in terms of recklessness.¹¹² In *Savage*, however, the House of Lords 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.¹¹³ This conclusion may be thought to indicate, amongst other things, that their Lordships in *Savage* saw no difficulty, or at least no overriding difficulty, in the proof of the actual state of mind of an accused, a matter that had given the majority of the House pause in *Caldwell*. However, to recognise the practical viability of a law of offences against the person based on subjective awareness does no more than to confirm the long-standing interpretation of the 1861 Act: for it will be seen from the account of sections 18, 20 and 47 set out in paragraph 7.16 above that each of those offences requires proof of *some* subjective state of mind.

7.24 Where the definition of these offences causes difficulty, however, is 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. That irrationality is increased by the failure of the 1861 Act to provide 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 deal with those objections in the next two sections.

¹⁰⁸ *Savage* [1990] 3 WLR at p. 928F.

¹⁰⁹ e.g. Sir Rupert Cross in 83 LQR 215 and 91 LQR 540. Professor Cross was, however, a member of the CLRC that, as we indicated in the text, recommended, without demur, a subjective formulation of such offences.

¹¹⁰ [1982] AC 341.

¹¹¹ By Lord Roskill in *Seymour* [1983] 2 AC 493 at p. 506. This observation was *obiter*: see the Court of Appeal (Criminal Division) in *Spratt* [1990] 1 WLR 1073 at p. 1082F.

¹¹² *Cunningham* [1957] 2 QB 396.

¹¹³ [1991] 3 WLR at p. 938G.

The 1861 Act: degrees of injury

7.25 In the 1861 Act the prohibited results of the accused's conduct are distributed between the various sections in an irrational way. Thus, since both section 18 and section 20 are concerned with *serious* bodily harm, the only offence that controls the infliction of actual (i.e. non-serious) bodily harm is section 47. That section does not, however, 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.

7.26 Even leaving aside the confused structure of section 47, 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. Even a very minor incident can amount to a wounding:¹¹⁴ 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.

7.27 Thus, although section 20 is generally accepted as creating a crime that is more serious than that created by section 47,¹¹⁵ the distinction between the two sections is far from clearly stated. At least if the injury to the accused can be characterised as a wound,¹¹⁶ there is little difference between the forbidden consequence under section 20 and the forbidden consequence, actual bodily harm,¹¹⁷ under section 47. 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",¹¹⁸ 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.

The 1861 Act: Erratic application of the accused's fault

7.28 The greatest problem of the present law, however, is 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 a conviction.¹¹⁹ 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.¹²⁰ 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. 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 8 of the present Bill.¹²¹ It is clearly different from, and is intended to be different from, the causing of bodily *harm*, in the sense of injury.

7.29 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

¹¹⁴ *Archbold* (44th edition, 1992), para. 19–127.

¹¹⁵ See the Court of Appeal in *Parmenter* [1991] 2 WLR at p. 416F.

¹¹⁶ See paragraph 7.26 above.

¹¹⁷ "Any hurt or injury calculated to interfere with the health or comfort of the prosecutor": see paragraph 7.16, n. 92, above.

¹¹⁸ *Savage* [1991] 3 WLR at p. 939H. This definition is unlikely in practice to be different from *actual* bodily harm.

¹¹⁹ We limit this criticism to sections 20 and 47 because the only serious issues for discussion arise in respect of those sections. We should, however, point out 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 do not think that it could be seriously contended that that law is supportable we do not discuss it further.

¹²⁰ See paragraph 7.27, n. 118, above.

¹²¹ See paragraph 9.10 below.

general principle. The House was pressed with an argument that the analysis of section 20 adopted by Diplock LJ in *Mowatt*,¹²² 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”.¹²³ 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 any such principle.

7.30 That, however, leaves open the more general question of whether, when one is considering general policy, and not merely the irrational results of piece-meal legislation,¹²⁴ an incoherence between the consequence for which the accused is punished and the accused’s mental state with regard to that consequence is desirable. The view of the CLRC¹²⁵ was that it is not. That is our view too, for the reasons set out in the next section.

The defects of the law

7.31 The law in the 1861 Act is defective on grounds both of effectiveness and of justice. It is commonly thought to be unjust to punish people for results of their conduct that they neither intended nor foresaw. Very pressing reasons of practicality or social protection are, therefore, required before such punishment can properly be inflicted. As we point out in paragraph 7.23 above, no such reasons based on what is sometimes alleged to be the practical impossibility of operating any sort of system of subjective liability can be advanced in the present case; and the general structure based on the 1861 Act has been created not for other reasons of policy or practicality, but by the accident of legislative history.

7.32 However, a law is not truly subjective, indeed does not in any way fulfil the moral and social arguments that support the subjectivist approach to criminal liability, if, as in the 1861 Act, what the accused has actually to foresee differs so much from that which he is accused of causing.¹²⁶

7.33 In section 20, all that the accused has to foresee is any minor physical harm. The consequence for which he is punished, the causing of serious bodily harm, may arise quite unforeseeably: yet he is still criminally liable for *that* consequence. 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,¹²⁷ 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 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.

7.34 In all such cases, the accused is at most negligent (and, at least in the version of the facts of *Savage* suggested in paragraph 7.33 above, not even negligent) as to the injury

¹²² See paragraph 7.12 above.

¹²³ *Savage* [1991] 3 WLR at p. 939C.

¹²⁴ *Savage* [1991] 3 WLR at p. 939E, cited in n. 76 above.

¹²⁵ *Working Paper on Offences against the Person*, 1976, paras. 110–117; and Fourteenth Report, paras. 149–152.

¹²⁶ See paragraphs 7.28–7.30 above.

¹²⁷ See paragraph 7.21 above.

for which he is punished. It is difficult to see how that can be a justified basis for criminal, as opposed to civil, liability. We have already indicated that, so far as we are aware, no reasons of practicality have been advanced in support of the 1861 Act. We should, however, mention some considerations that might be thought relevant, from a practical point of view, in assessing the merits of a law that only convicts the accused for causing injury of a category that he intended or actually foresaw.

7.35 First, in none of the cases suggested in paragraph 7.33 above should or would the accused be free of all criminal liability. If he intends or foresees actual harm, he should be punished for that; and in the *Savage* case itself, pouring the beer is a common assault, punishable by six months' imprisonment, and will remain an assault, similarly punishable, under the present Bill.¹²⁸ Second, in the present law, and in the law as recommended by the CLRC¹²⁹ and in the present Bill,¹³⁰ recklessness extends to being aware of a *risk* that a consequence may occur. That is a fairly broad test: as the CLRC indicated,¹³¹ it does not give an accused licence implausibly to claim that he did not appreciate a likely risk; and it certainly does not require the prosecution to prove that the accused foresaw all the details of what in fact occurred.

7.36 That law of recklessness would operate rationally and effectively if the categories of risk as to which the accused had to be shown to be reckless were set out in a graded manner, that discriminated between the more and the less serious types of injury, and thus between different types of risk. In the 1861 Act, however, the types of injury are distributed between the various sections in a muddled and irrational fashion and, in particular, the only section that clearly focuses on the causing of harm that is not characterised as "serious" is section 47.¹³² In *Savage* the House of Lords commented, in relation to section 20, that "If section 20 was to be limited to cases where the accused does not desire but does foresee wounding or grievous bodily harm, it would have a very limited scope."¹³³ But any fear as to the limited scope of the law *as a whole* can be set aside if there are other offences, defined in terms of non-"serious" harm, that impose sufficient penalties for conscious infliction of that harm. The structure of offences recommended by the CLRC, and adopted in clauses 4–6 of the present Bill, achieves that end by distinguishing clearly, and in different offences with different maximum penalties, between serious and other injury, and by imposing liability according to which of those broad categories covers the harm that the accused took the conscious risk of causing. He will thus be punished according to a broadly practical classification of his subjective fault.

7.37 Finally, it might be argued that the apparent severity of the cases suggested in paragraph 7.33 above could and would be mitigated by taking account of the accused's actual culpability at the sentencing stage. But it is unsatisfactory, unless there is no other viable solution, to seek to deal with what are truly issues of liability by means of judicial sentencing discretion; and 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.

7.38 Not only is the law under the 1861 Act unjust, but also its structure and statement are inefficient. Although magistrates and juries are now, by the decision in *Savage*, saved from some of the worst excesses of the statute, such as the need to speculate upon the meaning in 1992 of the word "maliciously", they are still faced with offences stated in complex terms, that puzzlingly use widely different concepts (e.g. serious bodily harm/some physical harm) within the same definition; or with the complex analysis of causation that, as we explained in paragraph 7.21 above, is now required under section 47 of the

¹²⁸ See paragraph 9 below, and clause 8 of the Bill.

¹²⁹ Fourteenth Report, paras. 11–12.

¹³⁰ Clause 2(b): see paragraph 5.13 above.

¹³¹ Fourteenth Report, para. 12.

¹³² See paragraphs 7.25–7.26 above.

¹³³ [1991] 3 WLR at p. 939F.

1861 Act. It is very difficult to see why laymen should be put to the trouble of understanding these complexities, and judges and magistrates' clerks 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.

7.39 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 serious (section 18) and minor (section 20) harm; and that although the law purports to punish and control subjective fault, that fault is not linked to the damage caused, and is irrelevant to the punishment that the law provides. That law does not clearly 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 violence is taken seriously, and will be punished according to the seriousness of the accused's conduct.

7.40 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 comprehensive language, between serious and less serious cases. Fortunately such a law stands ready, in the proposals for the reform of the 1861 Act made by the CLRC in their Fourteenth Report in 1980. Had those proposals, or the substance of them, been adopted in 1980 there could not have occurred the serious expenditure of judicial time taken up in rectifying, and the extensive uncertainty caused by, the developments that culminated in *Savage*.

7.41 We have reviewed the proposals of the CLRC in the light of *Savage*, and remain of the opinion that a law broadly based on them should be introduced as soon as possible to solve the difficulties caused by the 1861 Act. In the next section of this Consultation Paper we indicate the nature of the CLRC's proposals and the terms in which we think they should be expressed in legislation; and invite comment on the terms of the Bill now proposed.

E. THE CLRC'S PROPOSALS AND THE BILL

8.1 The CLRC heavily criticised the then existing law, saying that "no one who has worked with the Act of 1861 will doubt that it is overdue for replacement",¹³⁴ and proposed that replacement by a simplified set of offences that clearly indicated what had to be proved against the defendant, and clearly distinguished between acts of differing degrees of gravity.

8.2 The CLRC's basic conclusions were:

- (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";¹³⁵
- (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.

¹³⁴ CLRC, Fourteenth Report, para. 3.

¹³⁵ CLRC, Fourteenth Report, para. 3.

8.3 In respect of the latter two proposals the CLCR said:

“Just as there is a need to separate death caused by an intentional act (murder) from death caused recklessly (manslaughter), in order to distinguish the gravest from the less grave forms of homicide, there is similarly a need to separate the intentional causing of serious injury from the reckless causing of serious injury. There is, in our opinion, a definite moral and psychological difference between the two offences which it is appropriate for the criminal law to reflect”.¹³⁶

The Committee however thought that, in respect of non-serious injury, it would be too complex to have a structure of offences that required a distinction, affecting the offence charged, between intentional and reckless conduct even in respect of the most trivial injury. They therefore concluded that their general principles would be adequately served by a single offence of causing injury either intentionally or recklessly.

8.4 The CLRC therefore expressed its recommended scheme of new offences 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.¹³⁷

8.5 We agree with the broad structure of this approach, which in our view accurately distinguishes between the more serious and the less serious offences, and ensures that, as is consistent with the general principles that we have expounded in paragraph 7 above, the accused is punished according to the type of injury that he intended or was aware that he might cause. 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 the 1861 Act purports to be more grave than that envisaged by section 47, the maximum penalty under both sections is the same.

8.6 In the Draft Code¹³⁸ we adopted the substance of the recommendations of the CLRC, subject to a few minor amendments, and we do the same in clauses 4–6 of the present Bill, which provide:

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

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

- (a) the act causing injury is done, or**
- (b) the injury occurs,**

in England and Wales.

(3) Section 3 [which imposes liability for omissions] applies to an offence under this section.

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

(2) Section 4(2) applies also to an offence under this section.

¹³⁶ CLRC, Fourteenth Report, para. 152.

¹³⁷ CLRC, Fourteenth Report, paras. 152 and 155–157.

¹³⁸ Clauses 70–72.

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

We now comment on some particular aspects of these clauses.

Intention and recklessness

8.7 The concepts of acting intentionally or recklessly that are adopted in clauses 4–6 will be interpreted according to the definitions in clause 2 of the Bill that are explained in paragraph 5 above. It is one of the principal aims of the Bill to provide clear and workable definitions of fault terms.

8.8 The clause 2 definition of “intentionally” enables us to replace the CLRC’s formula of “causing serious injury with intent to cause serious injury”¹³⁹ with the simpler concept of intentionally causing serious injury. The clause 2 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.¹⁴⁰

Injury

8.9 The CLRC proposed that there should be no definition of the terms “injury” or “serious injury” used by them, though they thought it necessary to make clear, by a separate provision, that injury includes unconsciousness.¹⁴¹ In the Draft Code we substituted for those terms the expressions “personal harm” and “serious personal harm,”¹⁴² clause 6 of the Draft Code making clear that “personal harm” meant harm to body or mind, and included pain and unconsciousness.¹⁴³ This formulation has been criticised by Dr. Glanville Williams¹⁴⁴ on a number of grounds, which call in question both the terminology of the Draft Code and the policy adopted therein. We are not persuaded by all of Dr. Williams’ criticisms, but we do think that a number of them raise important issues for discussion, that have not yet been the subject of proper consultation either by the CLRC or by ourselves. We therefore in this section of the Consultation Paper set out various issues on which we specifically invite comment by consultees.

“Injury” or “personal harm”

8.10 Dr. Williams criticises the Draft Code’s use of the term “personal harm” as an inappropriate change from the expert opinion of the CLRC, on two main grounds: first, and linked to other objections considered later, the Draft Code’s formulation might be read as extending the law too widely. Secondly, “injury” is a much more natural colloquial expression than harm to express actual damage to body or mind (with which this part of the law is concerned), as opposed to merely economic harm.

8.11 We see some force in both of these criticisms. If only by a narrow margin, the word “injury” seems 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; and similarly, although it cannot be said that the word “injury” inevitably excludes reference to merely economic loss,¹⁴⁵ we tend to agree with the CLRC that it 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”. We have therefore

¹³⁹ See paragraph 8.4(a) above.

¹⁴⁰ See paragraph 7.36 above.

¹⁴¹ CLRC, Fourteenth Report, para. 154.

¹⁴² Draft Code, clause 70.

¹⁴³ Code Report, paragraph 14.35.

¹⁴⁴ [1990] New LJ 1227.

¹⁴⁵ See e.g. *Davies v Whiteways Cyder Co.* [1975] 1 QB 262: increased liability for estate duty an “injury resulting from death” under section 2 of the Fatal Accidents Act 1846.

provisionally restored in the Bill the concepts of injury and serious injury as used by the CLRC; but we invite comment on that usage.

8.12 We should emphasise that in our view the actual word used to identify the conditions referred to is less important than the way in which that word is defined, limited and referred to in the legislation. We are, however, at present minded to think that in the process of definition it is more appropriate to start from the narrower concept of “injury”, and then specifically 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 here concerned. We deal at some length in paragraphs 8.16ff below with these problems of definition, with particular reference to the nature of the physical and mental interference with the victim that should be punishable by the present offences.

Inclusion of minor injuries

8.13 The formulation of the Draft Code, and of the Bill, would include under the offence created by clause 6 of the Bill any outcome that could be legitimately described as an injury (or personal harm), however trivial the damage might be. Dr. Williams suggested that that may lead to cases falling under clause 6 that are inappropriate for an offence that carries a maximum penalty of three years’ imprisonment. We have some sympathy with this view, but the problems are, first, deciding what type of injury might be sufficiently minor to be excluded from the reach of a crime that punishes the infliction of injury;¹⁴⁶ and, second, finding a legislative formula that would accurately encapsulate whatever conclusion was reached on the first question.

8.14 We find attractive the view that 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 under clause 8 of the Bill is concerned, should be prosecutable under the more serious offences contained in the present clauses. We, therefore, provisionally propose that the offence in clause 6 which, unlike those in clauses 4–5, is not limited to *serious* injury, but extends to any injury, should indeed cover injury of any gravity. Where such injury was indeed of a minor degree we would expect that fact to be taken into account by prosecutors in deciding whether to charge under clause 6 rather than for an assault under clause 8; 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.

“Serious” injury

8.15 We agree with the CLRC that no attempt should be made to define “serious” injury.¹⁴⁷ This, again, is essentially a matter of judgement, and it is necessary, and indeed in our view desirable, that it should be left to the jury in each case to decide whether a particular harm is serious. This solution has been questioned by Dr. Williams, but we think that the length and complexity of the formulation that he proposes as a statutory definition of serious injury¹⁴⁸ in fact helps to illustrate the difficulty attendant on such an enterprise.

¹⁴⁶ The difficulty of this issue is perhaps illustrated by Dr. Williams’ approving citation of the Canadian case of *Dupperson* (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 6 of the present Bill.

¹⁴⁷ CLRC, Fourteenth Report, para. 154.

¹⁴⁸ [1990] New LJ at p. 1229.

Injury to body and to mind

Background

8.16 Clause 6 of the Draft Code went no further than to say that “personal harm”, the expression used in the Code, meant harm to body or mind, and included pain and unconsciousness. More detailed consideration of the problems of definition for the purposes of the present exercise has, however, revealed, first that closer attention needs to be paid to the definition of physical injury; and, secondly, that much more detailed discussion is required of the policy issues affecting whether, and to what extent, the serious offences set out in clauses 4–6 of the present Bill should extend to the causing of effects on the mind.

8.17 We deal with the latter question in paragraphs 8.20ff below. So far as physical injury is concerned, 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 offence 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 unconsciousness which the Commission, following the CLRC, specified in clause 6 of the Draft Code. A further case is the intentional or reckless inflicting of illness or disease.¹⁴⁹ There are other conditions the causing of which the criminal law might wish to punish; for instance, the inducement of vomiting.

8.18 In order to accommodate these possibilities we propose, in clause 1(6) of the Bill, to provide that (so far as physical injury is concerned)

“injury” means physical injury, including pain, unconsciousness, or any other impairment of a person’s physical condition.

The last part of this definition is admittedly broad, but we think that a provision in these terms, or something like them, is necessary to bring within the present offences cases of the type discussed in paragraph 8.17 above. We invite comment on whether the provision is indeed necessary, and justified, and whether it contains the appropriate elements of the offence.

8.19 One virtue of a definition in the form that we suggest should be that it is simple to use. Although the definition of “injury” in terms of “physical injury”, i.e. by repeating the word to be defined, may appear inelegant, it is very important that in the vast majority of straightforward cases the court 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. That is, we think, achieved by the present draft, that will enable 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.

¹⁴⁹ See *Clarence* (1888) 22 QBD 23. The accused, who had intercourse with his wife when he knew, but she did not, that he was suffering from gonorrhoea, 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 para. 2.10, and the speeches in the House of Lords in *R v R* [1991] 3 WLR 767. And, apart from that point, *Clarence* does not suggest that the accused could not have been convicted of an offence expressed, as are the offences in clauses 4–6 of our Bill, in terms of “causing” [disease].

Injury to mind: introduction

8.20 Clause 6 of the Draft Code made clear that “personal harm”, the expression used in the Code, meant harm to body or mind, and included pain and unconsciousness. The issue of whether, and to what extent, harm “to the mind” should be included in the possible grounds of liability for the serious offences contained in the 1861 Act, and now to be replaced by the offences in clauses 4–6 of the present Bill, is one of some difficulty. It has not so far received the consideration that it requires, and in this Consultation Paper we set out a series of issues on which we require the advice of consultees.

8.21 It should first be borne in mind that the offences with which we are concerned can only be committed intentionally or recklessly. Many of the problems associated with the *negligent* causing of nervous shock in the law of tort therefore do not arise. And, for the same reason, criminal offences involving the infliction of mental injury (however defined), as opposed to physical injury, are not likely to be frequent occurrences. It is, however, 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.

8.22 Thus, the accused may know that the victim suffers from some particular nervous condition, may deliberately excite the symptoms of that condition. Or, perhaps more pressingly, if mental conditions are comprehended within the general concept of injury or harm, an accused whose attempt physically to injure a victim miscarries, but who thereby causes a mental condition included within the definition of “injury”, would be liable for causing a legally prohibited result, though in a different form from that which he intended. Thus, if the accused foresees physical injury to A from, for instance, attacking A with a knife, but his aim misses and causes no *physical* injury to A, he will still commit a crime if, as a result, A suffers any type of mental harm that was included within the definition of “injury” for the purposes of clauses 4–6 of the present Bill; and, indeed, he will also commit that crime, under the doctrine of transferred fault that is part of the common law and which is put into statutory form in clause 25 of the present Bill, if B, a bystander, suffers the required form of mental harm. Such cases clearly pose the question of whether and to what extent harm to the mind should be included in “injury” for the purposes of clauses 4–6 of the Bill.

The present law

8.23 The present law on this subject is very far from clear. In *Miller*¹⁵⁰ *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 be described generally as “harm to the mind” fall within the range of *criminal* injuries that are recognised by the present law. Such a classification would include, within actual bodily harm under section 47 of the 1861 Act, the merely emotional 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.¹⁵¹

8.24 The CLRC did not address this 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 recommend that there should be express provision to this end”.¹⁵²

¹⁵⁰ (1954) 38 Cr App R 1; cited on this point in *Archbold* (44th edition, 1992), para. 19–197.

¹⁵¹ See, e.g., *Alcock v Chief Constable of South Yorkshire* [1991] 2 WLR 814 at p. 817E (Hidden J); and [1991] 3 WLR 1057 at pp. 1104C (Lord Ackner) and 1118G (Lord Oliver of Aylmerton).

¹⁵² Fourteenth Report, para. 154.

While this approach will not cause difficulty in the vast majority of cases, consideration should in our view be given to determining more clearly the extent of criminal liability for mental harm. The possible options, on all of which we seek comment, would seem to be as follows.

“Injury” or “harm” undefined

8.25 This would leave a great deal to the judgement of the jury or magistrates: much more than in the case of distinguishing between injury and “serious” injury.¹⁵³ It would also, we think, leave issues of genuine doubt unresolved. It would be unclear whether, and to what extent, the somewhat fragile authority on which, at present, liability for mental injury rests¹⁵⁴ applied to the new statutory law. The fact that the CLRC thought that a special term had to be included to ensure that “injury” extended even to unconsciousness¹⁵⁵ 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.

8.26 For these reasons, we are minded to think that the Bill should provide some further guidance to courts: that, however, depends in turn on what the terms of that guidance should be.

Limitation to physical injury

8.27 We mention this possibility for completeness, but we do not think that it is a serious proposition. To determine now that only injury that could be described as “physical” could, in any circumstances, be the subject of the law of offences against the person would be to reverse the position that has been thought to exist since at least 1954.¹⁵⁶ It would also permit the causing with impunity of injuries that on any view can be quite as harmful as injury to the physical body.

Specific inclusion of all “harm to the mind”

8.28 As we have pointed out in paragraph 8.13 above, even the most trivial *physical* injury will be included within the definition of these offences. The width of that provision is underlined if, as we think is desirable, following the CLRC, it is made clear that unconsciousness is so included; and also if it is made clear that the causing of physical pain, without discernible alteration to the physical state of the body, is included within physical injury. Bearing in mind that the crimes with which we are concerned only extend to the intentional or reckless causing of “injury”, why should all mental injury not equally be included?

8.29 This is a strong argument, on which we invite comment. We think, however, that it must be borne in mind that 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, does not seem to be appropriately sanctioned by offences under the 1861 Act, or by offences under clauses 4–6 of the present Bill.

¹⁵³ See paragraph 8.15 above.

¹⁵⁴ See paragraph 8.23 above.

¹⁵⁵ See paragraph 8.24 above.

¹⁵⁶ See paragraph 8.23 above.

8.30 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.¹⁵⁷ Even where the accused deliberately causes injury, there seems to us a clear distinction in social and legal implications between his causing of physical bodily damage to another, and the causing of distress or anxiety. We will, however, welcome views on that issue, which, we believe, has never been thoroughly considered as a matter of English criminal policy.

Some limitation on mental harm?

8.31 If, however, it is sought to make clear that not all harm to the mind should be included within offences of injury, the problem is to identify some sensible means of limitation. The only authoritative statement of what appears to be the present law¹⁵⁸ puts the matter very broadly; though, as we have said, that approach might not have survived if its full implications had ever been properly explored. While any limitation will have to leave a substantial amount to judgement, we are minded to think that the line is most appropriately drawn at the identification of some sort of medically-recognised condition that goes beyond mere alarm or anxiety.

8.32 A formulation that might achieve that end is to be found in 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 1989.¹⁵⁹ 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 examples of illness and not merely emotional conditions;¹⁶⁰ and any other injury to the mind that could properly be described as injury to health.

8.33 We invite comment on whether limitation of harm to the mind to impairment of the victim’s mental health would be a suitable means of ensuring that significant cases of injury were caught without unduly widening the ambit of criminal liability. Subject to consultation, this approach is adopted in the Bill, which provides that

Injury means

- (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.

Jurisdiction

8.34 The CLRC also recommended that it should be an offence to incite or conspire in this country to commit a serious injury abroad.¹⁶¹ The present Bill is not concerned with preliminary offences, and therefore does not implement that proposal. However, we consider 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

¹⁵⁷ Another, and very different, offence that is dealt with in clause 12 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.

¹⁵⁸ See paragraph 8.23 above.

¹⁵⁹ e.g. detention in secure accommodation (s.25); care and supervision orders (s.31); emergency protection orders (s.44); police power to remove a child (s.46).

¹⁶⁰ 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 n. 151 to paragraph 8.23 above, [1991] 2 WLR at pp. 818–819.

¹⁶¹ CLRC, Fourteenth Report, para. 154.

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 ensure that such conduct will be triable in the English courts.

Consultation

8.35 We invite comment on all the matters in this section. However, we would in particular welcome views on the following specific issues:

Should the present sections 18, 20 and 47 of the 1861 Act be replaced by a scheme broadly along the lines of the recommendations of the CLRC? If not, should the present law be reformed in any way, and if so, how? (see generally paragraphs 7 and 8 above)

Are the required mental states for the new offences appropriately stated in terms of intention and recklessness as those terms are defined in clause 2 of the Bill? (see paragraphs 5 and 8.7–8.8 above)

Should the prohibited consequences of the new offences be stated in terms of “injury”, or in some other way? (see paragraphs 8.9–8.12 above)

Should there be a statutory provision excluding minor injuries from the offence created by clause 6 of the Bill? (see paragraphs 8.13–8.14 above)

Should “serious” injury be defined, or be left to the judgement of the jury? (see paragraph 8.15 above)

Should “injury” include any, and if so what, injury to the mind? Would injury to the mind be satisfactorily limited by defining it in terms of “impairment of mental health”? (see paragraphs 8.20–8.33 above)

F. ASSAULT

The position before 1988

9.1 The CLRC summarised the position as it believed it to be in 1980 as follows:

“At common law, an assault is an act by which a person intentionally or recklessly causes another to apprehend immediate and unlawful personal violence and a battery is an act by which a person intentionally or recklessly inflicts personal violence upon another. However, the term “assault” is now, in both ordinary legal usage and in statutes, regularly used to cover both assault and battery”.¹⁶²

9.2 This analysis indicated the serious 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. That confusion is increased by the use in statutes of other terms such as “common assault”. This expression, for instance as used in the second part of section 47 of the 1861 Act,¹⁶³ is presumably used to differentiate the assaults to which it refers from special cases of assault that attract specific and increased statutory penalties: for instance, the assault occasioning actual bodily harm that is dealt with in the first part of section 47 of the 1861 Act. However, it still has to be determined whether “assault” when used in either of these contexts means simply (psychic) assault, or also includes battery.

9.3 A further complication is that the CLRC believed,¹⁶⁴ in the company of “generations of academic and practising lawyers”,¹⁶⁵ that assault and battery were in 1980

¹⁶² Fourteenth Report, para. 158.

¹⁶³ See paragraph 9.3 below.

¹⁶⁴ “The common law offence of common assault (which includes a battery) is, under section 47 of the Act of 1861, an indictable offence punishable with a maximum penalty of one year’s imprisonment”: Fourteenth Report, para. 148.

¹⁶⁵ *Archbold* (44th edition, 1992), First Supplement at para. 19–177, where the point is developed with great force.

common law crimes. However, in *DPP v Little*¹⁶⁶ the Divisional Court adopted the view of May LJ in *Harrow Justices, ex p Osaseri*¹⁶⁷ that although “assault” (here including battery) had been a common law offence until 1861, it was in that year made a statutory offence by the second part of section 47 of the 1861 Act, which read:

“... whosoever shall be convicted upon an indictment for common assault shall be liable to be imprisoned for any term not exceeding one year”.

The present law

9.4 That reading of section 47 is necessarily authoritative, but we feel obliged to say that we do not agree with it. As indicated above, the Divisional Court’s view conflicts with the great weight of previous opinion, including that of the CLRC. That previous opinion appears to have been shared by the draftsman of the section, who gave no indication in his contemporary comments on section 47 that the effect of the latter part of the section was anything other than to change the penalty available for the common law crime of assault, by creating a power to award hard labour.¹⁶⁸ By thus simply altering the penalty for an existing common law offence the second part of section 47 would have had the same type of effect as was intended by the first part of section 47, relating to the penalty for an assault occasioning actual bodily harm, which we have discussed at length in paragraph 7 above.¹⁶⁹

9.5 The court in *DPP v Little* was, however, directly concerned not with section 47 of the 1861 Act but with the effect of the Criminal Justice Act 1988, which repealed the part of section 47 of the 1861 Act that is quoted in paragraph 9.3 above, and provided, by section 39, that:

“Common assault and battery shall be summary offences and a person guilty of either of them shall be liable to a fine not exceeding level 5 on the standard scale, to imprisonment for a term not exceeding six months, or to both”.

This section, again, reads as if it merely provides for the level of penalty for an existing offence. However, consistently with its view of section 47 of the 1861 Act, the Divisional Court in *Little* held that section 39 of the 1988 Act was an offence-creating provision, that replaced the previous statutory offence of common assault. Moreover, and most importantly, the section made wholly clear, for the first time, that “assault” and “battery” were two separate crimes, and that an information (or a count in an indictment) charging “assault and battery” would therefore be duplicitous.

9.6 Although, however, the two offences are, in the view of the Divisional Court in *Little*, created by section 39 of the 1988 Act, that Act does not define the terms and content of those offences, which can only be determined by reference to previous case-law.

The approach of the Bill to assault and battery

9.7 The present exercise provides an opportunity to consider the formulation of these offences afresh, untrammelled by the terminological confusion, and the technical issues of statutory interpretation, that have obscured recent discussion of the present law. The principal issues are whether “assault” and “battery” should be statutorily defined; and whether the law should be presented in the form of one offence or two.

¹⁶⁶ [1992] 1 All ER 299 at p. 303.

¹⁶⁷ [1986] QB 589.

¹⁶⁸ C. S. Greaves QC, *op. cit.* in n. 77 to paragraph 7.5 above, at p. 76; and see also *Russell on Crimes* (4th edition, by Greaves, 1865), vol. 1 at pp. 1031–1032. Section 47 as originally formulated, in 1861, continued at the end of the phrase quoted in paragraph 9.3 above with the words “with or without hard labour”. This last provision was of course removed when hard labour was abolished.

¹⁶⁹ See in particular n. 78 to paragraph 7.5 above.

9.8 A majority of the CLRC were of the view 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 definition. The same view appears to have been taken by the draftsman, and by Parliament, in relation to section 39 of the 1988 Act. In the Draft Code¹⁷⁰ we indicated that we were unable to agree with that view. As a matter of principle, a concept so important as assault, which forms the substance of a criminal offence of violence, ought to be defined, and that policy is implemented by clause 8 of the present Bill. The matter, moreover, is not merely one of principle. Although there is, we think, little controversy about the basic terms of the assault and battery offences, some aspects of that law are sufficiently undeveloped or uncertain to make statutory statement and confirmation of them highly desirable. That is particularly true of the important, but only recently fully articulated, exemption from the law of assault of what we describe below as “trivial touchings”. That part of the law is set out in clause 8(2) of the Bill, and discussed in paragraphs 9.17–9.20 below. To put the matter at its lowest, it would be very odd to introduce this statutory exception to the law of assault without any statutory definition of the offence from which the conduct described in clause 8(2) was excluded.

9.9 So far as the formulation of the offence is concerned, the CLRC discussed whether there should be two separate offences: battery, and a “psychic” offence that they contemplated being expressed in terms of “threats”. They however considered¹⁷¹ that an offence of threats separated from the concept of immediate impact could become unduly wide; and that the creation of the two offences would create an unjustified distinction between the civil and the criminal law. They therefore thought that both aspects of “assault” should be included under the same offence, and that for that purpose “assault” should not be defined.¹⁷²

9.10 In the Code¹⁷³ we followed the CLRC’s approach of providing for a single offence, as part of our general policy of adopting the CLRC’s recommendations; but we differed from the CLRC by providing that a concept as important as assault should be statutorily defined. Clause 8 of the present Bill therefore stipulates that a person is guilty 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 likely or intended 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.

9.11 We however invite comment on whether clause 8 should be divided into two separate offences. The CLRC’s concern, that a non-battery offence expressed in terms of “threats” would become too wide, is not conclusive if, as in clause 8(b) of the present Bill, that offence is closely defined in terms of the causing of belief that force or impact is imminent. The creation of two clearly separate offences, whilst not making any substantive alteration in the law, might make plainer the two different types of activity that are made punishable by the present clause 8. As to terminology in that event, it would probably be easiest, and would certainly fit with normal if not necessarily at present strictly correct usage, to call physical assault simply “assault”, and to reserve a term such as “threat to assault” for psychic assault, narrowly defined as in clause 8(b) of the Bill.

¹⁷⁰ Clause 75.

¹⁷¹ Fourteenth Report, para. 159.

¹⁷² *Ibid.*, para. 160.

¹⁷³ Draft Code, clause 75.

9.12 As we have indicated, whatever policy is eventually adopted on this point will not affect the actual law to be applied, and we therefore in the rest of this section discuss that law in terms of clause 8 of the Bill, which provides for a single offence.

9.13 Clause 8(1) deals with the application of force or impact to the body of another. There is no need to prove injury; if such is intended, an offence is committed under clause 6. 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.¹⁷⁴ Clause 8(1)(b) covers the case where there is no battery, but fear is caused of an immediate application of force: for instance if the defendant points a pistol at a person who believes it to be loaded. However, in accordance with the policy adopted by the CLRC,¹⁷⁵ 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.¹⁷⁶

9.14 The CLRC considered that, because of the comparatively minor matters with which it deals, and the availability of serious offences dealing with actual injury, assault should be a summary offence only.¹⁷⁷ That proposal has in fact been implemented by section 39 of the Criminal Justice Act 1988 and we incorporate that provision in the present Bill.

9.15 Clause 8 of the Bill makes special provision in respect of the consent of the victim. As discussed in paragraph 3.4 above, and further in section G below, existing common law defences based on the consent of the victim remain unaffected by the Bill, and that law will apply, for instance, to the offences in clauses 4–6 of the Bill. Strictly speaking, therefore, it is not necessary to mention consent in clause 8 either. 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 so significant an element in assault it seemed helpful specifically to mention consent in clause 8.

9.16 Clause 8 also preserves the common law rule that, in general, one cannot consent to the infliction of injury. There are some recognised exceptions to that rule, the most obvious being the boxer or the surgeon’s patient. It would have been difficult, and indeed unduly limiting, to try to provide for all such cases in the Bill. They will, therefore, continue to be exempted from liability for assault by the common law; we revert to that matter in section G below.

Trivial Touchings

9.17 The definition of assault in clause 8(1) 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*,¹⁷⁸ 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 judgment in *Collins v Wilcock* went on to explain, is a

“[broad] exception . . . created to allow for the exigencies 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

¹⁷⁴ Cf. *Martin* (1881) 8 QBD 54.

¹⁷⁵ See paragraph 9.9 above.

¹⁷⁶ See the Code team report, at paragraph 15.47.

¹⁷⁷ Fourteenth Report, para. 161.

¹⁷⁸ [1984] 1 WLR 1172 at p. 1177C.

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”.

9.18 We believe that physical contact of the kind described in *Collins v Wilcock* should be expressly excepted from the statutory definition of assault, in the same way as a touching that is consented to. That result is achieved by clause 8(2) of the Bill, which requires the contact that would otherwise be an assault to be “within the limits of what is acceptable as incidental to social intercourse or to life in the community”. This formula directs attention to prevailing standards of social behaviour or tolerance, which are to be decided by the tribunal of fact, magistrates or a jury, trying the case. The question, we should stress, is not what the accused believes to be acceptable, but (as Lord Goff explained in *Collins v Wilcock*) what is *in fact* acceptable. The test is therefore an objective one. But in deciding whether, in a given case, that conduct was within the limits of what society accepts, the tribunal is likely to take into account any information that the accused had as to whether the person *prima facie* assaulted in fact objected to the contact involved; so, to adapt one of Lord Goff’s examples in his judgment quoted in paragraph 9.17 above, if the accused knew that a particular person objected to otherwise unobjectionable back-slapping, the tribunal might well think that such conduct towards *that* person was not within the limits of what society found acceptable.

9.19 In clause 8(2) of the Bill, the reference to conduct “acceptable as incidental to social intercourse or to life in the community” replaces the shorter expression in the judgment just quoted: “generally acceptable in the ordinary conduct of daily life”. That is because we think it desirable to distinguish between the private and public spheres of social existence, for two reasons. First, the standards and expectations prevailing in the former may vary according to the different spheres in which different people move. Second, “the ordinary conduct of daily life” is not an appropriate expression for encounters between police officers and citizens that, as we observe below, are in practice likely to be the most common context in which the subsection has to be considered. We appreciate that the statement of that point has led to a formulation that, in the comparatively rare cases in which these questions may arise, will require careful consideration and application by the tribunal of fact. That would, however, be true even of a shorter statement of this principle, and we consider that any difficulty of statement is outweighed by the greater flexibility afforded by the distinction drawn between private and public activity. However, we invite comment on whether it is agreed that the distinction drawn in clause 8(2) should be maintained.

9.20 Clause 8(2) is unlikely to be a frequent focus of argument or decision: people are not prosecuted in practice for trivial touchings 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.¹⁷⁹ Actual detention or physical restraint requires statutory warrant or a purpose justifying the use of force, and falling within clause 28 of our Bill. But the lawfulness, in any particular circumstances, of less serious contact has to be judged against “acceptable standards of conduct”¹⁸⁰ and would therefore in future fall to be decided under clause 8(2).

¹⁷⁹ 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.

¹⁸⁰ *Collins v Wilcock* [1984] 1 WLR 1172 at p. 1178D.

Assault and alternative verdicts

9.21 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*.¹⁸¹ 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.¹⁸² It is plainly desirable that on a charge of causing intentional or reckless injury, under clauses 4, 5 or 6 of the Bill, or of assault to resist arrest, under clause 10 of the Bill, it should be open to convict of the summary offence of assault under clause 8 of the Bill if the evidence indicates that crime has been committed, without there being any need for a specific alternative charge of assault to have been included in the indictment. Clause 21(1) of the Bill so provides.¹⁸³

9.22 Clause 21(2) of the 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 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 21(2) of the 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 5 (reckless serious injury) on an indictment that charges intentional serious injury under clause 4.

Special cases of assault

9.23 Because of its origins in many earlier statutes,¹⁸⁴ 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.¹⁸⁵ The CLRC considered that such particularisation was contrary to principle, and that all such special offences should be abolished. That Committee thought 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.¹⁸⁶

9.24 We fully agree with that approach. The Bill accordingly provides for the repeal of almost all of the outstanding instances of special offences of assault. Full details of our particular proposals, and of the reasons for those proposals, are given in Appendix C to this Paper.

9.25 We do, however, propose that there should be retained two special offences of assault, that were 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. We explain the particular considerations affecting those offences in the following paragraphs.

¹⁸¹ [1984] AC 242; and [1991] 3 WLR at p. 928D.

¹⁸² *Mearns* [1991] 1 QB 82.

¹⁸³ See further CLRC, Fourteenth Report, para. 161.

¹⁸⁴ See paragraphs 7.4–7.5 above.

¹⁸⁵ e.g., offering violence to a clergyman about to celebrate divine service (1861 Act, s.36); assaulting a magistrate concerned in preserving a wreck (*ibid.*, s.37); assault with intent to obstruct the sale or free passage of grain (*ibid.*, s.39); assault on a seaman (*ibid.*, s.40). Many other similar sections of the 1861 Act have already been repealed; details of such repeals are given in Appendix D hereto.

Assault on a constable

9.26 The CLRC discussed this offence at length in paragraphs 167–176 of their Fourteenth Report. They concluded 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, as clause 9 of the present Bill provides, the defendant knows that, or is reckless whether, the person assaulted is in fact a constable.

9.27 We bear in mind that we are only concerned here with *assault*: that is, the application of force without injury being caused. The more serious offences provided by clauses 4–6 of the 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, we can see 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 may also be 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. The CLRC considered, by a majority, and after long debate, that the offence should, like assault itself, be summary only, and subject to a maximum of six months’ imprisonment.¹⁸⁷ 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 of *assault* being tried on indictment: a view that is reinforced by the recent reduction of assault and battery to the status of summary offences by section 39 of the Criminal Justice Act 1988.¹⁸⁸

9.28 Clause 9 of the Bill accordingly implements the policy recommended by the CLRC with respect to the offence of assault on a constable. We would, however, welcome further comment in the light of the discussion by the CLRC¹⁸⁹ as to whether such an offence should continue to exist; and, if it does so continue, whether it should be summary only.

Assault to resist arrest

9.29 This offence was derived by the CLRC from 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”. The CLRC¹⁹⁰ thought that an offence on these lines should be retained because such conduct could be particularly serious from a public point of view, for instance if the assault was 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 under clauses 4–6 of the present Bill. The Committee therefore recommended an offence that, like that in section 38 of the 1861 Act, was triable either way, and had a maximum penalty of two years’ imprisonment.

9.30 We see the force of those views and, provisionally, implement the CLRC’s policy in clause 10 of the present Bill. We do, however, feel more concern about this offence than did the CLRC. The CLRC 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 are minded to think that in any other cases the clause 4–6 offences are likely in practice to be available. Further, whilst it is no doubt a necessary limitation on this special offence that it should apply only in the case of impeding a “lawful” arrest, it is doubtful whether specially severe sanctions should attach to the attempted prevention of arrest believed by the accused not to be lawful; whereas, on the other hand, an offence whose terms gave latitude to the accused to adjudicate on the lawfulness of the constable’s conduct might not achieve the simple effect in support of law enforcement that, we assume, was the objective behind the original creation of this offence. Accordingly, while

¹⁸⁷ Fourteenth Report, paras. 173–176.

¹⁸⁸ See paragraph 9.5 above.

¹⁸⁹ Fourteenth Report, paras. 167–177.

¹⁹⁰ Fourteenth Report, paras. 181–182.

not in any way undervaluing the need to support law enforcement that impressed the CLRC, we entertain doubts as to whether a special offence, in the terms set out in clause 10 of the Bill, is a necessary, or desirable, way of achieving that end. We therefore particularly ask for comment on whether this offence should be maintained and, if it is maintained, what the elements of the offence should be.

Assault with intent to rob

9.31 In the Draft Code we transferred this offence from section 8 of the Theft Act 1968 into the sections dealing with offences against the person.¹⁹¹ We did that in pursuit of a general policy that all offences against the person should be contained in a related set of provisions. We did not, however, consider the matter in any detail,¹⁹² and further reflection in the context of the present exercise has led us to conclude that assault with intent to rob should not be included in the present Bill.

9.32 Section 8 of the Theft Act 1968 reads:

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

(2) A person guilty of robbery, or of an assault with intent to rob, shall on conviction on indictment be liable to imprisonment for life.

Section 8(2), so far as it refers to assault with intent to rob, has a long statutory pedigree,¹⁹³ but there is little authority on the exact meaning of that reference. It was, until recently, thought merely to state the penalty for a particular case of assault, but that assumption is, as in the case of assault under section 47 of the 1861 Act, called into question by *Harrow Justices ex p Osaseri*.¹⁹⁴ It is, however, difficult to see how a separate offence of assault with intent to rob can ever be committed or, at least, can ever need to be charged. Under the definition now provided by section 8(1) of the Theft Act, robbery itself is in effect theft achieved by assault. An “assault with intent to rob” will therefore either be itself a robbery or an attempted robbery; or be an assault not committed immediately before the stealing, and thus only dubiously to be sanctioned by a special and separate offence simply because of its having some connection with that stealing.

9.33 These considerations have persuaded us that assault with intent to rob is too obscure a crime, and raises too many questions about whether it should be a separate crime at all, to be conveniently dealt with, for reasons which would be ones of tidiness and not of principle, in the course of the present exercise. And, since it is hard to think that the offence is not in effect redundant, failure to pursue it further on this occasion is unlikely to lead to practical difficulties.

G. COMMON LAW RULES OR DEFENCES AFFECTING OFFENCES OF CAUSING INJURY AND ASSAULT

10.1 As we explained in paragraphs 3.2–3.4 above, common law rules or defences, and the power of the courts to determine their existence, extent and application are, as clause 1(3) recognises, not touched by the present Bill. Such rules or defences are of particular importance in relation to offences against the person. Clear examples are the common law rules relating to medical treatment and to lawful sports and games. Most of the relevant acts can, of course, be lawful only if done with the consent of the victim.¹⁹⁵ But even if

¹⁹¹ Draft Code, clause 78.

¹⁹² Code Report, paragraph 14.46.

¹⁹³ It goes back, through section 42 of the Larceny Act 1861, to 7 Geo. 2, c. 21.

¹⁹⁴ [1986] QB 589, discussed in paragraphs 9.3–9.4 above. See further *Archbold* (42nd edition, 1992) para. 21–92.

¹⁹⁵ In some circumstances, a parent, or other person having parental responsibility or even simply caring for a child, may consent to medical treatment on behalf of that child.

done with consent, they are still *prima facie* assaults if “likely or intended to cause injury” (clause 8(1)(a)(ii)). Every blow landed in a boxing match would therefore be an offence of assault, and perhaps an offence of intentionally or recklessly causing injury (clause 6), or even serious injury (clauses 4 and 5), but for the common law defence which reflects “the accepted legality of properly conducted games and sports . . .”.¹⁹⁶ So also with “lawful chastisement or correction, reasonable surgical interference, dangerous exhibitions etc.”¹⁹⁷

10.2 The common law may also provide a defence to a charge of assault, or indeed of an offence involving personal injury, where an act is done upon the body of another without his or her consent. This may be the case, in particular, where action for which it is not practicable to obtain prior consent is justified in the special circumstances. An important example occurs where medical or surgical treatment is carried out in the best interests of a “victim” who, because of mental handicap or unconsciousness, is incapable of being consulted for his or her consent. Such treatment must involve an offence unless protected by a defence available at common law. That was recognised, and the relevant principle of “necessity” was discussed in some detail, by Lord Goff of Chieveley in *F v West Berkshire Health Authority*,¹⁹⁸ when the House of Lords granted a declaration that a proposed operation to sterilise a severely incompetent adult woman would not in the circumstances be unlawful. This relatively undeveloped aspect of the common law¹⁹⁹ will survive the enactment of the proposed Bill, with the same function that it now has.

H. THREATS TO KILL OR TO CAUSE SERIOUS INJURY

11.1 Clause 11 of the Bill is based on clause 65 of the Draft Code, which implements recommendation 63 of the CLRC.²⁰⁰ The clause extends to threats to cause serious injury as well as to threats to kill, and is thus wider than section 16 of the Offences against the Person Act 1861.

I. OTHER NON-FATAL OFFENCES AGAINST THE PERSON

Introduction

12.1 Clauses 7, 12, and 14–19 of the 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.

12.2 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 this Bill all of what we regard as the “mainline” offences. 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 given of the reasons for their omission.²⁰¹

¹⁹⁶ See *per* Lord Lane CJ in *Attorney General’s Reference (No. 6 of 1980)* [1981] QB 715 at p. 719E.

¹⁹⁷ See *loc. cit.*, n. 152, above. It appears from the “etc.” that the Lord Chief Justice’s list of activities that may be lawful although calculated, and perhaps even intended, to cause personal harm is not closed. One example that he does not mention is that of “rough and undisciplined play”: *Jones* [1987] Crim LR 123.

¹⁹⁸ *Sub nom. In re F* [1990] 2 AC 1.

¹⁹⁹ See further Code Report, paragraph 12.41(ii); and paragraphs 3.11 above and 19.3–19.5 below.

²⁰⁰ Fourteenth Report, paras. 215–218.

²⁰¹ See Law Com. No. 177, at paragraphs 14.58–14.60.

12.3 Secondly, inclusion of these offences in this 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 do not think that that will in practice make any difference to the present scope of those offences, at least if the latter are properly understood; but here again 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

12.4 At present, the law 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”.

12.5 The CLRC considered these offences in some detail.²⁰² As to section 23, they pointed out that there was some 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 4 and 5 of the present Bill). They therefore recommended that the offences should be abolished without replacement. We agree with that view, and have acted on it in schedule 4 of the present Bill.

12.6 As to section 24 of the 1861 Act, the CLRC considered that an offence of administering harmful substances without another person’s consent was required, but thought 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.

12.7 Clause 7 of the Bill makes provision in those terms. The CLRC did not put forward a legislative draft of its proposed offence,²⁰³ but clause 7 is in the same terms as clause 73 of the Draft Code, which we believe accurately to embody the CLRC’s recommendation.

Torture

12.8 Clause 12 of the Bill reflects the provisions of section 134 of the Criminal Justice Act 1988. We explained in paragraph 12.2 above why we think it desirable to take that course. Some further observations on this point will be found in paragraph 14.40 of the Code Report.

Offences of detention and abduction

12.9 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.

12.10 Clause 14–19 of the Bill implement the CLRC’s recommendations, save where they have been overtaken by later legislation, which again is reproduced in substance in those clauses.

²⁰² Fourteenth Report, paras. 184–191.

²⁰³ See CLRC, Fourteenth Report, paras. 187–188.

J. OTHER AMENDMENTS OF THE 1861 ACT

13.1 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 Paper will be found in Appendix C hereto. In one or two cases, policy issues that cannot be covered in the course of this exercise remain to be resolved; but we can claim now to have removed a very large part of the outstanding problems of the 1861 Act. In Appendix D 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 Bill, an indication of where those proposals are dealt with in the Bill and Consultation Paper.

PART III

GENERAL PRINCIPLES AND DEFENCES INCLUDED IN THE BILL

A. INTRODUCTION

14.1 As we explained in paragraph 2 above, a Bill purporting to give the courts guidance about the law of offences against the person would not in our view be complete unless it dealt with such general principles of law as commonly arise in offences against the person cases. Whilst the identification of such principles must to some extent be a matter of judgement, in our view (and we invite comment on this selection) such a Bill should deal with the effect on the defendant's liability of duress; with the possible defence provided by the fact that he was acting in self-defence or for the achievement of a defined public benefit; and with the effect on liability of the existing common law doctrines of transferred and supervening fault.

14.2 The issues that we have listed in paragraph 14.1 characteristically arise in cases of offences against the person, and it should be of great benefit to a court trying such a case to have available a clear statutory statement of the law. However, in the Bill we go further, and apply the legislation on these subjects not merely to offences against the person but to all crimes. Our reasons for so doing are twofold.

14.3 First, such general issues may arise on an indictment that contains counts both of offences against the person and of other types of crime. For instance, a person acting under duress may both physically attack the victim and damage property that belongs to him. It would be very inconvenient, on the trial of that indictment, if the judge directed the jury on the assault count according to a statutory definition of duress, but then had to decide whether or not the common law rule of duress significantly differed from a statutory rule limited to offences against the person; and, if he decided that there was a significant difference, then give the jury a different direction on duress as applied to the second count.

14.4 Our second reason for applying these parts of the Bill to the whole of the criminal law is that we think that it has been widely accepted, as a result of our Code project, that it would be helpful if the rules governing such concepts were laid down by statute; and that the terms in which that task was attempted in the Draft Code were basically correct. In the Bill we have, therefore, largely followed the approach and terminology used in the Draft Code. We regard these provisions as a substantial move towards the eventual Code objective of putting the whole of the "general part" of the criminal law into statutory form.

14.5 The process of restatement and generalisation adopted in the Draft Code adds force to the reasons already adduced for applying Part II of the Bill to all offences, and not merely to offences against the person. Particularly in the case of the defence of the use of force in public or private defence, which is dealt with in clause 28 of the Bill, we have brought together and sought to generalise a number of related but differently expressed rules that have been developed, with common aims but not always in common terms, in relation to a number of different crimes. We regard that process as a very important function of codification, not only to assist users after the code has been put into effect, but also, before that stage, to force on those drafting and assessing the code a critical view of the origins of the present rules and of their desirable future development. None of that could be achieved by a study of defences and general rules that limited itself to their application to offences against the person or any other particular type of offence.

14.6 Part II of the present Bill, which deals with these matters, is divided into two sub-parts: "Provisions Relating to Fault", in which is covered supervening fault and transferred fault; and "Defences", in which is covered duress by threats, duress of circumstances and the use of force in public or private defence. In the sections which follow we take each of those concepts separately and explain what is sought to be achieved by the terms adopted for dealing with them in the Bill. We invite comment upon the form adopted in the Bill; and upon whether there are objections not at present perceived by us to the extension of these parts of the Bill to the whole of the criminal law.

B. SUPERVENING FAULT

The general principle

15.1 Clause 24 of the Bill is based on clause 23 of the Draft Code. It 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 property belonging to another” (Criminal Damage Act 1971, s.1(1)); “causes injury to another” (clauses 4–6 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 24 provides that such language may also be satisfied where, without the required fault, a person does an act giving rise to a risk that the specified result will occur and later becomes aware of what he has done. He is now under a duty to “take measures that lie within his power to counteract the danger that he has himself created.”²⁰⁴ 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*²⁰⁵ 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 24

15.2 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*,²⁰⁶ in the context of the Criminal Damage Act. However, clause 24 is couched in terms which are believed to be 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, a person who lacks the fault required when he does an act that causes or may cause the result nevertheless commits the offence if—

- (a) he becomes aware that he has done the act and that the result has occurred and may continue, or may occur; and
- (b) with the fault required, he fails to do what he can reasonably be expected to do that might prevent the result continuing or occurring; and
- (c) the result continues or occurs.”

Some details

15.3 The following aspects of this formulation may be noticed:

- (i) 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”; that must mean, in the terms of clause 24, “[lacking] the fault required [for the offence].” The question was answered by the House without comment on this aspect.

²⁰⁴ *Miller* [1983] 2 AC 161 at p. 175, *per* Lord Diplock.

²⁰⁵ [1983] 2 AC 161.

²⁰⁶ [1982] AC 341.

- (ii) 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.²⁰⁷ 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.”
- (iii) For the principle to apply, the actor must have become aware 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.

15.4 We are persuaded that, if a principle of supervening fault is to be stated for offences against the person, it must be stated for general purposes; courts and practitioners concerned with a mixed indictment must be able to refer to a single source for the principle to be applied. It may be, however, that as an expression of the principle the present clause 24 is amenable to criticism. We shall welcome comment on any of the points mentioned in the preceding paragraph or on other points of detail.

C. TRANSFERRED FAULT

16.1 Clause 25 of the Bill, which is based on Draft Code clause 24, restates the doctrine known as “transferred intent” (subsection (1)) and provides a corresponding rule for “transferred” defences (subsection (2)).

Transferred fault

16.2 Clause 25(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”

16.3 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 that result, although not in relation to the same person or thing.

²⁰⁷ *Fagan v Metropolitan Police Commissioner* [1969] 1 QB 439.

Recklessness

16.4 Draft Code clause 24(1) referred in terms to “recklessness” and not, like the present draft, 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 in other contexts. 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* recklessness²⁰⁸ 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.

16.5 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. It would be cumbersome, and seems unnecessary, to spell out these points.

Transferred defences

16.6 Clause 25(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.

Consultation

16.7 The principles stated in clause 25 apply to offences generally, as we believe that the clause should enact those principles in the most general terms and not just in relation to offences against the person. We invite views as to whether that is right, as well as on points of detail; and, in particular, on whether the adaptation of Draft Code clause 24(1) in its relation to recklessness is satisfactory.

D. PRESERVATION OF COMMON LAW DEFENCES

17.1 The 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 use of force in public or private defence. It is important however to repeat here that, first, other existing common law defences remain in place; and second, that the courts retain a valuable flexibility at common law to recognise new defences or to determine the scope and extent of existing common law defences.²⁰⁹

17.2 Clause 1(3) of the Bill accordingly confirms that the Bill does not affect the application of defences and rules of law not specifically dealt with in it. All such rules relating to defences are thus left in place by the Bill apart from the three specific defences referred to in paragraph 17.1 above and set out in clauses 26–28 of the Bill. In respect of *those* defences, clause 31(3) of the Bill provides that the rules laid down by the Bill replace those of the common law. In respect of those defences, therefore the future judicial role is confined to the interpretation of the relevant clauses of the Bill. It will be a matter for future consideration whether any other common law defences are sufficiently developed

²⁰⁸ See *Caldwell* [1982] AC 341, and paragraph 5.3 above.

²⁰⁹ See the discussion in paragraph 12.41 of the Code Report.

to make it possible and desirable to confirm their existence and clarify their extent by providing for them in legislation.

E. DURESS BY THREATS

Introduction

Law reform background

18.1 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.²¹⁰ This was duly followed in 1977 by our *Report on Defences of General Application* (“our 1977 report”),²¹¹ 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 1985.²¹² 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. It is the basis of the provision now proposed.

The proposed defence and the common law

18.2 The proposed statutory defence contained in clause 26 of the present Bill reflects, 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 comes 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 departs from the common law in some respects. Although the points of variance have, as explained above, been the subject of consultation on more than one previous occasion it is right that we should carefully identify them once again, and seek views upon them, before finally settling the terms of our legislative proposal. Five questions in particular seem 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?
- (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?

²¹⁰ Working Paper No. 55, “Defences of General Application.”

²¹¹ Law Com. No. 83.

²¹² Law Com. No. 143.

We pay special attention to these questions in the course of commenting on the defence as we envisage its being formulated in the present Bill.

The proposed defence

Name

18.3 The defence is called “duress by threats” to distinguish it from the defence of “duress of circumstances” that has been recently recognised by the courts and is proposed for enactment in clause 27 of the Bill.

Nature of the defence

18.4 Clause 26(1) provides that “no act of a person constitutes an offence if the act is done under duress by threats”. Thus formulated, duress by threats is a true defence in two senses. First, it comes into play only if the elements of the offence, including its fault element, exist. The actor does the act prohibited by the definition of the offence with the relevant state of mind; but he is saved from liability by the existence of an excuse recognised by the law.²¹³ Secondly, the defence avoids liability and does not merely operate in mitigation of punishment. We gave our reasons for clearly preferring this function for it in our 1977 report.²¹⁴

The threat

18.5 The overwhelming tendency of the authorities, as of modern codes, is to limit the defence to cases where death or serious injury is threatened. We recorded in our 1977 report that those commenting on the working paper had not dissented from that limitation; and we have accordingly incorporated that limitation in clause 26(2)(a).

The person threatened

18.6 There is little authority on the question whether the threat must be, if not to the actor himself, at least to a member of some limited class (such as the actor’s close relatives), or whether it may be to anyone. We proposed the latter rule in our 1977 report,²¹⁵ and in the Draft Code, as we do now. Although the defence should be strictly defined, it can be generous on this point, because any difference in the way in which a person may be expected to respond when threatened with harm to, respectively, himself; a close relative; or a stranger; will be catered for by the question 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” (clause 26(2)(b)).

The possibility of official protection

18.7 The threat must be, or the actor must believe that it is, one that will be carried out immediately, or before he (or the person under threat) can obtain official protection. In this connection our clause provides (by subsection (3)) that it is immaterial that, in fact or as the actor believes, any available official protection will, or may be, ineffective. This would give effect to a proposal in the Commission’s 1977 report.²¹⁶ The Commission said:

“ . . . [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

²¹³ See *DPP for Northern Ireland v Lynch* [1975] AC 689 at p. 712. (The decision has since been overruled but has not been questioned on this point.)

²¹⁴ Law Com. No. 83, paragraphs 2.17–2.20.

²¹⁵ In the light of discussion in Working Paper No. 55, paragraph 18.

²¹⁶ Law Com. No. 83, paragraph 2.31.

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,²¹⁷ but . . . we aim to provide a strictly defined defence which can be applicable over the widest possible field.”

18.8 This approach was supported by the South-Eastern Circuit (Southwark) Scrutiny Group in its comments on the first Draft Code Bill. But it has been seriously questioned on the ground, in effect, of inconsistency with the rationale of the defence. Lord Griffiths, in *Howe*,²¹⁸ 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 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.”²¹⁹ We note also that the question whether the police would be able to provide effective protection was regarded as relevant in *Hudson*.²²⁰ We would therefore welcome further views on whether subsection (3), which we provisionally include in the Bill, ought to be preserved.

The actor’s view of the facts

18.9 The emphasis in subsection (2)(a) of our clause on the actor’s knowledge or belief reflects the fact that a defence of duress depends essentially on a state of mind. 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, like any other, ought equally to be available if the actor mistakenly believes the facts to be such that, were his belief correct, he would have the defence. The way in which we propose that this be stated departs from the authorities in a significant respect. In the leading case of *Graham*²²¹ Lord Lane CJ, on behalf of the Court of Appeal, required a mistaken belief as to the relevant act of the duressor to be “reasonable” so that the actor has “good cause” to fear the supposedly threatened harm. The view to the contrary, which informs the Draft Code and the present Bill, 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 held²²² 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”.²²³

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

²¹⁷ We cited *Carker* [1967] SCR 14 as an illustration: 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.

²¹⁸ [1987] AC 417 at p. 443.

²¹⁹ Law Com. No. 143, paragraph 13.18.

²²⁰ [1971] 2 QB 202.

²²¹ [1982] 1 WLR 294 at p. 300G. The passage was approved in *Howe* [1987] AC 417, but *obiter* and without argument.

²²² i.e. that the defendant is not telling the truth when he says that he held the belief.

²²³ *Gladstone Williams* (1983) 78 Cr App R 276 at p. 280.

Is the threat one which the actor should resist?

18.10 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.”²²⁴ A question on which we invite views is whether this requirement of “reasonable firmness” or “steadfastness” should be maintained.

18.11 We said in our 1977 report: “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.”²²⁵ 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.”²²⁶ We continue 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 take it to go without saying that a person could not under this test rely upon his insobriety as a relevant circumstance. At the same time we are 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.

18.12 Clause 26(2)(b) therefore provides 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.” We are not persuaded that any purpose would be effectively served by demanding more. But the *Graham* decision²²⁷ postdates our earlier consultation on this subject, so that it is right that we should once again seek views on this aspect of the defence.

Voluntary exposure to duress

18.13 Clause 26(4) provides 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. This is consistent with recent case law²²⁸ and with our own earlier recommendations.²²⁹

Application of the defence

Murder

18.14 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.²³⁰ Since we reported, however, the House of Lords has held, in *Howe*,²³¹ that duress is not available as a defence to anyone charged with murder. In so deciding the House confirmed the law as it had for

²²⁴ *Graham* [1982] 1 WLR 294 at p. 300.

²²⁵ Law Com. No. 83, paragraph 2.28.

²²⁶ 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”?).

²²⁷ Supported by a dictum in *Howe* [1987] AC 417: see n. 221, above.

²²⁸ *Sharp* [1987] QB 853; *Shepherd* (1988) 86 Cr App R 47; and see *Fitzpatrick* [1977] NI 20.

²²⁹ Law Com. No. 83, paragraphs 2.35–2.38.

²³⁰ Law Com. No. 83, paragraphs 2.39–2.45.

²³¹ [1987] AC 417.

centuries been understood to be before the House itself decided the contrary, in relation to secondary parties, in *DPP for Northern Ireland v Lynch*.²³² Although we share the view of our predecessors, we must obviously in the light of *Howe* once again canvass opinion on this question, before making a final recommendation as to a future statutory rule. In doing so, we would point out 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.²³³ As in 1977, and in the Code Report, we now propose such legislation. We indicate in paragraphs 18.15 and 18.16 the arguments against and in favour of the extension of the defence to murder. As stated, we find the latter more persuasive, but we invite further comments on this issue.

Arguments against application of the defence to murder

18.15 The main arguments of members of the House of Lords in *Howe* may perhaps be summarised as follows:²³⁴

- (i) with the exception of the inroad made in *Lynch's* case, duress has since the time of *Hale*²³⁵ consistently been understood not to be a defence to murder.²³⁶ This is in line with the denial, to one charged with murder, of a defence of "necessity", arising from imminent danger not caused by human threats.²³⁷ To change the law is the function of Parliament²³⁸ but Parliament has made no move to do so in spite of the Law Commission's recommendation.²³⁹
- (ii) The principle underlying the denial of both defences is "the special sanctity that the law attaches to human life and which denies to a man the right to take an innocent life even at the price of his own or another's life."²⁴⁰ 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.²⁴¹
- (iii) The present is not an appropriate time for change. The law must stand firm against "a rising tide of violence and terrorism."²⁴² Terrorists and their human tools should not be able to rely on a defence of duress,²⁴³ which would be easy to raise and might be difficult to disprove.²⁴⁴
- (iv) The exercise of executive discretion, by decision not to prosecute or by timely release on licence of one serving a life sentence for murder, is available to mitigate the rigours of a blanket denial of the defence.²⁴⁵

²³² [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.

²³³ See *per* Lord Bridge at pp. 437–438; Lord Brandon at p. 438; Lord Mackay at p. 455.

²³⁴ See also Lord Lane CJ in *Gotts* [1991] 1 QB 660 at p. 663, referring to Stephen, *History of Criminal Law*, vol. 2 (1883), p. 107 (who thought that "compulsion by threats ought in no case whatever to be admitted as an excuse for crime": p. 108).

²³⁵ 1 Pleas of the Crown, 51 (1736).

²³⁶ Lord Hailsham at p. 427; Lord Bridge at p. 437; Lord Brandon at p. 438; Lord Griffiths at p. 439; Lord Mackay at p. 449.

²³⁷ *Dudley and Stephens* (1884) 14 QBD 273. See below, paragraph 19.9, as to the application to murder of the defence of duress of circumstances proposed in clause 27 of the Bill.

²³⁸ See n. 233, above.

²³⁹ Lord Bridge at p. 437; Lord Griffiths at p. 438.

²⁴⁰ *Per* Lord Griffiths at p. 439.

²⁴¹ *Per* Lord Hailsham at pp. 430–432.

²⁴² *Per* Lord Griffiths at pp. 443–444 (Lord Bridge concurring at p. 438).

²⁴³ Lord Hailsham at p. 434; see also Lord Salmon in *Abbott v The Queen* [1977] AC 755 at p. 766.

²⁴⁴ Lords Bridge (at p. 438) 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.

²⁴⁵ Lord Hailsham at p. 433; Lord Griffiths at pp. 445–446.

*Contrary arguments*²⁴⁶

18.16 These arguments may be answered *seriatim*:

- (i) With the enactment of a tightly defined defence, the question of its application to murder can be considered on its merits, untrammelled by authority. (The same applies to “duress of circumstances”.²⁴⁷) In respect of the Law Commission’s recommendations of 1977, no Bill has been introduced in Parliament, which has thus had no opportunity of considering the matter.
- (ii) Innocent life is not effectively protected by a rule of which the actor is unlikely to be aware.
- (iii) It should be for the jury to say whether the threat was one “which he [could not] reasonably be expected to resist.”²⁴⁸ It is not right to expect heroism of those incapable of it²⁴⁹ and there is no point in doing so.
- (iv) The defence is not available to a member of a criminal or terrorist group.²⁵⁰ Innocent tools of terrorists, on the other hand, should be excused if they could not have been expected to act otherwise. They should not be denied the right to raise a true defence because others may claim it falsely. The question whether the defendant was a terrorist or an innocent tool is a proper question for the jury²⁵¹ and for the application of the normal burden of proof.
- (v) Reliance on executive discretion is not adequate in principle or in practice. Even if a 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.

18.17 In our 1977 report²⁵² we considered a suggestion²⁵³ 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.”

18.18 The Court of Appeal in *Howe*²⁵⁴ 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.²⁵⁵ But Lord Brandon did not regard it as just that duress should not afford “even a partial defence to a charge of [murder],”²⁵⁶

²⁴⁶ Critical commentary on the decision has been generally adverse: see J. C. Smith [1987] Crim LR 481; I. H. Dennis (1987) 51 J Cr L 463 at pp. 464–474; H. P. Milgate [1988] CLJ 61; L. Walters (1988) 8 LS 61.

²⁴⁷ See below, paragraph 19.

²⁴⁸ See clause 26(2)(b) of the Bill.

²⁴⁹ Lord Griffiths in *Howe* [1987] AC 417 at p. 442, while not subscribing to this argument, expressed it in the form: “the law should not demand more than human frailty can sustain.”

²⁵⁰ See above, paragraph 18.13, and clause 26(4) of the Bill.

²⁵¹ Rather than for an executive authority: see the next point.

²⁵² Law Com. No. 83, para. 2.43.

²⁵³ In *Abbott v The Queen* [1977] AC 755 at p. 768E.

²⁵⁴ [1986] QB 626 at p. 641F.

²⁵⁵ [1987] AC 417 at pp. 438A and 456A.

²⁵⁶ At p. 438D.

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 with a conviction even for manslaughter.²⁵⁷ Lord Hailsham L.C. 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.”²⁵⁸

18.19 There seems, therefore, 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.

18.20 Our own view remains that, the general defence being defined by statute, it should be available as a complete defence to a charge of murder. 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. We would welcome views.

Attempted Murder

18.21 At common law duress is not a defence to attempted murder.²⁵⁹ If 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 allow it for the attempt. As the Court of Appeal put it, if the arguments excluding duress as a defence to the completed offence of murder are accepted as valid, “the fact that the attempt failed to kill should not make any difference”²⁶⁰.

Other offences of violence

18.22 The judgment in *Gotts* continued as follows:

“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.”

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.

18.23 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

²⁵⁷ At p. 456B.

²⁵⁸ At p. 435B.

²⁵⁹ *Gotts* [1991] 1 QB 660.

²⁶⁰ *Ibid.*, at p. 667H.

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. As we pointed out in paragraph 18.4 above, and as is, we think, not a matter of controversy, 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*.

18.24 Second, however, the *mens rea* of murder is fulfilled by an intent to cause grievous, or serious, bodily harm.²⁶¹ 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 4 of the present Bill. The Court of Appeal's remarks in *Gotts*, quoted in paragraph 18.22 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,²⁶² 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, as a special rule demanded by considerations of policy in a case where a death has actually occurred.

Treason

18.25 We recommend, as we did in our 1977 report,²⁶³ that duress should be generally available as a defence to treason. At common law the scope of its availability is uncertain.²⁶⁴

Marital coercion

18.26 Clause 31(3)(b) abolishes this common law defence, as recommended in our 1977 report.²⁶⁵

Notice of defence

18.27 Our draft Bill of 1977 contained a provision requiring the giving of notice of an intention to advance a defence of duress.²⁶⁶ Although we do not doubt the desirability in principle of such notice, we do not include a similar provision in the present Bill. The subject 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.

²⁶¹ *Cunningham* [1982] AC 566.

²⁶² “[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.

²⁶³ Law Com. No. 83, paragraph 2.45.

²⁶⁴ See Smith & Hogan *Criminal Law* (6th edition), pp. 231–232.

²⁶⁵ Law Com. No. 83, paragraph 3.9.

²⁶⁶ Law Com. No. 83, Draft Criminal Liability (Duress) Bill, cl. 2(1).

F. DURESS OF CIRCUMSTANCES

The nature of the defence

Authority

19.1 Clause 27 of our Bill, following Draft Code clause 43, provides 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 a defence on a number of occasions, in cases of reckless driving²⁶⁷ and of driving while disqualified.²⁶⁸ 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.²⁶⁹

Relation to duress by threats and to necessity

19.2 *Duress by threats.* Our inclusion of the defence of duress of circumstances in the Draft Code 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.”²⁷⁰ 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 offence “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*.²⁷¹ Clause 27 of the present Bill, like the corresponding Code clause, is generally designed to reflect the analogy with duress by threats.

19.3 *Necessity.* The relationship between duress and necessity is a difficult matter. Duress is indeed sometimes spoken of as if it were a species of necessity: threats and “other objective dangers threatening the accused or another”²⁷² are said to be members of this species. But in fact the law may recognise 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 27 of the 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.²⁷³

19.4 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

²⁶⁷ *Willer* (1986) 83 Cr App R 225; *Conway* [1989] QB 290.

²⁶⁸ *Martin* (1989) 88 Cr App R 343.

²⁶⁹ In particular: *People v Lovercamp* 43 Cal App 3d 823 (1974); *Loughnan* [1978] VR 443; *Perka* (1984) 13 DLR (4th) 1.

²⁷⁰ Law Com. No. 177, paragraph 12.20, citing Law Com. No. 143, paragraph 13.25.

²⁷¹ [1982] 1 WLR 294.

²⁷² *Per Simon Brown J in Martin* (1989) 88 Cr App R 343 at p. 346. The judge’s statement reflects a passage in *Howe* [1987] AC 417 at p. 429 (cited in *Conway* [1989] QB 290 at p. 297), where Lord Hailsham LC might be interpreted as assuming that “necessity” took only those two forms.

²⁷³ Accordingly, the requirement that “from an objective viewpoint the accused [should] be acting reasonably and proportionately”, stated in *Martin*, n. 272 above, as a requirement of a defence of “necessity”, is not appropriately applied, as it was in that case, to what was in fact a defence of *duress*.

allegation that circumstances placed an irresistible pressure on him, but rather claims that his conduct, although falling within the definition of an offence, was not unlawful 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 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 judgement, as in the case of the kind of professional decision referred to in the next paragraph.

19.5 Although the English courts have not expressly recognised a general doctrine of "necessity", we referred in paragraph 10.2 above to a case of high authority, *F v West Berkshire Health Authority*,²⁷⁴ which provides an example of its operation, in connection with the very difficult decisions that have to be taken in relation to medical treatment, in that case sterilisation, for persons unable because of unconsciousness or mental handicap to give informed consent. The conclusion in that case was that, in all the circumstances, the operation was justified. 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".²⁷⁵ In such cases there is no question of the defence depending on the actor's resistance being overcome, in the sense discussed in paragraph 18.10 above; rather, the courts decide that in all the circumstances the actor's, freely adopted, conduct was justified.²⁷⁶

19.6 We therefore consider that, as part of the policy of retaining common law defences that we referred to in paragraphs 17.1–17.2 above, this specific defence of necessity should be kept open as something potentially separate from duress. That is provided for by clause 31(3)(b)(i) of our Bill, by explicitly saving "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

19.7 The act done must be "immediately necessary to avoid death or serious injury to [the actor] or another". The act (reckless driving) in *Conway*²⁷⁷ was (allegedly) done to save the life of the defendant's passenger; in *Martin*²⁷⁸ it was claimed that the accused had to drive whilst disqualified to prevent his wife's suicide.

Other matters

19.8 As with duress by threats, the actor's knowledge of, or belief in the existence of, relevant circumstances is crucial.²⁷⁹ Consistently with that defence, the circumstances

²⁷⁴ *Sub nom. In re F* [1990] 2 AC 1.

²⁷⁵ [1990] 2 AC at p. 74D.

²⁷⁶ Although the duress defences and the defence of necessity, to the extent that it exists, are different defences, subject to different rules as expounded above, elements of "necessity" may play a role in a given case in determining whether a defence of duress of circumstances is available; in particular, where it is sought to avoid criminal liability by referring to an emergency in which action is needed to save life. Lord Goff's example, cited at n. 275 above, illustrates such facts. For the defence of *duress* (of circumstances) to be available, the court must conclude that the accused "cannot reasonably be expected to act otherwise" (clause 27(2)(b) of the Bill), that stringent requirement being in line with, though not in terms identical to, the basic idea in duress of the actor's will being overborne. In some cases, pressures legitimately described as those of "necessity" may be found to have fulfilled that requirement; though, in most such cases, it will be difficult to say that the actor *could* not have been expected to act otherwise, as opposed to his action having been, in the circumstances, justified. That wider assessment of the actor's conduct is allowed by the, at present undeveloped, defence of necessity.

²⁷⁷ [1989] QB 290.

²⁷⁸ (1989) 88 Cr App R 343.

²⁷⁹ See above, paragraph 18.9.

that clause 27 of the 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 (3)(c)).

Application of the defence

19.9 We believe that this defence, like duress by threats, should apply to any offence. This policy, as it applies to murder, in effect proposes to depart from the law as stated in *Dudley and Stephens*.²⁸⁰ 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 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.²⁸¹

19.10 Inconvenient overlap between this defence and those provided by clause 26 (duress by threats) and clause 28 (use of force in public or private defence) is avoided by clause 27(3)(a) and (b) of the Bill.

G. USE OF FORCE IN PUBLIC OR PRIVATE DEFENCE

Aims and ambit

20.1 Clause 28 of the Bill states the circumstances in which a person may use force for a purpose of “public or private defence” without committing an offence that the use of force would involve in the absence of that purpose. “Public defence” purposes include the prevention of crime and the effecting of lawful arrests; “private defence” embraces self-defence, the defence of others and the protection of property. The clause states the law in a fair amount of detail, in accordance with the general policy of the Draft Code of reducing the principles of the criminal law so far as possible to statutory form. The clause goes a good deal further in this respect than the relatively limited provision on “self-defence”²⁸² contemplated by the CLRC in its Fourteenth Report.

20.2 *Application to offences generally.* Although clause 28 will be of primary importance in relation to offences against the person, it will be of general application to all offences involving the use of force or (because of an extensive meaning given to “uses force” by clause 28(3)²⁸³) a threat of force or the detention of another. In particular, it will supplement, and remove unjustifiable illogicalities in, existing statutory provisions entitling a person who uses force against property to justify his action by reference to a purpose of public or private defence. Some examples of gaps or illogicalities in the present law are as follows. The Criminal Damage Act, 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”).²⁸⁴ 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

²⁸⁰ (1884) 14 QBD 273.

²⁸¹ See above, paragraphs 18.14–18.24.

²⁸² The CLRC considered “self-defence” only, but used that expression to embrace the defence of another person and the defence of property belonging to oneself or another as well as the defence of oneself: Fourteenth Report, para. 284.

²⁸³ See paragraph 20.4 below.

²⁸⁴ *Renouf* [1986] 1 WLR 522.

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 clause 28 of the 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.

20.3 *Consistent principles.* The clause (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.²⁸⁵ Again, there are important differences between the principles governing the use of force in defence of the person and of property respectively.²⁸⁶ It is proposed to eliminate these inconsistencies.

20.4 *Limitation to force.* The limitation of the defence to offences involving the use of "force" may seem somewhat arbitrary. It may be objected that, if it is permissible to use reasonable force to prevent a crime or to protect someone from attack, although in the absence of that purpose the same force would amount to an offence, then it ought to be permissible to do any other act, ordinarily criminal, for a like purpose, so long as that act is "reasonable in the circumstances": there is nothing peculiar about force. If that is right (the objection would continue), the codified principle should so declare, referring to all acts and not just those involving force. A subsidiary argument would be that some acts, if not involving force, are nevertheless so similar to the use of force that it would at any rate be unsatisfactory for the statutory provision not to cover them. "Force", indeed, has no precise meaning, and difficult borderline cases could occur in which it was uncertain whether clause 28 applied.²⁸⁷

20.5 There are, however, ample reasons for confining clause 28 to the familiar subject-matter with which it is concerned. The subject-matter is familiar because in practice most acts for which a purpose of public or private defence is claimed as justification do involve the use of force. Part I of the present draft Bill, in particular, if it is to be supported by a satisfactory range of general principles, needs in Part II as full as possible an answer to the question: When may I act in a manner described in Part I—that is, almost invariably, by using "force"—without committing an offence? It is in relation to acts involving force that a substantial body of relevant authority exists from which codifiable principles can be derived or developed, for incorporation in the clause. There is thus a very strong positive case for the clause as it stands, which achieves a degree of generalisation and detail far exceeding anything attempted in English law before the recent work on the Criminal Code. There are, in addition, two important arguments against going further. First, total generalisation would be a law reform undertaking requiring substantial study and extensive consultation, which would hold up for some time, and for small reward, a

²⁸⁵ The principle in *Dadson* (1850) 2 Den 35: 169 ER 407 (see paragraph 20.9 below) probably applies to the common law defence but not to that under the Criminal Law Act.

²⁸⁶ In particular, (i) the common law allows only such force in defence of the person as is objectively reasonable; whereas the Criminal Damage Act 1971, s. 5(2)(b), permits a person to destroy or damage another's property to protect his own property if he *believes* the means of protection employed to be reasonable; (ii) a mistaken belief, caused by intoxication, in circumstances that would justify the use of force cannot be relied upon except under s. 5(2)(b) (see paragraph 21.10 below). For amendments to s. 5 of the 1971 Act now proposed to achieve consistency between that and clause 28, see paragraph 13 of Schedule 3 to the present Bill.

²⁸⁷ Both points can be illustrated by reference to *Renouf*, above, n. 284. It may be a nice question, said to depend on an understanding of the statutory language, whether a particular act of driving, done in order to effect an arrest, involved a "use of force": [1986] 1 WLR at 525B. The existence of a defence to a charge of dangerous driving (Road Traffic Act 1988, s. 2, as substituted by Road Traffic Act 1991, s. 1) ought not to depend, it might be objected, on how that question is answered.

project that ought to be completed without delay. Second, if the limitation to the use of force were abandoned, there would be no apparent stopping-point short of a general, and almost inevitably unelaborated, proposition that one may do any act that it is reasonable in the circumstances to do for a purpose referred to in the clause. But this proposition would give an inappropriate function to the tribunal of fact—effectively a law-making function—in deciding, without effective guidance, whether any act at all, undefined, is “reasonable” if done for one of the specified purposes.

20.6 *Relation to other defences.* In cases other than the use of force, the subject of public and private defence will, we believe, be better left to case-by-case judicial development. We have already referred to our intention that the specification of certain defences in clauses 26, 27 and 28 shall not inhibit the application and further development of the common law of defences.²⁸⁸ It will remain open to the courts to recognise public or private defence as a source of justification for a prima facie criminal act not protected by clause 28; and we envisage that in some cases they may feel encouraged to do so by the compelling analogy of the statutory defence.²⁸⁹ Exceptionally, of course, the peril of the situation in which the act is done may bring the case within the defence of duress of circumstances (clause 27), or the case may fall within a wider defence of necessity that may hereafter come to be recognised.

The general principle

20.7 Clause 28(1) provides that the use of “force . . . such as is reasonable in the circumstances as he believes them to be” for any of a number of stated purposes of public or private defence does not constitute an offence. This principle requires a number of comments.

The circumstances as the actor believes them to be

20.8 The reference to the actor’s understanding of the facts is mainly of importance in reflecting the common law principle, recently established,²⁹⁰ that where a person is mistaken as to the circumstances in which he uses force, he is to be judged on the basis of the facts as he believed them to be. That was the recommendation of the CLRC in relation to private defence,²⁹¹ and the principle should be stated for all the purposes for which force may lawfully be used. If, for instance, a police officer wrongly believes that the person he is arresting is armed, and uses force that it would be reasonable to use if that belief were true, he will (as now) be protected against criminal liability even if his belief was negligently formed. But the clause will be concerned with criminal liability only; civil liability will continue to be governed by the objective test now contained in the Criminal Law Act 1967, which permits only such force as is reasonable in the actual circumstances in the prevention of crime or in effecting an arrest.

Circumstances unknown to and unsuspected by the actor

20.9 Only such force will be permissible as is reasonable in the circumstances as the actor believes them to be. So a person will not be able to rely on circumstances of which he

²⁸⁸ See above, paragraphs 17.1–17.2.

²⁸⁹ This is a partial answer to a putative objection to clause 28 based on the vagueness of the word “force”: see above, paragraph 20.4.

²⁹⁰ *Gladstone Williams* (1983) 78 Cr App R 276; *Beckford v The Queen* [1988] AC 130. The analysis employed in these cases is that, because of the mistake under which he labours, the actor does not have the *mens rea* required for the offence: he does not intend to use, and does not recklessly use, *unlawful* force. The analysis implied by our Bill, as by the Draft Code, is different. The unlawfulness of the act is not treated as a separate element of the offence in respect of which the actor must be at fault. Clause 28, like clauses 26 and 27 (duress), assumes a relevant act done with the fault required for the offence but provides a defence to a charge of committing that offence. This method enables the clause to apply to all offences, whether or not their definition happens to use a word such as “unlawfully”.

²⁹¹ Fourteenth Report, para. 283.

was quite unaware and which he did not suspect, in order after the event to justify a use of force that was unreasonable on the facts as he perceived them. This is the so-called *Dadson* principle:²⁹² circumstances of justification provide a defence only if they are known to the actor. We understand that the principle was fully considered in the context of private defence by the CLRC, who thought that it should apply to that defence.²⁹³ We agree; and, in accordance with our aim of consistency,²⁹⁴ we propose that there should be no distinction in this respect between private and public defence.²⁹⁵ But we invite views on the soundness of this proposal.

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

20.10 The principle as we formulate it in clause 28(1) does not give effect to one aspect of the CLRC's recommendations in relation to private defence. The majority of the CLRC thought that it should be made clear "that a man is not allowed to take the law into his own hands by striking before self-defence becomes necessary"; and accordingly the Committee recommended that "the defence of self-defence should be confined to cases where the defendant feared an imminent attack".²⁹⁶ Clause 44 of the Draft Code went some way towards implementing this recommendation by requiring the force used to be in all cases "immediately necessary" as well as reasonable. That, however, is not quite the same as a requirement that the actor fear an imminent attack; for though the actor may have such fear, the use of force may not be objectively (that is, in a jury's eyes) immediately necessary even on the facts as the actor believes them to be. The CLRC favoured "a subjective test as to whether the defendant believed that force was necessary . . ."²⁹⁷

20.11 Giving effect to the CLRC's recommendation would seem to require a provision to the effect that a person would only obtain the benefit of this defence if (a) he believes that the use of force for one of the stated purposes is *immediately necessary* and (b) the (particular) force that he uses is reasonable in the circumstances as he believes them to be. Such a provision is, of course, possible; but it would entail, we think, an unnecessary and possibly an undesirable complication of an already elaborate clause. We agree with the

²⁹² After *Dadson* (1850) 2 Den 35; 169 ER 407.

²⁹³ This does not appear on the face of the Fourteenth Report, except from the way in which the Committee formulated the defence: para. 284; Recommendation 72(a).

²⁹⁴ See paragraphs 20.2–20.3 above.

²⁹⁵ Our clause differs in this respect from cl. 44 of the Draft Code. Under the latter clause a person's use of force might be lawful in the light of the circumstances "which exist or which he believes to exist". That formulation was thought to be dictated by the existing combination of statutory provisions on powers of arrest and the use of force. Under the Police and Criminal Evidence Act 1984, s. 24(4), (5) and (7) important powers of arrest exist where the person to be arrested in fact is committing, is guilty of or is about to commit, an arrestable offence, as well as where the arrestee has reasonable grounds for suspecting any such fact; and the Criminal Law Act 1967, s. 3(1), permits "such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large". Under existing law, therefore, the *Dadson* principle appears not to apply to the use of force in the prevention of crime or arrest although on principle it probably does apply to self-defence: see Smith and Hogan, *Criminal Law* (6th edition) p. 38. It was thought, when formulating the Draft Code, that the form of the arrest provisions required consistency to be achieved by abandoning the *Dadson* principle for all purposes. Further consideration, however, suggests that that course is unnecessary. First, a person making an arrest must at least suspect the ground that exists for the arrest if he is to state that ground as, in general, the law requires: Police and Criminal Evidence Act 1984, s. 28(3). An arrest will thus rarely itself be lawful under s. 24 if the arrestee does not believe that the person arrested is committing, is guilty of or is about to commit, an arrestable offence. Secondly, the present clause (like s. 3(1) of the Criminal Law Act 1967) concerns, not the lawfulness of an arrest in principle, but the reasonableness of the use of the particular force to effect it: a person may use such force as is reasonable in the circumstances as he believes them to be for the purpose "of effecting or assisting in the lawful arrest of an offender": clause 28(1), (2)(a). Granted that an arrest is being lawfully made, the question is whether the amount and nature of the force, if any, used to effect it is reasonable. It is not inconsistent with s. 24 of the 1984 Act to judge that question in the light of the circumstances as the arrestee believes them to be. We observe finally that the application of the *Dadson* principle is emphasised by another aspect of the language of clause 28(1), which permits the use of reasonable force for the purpose of preventing crime, effecting an arrest, or as the case may be. This phraseology makes it clear that it is impossible to rely on unknown circumstances when the act, although it happened to prevent crime etc., was done for some other purpose in ignorance of the justifying fact.

²⁹⁶ Fourteenth Report, para. 286.

²⁹⁷ *Ibid.*, para. 283.

minority of the CLRC in believing it unnecessary “because the court or jury will be able to decide whether in all the circumstances it was reasonable to use pre-emptive force”.²⁹⁸ It is perhaps also not merely unnecessary, but positively undesirable, for the same reason: if a court or jury might decide that the use of the pre-emptive force was in the circumstances reasonable, a person ought not to be denied a defence based on the use of that force. Moreover, the CLRC, in requiring fear of an “imminent attack”, did not have in mind the full range of purposes for which force might justifiably be used, but was concerned only with private defence (“self-defence”).

20.12 As we have indicated, clause 44 of the Draft Code sought to go some way to meet those criticisms by substituting a requirement of belief in the immediate necessity of force for the CLRC’s more specific requirement of fear of imminent attack. We now take the view, however, that the formulation not only is unsatisfactorily vague but also fails to meet the objections of principle set out in paragraph 20.11. For all these reasons therefore we omit any such requirement: but we invite views on this aspect of the clause.²⁹⁹

Permitted purposes of use of force

20.13 The several paragraphs of clause 28(2) set out the purposes for which force may be used:

(a) *Prevention of crime; arrest.* This paragraph covers the ground now covered by section 3 of the Criminal Law Act 1967, and will replace that section except as regards civil liability for the use of force.

(b) *Prevention of breach of peace.* In *Howell*³⁰⁰ it was said that a breach of the peace occurs

“whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbance”.³⁰¹

It is clear from this that prevention of a breach of the peace, which is a common occasion for the use of force, is a wider concept than prevention of crime, and requires separate provision. The effect of paragraph (b) is that it is not an offence to use reasonable force either to prevent a person’s being put in fear of the kind mentioned in the *Howell* dictum, or to remove the cause of such fear where it already exists.

(c) and (d) *Defence of person against force, injury or detention.* These paragraphs restate existing law.

(e) and (f) *Defence of property and prevention of trespass.* These paragraphs also restate existing law. Paragraph (e) permits the use of reasonable force to protect property from “unlawful appropriation, destruction, damage or infringement”. This keeps the present clause in line with the Criminal Damage Act, under which the purpose of protecting an interest in property or a privilege over land may provide a “lawful

²⁹⁸ *Ibid.*, para. 286.

²⁹⁹ S. 5(2)(b) of the Criminal Damage Act 1971, which concerns the purpose of protecting property as a “lawful excuse” for destroying or damaging property, employs a subjective test both as to the property being in immediate need of protection and as to the reasonableness in the circumstances of the means of protection adopted; the actor’s belief on these questions is the only criterion. In the latter respect the provision is inconsistent even with the CLRC’s recommendation. As indicated in n. 286 to paragraph 20.3 above, the Bill proposes the amendment of s. 5(2) of the Criminal Damage Act to achieve consistency between the use of force defence in clause 28 of the Bill and the defence provided by s. 5(2)(b) of that Act.

³⁰⁰ [1982] QB 416, *per* Watkins LJ at p. 427.

³⁰¹ The language pre-dates the replacement of the old common law offences against public order by new offences under the Public Order Act 1986; but the latter statute did not address the common law concept of breach of the peace.

excuse” for destroying or damaging property.³⁰² The reference in paragraph (e) to protection against “infringement” caters for the case where force is permissibly used to prevent unlawful interference with the exercise of a “right to interest in property or [a] privilege over land” (for example, an easement or a right to fish) rather than to protect the physical property itself.

The meaning of “uses force”

20.14 Clause 28(3) does not *define* the concept of using force; but it enlarges the concept for the purposes of the clause. First, a person is to be understood as using force in relation to another person or property not only when he applies force to the body of that person or to the property but also when he causes an impact on his body or on the property. The purpose of this formulation is mainly to reflect the definition of “assault” in clause 8, which distinguishes between applying force to and causing an impact on a person’s body; justifiable conduct that might amount to either form of assault must be protected by the present clause. Secondly, the clause ensures that the defence provided by the clause is available to one who, for a relevant purpose, uses only a threat of force or detains a person without actually using force.

Use of force against “unlawful” acts

20.15 Clause 28(1) provides a defence to one who uses force to protect person or property against “unlawful” acts. “Unlawful” here cannot simply mean criminal. There might be some reason why the person against whom protective force is used (the “attacker”) would be entitled to be acquitted if he were charged with an offence in respect of the act; but the reason might be one that ought not to disentitle the defender to use force to resist the attack. The attacker might be under ten years of age; or lack the fault required for the offence or be labouring under some kind of mistake that would afford him a defence; or be acting in pursuance of a reasonable suspicion entitling him to effect an arrest; or be acting under duress; or be “insane” within the meaning of the rules providing a defence of insanity to a criminal charge. Clause 28(4) therefore declares that, for the purposes of the section, the attacker’s act is “unlawful” although, if charged with an offence with respect to it, the attacker would be entitled to be acquitted on any of the grounds mentioned above (but only on such a ground). The case where the attacker acts “in pursuance of a reasonable suspicion” is included to ensure that a person does not commit an offence if he uses reasonable force to resist arrest (except by a constable acting lawfully: see next paragraph) even if the arrester is himself acting on a reasonable, although mistaken, suspicion of wrongdoing.³⁰³

Force against constable in the execution of his duty

20.16 Clause 28(5) provides that clause 28(1) affords no defence to a person who uses force “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”. If, for example, a constable arrests a person on the basis of “reasonable grounds for suspecting” him to be guilty of an arrestable offence, the constable will be acting in the execution of his

³⁰² Criminal Damage Act 1971, s. 5(2)(b) and (4).

³⁰³ See more fully, Code Report, paragraphs 12.29–12.31. One of the cases provided for in the Draft Code, clause 44(3), was the case where the attacker “(e) . . . was in a state of automatism or suffering from severe mental illness or severe mental handicap”. This is amended in the present version. It is not necessary to refer separately to “a state of automatism” (a technical expression in the Draft Code): the case of automatism is sufficiently covered by paragraph (b) (the attacker “lacked the fault required for the offence”). The reference to “severe mental illness or severe mental handicap” used the language of the reformed law of mental disorder proposed in the Draft Code but not pursued in the present Bill. The language now suggested (“(e) he was insane, so as not to be responsible, according to law, for the act”) follows that of the Trial of Lunatics Act 1882.

duty—the arrest will be lawful in the normal sense of the word.³⁰⁴ However, the constable's act, being based only on "reasonable suspicion", will be "unlawful" within the special meaning of the word in this clause.³⁰⁵ The arrest may nevertheless³⁰⁶ not be resisted 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 constable acting in the execution of his duty, from the general rule that the accused is to be judged according to his reaction to the circumstances as *he believes* them to be accords with existing authority.³⁰⁷ 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. However we invite comment on whether the present exception should be maintained.

20.17 Clause 28(5) 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, reasonably 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.³⁰⁸ We believe that that is the appropriate rule and probably coincides with existing law;³⁰⁹ but as judicial opinion has varied,³¹⁰ we would welcome views on the point.

Preparatory acts

20.18 Clause 28(6) 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.³¹¹

"Self-induced" occasions for the use of force

20.19 The effect of the first part of clause 28(7) is that clause 28(1) 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.³¹² If he does so and is attacked, he may defend himself.³¹³

Opportunity to retreat

20.20 Clause 28(8) 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.³¹⁴

³⁰⁴ Police and Criminal Evidence Act 1984, s. 24(6).

³⁰⁵ Clause 28(4)(c).

³⁰⁶ Clause 28(5): "Notwithstanding subsection (1) . . .".

³⁰⁷ See *Fennell* [1971] 1 QB 428.

³⁰⁸ Equally, a person may act to prevent such harm to another person so threatened.

³⁰⁹ See *Fennell* above.

³¹⁰ The authorities are conveniently collected in Smith and Hogan, *Criminal Law* (6th edition) p. 245, at nn. 16 and 17.

³¹¹ See more fully, Law Com. No. 143, paragraph 13.44.

³¹² See *Beatty v Gillbanks* (1882) 9 QBD 308.

³¹³ *Field* [1972] Crim LR 435.

³¹⁴ *Bird* [1985] 1 WLR 816.

Reasonable threats

20.21 Clause 28(9) states that a threat of force may be reasonable although the use of the force would not be.³¹⁵

20.22 Clause 28(10) ensures that the clause does not duplicate the corresponding defence provided by the Criminal Damage Act 1971, section 5(2)(b), for a person who destroys or damages property belonging to another for the purpose of protecting property.³¹⁶

H. INTOXICATION

Introduction

21.1 In paragraph 2.15 above we explained how further reflection on the problems relating to the effect of intoxication on criminal liability had led us to think that the present law would benefit from critical study and consultation. Some of the more important reasons for that view are the following:

- (a) Although evidence of intoxication may be admitted in defence of a charge based upon the accused's "specific intent", in cases where recklessness or so-called "basic intent" is in issue existing English law requires the accused to be judged as if he had not been intoxicated.³¹⁷ This important rule is highly controversial and has been questioned in a number of other jurisdictions.³¹⁸
- (b) Identification of the cases where intoxication can, and cannot, be taken into account under the foregoing rules is a difficult and controversial matter and the terminology used by the courts has been subjected to severe criticism.³¹⁹
- (c) Recent cases³²⁰ suggest that where an accused sets up a defence based on a mistaken belief (e.g. that he is about to be attacked and must defend himself), he cannot rely on that belief if it was induced by voluntary intoxication. That view is contrary to the recommendation of the CLRC,³²¹ who considered that such a belief should be able to found a defence where the fault element of the offence charged is intention as opposed to recklessness. The recent cases, however, give no clear guidance as to the principle on which a person is denied the benefit of a drunken mistake; which leads us to think that it would be desirable for the whole issue of the effect of intoxication upon defences to be considered afresh.
- (d) As we explained in paragraph 2.19 above, an as clause 22 of the Draft Code demonstrates, the present law is extremely complex, and thus difficult to apply with accuracy. We consider that at least an attempt should be made to produce a simpler and more practical solution.

We appreciate that in proposing a thorough review of the law we are differing from the majority of the CLRC, who considered that no such review was required,³²² and also to some extent from the view that we ourselves took in the Code Report.³²³ However, on reconsidering the matter we are persuaded that, particularly in view of recent developments in the law of intoxication, we cannot recommend simple adoption of the present common law without further review.

³¹⁵ *Cousins* [1982] QB 526.

³¹⁶ As to amendment of s. 5(2)(b), see n. 299 above.

³¹⁷ *DPP v Majewski* [1977] AC 443; *Caldwell* [1982] AC 341; see paragraph 21.5 below.

³¹⁸ *Majewski* has not been followed in Australia (*O'Connor* (1980) 54 ALJR 349, a majority decision of the High Court of Australia); or South Africa (*Chretien* (1981) 1 SA 1097 (S.A. Appellate Division)); the law in New Zealand is also different (*Kamipeli* (1975) 2 NZLR 610 (N.Z.C.A.)). In these jurisdictions, evidence of intoxication can be adduced to show lack of *mens rea* for any crime. The Supreme Court of Canada in *Leary* (1977) 33 CCC 473 followed *Majewski* only by a 4–3 majority, Laskin CJC being one of the dissenting minority.

³¹⁹ See e.g. Smith and Hogan, *op. cit.*, pp. 211–213.

³²⁰ *O'Grady* [1987] QB 995; *O'Connor* [1991] Crim LR 135.

³²¹ Fourteenth Report, paras. 276–278.

³²² Fourteenth Report, para. 274.

³²³ Code Report, paragraph 8.33.

21.2 Nevertheless, for the reasons stated in paragraphs 2.16–2.18 above, the present Bill cannot omit all reference to intoxication. It requires provisions to ensure that principles corresponding as closely as possible to those applying at common law in cases of intoxication will apply in such cases to the offences created by the Bill and to some of the defences provided by it. As we have explained, unlike most of the Bill these clauses do not propose a law reform solution, but only seek to ensure that the Bill will not be taken, in relation to the matters with which it deals, to have changed the law on the effect of intoxication before our study of that subject, and any proposals arising out of that study, are complete. We now explain in more detail the form and operation of the Bill’s clauses relating to intoxication.

21.3 Clause 1(5)(a) is concerned with the relevance of voluntary intoxication where a person is charged with an offence under the Bill involving recklessness; and clauses 1(5)(b) and 23(3) with its relevance where a defendant claims to have acted on the basis of a mistaken belief that might afford him a defence provided under the Bill. These provisions³²⁴ are considered in the following paragraphs. Clause 29 is concerned with the definition of the terms “intoxicant” and “voluntary intoxication”, which are considered thereafter.³²⁵ No special rules need to be stated for cases of intoxication which are not “voluntary”.

Recklessness in cases of voluntary intoxication

21.4 Where an offence requires for its commission an intention to cause a specified result, or knowledge of or belief in the existence of some circumstance, the fact that the actor was voluntarily intoxicated at the time of the relevant act raises no special legal issue. The question, as in the case of a sober person, is: did the defendant act with the intention, knowledge or belief required for commission of the offence? This will be so in the case of offences under Part I of the Bill as with offences under any other legislation. But at common law an important specialised rule, mentioned above, applies to offences that may be committed “recklessly”; and clause 1(5)(a) is designed to avoid any doubt that the rule applies to offences of recklessness under the Bill.

21.5 The effect of clause 2(b) of the Bill is that, for the purpose of offences under the Bill, a person acts “recklessly”, with respect to a circumstance or a result, when he is aware that the circumstance exists or will exist or that the result will occur and it is unreasonable to take that risk. It is with that definition in mind that clause 1(5)(a) provides (for the purposes of Part I of the Bill) that a person who was voluntarily intoxicated “shall be treated . . . as having been aware of any risk of which he would have been aware had he not been intoxicated”. So a person charged with an offence involving recklessness will not be able to deny recklessness on the ground that because of voluntary intoxication he was unaware of the relevant risk that his conduct plainly involved; awareness of the risk will be attributed to him. There is thus applied to offences under the Bill the rule declared by the House of Lords in *Caldwell*,³²⁶ employing the language of the American Law Institute’s Model Penal Code:³²⁷

“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”.³²⁸

³²⁴ And a proposed amendment to an associated defence in the Criminal Damage Act 1971: see paragraph 21.10, below.

³²⁵ See paragraphs 21.11–21.14, below.

³²⁶ [1982] AC 341.

³²⁷ S. 2.08(2).

³²⁸ This was the rule employed in the Public Order Act 1986, s. 6(5) (see paragraph 2.18, n. 13, above). It is slightly more generous to the defendant than that laid down in *DPP v Majewski* [1977] AC 443 (in which the Model Penal Code Rule was also referred to)—that “[taking] a substance which causes [one] to cast off the restraints of reason and conscience” is itself a form of recklessness sufficient to satisfy the fault requirement of an offence of “basic intent”. The Model Penal Code rule, unlike the *Majewski* rule, enables the defendant to claim that, because of some personal characteristic, *he* would not, even if sober, have been aware of a risk that would have been apparent to others.

21.6 It might be thought arguable that the rule stated in *Caldwell* would apply to offences created by the present Bill even without clause 1(5)(a). The terms in which the rule is stated are certainly apt for the purpose. But there is a strong argument to the contrary. Hitherto the rules of the common law relating to the effect of intoxication have not had to be applied to offences of recklessness expressly defined (as in the present Bill) in terms of an actual awareness of the relevant risk. The argument to be avoided is that the statutory requirement of awareness of a risk precludes application of a common law doctrine that would treat unawareness of that risk as immaterial.

Defence based on intoxicated belief

21.7 Similar considerations justify clauses 1(5)(b) and 23(3), which are concerned with mistaken beliefs advanced as the basis of defences provided by the Bill. They provide that a person who was voluntarily intoxicated “shall be treated as not having believed in any circumstance which he would not have believed in had he not been intoxicated”.

21.8 Common law defences based on mistaken belief appear to be subject to such a qualification. In particular, although a sober person, charged with an offence involving the use of force, may rely by way of defence upon his mistaken belief, whether reasonable or not, that he or someone else whom he sought to protect by the use of force was under unlawful attack,³²⁹ a person cannot rely on such a mistake “caused by voluntarily induced intoxication”,³³⁰ and clause 22 of the Draft Code proposed³³¹ that a similar general rule should continue to apply, at least to offences not requiring “specific intent”.³³² But it is very doubtful whether, in the absence of special provision, any such rule could be held to apply “where Parliament has specifically required the court to consider the accused’s actual state of belief”³³³—as in the case of the relevant defences created by the present Bill.

21.9 Clause 23(3) of the Bill, preventing reliance on certain beliefs caused by voluntary intoxication, makes no exception for the most serious offences requiring a so-called “specific intent”, such as murder and the offence under clause 4 of the Bill (intentional serious injury). It thus gives effect to the opinion³³⁴ of the Court of Appeal in *O’Grady*³³⁵ (in relation to self-defence) that no distinction should be drawn in relation to this aspect of the defence “between offences of what is called specific intent . . . and offences of so called basic intent, such as manslaughter”. In the Code Report³³⁶ we treated this opinion as insupportable, at least as denying a defence to murder to one who, albeit because of intoxication, thinks that he is acting to protect his life from an aggressor. But the difficulty of distinguishing in satisfactory terms between offences of “specific” and “basic” intent, and uncertainty as to the policy governing the law’s response to a defence based on an intoxicated mistake, are among our reasons for deciding now not, without further consideration, to advance the Draft Code’s solutions to these problems.³³⁷ We think that, pending our law reform consideration of the subject, it will be preferable to state a single rule applying to all offences.

21.10 Schedule 3 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.³³⁸ 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

³²⁹ *Gladstone Williams* (1983) 78 Cr App R 276; *Beckford v The Queen* [1988] AC 130.

³³⁰ *O’Grady* [1987] QB 995.

³³¹ Following the CLRC in the Fourteenth Report, paras. 276–278.

³³² See paragraph 21.1(c), above.

³³³ *Jaggard v Dickinson* [1981] QB 527 at p. 531. See paragraph 21.10, n. 339, below, for this case.

³³⁴ Treated in *O’Connor* [1991] Crim LR 135 as binding on the Court of Appeal.

³³⁵ [1987] QB 995.

³³⁶ Paragraph 8.42.

³³⁷ See paragraph 21.1(c) above.

³³⁸ See paragraph 20.3 above.

the belief may be a belief caused by voluntary intoxication.³³⁹ It is desirable that in respect of the effect of intoxication, as in other respects, 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 28 of the Bill: see paragraph 20.3 above. Paragraphs 13(3) and (4) of Schedule 3 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 28 of the Bill (use of force in public and private defence), as affected by clause 23(3).

“Intoxicant” and “voluntary intoxication”

“Intoxicant”

21.11 Clause 29, which is drawn from clause 22 of the Draft Code, explains what is meant by “voluntary intoxication”. The explanation seeks to express as closely as possible 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. There is, however, 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 present Bill, however, issues of the effect of intoxicants on *control* will not arise. Clause 29(5) can therefore define “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.

“Voluntary intoxication”

21.12 The special rules stated by clauses 1(5) and 23(3) 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 intoxication³⁴⁰ is in general “voluntary”, as clause 29(2) provides.³⁴¹

21.13 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

³³⁹ *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.

³⁴⁰ Clause 29(2) treats a person as “intoxicated” if the quantity of intoxicant taken “impairs his awareness or understanding”. The corresponding definition of “voluntary intoxication” in clause 22(5)(b) of the Draft Code may have been defective in not expressly requiring the intoxicant to have any effect. “Intoxicant” was defined in the Draft Code as a substance capable of impairing “awareness or control”. As explained in paragraph 21.11 above, in respect of the offences in the present Bill the relevant functions are limited to “awareness” (relevant to recklessness) and “understanding” (relevant to the formation of beliefs).

³⁴¹ In the interests of economy of statement, a person’s permitting an intoxicant to be administered to him is said by clause 29(3) to be a case of “taking” it.

taking alcohol . . . at all”.³⁴² 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. 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 29(2): was the person intoxicated by an intoxicant which he took . . . being aware that it was or might be an intoxicant?

21.14 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 way³⁴³ 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).³⁴⁴ To reflect this aspect of the common law, clause 29 employs, 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

- “(a) the intoxicant—
 - (i) is not taken on medical advice; or
 - (ii) is taken on medical advice but the taker fails then or thereafter to comply with any condition forming part of the advice; and
- (b) the taker is aware that the taking, or the failure, as the case may be, may result in his doing an act capable of constituting an offence of the kind in question”.³⁴⁵

21.15 The relative complexity of the common law compels this rather elaborate provision. We hope that, if this provision is enacted, it may be found useful to courts and practitioners as a statutory expression of principles applying to offences generally; although we stress that it will not have *statutory* force except in relation to offences created by the present Bill.

21.16 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 29(6) so provides. But we believe, as we explained in the Code Report,³⁴⁶ that, if there is such evidence, the burden of proving that the intoxication was in fact voluntary should rest on the prosecution.³⁴⁷ This result will follow from the fact that clause 29(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”.

³⁴² 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”.

³⁴³ See n. 345, below.

³⁴⁴ See *Bailey* [1983] 1 WLR 760; *Hardie* [1985] 1 WLR 64.

³⁴⁵ The test stated in *Bailey*, above, at p. 765, for a case of assault was whether the defendant knows that his actions or inaction (e.g. failing to take food after insulin) “are likely to make him aggressive, unpredictable or uncontrolled with the result that he may cause some injury to others”. But in the case of a driving offence it would seem to be sufficient that he knew that his consciousness might be affected, so that the necessary “continued conscious control” of the vehicle might be lost: see *ibid.* The formula in clause 29(4)(b) (“is aware that [his conduct] may result in his doing an act capable of constituting an offence of the kind in question”) is borrowed from the Draft Code, where it is intended to provide for the greatest possible variety of offences. We believe that this general formula is appropriate in the context of the present Bill, although only a relatively narrow range of offences is involved.

³⁴⁶ Paragraphs 8.50, 8.51.

³⁴⁷ 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 that 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”.

PART IV

CONSULTATION

22.1 As we made clear in paragraph 1.3 above, the Consultation Paper and the Bill are put forward with a general invitation for comment, in detail or in general, on the policy provisionally adopted, and on the content and style of the Bill, both in respect of the range of matters that are dealt with in them and in respect of the way in which those matters are handled. It is therefore unnecessary to include here a detailed list of topics for consultation, since that would in effect simply repeat the content of the Paper. It may, however, be convenient if we list those items on which we have expressed particular doubts, or have specifically asked for commentators' views, particularly in respect of matters on which we suggest, or consider, solutions different from those adopted in the Draft Code. We do, however, venture to repeat our appeal that those reading the Paper do not treat this as an exclusive statement of the issues in which we are interested.

22.2 The principal matter of law reform on which we have thought it appropriate to set out the conflicting arguments and invite comment on them is the issue of whether the defence of duress by threats should apply in a case of murder, which is discussed in paragraphs 18.14–18.21 of the Paper.

22.3 Other matters that we have noted for particular comment are:

Should the Bill make special provision for defences of authority or excuse (paragraph 3.10)?

Should the present sections 18, 20 and 47 of the 1861 Act be replaced by a scheme broadly along the lines of the recommendations of the CLRC? If not, should the present law be reformed in any way, and if so, how (paragraphs 7 and 8)?

Are the required mental states for the new offences appropriately stated in terms of intention and recklessness as those terms are defined in clause 2 of the Bill (paragraphs 5 and 8.7–8.8)?

Should the prohibited consequences of the new offences be stated in terms of "injury", or in some other way (paragraphs 8.9–8.12)?

Should there be a statutory provision excluding minor injuries from the offence created by clause 6 of the Bill (paragraphs 8.13–8.14)?

Should "serious" injury be defined, or be left to the judgement of the jury (paragraph 8.15)?

Should "injury" include any, and if so what, injury to the mind? Would injury to the mind be satisfactorily limited by defining it in terms of "impairment of mental health" (paragraphs 8.20–8.33)?

Should assault under clause 8 of the Bill be divided into two separate offences (paragraph 9.7)? Are the suggested provisions as to "trivial touchings" satisfactory (paragraphs 9.17–9.20)?

Should there continue to be a separate offence of assault on a constable, and if such an offence continues should it be summary only (paragraphs 9.26–9.28)?

Should a separate offence of assault to resist arrest continue in existence and, if so, in what terms (paragraphs 9.29–9.30)?

Are the defences and general principles of law selected for attention in Part II of the Bill the correct defences and principles for us to have chosen for that purpose (paragraph 14.1)?

Does clause 24 of the Bill accurately express the present law on supervening fault (paragraph 15.1)?

Is clause 25 of the Bill, relating to transferred fault, correct both in general principle and in detail (paragraph 16.7)?

Should clause 26(3) of the Bill, relating to the relevance to a defence of duress by threats of the accused's belief in the ineffectiveness of official protection, be preserved (paragraph 18.8)?

Should it be the case in duress that (as in respect of other defences) the reasonableness of the actor's beliefs is a matter of evidence only (paragraph 18.9)?

Is clause 26(2)(b) of the Bill correct in providing simply that in duress the threat must merely be one that the accused, taking into account his personal characteristics, cannot be reasonably expected to resist, without further requiring that his resistance match that of a person of reasonable firmness (paragraph 18.12)?

Should the circumstances by which the permissibility of the use of force under clause 28 is judged be limited to circumstances known to the accused (paragraph 20.9)?

Is it correct to omit from clause 28 of the Bill (use of force) any specific requirement of belief in the immediate necessity of force or fear of imminent attack (paragraph 20.12)?

APPENDIX A

Draft

Criminal Law Bill

ARRANGEMENT OF CLAUSES

PART I

NON-FATAL OFFENCES AGAINST THE PERSON

PRELIMINARY

Clause

1. Interpretation of this Part.
2. Definition of fault terms.
3. Liability for omissions.

THE OFFENCES

Causing injury and assault

4. Intentional serious injury.
5. Reckless serious injury.
6. Intentional or reckless injury.
7. Administering a substance without consent.
8. Assault.
9. Assault on a constable.
10. Assault to resist arrest.
11. Threats to kill or cause serious injury.
12. Torture.

Detention and Abduction

13. Interpretation of ss.14 to 19.
14. Unlawful detention.
15. Kidnapping.
16. Hostage-taking.
17. Abduction of child by parent etc.
18. Abduction of child by other persons.
19. Aggravated abduction.

Prosecution and Punishment

20. Prosecution and punishment.
21. Alternative verdicts.

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PART II
GENERAL PROVISIONS

Preliminary

Clause

22. Scope of this Part.
23. Interpretation of this Part.

Provisions relating to fault

24. Supervening fault.
25. Transferred fault and defences.

General Defences

26. Duress by threats.
27. Duress of circumstances.
28. Use of force in public or private defence.

PART III
SUPPLEMENTARY

29. Voluntary intoxication.
30. Consequential and related amendments.
31. Abolition of certain offences, defences and other rules and consequential repeals.
32. Short title, commencement and extent.

SCHEDULES:

- Schedule 1 — Modifications of Section 17 for Children in Certain Cases.
- Schedule 2 — Prosecution and Punishment.
- Schedule 3 — Minor and Consequential Amendments.
- Schedule 4 — Repeals.

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OF A

B I L L

TO

Revise the law of England and Wales with respect to the main non-fatal offences against the person, to enact with amendments certain defences and other rules of law generally applicable to offences and to make related amendments in that law.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART I

NON-FATAL OFFENCES AGAINST THE PERSON

PRELIMINARY

Interpretation of
this Part.

1.—(1) The following provisions apply for the interpretation of this Part of this Act.

(2) This Part is subject to the defences and other rules of law contained in Part II.

(3) The application of the defences and rules of law contained in Part II does not exclude the application of other defences under or rules of the common law and this Part is subject also to—

(a) those other defences or rules of the common law; and

(b) any enactment or rule of the common law providing or allowing a justification or excuse for any act or omission.

(4) The application of the defences and rules referred to in subsection (3)(b) above is not to be treated as excluded or restricted by reason of any express provision for a justification or excuse in the following provisions of this Part.

(5) A person who was voluntarily intoxicated when the offence requires reference to his state of mind shall be treated—

(a) as having been aware of any risk of which he would have been aware had he not been intoxicated; and

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(b) as not having believed in any circumstance which he would not have believed in had he not been intoxicated, and this Part has effect, in such cases, subject to those rules.

(6) In this Part—

“assault” means the offence under section 8;

“injury” means—

(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;

“justification” includes authority; and

“voluntarily intoxicated” (and “intoxicated”) are to be construed in accordance with section 29.

Definition of fault terms.

2. For the purposes of this Part of this Act a person acts—

(a) “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 is aware that it would occur in the ordinary course of events if he were to succeed in his purpose of causing some other result;

(b) “recklessly” with respect to—

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

(ii) a result when he is aware of a risk that it will occur; and it is, in the circumstances known to him, unreasonable to take that risk;

and cognate words shall be construed accordingly.

Liability for omissions.

3. Where this section applies to an offence a person may commit the offence if, with the result specified for the offence, he omits to do an act that he is under a duty to do at common law; and accordingly references to acts include references to omissions.

THE OFFENCES

Causing injury and assault

Intentional serious injury.

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

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

(a) the act causing injury is done, or

(b) the injury occurs,

in England and Wales.

(3) Section 3 applies to an offence under this section.

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- Reckless serious injury. 5.—(1) A person is guilty of an offence if he recklessly causes serious injury to another.
- (2) Section 4(2) applies also to an offence under this section.
- Intentional or reckless injury. 6. A person is guilty of an offence if he intentionally or recklessly causes injury to another.
- Administering a substance without consent. 7.—(1) A person is guilty of an offence if, knowing that the other does not consent, he administers to, or causes to be taken by, another any substance which he knows to be capable of interfering substantially with the other's bodily functions.
- (2) For the purposes of this section a substance capable of inducing unconsciousness or sleep is capable of interfering substantially with bodily functions.
- Assault. 8.—(1) A person is guilty 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 likely or intended 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) Except where the force or impact is intended or is likely to cause injury, a person does not commit an offence under this section in respect of any force or impact that is within the limits of what is acceptable as incidental to social intercourse or to life in the community.
- Assault on a constable. 9. A person is guilty of an offence if he assaults a constable acting in the execution of his duty, or anyone assisting a constable so acting, knowing that, or being reckless whether, the person assaulted or the person being assisted is a constable, whether or not he is aware that the constable is or may be acting in the execution of his duty.
- Assault to resist arrest. 10. 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.
- Threats to kill or cause serious injury. 11. 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.
- Torture. 12.—(1) A public official or person acting in an official capacity, whatever his nationality, is guilty of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official

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duties.

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

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

(i) of a public official; or

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

(b) the official or other person is performing or purporting to perform his official duties when he instigates the commission of the offence or consents to or acquiesces in it.

(3) It is immaterial whether the pain or suffering is physical or mental.

(4) Section 3 applies to an offence under this section.

(5) It is a defence in respect of any conduct for the defendant to prove that he had a lawful justification or excuse for the conduct.

(6) For the purposes of subsection (5) above “lawful justification or excuse” means—

(a) in relation to pain or suffering inflicted in the United Kingdom, lawful justification or excuse under the law of the part of the United Kingdom where it was inflicted;

(b) in relation to pain or suffering inflicted outside the United Kingdom—

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

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

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

Detention and Abduction

Interpretation of
ss.14 to 19.

13. For the purposes of sections 14 to 19 a person shall be treated as—

(a) taking another if he causes the other to accompany him or a third person or causes him to be taken;

(b) detaining another if he causes the other to remain where he is;

(c) sending another if he causes the other to be sent; and

(d) acting without the consent of another if he obtains the other's consent—

(i) by force or threat of force; or

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(ii) by deception causing the other to believe that he is under legal compulsion to consent.

Unlawful detention.

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

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

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

(3) Section 3 applies to an offence under this section.

Kidnapping.

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

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

(2) Section 3 applies to an offence under this section.

Hostage-taking.

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

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

Abduction of child by parent etc.

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

(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 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
- (e) he has custody of the child.

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(3) In this section “the appropriate consent”, in relation to a child 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 him;
 - (iii) any guardian of the child;
 - (iv) any person in whose favour a residence order is in force with respect to the child;
 - (v) any person who has custody of the child; or
- (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) Except in the case mentioned in subsection (5) below, a person does not commit an offence under this section in relation 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 period of less than one month.

(5) The case excepted from subsection (4) above is where the person taking or sending the child out of the United Kingdom does so in breach of an order under Part II of the Children Act 1989.

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

- (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
- (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.

(7) Subsection (6)(c) above does not apply if—

- (a) the person who refused to consent 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
- (b) 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.

(8) Section 3 applies to an offence under this section.

(9) For the purposes of this section—

- (a) “guardian of a child”, “residence order” and “parental responsibility” 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.

(10) This section shall have effect subject to the provisions of Schedule 1 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.

Abduction of child by other persons.

18.—(1) A person is guilty of an offence if, without lawful authority or reasonable excuse, he takes or detains a child under the age of sixteen—

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

(2) Subsection (1) above does not apply—

- (a) where the father and mother of the child in question were married to each other at the time of his birth, to the child’s father and mother;
- (b) where the father and mother of the child in question were not married to each other at the time of his birth, to the child’s mother; and
- (c) to any other person mentioned in section 17(2)(c) to (e) above.

(3) It is a defence for the defendant to prove that—

- (a) where the father and mother of the child in question were not married to each other at the time of his birth—
 - (i) he is the child’s father; or
 - (ii) he believed, on reasonable grounds, that he was the child’s father; or
- (b) he believed that the child had attained the age of sixteen.

Aggravated abduction.

19.—(1) A person is guilty of an offence if, without lawful authority or reasonable excuse, he takes or detains a child under the age of sixteen—

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

intending—

- (i) to hold the child to ransom or as a hostage; or
- (ii) to commit an arrestable offence; or
- (iii) to send him out of the United Kingdom.

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(2) Subsection (1) above does not apply to a person intending to send a child out of the United Kingdom if that person is, for the purposes of section 17, connected with the child by virtue of subsection (2)(a) or (b) of that section.

(3) Section 3 applies to an offence under this section.

Prosecution and Punishment

Prosecution and
punishment.

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

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

(3) Column 4 of that Schedule—

(a) in the case of conviction on indictment of an offence, specifies the maximum sentence of imprisonment that may be imposed; and

(b) in the case of summary conviction of an offence, specifies the maximum sentence of imprisonment or fine that may be imposed.

(4) Column 5 of that Schedule states any requirement of the consent of any person to the institution or conduct of proceedings for an offence.

Alternative
verdicts.

1967 c.58

21.—(1) If on the trial on indictment of a person charged with an offence under section 4, 5, 6 or 10 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 8.

(2) For the purposes of the application of section 6(3) of that Act to the trial of a person on indictment for any offence under this Part of this Act an allegation in the indictment of knowledge or intention includes an allegation of recklessness.

(3) If, on the summary trial of a person charged with an offence under section 5 the magistrates' court find him not guilty of that offence they may find him guilty of an offence under section 6 or 8.

(4) If, on the summary trial of a person charged with an offence under section 6, 9 or 10, the magistrates' court find him not guilty of that offence they may find him guilty of an offence under section 8.

PART II

GENERAL PROVISIONS

Preliminary

Scope of this
Part.

22. The provisions of this Part of this Act apply (so far as applicable) in relation to all offences under the law (including the statutory law) of England and Wales.

Interpretation of this Part.

23. (1) The following provisions apply for the interpretation of this Part of this Act.

(2) "Fault" and "at fault" in relation to an offence under any enactment or the common law, are to be construed as indicating that the elements of the offence, under that enactment or that law, include an element consisting of either or both of the following, that is to say—

- (a) a state of mind with which a person acts,
- (b) a failure to comply with a standard of conduct.

(3) A person who was voluntarily intoxicated when the offence requires reference to his state of mind shall be treated as not having believed in any circumstance which he would not have believed in had he not been intoxicated; and this Part has effect, in such cases, subject to that rule.

(4) "Voluntarily intoxicated" (and "intoxicated") are to be construed in accordance with section 29.

(5) "Exempting circumstance" means a circumstance amounting to a defence or to an element of a defence.

(6) "Injury" means—

- (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.

Provisions relating to fault

Supervening fault.

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

- (a) he becomes aware that he has done the act and that the result has occurred and may continue, or may occur; and
- (b) with the fault required, he fails to do what he can reasonably be expected to do that might prevent the result continuing or occurring; and
- (c) the result continues or occurs.

Transferred fault and defences.

25.—(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.

(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.

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General Defences

Duress by threats.

26.—(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—

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

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

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

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

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

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

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

(5) This section applies in relation to the omissions as it applies in relation to the acts of persons; and accordingly references to acts and the doing of acts include references to omissions and the making of omissions.

Duress of circumstances.

27.—(1) No act of a person constitutes an offence if the act is done under duress of circumstances.

(2) A person does an act under duress of circumstances if—

(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

(b) the danger that he knows or believes to exist is such that in all the circumstances (including any of his personal characteristics that effect its gravity) he cannot reasonably be expected to act otherwise.

(3) This section does not apply—

(a) to a person who acts in the knowledge or belief that a threat of a kind described in section 26(2)(a)(i) has been made; or

(b) to a person who uses force for any of the purposes referred to in section 28(1);

(c) to a person who has knowingly and without reasonable excuse exposed himself to the danger.

(4) This section applies in relation to the omissions as it applies in relation to the acts of persons; and accordingly references to acts and the doing of acts include references to omissions and the making of omissions.

Use of force in public or private defence.

28.—(1) The use of force by a person for any of the purposes specified in subsection (2) below, if only such as is reasonable in the circumstances as he believes them to be, does not constitute an offence.

(2) Those purposes are—

- (a) preventing or terminating crime, or effecting or assisting in the lawful arrest of an offender or suspected offender or of a person unlawfully at large;
- (b) preventing or terminating a breach of the peace;
- (c) protecting himself or another from unlawful force or unlawful injury;
- (d) preventing or terminating the unlawful detention of himself or another;
- (e) protecting property (whether belonging to himself or another) from unlawful appropriation, destruction, damage or infringement; or
- (f) preventing or terminating a trespass to his person or property or, with the authority of another, of preventing or terminating a trespass to the person or property of that other.

(3) For the purposes of this section 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; and a person shall be treated as—

- (a) 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
- (b) using force in relation to property if he threatens a person with its use in relation to property.

(4) For the purposes of this section, an act is “unlawful” although a person charged with an offence in respect of it would be acquitted on the ground only that—

- (a) he was under ten years of age; or
- (b) he lacked the fault required for the offence or believed that an exempting circumstance existed; or
- (c) he acted in pursuance of a reasonable suspicion; or
- (d) he acted under duress, whether by threats or of circumstances; or
- (e) he was insane, so as not to be responsible, according to law, for the act.

(5) Notwithstanding subsection (1) above, a person who believes circumstances to exist which would justify or excuse the use of force under that subsection has no defence 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, unless he believes the force to be immediately necessary to prevent injury to himself or another.

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(6) This section applies in relation to acts immediately preparatory to the use of force as it applies in relation to acts in which force is used.

(7) Subsection (1) above does not apply where a person causes unlawful conduct or an unlawful state of affairs with a view to using force to resist or terminate it; but subsection (1) above may apply although the occasion for the use of force arises only because he does anything he may lawfully do, knowing that such an occasion may arise.

(8) 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.

(9) A threat of force may be reasonable although the use of the force would not be.

(10) So much of subsection (1) above as relates to the use of force for the purpose specified in subsection (2)(e) above does not apply in relation to offences under the Criminal Damage Act 1971.

1971 c.48

PART III

SUPPLEMENTARY

Voluntary
intoxication.

29.—(1) Whether a person is “voluntarily intoxicated” or not is to be determined in accordance with the following provisions of this section.

(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—

(a) the intoxicant—

(i) is not taken on medical advice; or

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

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

and 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 is to 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.

Consequential and related amendments.

30.—(1) The enactments mentioned in Schedule 3 to this Act shall have effect subject to the amendments specified in that Schedule.

(2) The following amendments extend throughout the United Kingdom, that is to say, the amendments of—

1978 c.17

(a) the Internationally Protected Persons Act 1978;

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.

(3) No amendment applies in relation to any offence committed or act or omission done or made before the coming into force of this Act.

Abolition of certain offences, defences and other rules and consequential repeals.

31.—(1) The following offences are hereby abolished, that is to say—

(a) the offences under the common law of—

(i) common assault;

(ii) battery;

(iii) mayhem;

(iv) false imprisonment; and

(v) kidnapping; and

(b) the offences under the enactments mentioned in Schedule 4 to this Act.

(2) Accordingly the enactments mentioned in Schedule 4 to this Act are hereby repealed to the extent specified in the third column of that Schedule and any repeal in the enactments specified in section 30(2) extends throughout the United Kingdom.

(3) The following are hereby abrogated, that is to say—

(a) the rules of the common law relating to the matters provided for in sections 24 and 25; and

(b) the defences available under the common law of—

(i) duress, whether by threats or of circumstances (but not any distinct defence of necessity) and coercion of a wife by her husband; and

(ii) using force for any of the purposes specified in section 28(2).

(4) Nothing in this section applies in relation to any offence committed or act or omission done or made before the coming into force of this Act.

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Short title,
commencement
and extent.

- 32.—(1) This Act may be cited as the Criminal Law Act 1992.
- (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.
- (3) This Act extends to England and Wales only.

SCHEDULES

Section 17

SCHEDULE 1

MODIFICATIONS OF SECTION 17 FOR CHILDREN IN CERTAIN CASES

Children in care of local authorities within the meaning of the Children Act 1989

1989 c.41 1.—(1) This paragraph applies in the case of a child who is in the care of a local authority within the meaning of the Children Act 1989.

(2) Where this paragraph applies, section 17 of this Act shall have effect as if—

- (a) the reference in subsection (1) to the appropriate consent were a reference to the consent of the local authority or voluntary organisation in whose care the child is; and
- (b) subsections (3) to (8) were omitted.

Children in places of safety

1969 c.54 2.—(1) This paragraph applies in the case of a child who is—

- (a) detained in a place of safety under section 16(3) of the Children and Young Persons Act 1969; or
- (b) remanded to local authority accommodation under section 23 of that Act.

(2) Where this paragraph applies, section 17 of this Act shall have effect as if—

- (a) the reference in subsection (1) to the appropriate consent were a reference to the leave of any magistrates' court acting for the area in which the place of safety is; and
- (b) subsections (3) to (8) were omitted.

Adoption and custodianship

1976 c.36 3.—(1) This paragraph applies in the case of a child—

- (a) who is the subject of an order under section 18 of the Adoption Act 1976 freeing him for adoption; or
- (b) who is the subject of a pending application for such an order; or
- (c) who is the subject of a pending application for an adoption order; or
- (d) who is the subject of an order under section 55 of the Adoption Act 1976 relating to adoption abroad or of a pending application for such an order; or
- (e) who is the subject of a pending application for a custodianship order.

(2) Where this paragraph applies, section 17 of this Act shall have effect as if—

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(a) the reference in subsection (1) to the appropriate consent were a reference—

(i) in a case within sub-paragraph (1)(a) above, to the consent of the adoption agency which made the application for the section 18 order or, if the section 18 order has been varied under section 21 of that Act so as to give parental responsibility to another agency, to the consent of that other agency.

(ii) in a case within sub-paragraph (1)(b) or (c) above, to the leave of the court to which the application was made; and

(iii) in a case within sub-paragraph (1)(d) above, to the leave of the court which made the order or, as the case may be, to which the application was made; and

(b) subsections (3) to (8) were omitted.

(3) Sub-paragraph (2) above shall be construed as if the references to the court included, in any case where the court is a magistrates' court, a reference to any magistrates' court acting for the same area as that court.

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 shall apply to the exclusion of those in paragraph 1.

Interpretation

5. In this Schedule—

(a) "adoption agency" and "adoption order" have the same meaning as in the Adoption Act 1976; and

(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.

1979 c.55

PROSECUTION AND PUNISHMENT

(1) Provision creating offence	(2) Nature of offence	(3) How triable	(4) Punishment	(5) Restriction on institution of proceedings
4	Intentional serious injury	Only on indictment.	Life.	
5	Reckless serious injury	Either way.	On indictment: 5 years. Summarily: 6 months or a fine not exceeding the statutory maximum, or both.	
6	Intentional or reckless injury	Either way.	On indictment: 3 years. Summarily: 6 months or a fine not exceeding the statutory maximum, or both.	
7	Administering a substance without consent	Either way.	On indictment: 3 years. Summarily: 6 months or a fine not exceeding the statutory maximum, or both.	
8	Assault	Only summarily.	6 months or a fine not exceeding level 5 on the standard scale, or both.	
9	Assault on a constable	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
10	Assault to resist arrest	Either way.	On indictment: 2 years. Summarily: 6 months or a fine not exceeding the statutory maximum, or both.	
11	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.	
12	Torture	Only on indictment.	Life.	Only by or with the consent of the Attorney General.
14	Unlawful detention	Either way.	On indictment: 5 years. Summarily: 6 months or a fine not exceeding the statutory maximum, or both.	
15	Kidnapping	Only on indictment.	Life.	
16	Hostage-taking	Only on indictment.	Life.	Only by or with the consent of the Attorney General.
17	Abduction of child by parent etc.	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.

(1) Provision creating offence	(2) Nature of offence	(3) How triable	(4) Punishment	(5) Restriction on institution of proceedings
18	Abduction of child by person 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.
19	Aggravated abduction	Only on indictment.	Life.	Only by or with the consent of the Director of Public Proscutions.

Section 30.

SCHEDULE 3

MINOR AND CONSEQUENTIAL AMENDMENTS

Offences against the Person Act 1861

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, etc intending to do grievous bodily harm) there shall be substituted the following section—

“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;
- (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 shall be liable on conviction on indictment to imprisonment for life.

(3) In this section “serious injury” and “explosive substance” have the same meaning as in the Criminal Law Act 1992 and the Explosive Substances Act 1883 respectively.”

1992 c.0

1883 c.3

2. For section 30 of the Offences against the Person Act 1861 (maliciously placing gunpowder near a building etc intending to do bodily harm) there shall be substituted the following section—

“Causing injury by explosives. 30.—(1) A person is guilty of an offence if, intending to cause injury, he—

- (a) places an explosive substance in, on or near any building, ship or vessel;
- (b) throws an explosive substances at, on or into any building, ship or vessel.

(2) A person guilty of an offence under this section shall be liable on conviction on indictment to imprisonment for a term not exceeding fourteen years.

(3) In this section “injury” and “explosive substance” have the same meaning as in the Criminal Law Act 1992 and the the Explosive Substances Act 1883 respectively.”

3. In section 31 of the Offences against the Person Act 1861 (setting spring guns, etc., with intent to inflict grievous bodily harm)—

(a) for the words “inflict grievous bodily harm” (where first occurring) there shall be substituted the words “cause serious injury”;

(b) for the words “inflict grievous bodily harm upon” there shall be substituted the words “cause serious injury to”; and

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(c) at the end there shall be added the following paragraph—

“In this section “injury” and “serious injury” have the same meaning as in the Criminal Law Act 1992”.

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.

5. For section 34 of the Offences against the Person Act 1861 (doing or omitting anything to endanger passengers and others on a railway) there shall be substituted the following section—

“Endangering safety of railway passengers or employees. 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 shall be liable on conviction on indictment to imprisonment for a term not exceeding two years.”

Children and Young Persons Act 1933

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) there shall be substituted the words “Any offence under sections 8, 17 or 18 of the Criminal Law Act 1992.”

House to House Collections Act 1939

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 there shall be added the words “Offences under section 8 of the Criminal Law Act 1992.”.

Visiting Forces Act 1952

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 there shall be added—

“(xiii) the Criminal Law Act 1992.”

Criminal Law Act 1967

1967 c.58

9. In section 3 of the Criminal Law Act 1967 (use of force in making arrest etc), after subsection (2), there shall be inserted the following subsection—

“(3) Subsection (1) shall not apply for the purposes of any defence in proceedings for an offence to which section 28 of the Criminal Law Act 1992 is applied by section 22 of that

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Act.”

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” there shall be substituted the words “intentionally causing serious injury (within the meaning of the Criminal Law Act 1992)”.

Firearms Act 1968

1968 c.27

11.—(1) Schedule 1 to the Firearms Act 1968 (offences to which provisions relating to use of firearm to resist arrest apply) shall be amended as follows.

(2) In paragraph 2, for the words “section 30 (laying explosive to building etc.);” there shall be substituted the words “section 30 (causing injury by explosives);”.

(3) In paragraph 2, for the words “section 32 (endangering railway passengers by tampering with track);” there shall be substituted the words “section 34 (endangering safety of railway passengers or employees).”.

(4) For paragraph 2A there shall be substituted the following paragraph—

“2A. Offences under any of the following provisions of the Criminal Law Act 1992—

- section 4 (intentional serious injury);
- section 5 (reckless serious injury);
- section 6 (intentional or reckless injury);
- section 7 (administering a substance without consent);
- section 8 (assault);
- section 9 (assault on a constable);
- section 10 (assault to resist arrest);
- section 17 (abduction of child by parent);
- section 18 (abduction of child by other persons);
- section 19 (aggravated abduction).”

Theft Act 1968

1968 c.60

12. In section 9 of the Theft Act 1968 (burglary) in subsection (1)(b) for the words “inflicts or attempts to inflict on any person therein any grievous bodily harm” there shall be substituted the words “causes or attempts to cause any person therein serious injury (within the meaning of the Criminal Law Act 1992)”.

Criminal Damage Act 1971

1971 c.48

13.—(1) Section 5 of the Criminal Damage Act 1971 (which defines certain lawful excuses for offences under that Act) shall be amended as follows.

(2) In subsection (2)(b), for the words following “he believed” in the second place where they occur there shall be substituted the words

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(3) In subsection (3), for the words from the beginning to “it is immaterial” there shall be substituted the words “Except in a case falling within subsection (3A) below, for the purposes of subsection (2) above”.

(4) After subsection (3) there shall be inserted the following subsection—

“(3A) 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 circumstance which he would not have believed in had he not been intoxicated.

(3B) In subsection (3A) above “voluntarily intoxicated” (and “intoxicated”) are to be construed in accordance with section 29 of the Criminal Law Act 1992.”

Domestic Violence and Matrimonial Proceedings Act 1976

1976 c.50 14. In section 2(1) of the Domestic Violence and Matrimonial Proceedings Act 1976 (arrest for breach of injunction) for the words “actual bodily harm” there shall be substituted the words “injury (within the meaning of the Criminal Law Act 1992)”.

Internationally Protected Persons Act 1978

1978 c.17 15. Section 1 of the Internationally Protected Persons Act 1978 (attacks and threats of attacks on protected persons) shall be amended by the insertion in subsection (1)(a)—

(a) after the word “abduction” of the words “(not including an offence under section 17 of the Criminal Law Act 1992)”,

(b) after the words “Offences against the Person Act 1861 or” of the words “an offence under section 4, 5, 6, 7 or 14 of the Criminal Law Act 1992 or”.

Suppression of Terrorism Act 1978

1978 c.26 16.—(1) The Suppression of Terrorism Act 1978 shall be amended as follows.

(2) In section 4 (jurisdiction in respect of offences committed outside United Kingdom), in subsection (1)(a) after “11” there shall be inserted “11ZA”.

(3) In Schedule 1 (list of offences)—

(a) after paragraph 8 there shall be inserted the following paragraph—

“8A. An offence under any of the following provisions of the Criminal Law Act 1992—

(a) section 4 (intentional serious injury);

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- (b) section 5 (reckless serious injury);
- (c) section 6 (intentional or reckless injury);
- (d) section 7 (administering a substance without consent)."

(b) after paragraph 11 there shall be inserted the following paragraphs—

"11ZA. An offence under any of the following provisions of the Criminal Law Act 1992—

- (a) section 14 (unlawful detention);
- (b) section 15 (kidnapping);
- (c) section 18 (abduction of child by person other than parent)
- (d) section 19 (aggravated abduction).

11ZB. An offence under section 16 of the Criminal Law Act 1992 (hostage-taking)."

Magistrates' Courts Act 1980

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);" there shall be substituted the words "section 34 (endangering safety of railway passengers or employees);".

Criminal Justice Act 1982

1982 c.48

18.—(1) Schedule 1 to the Criminal Justice Act 1982 (offences excluded from early release) shall be amended as follows.

(2) In Part II, in paragraph 8, for the words "causing explosions or casting corrosive fluids with intent to do grievous bodily harm" there shall be substituted the words "causing serious injury by explosives".

(2) At the end there shall be added, appropriately numbered—

"Criminal Law Act 1992 (c.0)

- . Section 4 (intentional serious injury).
- . Section 5 (reckless serious injury).
- . Section 6 (intentional or reckless injury).
- . Section 7 (administering a substance without consent).
- . Section 11 (threats to kill or cause serious injury).
- . Section 12 (torture)."

Aviation Security Act 1982

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" there shall be inserted the words "under section 4, 5, 6 or 7 of the Criminal Law Act 1992 or".

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SCH. 3 (2) In section 6 (ancillary offences), in subsection (1), after the words “Offences against the Person Act 1861 or” there shall be inserted the words “under section 4, 5, 6 or 7 of the Criminal Law Act 1992 or”.

(3) In section 10 (purposes to which Part II applies), in subsection (2), after the words “Offences against the Person Act 1861” there shall be inserted the words “or under section 4, 5, 6 or 7 of the Criminal Law Act 1992”.

Nuclear Materials (Offences) Act 1983

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” there shall be inserted the words “section 4, 5 or 6 of the Criminal Law Act 1992 or”.

Police and Criminal Evidence Act 1984

1984 c.60 21. In Schedule 5 to the Police and Criminal Evidence Act 1984 (serious arrestable offences), in Part II at the end, there shall be added the following paragraphs—

“*Criminal Law Act 1992 (c.0)*

10. Section 12 (torture).

11. Section 16 (hostage-taking).”

Criminal Justice Act 1988

1988 c.33 22. In section 40 of the Criminal Justice Act 1988 (power to join in indictment count of common assault etc), for subsection (3)(a) there shall be substituted the following paragraph—

“(a) an offence under section 8 of the Criminal Law Act 1992 (assault);”

23. In section 109 of the Criminal Justice Act 1988 (criminal injuries) in subsection (3) after paragraph (k) there shall be inserted the following paragraph—

“(kk) unlawful detention;”

Extradition Act 1989

1989 c.33 24. In section 22 of the Extradition Act 1989 (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” there shall be inserted the words “or section 16 of the Criminal Law Act 1992”.

25. In section 25 of the Extradition Act 1989 (hostage-taking), in subsection (1)(b) after the words “the Taking of Hostages Act 1982” there shall be inserted the words “or section 16 of the Criminal Law Act 1992”.

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26. In Schedule 1 to the Extradition Act 1989 in paragraph 15(e) (deemed extension of jurisdiction of foreign states), after the words “the Taking of Hostages Act 1982” there shall be inserted the words “or section 16 of the Criminal Law Act 1992”.

Children Act 1989

1989 c.41

27. In section 51 of the Children Act 1989 (refuges for children at risk), for subsection (7)(d) there shall be substituted the following paragraph—

“(d) section 18 of the Criminal Law Act 1992.”

Aviation and Maritime Security Act 1990

1990 c.31

28. In section 1 of the Aviation and Maritime Security Act 1990 (endangering safety at aerodromes), in subsection (9) after the words “Explosive Substances Act 1883” there shall be inserted the words “or under section 4, 5, 6 or 7 of the Criminal Law Act 1992”

29. In section 11 of the Aviation and Maritime Security Act 1990 (destroying ships or fixed platforms or endangering their safety), in subsection (7) after the words “Explosive Substances Act 1883” there shall be inserted the words “or under section 4, 5, 6 or 7 of the Criminal Law Act 1992”

30. In section 14 of the Aviation and Maritime Security Act 1990 (ancillary offences), in subsection (2) after the words “Offences against the Person Act 1861” there shall be inserted the words “and sections 4, 5, 6 and 7 of the Criminal Law Act 1992”.

31. In section 18 of the Aviation and Maritime Security Act 1990 (purposes to which Part III applies), in subsection (2) after the words “Offences against the Person Act 1861” there shall be inserted the words “or under section 4, 5, 6 or 7 of the Criminal Law Act 1992”.

Section 31.

SCHEDULE 4

REPEALS

Chapter	Short title	Extent of repeal
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.
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”.

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Chapter	Short title	Extent of repeal
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).
1964 c.48	Police Act 1964	In section 51, subsections (1) and (2).
1968 c.27	Firearms Act 1968	In Schedule 1, in paragraph 2, the words from "sections 20" to "drugs);", and the words from "section 38" to "assaults);" In Schedule 1, in paragraph 5, the words "section 51(1) of the Police Act 1964 or".
1977 c.45	Criminal Law Act 1977	In Schedule 12, the entry for the Offences against the Person Act 1861.
1978 c.26	Suppression of Terrorism Act 1978	In section 4(1)(a) "11B". In Schedule 1, paragraphs 11A and 11B.
1980 c.43	Magistrates' Courts Act 1980	In Schedule 1, in paragraph 5, subparagraphs (a) to (d) and (f) to (h).
1982 c.28	Taking of Hostages Act 1982	Section 1. In section 2, subsection (1). In section 3, subsection (2).
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 paragraph 30.
1984 c.37	Child Abduction Act 1984	Sections 1 to 5. In section 11, subsections (1), (2), (3) and (4). The Schedule.
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.
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.

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Chapter	Short title	Extent of repeal
1990 c.31	Aviation and Maritime Security Act 1990	In section 18(2), the words from "18" to "28 or".

APPENDIX B

EXPLANATORY NOTES

CLAUSE 1

1. This clause provides for the interpretation of this Part of the Bill.
2. Subsection (2) applies the defences and other rules of law contained in Part II of the Bill. It is intended thereby to enable the Bill to achieve the object set out in paragraph 2.3 of this Consultation Paper, to provide the courts trying cases of non-fatal offences against the person with a rational guide to the main issues of law that they are likely to have to decide.
3. Paragraphs 2.4–2.6 of this Consultation Paper explain why Part II of the Bill applies throughout the criminal law. Paragraphs 3.2–3.8 explain the express savings in subsection (3) of this clause, for other defences and rules of the common law, and specifically, for any such rules, as well as any enactments, providing or allowing justification (which under subsection (6) includes authority) or excuse.
4. As explained at paragraphs 3.9–3.10 of this Consultation Paper, four clauses of the Bill refer specifically to justification (including authority) or excuse, notwithstanding subsection (3)(b) of this clause. For the avoidance of doubt, subsection (4) provides that such references are not to be read as excluding the application of subsection (3)(b) in other cases.
5. Subsection (5) is one of a set of provisions in the Bill about intoxication, an account of which is to be found in the note on clause 29.
6. Subsection (6) defines certain terms used in the Bill, including “injury” as used in the offence creating clauses. Paragraph 154 of its Fourteenth Report contains the CLRC’s arguments for using the word “injury”. Clause 6 and the offence creating clauses of the Draft Code, however, adopted the phrase “personal harm”. Paragraphs 8.9–8.33 of this Consultation Paper explain why the Bill reverts to “injury” and expressly includes in its definition of that term “pain and unconsciousness”, “impairment of a person’s physical condition” and “impairment of a person’s mental health”.

CLAUSE 2

1. The definitions of fault terms set out in this clause are explained in paragraphs 5.1–5.16 of this Consultation Paper. Definitions in the Bill are based on definitions by the Code Team (discussed in paragraphs 8.11 to 8.20 of their report) in the light of critical comments made since the report.

Paragraph (a) provides a two part definition of “intention”. First, a person can be taken to intend the result of his actions if it is his purpose to bring that result about. Secondly, if a person acts to achieve a particular purpose, knowing that this cannot be done without causing another result he must be held to intend to cause that other result. The wording is different from that in Clause 18(b) of the Draft Code and the changes are further explained in paragraphs 5.4–5.11 of this Consultation Paper (particularly paragraph 5.9).

Paragraph (b) defines “recklessly”. As indicated in paragraphs 5.12–5.13 of this Consultation Paper, the actor must knowingly take the risk of the occurrence of the type of harm that is specified in the definition of each particular offence for which “recklessly” provides the mental element: for instance, in the clause 5 offence the risk of serious injury. The Commission proposed this use in their *Report on the Mental Element in Crime* and the CLRC supported it in paragraphs 11 and 12 of the Fourteenth Report. Clause 18(c) of the Draft Code is thus adopted verbatim.

2. Paragraph 5.15 explains why the Bill does not follow clause 18(a) of the Draft Code, which defined “knowingly”.

3. The decision to limit the application of the definition of fault terms to Part I of the Bill is explained in paragraphs 2.7–2.8 of this Consultation Paper.

CLAUSE 3

1. This clause provides that, in respect of the offences to which it applies, a person may commit the offence if, with the result specified for the offence, he omits to do an act that he is under a duty to do at common law. The clause is applied by clauses 4 (intentional serious injury), 12 (torture), 14 (unlawful detention), 15 (kidnapping), 17 (abduction), and 19 (aggravated abduction), to the offences created by those clauses.

2. Paragraphs 6.1–6.20 of this Consultation Paper explain the approach reflected in these provisions and in the particular context of offences against the person, the Paper’s treatment of the difficult and controversial question of whether and to what extent criminal liability should be imposed for an omission to act. Paragraphs 6.2–6.6 explain the background of treatment in the CLRC’s Fourteenth Report (paragraphs 252–256), in the Code team report (paragraphs 7.6–7.15, clause 20) and in the Code Report (paragraphs 7.7–7.13) and Draft Code (clause 16).

3. Paragraphs 6.7–6.9 explain our decision to follow the approach of the CLRC in confining liability by omission to serious offences, and invite comment in particular on whether such liability should be extended to other of the Bill offences. Paragraphs 6.10–6.20 discuss the confinement of clause 3 to cases in which the duty to act exists at common law; and in particular, the two questions whether there should be a statutory rationalisation and restatement of such duties, and whether there should be added a specific reference to duties created by statute. Comment on both questions is invited.

CLAUSES 4–6

1. Paragraphs 7.1–7.21 of this Consultation Paper consider in detail the history and present problems with sections 18, 20 and 47 of the Offences Against the Person Act 1861 and paragraphs 7.22–7.41 of the same document discuss the need for reform. Clauses 70–72 of the Draft Code and clauses 4–6 of the Bill adopt the substance of the recommendations of the CLRC, (to be found in paragraphs 152, 154, 155–156 of the Fourteenth Report). The amendments now made to the CLRC’s proposals are discussed in paragraph 14.35 of the Code Report and paragraphs 8.7–8.33 of this Consultation Paper.

2. Paragraphs 8.7 and 8.8 of this Consultation Paper explain the use of the terms “intentionally” and “recklessly” in these clauses.

3. A definition of “injury” is contained in clause 1(6). Paragraph 154 of the Fourteenth Report gave the CLRC’s arguments for using the word “injury”, though clause 6 and the offence clauses of the Draft Code adopted the phrase “personal harm”. Paragraphs 8.9–8.33 of this Consultation Paper explain the adoption of the phrase “injury” and the express inclusion of “pain and unconsciousness”, “any other impairment of a person’s physical condition” and “impairment of a person’s mental health” in the definition.

CLAUSE 4

1. Clause 4 implements the substance of the CLRC’s recommendation on intentionally causing serious injury (to be found in paragraph 152 of the CLRC’s Fourteenth Report and paragraph 8.4(a) of this Consultation Paper).

2. Paragraphs 8.7 and 8.8 of this Consultation Paper explain that the clause 2 definition of “intentionally” enabled the Commission to replace the CLRC’s formula of “causing

serious injury with intent to cause serious injury” with the simpler concept of intentionally causing serious injury.

3. Subsection (2) ensures that our courts will have jurisdiction over acts committed here but intended to cause serious injury abroad, as explained in this Consultation Paper at paragraph 8.34. This subsection implements the spirit of paragraph 303 of the CLRC’s Fourteenth Report which recommended that it should be an offence to incite or conspire in this country to commit a serious injury abroad.

CLAUSE 5

1. Clause 5 implements the CLRC’s recommendations (to be found in paragraphs 152, 155 and 157 of the Fourteenth Report) on an offence of recklessly causing serious injury; also stated at paragraph 8.4(b) of this Consultation Paper.

CLAUSE 6

1. Clause 6 implements the CLRC’s recommendations on intentionally or recklessly causing injury which are found in paragraphs 152 and 157 of the Fourteenth Report; also stated at paragraph 8.4(c) of this Consultation Paper.

CLAUSE 7

1. Subsection (1) provides for the offence of administering a substance capable of interfering substantially with the other’s bodily functions, without that other’s consent. The wording is in the same terms as clause 73 of the Draft Code, which embodies the CLRC’s recommendations in relation to an offence of administering harmful substances which can be found in paragraphs 184–191 of the Fourteenth Report. Paragraphs 12.4–12.7 of this Consultation Paper explain the clause’s relationship to the offences in sections 23 and 24 of the 1861 Act. Those paragraphs also note that the defendant must know that what he administered was capable of interfering substantially with the other’s bodily functions and explain how this clause works alongside the offences of causing injury.

2. Subsection (2) provides an extended definition of “capable of interfering substantially with bodily functions.” The subsection provides that inducing unconsciousness or sleep is encompassed by the phrase. Paragraph 187 of the CLRC’s Fourteenth Report states the Committee’s recommendations on this point.

CLAUSE 8

1. Subsection (1) creates an offence of assault. The CLRC’s approach (found in paragraphs 158–160 of the Fourteenth Report) was to provide for a single offence of “assault”, rather than having both a “battery” and a “psychic” offence, and the Code Report (at paragraph 14.41) followed this approach. However clause 75 of the Draft Code and clause 8 of the Bill also *define* “assault” which the CLRC had not recommended. The wording in the Bill is in the same terms as that in the Draft Code and the proposals are discussed in paragraphs 9.1–9.16 of this Consultation Paper; Paragraph 9.11 particularly invites comments on whether clause 8 should be divided into two separate offences and paragraphs 9.15–9.16 explain the role of consent.

2. Subsection (1)(a) deals with the application of force or impact to the body of another. It should be noted that there is no need to prove injury under this clause; if such is intended an offence will be committed under clause 6.

3. Subsection (1)(b) covers the case of causing fear of immediate application of force.

4. Subsection (2) expressly excludes generally acceptable physical conduct from the statutory definition of assault, as explained in paragraphs 9.17–9.20 of this Consultation Paper. This subsection is an addition to the terms in which the offence was discussed in the Draft Code.

CLAUSE 9

1. Whilst many of the special cases of assault are repealed by Schedule 4 to this Bill, clause 9 retains the separate offence of assault on a police constable. In their Fourteenth Report (paragraphs 167–178) the CLRC concluded that this offence should be retained as a separate offence. This clause is a verbatim reproduction of clause 76 of the Draft Code and requires that the defendant knows or is reckless as to whether the person assaulted is in fact a police constable. This offence is discussed in paragraphs 9.26–9.28 of this Consultation Paper and 9.28 specifically invites comment on whether such an offence should continue to exist; and, if it does continue, whether it should be summary only.

CLAUSE 10

1. This clause retains a second special offence of assault, so as to deal in particular with assaults on police officers attempting to arrest persons suspected of serious crime. The CLRC recommended this course in paragraphs 181–182 of the Fourteenth Report. The present clause follows clause 77 of the Draft Code in reproducing, verbatim, clause 79 of the Code Team's Bill. Paragraphs 9.29–9.30 of this Consultation Paper explain the decision to retain this specific assault offence and again invite views as to whether the CLRC policy should be adopted.

CLAUSE 11

1. This clause makes it an offence to threaten to cause serious injury as well as to threaten to kill. The clause implements the recommendation of the CLRC discussed in paragraphs 215–217 of the Fourteenth Report which was incorporated into the Code Team's Bill as clause 68. Clause 11 reproduces clause 65 of the Draft Code (substituting the word "injury" for "personal harm") and is explained in paragraph 11.1 of this Consultation Paper.

CLAUSE 12

1. This clause reflects and replaces section 134 of the Criminal Justice Act 1988, where the offence of torture is at present to be found. Paragraphs 12.2 and 12.8 of this Consultation Paper explain this decision. The clause adopts, with some minor adjustment to the wording, clause 74 of the Draft Code (which is discussed in paragraph 14.40 of the Code Report).

CLAUSES 13–19

1. As explained in paragraphs 12.9–12.10 of this Consultation Paper, the offences of detention and abduction contained in clauses 13–19 implement the recommendations of the CLRC of four new offences (paragraphs 225–251 of the Fourteenth Report), save, in respect of abduction, where the clauses reproduce instead, subsequent overtaking legislation in the Child Abduction Act 1984 (as modified by the Children Act 1989). Clause 16 transfers to this Bill the offence in section 1 of the Taking of Hostages Act 1982. Clauses 79–85 of the Draft Code similarly implemented the CLRC recommendations, taking account of subsequent legislation. Paragraphs 14.47–14.57 of the Code Report contain further observations on the detail of the method of implementation. For the reasons given in paragraphs 6.1–6.3 of this Consultation Paper, the offences in clauses 14, 15 and 19 attract the provision in clause 3 which imposes liability for omissions.

CLAUSE 13

1. This clause is an interpretation clause, taken in substance from clause 79 of the Draft Code.

CLAUSE 14

1. This clause defines the offence of unlawful detention. It is taken with minor modification from clause 80 of the Draft Code and it is explained in paragraph 14.52 of the Code Report that that clause substantially replaced the common law offence of false imprisonment, closely following the recommendation of the CLRC.

CLAUSE 15

1. This clause is taken in substance from clause 81 of the Draft Code. Paragraph 14.53 of the Code Report explains that that clause replaced the common law offence of the same name, and, again, closely followed the recommendations of the CLRC.

CLAUSE 16

1. This clause provides for the offence of hostage-taking. It is repeated, verbatim, from clause 82 of the Draft Code. Paragraph 14.54 of the Code Report explains that that clause replaced the offence under section 1 of the Taking of Hostages Act 1982.

CLAUSE 17

1. This clause provides for the offence of abduction of a child by a parent. It is based on clause 83 of the Draft Code but takes into account section 1 of the Child Abduction Act 1984, (the re-enactment of which is additional to the CLRC's recommendations as explained in paragraph 14.55 of the Code Report) and the Children Act 1989. Schedule 1 to the Bill modifies clause 17 for children in certain cases.

CLAUSE 18

1. This clause provides for the offence of abduction of a child by other persons, as recommended by the CLRC. The clause is based on clause 84 of the Draft Code which re-enacts the offence in section 2 of the Child Abduction Act 1984, as explained in paragraph 14.56 of the Code Report.

CLAUSE 19

1. This clause provides for the offence of aggravated abduction. It is taken in substance from clause 85 of the Draft Code, which closely followed the recommendations of the CLRC as to their fourth recommended offence.

CLAUSE 20

1. Clause 20 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.

CLAUSE 21

1. Subsection (1) provides that the jury may convict of the summary offence in clause 8 (assault) if they find the defendant to be not guilty of an offence under sections 4, 5, 6, or 10 of the Bill. This is discussed in the CLRC's Fourteenth Report at paragraph 161 and this Consultation Paper at paragraph 9.21.

2. Subsection (2) 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 this Consultation Paper at paragraph 9.22.

3. Subsections (3) and (4) provide for alternative verdicts where Bill offences are tried summarily.

CLAUSE 22

1. This clause introduces Part II of the Act, applying the provisions contained in that Part to all offences under the law of England and Wales. The decision to apply Part II of the Bill to all offences is explained in this Consultation Paper at paragraphs 2.4–2.5.

CLAUSE 23

1. This clause provides for the interpretation of Part II of the Bill. The definitions of “fault” and “at fault” in subsection (2) operate in clause 24 (supervening fault, discussed at paragraphs 15.1–15.4 of this Consultation Paper). The definition of “fault” also operates in clause 28(4)(b) so as to ensure the application of the defence in that clause to the use of force against acts done without the fault required for criminal liability. Similarly, the definition of “exempting circumstance” in subsection (5) also operates in clause 28(4)(b), to ensure the application of the defence in that clause where force is used against acts done under belief in such circumstances. Clause 28 is discussed at paragraphs 20.1–20.22 of this Consultation Paper, and clause 28(4) is explained at paragraph 20.15.

2. Subsection (3), which prevents the defendant relying on certain beliefs caused by voluntary intoxication, is one of a set of intoxication provisions including also clause 1(5), clause 29 and subsection (4) of this clause which are discussed at paragraphs 21.1–21.16 of this Consultation Paper. Following the CLRC (paragraphs 276–278 of the Fourteenth Report), clause 22 of the Draft Code provided for the continuation of such a rule, limited to offences of “basic intent”. Paragraphs 21.7–21.9 explain subsection (3) of the Bill and, in particular, why it does not adopt that limitation. Section 23(3) is one of a set of provisions in the Bill about intoxication, an account of which is to be found in the note on clause 29.

3. Subsection (4) attracts the definitions of “voluntarily intoxicated” and “intoxicated” in clause 29, into Part II.

CLAUSE 24

1. This clause imposes criminal liability according to the principle of supervening fault, which it restates and generalises, as explained in paragraphs 15.1–15.4 of this Consultation Paper. The clause is based on clause 23 of the Draft Code, which is explained in paragraphs 8.52–8.55 of the Code Report.

CLAUSE 25

1. This clause gives effect to the principle of transferred fault, as explained at paragraphs 16.2–16.5 of this Consultation Paper. It is based on clause 24 of the Draft Code, which is explained at paragraphs 8.56–8.60 of the Code Report. However, clause 25(1) adopts the formulation “awareness of a risk” instead of “recklessness” in Code clause 24(1), because of the specialised meaning given in this Bill to the latter term.

CLAUSE 26

1. This clause provides for a defence of duress by threats, which broadly reflects that defence as it has developed at common law. It is discussed at paragraphs 18.1–18.27 of this Consultation Paper. Paragraph 18.1 sets out the law reform background to what now

appears in the clause, and paragraph 18.2 identifies for discussion in succeeding paragraphs, several matters in respect of which the clause departs from the common law. Paragraphs 18.14–18.21 contain our reasons for departing from Code clause 42 (paragraphs 12.11–12.19 of the Code Report) in extending the defence to murder and attempted murder.

CLAUSE 27

1. Following Draft Code clause 43 (paragraphs 12.20–12.23 of the Code Report) this clause provides for a defence of duress of circumstances. The discussion of the clause at paragraphs 19.1–19.10 of this Consultation Paper deals with the existence of the defence at common law, and the relationship between this defence and those of duress by threats and necessity. Paragraph 19.1 explains our view that the defence in this clause should apply to murder and attempted murder, and that the case for this proposal appears to stand or fall with the corresponding proposal in respect of duress by threats.

CLAUSE 28

1. This clause provides in some detail for a defence of the use of force for certain stated purposes of “public or private defence”. In its ambit, and also its detail, the clause goes considerably beyond the corresponding recommendation of the CLRC (paragraph 284 of its Fourteenth Report). It is based on clause 44 of the Draft Code, which is discussed at paragraphs 12.24–12.37 of the Code Report. Paragraphs 20.1–20.21 of this Consultation Paper contain an extensive discussion of the clause.

2. Paragraphs 20.1–20.6 describe the ambit and purpose of the clause. The latter includes replacement by consistent principles of several undesirable illogicalities in the present law, especially with regard to the use of force against property in defence of a person, and conversely, use of force against a person in defence of property. Paragraphs 20.4–20.6 explain the decision to limit the defence to the use of force, and the intended relationship between this defence and others.

3. Subsection (1) gives effect to the principle that a person may, without committing an offence, use force such as is reasonable in the circumstances as he believes them to be, for any of a number of purposes, which are then set out in subsection (2). Paragraphs 20.7–20.12 of this Consultation Paper explain various aspects of the general principle, including the principle of judging the actor according to the circumstances as he believes them to be (paragraph 20.8), and the decision not to follow the CLRC’s recommendation (at paragraph 286 of its Fourteenth Report) that the use of force must be “immediately necessary” (paragraphs 20.10–20.12). The purposes for which subsection (2) permits force to be used are discussed in paragraph 20.13.

4. Subsection (3) provides for an enlarged meaning of “uses force”, the reasons for which are given in paragraph 14. The extension of the defence by subsection (4) to the use of force against acts which are not criminal because defences are available to the person who carries them out, is explained in paragraph 20.15.

5. Paragraphs 20.16–20.17 discuss the provision in subsection (5), which disapplies the defence where a person uses force against someone whom he knows or believes to be a constable except where the person using force believes it to be immediately necessary to prevent injury to himself or another. Paragraphs 20.18–20.22 deal with the remaining provisions of the clause as to acts “preparatory to the use of force” (subsection (6)); “self-induced” occasions for the use of force (subsection (7)); opportunity to retreat (subsection (8)); the reasonableness of a threat of force (subsection (9)); and the relationship of the clause to the corresponding defence in section 5(2)(b) of the Criminal Damage Act 1971 (subsection (10)).

CLAUSE 29

1. Together with clause 1(5) and clause 23(3) and (4), this clause seeks to reproduce the common law on the effect of intoxication on criminal liability insofar as it affects matters dealt with in the Bill. For convenience we deal in this note with the effect of all these provisions together.

2. Paragraphs 2.15–2.19 of this Consultation Paper contain our reasons for adopting that course, pending the outcome of a full review by the Commission of the law on this topic. In particular, these paragraphs explain first, why, although the Bill clauses draw heavily on clause 22 of the Draft Code (which is discussed at paragraphs 8.33–8.51 of the Code Report), they do not necessarily represent the Commission’s view of what the criminal law should ideally say in respect of intoxication. Secondly, however, these paragraphs go on to explain why these provisions are needed to exclude the risk that would otherwise arise, that the Bill might be thought to disapply the existing law of intoxication from the matters with which the Bill deals.

3. As explained at paragraphs 21.4–21.6 of this Consultation Paper, clause 1(5)(a) ensures the continuation for the purposes of the offences in Part I of the Bill involving recklessness (as defined in clause 2(b)), of the common law rule that where that type of fault, or “basic intent” is in issue, the defendant is to be judged as if he had not been intoxicated.

4. Clauses 1(5)(b) and 23(3) provide that a person who is voluntarily intoxicated “shall be treated as not having believed in any circumstance which he would not have believed in had he not been intoxicated”. Paragraph 21.7 explains how this avoids the risk of abrogating without replacement the existing corresponding rule qualifying common law defences based on mistaken belief. Paragraph 21.8 gives the reasons why pending our law reform consideration of the topic, clause 23(3) follows a recent opinion of the Court of Appeal in making no exception to this rule for offences of “specific intent” including murder and the offence in clause 4 of the Bill. Paragraph 21.10 explains why, in order to achieve consistency with the general defence of use of force in clause 28, a provision in schedule 3 to the Bill amends the defence of protection of property in section 5(2) of the Criminal Damage Act 1971 so as to prevent reliance on belief caused by voluntary intoxication.

Clause 29 (foreshadowed by clause 23(4)) provides in some detail for the determination of the question whether a person is or is not “voluntarily intoxicated”. Paragraphs 21.11–21.16 explain its provisions.

CLAUSE 30

1. 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 10.1–10.8 of Appendix C.

CLAUSE 31

1. Paragraph 3.3 of this Consultation Paper explains the part played by this clause in achieving the purposes of the Bill in repealing or amending those statutory provisions inconsistent with it, and abrogating the common law rules governing the matters dealt with in Part II, while retaining, at least for the present, other valuable parts of the common law.

2. Subsections (1) and (2) abolish the offences and other statutory provisions inconsistent with the Bill. Subsection (1)(a) directly abolishes the relevant common law offences, and subsection (1)(b), with subsection (2), abolishes the relevant statutory offences and makes other consequential repeals (most but not all of which are in the Offences Against the Person Act 1861) by introduction of schedule 4. As explained in the opening notes to Appendix C to this Consultation Paper, 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 this clause 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.

3. Subsection (3) abrogates:

(a) the common law rules relating to supervening fault (clause 24) and transferred fault and defences (clause 25); and

(b) the common law defences of duress by threats, duress of circumstances, use of force in public or private defence and marital coercion. An explanation as to why the common law defence of marital coercion is abrogated appears at paragraph 18.26 of this Consultation Paper.

Subsection (3)(b)(i) expressly saves the common law defence of necessity, as explained in this Consultation Paper at paragraph 3.11. A further explanation as to why necessity remains a separate issue from duress of circumstances is to be found in paragraphs 19.3–19.5 of this Consultation Paper.

CLAUSE 32

1. This clause provides for the short title of the Bill, and for its commencement.

SCHEDULE 1

This schedule sets out the modification of section 17 (abduction of a child by a parent) for children in certain cases.

SCHEDULE 2

This schedule, introduced by clause 20, 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 30, 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 provisions.

SCHEDULE 4

This schedule sets out the repeals provided for by clause 31(1)(b) and (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 Paper), certain offences in other Acts transferred to the Bill and other provisions related to the foregoing.

APPENDIX C

RECOMMENDATIONS IN RESPECT OF CERTAIN SPECIFIC SECTIONS OF THE OFFENCES AGAINST THE PERSON ACT 1861

NOTE:

As indicated in paragraphs 2.1–2.19 of the Consultation Paper, 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 the Paper. 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 D to this Paper.

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.¹ 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.² 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 4–7 of the new 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 4–7 of the Bill, and so provide for its repeal in Schedule 4.

¹ Fourteenth Report, paras. 205–206.

² Fourteenth Report, paras. 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 21,³ 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 12.5 of the Consultation Paper and we, therefore, provide for its repeal in Schedule 4. The present Bill makes general provision for alternative verdicts in clause 21.

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 6.⁴ 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 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 1933,⁵ and considered that it could therefore be repealed.

³ Fourteenth Report, paras. 207–208.

⁴ Fourteenth Report, paras. 209–210.

⁵ Fourteenth Report, para. 200.

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*,⁶ 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 alongside many other offences in the 1933 Act, some of which were not offences against the person.

6.4 The Children and Young Persons Act 1933, Pt I 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),

exposing children under the age of twelve to the risk of burning (s. 11),

punishment of vagrants who prevent children from receiving an education (s. 10),

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(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 misdemeanour,

1(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.

⁶ Code Report, paragraph 14.60

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 a 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.⁷ They did not, therefore, deal with those sections in their report. No such review has yet taken place.⁸

7.3 We have reconsidered this section in the light of the general offences now proposed in clauses 4–6 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 4 of the Bill. The 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.⁹ 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 7 of the Consultation

⁷ Fourteenth Report, n. 1 on p. 91.

⁸ Code Report, paragraph 14.59.

⁹ Fourteenth Report, n. 1 on p. 91.

Paper. 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, etc., 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 misdemeanor. . .”

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:

“3. 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.¹⁰ 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.¹¹

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 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.”

¹⁰ Professor Glanville Williams “Wrong Turnings on the Law of Attempt” [1991] Crim LR 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 7.5 of the Consultation Paper, the Consolidating Statutes 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.

¹¹ Fourteenth Report, n. 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.

9.2 The CLRC thought that the language and substance of this section needed to be reconsidered.¹² 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”.¹³ 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 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. . .”

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.¹⁴ 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.

¹² Fourteenth Report, paras. 211–213.

¹³ See paragraph 3 of Schedule 3 to the Bill.

¹⁴ Fourteenth Report, paras. 192–198.

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 sections 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.¹⁵ 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 defence of deliberate endangerment.¹⁶

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 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 This offence in practice overlaps with the offence of dangerous driving in section 1 of the Road Traffic Act 1990. We therefore propose that it should be repealed. Although there is no specific provision elsewhere in the law for causing injury as opposed to death by dangerous driving, we consider that 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 4–6 of this Bill are available.

¹⁵ Draft Code, clause 86.

¹⁶ Code Report, paragraph 14.58.

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 289 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* (44th edition, 1992), 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.

APPENDIX D

OFFENCES AGAINST THE PERSON ACT 1861: CURRENT STATUS

Section 1, Murder

Repealed by the Murder (Abolition of Death Penalty) Act 1965, s2.

Section 2, Sentence for Murder

Repealed by the Homicide Act 1957, s17(2), Sch 2.

Section 3, Body to be buried in Prison

Repealed by the Homicide Act 1957, s17(2), Sch 2.

Section 4, Conspiring or soliciting to commit Murder

Still in force, although repealed in part by the SLR Act 1892, slightly modified by the Criminal Law Act 1977, ss5(10)(a), 65(5), Sch 13, and amended by the Criminal Law Act 1977 s5(10)(b). Beyond the terms of the present project.

Section 5, Manslaughter

Still in force, although slightly modified by the Criminal Justice Act 1948, s83(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, s9, Sch 2.

Section 7, Excusable homicide

Repealed by the Criminal Law Act 1967, s10(2), Sch 3, Pt I.

Section 8, Petit Treason

Repealed by the Criminal Law Act 1967, s10(2), Sch 3, Pt I.

Section 9, Murder or Manslaughter abroad

Still in force, although certain words were omitted by the Criminal Law Act 1967, s10(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 modified by the Criminal Law Act 1967, s10(1), Sch 2, para 6, and s10(2). 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, etc, 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, s10(2), Sch 3, Pt III.

Section 16, Sending letters threatening to murder

Substituted by the Criminal Law Act 1977, s65(4), Sch 12, amended by the Magistrates' Courts Act 1980, s17, Sch 1, para 5.

To be repealed by Schedule 4 of the Criminal Law Bill and replaced by clause 11: see paragraph 11.1 of the Consultation Paper.

Section 17, Impeding a person endeavouring to save himself or another from shipwreck

Still in force, although repealed in part by the SLR Acts 1892 and 1893.

To be repealed by Schedule 4 of the Criminal Law Bill: see paragraphs 1.1–1.3 of Appendix C.

Section 18, Shooting or attempting to shoot, or wounding with intent to do grievous bodily harm

Still in force, although modified by the SLR Act 1892, the SLR (No.2) Act 1893, and the Criminal Law Act 1967, s10(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 4: see paragraphs 7 and 8 of the Consultation Paper.

Section 19, What shall constitute loaded arms

Repealed by the Criminal Law Act 1967, s10(2), Sch 3, Pt III.

Section 20, Inflicting bodily injury with or without Weapon

Still in force, repealed in part by the SLR Act 1892, amended by the Magistrates' Courts Act 1980, s17, Sch 1, para 5.

To be repealed by Schedule 4 of the Criminal Law Bill and replaced by clauses 5–6: see paragraphs 7 and 8 of the Consultation Paper.

Section 21, Attempting to choke, etc, in order to commit any indictable Offence

Still in force, repealed in part by the SLR Act 1892.

To be repealed by Schedule 4 of the Criminal Law Bill: see paragraphs 2.1–2.3 of Appendix C.

Section 22, Using chloroform, etc, to commit any indictable offence

Still in force, repealed in part by the SLR Act 1892.

To be repealed by Schedule 4 of the Criminal Law Bill: see paragraphs 3.1–3.2 of Appendix C.

Section 23, Maliciously administering Poison, etc, so as to endanger life or inflict grievous bodily harm

Still in force, repealed in part by the SLR Act 1892.

To be repealed by Schedule 4 of the Criminal Law Bill: see paragraphs 12.4–12.5 of the Consultation Paper.

Section 24, Maliciously administering poison, etc, with intent to injure, aggrieve, or annoy any other Person

Still in force, repealed in part by the SLR Acts 1892 and 1893. To be repealed by Schedule 4 of the Criminal Law Bill and replaced by clause 7: see paragraphs 12.6–12.7 of the Consultation Paper.

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 21: see paragraphs 4.1–4.2 of Appendix C.

Section 26, Not providing Apprentices or Servants with food, etc, whereby Life endangered

Still in force, although repealed in part by the SLR Act 1892, amended by the Magistrates' Courts Act 1980, s17, Sch 1, para 5.

To be repealed by Schedule 4 of the Criminal Law Bill: see paragraphs 5.1–5.2 of Appendix C.

Section 27, Exposing child, whereby life is endangered, or health permanently injured

Still in force, although repealed in part by the SLR Acts 1892 and 1893. This section is in effect superseded by the provisions of the Children and Young Persons Act 1933, s1, as amended by the Magistrates' Courts Act 1980, s17, Sch 1, para 5.

To be repealed by Schedule 4 of the Criminal Law Bill: see paragraphs 6.1–6.6 of Appendix C.

Section 28, Causing bodily Injury by Gunpowder

Still in force, repealed in part by the SLR Acts 1892 and 1893, and by the Criminal Justice Act 1948, s83, Sch 10, Pt I.

To be repealed by Schedule 4 of the Criminal Law Bill: see paragraphs 7.1–7.4 of Appendix C.

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 SLR Act 1892, the SLR Act 1893, the SLR (No. 2) Act 1893, the Criminal Justice Act 1948 s83, 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 C.

Section 30, Placing gunpowder near a building, etc, with intent to do bodily injury to any person

Still in force, repealed in part by the SLR Act 1892, the SLR Act 1893, the SLR (No. 2) Act 1893, the Criminal Justice Act 1948 s83, 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 C.

Section 31, Setting Spring Guns, etc, with intent to inflict grievous bodily harm

Still in force, repealed in part by the SLR Act 1892.

To remain in force: see paragraphs 9.1–9.3 of Appendix C.

Section 32, Placing wood, etc, on railway, taking up rails, turning points, showing or hiding signals, etc, with intent to endanger passengers

Still in force, repealed in part by the SLR Act 1892, the Criminal Justice Act 1948, s83, Sch 10, Pt 1.

Section 33, Casting stone, etc, 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 SLR 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 s17, 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 C.

Section 35, Drivers of carriages injuring persons by furious driving

Still in force.

This section is effectively replaced by the Road Traffic Act 1988 s2, and is, therefore, repealed by Schedule 4 of the Bill: see paragraphs 11.1–11.2 of Appendix C.

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 s17, Sch 1, para 5.

Section 37, Assaulting a magistrate, etc, on account of his preserving wreck

Repealed in part by the SLR Act 1892.

Section 38, Assault with intent to commit felony, or on peace officers

Repealed in part by the Police Act 1964 s64, Sch 10, Pt I, and the Criminal Law act 1967 s10, Sch 3, Pt III, as amended by the Magistrates' Courts Act 1980 s17, 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 9.23 of the Consultation Paper: see Schedule 4 of the Bill. The offences that, partly, replace them are set out in clauses 9–10 of the Bill.

Section 39, Assaults with intent to obstruct the sale of grain, or its free passage

Section 40, Assaults on seamen

Sections 39 and 40 were repealed by Statute Law (Repeals) Act 1989, Sch 1.

Section 41, Assaults arising from combination

Repealed by the Criminal Law Amendment Act 1871, s7.

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, s170(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, s170(2), Sch 16.

Section 44, If the magistrates dismiss the complaint they shall make out a certificate to that effect

Still in force, as amended by 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 C.

Section 45, Certificate or conviction shall be a bar to any other proceedings

Still in force, amended by the Criminal Justice Act 1988, s170, Sch 15, para 3, and Sch 16.

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, s170(2), Sch 16.

Section 47, Assault occasioning bodily harm

Still in force, amended by the Criminal Justice Act 1988, Sch 16. To be repealed by Schedule 4 of the Criminal Law Bill and replaced by clause 8 thereof.

Section 48, Rape

Repealed by the Sexual Offences Act 1956, s51, Sch 4.

Section 49, Procuring the defilement of girl under age

Repealed by the Criminal Law Amendment Act 1885, s19.

Section 50, Carnally knowing a girl under the age of ten years of age

Repealed by the Offences Against the Person Act 1875, s2.

Section 51, Carnally knowing a girl between the ages of ten and twelve

Repealed by the Offences Against the Person Act 1875, s2.

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, s51, Sch 4.

Section 56, Child-stealing

Repealed by the Child Abduction Act 1984, ss11(5)(a), 13(3).

Section 57, Bigamy

Still in force, repealed in part by the SLR Act 1892, the Criminal Justice Act 1925 s49(4)(5), Sch 3, the Criminal Law Act 1967 s10, Sch 3, Pt III, amended by the Magistrates' Courts Act 1980 s17, Sch 1, para 5.

Section 58, Administering drugs or using instruments to procure abortion

Still in force, repealed in part by the SLR Act 1892, the SLR (No. 2) Act 1893.

Section 59, Procuring drugs, etc, to cause abortion

Still in force, repealed in part by the SLR Act 1892.

Section 60, Concealing the birth of a child

Still in force, repealed in part by the Criminal Law Act 1967 s10, Sch 2, para 13(1)(a), Sch 3, Pt III, amended by the Magistrates' Courts Act 1980 s17, 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, etc, with intent to commit any felony against this Act

Still in force, repealed in part by the Criminal Justice Act 1948 s83, Sch 10, Pt I, the Sexual Offences Act 1956 s51, Sch 4, amended by the Criminal Law Act 1967 s10, Sch 2, para 8.

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

Still in force, repealed in part by the Sexual Offences Act 1956 s51, Sch 4, the Police and Criminal Evidence Act 1984 s119, Sch 7, Pt I, amended by the Criminal Law Act 1967 s10, Sch 2, para 8.

Sections 64 and 65 are not addressed in this project: see paragraphs 8.5–8.12 of Appendix C.

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, s10(2), Sch 3, Pt III.

Section 68, Offences committed within the jurisdiction of the Admiralty

Still in force, amended by the Sexual Offences Act 1956 s51, Sch 4, repealed in part by the Criminal Law Act 1967 s10, Sch 3, Pt III.

Not to be repealed.

Section 69, Hard labour in gaol or House of Correction

Repealed by the SLR Act 1892.

Section 70, Solitary Confinement and Whipping

Repealed by the Criminal Justice Act 1948, s83(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, s8(2), Sch 5, Pt II.

Section 72, No certiorari, etc

Repealed by the SL(R) Act 1976.

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, s62(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, s10(1).

Section 76, Summary proceedings

Repealed by the Statute Law (Repeals) Act 1989, Sch 1.

Section 77, Except in London and the Metropolitan Police District

Repealed by the Costs in Criminal Cases Act 1908, s10(1).

Section 78, Act not to extend to Scotland

Still in force.

Not to be repealed.

Section 79, Commencement of Act

Repealed by the SLR Act 1892.

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