The Law Commission – How We Consult

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

The Law Commissioners are: The Rt Hon Lord Justice Lloyd Jones, Chairman, Professor Elizabeth Cooke, David Hertzell, Professor David Ormerod QC and Nicholas Paines QC. The Chief Executive is Elaine Lorimer.

Topic of this consultation: Offences against the person. This scoping consultation paper addresses:

- Whether the Offences Against the Person Act 1861 is in need of updating or replacement
- Whether other offences against the person, such as assault and battery, should be included in the scope of any reform
- How any reform might affect liability for the transmission of disease

Geographical scope: This scoping consultation paper applies to the law of England and Wales.

Availability of materials: The scoping consultation paper and a summary are available on our website at http://lawcommission.justice.gov.uk/consultations/offences_against_the_person.htm

Duration of the consultation: We invite responses from 12 November 2014 to 11 February 2015.

Comments may be sent:

By email to oapa@lawcommission.gsi.gov.uk

OR

By post to Criminal Law Team, Law Commission, 1st Floor, Tower, 52 Queen Anne’s Gate, London SW1H 9AG
Tel: 020 3334 3840 / Fax: 020 3334 0201

If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically (for example, on CD or by email to the above address, in any commonly used format).

After the consultation: In the light of the responses we receive, we will decide on our recommendations for the scope of reform in this area and present them to Government in the form of a scoping report.
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THE LAW COMMISSION

REFORM OF OFFENCES AGAINST
THE PERSON
A SCOPING CONSULTATION PAPER

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CHAPTER 1
INTRODUCTION

THE PROJECT
1.1 In this scoping paper we discuss and invite views on whether the law governing offences against the person should be considered for reform.

1.2 The offences that we are considering are principally set out in the Offences Against the Person Act 1861 (“the 1861 Act”). In addition we consider the offences of assault and battery, which are common law offences,1 and the offence of assaulting a constable in execution of his duty, which is contained in section 89(1) of the Police Act 1996.

BACKGROUND
1.3 The 1861 Act has been in operation for over 150 years.

(1) The main three offences, namely assault occasioning actual bodily harm, malicious wounding/inflicting grievous bodily harm and wounding/causing grievous bodily harm with intent, between them generate at least 26,000 prosecutions a year.2 In addition, the offences of assault and battery generate over 100,000 prosecutions a year.3

(2) There are numerous other offences, for example those connected with poisons and explosives, which generate a few prosecutions a year, as well as some which are seldom or never encountered in practice such as impeding escape from a shipwreck.

1.4 The 1861 Act has attracted a great deal of criticism,4 in particular because:

(1) the offences are not clearly classified in order of seriousness;

(2) some offences relate to narrowly specialised situations, or include complex lists of situations, rather than setting out a clear principle;

(3) the mental element of some offences is not clearly expressed, and does not reflect the external elements of those offences;5

(4) the language is often archaic and obscure;

---

1 Probably: see para 2.7 below.

2 The figure is that for the number of offences charged that reach a first hearing at a magistrates’ court. For figures on individual offences see paras 2.72 (actual bodily harm), 2.111 (grievous bodily harm) and 2.133 (grievous bodily harm with intent); they are also set out in the table at the end of Chapter 2. The figures were supplied by the Crown Prosecution Service.

3 Para 2.41 below.

4 See Chapter 3 below.

5 For the meaning of “external elements” and “mental element”, see para 2.4 below.
(5) there are redundancies in the drafting, such as the use of “maliciously” together with a more clearly defined requirement of intent;

(6) there are references to obsolete legal concepts and procedures, which are only resolved by interpretation provisions in other statutes.

1.5 The offences are heavily used and the range and strength of these criticisms has, unsurprisingly, led to various reform proposals advanced by the Law Commission and the Home Office. These include:  

(1) Codification of the Criminal Law (report with draft code submitted to the Law Commission by a group of academics chaired by Professor Sir John Smith QC);  

(2) Draft Criminal Code with commentary;  

(3) Legislating the Criminal Code: Offences against the Person and General Principles (consultation paper).  

(4) Legislating the Criminal Code: Offences against the Person and General Principles (report).

1.6 In 1998 the Home Office published a Consultation Paper with draft Bill, entitled Violence: Reforming the Offences against the Person Act 1861 (“the 1998 Consultation Paper”) together with a draft Bill (“the draft Bill”). The draft Bill is based on the draft Bill attached to the Law Commission report on Legislating the Criminal Code: Offences against the Person and General Principles.

1.7 Despite the fact that the draft Bill was a government publication, no Bill based on it was introduced into Parliament. The criticisms of the 1861 Act persist. As part of our 11th Programme of Law Reform the Commission was asked by the Ministry of Justice to carry out a scoping exercise as a first step towards a project to reform the law on offences against the person.

THE PURPOSE OF THIS PAPER

1.8 As our present remit, as set by the Ministry of Justice, is limited to a scoping exercise as opposed to a law reform project, this paper could not, and does not, present a single detailed scheme of law reform. It is aimed partly at inviting views on whether reform of the law of offences against the person is worth pursuing in principle and partly at exploring and comparing the options for reform.

6 In Chapter 4 we give the history of these drafts in more detail.

7 (1985) Law Com No 143.


13 Eleventh Programme of Law Reform (2011) Law Com No 330 paras 2.61 to 2.64.
In this paper we examine the criticisms of the existing law and the extent to which they are reflected in problems in practice. Our provisional view is that the problems produce a compelling case for reform, and that the economical as well as the most sensible practical course is to base this reform on the work already done, in particular the 1998 draft Bill.

We go on to describe the proposals in the 1998 Consultation Paper and draft Bill, which was the most recent Government scheme for such reform, and explain how they might need to be updated in light of events since 1998.

We then examine possible options for reform, using the draft Bill as a framework so as to consider the topics in order. In each case we consider whether the Bill, with necessary updates and refinements, could serve as an appropriate model for any detailed law reform agenda. In some cases we express a provisional view on the form that reform might take while in others we list several possible options.

When we have studied and analysed the responses to this paper, we intend to publish a scoping report setting out a more definite scheme of reform. This could form the basis for any Bill that might be drafted in the future.

THE SCHEME OF THIS PAPER

The structure of this scoping paper is as follows.

1. In Chapter 2 we describe the existing law. We also refer to the charging standards and sentencing guidelines for different offences, and summarise statistics about prosecutions.

2. In Chapter 3 we describe the general problems with the existing law and provisionally conclude that the law of offences against the person is in need of reform.

3. In Chapter 4 we give a brief history of previous attempts at reform, culminating in the 1998 draft Bill. We present arguments for using the draft Bill as a basis for considering future reform.

4. In Chapter 5 we consider how far the problems with different groups of offences are resolved by the draft Bill, and what changes to the scheme of that Bill might be desirable.

5. In Chapter 6 we consider the issues raised by the transmission of disease, in particular the transmission of HIV and sexually transmitted infections through consensual intercourse.

6. In Chapter 7 we list our Consultation Questions and invite views.

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CHAPTER 2
EXISTING LAW

2.1 In this chapter we describe the present law of offences against the person, so far as our review extends. We propose to consider the offences under the 1861 Act, the offences of assault and battery and the offence of assaulting a constable in the execution of his duty. We do not propose to consider homicide offences, sexual offences, false imprisonment, kidnapping or offences of harassment, all of which might be seen as "offences against the person".

2.2 In addition to the law concerning the offences under consideration, this chapter describes the CPS charging standards and Sentencing Council guidelines for the different offences. We also summarise the statistics about prosecutions, trial allocation, convictions and sentences.

2.3 We divide the offences into the following groups:

1. assault and battery;
2. assault occasioning actual bodily harm;
3. wounding and infliction of grievous bodily harm;
4. wounding and causing grievous bodily harm with intent;
5. particular assaults;
6. threats to kill;
7. solicitation to murder;
8. poisoning offences;
9. explosives and dangerous substances;
10. other offences.

1 Except for bigamy, attempted abortion and concealing a birth.
2 Problems in and criticisms of the present law, and the case for reform, are considered in Chapter 3 and Chapter 5.
3 Para 2.5 and following, below.
4 Para 2.47 and following, below.
5 Para 2.77 and following, below.
6 Para 2.116 and following, below.
7 Para 2.139 and following, below.
8 Para 2.159 and following, below.
9 Para 2.171 and following, below.
10 Para 2.189 and following, below.
11 Para 2.211 and following, below.
12 Para 2.231 and following, below.
2.4 In analysing offences, we use the following terminology, which is commonly used in legal textbooks and academic literature.

(1) The “external elements” of an offence are the elements of the offence other than those relating to the defendant’s mental fault. They divide into:

   (a) conduct elements: what the defendant (“D”) must do or fail to do;

   (b) consequence elements: the result of D’s conduct (e.g. in murder, that the victim (“V”) dies);

   (c) the circumstance elements: other facts affecting whether D is guilty or not (e.g. in rape, that V does not consent).

(2) The “mental element” (or “fault element”) is the state of mind which must be established to show that D is culpable, e.g. intention, recklessness, knowledge or belief or the lack of it.

ASSAULT AND BATTERY
2.5 Assault in its strict sense means any (intentional or reckless) conduct which causes a person to apprehend immediate unlawful violence. Battery means the (intentional or reckless) infliction of such violence, including any unlawful touching however slight. In practice, the word “assault” is often used to include both forms of behaviour.

Common law or statute?
2.6 Assault and battery have both been common law offences since ancient times. They are also forms of the tort of trespass against the person.

2.7 Section 39 of the Criminal Justice Act 1988 provides that both offences are summary only (triable only in a magistrates’ court), and that they are punishable with a fine not exceeding level 5 on the standard scale, six months’ imprisonment or both. The offences are therefore sometimes regarded as statutory offences, to be charged as “contrary to section 39 of the Criminal Justice Act 1988”. However, the better view appears to be that they remain common law offences, and that

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15 Para 2.8 below.

section 39 does no more than provide for their mode of trial and punishment. 17

The authorities on this conflict. 18

**One offence or two?**

2.8 The terminology in this area is confused, as the word “assault” is used in a narrower and a broader sense.

(1) Technically, the term “assault” should be reserved for conduct which causes a person to apprehend immediate unlawful violence. Actual physical violence should properly be described as battery and not assault. Assaults where no physical contact takes place, and the effect is limited to the causing of apprehension, are sometimes called “psychic assault”, and we shall use this term in our discussion.

(2) However, “assault” is often used in statute as a generic term for both offences. For example, statutory references to assault occasioning actual bodily harm 19 and assault on police constables 20 clearly include battery, and in practice most instances of those offences will involve battery.

2.9 A further complication is the statutory term “common assault”.

(1) In section 47 of the Offences Against the Person Act 1861, as originally enacted, “common assault” was used to mean any assault other than one occasioning actual bodily harm, but in that context it clearly included battery. 21 “Common assault” is also used to cover both offences in section 40 of the Criminal Justice Act 1988.

(2) By contrast, section 39 of the Criminal Justice Act 1988 distinguishes offences of “common assault” and “battery”. 22

2.10 This might suggest that battery is one form of assault (or at least that every battery must involve an assault 23) and that “psychic assault” is simply the lowest level of assault rather than a necessary ingredient of all assaults. However, the

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17 For example, in the lists of offences in Criminal Justice Act 1988, s 40(3), and Crime and Disorder Act 1998, s 29(1), “common assault” is the only offence listed without a statutory reference.


19 In *Little* [1992] QB 645, 652 Lord Justice Mann explains that the phrase “common assault” exists to distinguish the basic offence from specific offences in which assault is an element, such as assaulting a clergyman or police officer or assault occasioning actual bodily harm.

20 Police Act 1996, s 89(1); para 2.139 and following, below.

21 This was the traditional view: W Russell, *A Treatise on Crimes and Indictable Misdemeanours* (2nd ed 1826) p 605.
current view is that assault and battery are distinct offences, which can occur either separately or together. If D swings a fist at V and misses, there may be an assault but there is no battery. If D hits V from behind, or while V is asleep, there is a battery without assault.\(^{24}\)

2.11 For this reason it has been held\(^ {25}\) that a charge containing the wording “did assault and batter”\(^ {26}\) is defective, as it alleges two offences in one charge. A charge of “common assault” must specify whether the assault was committed by beating or by putting a person in fear of violence, and if the charge alleges beating it is not open to the court to convict on the basis of psychic assault.\(^ {27}\)

External elements

Battery

2.12 The external elements of battery consist of the infliction of unlawful violence. “Violence” here can include any unwanted touching.\(^ {28}\) “Unlawful” means that it is not consented to,\(^ {29}\) that there is no lawful excuse and that it is not one of the contacts inevitably experienced in normal life, such as jostling in queues and crowds.

2.13 Battery need not involve direct physical contact between D and V. For example D might batter V by spitting or throwing a stone at him or her. It is also clear that battery can be committed by setting a trap or by use of other instruments that act at a distance.\(^ {30}\)

2.14 Usually the offence is committed by an act of the accused. In Fagan v Metropolitan Police Commissioner\(^ {31}\) a driver accidentally drove onto a policeman’s foot, and was held to have committed battery when he refused to drive off it. However, the reasoning of the court was not that the simple omission

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\(^ {24}\) Smith and Hogan, 17.1.5; Nelson [2013] EWCA Crim 30, [2013] 1 WLR 2861. In para 5.202 below, we criticise this case as inconsistent with House of Lords authority, but on a different point.


\(^ {26}\) Early editions of the major practitioner works, e.g. Archbold’s Pleading and Evidence in Criminal Cases (16th ed 1867) p 611 and Chitty, A Practical Treatise on the Criminal Law (2nd ed 1826) p 821 (and many subsequent editions of both works) give the standard wording for a count of battery as “assault and beat”. The court in Little expressed the view that “now may be too late to regard the formulation as objectionable” but that “assault by beating” was preferable. Practitioner works published since Little generally use the wording “assault by beating” in specimen charges.

\(^ {27}\) R (Kracher) v Leicester Magistrates’ Court [2013] EWHC 4627 (Admin).

\(^ {28}\) Traditional formulations make it clear that this includes any touching however slight. However, OAPA 1861, ss 44 and 45 provide that the magistrates can dismiss a private prosecution brought by the victim if the assault or battery was “so trifling as not to merit any punishment”, and that this has the same effect as an acquittal (as well as barring future civil proceedings).

\(^ {29}\) Or that the consent is not regarded as legally valid: para 2.20 and following, below.

\(^ {30}\) See DPP v K [1990] 1 WLR 1067, [1990] 1 All ER 331.

to move amounts to a battery, but that the whole process of driving onto V’s foot and remaining there constitutes a single continuing act, during some of which D had the required intention. The court stated:

To constitute the offence of assault some intentional act must have been performed: a mere omission to act cannot amount to an assault.

According to Fagan, then, battery cannot be committed by omission alone. But it can be committed by a longer course of conduct including an omission, even though the omission was the immediate cause of the injury or impact and it was only at the time of the omission that D had the required state of mind.

2.15 In Miller, a homeless person was charged with arson after he accidentally set fire to a mattress by going to sleep while smoking and made no attempt to extinguish the fire when he woke up. The House of Lords held that failure to take measures to counteract a danger which one has created can amount to an offence, if D has the necessary state of mind (for battery, as for arson, that is intention or recklessness) at the time of the omission. Lord Diplock said that, in academic terms, there were two equally valid explanations for this result, namely:

(1) that creating the danger and failing to counteract it were part of one continuing course of conduct, during part of which D had the necessary state of mind (the reasoning in Fagan);

(2) that D had a duty to counteract the danger D had created, and that the failure to fulfil that duty was itself the conduct constituting the offence;

but that the “duty” theory was easier to explain to a jury.

2.16 Michael Hirst argues that battery must always involve a direct forcible infliction of violence; neither an omission to act nor an act causing injury by indirect means can qualify. A series of cases, starting from Wilson, holds that the word “inflict”, in section 20 of the 1861 Act, can include an indirect means of causing injury and need not involve battery. Hirst deduces from this “that the indirect infliction of violence cannot involve assault or battery”. This is not logically conclusive. The cases hold that there are indirect injuries that do not constitute battery but nevertheless fall within section 20. It does not follow that no indirect injury can ever be a battery.

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32 In this context, “assault” is used in its broad sense including battery.
36 J C Smith [1982] Criminal Law Review 528 (case comment on Court of Appeal’s decision in Miller).
2.17 In *DPP v Santana-Bermudez* 40 a policeman was injured by putting his hand into a suspect’s pocket, which contained syringe needles, when the suspect had previously assured him that it did not. The Divisional Court held that there was no need to decide whether, in principle, a battery could be committed by omission, but that in general, where D creates a danger by act or word or a combination of the two and thereby exposes V to a foreseeable risk, this can amount to battery. Given this case, and *Fagan*, it would seem that Hirst’s view does not represent the current law and that indirectly bringing about a violent impact, through an omission forming part of a longer course of conduct, can amount to the offence.

**Assault**

2.18 To commit assault the defendant must cause the victim to apprehend immediate unlawful violence. 41 The following points may be made.

1. “Violence” and “unlawful” here have the same meaning as in battery.

2. “Apprehend” is wider than “fear”, in that V need not feel frightened. It is also wider than “believe”, as V need not regard the violence as certain to happen.

3. “Immediate” is generously interpreted, and goes beyond a physical approach making V believe that D is about to attack there and then. For example threats made by letter or telephone call can amount to an assault. 42

2.19 There is no authority on whether assault, as distinct from battery, can consist of an omission, though it would seem on the analogy of *Fagan* that it can do where the omission forms part of a longer course of conduct. 43 On Hirst’s view cited above, 44 the assault itself need not consist of a direct physical attack, but must have the effect of causing V to apprehend a direct physical attack.

**Consent**

2.20 There is no criminal liability for assault or battery if V consents to D’s conduct and no physical harm is caused or intended. 45

2.21 The position where physical harm is caused or intended is more complicated. It is discussed under the heading of the offence of assault occasioning actual bodily harm. 46 Briefly, V cannot validly consent to the intentional or reckless infliction of

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42 *Smith and Hogan* 17.1.4.1; *Ireland* [1998] AC 147, 161.

43 *Smith and Hogan* 17.1.4.2.

44 Para 2.16 above.

45 *Smith and Hogan* 17.2.1 p 626 and 17.2.1.3 p 637 sub-para (4); *Barnes* [2004] EWCA Crim 3246, [2005] 2 All ER 113.

46 Para 2.55 and following, below.
a physical harm that is more than transient and trifling, except in particular contexts such as surgery and sport.\textsuperscript{47}

\textbf{Mental element}

2.22 The fault element for both assault and battery is intention or recklessness.\textsuperscript{48} This raises three questions:

\begin{enumerate}
  \item the meaning of intention;
  \item the meaning of recklessness;
  \item what harm D must intend or be reckless about.
\end{enumerate}

The meanings of intention and recklessness, as discussed below, will be relevant not only to assault and battery, but also to many other offences against the person.

\textit{Intention}

2.23 Intention may be either direct or oblique. Direct intention means that D acted in order to bring about the harm in question. Oblique intention arises where D did not act in order to bring about that harm, but D was aware that it was a virtually certain consequence if D’s purpose is achieved.

2.24 Our report on Murder, Manslaughter and Infanticide\textsuperscript{49} states the current law as follows.

\begin{quote}
\ldots the jury should be directed that they may find that D intended [a forbidden result],\textsuperscript{50} if they are sure that D realised that [that result] was certain (barring an extraordinary intervention)\textsuperscript{51} if D did what he or she was set upon doing.\textsuperscript{52}
\end{quote}


\textsuperscript{48} Smith and Hogan, 17.1.6; Venna [1976] QB 421, [1975] 3 All ER 788.


\textsuperscript{50} In original, “to kill V or to cause V serious injury”. We have here adapted the extract so as to include offences other than murder.

\textsuperscript{51} In original, “that V was certain (barring an extraordinary intervention) to die or suffer serious injury”.

\textsuperscript{52} In our view, a person will think that a consequence is virtually certain to occur so long as he or she thinks that it will be virtually certain \textit{if they do as they mean to do}. Eg, if someone plants a home made bomb on a plane intending to detonate it when the plane is in mid-air, given that they mean to detonate it, they can be taken to foresee the deaths of the passengers as virtually certain to occur even if they realise that the home made bomb is unreliable and might fail to detonate as planned. (Footnote in original.)
Recklessness

2.25 In the context of offences against the person, recklessness has its “subjective” meaning, as given in Cunningham. That is, that D was aware of the risk of a particular result and nevertheless went on to take the risk. It is not sufficient that, in the circumstances, D ought to have been aware of it.

2.26 A further point was added to this definition by G, namely that the decision to take the risk was unjustified in the circumstances (meaning the circumstances as D believed them to be). This decision concerned criminal damage, where the statute expressly refers to “being reckless”: the point has not been specifically addressed in the context of assault or battery.

The harm intended or foreseen

2.27 The harm which must be intended, or the risk of which must be foreseen, depends on the offence charged.

(1) In assault, D must intend V to apprehend immediate unlawful violence, or be reckless as to whether V apprehends such violence or not.

(2) In battery, D must intend to inflict unlawful violence on V, or be reckless as to whether his or her conduct will have results amounting to such violence.

2.28 As discussed above, assault and battery are separate offences. They therefore have separate fault elements, which are not interchangeable. That is, the external elements of assault and the mental element of battery (or vice versa) do not add up to an offence.

Mode of trial

2.29 Assault and battery are both summary offences.

2.30 However, they can be tried in the Crown Court provided that the defendant also faces charges for an indictable offence based on the same facts or series of events. In such a case, the Crown Court can only pass the same sentence for the assault or battery as a magistrates’ court could have done.

2.31 There is one other case in which the Crown Court can convict a person of assault or battery. Under section 6 of the Criminal Law Act 1967, if D is charged on an indictment with one offence, it is open to the jury to acquit D of that offence but


54 [1957] 2 QB 396, [1957] 2 All ER 412. The case is described in para 2.198 below.


57 Smith and Hogan, 17.1.6.2.

58 Criminal Justice Act 1988, s 39.

59 That is, either an offence triable on indictment only or an offence triable either way.

60 Criminal Justice Act 1988, s 40(1).
convict him or her of another indictable offence included within it.61 This was amended in 2004 to allow the jury to convict of assault or battery 62 as the “included offence”, even though assault and battery are not indictable offences and were not charged in the particular indictment.63 In practice, therefore, a person charged with an offence of violence such as inflicting grievous bodily harm 64 can be convicted of assault or battery instead. This is allowed even though it is possible to commit the grievous bodily harm offence without an assault.65

**Charging standards**

2.32 The offences of assault and battery can be charged whether or not any injury to V resulted, though where injury is caused it is also possible to charge the offence of assault occasioning actual bodily harm under section 47 of the 1861 Act. There is thus a considerable overlap between the two offences. (Or rather, all examples of the section 47 offence also fall within assault or battery.66)

2.33 As we shall see, the offence under section 47 can be charged if there is any bodily injury at all, beyond the transient and trifling. However, in cases where the injury is minor and the prosecution believes that the likely sentence will be six months’ imprisonment or less, there is a settled practice of charging common assault or battery, rather than the section 47 offence.67

2.34 The charging standard incorporated in the legal guidance issued by the Crown Prosecution Service reads as follows:68

> Although any injury that is more than ‘transient or trifling’ can be classified as actual bodily harm, the appropriate charge will be one of common assault where no injury or injuries which are not serious occur. …

61 Explained in full below, para 5.199 and following.

62 Or any other summary offence specified in Criminal Justice Act 1988, s 40.

63 Criminal Law Act 1967, s 6(3A) and (3B), inserted by Domestic Violence, Crime and Victims Act 2004, s 11. With that exception, the system of “included offences” applies only to offences tried on indictment. We therefore discuss it at para 2.105 and following, below, under the heading of the infliction of grievous bodily harm.

64 OAPA 1861, s 20.


66 There is one possible exception. The Children Act 2004, s 58 provides that reasonable punishment is no longer a defence to any charge under OAPA 1861, s 47, but makes no provision for common assault, whether or not harm is in fact caused. There could therefore theoretically be a case where, on the same facts, a charge under s 47 would be available but a prosecution for common assault would fail because there is a defence of reasonable punishment.

67 This practice has become more prevalent over the years. Statistics for the period from 2003 to 2013 show a steady diminution in the number of prosecutions for assault occasioning actual bodily harm and a corresponding (if somewhat smaller) increase in prosecutions for common assault: para 2.72 below. See also the graphs at the end of this chapter.

The offence of common assault carries a maximum penalty of six months’ imprisonment. This will provide the court with adequate sentencing powers in most cases. **ABH should generally be charged where the injuries and overall circumstances indicate that the offence merits clearly more than six months’ imprisonment and where the prosecution intend to represent that the case is not suitable for summary trial.**

“Serious”, in this passage, appears to mean “significant”, and must be distinguished from the use of “serious” to mean “of exceptional gravity” in the context of offences of grievous bodily harm.

2.35 Charging standards such as these have no official legal standing and should not be taken into account by a court reviewing a decision to bring a charge.69

**Sentencing**

2.36 Section 39 of the Criminal Justice Act 1988 provides that both offences are punishable with a fine not exceeding level 5 on the standard scale, six months’ imprisonment or both.

2.37 The Sentencing Council has published guidelines covering the most important offences against the person. These describe a step by step approach to setting sentences, as follows.

(1) First, each guideline sets criteria for distinguishing greater from lesser harm, and higher from lower culpability.

(2) Then, for each level of harm and culpability, it fixes a starting point and a category range.

(3) There are then lists of aggravating and mitigating factors for each offence, to be applied in deciding where, within the category range, the sentence should fall.

(4) The sentence thus arrived at is then subject to further adjustments, to reflect factors such as early guilty pleas, assistance to the prosecution and how much time on electronically tagged bail should be counted towards a sentence (time spent on remand is counted towards a sentence automatically).

2.38 In the guideline governing assault (including battery):70

(1) “harm” refers both to the injury caused, if any, and to whether there was a sustained or repeated assault on the same victim;

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(2) “culpability” factors include the use of a weapon, causing more harm than required for the purpose of the assault and having a leading role in a collective attack.

2.39 Where there is both greater harm and higher culpability, the starting point for sentencing is a higher level community order, within a category range from a lower level community order to 26 weeks’ custody. Where there is lesser harm and/or lower culpability, the category ranges extend from a discharge up to a high level community order.

Statistics
2.40 In what follows, we summarise the numbers of cases of assault and battery over a period of 11 years. In each case we give the range from the lowest to the highest annual figure (“up to” means that the lowest figure is close to zero). The same approach is followed in the statistics given for other offences. For ease of comparison, the statistics for all the offences are brought together in a table at the end of this chapter.

Total number of cases
2.41 The total number of prosecutions is variously stated.

(1) According to the Crown Prosecution Service, in the period from 2005 to 2013, between 111,000 and 122,000 charges of common assault reached a first hearing in a magistrates’ court in each year. These figures represent the number of charges rather than the number of defendants.

(2) According to the Ministry of Justice, in the period from 2003 to 2013, between 55,000 and 80,000 defendants were prosecuted for common assault in a magistrates’ court in each calendar year.

2.42 Both sets of figures include cases which were later sent to the Crown Court as well as those dealt with in the magistrates’ courts.

Cases disposed of in magistrates’ courts
2.43 Of defendants dealt with in the magistrates’ courts in the period from 2003 to 2013, between 31,000 and 53,000 were convicted and sentenced in each year. Between 3,000 and 6,500 received custodial sentences.

Cases disposed of in the Crown Court.
2.44 In the same period, between 1,000 and 2,000 cases of common assault in each year reached the Crown Court for trial. Up to 80 of these cases each year

71 Figures supplied by the Ministry of Justice. The numbers given are those of persons prosecuted for assault or battery, where that was the principal offence charged (that is, where several offences are charged, the one attracting the heaviest sentence).

72 With the exception of a very few cases commenced by “voluntary bill of indictment” (Archbold para 1-288 and following; Blackstone’s para D10.44 - 49), all Crown Court prosecutions start with a hearing in a magistrates’ court, following which the proceedings are transferred to the Crown Court: Crime and Disorder Act 1998, s 51.

73 Figures supplied by the Ministry of Justice.
resulted in acquittals. In addition, up to 700 cases each year were tried in a magistrates’ court but sentenced by the Crown Court.

2.45 In 2003, 1,247 defendants were convicted in the Crown Court of assault or battery. Of these, 1,136 pleaded guilty and 111 were convicted following trial.

Further discussion

2.46 We discuss the problems in the law of assault and battery, and possible solutions on the basis of the draft Bill, in Chapter 5 below.74

ASSAULT OCCASIONING ACTUAL BODILY HARM

Statutory definition

2.47 Section 47 of the Offences Against the Person Act 1861 reads:

47. Whosoever shall be convicted upon an indictment of any assault occasioning actual bodily harm shall be liable to be kept in penal servitude.75

2.48 As a matter of authority, it is now clear that the section creates an offence that is separate from the offences of assault and battery.76 There is no authoritative judicial statement about whether the section creates two separate offences of “(psychic) assault occasioning actual harm” and “battery occasioning actual bodily harm”, or whether there is a single offence which can be committed in two ways.77

External elements

Assault or battery

2.49 The conduct element of the offence under section 47 is identical to that of assault, or of battery, as the case may be. We discuss above78 the question whether it can include an indirect means of causing injury, or an omission forming part of a longer course of conduct.

74 Paras 5.33 to 5.49 below.
75 Penal servitude is to be read as meaning imprisonment, and the maximum term for this offence is five years (combined effect of Penal Servitude Act 1891, s 1 and Criminal Justice Act 1948, s 1: paras 2.69 and 3.93 below).
76 Courtie [1984] AC 463, [1984] 1 All ER 740 (HL); R v Harrow Justices ex parte Osaseri [1986] QB 589, [1985] 3 All ER 185 (DC); Smith and Hogan, 17.3.1.1.
77 Smith and Hogan, 17.3.1.1, prefers the first view. But in Notman [1994] Criminal Law Review 518, concerning an offence of assault occasioning actual bodily harm, the Court of Appeal approved a direction that “an assault was either causing another to fear or to sustain unlawful violence”. This suggests that, however it may be with common assault, “assault” as an ingredient of the s 47 offence is a single concept.
78 See para 2.13 and following, above.
2.50 In section 47 the word “assault” must be taken in its generic sense, including both psychic assault (causing V to apprehend immediate unlawful violence) and battery.\textsuperscript{79}

(1) In the typical case, where D attacks and injures V, both an assault and a battery occur.

(2) However, it is certainly possible for a pure psychic assault to cause actual bodily harm. In Roberts\textsuperscript{80} D was convicted of the section 47 offence when he attempted to take off V’s coat in a moving car, and V jumped out and suffered injuries. This technically included a battery because D touched the coat. But if D had not quite touched the coat but the other facts were the same, it is inconceivable that the legal result would be different. Even in Roberts it was arguably the fear of further violence, rather than the minimal violence involved in touching the coat, that caused V to jump out and suffer injury.

(3) Conversely, it must be possible to commit the section 47 offence by means of a battery alone, for example by hitting someone from behind or by hitting a very young child who does not appreciate that any attack is imminent.\textsuperscript{81}

\textbf{Occasioning}

2.51 The requirement here is that D’s conduct in fact caused harm to V. There is no requirement that V either intended or was reckless about this result.\textsuperscript{82}

\textbf{Actual bodily harm}

2.52 “Actual bodily harm” does not have to be a definite physical injury. It extends to any hurt or injury calculated\textsuperscript{83} to interfere with the health or comfort of the victim,\textsuperscript{84} provided that it is more than transient or trifling. It can include cutting off a person’s hair\textsuperscript{85} or a temporary loss of consciousness.\textsuperscript{86}

\textsuperscript{79} The argument is set out in more detail in our 1993 Report, (1993) Law Com No 218 paras 12.16 to 12.19.


\textsuperscript{81} As in Parmenter [1992] 1 AC 699, 732C.

\textsuperscript{82} Para 2.61 below.

\textsuperscript{83} “Calculated” in this context means “fitted, suited, apt; proper or likely [to]” (Shorter Oxford Dictionary): there is no requirement that D in fact calculated on that result.

\textsuperscript{84} Miller [1954] 2 QB 282, [1954] 2 All ER 529.


2.53 Actual bodily harm can include recognised psychiatric conditions, but not other psychological states such as depression. The reasoning appears to be that psychiatric conditions are traceable to physical or chemical malfunctions of the brain and are therefore “bodily”. According to Mr Justice Lynskey in Miller:

There was a time when shock was not regarded as bodily hurt, but the day has gone by when that could be said. It seems to me now that if a person is caused hurt or injury resulting, not in any physical injury, but in an injury to her state of mind for the time being, that is within the definition of actual bodily harm…

2.54 It appears that actual bodily harm can include a disease. However, this will not often arise in the context of the section 47 offence, as disease is not normally transmitted by means of an assault or a battery. The issue more often arises in the context of the offence of inflicting grievous bodily harm (section 20), and we discuss it in full in Chapter 6.90

**Effect of consent**

2.55 The law concerning the effect of consent on liability for crimes of violence is extremely complicated and is the subject of a copious academic literature. As we are not proposing to reform the general principles governing consent in this project, we give only a brief summary.


88 Ireland and Burstow [1998] AC 147, 156.


90 In Golding [2014] EWCA Crim 889, concerning the transmission of genital herpes through consensual intercourse, D pleaded guilty to inflicting grievous bodily harm, but in terms which suggested that he had the s 47 offence in mind. After further medical evidence it was decided that the facts could not amount to the s 47 offence, as there was no assault, but that there was a valid plea of guilty to the offence under s 20.


The general principle is that one cannot validly consent to the intentional or reckless infliction of an injury of more than a transient or trifling nature.\(^{93}\) This is subject to a number of exceptions, discussed below.

The exceptions to this principle concern a number of activities regarded as legitimate, where one can consent either to an injury or to the risk of injury.\(^{94}\) They include sport (including boxing),\(^{95}\) horseplay even outside the context of sport, surgery, tattooing and religious rituals such as male circumcision.

Cases concerned with sexual activity can fall on either side of the line.\(^{96}\)

1. Injury inflicted with consent\(^{97}\) in the course of normal (and consensual) sexual activity does not amount to an assault or to the section 47 offence.\(^{98}\)

2. On the other hand, assaults or injuries in the course of sadomasochistic activity, including caning, do amount to an offence regardless of consent.\(^{99}\)

The law on this has been criticised on the ground that it depends entirely on fields of activity: within a given field, either consent is always valid or it is never valid. It might be preferable to take account of factors such as degree of harm and the vulnerability of V.\(^{100}\)

As we have seen, it is a requirement of the section 47 offence that a complete assault or battery has been committed. Accordingly, there is no liability in a case where:

1. D’s conduct causes physical injury to V;

2. V consented to that conduct (which would otherwise be an assault or battery); and

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94 Smith and Hogan, 17.2.1.3 pp 637 to 643.


96 For the transmission of disease through sexual intercourse, see Chapter 6 below.

97 Or even without it, if the sexual activity was consented to, the injury itself did not amount to an assault and the injury was not intended or foreseen by D: Meachen [2006] EWCA Crim 2414, para 2.59 below. But contrast Boyea [1992] Criminal Law Review 574.


(3) D did not intend, and was not reckless about, the risk of any physical injury.101

This is so whether or not V consented to (or was even aware of) the risk of injury: in either case, no assault or battery has taken place.

2.60 This rule must be contrasted with the situation where D intended or was reckless about the injury. In these cases, if:

(1) V did not consent to the injury or risk of it, or

(2) V did consent, but the activity is not one of those in which valid consent to harm or the risk of it can be given,

this invalidates consent to the assault or battery as well, and the offence is committed.102

Mental element

2.61 As mentioned above,103 there is no requirement that D intended or foresaw that his or her conduct might cause actual bodily harm.104 The mental element for the section 47 offence is identical to that for assault or battery. That is, there must be intention or subjective recklessness as to causing V to apprehend unlawful violence; or intention or subjective recklessness as to the violence itself, namely the contact with V. And as with the basic offences of assault and battery, the two possible mental elements are not interchangeable.105

2.62 Though intention or foresight of bodily harm forms no part of the offence, it is relevant to the question of consent. As we have seen,106 outside certain permitted activities V cannot validly consent to the intentional or reckless infliction of harm; but where no harm is intended or foreseen by D, V can consent to the assault or battery that causes that harm.

2.63 In short, the requirements of the offence are as follows:

(1) D’s conduct must cause V to apprehend immediate unlawful violence, and D must intend this result or be reckless as to the risk of its occurring; or

(2) D must cause unlawful violence to occur, intending to do so or being reckless about the risk of this result; and

101 Meachen [2006] EWCA Crim 2414; Smith and Hogan, 17.2.1.3 p 636 sub-para (3).
102 Donovan and Brown (fn 99 above).
103 Para 2.51 above.
105 Para 2.28 above.
106 Para 2.59 above.
(3) in either case, D’s conduct must result in causing V to suffer a physical or psychiatric hurt or injury (whether D is aware of the risk or not); and

(4) either

(a) V does not consent to the assault or battery, or

(b) V consents to the assault or battery but D intends or is reckless as to the risk of hurt or injury occurring, and the activity is not one for which consent can be validly given in law.

Mode of trial

2.64 The offence under section 47 is among those listed in Schedule 1 to the Magistrates’ Courts Act 1980 as being triable either way.\(^\text{107}\) The offence can therefore be tried either in the Crown Court with a jury or in a magistrates’ court.

2.65 Where a charge under section 47 is tried on indictment, it is open to the jury to acquit the defendant of that charge but convict him or her of assault or battery, even though those offences are summary only.\(^\text{108}\) Similarly, where the charge is one of grievous bodily harm under section 18 or 20, the jury may acquit of that offence and convict of the section 47 offence.\(^\text{109}\)

Charging standard

2.66 The CPS charging standard for common assault, as cited above,\(^\text{110}\) states that common assault should be charged in cases where the injury caused is not serious and not likely to lead to a sentence of more than 6 months’ imprisonment, even though as a matter of law the case falls under section 47. Similarly, the charging standard for the section 47 offence states that:\(^\text{111}\)

Where the injuries exceed those that can suitably be reflected by common assault — namely where the injuries are serious — a charge of ABH should normally be preferred.

Dividing line from common assault

2.67 This standard, in speaking of “serious injury”, is not attempting to define the boundaries of the section 47 offence. Where any injury at all is caused, either assault/battery or the section 47 offence may legally be charged. The charging standard expresses a pragmatic preference, based on whether the offence is likely to attract a sentence of over six months and would therefore be unsuitable for trial in a magistrates’ court.

\(^{107}\) Magistrates’ Courts Act 1980, s 17 and Sch 1 para 5(h).

\(^{108}\) Criminal Law Act 1967, s 6, as amended by Domestic Violence, Crime and Victims Act 2004, s 11; see para 2.31 above.

\(^{109}\) Para 2.105 and following, below.

\(^{110}\) Para 2.34 above.

\(^{111}\) CPS, Legal Guidance: Offences Against the Person, Incorporating Charging Standard https://www.cps.gov.uk/legal/l_to_o/offences_against_the_person/a08 (last visited 30 October 2014); emphasis in original.
**Dividing line from GBH**

2.68 As mentioned before,\(^{112}\) the word “serious” is somewhat confusing because it is also used as a synonym of “grievous”. (The charging standard describes this higher level of injury as “really serious”.) The dividing line between the section 47 and section 20 offences, both in law and in the charging standards, is discussed under the heading of section 20, below.\(^{113}\)

**Sentencing**

2.69 The maximum sentence for this offence is five years’ imprisonment. However, this is not stated anywhere in the 1861 Act, which simply speaks of “penal servitude”. By the combined effect of section 1(1) of the Penal Servitude Act 1891 and section 1 of the Criminal Justice Act 1948, any power to pass a sentence of penal servitude in an Act passed before 1891 is construed as a power to impose a term of imprisonment for a term not exceeding 5 years, unless the Act in question specifies a higher limit.\(^{114}\)

2.70 The Sentencing Guideline for this offence distinguishes categories of greater and lesser harm, and higher and lower culpability, in exactly the same way as for assault and battery.\(^{115}\) Depending on the degrees of harm and culpability, the sentence range in the guideline goes from a band A fine to 3 years’ imprisonment, with starting points from a medium level community order to 1 year 6 months’ custody.

2.71 Aggravating and mitigating factors, and other subsequent adjustments, work in the same way as for assault and battery.\(^{116}\)

**Statistics**

**Total number of cases**

2.72 The total number of prosecutions is variously stated.

1. According to the Crown Prosecution Service, in the period from 2009 to 2014, between 16,000 and 35,000 offences under section 47 were charged and reached a first hearing in a magistrates’ court in each year. These figures represent the number of charges rather than the number of defendants.

2. According to the Ministry of Justice, in the period from 2003 to 2013, between 11,000 and 36,000 defendants were prosecuted for this offence in a magistrates’ court in each year.\(^{117}\)

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\(^{112}\) Para 2.34 above, last three lines.

\(^{113}\) Para 2.103 below.

\(^{114}\) For a full explanation, see para 3.93 below.

\(^{115}\) Para 2.38 above.

\(^{116}\) Para 2.37(3) above.

\(^{117}\) These figures relate to cases where the offence under s 47 was the principal offence charged.
Both sets of figures include cases which were later sent to the Crown Court as well as those dealt with in the magistrates’ courts.\footnote{With the exception of a very few cases commenced by “voluntary bill of indictment” \textit{(Archbold} para 1-288 and following; \textit{Blackstone’s} para D10.44 and following), all Crown Court prosecutions start with a hearing in a magistrates’ court, following which the proceedings are transferred to the Crown Court.} They show a general decline over that period, which appears to go together with a rise in the number of prosecutions for common assault. This pattern is shown in Graphs 1 and 2 at the end of this chapter.

\textbf{Cases disposed of in magistrates’ courts}

\textbf{2.73} Of defendants dealt with in the magistrates’ courts in the period from 2003 to 2013, between 2,000 and 10,000 were convicted and sentenced in each year. Between 250 and 1,500 received custodial sentences.\footnote{Figures supplied by the Ministry of Justice.}

\textbf{Cases disposed of in the Crown Court}

\textbf{2.74} In the same period, between 6,000 and 11,000 defendants were sent for trial in the Crown Court for this offence in each year. Of these, between 4,000 and 8,000 were convicted. In addition, between 800 and 1,700 were convicted in a magistrates’ court and sentenced by the Crown Court. Between 2,000 and 4,000 received custodial sentences. Of these, between 380 and 670 received a sentence of 6 months or less. This represents between 7\% and 12\% of all sentences passed by the Crown Court for this offence.\footnote{Figures supplied by the Ministry of Justice.} This is shown in Graph 3 at the end of this chapter.

\textbf{2.75} In 2003, 4,650 defendants were convicted in the Crown Court of assault occasioning actual bodily harm. Of these, 4,064 pleaded guilty and 586 were convicted following trial.

\textbf{Further discussion}

\textbf{2.76} We consider the problems concerning all three offences of causing harm, and possible solutions on the basis of the draft Bill, in Chapter 5 below.\footnote{Paras 5.51 to 5.112 below.}

\textbf{MALICIOUS WOUNDING OR INFLICTION OF GRIEVOUS BODILY HARM}

\textbf{Statutory definition}

\textbf{2.77} The Offences Against the Person Act 1861 provides as follows.

\begin{quote}
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 a misdemeanor (sic), and being convicted thereof shall be liable to be kept in penal servitude.\footnote{Penal servitude is to be read as meaning imprisonment, and the maximum term for this offence is five years (paras 2.107 and 3.93 below). “Misdemeanor” should be read as “offence”: Criminal Law Act 1967, s 1.}
\end{quote}
External elements

2.78 There are two forms of this offence: wounding, and inflicting grievous bodily harm.

Wounding

2.79 Wounding refers to any break in the skin, whether or not the injury is otherwise a serious one. The break must go right through the skin, and a scratch is not sufficient.\textsuperscript{123}

2.80 On the analogy of DPP v Santana-Bermudez\textsuperscript{124} it would seem that wounding can be effected by omission. However there is no authority on the point, and Smith and Hogan regards the question as unclear.\textsuperscript{125}

Grievous bodily harm

INFLECTING

2.81 It was once thought that “inflict”, in section 20, had a narrower meaning than “cause”, in section 18,\textsuperscript{126} and required a direct act of violence such as an assault. On this understanding, the offence cannot take the form of an omission, except in the special circumstances of Fagan\textsuperscript{127} and Miller,\textsuperscript{128} in which D failed to perform a duty of counteracting a danger created by him or her.

2.82 More recent cases, such as Wilson,\textsuperscript{129} Ireland and Burstow\textsuperscript{130} and Dica,\textsuperscript{131} clarify that “inflict” need not involve an assault and is virtually synonymous with “cause”. It would seem to follow that the offence can take the form of either an act or an omission, that is to say any failure to perform a duty arising at common law.

NATURE OF HARM

2.83 “Grievous”, in grievous bodily harm, has been interpreted as “serious”. As “serious” is capable of a variety of meanings, from “more than trivial, enough to be taken seriously” to “exceptionally grave”, this is sometimes explained as

\textsuperscript{123} Smith and Hogan, 17.4.1.1; Morris [2005] EWCA Crim 609.
\textsuperscript{125} Smith and Hogan, 17.4.1.1.
\textsuperscript{126} See fuller discussion at para 2.123 and following, below.
\textsuperscript{127} [1969] 1 QB 439, [1968] 3 All ER 442.
\textsuperscript{129} [1984] AC 242, [1983] 3 All ER 448.
\textsuperscript{130} [1998] AC 147.
“really serious” though this phrase need not always be used in directions to the jury.  

2.84 Grievous bodily harm, like actual bodily harm, can include recognised psychiatric conditions, but not other psychological states such as depression.  

ILLNESS

2.85 According to Dica, bodily harm can include an illness or infection. That case is treated by some commentators as an innovation. However, the innovation concerned the nature and effect of consent, rather than the definition of bodily harm. The law before Dica was represented by Clarence, in which it was held that a husband who infects his wife with a sexually transmitted disease through consensual intercourse cannot be said to “inflict” it on her.

2.86 There can be no doubt that, even before Dica, the offence could have been committed by injecting the virus by means of a syringe without the victim’s consent. We consider that the same would have been true had the infection been transmitted in the course of non-consensual sexual activity.

2.87 Medical experts may be called as witnesses, to describe the course and effects of an illness, either in general or in relation to the infected person. However, it is for the jury, not the experts, to decide whether the illness is serious enough to be “grievous”.

2.88 We discuss the transmission of disease further in Chapter 6.

Effect of consent

2.89 The rules about consent are explained above, under the heading of assault occasioning actual bodily harm. There can be no valid consent to bodily harm, such as to excuse the actor from liability, except in the case of particular activities such as sport and surgery.

2.90 In activities where factual consent is recognised by law as sufficient to negate liability, it must be an informed consent. In each of the cases of Dica and

\[ \text{References}\]


133 See para 2.53 above and the sources cited in fn 87.


136 (1888) 22 QBD 23.

137 In Golding [2014] EWCA Crim 889 it was held that the jury was entitled to find that genital herpes amounted to grievous bodily harm: para 6.15 below.

138 Para 2.55 and following, above.


140 Smith and Hogan, 17.2.1.2 p 630 and following.

Konzani,\textsuperscript{142} for example, D engaged in intercourse with V without disclosing that he was HIV positive and was charged with inflicting grievous bodily harm contrary to section 20 of the Offences Against the Person Act 1861. It was held that V had consented to intercourse (so D was not guilty of rape), but had not consented to reckless exposure to the risk of infection amounting to grievous bodily harm.

2.91 In other words, consent is only an answer to a charge of inflicting grievous bodily harm or wounding if:

\begin{itemize}
\item[(1)] V was aware of the risk of harm and nevertheless consented to D’s conduct,\textsuperscript{143} and
\item[(2)] the harm occurs in the course of an activity for which consent can, as a matter of law, be recognised.
\end{itemize}

**Mental element**

2.92 Section 20 states that the wounding or infliction of harm must be done “maliciously”. In Cunningham,\textsuperscript{144} the Court of Criminal Appeal held that, in any statutory definition of a crime, “malice” is to be interpreted as meaning either intention to cause the kind of harm that was in fact done or recklessness as to whether such harm is caused. (The case concerned the offence under section 23 of the 1861 Act, maliciously administering a noxious thing so as to endanger life.)\textsuperscript{145} The same definition clearly applies to the section 20 offence.\textsuperscript{146} This raises three questions:

\begin{itemize}
\item[(1)] the meaning of intention;
\item[(2)] the meaning of recklessness; and
\item[(3)] the harm which D must intend or as to which D must be reckless.
\end{itemize}

**Intention**

2.93 As in the case of assault,\textsuperscript{147} intention may be either direct or oblique. Direct intention means that D acted in order to bring about the result. Oblique intention arises where D did not act in order to bring about that harm, but D was aware that it was virtually certain to occur in the ordinary course of events if D’s purpose was achieved.

\begin{footnotes}
\item[142] [2005] EWCA Crim 706, [2005] 2 Cr App R 14.
\item[143] Or if D honestly believed that this was the case. He will then not have the state of mind constituting the mental element of the offence.
\item[144] [1957] 2 QB 396, [1957] 2 All ER 412, discussed in full in para 2.198 below.
\item[145] Smith and Hogan, 5.2.2.1. The source of the definition was Kenny’s Outlines of Criminal Law (16th ed 1952) p 186, reproducing the corresponding passage in the 1902 edition.
\item[147] Para 2.23 above.
\end{footnotes}
**Recklessness**

2.94 The court in *Cunningham*\(^{148}\) quoted with approval the definition of recklessness in Kenny’s *Outlines of Criminal Law*: “the accused has foreseen that the particular kind of harm might be done, and yet has gone on to take the risk of it”. According to that case, this definition applies whenever a statute defines a crime using the word “malice”.

2.95 One qualification was added to this definition by *G*,\(^{149}\) namely that the decision to take the risk was unjustified in the circumstances.\(^{150}\) This case concerned criminal damage, but it seems that the qualification in *G* also applies, at least, to all other statutory offences in which the mental element is described as “recklessly”.\(^{151}\)

2.96 However, it is not certain as a matter of authority whether this qualification also applies where the mental element is described as “maliciously”, as in the section 20 offence. In other words, assuming there was no intention to cause harm, is the test one of “awareness without objective justification”, or “awareness” alone?\(^{152}\)

1. (1) The court in *Brady*\(^{153}\) accepted the decision in *G* as the definition of recklessness, including for the purposes of the section 20 offence (inflicting grievous bodily harm). It did not specifically discuss the point about whether the decision to take the risk was objectively justified, but the approach taken seemed consistent with that rule.\(^{154}\)

2. (2) On the other hand, *Mowatt*\(^{155}\) and *Savage*\(^{156}\) speak only of intention or foresight, in accordance with *Cunningham*, and nowhere address the question whether it was justified to take the risk.\(^{157}\)

2.97 We consider that the qualification in *G* does apply to the section 20 offence. For example, there are cases where a surgeon may justifiably carry out a surgical procedure despite knowing that there is a risk of serious harm, and should not be

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148 [1957] 2 QB 396, [1957] 2 All ER 412; para 2.25 above. The case is described more fully in para 2.198 below.


150 Meaning the circumstances as D knows or believes them to be.

151 For a recent example, see *Foster v CPS* [2013] EWHC 3885 (Admin), about the offence of recklessly destroying a badger sett.

152 For an example of a pure “awareness” test, see Public Order Act 1986, s 6. However, most of the individual offences have a defence of reasonableness.


154 The argument is not conclusive, as the defence case was that Brady was justified in acting as he did *because he did not foresee the risk*.


157 The leading speech in *Savage* describes the dissent in *Caldwell v Metropolitan Police Commissioner* [1982] AC 341, which does refer to justification, but the final conclusion was based on *Cunningham* and did not adopt the dissent in *Caldwell*. 
guilty of an offence if the operation miscarries.\textsuperscript{158} This is also the view expressed in the \textit{Crown Court Bench Book}:\textsuperscript{159}

While the House [of Lords] in \textit{G} was dealing with section 1 Criminal Damage Act 1971, the Court of Appeal Criminal Division has accepted the wider application of the decision.\textsuperscript{160} The mens rea of offences requiring malice, such as section 20 Offences Against the Person Act 1861, remains intention or subjective recklessness and is therefore in line with \textit{G} (ie the defendant was aware of a risk of some harm which he then, unreasonably, went on to take).\textsuperscript{161}

2.98 In practice, these questions will rarely arise. Where a wound or grievous bodily harm is caused by a direct attack inherently likely to cause physical harm, there is no need to direct the jury about the meaning of malice.\textsuperscript{162}

\textbf{Harm intended or foreseen}

2.99 The definition in Kenny, as adopted in \textit{Cunningham},\textsuperscript{163} speaks of “the particular kind of harm” that “might be done”. However, under section 20 there is no requirement that D should intend or foresee the exact course of events, or even the possibility of grievous bodily harm: it is sufficient that D should intend or foresee the risk of some physical harm.\textsuperscript{164}

2.100 Both grievous and actual bodily harm can include recognised psychiatric conditions, but not other psychological states such as depression.\textsuperscript{165} It seems, therefore, that psychiatric harm falls within the same “kind” as any other physical harm. It should therefore be sufficient if D intended or foresaw the risk of psychiatric harm.\textsuperscript{166}

2.101 It would seem to follow that the section 20 offence is committed when D intends or foresees physical harm, but in fact causes psychiatric harm, or vice versa: there is still foresight of “some harm” of the kind that falls within the offence.\textsuperscript{167}

\begin{itemize}
  \item \textsuperscript{159} Judicial Studies Board (2010); p 53.
  \item \textsuperscript{160} \textit{AG's Reference (No 3 of 2003)} [2004] EWCA Crim 868, [2004] Cr App R 23 (misconduct in public office); \textit{Brady} [2006] EWCA Crim 2413, [2007] Criminal Law Review 564 (s 20 Offences Against the Person Act 1861). (Footnote in original.)
  \item \textsuperscript{161} \textit{Brady} (fn 153 above).
  \item \textsuperscript{162} \textit{Mowatt} [1968] 1 QB 421, [1967] 3 All ER 47; see case note by JC Smith on the otherwise unreported \textit{Beeson} at [1994] Criminal Law Review 190.
  \item \textsuperscript{163} Para 2.198 below.
  \item \textsuperscript{165} See para 2.53 above and the sources cited in fn 87.
  \item \textsuperscript{166} \textit{Smith and Hogan}, 17.4.1.2 last sentence, suggests that the same rule applies in this context.
  \item \textsuperscript{167} J Horder, in “A critique of the correspondence principle in criminal law” [1995] \textit{Criminal Law Review} 759 (penultimate paragraph), acknowledges that this would still be the case even if the offence were reformed so as to require D to foresee the risk of “grievous bodily harm”, rather than “some harm”.
\end{itemize}
Mode of trial

2.102 The offence under section 20 is among those listed in Schedule 1 to the Magistrates' Courts Act 1980 as being triable either way.\(^{168}\)

Charging standard

2.103 The legal guidance to the CPS describes the offence under section 20.\(^{169}\) Most of this description simply sets out the legal boundaries of the offence. However, it adds one qualification. As it acknowledges, a wounding falls within the offence whether or not it amounts to a serious injury. However, it recommends as a matter of practice that the offence should only be charged when the injury is "really serious". In summary:

(1) A wounding that amounts to a really serious injury can be charged either as the "wounding" form of the section 20 offence or as the "GBH" form of the offence. It should be charged as the wounding form.\(^{170}\)

(2) A wounding that does not amount to a really serious injury can be charged either as the "wounding" form of the section 20 offence or as actual bodily harm under section 47. It should be charged under section 47.

(3) A really serious injury other than a wound can, and should, be charged as the GBH form of the section 20 offence.

2.104 The choice between the section 20 offence and the section 18 offence is discussed below.\(^{171}\)

Alternative verdicts

2.105 Under section 6 of the Criminal Law Act 1967,\(^{172}\) a person tried on indictment for any offence may be acquitted of that offence but convicted of another offence included within it, even if the included offence is not charged on the indictment.\(^{173}\) For this purpose:

(1) the section 18 offence includes the section 20 offence\(^{174}\) and the section 47 offence;

(2) the section 20 offence includes the section 47 offence;\(^{175}\)

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\(^{168}\) Magistrates' Courts Act 1980, s 17 and Sch 1 para 5(b).

\(^{169}\) CPS, Legal Guidance: Offences Against the Person, Incorporating Charging Standard https://www.cps.gov.uk/legal/l_to_o/offences_against_the_person/#a15 (last visited 30 October 2014); emphasis in original.


\(^{171}\) Para 2.132 below.

\(^{172}\) As amended by Domestic Violence, Crime and Victims Act 2004, s 11.

\(^{173}\) For a full account of "included offences", see para 5.199 and following, below.


(3) all three offences include common assault (and battery).  

2.106 Accordingly, where a charge under section 20 is tried on indictment, it is open to the jury to acquit the defendant of that charge but convict him or her of the offence under section 47, or even of assault or battery, though those offences are summary only. Similarly, where the charge is one of intentional grievous bodily harm under section 18, the jury may acquit of that offence and convict of the section 20 offence.

Sentencing

2.107 The maximum sentence for this offence is five years' imprisonment.  

2.108 The Sentencing Council Guideline for this offence distinguishes categories of greater and lesser harm, and higher and lower culpability, in exactly the same way as for assault and battery and the section 47 offence.

2.109 The sentencing ranges set are from one to four years’ imprisonment, except where both harm and culpability are low, in which case the starting point is a high level community order.

2.110 Aggravating and mitigating factors and the subsequent adjustments work the same way as in assault and battery and the section 47 offence.

Statistics

Total number of cases

2.111 As before, the total number of prosecutions is variously stated.

(1) According to the Crown Prosecution Service, in the period from 2009 to 2014, between 4,000 and 6,200 charges for this offence reached a first hearing in a magistrates’ court in each year. These figures represent the number of charges rather than the number of defendants.

(2) According to the Ministry of Justice, in the period from 2003 to 2013, between 3,000 and 5,500 defendants were prosecuted for this offence and reached a first hearing in a magistrates’ court in each year.

Both sets of figures include cases which were later sent to the Crown Court as well as those dealt with in the magistrates’ courts.

176 Although assault and battery are not indictable offences: Criminal Law Act 1967, s 6(3A) (inserted by Domestic Violence, Crime and Victims Act 2004, s 11) and Criminal Justice Act 1988, s 40; Blackstone's paras D19.56 and D19.57.

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

178 Combined effect of Penal Servitude Act 1891, s 1(1) and Criminal Justice Act 1948, s 1: paras 2.69 above and 3.93 below.

179 Para 2.37 above.

180 Paras 2.37 to 2.39 and 2.71 above.

181 These figures relate to cases where the offence under s 20 was the principal offence charged.
Cases disposed of in magistrates’ courts

2.112 Of defendants dealt with in the magistrates’ courts in the period from 2003 to 2013, between 250 and 900 were convicted and sentenced in each year. Between 30 and 200 received custodial sentences.\(^{182}\)

Cases disposed of in the Crown Court

2.113 In the same period, between 3,600 and 4,200 defendants were sent for trial in the Crown Court for this offence in each year. Of these, between 3,000 and 4,100 were convicted. In addition, between 180 and 340 were convicted in a magistrates’ court and sentenced by the Crown Court. Between 1,800 and 2,500 received custodial sentences.\(^{183}\)

2.114 In 2003, 3,092 defendants were convicted in the Crown Court of the offence under section 20. Of these, 2,760 pleaded guilty and 332 were convicted following trial.\(^{184}\)

Further discussion

2.115 We consider the problems concerning all three offences of causing harm, and possible solutions on the basis of the draft Bill, in Chapter 5 below.\(^{185}\)

WOUNDING AND CAUSING GRIEVous BODILY HARM WITH INTENT

Statutory definition

2.116 The Offences Against the Person Act 1861 provides as follows.

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\(^{186}\) of any person, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for life.\(^{187}\)

2.117 There are four basic divisions of this offence:

1. wounding with intent to do grievous bodily harm;
2. causing grievous bodily harm with intent to do grievous bodily harm;
3. wounding with intent to resist or prevent apprehension or detention;

\(^{182}\) Figures supplied by the Ministry of Justice.

\(^{183}\) Figures supplied by the Ministry of Justice.

\(^{184}\) Figures supplied by the Ministry of Justice.

\(^{185}\) Paras 5.51 to 5.112 below.

\(^{186}\) Meaning “detention”: para 3.77 below.

\(^{187}\) Criminal Justice Act 1948, s 1(1) provides that all statutory references to penal servitude are to be construed as references to imprisonment. “Felony” should be read as “an offence”: Criminal Law Act 1967, s 12(5)(a).
(4) causing grievous bodily harm with intent to resist or prevent apprehension or detention.\textsuperscript{188}

External elements

2.118 We can describe the external elements of this offence very briefly indeed, as in most respects they are identical to those of the section 20 offence.

2.119 The harm suffered must consist either of wounding or of grievous bodily harm. Both wounding and grievous bodily harm have the same meanings as in the section 20 offence. For example, grievous bodily harm is capable of including a disease or recognised psychiatric illness.

2.120 The main difference between the wording of the two sections, as concerns the conduct covered, is that section 18 speaks of “causing” grievous bodily harm “by any means whatsoever”, while section 20 speaks of “inflicting” it. Since \textit{Wilson},\textsuperscript{189} \textit{Ireland and Burstow}\textsuperscript{190} and \textit{Dica},\textsuperscript{191} it is clear that “inflict” need not involve an assault and is virtually synonymous with “cause”.

2.121 Whatever the meaning of “inflict”, “cause … by any means whatsoever” is clearly very wide. For example it is capable of including causing by omission.\textsuperscript{192} On the analogy of \textit{DPP v Santana-Bermudez}\textsuperscript{193} it would seem that the wounding forms of the offence can also be committed by omission, though there is no authority on the point.\textsuperscript{194} However, given the requirement of intent, discussed below, a case on the facts of \textit{Santana-Bermudez} would not fall within the offence.

2.122 A further difference is that section 18 speaks of wounding or causing grievous bodily harm to “any person”, while section 20 speaks of “any other person”. In this respect section 18 appears to follow the common law offence of mayhem, which forbids the mutilation of either another person or oneself, as in either case this would make the mutilated person unfit to fight for the country.\textsuperscript{195}

\textsuperscript{188} \textit{Simester and Sullivan} (above), 11.6 p 446. The third and fourth divisions can each be further subdivided into four factual situations, according to whether the intent involves resistance or prevention, and whether it concerns apprehension or detention, yielding 10 permutations in all. For the purposes of the present discussion we do not need to consider these subdivisions.

\textsuperscript{189} [1984] AC 242, [1983] 3 All ER 448.

\textsuperscript{190} [1998] AC 147, [1997] 4 All ER 225.


\textsuperscript{192} Criminal Law Revision Committee, Fourteenth Report: Offences against the Person (1980) Cmd 7844 para 253. Both that report and our 1993 report (Law Com No 218 para 11.5) took the view that this was confined to duties existing at common law and recommended that this should continue.


\textsuperscript{194} That is, no authority on the 1861 Act. Some cases under (somewhat differently worded) previous legislation held that an omission was insufficient: \textit{Smith and Hogan}, 17.4.1.1.

Effect of consent

2.123 The rules about the effect of the victim’s consent are identical to those for the offence under section 20. However, there will not be many cases in which a person can lawfully consent to the intentional doing of grievous bodily harm, except for major surgery such as amputation or possibly in some martial arts or combat sports.

Mental element

Malice

2.124 As in the section 20 offence, “maliciously” is interpreted as meaning intending to cause some bodily harm, or being reckless as to whether such harm is caused.196

2.125 In two out of the four forms of the offence, there is an explicit requirement that D must intend to do grievous bodily harm. It follows that, in these cases, recklessness is never sufficient and the word “maliciously” adds nothing.197

2.126 In the other two forms, D must intend to resist or prevent lawful apprehension or detention. In these cases the requirement of malice does add something: a person could intend to resist or prevent arrest without foreseeing any harm at all.199

Intention

2.127 A requirement of this offence is that there must be either intent to do grievous bodily harm or intent to resist or prevent lawful apprehension or detention. There is no third possibility, of intent to wound.200 Intentional wounding, without the intention to cause grievous bodily harm, will not fall within the section 18 offence and must be prosecuted under section 20 or section 47.

2.128 Intention here has the same meaning as in the other offences against the person: for example it can include oblique intent, where the grievous bodily harm is not in itself the desired result of D’s conduct, but D knows that it is the virtually certain result of something that D wishes to achieve in engaging in that conduct.201

Mode of trial and sentencing

2.129 The offence under section 18 is triable on indictment only, and the maximum sentence is life imprisonment.

2.130 The Sentencing Council Guideline for this offence distinguishes categories of greater and lesser harm, and higher and lower culpability, in exactly the same

196 Smith and Hogan, 17.4.1.2; Brady [2006] EWCA Crim 2413, [2007] Criminal Law Review 564.
199 Smith and Hogan, 17.5.1.2; Simester and Sullivan, 11.6(ii), pp 447 and 448.
201 Para 3.29 and following, below.
way as for offences previously mentioned.\textsuperscript{202} Even when both harm and culpability are low, the category range is three to five years’ imprisonment.

2.131 Aggravating and mitigating factors and the subsequent adjustments work the same way as in the other offences.\textsuperscript{203}

**Charging standard**

2.132 The legal guidance to the CPS describes the offence and states:

\begin{quote}
The distinction between charges under section 18 and section 20 is one of intent. The gravity of the injury resulting is not the determining factor, although it may provide some evidence of intent.\textsuperscript{204}
\end{quote}

There is thus no explicit practice of reserving the section 18 offence for the most serious injuries, though Elaine Genders,\textsuperscript{205} writing in 1999, claimed that statistics indicated that this was in fact the usual charging pattern.

**Statistics**

**Total number of cases**

2.133 As before, the total number of prosecutions is variously stated.

\begin{enumerate}
\item According to the Crown Prosecution Service, in the period from 2009 to 2014, between 6,000 and 8,500 offences were charged under section 18 and reached a first hearing in a magistrates’ court in each year. These figures represent numbers of charges rather than numbers of defendants.
\item According to the Ministry of Justice, in the period from 2003 to 2013, between 4,500 and 8,000 defendants were prosecuted for this offence and reached a first hearing in a magistrates’ court in each year.\textsuperscript{206}
\end{enumerate}

**Cases disposed of in magistrates’ courts**

2.134 As this offence is triable only on indictment, the only cases tried and sentenced in magistrates’ courts are cases in the youth court. The number of cases involved is less than 100 each year.\textsuperscript{207}

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\textsuperscript{202} Para 2.37 above.

\textsuperscript{203} Paras 2.37 to 2.39, 2.71 and 2.110 above.

\textsuperscript{204} CPS, *Legal Guidance: Offences Against the Person, Incorporating Charging Standard* https://www.cps.gov.uk/legal/l_to_o/offences_against_the_person/#a16 (last visited 30 October 2014).


\textsuperscript{206} These figures relate to cases where the offence under s 18 was the principal offence charged.

\textsuperscript{207} Figures supplied by the Ministry of Justice.
Cases disposed of in the Crown Court

2.135 In the period from 2003 to 2013, between 2,300 and 3,000 defendants were sent for trial in the Crown Court for this offence in each year. Of these, between 1,400 and 1,700 were convicted and sentenced, almost all of them receiving custodial sentences. 208

2.136 Compared to the other offences, the above figures indicate a far lower conviction rate. The explanation for this is likely to be that there is more scope for these charges to be downgraded to section 20 or section 47. 209

2.137 In 2003, 3,092 defendants were convicted in the Crown Court of the offence under section 18. Of these, 2,760 pleaded guilty and 332 were convicted following trial.

Further discussion

2.138 We consider the problems concerning all three offences of causing harm, and possible solutions on the basis of the draft Bill, in Chapter 5 below. 210

PARTICULAR ASSAULTS

2.139 The 1861 Act contains several offences of violence against particular people or in particular circumstances:

(1) wounding or causing grievous bodily harm with intent to resist or prevent the lawful apprehension or detention of any person; 211

(2) obstructing or assaulting a clergyman in the discharge of his duties; 212

(3) assaulting a magistrate or other person in the exercise of his duty preserving a wreck; 213

(4) assault with intent to resist or prevent the lawful apprehension or detention of any person. 214

A similar offence, not in the 1861 Act, is that of assaulting a constable in the execution of his duty, under section 89(1) of the Police Act 1996. 215 There are

208 Figures supplied by the Ministry of Justice.
209 E Genders (1999), above.
210 Paras 5.51 to 5.112 below.
211 OAPA 1861, s 18.
212 OAPA 1861, s 36.
213 OAPA 1861, s 37.
214 OAPA 1861, s 38.
215 This offence is extended by statute to include assaults on members of the Civil Nuclear Constabulary (Energy Act 2004, s 68), foreign officers exercising cross-border surveillance (Crime (International Cooperation) Act 2003, s 84) and officers of the British Transport Police (Railways and Transport Safety Act 2003, s 68).
also specific offences of assaulting court staff, Revenue officers and various other officials.

The first of these offences is described above, under the heading of wounding or causing grievous bodily harm with intent, and we do not describe it further here.

**External elements**

The offences can all involve “assault”, which in this context clearly includes battery. However, the offence against clergymen can also involve “obstructing” without an assault. There is a separate offence of “resisting or wilfully obstructing” a constable in the execution of his duty.

**Mental element**

In the offence of assaulting a constable, the only mental element required is that for assault or battery. There is no further requirement that D should know or believe that V is a constable or that V is in the execution of his or her duty.

Indirectly, however, D’s belief can be relevant to liability. If V attempts to arrest D in exercise of V’s authority as a police officer, and D honestly believes that V is not a police officer and resists the arrest, D may be acting in legitimate self-defence on the facts as D believes them to be. In that case D will not be guilty of common assault, and therefore cannot be guilty of the special assault offence either.

Section 36 of the 1861 Act, on assaulting or obstructing clergy, does not address the question of whether D knew or believed that V was a member of the clergy. However, the offence only applies if V is engaging in religious rites or duties at the time, or if D knows that V is about to do so or on the way to or from doing so. It would be possible to devise a case falling within these facts where D does not know or believe V to be a clergyman (for example, if D believes that V is an impostor), but it would be fairly unlikely.

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217 Commissioners for Revenue and Customs Act 2005, s 32.
218 UK Borders Act 2007, s 22 (immigration officers); Immigration and Asylum Act 1999, s 4 (detainee custody officers); Police Reform Act 2002, s 46 (designated and accredited persons exercising police functions); Criminal Justice Act 1991, s 90 (prison custody officers); Criminal Justice and Public Order Act 1994, s 13 (secure training centre custody officers); Parks Regulation Act 1872, s 15 (park keepers).
219 Para 2.116 and following, above.
220 Smith and Hogan, 17.9.2.3. This rule goes back to Forbes and Webb (1865) 10 Cox CC 362, concerning a previous offence of the same kind – a first instance decision of the Recorder of London (Russell Gurney QC) at the Central Criminal Court.
Statistics

Police officers

According to a Government survey, the total number of police officers assaulted in the course of duty in 2009/10 was 8,175. This includes all assaults reported by individual police forces, whether or not they resulted in prosecution, and whether or not injury was caused.

According to the Crown Prosecution Service, in the period from 2011 to 2013 inclusive there were between 17,000 and 20,000 charges for assaulting a constable in each year.

According to the Ministry of Justice, during the period from 2003 to 2013 between 9,000 and 13,000 defendants in each year were charged with assaulting a constable in the execution of his duty.

Others

According to the Crown Prosecution Service, there was one prosecution for assaulting or obstructing clergy in 2005 and another in 2008. In the years from 2011 to 2013 inclusive there were no prosecutions for assaulting or obstructing clergy. They are not aware of any prosecution for assaulting a magistrate or other person preserving a wreck. Nor were any prosecutions for either of those offences reported by the Ministry of Justice for the years from 2003 to 2013.

According to a Supplementary Memorandum from the Home Office to the Select Committee on Religious Offences in England and Wales, there were two cases of assaulting or obstructing clergy in the years 2000 and 2001 in which the defendant was proceeded against or cautioned.

Racially or religiously aggravated crimes of violence

Other crimes of violence distinguished by particular circumstances are the racially or religiously aggravated offences created by the Crime and Disorder Act 1998. We give only a brief summary here, as these offences are described in detail in our report on “Hate crime: should the current offences be extended?”

For this purpose, “racially or religiously aggravated” is defined as meaning that:

(a) at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence hostility based on the victim’s membership (or presumed membership) of a racial or religious group; or

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226 (2014) Law Com No 348, paras 2.2 to 2.32.
(b) the offence is motivated (wholly or partly) by hostility towards members of a racial or religious group based on their membership of that group.227

2.152 The offences that can be aggravated are:

(1) common assault (meaning assault or battery);

(2) assault occasioning actual bodily harm;228 and

(3) malicious wounding or infliction of grievous bodily harm.229

2.153 There are also aggravated forms of other offences, such as criminal damage,230 harassment offences231 and some offences under the Public Order Act 1986,232 but these are not within the scope of this review. There is no aggravated form of the section 18 offence: as this offence is punishable by life imprisonment, there is no need for any additional sentencing powers.

2.154 The aggravated offences created by section 29 of the Crime and Disorder Act 1998 are separate from the non-aggravated offences on which they are based. This is shown by the provisions about mode of trial and sentence.

(1) Common assault is triable summarily only, and the maximum sentence is 6 months. Aggravated assault is triable either way, and the maximum sentence is 2 years.

(2) The maximum sentence for assault occasioning actual bodily harm and malicious wounding or infliction of grievous bodily harm is 5 years. The maximum sentence for the aggravated forms of these offences is 7 years. All these offences are triable either way.

**Statistics for racially and religiously aggravated offences**

2.155 Over the period from 2003 to 2013, the number of defendants prosecuted in the magistrates’ courts (including cases that were later sent to the Crown Court) were as follows:

(1) for racially or religiously aggravated assault (including battery), between 750 and 1,600 defendants per year;

(2) for racially or religiously aggravated assault occasioning actual bodily harm, up to 550 defendants per year, showing a steady decline over the period;

228 OAPA 1861, s 47.
229 OAPA 1861, s 20.
230 Criminal Damage Act 1971, s 1.
231 Under the Protection from Harassment Act 1997, ss 2, 2A, 4 and 4A.
232 Causing fear or provocation of violence, s 4; intentional harassment, alarm or distress, s 4A; harassment, alarm or distress, s 5.
(3) for racially or religiously aggravated wounding or grievous bodily harm, up to 190 defendants per year.\textsuperscript{233}

2.156 Over the same period, the following numbers of prosecutions were disposed of in the magistrates’ courts:

(1) for racially or religiously aggravated assault (including battery), between 250 and 950 defendants were convicted and sentenced in each year, between 60 and 160 receiving a custodial sentence;

(2) for racially or religiously aggravated assault occasioning actual bodily harm, up to 100 defendants were convicted and sentenced in each year, up to 22 receiving a custodial sentence;

(3) for racially or religiously aggravated wounding or grievous bodily harm, up to 80 defendants were convicted and sentenced in each year, with up to 14 (usually many fewer) receiving a custodial sentence.

2.157 Over the same period, the following numbers of prosecutions were disposed of in the Crown Court:

(1) for racially or religiously aggravated assault, between 140 and 270 defendants were sent for trial each year; between 80 and 200 were sentenced (including those convicted in a magistrates’ court but sentenced by the Crown Court), between 43 and 92 receiving a custodial sentence;

(2) for racially or religiously aggravated assault occasioning actual bodily harm, up to 164 defendants were sent for trial each year; up to 101 were sentenced (including those convicted in a magistrates’ court but sentenced by the Crown Court), up to 66 receiving a custodial sentence;

(3) for racially or religiously aggravated wounding or grievous bodily harm, up to 54 defendants were sent for trial each year; up to 34 were sentenced (including those convicted in a magistrates’ court but sentenced by the Crown Court), up to 27 receiving a custodial sentence.

Further discussion

2.158 We consider the problems concerning particular assaults, and possible solutions on the basis of the draft Bill, in Chapter 5 below.\textsuperscript{234}

THREATS TO KILL

2.159 The 1861 Act provides as follows.\textsuperscript{235}

\textsuperscript{233} These figures, and those in the following paragraphs, were supplied by the Ministry of Justice. As before, they are confined to defendants charged with a racially or religiously aggravated crime of violence as the principal offence.

\textsuperscript{234} Paras 5.123 to 5.143 below.

\textsuperscript{235} The present section is as substituted by the Criminal Law Act 1977, Sch 12. The original section was confined to written threats, and used the word “maliciously”: Solanke [1970] 1 WLR 1, [1969] 3 All ER 1383.
16. A person who without lawful excuse makes to another a threat, intending that that other would fear it would be carried out, to kill that other or a third person shall be guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding ten years.

External elements

2.160 The conduct element of this offence is simply the making of the threat. A threat to kill one person may be made to another person; in that case there is no requirement that the person whom D threatens to kill should ever become aware of the threat.\textsuperscript{236} The section contains no explicit requirement that the threat should be believed,\textsuperscript{237} or that there is any likelihood of its being carried out.\textsuperscript{238}

2.161 The offence does not include threatening to kill a foetus. In Tait\textsuperscript{239} the Court of Appeal quashed a conviction for threatening a pregnant woman that D would kill “your baby”, as the jury was not directed to consider whether this was a threat to kill the foetus or a threat to kill the child after it was born. Following Shephard\textsuperscript{240} the court assumed, with some reluctance, that an unambiguous threat to kill the child after it was born would have been an offence.\textsuperscript{241}

Mental element

2.162 D must intend that the person to whom the threat is made “would fear it would be carried out”. This goes somewhat wider than an intention to create a firm belief that the threat will certainly be carried out.\textsuperscript{242} The offence seems to cover a conditional threat, such as “if you don’t do so and so I will kill you”. There is no requirement that D intends that the threat should be carried out.

Defences

2.163 A threat to kill may be made in self-defence or to prevent a crime. Although the threat does not in itself constitute “force” as required by section 3 of the Criminal

\textsuperscript{236} Donovan [2009] EWCA Crim 1258.

\textsuperscript{237} Blackstone’s states at para B1.147 that “The victim must fear that the threat will be carried out against himself or another so it is the person to whom the threat is made, rather than the person to be killed (if different), who must fear that the threat will be carried out”, but cites no authority for this. As the offence is worded as one of ulterior intent, we believe that “must fear”, in both places, should have read “must be intended to fear”; but it could be argued that a requirement of actual fear is implicit in the use of “would fear” rather than “should fear” in the statute.

\textsuperscript{238} Syme (1911) 6 Cr App R 257. It must be pointed out that, in 1911, the wording of the offence was very different: the threat was required to be in writing, there was no requirement of intent to cause fear and the mental element was expressed as “maliciously”.

\textsuperscript{239} Tait [1990] 1 QB 290, [1989] 3 All ER 682.

\textsuperscript{240} [1919] 2 KB 125, (1920) 14 Cr App R 26 (see para 2.173 below).

\textsuperscript{241} Blackstone’s para B1.147. The arguments of the court are discussed in Smith and Hogan, 16.1.2. Had the matter been free of authority, the court would have held that a threat to kill the child when born would not have been an offence. In the event they felt bound by Shephard though this was not necessary for their decision.

\textsuperscript{242} Though it could be argued that the second “would” is only used for grammatical reasons, to preserve the sequence of tenses, and therefore in effect means “will”.

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it is a logical inference that if force is permissible the threat of it can be. It is possible for the threat to be reasonable self-defence though it would not be reasonable to carry it out.

Mode of trial

The offence is triable either way.

Charging

The CPS legal guidance describes the offence and observes that it is difficult to prove: a charge of assault or under section 4 of the Public Order Act 1986 is often preferable. There may be exceptional cases where either there is no assault or the severity of the threat is not matched by the physical injury sustained in the assault. A charge of threatening to kill should then be brought if the person threatened was given real cause to fear that it would be carried out.

Sentencing

As stated in the section, the maximum sentence is 10 years’ imprisonment. There is no sentencing guideline governing this offence.

Statistics

Total number of cases

According to the Ministry of Justice, in the period from 2003 to 2013, between 1,300 and 3,800 defendants were prosecuted for this offence and reached a first hearing in a magistrates’ court in each year. These figures include cases which were later sent to the Crown Court as well as those dealt with in the magistrates’ courts.

Cases disposed of in magistrates’ courts

Of defendants dealt with in the magistrates’ courts in the period from 2003 to 2013, between 120 and 280 were convicted and sentenced in each year. Between 27 and 62 received custodial sentences.

And Criminal Justice and Immigration Act 2008, s 76, which governs self-defence.


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

Available at https://www.cps.gov.uk/legal/l_to_o/offences_against_the_person/#a19 (last visited 30 October 2014).

However the CPS’s Sentencing Manual sets out some relevant authorities, in which sentences ranging from two to five years were deemed appropriate by the Court of Appeal: http://www.cps.gov.uk/legal/s_to_u/sentencing_manual/threats_to_kill/ (last visited 30 October 2014).

These figures relate to cases where the offence under s 16 was the principal offence charged.

Figures supplied by the Ministry of Justice.
**Cases disposed of in the Crown Court**

2.169 In the same period, between 350 and 510 defendants were sent for trial in the Crown Court for this offence in each year. Of these, between 170 and 240 were convicted. In addition, between 45 and 92 were convicted in a magistrates’ court and sentenced by the Crown Court. Between 128 and 176 received custodial sentences.  

**Further discussion**

2.170 We consider the problems concerning both solicitation to murder and threats to kill, and possible solutions, in Chapter 5 below.  

**SOLICITATION TO MURDER**

2.171 The 1861 Act provides as follows.

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

**External elements**

2.172 For brevity, in what follows we refer to the person solicited as “M” and the intended victim as “V”. In other words, the offence is committed if D solicits M to murder V.

2.173 The offence does not require V to be an identified person in being. For example, inciting a pregnant woman to kill the child once born falls within the offence. Similarly the offence includes incitement to kill people in generic categories, such as “Hindus, Jews and non-believers”. Nor need M be an identified person: the offence includes an appeal to the public in a newspaper or, presumably, through the internet.

2.174 There is no requirement that the solicitation or encouragement be acted upon. However it is a requirement that the solicitation or encouragement should reach its intended audience.  

2.175 It is not clear whether a conditional solicitation falls within the offence: for example where D encourages M to kill V if V performs a given action or if some

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251 Figures supplied by the Ministry of Justice.
252 Paras 5.154 to 5.174 below.
253 Shephard [1919] 2 KB 125. The court explicitly refused to decide whether it was a necessary condition of the offence that the child was later born alive.
255 Smith and Hogan, 16.1.1.3.
256 Krause (1902) 66 Justice of the Peace 121.
other event occurs. It would appear from Shephard\textsuperscript{257} that such solicitation, even if not criminal at the time, becomes so once the condition is fulfilled.\textsuperscript{258}

**Mental element**

2.176 Soliciting, encouraging and the other verbs used all denote deliberate acts. However, there is no explicit requirement in the section that D must either intend or believe that the suggestion will be acted upon.

2.177 The law on this point is unclear. First, it is not certain whether the offence of soliciting to murder follows the common law of incitement, as it existed before 2007.\textsuperscript{259} Secondly, the law of incitement was itself unclear on this point. The case of Marlow,\textsuperscript{260} concerning a statutory offence of incitement under section 19 of the Misuse of Drugs Act 1971, is imperfectly reported and could be interpreted in any of three ways:

- (1) D must intend that V commit the principal offence;
- (2) D must intend that V should feel encouraged to commit the principal offence;
- (3) D must be aware that, were V to act on D’s suggestion, the principal offence would be committed.\textsuperscript{261}

2.178 In Jones\textsuperscript{262} D offered for sale equipment which could be used for growing cannabis,\textsuperscript{263} and gave oral advice about how to grow “vegetables”. It was held that, while simply having the equipment for sale did not amount to incitement, the advice could amount to encouragement and it was open to the jury to find that there was incitement under the Misuse of Drugs Act 1971.

2.179 On the wording of section 4 of the 1861 Act, the offence may be similar to incitement at common law (or under the Misuse of Drugs Act 1971) or may be wider, but cannot be narrower. We consider that the offence is committed even if D’s plan is to expose M as a potential murderer and D does not expect the murder to occur.

\textsuperscript{257} Fn 253 above.

\textsuperscript{258} “Here the child was in fact born alive, so that the event happened upon which the act was to be done”: [1919] 2 KB 125, 126.

\textsuperscript{259} Criminal Law Revision Committee, Fourteenth Report: Offences Against the Person (Cmd 7844) (1980), para 223, and the 1989 draft Code, para 13.54, both assumed that the scope of the offence of soliciting to murder was wholly covered by incitement at common law: fn 141 in Chapter 5 below. Incitement was abolished by the Serious Crime Act 2007, which created offences of assisting and encouraging crime.


\textsuperscript{262} [2010] EWCA Crim 925, [2010] 3 All ER 1186.

\textsuperscript{263} Smoking and grinding equipment and books on growing cannabis were available in the same shop.
If this is right, the offence of solicitation may or may not be wider than the former offence of incitement, but is certainly wider than the current offences of assisting and encouraging crime under sections 44 and 45 of the Serious Crime Act 2007, which do require an intention or belief that the crime will be committed.\(^{264}\)

**Jurisdiction**

The section states that V need not be a British subject, and need not be within the Queen’s dominions; accordingly the proposed killing need not be intended to take place in England and Wales. It appears that D and M need not be British subjects either.\(^{265}\) It was suggested in *Abu Hamza* that this was in fact the reason for creating the offence: when the section was first enacted, the common law of incitement did not catch foreign nationals in England and Wales inciting murders abroad.

It appears to have been assumed in *Abu Hamza* that the act of solicitation must take place in England and Wales. In this respect the offence is narrower than the offence of assisting and encouraging crime under the Serious Crime Act 2007.

1. Under Schedule 4 para 3 of that Act, there can be criminal liability for acts of assisting and encouraging abroad, in relation to an offence to be committed abroad, but only if D could have been prosecuted in England and Wales had D committed the principal offence in the country in question.

2. Section 9 of the 1861 Act provides that murder or manslaughter carried out by a British subject abroad is triable in England and Wales.

3. It follows that where D, while abroad, assists or encourages M to murder V, also abroad, D can be tried for assisting and encouraging murder provided that D is a British subject.

**Mode of trial**

The offence is triable on indictment only.\(^{266}\)

**Sentencing**

The maximum sentence is imprisonment for life. There is no sentencing guideline.\(^{267}\)

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\(^{264}\) Para 5.160 below.

\(^{265}\) *Smith and Hogan*, 16.1.1.2; *Abu Hamza* [2006] EWCA Crim 2918, [2007] QB 659.

\(^{266}\) As is every offence unless statute provides otherwise.

\(^{267}\) But see the CPS’s Sentencing Manual, which gathers together relevant authority: the minimum starting point following trial is five to six years’ imprisonment, but much higher sentences are sometimes passed. https://www.cps.gov.uk/legal/s_to_u/sentencing_manual/soliciting_to_murder/ (last visited 30 October 2014).
Statistics

Total number of cases

2.185 According to the Ministry of Justice, in the period from 2003 to 2013, between 17 and 63 defendants were prosecuted for this offence and reached a first hearing in a magistrates’ court in each year. These figures include cases which were later sent to the Crown Court.

Cases disposed of in magistrates’ courts

2.186 As this offence is triable only on indictment, the only cases tried and sentenced in magistrates’ courts are cases in the youth court. The greatest number of such cases in any year from 2003 to 2013 is 3, and only one case in that period has resulted in a custodial sentence.

Cases disposed of in the Crown Court

2.187 In the period from 2003 to 2013, between 12 and 50 defendants were sent for trial in the Crown Court for this offence in each year. Of these, between 2 and 26 were convicted and sentenced, almost all of them receiving custodial sentences.

Further discussion

2.188 We consider the problems concerning both solicitation to murder and threats to kill, and possible solutions, in Chapter 5 below.

POISONING OFFENCES

The different offences

2.189 The 1861 Act provides the following offences.

22. Whosoever shall unlawfully apply or administer to or cause to be taken by, or attempt to apply or administer to or attempt to cause to be administered to or taken by, any person, any chloroform, laudanum, or other stupefying or overpowering drug, matter, or thing, with intent in any of such cases thereby to enable himself or any other person to commit, or with intent in any of such cases thereby to assist any other person in committing, any indictable offence, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for life.

23. Whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, so as thereby to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm, shall be guilty of felony, and being convicted

268 These figures relate to cases where the offence under s 4 was the principal offence charged.

269 Figures supplied by the Ministry of Justice.

270 Figures supplied by the Ministry of Justice.

271 Paras 5.154 to 5.174 below.
thereof shall be liable to be kept in penal servitude for any term not exceeding ten years.

24. Whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, with intent to injure, aggrieve, or annoy such person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be kept in penal servitude.272

**External elements**

**Conduct**

2.190 The conduct element of all three offences is the act of administering the drug or other substance.

2.191 There was once a doubt about what constitutes “administering” a substance, namely whether D can be said to administer a drug to V if D assists V to inject it (for example, by supplying the drug or the equipment or tying the tourniquet) but V performs the final act of injection.273 The position is now clear: D does not administer the drug in these circumstances, as V’s free act in pressing the plunger breaks the chain of causation.274

2.192 In the offences under sections 23 and 24 the substance must be a “poison or other destructive or noxious thing”. Whether a substance is "noxious" is a purely objective question. Heroin is a noxious substance in itself, even if the victim has built up a tolerance of it.275 Conversely, a normal dose of a sleeping pill is not noxious, even if administered for a hostile purpose.276

**Result**

2.193 The offence under section 22 does not require that the stupefying substance should actually be administered to V: it is sufficient to attempt to apply or administer it. Similarly there is no requirement that the intended indictable offence should be committed.

2.194 Section 23 does have a requirement concerning results. The wording “so as thereby to endanger … or … inflict” is interpreted literally, as meaning that D’s conduct must in fact have the effect of endangering life or inflicting harm.

2.195 Section 24 requires the substance to be administered, but does not require that V be in fact injured, aggrieved or annoyed.

272 In all three offences, references to penal servitude are to be read as meaning imprisonment. The maximum term for the s 24 offence is 5 years: para 3.93 below. References to “felony” and “misdemeanor” mean simply “an offence”.


274 Burgess [2008] EWCA Crim 516; Kennedy [2007] UKHL 38, [2008] 1 AC 269. In Australia, a supplier of drugs which the victim self-administered and subsequently died of has been held on appeal to be guilty of manslaughter (Burns [2011] NSWCCA 56), but this could be on the basis of gross negligence rather than an unlawful act. For Scotland, see Khaliq v HM Advocate 1984 JC 23 and Ulhaq v HM Advocate 1991 SLT 614.


Consent

2.196 The rules governing consent are the same as for the offence of inflicting grievous bodily harm under section 20. In general, consent does not negate liability for an offence under section 23 or 24. But where the consent is for particular justifiable purposes (for example, the administration of anaesthetic for an operation) it can do so.

Mental element: intention, recklessness, ulterior intention

2.197 The mental element for the stupefying substances offence is intent to enable D or another to commit, or assist another in committing, an indictable offence. The offence need not be one under the 1861 Act.

2.198 The mental element for the more serious poisoning offence, under section 23, is confined to the word "maliciously". The meaning of that word was stated in Cunningham, which concerned that very offence. In that case, D ripped out a gas meter in order to steal the money in it, thereby causing an escape of gas which was inhaled by V and endangered her life. The court quoted with approval the definition in the 1952 edition of Kenny's Outlines of Criminal Law:

In any statutory definition of a crime, malice must be taken not in the old vague sense of wickedness in general but as requiring either (1) An actual intention to do the particular kind of harm that in fact was done; or (2) recklessness as to whether such harm should occur or not (i.e., the accused has foreseen that the particular kind of harm might be done and yet has gone on to take the risk of it).

Accordingly the court concluded:

In our view it should have been left to the jury to decide whether, even if the appellant did not intend the injury to Mrs Wade, he foresaw that the removal of the gas meter might cause injury to someone but nevertheless removed it.

2.199 This suggests that the relevant foresight is foresight of "injury". This appears to mean any physical injury, not necessarily danger to life or grievous bodily harm. However, in the later case of Cato it was held that the requirement of malice was sufficiently established if D intended to administer the substance (in that case, by inserting the syringe) and knew that it was a noxious one. It was no defence that D believed that there was no danger to life or risk of infliction of bodily harm (because D thought that V had built up a high tolerance of heroin). Cunningham was distinguished on the ground that the administration in that case

277 We do not believe that consent can negate liability under section 22, as the commission of an indictable offence would not be a justifiable purpose.

278 Smith and Hogan, 17.10.1.1 p 675, para 17.10.2.1 p 677.

279 [1957] 2 QB 396, [1957] 2 All ER 41 (see discussion at para 2.92 and following, above).


was indirect, and there was room for doubt whether the substance would reach V at all.

2.200 In short, it is sufficient if there is intention or recklessness either as to the administration and noxious nature of the substance or as to the causing of some injury.

2.201 The less serious poisoning offence under section 24 requires “intent to injure, aggrieve, or annoy”. It may seem paradoxical that the less serious offence has a stricter mental element requirement than the more serious offence; but this may be explained by the fact that, in the less serious offence, there is no requirement for the injury, grievance or annoyance to happen.

Mode of trial

2.202 All three offences are triable on indictment only.

Included offence

2.203 A person charged with the offence under section 23 may be convicted of the offence under section 24.

Sentencing

2.204 The maximum sentence for the stupefying substances offence is imprisonment for life. The maximum sentence for poisoning so as to endanger life or inflict grievous bodily harm is 10 years’ imprisonment. No maximum is specified for poisoning with intent to injure or annoy; but, as with the section 47 offence, there is a maximum of five years’ imprisonment through the combined effect of section 1(1) of the Penal Servitude Act 1891 and section 1 of the Criminal Justice Act 1948.

2.205 There is no sentencing guideline or CPS legal guidance for any of these offences. However, the Court of Appeal in Jones said that section 24 offences ought to be equated to section 20 ones in terms of sentencing. From the few reported appeals in recent years, sentences seem to average around two to three years’ imprisonment.

Statistics

Total number of cases

2.206 According to the Crown Prosecution Service, the following total numbers of charges reached a first hearing in a magistrates’ court in the period from 2011 to 2013 inclusive:

283 Smith and Hogan 17.10.1.2.
284 Archbold paras 19-276 and 19-280; Blackstone’s paras B2.77, B2.86.
285 Offences Against the Person Act 1861, s 25.
286 Para 2.69 above.
287 Para 3.93 below.
288 (1990-91) 12 Cr App R (S) 233.
289 See eg Sibula [2008] EWCA Crim 1480, (2009) 1 Cr App R (S) 47.
(1) 38 cases of administering stupefying substances;  
(2) 29 cases of administering a noxious thing so as to endanger life or cause grievous bodily harm;  
(3) 100 cases of administering a noxious thing with intent to injure, aggrieve or annoy.

2.207 According to the Ministry of Justice, in the period from 2003 to 2013, between 20 and 45 defendants were prosecuted and reached a first hearing in a magistrates’ court for these offences in each year. These figures include cases which were later sent to the Crown Court.

**Cases disposed of in magistrates’ courts**

2.208 As these offences are triable only on indictment, the only cases tried and sentenced in magistrates’ courts are cases in the youth court. The number of cases involved is 7 or less in each year, of which only 2 have ever resulted in a custodial sentence.

**Cases disposed of in the Crown Court**

2.209 In the period from 2003 to 2013, the greatest number of defendants sent for trial in the Crown Court for these offences in any one year was 37. Of these, 21 were convicted and sentenced, and 15 received a custodial sentence. The figures for the other years were significantly smaller.

**Further discussion**

2.210 We consider the problems concerning poisoning offences, and possible solutions on the basis of the draft Bill, in Chapter 5 below.

**EXPLOSIVES AND DANGEROUS SUBSTANCES**

**The different offences**

2.211 There are offences of:

(1) causing grievous bodily harm by gunpowder or explosives (section 28);

(2) using, sending or throwing explosive or corrosive substances with intent to cause grievous bodily harm (section 29);

(3) placing explosives near a building or vessel with intent to do bodily injury (section 30);

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290 OAPA 1861, s 22.  
291 OAPA 1861, s 23.  
292 OAPA 1861, s 24.  
293 Figures supplied by the Ministry of Justice.  
294 Figures supplied by the Ministry of Justice.  
295 Paras 5.175 to 5.187 below.
(4) making or having explosives with intent to commit a felony\textsuperscript{296} in the Act (section 64).

2.212 The relevant sections read:

28. Whosoever shall unlawfully and maliciously, by the explosion of gunpowder or other explosive substance, burn, maim, disfigure, disable, or do any grievous bodily harm to any person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court to be kept in penal servitude for life or to be imprisoned.\textsuperscript{297}

29. Whosoever shall unlawfully and maliciously cause any gunpowder or other explosive substance to explode, or send or deliver to or cause to be taken or received by any person any explosive substance or any other dangerous or noxious thing, or put or lay at any place, or cast or throw at or upon or otherwise apply to any person, any corrosive fluid or any destructive or explosive substance, with intent in any of the cases aforesaid to burn, maim, disfigure, or disable any person, or to do some grievous bodily harm to any person, shall, whether any bodily injury be effected or not, be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or to be imprisoned.\textsuperscript{298}

30. Whosoever shall unlawfully and maliciously place or throw in, into, upon, against, or near any building, ship, or vessel any gunpowder or other explosive substance, with intent to do any bodily injury to any person, shall, whether or not any explosion take place, and whether or not any bodily injury be effected, be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years or to be imprisoned.\textsuperscript{299}

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

\textsuperscript{296} Meaning any offence for which a person (not previously convicted) may be tried on indictment otherwise than at his own instance: Criminal Law Act 1967, s 10(1) and Sch 2 para 8.

\textsuperscript{297} The effect of Criminal Justice Act 1948, s 1 is to substitute a maximum of imprisonment for life. “Felony” should be read as “an offence”: Criminal Law Act 1967, s 12(5)(a).

\textsuperscript{298} See fn 297.

\textsuperscript{299} The effect of Criminal Justice Act 1948, s 1 is to substitute a maximum of 14 years’ imprisonment. “Felony” should be read as “an offence”: Criminal Law Act 1967, s 12(5)(a).
liable, at the discretion of the court, to be imprisoned for any term not exceeding two years.

2.213 In addition to the offences under the 1861 Act, there are offences of causing an explosion likely to endanger life or property, attempting to cause explosion or making or keeping explosive with intent to endanger life or property, making or possessing explosives under suspicious circumstances and knowingly causing a nuclear weapon explosion.

**External elements**

2.214 The section 28 offence is a “result crime”. The explosion must in fact take place, and V must in fact be injured.

2.215 The section 29 offence requires that the explosion take place, or that the substance be sent, taken, thrown, received etc. The section is explicit that the offence is committed whether the intended injury to V occurs or not.

2.216 In the section 30 offence:

1. the explosive substance must in fact be placed in the relevant location;
2. there is no requirement that an explosion occur;
3. the offence is committed whether anyone is injured or not.

2.217 The conduct element of the section 64 offence is simply possession or making of the substance or machine in question. There is no required result.

**Mental element**

2.218 The section 28 offence must be committed “maliciously”, meaning there must be intention to cause some physical injury, or awareness of the risk of such injury.

2.219 The section 29 offence has two stated mental elements.

1. The conduct must be performed “maliciously”.
2. In addition, there must be intent to burn, maim, disfigure, or disable any person or to do some grievous bodily harm.

Following Cunningham, the requirement of malice is satisfied if there is intention or recklessness as to some physical injury. As this is necessarily implied by the second element, it would seem that the word “maliciously” is superfluous.

300 Explosive Substances Act 1883, s 2.
301 Explosive Substances Act 1883, s 3.
302 Explosive Substances Act 1883, s 4.
304 Cunningham [1957] 2 QB 396; Mowatt [1968] 1 QB 421, 426; see para 2.198 above.
2.220 The offence under section 30 always requires intention to do a bodily injury. That being so, it is doubtful whether the word “maliciously” adds anything. It cannot mean simply intention or recklessness as to the placing of the gunpowder or explosives, as placing gunpowder or explosives was not in itself illegal (in 1861). Nor will there be a case where D is merely reckless about the placing of the explosives but at the same time intends them to cause bodily injury.

2.221 The offence under section 64 requires intent to commit, or enable another person to commit, a felony under the 1861 Act. “Felony” here is interpreted as any offence for which a person (not previously convicted) may be tried on indictment otherwise than at his own instance.306

Relationship to other offences involving bodily harm

2.222 The offence under section 28 will almost always amount to an offence under section 20 (infliction of grievous bodily harm) as well. There may be an exception in the case of a burn or disfigurement which is insufficient to constitute grievous bodily harm.

2.223 The other offences do not require any physical injury to occur, and are in that sense inchoate offences. They will therefore not be covered by other offences against the person, though in some cases they will amount to an attempt to commit these offences.

Mode of trial and sentencing

2.224 All four offences are triable on indictment only.307 As provided by the sections creating those offences,308 for the offences under sections 28 and 29, the maximum sentence is imprisonment for life; for section 30, fourteen years; and for section 64, two years.

2.225 There are no sentencing guidelines for the explosives offences under the 1861 Act, and they are not mentioned in the CPS sentencing manual.309

2.226 Some guidance may be derived from the similar offences under the Explosives Act 1883. Martin310 established the sentencing range for the offence under sections 2 and 3 of that Act and distinguished between cases where the primary purpose was aimed at endangering life (20 to 35 years depending on the facts of the case) and destruction of property. For the latter type of case, the starting point could be less than 20 years, or even less than 15 years, having regard to

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305 On the analogy of Cato, para 2.199 above, it might also be satisfied by intention or recklessness as to the causing of explosions, the impact of the substance etc. The point here is that, whether or not intention or recklessness as to physical harm is necessary, it is always sufficient.

306 Criminal Law Act 1967, s 10(1) and Sch 2 para 8.

307 Archbold para 19-293; Blackstone’s paras B12.224 to B.12.237.

308 In combination with section 1 of the Criminal Justice Act 1948, abolishing penal servitude; the sections are set out in full at para 2.212 above.


the circumstances of the case and the potential for injury and loss of life. On the facts, 28 years was deemed appropriate as "weight must be given to the fact that death and injury, although a likely by-product of implementation of the conspirators’ plan, was not its primary object". 

Statistics

Total number of cases

According to the Ministry of Justice, in the period from 2003 to 2013, between 3 and 13 defendants were prosecuted and reached a first hearing in a magistrates’ court for these offences in each year. These figures include cases which were later sent to the Crown Court.

Cases disposed of in magistrates’ courts

As these offences are triable only on indictment, the only cases tried and sentenced in magistrates’ courts are cases in the youth court. In the period from 2003 to 2013, there have only been two such cases, both of which resulted in a custodial sentence.

Cases disposed of in the Crown Court

In the period from 2003 to 2013, the greatest number of defendants sent for trial in the Crown Court for these offences in any one year was 12. Of these, 10 were convicted and all of them received a custodial sentence. The figures for the other years were significantly lower, three years having only one case each and one year having none at all.

Further discussion

We consider the problems concerning explosives and dangerous substances, and possible solutions on the basis of the draft Bill, in Chapter 5 below.

OTHER OFFENCES

Bigamy, attempted abortion and concealing birth

We do not propose to include the following offences under the 1861 Act within this project:

1. bigamy;
2. attempted abortion;


Figures supplied by the Ministry of Justice.

Paras 5.188 to 5.195 below.

OAPA 1861, s 57.

OAPA 1861, ss 58 and 59.
(3) concealing birth.\(^{317}\)

They are not included in the 1998 draft Bill or in previous Law Commission projects on offences against the person, and raise issues going well beyond the law of offences against the person.

**Railway offences**

2.232 Sections 32, 33 and 34 of the 1861 Act all concern the causing of danger on railways.

(1) Section 32 makes it an offence “unlawfully and maliciously” to interfere with railway lines (such as by putting obstacles on the track, removing rails or sleepers, interfering with points or signals) with intent to endanger the safety of any person travelling or being on the railway. This offence is triable on indictment only, and the maximum sentence is imprisonment for life.

(2) Section 33 makes it an offence “unlawfully and maliciously” to throw things at a train with intent to endanger the safety of a person on the train. This too is triable on indictment only and has a maximum sentence of imprisonment for life.

(3) Section 34 makes it an offence to endanger the safety of a person on a railway by any unlawful act or wilful omission. This is triable either way and has a maximum of two years’ imprisonment.

**Statistics of use**

2.233 According to the Ministry of Justice, the following numbers of defendants were prosecuted for these offences in the years from 2003 to 2013:

(1) up to 16 per year for the offence under section 32;

(2) up to 4 per year for the offence under section 33;

(3) between 14 and 44 per year for the offence under section 34.

**Remaining offences**

2.234 The remaining offences in the 1861 Act are not reproduced in the draft Bill. They are as follows:

(1) impeding a person escaping from a shipwreck;\(^{318}\)

(2) attempting to choke in order to commit an indictable offence;\(^{319}\)

(3) not providing apprentices or servants with food;\(^{320}\)

\(^{317}\) OAPA 1861, s 60.

\(^{318}\) OAPA 1861, s 17.

\(^{319}\) OAPA 1861, s 21.

\(^{320}\) OAPA 1861, s 26.
(4) exposing children to danger; 321
(5) setting a spring gun, man trap or other engine calculated to destroy life or cause grievous bodily harm; 322
(6) causing harm by furious driving. 323

Statistics of use

2.235 According to the Crown Prosecution Service, the total numbers of charges for each of these offences which reached a first hearing at a magistrates’ court in the years from 2011 to 2013 inclusive were as follows:

(1) 28 charges of attempting to choke; 324
(2) 9 charges of exposing children to danger; 325
(3) 2 charges of setting a spring gun, man trap or engine; 326
(4) 43 charges of causing harm by furious driving. 327

2.236 According to the Ministry of Justice, the numbers of defendants for the years from 2003 to 2013 inclusive were as follows.

(1) For attempting to choke, 328 up to 28 defendants per year.
(2) For exposing children to danger, 329 up to 9 defendants per year.
(3) For setting spring guns or man-traps, 330 up to 5 defendants per year (but frequently none at all).
(4) For furious driving, 331 between 7 and 31 defendants per year.

2.237 The Crown Prosecution Service and Ministry of Justice figures show no prosecutions for impeding a person escaping from a shipwreck. According to the Ministry of Justice there was one prosecution for not providing servants or

321 OAPA 1861, s 27.
322 OAPA 1861, s 31. In Cockburn [2008] EWCA Crim 316, [2008] QB 882 it was held that a spiked steel plate placed so as to fall from a shed door could be an “engine” though it had no motive power of its own. See D Ormerod, case comment, [2008] Crim LR 802. See also Munks [1964] 1 QB 304, [1963] 3 All ER 757 (only mechanical, and not electrical, devices are covered by the offence).
323 OAPA 1861, s 35.
324 OAPA 1861, s 21.
325 OAPA 1861, s 27.
326 OAPA 1861, s 31.
327 OAPA 1861, s 35.
328 OAPA 1861, s 21.
329 OAPA 1861, s 27.
330 OAPA 1861, s 31.
331 OAPA 1861, s 35.
apprentices with food in 2004,\textsuperscript{332} but this appears to be the only example in the last decade.

\textsuperscript{332} OAPA 1861, s 26.
<table>
<thead>
<tr>
<th>OFFENCE</th>
<th>CHARGES/YEAR&lt;sup&gt;347&lt;/sup&gt;</th>
<th>DEFENDANTS/YEAR&lt;sup&gt;348&lt;/sup&gt;</th>
<th>CONVICTED IN MAGISTRATES’ COURTS&lt;sup&gt;349&lt;/sup&gt;</th>
<th>SENT FOR TRIAL &amp; CONVICTED IN THE CROWN COURT&lt;sup&gt;350&lt;/sup&gt;</th>
</tr>
</thead>
<tbody>
<tr>
<td>Common assault</td>
<td>111,000-122,000</td>
<td>55,000-80,000</td>
<td>31,000-53,000 (3,000-6,500 custodial sentences + 700 sent to Crown Court for sentence)</td>
<td>1,000-2,000</td>
</tr>
<tr>
<td>Assault occasioning ABH OAPA 1861 s 47</td>
<td>16,000-35,000</td>
<td>11,000-36,000</td>
<td>2,000-10,000 (250-1,500 custodial sentences + 800-1,700 sent to Crown Court for sentence).</td>
<td>4,000-8,000 (2,000-4,000 custodial sentences&lt;sup&gt;351&lt;/sup&gt;)</td>
</tr>
<tr>
<td>GBH/wounding OAPA 1861 s 20</td>
<td>4,000-6,200</td>
<td>3,000-5,000</td>
<td>250-900 (30-200 custodial sentences)</td>
<td>3,000-4,100 (1,800-2,500 custodial sentences)</td>
</tr>
<tr>
<td>GBH/wounding with intent OAPA 1861 s 18</td>
<td>6,000-8,500</td>
<td>4,500-8,000</td>
<td>&lt;100&lt;sup&gt;352&lt;/sup&gt;</td>
<td>1,400-1,700 (almost all custodial)</td>
</tr>
<tr>
<td>Assaulting constable PA 1996 s 89(1)</td>
<td>17,000-20,000</td>
<td>9,000-13,000</td>
<td>All.</td>
<td>None.&lt;sup&gt;353&lt;/sup&gt;</td>
</tr>
</tbody>
</table>

<sup>347</sup> Number of offences charged reaching a first hearing in a magistrates’ court each year in the period 2009-14, except in the case of common assault, where the relevant period is 2005-13, and assault of a constable where it is 2011-13. From Crown Prosecution Service figures, which are only available for the offences displayed on this page.

<sup>348</sup> Number of defendants prosecuted in a magistrates’ court each year in the period 2003-13, according to Ministry of Justice figures.

<sup>349</sup> Number of defendants per year, 2003-13, MoJ figures.

<sup>350</sup> Number of defendants per year, 2003-13, MoJ figures.

<sup>351</sup> All figures for custodial sentences include those sent from the magistrates’ court for sentence post-conviction, since the MoJ does not record these statistics separately. 380-670 s 47 offenders over the period received custodial sentences under 6mths in the Crown Ct in total in relation to this offence.

<sup>352</sup> Only youths can be tried for s 18 offences in a magistrates’ court.
<table>
<thead>
<tr>
<th>OFFENCE</th>
<th>DEFENDANTS/ YEAR</th>
<th>CONVICTED IN MAGISTRATES' COURTS</th>
<th>SENT FOR TRIAL &amp; CONVICTED IN THE CROWN COURT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Racially or religiously aggravated assault(^{354})</td>
<td>750-1,600</td>
<td>250-950 (60-160 custodial sentences)</td>
<td>80-200 (43-92 custodial sentences)</td>
</tr>
<tr>
<td>Racially or religiously aggravated ABH</td>
<td>Up to 550(^{355})</td>
<td>Up to 100 (up to 22 custodial sentences)</td>
<td>Up to 101 (up to 66 custodial sentences)</td>
</tr>
<tr>
<td>Racially or religiously aggravated GBH</td>
<td>Up to 190(^{356})</td>
<td>Up to 80 (up to 14 custodial sentences, normally many fewer)</td>
<td>Up to 34 (up to 27 custodial sentences)</td>
</tr>
<tr>
<td>Threats to Kill OAPA 1861 s 16</td>
<td>1,300-3,800</td>
<td>120-280 (27-62 custodial sentences; 45-92 sent to Crown Ct for sentencing)</td>
<td>170-240 (128-176 custodial sentences)</td>
</tr>
</tbody>
</table>

\(^{353}\) The s 89(1) offence cannot be tried in the Crown Court, even as part of a larger indictment.

\(^{354}\) Including battery – this and the following two aggravated offences exist by virtue of s 29 of the Crime and Disorder Act 1998.

\(^{355}\) There is a consistent and steep decline in the usage of this offence over the relevant period.

\(^{356}\) There is a consistent and steep decline in the usage of this offence over the relevant period.
<table>
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<tr>
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</tr>
</thead>
<tbody>
<tr>
<td>Solicitation to Murder</td>
<td>17-63</td>
<td>Up to 3(^{357})</td>
<td>2-26 (almost all custodial sentences)</td>
</tr>
<tr>
<td>OAPA 1861 s 4</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Poisoning:</td>
<td>20-45</td>
<td>Up to 7(^{358})</td>
<td>Up to 21 (up to 15 custodial sentences)^{359}</td>
</tr>
<tr>
<td>OAPA 1861 ss 22-24</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Explosives:</td>
<td>3-13</td>
<td>2 between 2003 and 2013(^{360})</td>
<td>Up to 10 (almost all custodial)^{361}</td>
</tr>
<tr>
<td>OAPA 1861 ss 28-9, 30 &amp; 64</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

\(^{357}\) Since this offence is indictable-only, only youths are tried for it in the magistrates' courts. In our period, only 1 ever received a custodial sentence.

\(^{358}\) Since this offence is indictable-only, only youths are tried for it in the magistrates' courts. In our period, only 2 ever received a custodial sentence.

\(^{359}\) This was exceptional, with only 2 of the 10 years covered having numbers anywhere near this – 2003 & 2005.

\(^{360}\) These offences are all indictable-only, so this only refers to youths. Both received custodial sentences.

\(^{361}\) The year this refers to, 2004, was also exceptional – in 2009, there were no such offences recorded at all.
Graph 1 shows the number of charges brought by the CPS for common assault and the section 47 offence between 2009/10 and 2013/14 – as with violent crime in general, there is an overall pattern of decline.

Graph 2 uses the same CPS statistics to show the proportion of common assault and section 47 charges out of the total number of charges for both offences. So while both are declining in absolute terms, relatively charges of summary-only common assault are becoming more common.
Graph 3 uses MoJ statistics to show the percentage of section 47 cases that end up in the Crown Court but receive sentences within the sentencing powers of magistrates.
CHAPTER 3
PROBLEMS IN THE EXISTING LAW

3.1 We have identified a number of problems with the existing law, as found in the 1861 Act. In this chapter we examine these and reach a provisional conclusion that they present a compelling case for further reform. We seek views on that discussion and provisional conclusion.

3.2 The main problems are:

(1) there is some incoherence in the classification of the offences, for example:
   (a) some offences relate to narrowly specialised situations, or include complex lists of situations, rather than setting out a clear principle;
   (b) the offences are not clearly classified in order of seriousness;

(2) the mental element of some offences is not clearly expressed, and does not reflect the external elements of those offences;

(3) the language is often archaic and obscure;

(4) there are redundancies in the drafting, such as the use of “maliciously” together with a more clearly defined requirement of intent;

(5) there are references to obsolete legal concepts and procedures, which are only resolved by interpretation provisions in other statutes.

3.3 Such problems are not confined to the 1861 Act. Commenting on the complicated relationship between the offences of assault and battery, Lord Justice Henry said:

Most, if not all, practitioners and commentators agree that the law concerning non-fatal offences against the person is in urgent need of comprehensive reform to simplify it, rationalise it and make it trap-free. The present appeal … is of no practical importance whatsoever but is yet another example of how bad laws cost money and clog up courts with better things to do.¹

(1) INCOHERENCE OF OFFENCE CLASSIFICATION

3.4 The first main criticism of the 1861 Act relates to its structure. The divisions between the different offences appear arbitrary and illogical, whether one considers divisions according to subject matter² or according to seriousness of harm.

² The individuals affected, the methods used etc.
Incoherent division by subject matter

3.5 In our Eleventh Programme, we observed that the 1861 Act “follows a Victorian approach of listing separate offences for individual factual scenarios, many of which are no longer necessary”. After further study we stand by this criticism. Examples of specialised offences covering narrow scenarios are as follows:

(1) obstructing or assaulting a clergyman in the discharge of his duties;\(^4\)

(2) assaulting a magistrate or other person in the exercise of his duty preserving a wreck;\(^5\)

(3) administering stupefying substances with intent to commit an offence;\(^6\)

(4) impeding a person escaping from a shipwreck;\(^7\)

(5) attempting to choke in order to commit an indictable offence;\(^8\)

(6) not providing apprentices or servants with food;\(^9\)

(7) exposing children to danger;\(^10\)

(8) setting spring guns, man traps and similar engines;\(^11\)

(9) causing harm by wanton or furious driving of a carriage or vehicle.\(^12\)

3.6 This is unsatisfactory for several reasons.

(1) Some of these situations are of rare occurrence, or are not applicable in today’s society: for example impeding escape from wrecks and not providing apprentices or servants with food.\(^13\)

(2) Some are adequately covered by more general offences such as assault: for example assaulting clergymen or officers concerned with wrecks.

(3) The more narrowly specialised the ingredients of an offence, the more difficult they are to prove and the greater the danger of selecting the wrong charge.

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\(^3\) Eleventh Programme of Law Reform (2011) Law Com No 330, para 2.61.
\(^4\) OAPA 1861, s 36.
\(^5\) OAPA 1861, s 37.
\(^6\) OAPA 1861, s 22.
\(^7\) OAPA 1861, s 17.
\(^8\) OAPA 1861, s 21.
\(^9\) OAPA 1861, s 26.
\(^10\) OAPA 1861, s 27.
\(^11\) OAPA 1861, s 31.
\(^12\) OAPA 1861, s 35.
\(^13\) Para 2.237 above.
(4) Some offences under the 1861 Act refer to specific chemicals or technological devices, and therefore risk becoming obsolete or under-inclusive as new inventions are made.

(5) The offence of causing harm by furious driving is anomalously placed in this statute, given the abundance of offences under the Road Traffic Acts.14

3.7 In some cases there are several narrow offences covering similar subject matter. For example:

(1) the 1861 Act contains four separate offences relating to explosives; some of these also relate to substances other than explosives.15 (There are three further offences in the Explosive Substances Act 1883.16)

(2) There are also three separate offences of causing danger on railways.17

This may not cause many practical difficulties, as in cases of doubt more than one offence can be charged. However, it is uneconomical and clutters the statute book. Fewer, simpler and broader offences could cover the same ground.

3.8 In other cases a section creating an offence lists several factual variants. Examples are as follows.

(1) The offence under section 20 covers both the infliction of grievous bodily harm and wounding, whether grievous or not. (As originally drafted it also covered shooting.)

(2) The offence under section 18 is also divided between grievous bodily harm and wounding. In addition, it can be committed either with intent to do grievous bodily harm or with intent to resist or prevent lawful apprehension or detention. This yields ten factual permutations.18

(3) The offence under section 29 includes:

   (a) causing explosions;
   
   (b) sending explosives or other dangerous or noxious thing;

   (c) putting corrosive fluid or any destructive or explosive substance in a place;

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14 The offence is still occasionally used, particularly for vehicles other than motor cars and incidents not taking place on a road: Archbold para 19-306, Blackstone’s para C3.53; see for example Hall [2009] EWCA Crim 2236, [2010] 1 Cr App R (S) 95.

15 OAPA 1861, ss 28 to 30 and 64.

16 Para 2.213 above.

17 OAPA 1861, ss 32 to 34.

18 Chapter 2 fn 188 above.
(d) throwing corrosive fluid\textsuperscript{19} or any destructive or explosive substance at a person;

in each case, with the intent to burn, maim, disfigure, disable or do grievous bodily harm.

3.9 The use of lists of factual variants can give rise to the following difficulties.

(1) There is doubt whether some of these sections create one offence or several, for example, whether “malicious wounding” is an offence separate from “inflicting grievous bodily harm”.\textsuperscript{20}

(2) It makes the drafting of indictments complicated, and a prosecution may fail because the combination of elements proved at the trial does not coincide with that set out in the indictment. This is particularly likely if the scenarios listed in the section overlap, but the facts proved turn out not to fall within the overlap. For example, D may be charged with causing grievous bodily harm, and the court may find that the injury, though qualifying as a wounding, falls just short of being “grievous”.

(3) Some of the types of conduct or harm specified in the definition of an offence may be much more serious than others; for example “wounding” covers some fairly minor injuries, which are not comparable with “grievous bodily harm”. This makes it hard to set a clear hierarchy among the offences.\textsuperscript{21}

(4) This method of drafting makes the sections hard to understand. It can take time to work out whether a particular incident falls within the section or not. It also takes time for a reader to work out whether the mental element for an offence (such as “maliciously” or “with intent”) applies to all the ways of committing it or only some of them.

(5) More generally, this method of drafting is inelegant and uneconomical. If there is a common theme to the scenarios listed, the offence should be defined by that common theme. If there is not, the scenarios should be separate offences set out in separate sections.

3.10 There is some debate about whether fewer broader offences or several specific offences are more effective in sending a powerful enough message to the public. On the one hand, an offence can be so narrow that the facts seldom occur and its existence has little impact. On the other, an offence can be so broad as to be colourless and not suggest typical behaviour patterns which the public recognises as wrong.


\textsuperscript{20} It has been held that section 18 creates separate offences of wounding with intent and causing grievous bodily harm with intent: \textit{Naismith} [1961] 1 WLR 952, [1961] 2 All ER 735.

\textsuperscript{21} Para 3.16 and following, below.
3.11 In favour of broad offences, we may cite the following comment by Lord Simon of Glaisdale:

It is, in general, the difference between mature and rudimentary legal systems that the latter deal specifically with a number of particular and unrelated instances, whereas the former embody the law in comprehensive, cohesive and rational general rules. The law is then easier to understand and commands a greater respect. Fragmentation, on the other hand, leads to anomalous (and therefore inequitable) distinctions and to hedging legal rules round with technicalities that are only within the understanding of an esoteric class. The general development of English law (like that of other mature systems) has been towards the co-ordination of particular instances into comprehensive and comprehensible general rules.\(^{22}\)

3.12 On the other side of the debate, Professor John Gardner\(^{23}\) argues that it is wrong to classify offences solely by the harm caused: “moral clarity” is achieved by distinguishing the means by which the harm is brought about. For example, both theft and fraud can be means of wrongfully depriving a person of property, though the current concept of fraud\(^ {24}\) is wider than this. However, as Gardner argues, the ideas of “stealing” and “cheating” are clearly distinct in the public mind and have more impact as embodied in separate offences than as a colourless generic offence of “wrongful deprivation”.\(^{25}\) Professor Stuart P Green makes the same point in his recent book Thirteen Ways to Steal a Bicycle,\(^ {26}\) where he argues that different forms of theft involve different wrongs and advocates separate offences based (for example) on the different types of property that can be wrongfully taken.

3.13 We agree that this is a valuable point. However it does not follow that it is always psychologically more effective to distinguish different means of causing the same harm. For example, we believe that the idea of “murder” is psychologically more potent than separate offences of “causing death by shooting”, “causing death by drowning”, “causing death by stabbing”, “causing death by poisoning” and so on.

3.14 In the case of offences against the person, the commonly used offences under sections 18 and 20 are already fairly generic and already well known. The specialised offences of choking, poisoning and so on are comparatively little used and add little to the moral clarity of the law.

Consultation question 1

3.15 Do consultees agree that the number and level of detail of the offences in the 1861 Act is unsatisfactory? In their experience, does this cause problems in practice?


\(^{24}\) Under the Fraud Act 2006.


\(^{26}\) Thirteen Ways to Steal a Bicycle: Theft Law in the Information Age (2012).
Incoherent division by seriousness

3.16 In the document introducing our Eleventh Programme,\textsuperscript{27} we observed:

The structure of the Act is also unsatisfactory as there is no clear hierarchy of offences and the differences between sections 18, 20 and 47 are not clearly spelt out in the Act. Section 20 (maliciously wounding or inflicting grievous bodily harm) is seen as more serious than section 47 (assault occasioning actual bodily harm) but the maximum penalty (five years) is the same. Furthermore the actus reus for sections 18 (intentionally wounding or causing grievous bodily harm) and 20 appear to be the same apart from the distinction between “causing” and “inflicting”, which is notoriously difficult to draw.

Similarly Lord Lowry, in \textit{Brown},\textsuperscript{28} commented that the offences under sections 18, 20 and 47 “were not drafted with a view to setting out the various offences with which they deal in a logical or graded manner”.

3.17 An approximate hierarchy among the offences is set by the available sentences.

(1) The offences under sections 4 (solicitation to murder), 18 (causing grievous bodily harm with intent), 22 (administering stupefying substances), 28 (causing explosions to do grievous bodily harm), 29 (using explosives or noxious substances with intent to do grievous bodily harm), 32 (interfering with railway lines) and 33 (throwing things at trains) are all punishable with imprisonment for life.

(2) The offence under section 30 (placing or throwing explosives or noxious substances) is punishable with imprisonment for fourteen years.

(3) The offences under sections 16 (threats to kill) and 23 (administering noxious thing to endanger life or inflict grievous bodily harm) are punishable with imprisonment for ten years.

(4) The offences under sections 20 (wounding or inflicting grievous bodily harm), 24 (administering noxious thing with intent to injure or annoy) and 47 (assault occasioning actual bodily harm) are punishable with imprisonment for five years.

(5) The offences under sections 34 (endangering safety of persons on railway) and 64 (possession of explosives) are punishable with imprisonment for two years.

3.18 This could correlate to the seriousness of the offence, as measured by either of two criteria: the harm caused, or the mental element.

\textsuperscript{27} Eleventh Programme of Law Reform (2011) Law Com No 330, para 2.62.

\textsuperscript{28} [1994] 1 AC 212, 248, citing our 1992 CP, para 7.4.
Assessing seriousness by harm caused

3.19 Generally speaking, the offences attracting longer sentences are those involving “grievous bodily harm”, either occurring or intended. However, there are anomalies.

(1) Both the offence under section 18 and that under section 20 can be committed by wounding, without causing grievous bodily harm, though in the case of the section 18 offence grievous bodily harm must be intended.29

(2) The explosives offences under sections 28 and 29 speak of burning, maiming, disfigurement, disablement or grievous bodily harm. It is not clear whether burning, maiming, disfigurement and disablement automatically qualify as grievous bodily harm for the purposes of any other offences.

(3) The offence under section 20, although involving grievous bodily harm, only attracts a maximum sentence of five years, whereas the equivalent offence involving drugs or noxious substances is punishable with up to ten years.

3.20 The most problematic boundary is probably that between the section 47 offence (assault occasioning actual bodily harm) and common assault. An assault causing minor physical injuries can be prosecuted as either offence. However, common assault is triable summarily only and the maximum sentence is 6 months. Assault occasioning actual bodily harm is triable either way and punishable with up to 5 years.

3.21 This difference can put prosecutors in a difficult position, resulting in distorted charging decisions. On the one hand, there is an inducement to prosecute some quite serious cases as common assault, so as to dispose of the case more quickly and efficiently. On the other, there is an inducement to prosecute some minor cases under section 47, so as to increase pressure on a defendant to plead guilty to common assault as an included offence. Doing this can incur all the trouble and expense of Crown Court proceedings, though the final sentence is one that could have been imposed by a magistrates’ court. This is borne out by the statistics: as stated in Chapter 2, between 7% and 12% of defendants sentenced by the Crown Court for the section 47 offence receive a sentence which would have been within the powers of a magistrates’ court.30

Assessing seriousness by mental element

3.22 The correspondence between sentence and mental element is somewhat closer, in that all the offences punishable with imprisonment for life are offences of intent.

3.23 The anomalous case is the relationship between the offences under sections 20 and 47. Section 20 requires “malice”, namely intent or recklessness as to some bodily harm. Section 47 requires only the same mental element as common

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29 Except in the form involving resistance to or prevention of lawful apprehension or detention.

30 Para 2.74 above and Graph 3 at end of Chapter 2.
assault, and does not specify that D must intend or foresee any bodily harm. Nevertheless they attract the same maximum sentence, five years. This, however, may be regarded as a problem about sentencing rather than a problem about the hierarchy of offences.

*Proportionality in sentencing*

3.24 There are three offences under the 1861 Act which carry a maximum sentence of five years’ imprisonment, namely the offences under sections 47 (assault occasioning actual bodily harm), 20 (inflicting grievous bodily harm) and 24 (poisoning with intent to injure or annoy).

3.25 Whether one considers the harm caused or the mental element, the offence under section 20 must be more serious than that under section 47. Section 20 requires “grievous bodily harm” or wounding; section 47 requires only actual bodily harm. Section 20 requires intention to cause bodily harm, or recklessness as to such harm; section 47 requires only sufficient intention or recklessness to commit an assault.

3.26 On the other hand, the difference between the sentencing powers under section 20 (5 years) and section 18 (life) is enormous, though the external elements of the two offences are almost identical. We appreciate that a deliberate intention to cause grievous bodily harm moves an attack to a much higher level of seriousness. However, it is not clear whether it is proportionate to have a life sentence available for the other forms of the offence, in which D intends to resist or prevent lawful apprehension or detention.31

**Consultation question 2**

3.27 Do consultees consider that the grading of offences in the 1861 Act is illogical? In their experience, are there practical problems associated with the grading of the offences?

**(2) PROBLEMS OF DEFINITION WITHIN INDIVIDUAL OFFENCES**

3.28 There are some problems of definition within the individual offences. These mainly relate to the mental element of each offence, for example whether D needs to intend or foresee a particular result to be guilty of an offence. The problems fall under the following headings:

(a) the meaning of intent;

(b) the role of recklessness;

(c) what must D intend or foresee?

(d) whether it is justified to have offences of endangerment.

(a) Meaning of intent

3.29 As mentioned in Chapter 2,\(^{32}\) intention is not limited to cases where D acts in order to bring about a particular result. There are also cases of “oblique intent”, where D’s foresees as virtually certain that his conduct will lead to a result. Our report on Murder, Manslaughter and Infanticide\(^ {33}\) states the current law as follows.

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

One advantage of this formulation is that the phrase “if D did what he or she was set on doing” can mean equally “if D performed the intended conduct” or “if D achieved the intended result”.

3.30 We do not believe that this is an unreasonable result; and if there are problems, they are not peculiar to the law of non-fatal offences against the person. However it would be desirable for the law in this area to be stated explicitly rather than inferred from the word “intent” or “intention”.

(b) The role of recklessness in the offences

3.31 Many of the offences under the 1861 are described in terms of “maliciously” performing a given action or bringing about a given result. This has been interpreted judicially as meaning that D either intends to cause harm or is reckless as to whether harm is caused.

3.32 As explained in Chapter 2,\(^ {34}\) there is still a doubt about the meaning of recklessness in this context. Where a statute uses the term “recklessness” or “recklessly”, this is interpreted as meaning that:

(1) D was aware of the risk of causing harm;
(2) D nevertheless took that risk;
(3) the decision to take that risk was not justified in the circumstances as D knew or believed them to be.

However, when the word used is “maliciously” rather than “recklessly”, it is not clear as a matter of authority that the third requirement, about the risk being unjustified, applies.

3.33 In Chapter 2\(^ {35}\) we argue that the better view is that the requirement of lack of justification does apply in these offences, and we assume this for the purposes of

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\(^{32}\) Para 2.23 above.


\(^{34}\) Para 2.96 above.

\(^{35}\) Para 2.97 above.
our subsequent discussion.\(^{36}\) However, the existence of this doubt is itself a defect in the law, which should be resolved in any reforming statute.

\textbf{(c) What must D intend or foresee?}

3.34 A frequent criticism of the 1861 Act is that, in many offences, there is a lack of correspondence between the external elements of the offence\(^ {37}\) and the required mental element. That is to say, D can be held liable for results that are more severe than what D intended or foresaw. For example, under section 47, D’s act must cause actual bodily harm to V, but there is no requirement that D should have intended or foreseen such harm.

\textit{Principles of liability}

3.35 The 1989 draft Criminal Code\(^ {38}\) lays down that, in general, a person should not be liable for an offence unless he or she acts intentionally, knowingly or recklessly in respect of each of its elements. Academics refer to this as “the correspondence principle”.\(^ {39}\)

3.36 The justification for this principle is that D is not morally to blame for causing harm unless he or she intended that harm, or at least knowingly took the risk of it. To hold D responsible for harm going beyond what was intended or foreseen is to make criminal liability depend on luck.\(^ {40}\) That is not to say that D must have foreseen the precise chain of events. It is sufficient if the harm intended or foreseen is of the kind and degree specified in the definition of the offence.

3.37 Offences may depart from the correspondence principle in a variety of ways. There are:

\begin{enumerate}
\item offences of strict liability, where D can be guilty for performing a given act or bringing about a given result, regardless of D’s intention or knowledge concerning one or more of the external elements of the offence; for example, possession of firearms,\(^ {41}\) where D need not know the nature of the article possessed;
\item offences of constructive liability, where D must intend or foresee some harm, but the required state of mind relates to a lower degree of harm than that required for the offence; for example, murder, where D need only intend grievous bodily harm;
\end{enumerate}

\(^{36}\) For example, of the transmission of disease in Chapter 6.

\(^{37}\) That is, the physical nature of the conduct constituting the offence and the circumstances and consequences of that conduct, as opposed to D’s state of mind in engaging in it.

\(^{38}\) (1989) Law Com No 177, cl 24(1).


\(^{40}\) Ashworth and Horder (above), pp 156 and 157.

\(^{41}\) Firearms Act 1968, s 1.
(3) offences of ulterior intent, where D must intend some result over and above the external requirements of the offence; for example, assault with intent to rob,\(^d\) where no actual robbery need occur.

We do not discuss offences of strict liability here.

**CONSTRUCTIVE LIABILITY**

3.38 The desirability of always constructing offences so as to respect the correspondence principle is not universally accepted.\(^d\) For example, Professor John Gardner\(^d\) defends the existence of offences of constructive liability. In such offences, D’s state of mind need not relate to the precise ingredients of the offence committed but need only be sufficient to bring D to the threshold of criminal liability.\(^d\) The effect of this is that, once D is to blame for a particular degree of harm, he or she is responsible for any consequences that follow and cannot complain if the harm done goes beyond what was intended or foreseen.

3.39 Constructive liability can exist in two variants.

(1) In the more extreme version, it is sufficient that D intended (or took the risk of) *anything* wrong: any harm caused is then “D’s fault”. An example of this is the offence of “unlawful act manslaughter”, which is committed when death results from any unlawful act; though it is now held that that act must be dangerous, in the sense that some harm was foreseeable by the sober and reasonable person (even if not by D).\(^d\)

(2) In the more moderate version, D must intend (or be reckless about) the same kind of harm as underlies that family of offences. This is the principle that underlies section 20 of the 1861 Act: D must intend or be reckless about the risk of some physical harm, even if that harm would not be sufficient to constitute the offence.\(^d\)

3.40 The above discussion concerns the results of D’s actions. There is a similar debate about whether offences should always require proof of D’s state of mind as to the circumstance element(s) of the offence: for example where the definition of an offence includes requirements as to time, place, or whether V consents to D’s actions. The correspondence principle indicates that, if the circumstances contribute to the wrongfulness of the offence, it follows that D should not be liable

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42 Theft Act 1968, s 8.


44 A Ashworth and J Horder (above), pp 76 and 77.

45 Smith and Hogan, 15.3.1.

46 For this distinction, see Ashworth and Horder (above) p 76.
for that offence unless he or she is aware of them (or at least of the risk that they may be present).

3.41 An example where this principle is not followed is the offence of assaulting a constable in the execution of his duty. The mental element for this offence is identical to that of common assault, and there is no requirement that D should be aware that V was or might be a police officer.48

ULTERIOR INTENT

3.42 We do not regard the existence of offences of ulterior intent as problematic in principle.49 In a sense they violate the correspondence principle, but not in a way that causes unfairness to a defendant. That is, offences of constructive liability penalise a defendant for a result which he or she brought about but did not intend or foresee. Offences of ulterior intent penalise a defendant for a result which he or she intended but did not bring about; unlike offences of constructive liability, they do not depend on luck. They may be regarded as similar to inchoate offences, such as attempt; but it has been argued that they are preferable to attempt, as they define the forbidden conduct more closely and are further from constituting thought crime.50

Consultation question 3

3.43 Do consultees consider that, in principle, it is desirable that offences of violence to the person should be defined in such a way that the offender must intend or foresee the type and level of harm specified in the external elements of the offence? Or should the mental element of offences be set in accordance with a different principle?

Examples under the 1861 Act

3.44 Very few offences under the 1861 Act show strict correspondence between the external elements of the offence and the results which D is required to intend or foresee. Most of the offences are either offences of constructive liability or offences of ulterior intent.

OFFENCES OF CONSTRUCTIVE LIABILITY

3.45 Some offences against the person are offences of constructive or even strict liability.51 Examples are:

(1) section 47: D must cause actual bodily harm but there is no need for D to foresee actual bodily harm;

(2) section 20: D must cause a wound or grievous bodily harm but need only foresee some bodily harm;

48 Paras 2.142 and 2.143.

49 For a general discussion, see J Horder, “Crimes of Ulterior Intent”, in A Simester and A Smith (eds), Harm and Culpability (1996) p 153.


51 For constructive liability, see para 3.50 below.
(3) assault on a constable: V must be a constable, but D need not know or suspect that V is a constable when assaulting him;

(4) the offence of poisoning under section 23 violates the correspondence principle in two respects. First, the offence requires administration of the substance and bodily harm; it is sufficient for D to intend or foresee administration of the substance or bodily harm. Secondly, D need only foresee some bodily harm, not necessarily danger to life or grievous bodily harm.

Assault occasioning actual bodily harm

3.46 The mismatch is perhaps most marked in the case of section 47. The occasioning of actual bodily harm is the main distinguishing feature of the offence; but D need not intend or foresee any bodily harm.\(^{52}\) Similarly, broadly speaking it is lack of consent to assault, rather than lack of consent to bodily harm, that determines liability for the offence.\(^{53}\)

3.47 The current reading of section 47 is that it creates an offence separate from assault, and that actual bodily harm is a central ingredient of that offence.\(^{54}\) It is also the ingredient that seems to import most of the seriousness of the offence, as shown in the fact that its presence increases the possible sentence from 6 months to 5 years. It seems extraordinary, and unjust, that D need have no awareness of the main ingredient of the offence, and that the choice between such widely divergent maximum sentences can depend on a pure accident.

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

Other offences

3.49 There is also a lack of correspondence in the offences under sections 20 and 23. D’s conduct must cause grievous bodily harm (or a wound, or danger to life); but D need only intend or foresee the possibility of some harm.\(^{55}\)

3.50 This is a classic instance of constructive liability. The Act as a whole is concerned with injuries to the person. Its underlying rationale is that it is sufficient that, in each offence, some injury to the person is intended or foreseen.\(^{56}\) That is what Kenny meant by “an injury of the same kind as that which in fact was done”:

\(^{52}\) Para 2.61 above.

\(^{53}\) Para 2.59 above. Where the harm is intentionally or recklessly inflicted, this may invalidate consent to the assault.

\(^{54}\) Para 2.48 above.

\(^{55}\) See above, para 2.99 and following. In the case of s 23, the mental element is also satisfied if D knows that the substance is noxious.

\(^{56}\) Except in the offences of ulterior intent, ie where D intended a greater harm than was in fact caused, for instance wounding with intent to cause GBH contrary to s 18. See from para 3.57 below.
intention to cause bodily harm (of whatever degree) is relevant, intention to cause damage to property is not.\textsuperscript{57}

3.51 This is less seriously anomalous than the position under section 47, though it still violates the correspondence principle.

(1) In section 47, a whole ingredient is missing from the mental element, as D need not foresee any harm at all. In sections 20 and 23, the only difference is one of degree: D must foresee some harm, and cause serious harm.

(2) Also, there is no resulting unfairness about sentencing powers. If D foresees minor harm, but causes serious harm, the available sentence under sections 20 and 23 is five years. Had D only caused minor harm, section 47 or 24 would apply, and the maximum sentence would still be five years. Accordingly, D is not exposed to a longer maximum sentence because of a purely accidental result of his or her action.

3.52 It could accordingly be argued that the disparity in sections 20 and 23 is unlikely to cause serious injustice in practice. We are not convinced of this, for the following reasons.

(1) The jury, in convicting D of the offence under section 20 or 23, will not indicate whether they believe that D foresaw minor harm or serious harm.\textsuperscript{58} It is therefore possible that the sentence, though falling within the 5 year maximum, will be based on a view of the facts different from that which the jury actually took.

(2) Even if the sentence passed is just and proportionate, D still suffers the stigma of the grievous bodily harm offence. This will appear on his or her criminal record in the same way as if D had foreseen really serious harm.

3.53 The main concerns are those of labelling, and the general subjectivist principle that D should not be convicted for a wrong/harm he or she has not chosen to cause or risk causing. It looks strange to have an offence of wounding where D need not intend or consciously risk causing a wound, and similarly for the other permutations.

General points

3.54 Another point is that, whatever the merits of constructive liability in principle, it does not apply in a consistent way across the 1861 Act. If it is sufficient that D has reached the threshold of criminal liability, the required state of mind for all the offences should be that for common assault. If however intention or recklessness as to some physical harm is required, this should equally be the case for the section 47 offence, which is based precisely on that kind of harm.\textsuperscript{59} In short, the objection to the scheme of the 1861 Act is not simply that it violates the

\textsuperscript{57} C Kenny, \textit{Outlines of Criminal Law} (1st ed 1902, repr 1904) p 147.

\textsuperscript{58} Or, in the case of s 23, simply that the substance was noxious.

correspondence principle, but that it does so inconsistently and for no apparent reason.

3.55 A further effect of the lack of correspondence between the external and mental elements of these offences is unnecessarily complicated and intricate drafting, producing offences that are hard to label appropriately or to rank in a clear hierarchy.

3.56 A final point on constructive liability is that, even if it is justified in principle, it should be stated in explicit terms. It should not be a by-product of Victorian drafting conventions, of which the meaning becomes apparent only after detailed academic and historical research.60

OFFENCES OF ULTERIOR INTENT

3.57 Many of the offences under the 1861 Act are offences of ulterior intent.61 That is to say, D must intend some result over and above those required for the external elements of the offence.

3.58 Examples are:

(1) section 18 wounding: D must intend grievous bodily harm but it is sufficient that he causes a wound and the wound need not itself amount to grievous bodily harm;

(2) section 22: D must administer stupefying substances intending to commit an offence, but that offence need not be committed;

(3) section 24: D must administer a noxious thing intending to injure, aggrieve or annoy, but need not succeed in bringing about that result.

Consultation question 4

3.59 Do consultees consider that the offences under sections 20 and 47 of the 1861 Act are unsatisfactory because they do not require intention or foresight of the type and level of harm that must occur? In their experience, does this give rise to problems in practice?

(d) Endangerment offences

3.60 Most of the offences under the 1861 Act depend on the occurrence of a particular result, such as bodily harm; others depend on the intention to achieve a result, whether it occurs or not. A third category is that of actions that create a danger of harm. These include:

(1) administering poison or a noxious thing so as to endanger life (one branch of the offence under section 23);

(2) exposing children to danger (section 27);


61 Smith and Hogan, 5.3.1.2; J Horder, "Crimes of Ulterior Intent", in AP Simester and ATH Smith (eds), Harm and Culpability (1996) p 153.
(3) setting a spring gun, man trap or engine calculated to destroy life or cause grievous bodily harm (section 31);

(4) endangering the safety of a person on a railway (section 34).

Some other offences contain an element of danger (such as the use of “dangerous” substances) without that being the main feature of the offence.

3.61 These offences are very different from the general endangerment offences that exist in some jurisdictions. The US Model Penal Code, for example, contains an offence of recklessly engaging in conduct which places another person in danger of death or serious bodily injury. There are similar offences in four of the Australian states. (There are some differences between them: in Western Australia the conduct creating the danger need not be reckless but must be “unlawful”, while in Victoria it must be reckless and “without lawful excuse”.)

3.62 The questions of principle concerning endangerment offences are as follows:

(1) are endangerment offences ever justified, or should the law only penalise actual results?

(2) if endangerment offences are justified, is there merit in a general endangerment offence of the type found in the United States and Australia?

(3) if endangerment offences are to exist only in relation to specific activities, how should those activities be chosen?

3.63 The argument for endangerment offences is similar to the argument for inchoate offences and offences of ulterior intent. The law justifiably penalises the intentional or reckless causing of certain harms. If D does exactly the same thing, with exactly the same state of mind, creating exactly the same risks, he or she should not benefit from the purely chance circumstance that the harm does not eventuate.

3.64 The argument against endangerment offences is based on the principle of minimum criminalisation. Penalising simply irresponsible behaviour, where no harm is caused, subjects too many people to liability for too much of the time. For this reason, it is generally accepted that inchoate offences such as attempt

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64 All these questions are discussed by R A Duff, “Criminalizing Endangerment”, in R A Duff and S Green, Defining Crimes: essays on the general part of the criminal law (2005).


66 A Ashworth and J Horder, Principles of Criminal Law (7th ed 2013) p 31 and following.

67 Clarkson (above), pp 141 to 143. See also D Husak, Overcriminalisation (2008) pp 162 and 163.
should only cover cases where the result was intended, and that recklessness should not be sufficient. On this reasoning, offences of ulterior intent are acceptable but endangerment offences, which need only involve recklessness, are not.

3.65 The existing law appears to reflect a middle position. Endangerment offences are justified in connection with activities that intrinsically involve a high level of risk, such as driving and the use of explosives and firearms: to intervene only when the harm occurs is to act too late. Outside these fields, such offences entail an unacceptable degree of intrusion into private life.

3.66 We are not here concerned to take any position on this debate, but only to leave it open to consultation.

Consultation questions 5 and 6

3.67 Do consultees consider that there is benefit in pursuing reform of the law of offences against the person including offences of endangering others?

3.68 If so, should these offences be general or restricted to specific fields of activity?

(3) LANGUAGE

3.69 A common criticism of the 1861 Act is that the language used is archaic and imprecise. As the Act was intended to consolidate previous legislation rather than to constitute a new code, in some cases the language was archaic even in 1861. We consider a few examples here.

Bodily

3.70 The word “bodily” has a somewhat old-fashioned sound, but is readily understood. Unfortunately it is liable to be understood as meaning the wrong thing. A normal reader thinks of physical injuries, and would not suspect that “bodily harm” is also capable of covering psychiatric conditions.

3.71 This is not a criticism of the original drafting: it only means that the law, and the understanding of mental illness, have moved on since 1861. But it is desirable that the language used should clearly describe the law as it now is, rather than requiring creative interpretation.

Grievous

3.72 It is often pointed out that “grievous” is not a word in frequent use in modern English, except in deliberately high-flown and rhetorical contexts such as

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69 As to the result; D may intend to create a danger of harm, but be reckless as to whether the harm occurs.

70 Compare the discussion of remote harms in Ashworth and Horder (above), pp 38 and 39.
“grievous sin”. In describing physical harm, it is more normal to speak of “serious injuries”.

3.73 As against that, it could be argued that the word “grievous” is more precise than “serious”, which is capable of a wide range of meanings. “Grievous” clearly means “really serious” or “exceptionally serious”. “Serious” can have this meaning; but it can equally mean no more than “significant”, “substantial” or “enough to be taken seriously”.

3.74 It has also been pointed out that the term remains familiar because the offences themselves are known to popular culture:71

... the expressions “grievous bodily harm” and “actual bodily harm” and even their abbreviations “GBH” and “ABH” have entered the popular imagination, and now help to constitute the very moral significances which they quaintly but evocatively describe.

3.75 However, the conclusion to be drawn from this is that “grievous” is familiar mainly as part of the label of an offence. For that very reason, it is of no assistance in defining that offence: if all that “grievous” suggests to the popular mind is “bad enough to be GBH”, the definition becomes circular. “Serious”, for all its imprecision, at least has points of reference outside this particular offence and sets the jury to thinking about degrees of seriousness.

3.76 In short, a jury may well ask “how serious is serious” and need an appropriate direction. But they are at least as likely to ask “what does grievous mean”, only to be told something like “really serious”.

Detainer

3.77 Sections 20 and 38 speak of resisting or preventing the “detainer” of a person. This is a Law French infinitive meaning “detention”,72 and is wholly obsolete in modern English, including legal English. It also carries misleading connotations of the American procedure of “entering a detainer”.

Consultation question 7

3.78 Do consultees consider that the language of the 1861 Act is in need of updating?

(4) REDUNDANCY AND OBSCURITY IN DRAFTING

3.79 Apart from archaic vocabulary, there are other points to be made in criticism of the language and drafting of the 1861 Act.

(1) The Act makes use of vague and general terms which have needed a considerable amount of judicial interpretation.

(2) In some cases these terms appear to be redundant, as they express content that is already implied by the context.


72 Compare the use in property law of “user” to mean the use to which property is put.
Different sections of the Act use different words to express what appears to be the same meaning.

Terms requiring judicial interpretation

3.80 The main example of the first criticism concerns the use of the word “maliciously.” Most of the more serious offences in the 1861 Act, in particular that in section 20, contain the description “unlawfully and maliciously”. To the casual reader, this would appear to be mainly rhetorical, or to mean at most “with a wicked enough state of mind to deserve to be criminal”. It also carries a misleading implication of ill will to a particular person.

3.81 The legal meaning of this phrase is now well established and well known to the judiciary and legal profession, and juries are explicitly directed about it. As explained in Chapter 2, the technical meaning of “maliciously” in the 1861 Act covers two possible states of mind, namely intention or recklessness as to the causing of some physical harm.

3.82 This is not the place to discuss whether this should be the mental element of the offences in question. The point here is simply that this meaning is not apparent to a reader of the statute and needs to be explained to juries on each occasion. It would be preferable for the meaning to be clearly explained on the face of the statute.

3.83 In section 23, there is the further ambiguity: intention or recklessness about what? The administration of the substance, or the resulting harm? As we know from Cato, the answer is “either”, but once more this is not clear on the wording of the statute.

3.84 In short, in provisions such as section 20, where it is relied upon to define the mental element of the offence, the word “maliciously” has too much work to do. It would be better for the statute to contain a full explanation, distinguishing intention from recklessness and giving an explicit definition of the latter.

Apparently redundant terms

3.85 By contrast, in some other places in the 1861 Act the word “maliciously” has too little work to do and is arguably unnecessary.

(1) One branch of the offence under section 18 explicitly requires an intention to cause grievous bodily harm. There is no need for a further

73 Another is “bodily”: see para 3.70 above.
74 Complaints about the vagueness of the term “malice” were made as early as 1839: Fourth Report of the Commissioners of Criminal Law (1839) p xiv.
75 See the Crown Court Bench Book, Judicial Studies Board (2010), p 53.
76 Para 2.92 and following, above (for the s 20 offence: the position in other offences is similar).
78 Para 2.198 and following, above.
requirement of intention or recklessness concerning some bodily harm, as this is necessarily implied. The word “maliciously” adds nothing.\(^79\)

(2) As argued above,\(^80\) the same is true of the two explosives offences under sections 29 and 30.

**Use of nearly synonymous terms**

3.86 Section 18 speaks of “causing” grievous bodily harm to any person, while section 20 speaks of “inflicting” grievous bodily harm on another person. Some other sections, such as section 29, speak of “doing” grievous bodily harm, while section 47 speaks of assault “occasioning” actual bodily harm.\(^81\) Each of these terms is defensible, if taken on its own, though perhaps “inflict” is not now a word in very common use. It is the use of all four in the same statute that is confusing.

3.87 In *Mandair*,\(^82\) which turned on a conviction for “causing” grievous bodily harm when it should have been “inflicting”, Lord Mustill commented:

> The reappearance of section 20 before your Lordships’ House barely two years after it was minutely examined in *R v Parmenter*\(^83\) demonstrates once again that this unsatisfactory statute is long overdue for repeal and replacement by legislation which is soundly based in logic and expressed in language which everyone can understand.

3.88 It is not clear how this difference in the drafting arose. The relevant words in section 20 were taken unchanged from a previous statute;\(^84\) the relevant words in section 18 were new, as the predecessor section\(^85\) spoke only of shooting and wounding.\(^86\) The term “inflict” may be derived from the definition of battery as “the actual infliction of any the least unlawful violence to the person of another.”\(^87\)

3.89 Possibly for this reason, it was once thought that the section 20 offence had to involve an assault or battery, whereas the section 18 offence could consist of causing injury by any means (presumably including an omission). As explained above, this no longer represents the current law and the terms are now treated as synonymous.\(^88\)

\(^{79}\) Para 2.125 above.
\(^{80}\) Para 2.220 above.
\(^{81}\) One obvious difference is that a person or object can “do” or “inflict” harm, while an action or event can “occasion” harm. However, “cause” would do for all of them.
\(^{84}\) Prevention of Offences Act 1851, s 4.
\(^{85}\) Offences Against the Person Act 1837, s 4.
\(^{88}\) Para 2.81 above.
3.90 The legal meanings of “inflict” and “cause” are now reasonably settled and no longer cause problems in practice. Nevertheless the difference is confusing for a non-expert reader. In any new statute, either the same wording should be used in both contexts or the difference should be clearly explained.

Consultation question 8

3.91 Do consultees consider that the language of the 1861 Act is obscure and contains redundancies, and would there be benefits in making it more explicit?

(5) OBSOLETE LEGAL REFERENCES

3.92 In many places the 1861 Act refers to “felony”, “misdemeanor” and “penal servitude”, none of which correspond to any concept used in current law. Other Acts contain interpretation provisions about how these words should be read.\(^89\) However it is clearly undesirable that the wording on the face of the Act does not reflect the position in current law. The most serious example of this concerns sentencing.

Sentencing provisions

3.93 As stated, the offences under sections 47, 20 and 24 all carry maximum sentences of five years’ imprisonment. However, these sentences are not stated anywhere in the 1861 Act and can only be established through a somewhat tortuous route.

(1) The sections in question, as now in force, do not set any length of sentence but simply refer to “penal servitude”. As originally enacted, they provided a maximum sentence of three years’ penal servitude, or two years’ imprisonment, in each case.

(2) Section 1(1) of the Penal Servitude Act 1891 provided that any power to pass a sentence of penal servitude in an Act passed before 1891 could be exercised to impose a sentence of between three and five years, unless the Act in question specified a higher limit. This provision overrode the three year maxima in the sections as enacted, effectively raising them to five years.

(3) The Statute Law Revision Act 1892 repealed the words in each section following “penal servitude” (in the case of section 47, up to the first occurrence of “hard labour”; in the case of the other two sections, to the end of the section).

(4) Section 1 of the Criminal Justice Act 1948 abolishes penal servitude, and provides that any enactment conferring power to pass a sentence of

\(^89\) Criminal Justice Act 1948, s 1(1) provides that all statutory references to penal servitude are to be construed as references to imprisonment. Criminal Law Act 1967, s 12(5)(a) provides that, in contexts such as “shall be guilty of felony” in OAPA 1861 s 18, “felony” should be read as “an offence”. In other contexts, such as “with intent to commit … any of the felonies under this Act” in OAPA 1861 s 64, “felony” means an offence for which a person (not previously convicted) may be tried on indictment otherwise than at his own instance: Criminal Law Act 1967, s 10(1) and Sch 2 para 8. “Misdemeanor” should be read as “offence”: Criminal Law Act 1967, s 1.
penal servitude shall be construed as conferring power to impose a term of imprisonment for a term not exceeding the maximum term of penal servitude which could have been imposed immediately before the commencement of the 1948 Act. Accordingly it preserved the five year maxima in force at that time.\textsuperscript{90} This remains the position.

3.94 This situation does not cause problems in practice. The five year maximum for these offences is known to practitioners in the field and readily accessible in textbooks and other secondary sources, though these often do not cite any statutory authority for the correct sentence and expect the reader to take it on trust. Nevertheless it is clearly undesirable that the current text of the Act not only fails to state the correct sentence for these offences but also retains obsolete and misleading references to "penal servitude".

Consultation questions 9, 10 and 11

3.95 Do consultees consider that legal references in any statute governing offences against the person should be updated to reflect the current state of the law to which they refer?

3.96 We consider that there are serious problems in the drafting of the 1861 Act, and that there would be substantial benefit in pursuing reform of the offences now contained in that Act. Do consultees agree?

3.97 Are consultees aware of further theoretical or practical problems in connection with the 1861 Act other than those addressed above?

\textsuperscript{90} But not the three year minimum under the 1891 Act.
CHAPTER 4
PREVIOUS ATTEMPTS AT REFORM

INTRODUCTION

4.1 In Chapter 3 we identified a number of problems with the existing law as stated in the 1861 Act.

4.2 The extent and strength of the problems is confirmed by the fact that there have been so many attempts to reform the law in recent times.

(1) Criminal Law Revision Committee, Fourteenth Report, Offences against the Person, in 1980;¹

(2) Codification of the Criminal Law (report with draft code submitted to the Law Commission by a group of academics chaired by Prof J C Smith), in 1985;²

(3) Draft Criminal Code with commentary, in 1989;³

(4) Legislating the Criminal Code: Offences against the Person and General Principles (consultation paper), in 1992;⁴

(5) Legislating the Criminal Code: Offences against the Person and General Principles (report), in 1993;⁵


4.3 On the assumption that consultees agree with our provisional conclusion in question 10 at the end of Chapter 3 that further reform is worth pursuing, the question becomes how such reform might best be approached.

4.4 If we were starting from a blank slate there would be several possible approaches to reform.

(1) One approach would be to concentrate on the major offences which are frequently used, namely those under sections 18, 20 and 47 (and possibly common assault). The object would be to replace these with a clear hierarchy of offences stated in simple language. The remaining offences under the Act, which are far less frequently used, would be left alone.

(2) Conversely, one could start by abolishing offences that are seldom or never used, such as assaulting magistrates in charge of wrecks and

² (1985) Law Com No 143.
⁴ (1992) CP 122.
failing to feed servants and apprentices. More substantial reform would be left for another occasion.

(3) The ideal would be a comprehensive reform of the whole Act, leaving out only offences of a fundamentally different character such as bigamy and attempted abortion.

Consultation question 12

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

4.6 As explained in this chapter, a great deal of work on reform of the 1861 Act has already been done, dating from the 1970s, and there have been several draft statutes designed to replace all or most of that Act. The economical as well as the most sensible practical course is therefore to consider comprehensive rather than piecemeal reform. This should make use of the work already done, and specifically of the draft Bill published by the Home Office in 1998, which is the latest of those drafts, for two reasons.

(1) The 1998 Report, and the previous Law Commission reports on which it was based, were widely welcomed, and more than one commentator has since asked why nothing has been done to implement them.

(2) Any reform of this area will necessarily involve consideration of most of the same questions as were raised in those documents, and it would be an uneconomical duplication of effort to consider them afresh without reference to the work already done.

This is the approach taken in this scoping paper.

4.7 It does not follow from this that any reform we discuss must reproduce the 1998 draft Bill (or of any of the other drafts) in every detail. The draft Bill provides a convenient framework on which to structure the discussion, as it covers a substantial proportion of the law of offences against the person. In relation to each individual issue, we can and should consider the arguments both for following the draft Bill and for reforming the law in a different way. This discussion forms Chapter 5 of this paper.

Consultation question 13

4.8 We consider that any comprehensive statutory reform of offences against the person should involve consideration of the previous proposals, and specifically the Home Office’s 1998 draft Bill. Do consultees agree?

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BACKGROUND

4.9 The 1861 Act formed part of a major series of consolidating statutes, including the Larceny Act 1861, the Malicious Damage Act 1861, the Forgery Act 1861 and the Statute Law Revision Act 1861. The draftsman expressed the opinion:

… that these Acts are the very best Acts that ever were passed on the subjects to which they relate, and that they afford a greater protection to the lives, the homes and the property of those of Her Majesty’s subjects to whom they extend than ever existed before …

CRIMINAL LAW REVISION COMMITTEE

4.10 The Criminal Law Revision Committee was asked in 1970 to review the law relating to offences against the person, including homicide. It published a working paper in September 1976 and a report in March 1980.

4.11 Leaving aside the recommendations on homicide, false imprisonment, kidnapping and child stealing, the Committee’s conclusions were as follows.

(1) The term “maliciously” should not be used. Intention or recklessness (or intention alone in some cases) should be required in relation to the result referred to in the definition of the offence. Recklessness should be defined in accordance with the Law Commission’s report on the Mental Element in Crime. That is:

(i) that the defendant foresaw that his act might cause the particular result, and (ii) that the risk of causing that result which he knew he was taking was, on an objective assessment, an unreasonable risk to take in the circumstances known to him.

(2) There should be three general offences of causing injury:

(a) causing serious injury with intent to cause serious injury;

(b) causing serious injury recklessly;

(c) causing injury recklessly or with intent to cause injury.

(3) Assault and battery should continue to be common law offences.

(4) There is no need for an offence of administering noxious substances to cause grievous bodily harm, as that is covered by the proposed general


9 Greaves (above), Preface, p vii.

10 Cmd 7844.

11 Paras 6 to 12 of the report.


13 Paras 152 and 157 of report. The Working Paper proposed four offences, as it separated causing injury with intent and causing injury recklessly.
offences of causing serious injury. The lesser offence should be replaced by an offence of administering substances capable of substantially interfering with V’s bodily functions.14

(5) There should be only one railway offence, and this should be extended to interference with other means of transport.15

(6) The offence of threatening to kill should be extended to threats to cause serious injury.16

(7) The offence of solicitation to murder should be abolished, as it is covered by the common law of incitement.17

(8) The offences of abandonment of children, impeding escape from ships, choking with intent to commit an offence, failure to provide servants and apprentices with food, assaulting or obstructing clergymen and assaulting magistrates and officers preserving a wreck should be abolished.18 The offence of setting spring guns should be reviewed to see what kinds of device should be covered.

4.12 No draft Bill or code was attached to this report.

PREVIOUS LAW COMMISSION PROPOSALS

1985 Codification Report

4.13 In 1985 the Law Commission published a report made to it by a group of distinguished academics chaired by Professor Sir John Smith QC.19 This discussed the possibility of codifying the whole of the criminal law. However, the draft Bill forming part of the report, being intended only as a specimen, was confined to the general principles of criminal law, offences against the person and offences of damage to property.

4.14 The provisions about offences against the person closely followed the recommendations of the Criminal Law Revision Committee. Unlike the Committee recommendations, the draft Bill did contain a clause creating a single offence to replace assault and battery, though it could still be committed in two ways:

77.—(1) A person who intentionally or recklessly—

(a) applies force to or causes any impact on the body of another; or

(b) causes another to fear that any such force or impact is imminent,

14 Paras 184 to 191 of report.
15 Para 198 of report.
16 Para 219 of report.
17 Para 223 of report.
18 Para 183 of report.
without that other’s consent or, where the act is likely or intended to cause injury to another, with or without that other’s consent, is guilty of an assault.

(2) A person does not commit an offence under subsection (1) by an act done to another with his consent if it is a reasonable act to do in the course of a lawful game, sport, entertainment or medical treatment or is otherwise justified or excused by any provision or rule referred to in section 49.

1989 draft Code

4.15 In 1989 the Law Commission published a draft Code with commentary. Unlike the 1985 draft, this was intended to be comprehensive, though it did not include detailed repeal provisions and was not intended for immediate enactment.

4.16 As concerns offences against the person, this closely followed the 1985 draft Code. Some differences are:

(1) the 1989 draft used the term “personal harm” instead of “injury”;

(2) the 1989 draft included an offence of torture, based on section 134 of the Criminal Justice Act 1988, and an offence of assault with intent to rob, based on section 8 of the Theft Act 1968;

(3) the offence of assault does not contain a subsection (2) relating to lawful contexts for consent to injury;

(4) the definition of assault requires V to “believe”, rather than “fear”, that force or impact is imminent;

(5) in the offence of threatening to kill or cause serious personal harm, D must intend that V will “believe”, rather than “fear”, that the threat will be carried out;

(6) in the offence of administering a substance without consent, it is specifically provided that inducing unconsciousness or sleep qualifies as substantial interference with bodily functions.

1992 Consultation Paper

4.17 In 1992 the Law Commission published a consultation paper, Legislating the Criminal Code: Offences against the Person and General Principles, including a draft Bill. This draft Bill was closely modelled on the draft Bills attached to the 1985 report and the 1989 draft Code. Particular points are as follows.

(1) Detailed definitions of intent and recklessness were given in clause 2. This enabled clause 4 to read “intentionally causes serious injury to another”, instead of “causing serious injury with intent to cause serious
"injury" as found in the proposals of the Criminal Law Revision Committee.\textsuperscript{23} In this respect the 1992 draft follows both the 1985 report and the 1989 draft Code.

(2) The 1992 draft Bill followed the 1985 report and the 1989 draft Code in including a single offence covering assault and battery. Unlike in the 1989 draft Code, the provision about consent to acts likely or intended to cause injury was confined to battery: assault can only be committed without consent.

(3) The 1992 draft reverted to the term "injury", rather than "personal harm", but a definition of injury was given in an interpretation provision:\textsuperscript{24}

"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.

(4) In the offence of administering substances without consent, the wording was "knowing that the other does not consent" instead of "without his consent".

(5) No offence of assault with intent to rob was included, as the draft Bill did not aim to codify the whole of the criminal law.

1993 Report

4.18 In 1993 the Law Commission published its report, Legislating the Criminal Code: Offences against the Person and General Principles,\textsuperscript{25} also including a draft Bill. It follows the draft in the consultation paper almost exactly subject to the following points.

(1) The defence to assault and battery concerning normal contacts in daily life was redrafted and simplified.

(2) The offence of assault to resist arrest depended whether the arrest would be lawful on the facts as D believed them to be.

(3) The offence of administering substances without consent was modified so that D was guilty if V consented to the administration but was ignorant of the potential effect of the substance.

HOME OFFICE CP AND DRAFT BILL

4.19 In 1998 the Home Office published a consultation paper, entitled Violence: Reforming the Offences Against the Person Act 1861, together with a draft Bill. The draft Bill was based on the drafts described above.

\textsuperscript{23} (1992) CP para 8.8.
\textsuperscript{24} Clause 1(6).
\textsuperscript{25} (1993) Law Com No 218.
4.20 The structure of the draft Bill is as follows.

(1) Clauses 1 to 3 create offences of causing injury. Clause 1 covers intentionally causing serious injury, clause 2 covers recklessly causing serious injury and clause 3 covers causing injury in general, whether intentionally or recklessly.

(2) Clause 4 creates an offence replacing assault and battery, and clauses 5 to 7 cover particular assaults, such as assault on a constable and assault to resist arrest.

(3) Clauses 8 and 9 create offences of using dangerous or explosive substances intending or risking injury.

(4) Clause 10 covers threats to kill, clause 11 covers administering substances capable of causing injury (poisoning), clause 12 covers torture and clause 13 covers causing danger on railways.

(5) Clause 14 defines intention and recklessness and clause 15 defines injury.

(6) Clauses 16 to 20 contain other provisions relating to fault in particular situations.

(7) Clauses 21 and 22 provide for combining charges and alternative verdicts.

(8) Clause 23 abolishes certain common law offences.

4.21 Particular points are as follows:

(1) It is specified that the offence of intentionally causing serious injury can take the form of either an act or an omission. There is no corresponding provision for the offences of recklessly causing serious injury or intentionally or recklessly causing injury.

26 Para 5.64 and following, below.
27 Para 5.37 and following, below.
28 Para 5.127 and following, below.
29 Para 5.192 and following, below.
30 Para 5.158 below.
31 Para 5.180 and following, below.
32 Para 5.25 below.
33 Para 5.11 and following, below.
34 Clause 16 is set out in para 5.106 below; clauses 17 to 20 are not discussed in this paper.
35 Clause 22 is set out in para 5.204 below; clause 21 is cited more than once in this paper but is not the subject of a specific discussion.
36 Not discussed in this paper.
37 Clause 1(2).
(2) The offence of recklessly causing serious injury is triable either way and the maximum sentence (on indictment) is seven years.\textsuperscript{38} The offence of intentionally or recklessly causing injury is triable either way and the maximum sentence (on indictment) is five years.\textsuperscript{39}

(3) Unlike the previous drafts, the clause providing for the offence replacing assault and battery\textsuperscript{40} says nothing about consent. The effect of consent, for all the offences, is left to the common law.\textsuperscript{41}

(4) There are two offences based on the throwing or placing of explosives or other dangerous substances. The more serious offence is committed if D intends, or is reckless about the risk of, serious injury.\textsuperscript{42} The less serious offence is committed if D intends, or is reckless about the risk of, injury.\textsuperscript{43}

(5) The poisoning offence\textsuperscript{44} refers to a substance which D knows to be capable of causing injury, rather than of interfering with bodily functions as in the Law Commission drafts. There is no distinction according to whether the act was intentional or reckless, or as to whether the possible injury was serious or otherwise.

(6) For the purposes of all the offences, injury is defined as physical or mental injury, including pain, unconsciousness and any other impairment of a person’s physical condition or mental health.\textsuperscript{45} Except for the purposes of the offence of intentionally causing serious injury, it excludes anything caused by disease.

(7) There are detailed provisions for included offences. Each section is construed as creating just one offence (regardless of the number of permutations that can be derived from the wording),\textsuperscript{46} any allegation of intention includes one of recklessness,\textsuperscript{47} the injury offences include the assault offence.\textsuperscript{48}

\textsuperscript{38} Clause 2.
\textsuperscript{39} Clause 3.
\textsuperscript{40} Clause 5.
\textsuperscript{41} Clause 18; Home Office CP para 3.22.
\textsuperscript{42} Clause 8.
\textsuperscript{43} Clause 9.
\textsuperscript{44} Clause 11.
\textsuperscript{45} Clause 15.
\textsuperscript{46} Clause 21.
\textsuperscript{47} Clause 22(1).
\textsuperscript{48} Clause 22(2).
(8) The draft Bill includes offences of assaulting a constable, torture, threats to kill or cause serious injury and causing danger on railways (but not other means of transport), but does not include an offence of solicitation to murder.
CHAPTER 5
POSSIBLE APPROACHES TO REFORM

GENERAL PRINCIPLES

5.1 The Offences Against the Person Act 1861 was, at the time, a creditable attempt to consolidate an important area of the criminal law, and has continued to function as a workable code for over 150 years. However, as shown in Chapter 3, by the standards of the present day it is needlessly complicated and obscure.

5.2 We consider that a modern statute could be created to deal with offences of violence against the person. It could avoid the problems present in the 1861 Act and respect certain key principles.

(1) It should provide a clear hierarchy of offences from the most serious to the least. The place of each offence in the hierarchy should reflect:

(a) the harm caused; and

(b) the culpability of the defendant;

and the maximum penalty should be in proportion.

(2) Each offence should provide a clear and accurate label for the conduct in question, and should be defined in language that is easy to understand.

(3) Each ingredient of an offence, whether an external element or a mental element, should be set out explicitly and not left to implication. There should not be overlaps or redundancies among different ingredients of the same offence.

(4) So far as possible, each offence should be set out in a separate section, which should express a single coherent concept (for example, by targeting one type of harm) and minimise the need to sub-divide the offence into alternative forms.

(5) Within a given subject matter, fewer broader offences are preferable to numerous specialised ones.

(6) The statute should where possible avoid references to specific types of chemicals, machinery or technology, as these are liable to be superseded.

(7) Offences should not be unnecessarily wide. In particular, defendants should not be penalised for harm that is inadvertently caused and unforeseeable.

(8) The offences should be drawn in such a way that all offences are tried in a court of the appropriate level.

(9) References to other statutes and legal concepts and procedures should be up to date.
STRUCTURE OF THIS CHAPTER

5.3 In this chapter we consider the possibilities for reform. For reasons explained at the beginning of Chapter 4, we primarily consider the possibility of comprehensive reform, based on the previous attempts at reform listed in that chapter, rather than piecemeal reform of individual offences or groups of offences.

5.4 For the reasons explained in Chapter 4 we base our discussion on the Home Office’s 1998 draft Bill. However, for each issue we shall need to discuss whether any possible reform should be based on the draft Bill as it stands or whether some different scheme should be considered. For example:

(1) in some cases one might also consider the proposals in one of the previous attempts at reform mentioned in Chapter 4;

(2) in others, it might be necessary to modify the scheme of the draft Bill to take account of developments in the law since 1998.

In what follows, we consider (among other issues) how far the draft Bill complies with the principles set out at the beginning of this chapter.

5.5 We first consider more general issues that affect several offences, namely:

(1) the meaning of injury;

(2) the mental elements of the offences.

5.6 We then consider the various groups of offences, as follows:

(1) assault and battery;

(2) offences of causing harm;

(3) particular assaults;

(4) solicitation to murder and threats to kill;

(5) poisoning offences.

1 Para 4.7 above.
2 For example, assault on a constable, para 5.128 and following, below.
3 For example, the transmission of disease (Chapter 6 below) and racially and religiously aggravated offences (para 5.140 and following, below).
4 Para 5.8 and following, below.
5 Para 5.19 and following, below.
6 Para 5.33 and following, below.
7 Para 5.51 and following, below.
8 Para 5.123 and following, below.
9 Para 5.154 and following, below.
10 Para 5.175 and following, below.
(6) offences concerning explosives and dangerous substances;\textsuperscript{11}
(7) offences relating to railways and other offences.\textsuperscript{12}

5.7 We finally consider one procedural issue, namely the law on alternative verdicts.\textsuperscript{13}

**MEANING OF INJURY**

**Summary of problems with the present law**

5.8 In the 1861 Act, the harm required to be done or intended is expressed differently in different offences.

(1) Section 18 requires wounding or the causing of grievous bodily harm.
(2) Section 20 requires wounding or the inflicting of grievous bodily harm.
(3) Section 47 requires assault occasioning actual bodily harm.
(4) Section 23 requires danger to life or the inflicting of grievous bodily harm.
(5) Section 24 requires intent to injure, aggrieve or annoy, but does not require actual harm.
(6) Section 28 requires burning, maiming, disfigurement, disabling or the doing of grievous bodily harm.
(7) Section 29 requires intent to burn, maim, disfigure, disable or do grievous bodily harm, but does not require actual harm.
(8) Section 30 requires intent to do bodily injury, but does not require actual harm.

5.9 In addition to physical injuries, bodily harm covers:

(1) disfigurement, such as cutting off a person’s hair;
(2) temporary loss of consciousness;
(3) pain sufficient to interfere with health or comfort;
(4) recognised psychiatric conditions (but not other psychological conditions such as depression);
(5) being infected with a disease.

5.10 The main problem with the existing law is not so much that this is an unreasonable range of harms for the offences to cover as that it is not clearly

\textsuperscript{11} Para 5.188 and following, below.
\textsuperscript{12} Para 5.196 and following, below.
\textsuperscript{13} Para 5.199 and following, below.
expressed. There are also unnecessary differences between the harm involved in the various offences.

**The 1998 draft Bill**

5.11 The definition of injury in the draft Bill is as follows.

15.—(1) In this Act “injury” means—

(a) physical injury, or

(b) mental injury.

(2) Physical injury does not include anything caused by disease but (subject to that) it includes pain, unconsciousness and any other impairment of a person’s physical condition.

(3) Mental injury does not include anything caused by disease but (subject to that) it includes any impairment of a person’s mental health.

(4) In its application to section 1 this section applies without the exceptions relating to things caused by disease.

5.12 At first sight the term “injury” appears to be narrower than the term “harm” as used in the present law. As we have seen, “harm” is defined as any “hurt or injury” calculated to interfere with the health or comfort of the victim;\(^\text{14}\) so there are “hurts” that are harms without amounting to injuries.\(^\text{15}\) However, clause 15 partially neutralises that result by including pain and unconsciousness in the definition.

5.13 The definition of mental injury appears to be wider than the present law, as it includes any psychological condition sufficient to impair the victim’s mental health and is not limited to recognised psychiatric conditions. However, the effect of excluding “disease” is uncertain, as conditions such as psychosis may be regarded as illnesses.

5.14 The draft Bill includes the deliberate transmission of disease in the offence under clause 1, of intentionally causing serious injury. However, it excludes the reckless transmission of serious disease from the offence under clause 2, and the transmission of minor disease, whether intentional or reckless, from the offence under clause 3.

**Discussion**

5.15 The scheme of the draft Bill is a considerable simplification of the present law. There are only three offences of causing injury, and injury is defined in the same

\(^{14}\) Para 2.52 above.

way in each of them. The remaining offences, such as those involving poisons and explosives, require intention or recklessness about causing injury, but no actual injury; and injury is defined in the same way as in the three main offences. In this way it avoids both the overlaps and the unnecessary differences found in the present law.

5.16 The main change to the present law is the deliberate exclusion of disease from the definition of injury, in all cases except the intentional causing of serious injury. We discuss the transmission of disease further in Chapter 6.

5.17 The expansion of the scope of mental injury may make the offences problematically wide. For example, there is danger that the offences could be interpreted too widely, and include conduct which causes a person mild depression. This might include, for example, a case where D unlawfully dismisses V from employment or ends a relationship.

Consultation question 14

5.18 We consider that there would be benefit in pursuing reform with a modern statute that included a definition of injury, subject to further consideration of:

(1) the breadth of “mental injury”;
(2) the exclusion of disease (see Chapter 6).

Do consultees have any views on this?

MENTAL ELEMENT OF OFFENCES

Summary of problems with the present law

5.19 In principle, this issue may be divided into:

(1) the meaning of intention;
(2) the meaning of recklessness;
(3) intention or recklessness as to what.

However, we do not discuss the third question here, as the issue of principle is addressed in Chapter 3, and the details will be discussed further below when we come to consider the definitions of the individual offences.

Meaning of intention

5.20 The meaning of intention is discussed above. Briefly, there is intention if D acted in order to bring about a given result. The jury may also find that there is

Apart from the question of whether it includes illness, which differs as between the offence of intentionally causing serious injury and the other two.


Paras 3.44 to 3.53 above.

Paras 2.23 and following and 3.29 and following, above.
intention if D did not act in order to bring it about, but it was virtually certain to occur if D’s main purpose (whatever that might be) was achieved and D knew this.

5.21 This is not an issue peculiar to the law of non-fatal offences against the person. The question for any revising statute is whether to include a definition of intention on the above lines, or whether to leave it as a principle of general criminal law applying equally to all offences.

(1) The advantage of including a definition is that the law relating to offences against the person will be readily available in one statute.

(2) The disadvantage is that the law will be presented in a fragmented form. Instead of one definition of intention, spanning all offences where intention is an element, there will be a separate statement for this one area of the criminal law (namely offences against the person), suggesting that in other offences the definition may be different.20

Meaning of recklessness

5.22 The word “reckless” is not used in the 1861 Act. Several of the offences must be committed “maliciously”: this is judicially interpreted as meaning intending some physical harm or being reckless as to the risk of such harm. Recklessness, in turn, means that D foresaw a risk of harm and was objectively unjustified in taking it on the facts as D knew or believed them to be.

5.23 There can be no doubt that the word “maliciously” is misleading and needlessly obscure,21 and that explicit references to intention or recklessness are preferable. The question is whether any revising statute should go further and define recklessness.

5.24 As in the question whether to define intention, there are arguments both ways. In modern statutes such as the Criminal Damage Act 1971 the word “recklessly” is used and its meaning is well established though no definition is given. It also seems that the same meaning should be understood whenever that word is used in statute.22 Defining recklessness in statute increases the accessibility of the law. On the other hand, as a matter of presentation it may fragment the law by suggesting that this meaning is peculiar to offences against the person and that in other offences the meaning may be different.

The 1998 draft Bill

5.25 The draft Bill provides as follows.

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

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

20 This danger exists whether or not the definition adopted in fact differs from the current common law. The common law may change.

21 Para 3.80 and following, above.

22 Para 2.95 above.
(b) although it is not his purpose to cause it, he knows that it would occur in the ordinary course of events if he were to succeed in his purpose of causing some other result.

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

(3) A person intends an omission to have a result if—

(a) it is his purpose that the result will occur, or

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

(4) A person is reckless whether an omission will have a result if he is aware of a risk that the result will occur and it is unreasonable to take that risk having regard to the circumstances as he knows or believes them to be.

(5) Related expressions must be construed accordingly.

(6) This section has effect for the purposes of this Act.

Discussion

Intent

5.26 We consider on balance that it would be desirable to incorporate an explicit definition of intention, and do not believe that so doing poses a significant risk of fragmentation of the law.23

5.27 The clause in the draft Bill provides a definition of intention which differs slightly from the present law. Whereas under the clause oblique intent is intention, under the present law the jury may find intention, but are not bound to do so, in such a case. The clause also provides that D intends “if he were to succeed in his purpose of causing some other result”. As pointed out by Professor Sir John Smith QC,24 there are cases where D intends particular conduct but is not trying to cause any particular result. It would seem safer to say that D intends a result if it will occur in the normal course of events if D achieves his purpose, regardless of whether that purpose is to engage in particular conduct or to bring about particular results.

5.28 This may be achieved by a formulation similar to that in our report on Murder, Manslaughter and Infanticide.25

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23 As discussed at the end of para 5.24 above.


... the jury should be directed that they may find that D intended a result\(^{26}\) if they are sure that D realised that that result was certain (barring an extraordinary intervention)\(^{27}\) if D did what he or she was set upon doing.

**Consultation question 15**

5.29 We consider that there would be benefit in pursuing reform with a modern offences against the person statute which included a definition of the term “intention”. However, we consider that a formula similar to that in our report on Murder, Manslaughter and Infanticide would be preferable to that in the 1998 Bill. Do consultees have any views on this?

**Recklessness**

5.30 The definition of recklessness in the draft Bill is in accordance with the law as laid down in G.\(^{28}\) This comes as no surprise, given that both definitions were based on our Working Paper on General Principles: the Mental Element in Crime.\(^{29}\)

(1) The House of Lords’ reasoning in G was that the legislature, in using the term “recklessly” in the Criminal Damage Act 1971, must have had in mind the analysis of recklessness in the Working Paper, given that the 1971 Act was based on a Law Commission report\(^{30}\) appearing at virtually the same time.

(2) The definition in the Working Paper was reproduced in our 1993 Report, and later in the 1998 draft Bill.

5.31 The one refinement is that the present draft Bill speaks of the decision being unreasonable in the circumstances as D “knows or believes” them to be.\(^{31}\) This follows through the “subjective” nature of the recklessness test, and achieves consistency with the law on self-defence and other defences.

**Consultation question 16**

5.32 We consider that there would be benefit in pursuing reform with a modern offences against the person statute including a definition of “recklessness” similar to that in the draft Bill. Do consultees agree?

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\(^{26}\) In original, “to kill V or to cause V serious injury”. We have here adapted the extract so as to include offences other than murder.

\(^{27}\) In original, “that V was certain (barring an extraordinary intervention) to die or suffer serious injury”.


ASSAULT AND BATTERY

Summary of problems with the present law

Coherence of classification

5.33 The main problem with the existing offences of assault and battery is one of terminology. There are two separate offences, but “assault” (or “common assault”) is often used to cover both. This creates considerable confusion in interpreting other statutes in which the word “assault” is used.

5.34 It also gives rise to difficulty in drafting charges: why should “assault and beat” or “assault by beating” be acceptable, but “assault and batter” not? It is even arguable that the word “assault” creates duplicity in itself, as it covers two offences.

5.35 A defendant who has clearly carried out some kind of attack can sometimes slip through the crack between the two offences, for example:

1. if D performs the conduct required for psychic assault, with the state of mind required for battery, or vice versa;
2. if there is a genuine conflict of evidence about whether D’s blow landed on V or not; or
3. if the charge alleges battery and the evidence supports psychic assault or vice versa.

Definition of offences

5.36 There are issues about how far the definition of the offences depends on V’s lack of consent. However, the main practical problem is the knock-on effect on the offence under section 47, which requires an assault to have been committed, and we discuss it under that head.

The 1998 draft Bill

5.37 The draft Bill defines a new offence as follows.

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

32 Para 2.8 and following, above.
33 For an example of such problems, see Lynsey [1995] 3 All ER 654.
34 For example in references to “assault occasioning actual bodily harm”: Smith and Hogan para 17.1.2 p 621.
35 Para 2.28 above.
36 R (Kracher) v Leicester Magistrates’ Court [2013] EWHC 4627 (Admin).
37 Para 5.55 below.
(2) No such offence is committed if the force or impact, not being intended or likely to cause injury, is in the circumstances such as is generally acceptable in the ordinary conduct of daily life and the defendant does not know or believe that it is in fact unacceptable to the other person.

(3) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding 6 months or a fine not exceeding level 5 on the standard scale or both.

Discussion
5.38 The clause contains a full statement of the offence, which is accurate and explicit and sets out all the elements, including the mental element. It creates a single offence, though the offence has two forms.

5.39 Unfortunately the offence does not have a name. (There are interpretation provisions in the definitions of other offences stating that the verb “assault” means any conduct amounting to the offence under clause 4.) A statement of offence in the form that D is charged “that he did intentionally or recklessly apply force or cause impact to the body of V” might sound both strange and rather colourless. It would be a simple drafting matter to include the familiar term “assault” in the body of the section. That might improve the offence’s labelling and communicative function.

5.40 Clause 21 of the Bill clarifies that, for the purposes of the rules against charging more than one offence in the same count or information, clause 4 creates only one offence. However, Professor Sir John Smith QC\(^{38}\) suggests that, in substance, the clause creates two offences, with the risk of the same difficulties as the present law. For example, it would probably remain the case that the offence does not cover a person who commits a psychic assault while intending or foreseeing a battery, or vice versa.\(^{39}\)

5.41 If this is a problem, it could be solved by minor redrafting. It would be a simple matter to separate the offences and have one offence of psychic assault and one of unlawful use of force. Alternatively, the clause could be redrafted so that, to commit the offence, it is sufficient to intend or be reckless about either type of harm. We discuss the choice between these options below.\(^{40}\)

5.42 The draft clause extends to causing the victim to “believe” that force is imminent. This follows the previous Law Commission drafts but departs from the draft originally submitted in 1985, which speaks of causing the victim to “fear”.\(^{41}\) (The existing offence is described as causing the victim to “apprehend” unlawful violence.\(^{42}\)) Consideration may need to be given to whether the 1998 clause is


\(^{39}\) Para 2.28 above.

\(^{40}\) Para 5.44 and following, below.

\(^{41}\) There is no discussion of this point in either the commentary to the 1989 Draft Code or the 1992 CP.

\(^{42}\) Smith and Hogan para 17.1.4.
too narrow because it requires a belief that force is imminent rather than a belief that force may be imminent.

5.43 One virtue of the draft Bill is that it uncouples the offence or offences based on assault from the offences of causing physical harm. This may provide an opportunity to simplify the law about consent.

(1) At present the basic rule is that, except in circumstances specifically recognised by the courts (such as surgery), V cannot consent to the intentional or reckless infliction of harm. One impact of this rule is that V’s informed voluntary consent to the assault can be invalid if D intended or foresaw bodily harm. In other words, there is confusion between consent to a given act and consent to the harm caused by that act, even when the harm does not form part of the offence charged.

(2) The draft Bill enables us to treat consent to the act constituting an assault or battery and consent to harm entirely separately. Consent will be a defence to the offence under clause 4 but will not be a defence to the offences of causing harm unless the conduct is within a category recognised by the courts as socially desirable. We discuss this further when we consider the harm offences.

**One offence or two**

5.44 The scheme of clause 4 is closely based on the existing law, except that it is designed to incorporate psychic assault and battery in a single offence. We need to consider whether this is the best approach.

5.45 In ordinary language “assault” is used as a synonym of “attack”, and this would be one way of conceiving the offence(s). In this scheme:

(1) all attacks are criminal, and the distinction between an attack that physically connects and one that marginally fails to do so is less relevant;

(2) the definition of assault as an act causing apprehension of violence would be not a universal requirement of the offence but simply a description of the lowest level of assault that occurs in practice;

(3) assault would be a single offence, of which battery would be the more serious form.

Whether or not this was ever accurate as a description of the existing law, a new offence of assault could be drafted along these lines.

5.46 However, if this was ever the legal understanding of assault it has long been left behind. Psychic assault has broadened over the years to cover several types of threatening behaviour that do not form part of any attack or incipient attack.

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43 As in *Donovan* [1934] 2 KB 498, (1936) 25 Cr App R 1, where the charge was of common assault.

44 Para 5.56 below.

45 Para 2.18(3) above.
Conversely, a battery can take place without any psychic assault occurring.\textsuperscript{46} In substance, and irrespective of the labels used, the present offence or offences cover two separate forms of behaviour.

5.47 To preserve the width of the present law, while keeping the offences coherent, it would therefore seem preferable to create two separate offences. The main difficulty would be what to call them.

(1) One possibility would be to reserve “assault” for an offence of causing apprehension of violence (what we have called psychic assault), while a completed attack would be “battery”. This might jar with the popular understanding of the word “assault”, as well as requiring a comprehensive revision of all statutes in which that word is at present used in the more inclusive sense.\textsuperscript{47}

(2) Another possibility would be to use either “assault” or “battery” for the offence involving a completed attack, while the psychic assault offence would be called something like “threatening to assault”.

5.48 Creating two offences would require some adjustment to the draft Bill and to the rest of the statute book.

(1) It would need to be provided that the harm offences under clauses 1, 2 and 3 include both of the assault offences,\textsuperscript{48} so that either of them can be found as an included offence.

(2) References to “assault” in other statutes would have to be amended or interpreted to include both the new offences.

Consultation questions 17 and 18

5.49 We consider that there would be benefit in pursuing reform of psychic assault and battery. Do consultees agree?

5.50 Do consultees consider that it would be preferable to pursue reform based on:

(1) a single offence covering the scope of both of the present offences, as in clause 4 of the 1998 draft Bill; or

(2) separate offences (under whatever names) of psychic assault and physical attack?

\textsuperscript{46} Para 2.10 above.

\textsuperscript{47} On a search for statutory references to “assault”, we found that just three of them referred to “assault and battery”, requiring “assault” to be read in the narrower sense. All the other references (e.g. offences of assaulting particular categories of person) were clearly inclusive of both offences.

\textsuperscript{48} This would be done by amending Criminal Justice Act 1988, s 40, and making the necessary modifications to clause 22 of the draft Bill.
OFFENCES OF CAUSING HARM

Summary of problems with the present law

5.51 For convenience, we consider the offence under section 47 (assault occasioning actual bodily harm) separately from the two grievous bodily harm offences.

Assault occasioning actual bodily harm

COHERENCE OF CLASSIFICATION

5.52 The main problems with the offence under section 47 flow from the fact that it simultaneously belongs to two groups of offences:

(1) the assault-based offences, including common assault, assaulting police officers, assault to resist arrest and so on; and

(2) the injury-based offences, including the offences under sections 18 and 20.

5.53 There is no offence of causing non-grievous bodily harm without also committing assault. Section 24 creates an offence of administering a poison or noxious thing with intent to injure and annoy, and section 30 creates an offence of placing explosives with intent to do bodily injury, but in neither case need the harm actually take place.

DEFINITION OF OFFENCE

5.54 We have already discussed the fact that the offence under section 47 does not contain any mental element relating to the harm caused. That is, where D assaults V, causing actual bodily harm, if D intended (or was reckless about) the assault or battery D is guilty of the section 47 offence even though D did not foresee any injury.50

Example. D shouts a threat at V, who is in the next room. Unknown to D, V is pouring boiling water from a kettle and accidentally scalds him- or herself as a result of being startled. D is guilty of the section 47 offence.

5.55 Similar problems arise about the effect of V’s consent.

(1) In some contexts, such as sport and surgery, V can consent to physical harm or the risk of it. If V does consent, D is not guilty of the section 47 offence.

(2) Outside those particular contexts, V cannot consent to the intentional or reckless infliction of physical harm.51 In these cases, consent to the assault is invalid too. D is therefore guilty of the section 47 offence.

49 Para 3.46 and following, above.


(3) Suppose, however, that physical harm is caused, but that it happened by accident and was not intended or foreseen by D. V did not foresee any risk of harm either, and therefore cannot have “consented” to it. But V did consent to what would otherwise be an assault: for example, vigorous consensual sex. In that case, D is not guilty of any assault at all; still less, of “assault occasioning actual bodily harm”.

In other words, whether V can “consent” to the assault depends on whether D intends, or is reckless about the risk of, physical harm. And yet in general, D’s intention or foresight of physical harm is not a requirement of the offence!

This cannot be defended as a rational or coherent scheme. It would be far better for there to be:

(1) one or more offences similar to assault or battery, where D must intend or be reckless as to the assault, but which is not committed if V consents to the assault; and

(2) one or more offences of causing injury, where D must intend or be reckless about the injury.

It would be a question of policy whether informed voluntary consent to the level of injury specified in the offence ought to be allowed in all circumstances or, as under the present law, only in the permitted exceptions such as surgery. However that question is answered, the only relevant consent would be consent to the injury or risk of it.

In short, the offence under section 47 does not express a single concept, and risks making the defendant liable for unintended and unforeseen results.

ACCURACY OF LEGAL REFERENCES

Section 47 reads “Whosoever shall be convicted upon an indictment of any assault occasioning actual bodily harm shall be liable to be kept in penal servitude”. The maximum sentence is five years’ imprisonment; so the reference to “penal servitude” is obsolete and inaccurate.

Offences of grievous bodily harm

CLASSIFICATION OF OFFENCES

Before Wilson the offence of inflicting grievous bodily harm under section 20 was interpreted as requiring an assault, and thus had the same hybrid character as the section 47 offence. However, as intention or foresight of physical harm is required, this did not give rise to the same problems as those set out above.

52 Meachen [2006] EWCA Crim 2414; para 2.59 above.
53 A fuller list of the different possible situations with their outcomes is given in Smith and Hogan, pp 636 and 637.
54 We discuss below the possibility of a separate category of minor injuries, where consent could be a defence.
55 Para 3.93 above.
Since Wilson and Ireland and Burstow\textsuperscript{57} it is clear that the offence includes the causing of harm by any means, and the offence is no longer a hybrid.

**DEFINITION OF OFFENCES**

5.60 One difficulty is the anomalous status of “wounding”. On the one hand, in the external elements of the offences under sections 18 and 20, wounding is treated as equivalent to the causing of grievous bodily harm. On the other hand, in the section 18 offence, intention to wound is not treated as equivalent to intention to cause grievous bodily harm. (The question does not arise in practice in section 20, as both grievous bodily harm and wounding are included in “some harm”, which D must intend or foresee.)

5.61 In Chapter 3,\textsuperscript{58} we discussed the fact that the section 20 offence, while requiring grievous bodily harm or wounding in fact, requires only intention or foresight of the risk of some harm. We also discussed the use of the words “grievous” and “maliciously”, and concluded that in section 20 “maliciously” has too much work to do, and in section 18 not enough.

**ACCURACY OF LEGAL REFERENCES**

5.62 Sections 18 and 20 contain references to “felony”, “misdemeanor” and “penal servitude”, and section 20 does not state that the maximum term of imprisonment is five years.\textsuperscript{59}

**Summary**

5.63 In short:

(1) the offence under section 20 does not occupy a clear place in a hierarchy;

(2) both offences have too many forms and do not target a single harm;

(3) the mental elements are not clearly stated, and in section 18 there are two such elements, one of which is redundant in the principal form of the offence;

(4) the language of both sections 18 and 20 is not clear, modern or explicit.

**The 1998 draft Bill**

5.64 The relevant provisions of the draft Bill are as follows.

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

(2) A person is guilty of an offence if he omits to do an act which he has a duty to do at common law, the omission results in serious injury to another, and he intends the omission to have that result.

\textsuperscript{57} [1998] AC 147.

\textsuperscript{58} Para 3.49 and following, above.

\textsuperscript{59} Paras 3.92 and 3.93 above.
(3) An offence under this section is committed notwithstanding that the injury occurs outside England and Wales if the act causing injury is done in England and Wales or the omission resulting in injury is made there.

(4) A person guilty of an offence under this section is liable on conviction on indictment to imprisonment for life.

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

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

(3) A person guilty of an offence under this section is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding 7 years;

(b) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both.

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

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

(3) A person guilty of an offence under this section is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding 5 years;

(b) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both.

5.65 This differs from the present law in the following respects.

(1) The term “injury” is preferred to “bodily harm”. We discuss the definition of injury separately above.

(2) There is no special provision for “wounding”. This seems desirable since a wound can be either a serious injury or an injury, depending on its nature, so retaining it as a separate harm would undermine the clear hierarchy of harms.

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60 The 1989 draft Code speaks of “harm”, but both the 1992 CP and the 1993 report have “injury”.

61 Para 5.8 and following, above.
(3) The offence under clause 2, corresponding to the existing section 20 offence, requires recklessness as to the risk of serious injury, corresponding to the external element of the offence. The maximum sentence is accordingly increased from 5 to 7 years.

(4) The offence under clause 3, corresponding to the existing section 47 offence, does not require proof of an assault, but does require intention or recklessness as to the risk of injury.

(5) The offence of causing serious injury intending to resist or break arrest, from section 18, is retained, but is contained in a separate clause 6, discussed below.\(^{62}\)

**Discussion**

5.66 These clauses remedy most of the defects identified with the existing law.

(1) The offences are in a clear order of seriousness, both as measured by the level of harm resulting and as measured by culpability, and the mental element of each offence corresponds to the external elements.

(2) Each section states a single offence that is not divided into sub-forms.\(^ {63}\)

(3) The mental element of each offence is spelled out (we consider the draft Bill’s definitions of intention and recklessness above\(^ {64}\)).

(4) They are in clear comprehensible language.

**Number and division of offences**

5.67 The offences are divided, firstly, according to whether the harm caused is serious or not and, secondly, according to whether it was caused intentionally or recklessly. One might therefore expect either two or four offences, rather than three.

**BACKGROUND**

5.68 The Criminal Law Revision Committee’s Working Paper originally proposed four offences. Many of the responses expressed the view that this was unnecessary and that the offences should be reduced to two: intentional or reckless causing of serious injury, and intentional or reckless causing of injury.

5.69 The CLRC’s report adopted a compromise. It recommended that the distinction between intentional serious injury and reckless serious injury should be retained, so as to reflect the distinction in existing law between the section 18 and section 20 offences, which are regarded as having very different degrees of seriousness and attract very different sentences. The CLRC regarded this distinction as similar to that between murder and manslaughter. However it was often difficult to

\(^{62}\) Para 5.123 and following, below.

\(^{63}\) Except for the distinction between the intentional and reckless causing of non-serious injury, which we consider at para 5.77 and following, below.

\(^{64}\) Paras 5.25 to 5.32 above.
distinguish intention from recklessness, and the CLRC argued that this should not be required in minor cases where the difference in sentence is unlikely to be great.\textsuperscript{65}

5.70 This scheme was retained in all the subsequent drafts.

(1) The 1985 Report and 1989 draft Code and commentary contain no discussion at all of the way these offences should be divided, beyond saying that they were implementing the proposals in the CLRC report.

(2) The 1992 CP\textsuperscript{66} summarised the argument in the CLRC report, and agreed that there was no need to distinguish intentional and reckless forms of the non-serious injury offence. The same view was taken in the 1993 report.\textsuperscript{67}

(3) The Home Office report accompanying the draft Bill in 1998 does not discuss the question beyond saying that the draft implements the Law Commission’s proposals.

SHOULD THERE BE ONLY ONE OFFENCE OF CAUSING SERIOUS INJURY?

5.71 The pragmatic argument in favour of this structure is that it creates three offences, of high, medium and low degrees of seriousness, more or less corresponding to the familiar offences in the present law.

5.72 It would be theoretically possible to create just two offences, of causing serious injury and causing injury,\textsuperscript{68} and leave the distinction between intention and recklessness to be addressed in sentencing guidelines. As we have seen, these guidelines already distinguish between greater and lesser harm, and higher and lower culpability, and set different starting points and ranges for each permutation. However, we believe that this would be highly undesirable, for two reasons.

5.73 Our main reason is that it would reduce the communicative effect of the offences. In existing law a special stigma attaches to the most serious offence, of causing grievous bodily harm with intent, and this would continue to be so under the 1998 proposals. This is reflected in the very different maximum sentences.

5.74 Another reason is more technical. In existing law, one further distinction between the offences under sections 18 and 20 is that the section 18 offence is a crime of specific intent.\textsuperscript{69} That is, D cannot be convicted of that offence if he or she was so intoxicated as not to form the intention required. On the other hand, the section 20 offence is a crime of basic intent:\textsuperscript{70} if D is voluntarily intoxicated, he or she may be convicted, although he or she does not have the necessary intent or

\textsuperscript{65} CLRC Report, para 152.
\textsuperscript{66} In paras 8.3 to 8.6.
\textsuperscript{67} In paras 13.3 to 13.5.
\textsuperscript{68} As suggested by some consultees to the CLRC working paper: para 5.68 above.
\textsuperscript{70} Bratty, above.
recklessness for that offence, subject to the rules on voluntary intoxication. This would presumably continue to be the case under the draft Bill as it stands. Merging the two offences could make the question highly problematic.

5.75 It is worth noting that the 1998 Bill made specific provision for alternative verdicts. Clause 22 of the draft Bill provides that, for the purposes of section 6(3) of the Criminal Law Act 1967, every allegation of intention includes an allegation of recklessness. Thus, a person charged with the offence under clause 1 (intentional serious injury) may be found guilty of an offence under clause 2 (reckless serious injury) or 3 (intentional or reckless serious injury). A separate subsection of that clause enables a person charged with any of these offences to be found guilty of the assault offence.

5.76 Given the existence of clause 22, there would seem to be no procedural advantage in merging the offences under clauses 1 and 2. Under the Bill as it stands, counts for both offences can be included on the same indictment; and even if the indictment charges the clause 1 offence alone, it is open to the jury to convict of the clause 2 offence.

SHOULD THERE BE TWO OFFENCES OF CAUSING INJURY?

5.77 Similar arguments could be used to support the original suggestion in the CLRC Working Paper that there should be a total of four offences. That is, in addition to the serious injury offences there would be two separate offences of intentionally causing injury and recklessly causing injury.

Arguments for two offences

5.78 The main argument for separate offences of intentionally causing injury and recklessly causing injury is the principle of fair labelling. For the offences of causing serious injury, the distinction is clearly one of great importance, and both in existing law and in the draft Bill it gives rise to a marked difference in sentencing powers. It seems odd that in the offence of causing injury, which is not exactly minor, there should be no difference at all.

5.79 Another argument is that separating the offences effectively requires a jury to state in all cases whether the injury was intentional or reckless, thus giving the court the maximum amount of information upon which to determine the appropriate sentence.

5.80 For reasons similar to those given above, separating the offences should not create procedural difficulties. In cases of doubt, both offences can be charged in the same indictment or information. If the intentional offence is tried in the Crown

71 For the distinction, see Smith and Hogan para 11.4.3, pp 314 to 321. The leading case is Majewski [1977] AC 443, [1976] 2 All ER 142.

72 Set out in full at para 5.204 below.

Court, it is open to the jury to convict of the reckless offence instead, as under clause 22 every allegation of intention includes one of recklessness.74

Arguments for one offence

5.81 The communicative effect of the offence under clause 3 might not be significantly increased by splitting it into two offences. Where the injury caused is not serious, neither the stigma nor the sentence imposed is likely to differ widely according to whether the injury was caused intentionally or recklessly.

5.82 The draft Bill as it stands ought not to give rise to significant difficulties about charging, such as requiring separate counts of intentionally causing injury and recklessly causing injury.

5.83 Several offences are defined in such a way as to include both intentional and reckless ways of committing them. The typical example is criminal damage,75 which is usually charged in a single count specifying both alternatives: “with intent … or being reckless …”76

5.84 In some cases, however, it is preferable to include separate counts for the intentional and reckless forms of an offence.

In Hardie77 it was held that there should be separate counts for “criminal damage with intent to endanger life” and “criminal damage with recklessness as to whether life is endangered”,78 even though both are forms of the same offence of aggravated criminal damage, because the intentional form is a crime of specific intent.79

The reason for including two counts is one of convenience. It was not suggested that there were in substance two offences, so that charging them both in one count infringed the rule against duplicity.80

5.85 We believe that the offence under clause 3 is more closely analogous to basic criminal damage than to criminal damage with intent/recklessness as to endangering life. The offence under clause 3, like the present offence under section 47 of the 1861 Act, would be one of basic intent. Moreover, the court will usually be perfectly well placed to determine the appropriate sentence since the judge will have heard all the evidence that led the jury to reach its conclusion. In

74 This will not be true if the offence is charged in a magistrates’ court. If there are to be separate offences, in doubtful cases both will be charged.

75 Criminal Damage Act 1971, s 1.

76 Archbold para 23-2; Blackstone’s para B8.4.

77 [1985] 1 WLR 64, [1984] 3 All ER 848.

78 Criminal Damage Act 1971, s 1(2).

79 Compare Hoof (1981) 72 Cr App R 126, [1980] Criminal Law Review 719 where the court expressed frustration that it was not possible to know whether the jury had found that D had intended to endanger life or was reckless as to whether it would be endangered, given that this could give rise to different considerations on sentence.

80 That is, the rule that one count or charge must not allege two offences: Blackstone’s, para D11.45 and following.
any case where this is likely to make a significant difference, the indictment can be amended before the jury retires.

Conclusion

5.86 From the procedural point of view, the choice between having one offence or two offences of causing injury is broadly neutral. Economy in drafting would be achieved by retaining the scheme of the draft Bill.

Consultation question 19

5.87 We consider that there would be benefit in pursuing reform consisting of a modern statute with a hierarchy of offences based on causing injury, similar to that in the draft Bill. Do consultees agree?

Low level injuries

5.88 The present law provides two offences of causing grievous bodily harm, and one of causing actual bodily harm, but the latter offence must consist of an assault. In the scheme of the draft Bill there are two offences of causing serious injury and one of causing injury, none of which need consist of an assault.

5.89 As we have seen, however, the CPS guidelines classify injuries into three levels: really serious injuries, prosecuted under section 18 or 20; serious injuries, prosecuted under section 47; and minor injuries, prosecuted as common assault/battery. The rationale for this is that the minor injuries are unlikely to attract a sentence of more than 6 months, and should therefore be tried in a magistrates’ court.

5.90 The approach of the draft Bill is to uncouple offences of causing injury from offences of assault/battery. This being so, it would be undesirable to perpetuate a practice of using the assault/battery offence in prosecuting the causing of minor injuries. However, under the draft Bill as it stands there would be pressure on prosecutors to do precisely that, for exactly the same reasons as under the present law: the offence of intentionally or recklessly causing injury is triable either way but the assault/battery offence is triable summarily only.

5.91 For this reason we consider that there is a case for creating further subdivision so that there is an offence of intentional or reckless injury triable either way and a summary only offence of causing minor injuries.

ADVANTAGES OF A SUMMARY ONLY OFFENCE OF CAUSING MINOR INJURY

5.92 There are several advantages to this.

(1) It could be used to prosecute some cases which are at present prosecuted as common assault/battery. In practical and procedural terms this makes no difference, but it achieves honesty in labelling by showing that injury was in fact caused. It also promotes the draft Bill’s object of uncoupling offences of causing injury from offences of assault.

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81 Paras 2.33, 2.66 and 2.103 above.
(2) It could also be used to prosecute some cases which are at present prosecuted under section 47. As the section 47 offence is triable either way, in a significant number of cases this offence is tried in the Crown Court. However, in recent years between 7% and 12% of defendants sentenced by the Crown Court for this offence have received a sentence which would have been within the powers of a magistrates’ court. Under the system proposed, these cases would be prosecuted as causing minor injury, and tried in a magistrates’ court. Accordingly, more cases will be tried in the appropriate forum. It should also achieve significant savings in time and cost. The cost of a day’s sitting in a magistrates’ court is considerably less than in the Crown Court; also, prosecution and legal aid costs are higher in the Crown Court, and a Crown Court trial will usually last longer than a trial on identical facts in a magistrates’ court.

(3) Such a scheme would also give the opportunity to review the issue of consent. For example, the statute could provide that consent is a defence to the minor injury offence even outside the permitted exceptions such as sport and surgery.

(4) In general terms, it increases the comprehensibility of the law and avoids distorted charging decisions. Charging these cases under the general injury offence will often appear as over-charging; charging them as common assault will appear as under-charging. Causing minor injury means precisely what it says.

DISADVANTAGES OF AN OFFENCE OF CAUSING MINOR INJURY

5.93 One question would be whether to define the offence under clause 3 (intentionally or recklessly causing injury) so as to exclude the cases of minor injury.

5.94 If clause 3 remains exactly as it stands, all cases falling within the new offence (causing minor injury) will also fall within the general offence (causing injury). There will therefore be the same possibility of over-charging as at present.

5.95 If however clause 3 were to be amended so as to exclude minor injury cases, several complications would ensue. In particular, there would be a question about how to define the mental element of the offence under clause 3. Should it be enough for D to intend or be reckless about the risk of any injury, or must D intend or be reckless about the risk of an injury that is more than minor? In the first case, the offence under clause 3 will be an offence of constructive liability, like the section 20 offence at present. In the second case, charging decisions will be still more complicated.

5.96 It would therefore seem better to leave the offence under clause 3 as including all injuries, including the minor ones covered by the new offence of causing minor injury. Similar overlaps occur in other areas of the criminal law without causing

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82 Para 2.74 above and Graph 3 at the end of Chapter 2.
83 For the meaning of this, see para 3.38 and following, above.
major problems: for example the offence of causing death by dangerous driving\textsuperscript{84} is regularly used, though many instances of it also fall within manslaughter.

POSITION IN THE HIERARCHY OF OFFENCES

5.97 If there is to be an offence of causing minor injuries, the hierarchy of offences would be as follows.\textsuperscript{85}

\begin{enumerate}
\item intentionally causing serious injury, as in clause 1 (indictable only);
\item recklessly causing serious injury, as in clause 2 (either way);
\item intentionally or recklessly causing injury, as in clause 3 (either way);
\item intentionally or recklessly causing minor injury (summary only);
\item causing a physical impact, intending or reckless about the risk of a physical impact (summary only);
\item psychic assault, that is, intentionally or recklessly causing V to apprehend a physical impact (summary only).
\end{enumerate}

5.98 It would be possible to define the offence in paragraph (6) so as to include the case where D intends (or is reckless about) a physical impact but in fact only causes apprehension. This may make the overall scheme less conceptually neat from the point of view of the correspondence principle,\textsuperscript{86} but will mean that marginal cases do not fall through the gap between two offences.

5.99 If an offence of causing minor injuries is introduced, it would be desirable to adapt section 40 of the Criminal Justice Act 1988 so as to allow that offence to be charged in an indictment together with indictable offences founded on the same facts. (This could be done either by textual amendment or by an order under section 40(4) specifying the offence.) This will also enable that offence to be found as an included offence under section 6(3A) of the Criminal Justice Act 1967.\textsuperscript{87} There may also need to be a provision analogous to clause 22(4) of the draft Bill, stating that the new offence is included in the offences under clauses 1 to 3.

Consultation questions 20 and 21

5.100 We consider that there would be benefit in pursuing reform in which the scheme of the 1998 draft Bill would be modified to include a summary offence of causing minor injury. Do consultees agree?

5.101 Do consultees have views on the way in which an offence of causing minor injury should be incorporated into the hierarchy of offences?

\textsuperscript{84} Road Traffic Act 1988, s 1 (substituted by Road Traffic Act 1991, s 1).

\textsuperscript{85} Assuming that there are to be separate offences of battery and psychic assault, as discussed at para 5.44 and following, above.

\textsuperscript{86} For which see para 3.35 and following, above.

\textsuperscript{87} Para 5.199 below.
**Omissions**

5.102 Liability for omissions in criminal law can take various forms; the most detailed treatment is that of Professor Andrew Ashworth. He starts from the principle that omission must mean failure to perform a duty: it cannot include every instance of not doing something. The examples he gives fall into three groups.

1. A criminal statute may create a new duty (or recognise a duty which was previously moral rather than legal) and criminalise breach of it: the omission is the core of the offence. An example is failure to report suspected money laundering.

2. An offence may take the form of an act or omission, where “omission” means failure to comply with a legal duty that exists independently of the offence, such as a common law duty of care.

3. An offence may in principle require an act rather than an omission, but may impose liability for failure to minimise harm resulting from one’s previous act (the situation in *Miller*).

5.103 We consider that, in existing law, the two grievous bodily harm offences fall within group (2) and can therefore be committed by an omission to comply with a common law duty, as well as by an act. Assault, and therefore assault occasioning actual bodily harm under section 47, fall within group (3) and can only take the form of an omission in the limited circumstances envisaged in *Miller*.

5.104 In the draft Bill, clause 1 (intentional injury) contains a sub-section in the following terms:

(2) A person is guilty of an offence if he omits to do an act which he has a duty to do at common law, the omission results in serious injury to another, and he intends the omission to have that result.

5.105 There is no such subsection in clauses 2 and 3. Further, clause 1 speaks of the “act or omission” being performed in England and Wales, while clauses 2 and 3 speak only of the “act” being performed there. It would therefore seem that the offences under clauses 2 (reckless injury) and 3 (intentional or reckless injury) cannot by committed by omission. The position under clause 4 (assault) is not stated, but is likely to coincide with the present law.

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89 In *Positive Obligations* (above, p 30) he distinguishes “omissions” from “not-doings”.

90 Ashworth (above), p 58.

91 Ashworth (above), p 53 and following.

92 [1983] 2 AC 161, [1983] 1 All ER 978; see para 2.15 above.

93 Para 2.80 above for malicious wounding and inflicting grievous bodily harm (s 20); para 2.121 above for wounding or causing grievous bodily harm with intent (s 18).

94 Paras 2.13 to 2.19 above.
5.106 The Bill provides for liability for omissions in circumstances such as those of *Miller,* 95 in accordance with the “duty theory” recognised by the House of Lords in that case:

16.—(1) Where it is an offence under this Act to be at fault in causing a result by an act and a person lacks the fault required when he does an act that may cause or does cause the result, he nevertheless commits the offence if—

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

(b) with the fault required,

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

(2) Where it is an offence under this Act to be at fault in causing a result by an omission and a person lacks the fault required when he makes an omission that may cause or does cause the result, he nevertheless commits the offence if—

(a) being aware that he has made the omission and that the result may occur or (as the case may be) has occurred and may continue, and

(b) with the fault required,

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

(3) For the purposes of this section fault is intention or recklessness, and references to a person being at fault must be construed accordingly.

(4) Common law rules relating to matters provided for in this section do not apply to offences under this Act.

This rule applies equally to all three injury offences, and to the offence under clause 4 that would replace assault and battery.

5.107 Briefly, then, the clause 1 offence includes an omission to perform any duty imposed by the common law. The offences under clauses 2 to 4 only include an omission to perform the particular duty of guarding against a danger one has created.

5.108 The reason for this distinction is not discussed in the 1998 Home Office report, beyond saying that the definitions followed the 1993 Law Commission report. The reason given in our 1993 report was that there should only be liability for

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95 [1983] 2 AC 161, [1983] 1 All ER 978; see para 2.15 above.
omissions in the most serious cases. The same reasoning was adopted by the Criminal Law Revision Committee, with two further reasons:

(1) this scheme coincided with the existing law;

(2) it was undesirable for the offences of causing injury to include persons such as a cleaner who polished a floor and recklessly failed to put up a notice that it was slippery.

5.109 One argument against the scheme in the draft Bill is that it is unnecessarily complicated. All three offences are ones of causing injury. In both legal and normal language, “causing” means more than mere failure to avoid or remedy an undesirable result, and implies that one’s conduct was a substantial factor in bringing it about. Whether D’s omission has caused an injury, so that D can be held to be to blame for it, is a question that can be left to the jury.

5.110 As stated above, the draft Bill contains two schemes of liability for omission. One is liability for failure to perform any duty at common law. The other is liability only for failure to guard against danger created by one’s own act. The question is whether the broader standard should apply to all the offences under clauses 1 to 4, to none of them, or to some and not others.

5.111 Adopting the same scheme for all the offences would allow some simplification of clause 16. Instead of separate subsections relating to acts and omissions, there could be a single provision referring to taking steps to prevent the continuing results of D’s “conduct”.

Consultation question 22

5.112 We consider that there would be benefit in pursuing reform of offences against the person in which it is specified in what circumstances offences of causing injury can be committed by omission. Do consultees have views on whether any of these offences should include causing injury by omission?

Jurisdiction

5.113 Clause 1(2) of the draft Bill provides that an offence under that clause “is committed notwithstanding that the injury occurs outside England and Wales if the act causing injury is done in England and Wales or the omission resulting in injury is made there”. Clauses 2 and 3 contain similar provisions, without the reference to omissions.

96 (1993) Law Com No 218 para 11.1 and following.
98 The understanding in 1985 was that the offence under s 20 required an assault, and therefore could not consist of an omission: para 2.81 above.
99 CLRC Report, para 254.
100 Group (2) in para 5.102 above.
101 Group (3) in para 5.102 above.
5.114 This follows the recommendations in the 1993 Law Commission report. The Criminal Law Revision Committee had recommended that it should be an offence to conspire in this country to commit a serious injury abroad. The draft Bills attached to the Law Commission’s 1992 consultation paper and 1993 report did not follow this recommendation, as the draft Bills were not concerned with preliminary offences. However we did 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 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.

5.115 There are two questions here.

(1) Should we support the reasoning behind these provisions, namely that acts performed in England and Wales and resulting in injury abroad should be punishable?

(2) If so, are the provisions in the draft necessary, or would this be the position under the draft Bill even if those provisions were not included?

SHOULD CROSS-BORDER ACTS BE INCLUDED?

5.116 The example given in the 1993 report was posting a letter bomb from London to Paris that explodes on opening. One instinctively feels that this should be included in the offence, and that to exclude it on the ground that the harm did not occur here is unacceptably insular. In this case most of the conduct concerned, that is to say the manufacture and priming of the bomb as well as its posting, takes place in England and Wales.

5.117 In the modern world, however, there may be acts which cause harm abroad where the part of the process occurring in England and Wales is physically negligible, such as forwarding an email or making a web post.

ARE CROSS-BORDER ACTS INCLUDED IN CURRENT LAW?

5.118 The traditional approach of the law is sometimes called the “terminatory theory”. That is, where an offence is defined as consisting of a course of conduct, that course of conduct constitutes the offence if and only if the last act, which causes the offence to be complete, is performed in England and Wales. This was criticised by Michael Hirst, who favoured including cases where any part of the conduct or its effects take place in England and Wales.

102 CLRC, Fourteenth Report, para 154.
In more recent times the terminatory theory has given way to a broader test known as the "substantial measure principle", in which an offence is committed if a substantial part of the prohibited conduct or result takes place in England and Wales. Accordingly, where an offence is defined in such a way that particular described conduct must lead to particular described results, it is sufficient for either the conduct (or a substantial measure of it) or the results to take place here.

The difficulty is that the offences under clauses 1 to 3 contain no limitation on the kind of conduct prohibited: they are pure "result crimes". In such cases it is certain that the offence is committed if conduct performed abroad has consequences in England and Wales. It is less clear that the offence is committed if conduct performed in England and Wales has consequences abroad. It seems likely that the courts would follow the "substantial measure principle" and hold that the offence is indeed committed if the conduct occurring in England and Wales is substantial enough.

Summary of Arguments

The argument for including a provision on the lines of clause 1(2) is that the provisions in question are valuable, because they remove a possible doubt. The argument against doing so is that the existing interpretation of the law on cross-border offences will yield the desired results.

Consultation question 23

Do consultees consider that there would be benefit in pursuing reform in which it is specifically provided that conduct in England and Wales causing injury abroad falls within the offences of causing injury?

Particular Assaults

Summary of problems with the present law

The 1861 Act contains several offences of violence against particular people or in particular circumstances.

(1) Wounding or causing grievous bodily harm with intent to resist or prevent the lawful apprehension or detention of any person (section 18).

(2) Obstructing or assaulting a clergyman in the discharge of his duties (section 36).

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107 Smith (Wallace Duncan) (No 4) [2004] EWCA Crim 681, [2004] QB 1418; Sheppard [2010] EWCA Crim 65, [2010] 2 All ER 850. For general discussion of the principles, see Archbold paras 2-33 and 2-34 and Blackstone’s paras A8.5 and A8.6. The turning point came with Treacy v DPP [1971] AC 537, a blackmail case in which a letter making demands was posted from England to Germany. The House of Lords considered both theories but decided that, on either theory, the offence of blackmail was committed here, as blackmail is defined by reference to D’s conduct rather than its consequences.

108 Archbold para 2-33, last sentence.

109 For the distinction between “conduct crimes” and “result crimes”, see Blackstone’s paras A1.2 and A1.3.

(3) Assaulting a magistrate in the exercise of his duty preserving a wreck (section 37).

(4) Assault with intent to resist or prevent the lawful apprehension or detention of any person (section 38).

A similar offence, not in the 1861 Act, is that of assaulting a constable in the execution of his duty, under section 89(1) of the Police Act 1996.\textsuperscript{111}

Coherence in classification

5.124 The offences concerning clergymen and persons preserving a wreck have been criticised on the grounds that these assaults are rare, and that there is no reason to treat them separately from other assaults.\textsuperscript{112} This is an instance of the complaint that the 1861 Act contains too many narrow and over-specialised offences.\textsuperscript{113} In particular, it is hard to see why these cases should attract a higher sentence, or a different mode of trial, as compared with other assaults.

Definition of individual offences

5.125 The other criticism of some of these offences concerns their mental elements. For example, in the offence of assaulting a constable there is no need for D to be aware that V is or might be a police constable.

5.126 As we have seen,\textsuperscript{114} in some cases D's ignorance of V's status may mean that D believed that V was acting unlawfully, and D will have a defence of lawful excuse.\textsuperscript{115} However, there may be cases where this defence does not apply, but D still does not suspect that V is a police officer. In these cases, as far as D's state of knowledge goes D is only committing a common assault. It is hard to see why D should be guilty of a more serious offence.\textsuperscript{116}

The 1998 draft Bill

5.127 The draft Bill omits the offences of assault on a clergyman and assault on a magistrate or officer preserving a wreck. It reproduces the other three offences as follows.

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

(a) a constable acting in the execution of his duty, or

\textsuperscript{111} Other offences of assaulting particular officials are listed in the footnotes to para 2.139 above.


\textsuperscript{113} Para 3.5 above.

\textsuperscript{114} Para 2.143 above.

\textsuperscript{115} Smith and Hogan, 17.9.2.3; Blackburn v Bowering [1994] 1 WLR 1324, [1994] 3 All ER 380 (on a similar offence involving court bailiffs).

\textsuperscript{116} Though the practical impact is limited, as the offence under Police Act 1996, s 89 is summary and the maximum sentence is 6 months, the same as for common assault: Archbold para 19-325; Blackstone’s para B.2.38.
(b) a person assisting a constable acting in the execution of his duty.

(2) For the purposes of this section a person assaults if he commits the offence under section 4.

(3) A reference in this section to a constable acting in the execution of his duty includes a reference to a constable who is a member of a police force maintained in Scotland or Northern Ireland when he is executing a warrant, or otherwise acting in England and Wales, by virtue of an enactment conferring powers on him in England and Wales.

(4) For the purposes of subsection (3) each of the following is a police force—

(a) a police force within the meaning given by section 50 of the Police (Scotland) Act 1967;

(b) the Royal Ulster Constabulary and the Royal Ulster Constabulary Reserve.¹¹⁷

(5) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding 6 months or a fine not exceeding level 5 on the standard scale or both.

6.—(1) A person is guilty of an offence under this section if he causes serious injury to another intending to resist, prevent or terminate the lawful arrest or detention of himself or a third person.

(2) The question whether the defendant believes the arrest or detention is lawful must be determined according to the circumstances as he believes them to be.

(3) A person guilty of an offence under this section is liable on conviction on indictment to imprisonment for life.

7.—(1) A person is guilty of an offence if he assaults another intending to resist, prevent or terminate the lawful arrest or detention of himself or a third person.

(2) The question whether the defendant believes the arrest or detention is lawful must be determined according to the circumstances as he believes them to be.

(3) For the purposes of this section a person assaults if he commits the offence under section 4.

(4) A person guilty of an offence under this section is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding 2 years;

(b) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both.

Discussion

5.128 The offence of assaulting a constable is similar to that under the present law, except for a provision linking the word “assault” with the new offence under clause 4. As in existing law, there is no requirement that D should be aware that V was or might be a police officer.

5.129 In this respect, the offence is different from that in the Law Commission’s 1993 Report,118 which contained the words “knowing that, or being reckless whether, the person assaulted or the person being assisted is a constable”. Instead it replicated the statute as it stood in 1998, on the ground that “the Government does not wish to reduce the protection given to the police in this law reform”.119 In any future reform, we would wish to consider whether the existing rule of strict liability should be retained, or a rule similar to that in the 1993 Report should be introduced.120

5.130 The other two offences are also basically similar to the existing law, except for—

(1) the omission of “wounding” from the offence in clause 6, and

(2) the changes required to reflect the draft Bill’s definitions of injury and assault.

However, they are in far simpler language, and clearly state the position when D believes that the arrest or detention is unlawful.

5.131 Like the existing offences, they can be divided into sub-forms. D may intend to “resist, prevent or terminate” the “arrest or detention” of “himself or a third person”: therefore, each of the two offences can theoretically be committed in twelve ways. However, clause 21 makes it clear that each section creates only one offence. Indictments in the Crown Court, and charges in magistrates’ courts, will therefore reproduce the statutory phrase in full, without any danger of being held bad for duplicity.

5.132 Professor Ashworth121 queries why a life sentence should be retained for the offence in clause 6, and indeed why such an offence should be necessary. According to him, it is contrary to principle that there should be liability to the highest penalty (life imprisonment) without a need to prove that the injury was caused intentionally or even recklessly. The Home Office argument that the offence in the 1861 Act must be retained in order not to reduce the protection given to the police is, he considers, weak. If the causing of serious harm is

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118 Legislating the Criminal Code: Offences Against the Person and General Principles (1993) LC No 218, cl 7(1) of draft Bill.

119 Home Office Consultation Paper para 3.8. Prof A Ashworth, in the article cited in fn 121 below, describes this change as unfortunate, and the argument about protection as unconvincing.

120 The same question arises in connection with the other offences of assaulting specific categories of official, as listed in the footnotes to para 2.139 above.

intentional, a life sentence will in any case be available under clause 1. If it is not, the fact that the victim was a police officer can be taken into account in sentencing as an aggravating factor, in the same way as if the victim were an elderly person.

5.133 This reasoning would equally imply that there is no need for a special offence of assaulting a constable in the execution of his duty; after all, the available penalty is the same as for common assault.

5.134 We would not go so far as to recommend the abolition of these offences: there is a legitimate concern that the label given to the offence should reflect the special nature of D's conduct. However there is an argument that a maximum of life imprisonment in clause 6, in a case where the injury was neither intended nor foreseen, is disproportionate.

5.135 The offence of assaulting or obstructing members of the clergy is rarely prosecuted and the offence of assaulting magistrates and others concerned with wrecks does not appear to occur.

5.136 We proposed the abolition of the offence of assaulting or obstructing clergy in our report on Offences against Religion and Public Worship.\textsuperscript{122} However no repeal provision was contained in the draft Bill attached to that report, as it was thought that “they can be dealt with when the statutes concerned are examined as a whole with a view to repeal”. Accordingly, this offence does not appear in the 1998 draft Bill or in any of the earlier Law Commission drafts on which it was based.

5.137 The “assault” limb of the offence would appear to be unnecessary. The behaviour concerned will be covered by the offence of common assault, or in more serious cases by religiously aggravated assault. It may need to be considered whether the “obstructing” limb is still necessary.

Consultation questions 24 and 25

5.138 We consider that there would be benefit in pursuing reform including offences of assaulting a police constable, causing serious injury while resisting arrest and assault while resisting arrest in the form contained in the draft Bill, subject to consideration being given to:

(1) the maximum sentence for the offence of causing serious injury while resisting arrest;

(2) the possibility of introducing a requirement that D knew that or was reckless as to whether V was a police constable, as in the 1993 report.

Do consultees agree?

Do consultees consider that there would be benefit in considering the abolition of the offences of assaulting or obstructing clergy and of assaulting magistrates and others preserving a wreck?

Racially and religiously aggravated offences

As explained in Chapter 2, there are racially and religiously aggravated offences of assault, assault occasioning actual bodily harm and malicious wounding or grievous bodily harm. These are offences created by the Crime and Disorder Act 1998, and are separate from the offences without aggravation on which they are based. In our recent report on hate crime, we considered whether there should be similar offences aggravated by hostility on the grounds of sexual orientation, disability or transgender identity and recommended a wider review of these offences.

These offences would need to be modified or replaced if legislation on the lines of the 1998 draft Bill were introduced. There could for example be racially and religiously aggravated forms of the offences under clause 2 (recklessly causing serious injury), 3 (intentionally or recklessly causing injury) and 4 (assault or battery). If there were to be an offence of causing minor injury, it would need to be considered whether there should also be an aggravated form of that offence.

The replacement offences, like the existing aggravated offences, would presumably be triable either way. There would also need to be some consideration of sentencing powers. For example, the maximum sentence for the existing offence under section 20 (malicious wounding or infliction of grievous bodily harm) is 5 years, and that for the aggravated offence is 7 years. However, the maximum sentence for the offence under clause 2 of the draft Bill is 7 years, so that for the aggravated offence would need to be greater than this.

Consultation question 26

We consider that there would be benefit in pursuing reform including revised offences of racially and religiously aggravated violence, based on the offences of assault and causing injury defined in the draft Bill. Do consultees agree?

Domestic violence

The 1861 Act contains no offences specifically relating to domestic violence, with the possible exception of the offence of exposing children to danger in section 27. Nor does the draft Bill. The question is whether it would be desirable to pursue the 1861 Act or to consider new offences.

123 Para 2.150 and following, above.
125 And forms based on the other forms of hostility, if the current offences are extended to cover these before reform of the offences against the person takes place.
126 As discussed at para 5.88 and following, above.
reform including specific offences of this kind, in light of the continuing concern about the policing of domestic violence.\textsuperscript{127}

5.145 In recent times this concern has not been primarily focused on creating new offences of domestic violence. It has largely been concerned with:

(1) whether domestic violence is being effectively policed, using the existing offences of violence;

(2) whether new offences should be created for forms of domestic abuse falling short of physical violence.

New offences of violence

5.146 It would be possible to create aggravated or specialised forms of the offences of assault under clause 4 and of causing injury under clause 3 (and of causing minor injury, if the suggestion in paragraph 5.100 above is pursued), covering cases where V is living with D as a member of the family. It would need to be considered what sentencing powers would be appropriate.

ARGUMENTS FOR NEW OFFENCES

5.147 One argument for creating such offences is one of labelling and protection. Where D is convicted of such an offence, this fact will appear on D’s criminal record. This will give notice to social services and other agencies that D has a record of domestic violence.

5.148 Another argument is that, in addition to the wrong implicit in all unjustified acts of violence, domestic violence involves wrongs peculiar to it: abuse of trust and destruction of the sanctity of a relationship. It has also been argued\textsuperscript{128} that the prosecution of offences of domestic violence has a part to play in correcting the power imbalance between the sexes.

ARGUMENTS AGAINST NEW OFFENCES

5.149 The argument against creating such offences is that it would create a misleading impression that domestic violence is primarily an offence against family relationships, to be distinguished from “real” violence. It is widely accepted that it is wrong to dismiss such incidents as “just a domestic”, and therefore as quarrels to be resolved within the family without the intervention of the criminal justice system.\textsuperscript{129} By the same token one could argue that it is wrong to regard the domestic context as transforming the basic nature of the offence. On this approach, the main principle should be that violence is violence, and assaulting


\textsuperscript{128} M Dempsey, *Prosecuting Domestic Violence: A Philosophical Analysis* (2009). In this book, Dempsey is concerned with the principled justification for prosecution and does not discuss the creation of new offences.

\textsuperscript{129} See for example the debates on the Domestic Violence, Crime and Victims Bill, HC Deb, 14 June 2004, cols 536 to 611, in particular col 547.
or injuring a member of the family is wrong for precisely the same reasons as assaulting or injuring anyone else.

5.150 Another point is that domestic violence should not be confused with gender-based violence. Violence within a family or a relationship can occur whatever the genders of those involved. Conversely, there is gender-based violence that has nothing to do with family or domestic relationships.130

5.151 We agree that, where V is a young child, assaulting or injuring V can involve additional wrongs of targeting the vulnerable and abusing a relationship of trust. However, this is already recognised by the law. There is an offence of cruelty to children under section 1 of the Children and Young Persons Act 1933. Further offences connected with the non-accidental death or serious injury of a child are created by the Domestic Violence, Crime and Victims Act 2004.131

New offences of abuse falling short of violence

5.152 There is a separate question whether there should be a broader offence of domestic abuse, covering behaviour that does not currently fall within any of the offences of violence.132 Examples would be coercive control, bullying or keeping a person short of money.133 This is the subject of a current consultation;134 while it is currently a question for political decision falling well outside the scope of the present project, the two could be combined at the legislative stage.

Consultation question 27

5.153 Do consultees consider that there is benefit in examining whether reform of offences against the person should include specific offences of domestic violence?

SOLICITATION TO MURDER AND THREATS TO KILL

Summary of problems with the present law

Coherence in classification

5.154 One question raised by the previous reform proposals is whether the offence of solicitation to murder is still necessary, given the existence of the offence of assisting and encouraging crime.135

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130 For example rape by strangers, or the Mexican serial murders cited by Dempsey (above), p 146.
131 As amended by Domestic Violence, Crime and Victims (Amendment) Act 2012.
132 Though it will often fall within offences of harassment under the Protection from Harassment Act 1997.
135 Under Serious Crime Act 2007, ss 44 and 45; discussed para 5.159 and following, below.
**Definition of individual offences**

5.155 The 1861 Act provides offences of solicitation to murder\(^{136}\) and threatening to kill.\(^{137}\) As we have seen, there are uncertainties about the scope of both offences.

(1) In the offence of solicitation to murder, it is not clear whether D must intend or believe that the person solicited will carry out a murder.\(^{138}\)

(2) In the offence of threatening to kill, D must intend that the person to whom the threat is made would fear that the threat would be carried out; but it is not clear whether than person must in fact have that fear.\(^{139}\) It is also not clear whether the offence covers conditional threats.\(^{140}\)

**Accuracy of legal references**

5.156 One minor defect in the drafting is the use of “misdemeanor” in section 4.

**The 1998 draft Bill**

5.157 No offence of solicitation to murder was included in the draft Bill. It was presumably considered that this conduct was adequately covered by the offence of incitement, now replaced by assisting and encouraging crime under the Serious Crime Act 2007.\(^{141}\)

5.158 The offence of threatening to kill is widened to an offence of threatening to kill or cause serious injury.

10.—(1) A person is guilty of an offence if he makes to another a threat to cause the death of, or serious injury to, that other or a third person, intending that other to believe that it will be carried out.

(2) A person guilty of an offence under this section is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding 10 years;

(b) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both.

**Discussion**

**Solicitation to murder**

5.159 The abolition of the offence of solicitation to murder was recommended in the Criminal Law Reform Committee’s Fourteenth Report, para 223, and the offence

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\(^{136}\) OAPA 1861, s 4.

\(^{137}\) OAPA 1861, s 16.

\(^{138}\) Para 2.176 and following, above.

\(^{139}\) Para 2.160 above.

\(^{140}\) Para 2.162 above.

\(^{141}\) Para 5.159 below.
was therefore not included in the 1985 draft Code. The commentary to the 1989 Draft Code states that:

A number of statutes create specific offences of incitement, conspiracy or attempt to commit other offences. Most of these offences are already unnecessary because the conduct referred to is covered by the existing general law. These can safely be repealed when the relevant statutes are revised after the Code comes into force.

The CLRC and the Law Commission clearly considered that the scope of the offence of soliciting to murder was wholly covered by incitement at common law. This offence was considered to be beyond the scope of the 1992-93 project on offences against the person.

5.160 On reconsideration, we cannot be sure that the conduct covered by this offence always falls within the offence of assisting and encouraging crime under sections 44 and 45 of the Serious Crime Act 2007.

(1) The offence under section 44 requires that D should intend that the person encouraged will commit the offence in question.

(2) The offence under section 45 requires that D should believe that the offence will be committed, and that D’s act will encourage or assist its commission. In a case where D is offering a choice of offences, section 46 provides that the offence of assisting and encouraging is committed if D believes that the person encouraged will commit one of them but does not know which, and that D’s act will encourage or assist one or more of them (not necessarily the same as the one committed).

By contrast, as argued above the solicitation offence does not require D to intend or believe that a murder will take place.

5.161 A related problem concerns encouragement to kill people in generic categories. In some cases, this might come within section 46: D is encouraging a person to kill anyone within a range of people, and intends or believes that that person will kill one of them. An example would be a case where D is involved in a gang war and tells a henchman to select and kill a member of the rival gang to make an example. In a case like *El-Faisal*, by contrast, the encouragement is more likely to take the form of saying that the killing of unbelievers is lawful and that one should feel free to do so if the occasion arises. This certainly falls within

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142 1985 draft Code, p 135 fn 18.
143 Para 13.54.
144 1992 CP, Appendix D p 124.
145 For a full account of why this test was adopted, see Inchoate Liability for Assisting and Encouraging Crime (2006) Law Com No 300, paras 5.73 to 5.89.
146 Law Com No 300 (above) paras 5.90 to 5.99.
147 Para 2.177 above.
148 Para 2.173 above.
149 [2004] EWCA Crim 343; para 2.173 above.
the solicitation offence, but we are not sure that it would be covered by section 46: the advice is contingent and D cannot have any certainty that it will be followed.

5.162 The maximum sentence for assisting and encouraging an offence is the same as that for the offence assisted or encouraged. In the case of assisting and encouraging murder, the maximum is therefore imprisonment for life, the same as the maximum for solicitation of murder. However, it could be argued that inciting murder is a crime of such exceptional malignity that it deserves a label of its own, distinct from the comparatively colourless one of “assisting or encouraging crime”.

5.163 This could also justify the broader scope of the offence. In most cases, the reason for restraining the encouragement of crime is to make it less likely that the crime will take place. However, encouraging murder is an evil in itself, as it creates an atmosphere of fear and danger even if no murder actually happens.

5.164 One possibility would be to leave the offence of solicitation to murder in place in the 1861 Act. The argument for this is that it is essentially a homicide-related offence rather than an offence of non-fatal violence like most of those in the 1861 Act: it can therefore appropriately be omitted from a statute codifying offences of violence.

5.165 On the other hand, the boundaries of the offence are not entirely clear, and it might be worth including a reformulated offence in any new statute.

JURISDICTION

5.166 As mentioned in Chapter 2, it was explained in Abu Hamza that one reason for the introduction of section 4 was that the common law of incitement did not cover foreign nationals in England and Wales inciting a murder to take place abroad: incitement to murder abroad, like actual murders abroad, was only triable in England and Wales if committed by citizens of the United Kingdom. If so, the Criminal Law Reform Committee in 1985, and the Law Commission in 1989, may not have been quite correct in assuming that the scope of solicitation to murder was wholly included in incitement.

5.167 The Serious Crime Act 2007, in creating offences of assisting and encouraging crime, makes detailed provision for jurisdiction.

(1) Under section 52(1) of the Serious Crime Act 2007, D is liable for any act of assisting and encouraging, wherever it occurs, if the proposed offence is to take place in England and Wales.

(2) Under Schedule 4 para 2, D is liable for acts of assisting and encouraging taking place in England and Wales in relation to an offence

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150 Para 2.181 above.
152 Para 2.182 above.
153 Smith and Hogan p 479.
proposed to take place abroad, if the offence is also an offence under the
law of the foreign country in question.

(3) Under Schedule 4 para 3, where both the assisting and encouraging and
the proposed offence take place or are intended to take place abroad, D
is liable if and only if there would have been jurisdiction to prosecute D, in
England and Wales, had D committed the proposed offence in the
country in question. In other words, extraterritorial jurisdiction for the
assisting and encouraging follows extraterritorial jurisdiction for the
substantive offence. As there is extraterritorial jurisdiction for murder, it
follows that there is for assisting and encouraging murder.

Prosecutions under any provision of Schedule 4 may only be brought by or with
the permission of the Attorney General.

5.168 In short, the offence of assisting and encouraging a murder to take place abroad
can be tried in England and Wales if either the act capable of assistance or
encouragement took place in England and Wales or the person doing the
assisting and encouraging is a citizen of the United Kingdom. It is therefore
unnecessary to retain the offence of solicitation to murder for purely jurisdictional
reasons. The question remains whether the offence should be retained for cases
where D does not necessarily believe or intend that the murder will be committed.

5.169 If a reformulated offence is included, it will be necessary to consider whether to
make specific provision for:

(1) acts of encouragement in England and Wales, relating to a murder to be
committed abroad;

(2) acts of encouragement abroad, relating to a murder to be committed in
England and Wales;

(3) acts of encouragement abroad by a citizen of the United Kingdom,
relating to a murder to be committed abroad.

Consultation question 28

5.170 Do consultees consider that there would be benefit in pursuing reform
including a revised and clarified offence of encouraging murder?

Threats to kill

5.171 Similar points arise in connection with the threats offence in the draft Bill. The
present offence contains the words “intending that that other would fear it would
be carried out”. As mentioned above, it is uncertain whether the second
“would” is used only in order to respect the sequence of tenses, or whether it can
mean “would in certain conditions”. The 1998 draft Bill changes the wording to
“intending that other to believe that it will be carried out”. The use of “believe”,
instead of “fear”, also imports a higher degree of certainty.

154 OAPA 1861, s 9: Blackstone’s para B1.9.
155 Serious Crime Act 2007, s 53.
156 Para 2.162 above.
The usual purpose and effect of a threat is to make V believe that the threat will be carried out in certain conditions (usually, if V does not comply with a demand by D), rather than certainly in any event. “Intending that other to believe that it will be carried out” may not be adequate to include this.

If an offence of threatening to kill is included, it will be necessary to consider whether to make specific provision for:

(1) threats made in England and Wales, to kill a person abroad;

(2) threats made abroad, to kill a person in England and Wales;

(3) threats made by a citizen of the United Kingdom abroad, to kill a person abroad.

Consultation question 29

We consider that there would be benefit in pursuing reform including an offence of threatening to kill or cause serious injury, in the form given in clause 10 of the 1998 Bill, amended to cover the case where the threat is conditional. Do consultees agree?

Summary of problems with the present law

Coherence in classification

There are three separate poisoning offences: administering stupefying substances with intent to commit an offence; administering a poison or noxious thing so as to endanger life or inflict grievous bodily harm; administering a poison or noxious thing with intent to injure or annoy.

All three offences list series of alternatives, rather than stating a single principle. In particular, the offence under section 22 is needlessly specific in referring to chloroform and laudanum.

It could also be argued that the offence under section 23 is unnecessary, as all instances are covered by the offence of inflicting grievous bodily harm in section 20. The main difference is the maximum sentence: ten years instead of five.

Definition of individual offences

As explained in Chapter 2, D does not “administer” a drug to V if D assists V to inject it (for example, by supplying the drug or the equipment or tying the

157 OAPA 1861, s 22.
158 OAPA 1861, s 23.
159 OAPA 1861, s 24.
160 Para 2.191 above.
tourniquet) but V performs the final act of injection. V’s free act in pressing the plunger breaks the chain of causation.\textsuperscript{161}

5.179 In sections 23 and 24, the word “maliciously” does not clearly describe the mental element of the offence. Even assuming that it means “intentionally or recklessly”, it is not stated whether D must intend or be reckless about the fact of administration, the noxious nature of the substance or the possible effect on V.

**The 1998 draft Bill**

5.180 There is just one poisoning offence in the Bill.

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

(a) he administers a substance to another or causes it to be taken by him and (in either case) he does so intentionally or recklessly,

(b) he knows the substance is capable of causing injury to the other, and

(c) it is unreasonable to administer the substance or cause it to be taken having regard to the circumstances as he knows or believes them to be.

(2) A person guilty of an offence under this section is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding 5 years;

(b) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both.

No distinction is made according to whether:

(a) the conduct was intentional or reckless;

(b) the expected injury was serious or not;

(c) the injury in fact occurred.

5.181 This is somewhat similar to the offence under section 24, though it requires only knowledge that the substance may cause injury, rather than intent to injure. Like the section 24 offence, the proposed offence is one of endangerment rather than of doing harm.

5.182 There is no equivalent of the offences under sections 22 and 23.

(1) The offence under section 22 was considered unnecessary,\textsuperscript{162} in line with the recommendations of the Criminal Law Revision Committee.\textsuperscript{163}

\textsuperscript{162} 1993 Report, Appendix B para 3.2.
\textsuperscript{163} CLRC Report, para 208.
conduct in question would be covered by their recommended offence of administering a substance “capable of interfering substantially with another’s bodily functions”. The 1998 draft Bill defines “injury” to include “pain, unconsciousness and any other impairment of a person’s physical condition”;\textsuperscript{164} this conduct would therefore fall within the offence of causing injury (clause 3) or poisoning (clause 11). There is a separate offence of administering a substance to stupefy or overpower V with the intention of engaging in sexual activity.\textsuperscript{165} Outside that special case, the Committee did not “consider it necessary to apply a special provision with a maximum penalty of life imprisonment to the generality of indictable offences”.

(2) The offence under section 23 was also considered unnecessary, as this behaviour is covered by the offence of recklessly causing serious injury (for which the maximum sentence is 7 years).\textsuperscript{166}

Discussion

5.183 We agree with the argument that there is no need for an offence of causing harm by poison, given the existence of the general offences of causing injury. We therefore support the proposal that these offences should cover the administration of dangerous substances whether they in fact cause injury or not.

5.184 This proposal can only be supported if offences of endangerment are justified in principle; we invite views on this above.\textsuperscript{167} The argument for including such an offence in this particular case is that drugs, like explosives, are intrinsically dangerous things, and that there is a legitimate public interest in discouraging their irresponsible use. To prosecute only when the harm is done is to intervene too late.

5.185 The clause does not explicitly address the point raised above,\textsuperscript{168} about assisting V to administer a drug to him- or herself. However, we believe that as a matter of general legal logic the argument in *Kennedy* is unanswerable, and would continue to represent the position if this clause were enacted. We would not propose to alter this position.

5.186 The offence can be committed “intentionally or recklessly”. It is not immediately clear what D must intend or be reckless about. However, as D’s state of mind about the nature of the substance and the possible injury to V is clearly spelled out, it can only mean intention or recklessness as to the fact of administration.

Consultation question 30

5.187 We consider that there would be benefit in considering whether reform of the law of offences against the person should include an offence of

\textsuperscript{164} Clause 15.

\textsuperscript{165} Sexual Offences Act 2003, s 61 (now; at the time of the CLRC report, this offence was provided by Sexual Offences Act 1956, s 4).

\textsuperscript{166} 1993 report, para 24.5.

\textsuperscript{167} Paras 3.67 and 3.68 above.

\textsuperscript{168} Para 5.178 above.
administering a substance capable of causing injury, similar to that in clause 11 of the draft Bill. Do consultees have views about such an offence?

EXPLOSIVES AND DANGEROUS SUBSTANCES

Summary of problems with the present law

Coherence of classification

5.188 There are four separate offences involving explosives and corrosive substances in the 1861 Act,¹⁶⁹ and three more in the Explosive Substances Act 1883.¹⁷⁰

5.189 The main problem here is the multiplication of closely related offences. In addition, many of the elements of each offence consist of long lists of narrowly defined alternatives. For example, the offence under section 29 has four separate branches, each divided into further alternatives.¹⁷¹ This does not make the sections easy to understand.

Definition of individual offences

5.190 The word “maliciously” is also problematic. In section 28 it means “intending or reckless about the risk of some physical harm”. In sections 29 and 30 it has the same meaning, but given the separate requirement of intention to cause certain injuries it is redundant.

Language; accuracy of legal references

5.191 The sections contain references to “felony”, “misdemeanor” and “penal servitude”, which are now obsolete, and “grievous bodily harm”, which is not obsolete but is archaic.

The 1998 draft Bill

5.192 The explosives offences are replaced by two offences, depending on whether D intended (or was reckless about) serious injury or injury in general.

8.—(1) A person is guilty of an offence if he acts as mentioned in subsection (2) and—

(a) he intends to cause serious injury, or

(b) he is reckless whether serious injury is caused.

(2) A person acts as mentioned in this subsection if he—

(a) causes an explosive substance to explode,

(b) places a dangerous substance in any place,

¹⁶⁹ Para 2.211 and following, above.
¹⁷⁰ Para 2.213 above.
¹⁷¹ The section is set out in full in para 2.212 above; the four branches are distinguished in para 3.6(3) above.
(c) delivers or sends a dangerous substance to a person,

(d) throws a dangerous substance at or near a person, or

(e) applies a dangerous substance to a person.

(3) For the purposes of subsection (2) a dangerous substance is an explosive substance or any other dangerous substance.

(4) In this section “explosive substance” has the same meaning as in the Explosive Substances Act 1883.

(5) A person guilty of an offence under this section is liable on conviction on indictment to imprisonment for life.

9.—(1) A person is guilty of an offence if he acts as mentioned in section 8(2) and—

(a) he intends to cause injury, or risk injury, or

(b) he is reckless whether injury is caused.

(2) A person guilty of an offence under this section is liable on conviction on indictment to imprisonment for a term not exceeding 14 years.

Discussion

5.193 These offences are “endangerment offences”, in the sense that they are committed whether or not the injury occurs: the arguments for and against such offences are the same as in the case of the drugs offences.172 If injury is caused, D can be charged with an offence under clause 1 (intentional serious injury), 2 (reckless serious injury) or 3 (intentional or reckless injury) as appropriate. As in the case of the poisoning offences, this avoids unnecessary overlap between the offences.

5.194 Each of these offences is divided into five sub-forms, though clause 21 states that the relevant clauses create one offence each. However, the sub-forms are clearly listed in clause 8(2) and there are no complications about how they are related to the remaining ingredients of the offence. Also, there will seldom be doubt about which of them has occurred on a given set of facts.

Consultation question 31

5.195 We consider that there is benefit in pursuing reform including offences relating to explosives and dangerous substances, in the form given in the draft Bill. Do consultees agree?

OTHER OFFENCES

5.196 The remaining offences under the 1861 Act are:

172 Para 5.184 above.
(1) the railway offences;\textsuperscript{173}
(2) impeding a person escaping from a shipwreck;\textsuperscript{174}
(3) attempting to choke in order to commit an indictable offence;\textsuperscript{175}
(4) not providing apprentices or servants with food;\textsuperscript{176}
(5) exposing children to danger;\textsuperscript{177}
(6) setting a spring gun, man trap or other engine calculated to destroy life or cause grievous bodily harm;\textsuperscript{178}
(7) causing harm by furious driving.\textsuperscript{179}

5.197 The draft Bill replaces the railway offences by a single offence of causing danger on railways, and does not reproduce any of the other offences. The offences of impeding a person escaping from a shipwreck and not providing apprentices or servants with food are not encountered in modern practice: the rest generate a few prosecutions each year.

5.198 If reform of offences against the person is pursued, it will be necessary to consider:

(1) whether the railway offences should be retained in their present form or replaced in accordance with the draft Bill;

(2) whether any of the remaining offences (and if so which) should be abolished.

We have not studied these topics in detail as part of this scoping exercise and therefore do not include a consultation question at this stage.

**ALTERNATIVE VERDICTS**

**Present law**

5.199 A person charged with one offence can be convicted of another offence included within it. Section 6 of the Criminal Law Act 1967\textsuperscript{180} provides:

\textsuperscript{173} OAPA 1861, ss 32, 33 and 34.
\textsuperscript{174} OAPA 1861, s 17.
\textsuperscript{175} OAPA 1861, s 21.
\textsuperscript{176} OAPA 1861, s 26.
\textsuperscript{177} OAPA 1861, s 27.
\textsuperscript{178} OAPA 1861, s 31. In *Cockburn* [2008] EWCA Crim 316, [2008] QB 882 it was held that a spiked steel plate placed so as to fall from a shed door could be an "engine" though it had no motive power of its own. See D Ormerod, case comment, [2008] Crim LR 802. See also *Munks* [1964] 1 QB 304, [1963] 3 All ER 757 (only mechanical, and not electrical, devices are covered by the offence).
\textsuperscript{179} OAPA 1861, s 35.
\textsuperscript{180} As amended by Domestic Violence, Crime and Victims Act 2004, s 11.
(3) Where, on a person’s trial on indictment for any offence except treason or murder, the jury find him not guilty of the offence specifically charged in the indictment, but the allegations in the indictment amount to or include (expressly or by implication) an allegation of another offence falling within the jurisdiction of the court of trial, the jury may find him guilty of that other offence or of an offence of which he could be found guilty on an indictment specifically charging that other offence.

(3A) For the purposes of subsection (3) above an offence falls within the jurisdiction of the court of trial if it is an offence to which section 40 of the Criminal Justice Act 1988 applies (power to join in indictment count for common assault etc.), even if a count charging the offence is not included in the indictment.

(3B) A person convicted of an offence by virtue of subsection (3A) may only be dealt with for it in a manner in which a magistrates’ court could have dealt with him.

(4) For purposes of subsection (3) above any allegation of an offence shall be taken as including an allegation of attempting to commit that offence …

5.200 “Included”, here, is broadly interpreted: there is no requirement that the definition of the first offence must always include all the elements of the second offence. That is, “include” means “include cases of” rather than “include the same necessary ingredients as”.

5.201 In Wilson and Jenkins it was held that a person charged with inflicting grievous bodily harm contrary to section 20 can be convicted of assault occasioning actual bodily harm under section 47, even though the section 20 offence need not involve an assault, and even though the particulars of offence did not allege an assault. It was sufficient that an assault was one way in which the section 20 offence could be committed: in that sense “inflicting” includes “inflicting by assault”. Accordingly:

(1) the section 18 offence includes the section 20 offence, the section 47 offence and common assault (meaning assault or battery);

(2) the section 20 offence includes the section 47 offence and common assault;

(3) the section 47 offence includes common assault.

5.202 Wilson does not address the question whether battery includes assault. According to Nelson battery does not include assault, but this seems

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181 Archbold paras 4-525 to 4-527; Blackstone’s para D19.47 and following; Wilson, discussed in next two paragraphs.


inconsistent with *Wilson* and should not be taken as a correct statement of the law.

5.203 The inserted subsections (3A) and (3B) have the effect of allowing common assault\(^{185}\) to be found as an included offence, even though assault is a summary offence and therefore not “another offence falling within the jurisdiction of the court of trial”.

**The 1998 draft Bill**

5.204 Clause 22 of the draft Bill provides as follows.

22.—(1) For the purposes of the application of section 6(3) of the Criminal Law Act 1967 (alternative verdicts) to the trial of a person on indictment for any offence under this Act, an allegation in the indictment of intention includes an allegation of recklessness.

(2) If on the trial on indictment of a person charged with an offence under section 1, 2, 3, 6 or 7 the jury find him not guilty of the offence charged, they may (without prejudice to section 6(3) of the Criminal Law Act 1967) find him guilty of an offence under section 4.

(3) If on the summary trial of a person charged with an offence under section 2 the magistrates’ court find him not guilty of that offence, they may find him guilty of an offence under section 3 or 4.

(4) If on the summary trial of a person charged with an offence under section 3, 5 or 7 the magistrates’ court find him not guilty of that offence, they may find him guilty of an offence under section 4.

(5) If—

(a) on the summary trial of a person charged with an offence under section 2 the magistrates’ court convict him of that offence and make no decision whether he is guilty of an offence under section 3 or 4, and

(b) he appeals to the Crown Court against the conviction,

the Crown Court may reverse the conviction and find him guilty of an offence under section 3 or 4.

(6) If—

(a) on the summary trial of a person charged with an offence under section 3, 5 or 7 the magistrates’ court convict him of that offence and make no decision whether he is guilty of an offence under section 4, and

(b) he appeals to the Crown Court against the conviction,

\(^{185}\) And other summary offences listed in Criminal Justice Act 1988, s 40. These include the offence of assaulting a prison custody officer (Criminal Justice Act, s 90(1)), but not that of assaulting a police officer (Police Act 1996, s 89(1)).
the Crown Court may reverse the conviction and find him guilty of an
offence under section 4.

5.205 In summary:

(1) the offence of intentional serious injury, under clause 1, includes the
offences of reckless serious injury (clause 2), intentional or reckless
injury (clause 3) and assault (clause 4);

(2) the offence of reckless serious injury includes the offences of reckless
injury (clause 3) and assault;

(3) the offence of intentional or reckless injury includes assault;

(4) the offences of assaulting a constable and assault to resist arrest include
assault.

This resolves the theoretical doubt about the reasoning in Wilson and removes
the problem in Nelson. Otherwise it coincides with the existing law.

Discussion

5.206 Elaine Genders\textsuperscript{186} gives a detailed statistical analysis of the charging pattern for
the offences under sections 18, 20 and 47 of the 1861 Act. In particular she sets
out the proportion of cases in which the charge is downgraded, whether through
plea bargaining or the jury convicting of an included offence. Her general
conclusion is that defendants are frequently convicted of an offence that is too
"low" in the hierarchy for the actual facts.\textsuperscript{187} In particular there is a tendency to
reserve the section 18 offence for only the most serious injuries, though there is
nothing in its wording to justify this. Quoting the criticisms by Gardner\textsuperscript{188} and
Horder\textsuperscript{189} she argues that the effect of the draft Bill will be to erode the
differences between the offences still further and thus encourage this downward
drift.

5.207 Assuming that her diagnosis of the present position is correct, we do not see that
the draft Bill will make a material difference. As we have seen, under the present
law the greater offences all "include" the lesser, so there is already no obstacle to
the downward drift she identifies.\textsuperscript{190} The draft Bill simply leaves this position
unaltered.

5.208 Nor is it clear what the solution should be. If the offences were all made
qualitatively different so that they did not include each other, or if the system of
included offences were abolished, the tendency would then be to under-charge at

\textsuperscript{186} "Reform of the Offences against the Person Act: lessons from the law in action" [1999]
Criminal Law Review 689.

\textsuperscript{187} Similarly, there is a tendency for the racially and religiously aggravated forms of these
offences to be replaced by the non-aggravated forms.

\textsuperscript{188} J Gardner, “Rationality and the Rule of Law in Offences against the Person” (1994) 53 CLJ
502.

\textsuperscript{189} J Horder, “Rethinking Non-Fatal Offences against the Person” (1994) 14 OJLS 335.

\textsuperscript{190} Except for the fact that, at present, the section 47 offence cannot be found as an “included
offence” on a charge under section 20 if the jury consider that no assault took place.
the outset so as to be sure of a conviction. Alternatively, several offences would be charged together, and the more serious ones would be dropped or plea-bargained away, or the jury would err on the side of convicting only of the more basic offence. In essence, there would be the same scope for downward drift as at present, and only the mechanics would change.

5.209 The only way of avoiding the problem would be to devise an omnibus charge including all the offences in the hierarchy, and then require the jury to return a special verdict making separate findings about each ingredient of the offences in turn: the judge would then interpret the findings and decide what offence they added up to. We do not think this would be politically acceptable or practically workable, and do not propose to explore it further.

5.210 The proposal to create an offence of causing minor injury, mentioned above, may reduce the amount of plea bargaining and dilution of charges at the lower end of the scale. Where minor injuries are caused, there will be one obvious offence to charge, and there will be no incentive to over-charge in order to plea bargain, or to reduce the charge to common assault.

Consultation question 32
5.211 We consider that there would be benefit in pursuing reform including a provision about included offences, similar to clause 22 of the draft Bill, amended to take account of the offence structure decided upon. Do consultees agree?

\[191\] Para 5.88 and following, above.
CHAPTER 6
TRANSMISSION OF DISEASE

INTRODUCTION

6.1 In this chapter we consider the application of the law governing offences against the person to the transmission of disease, in particular the transmission of HIV and sexual infections through consensual intercourse. One reason for devoting a separate chapter to this is that the present law is significantly different from the law as it stood at the time of the 1998 draft Bill.

6.2 In present law:

(1) the intentional transmission of infection through consensual sexual intercourse falls within the offence of causing grievous bodily harm with intent under section 18 of the 1861 Act;

(2) the reckless transmission of infection through consensual sexual intercourse falls within the offence of malicious infliction of grievous bodily harm under section 20 of the 1861 Act.

6.3 However, the law was not understood that way in 1998. At that time the section 20 offence was interpreted in such a way as to require an act performed without consent, and therefore did not extend to inflicting GBH by transmission in an act of consensual intercourse. Accordingly, the 1998 draft Bill defined injury as excluding anything caused by disease, except for the purposes of the offence of intentionally causing serious injury.

6.4 A further reason for devoting a separate chapter to this topic is that it remains one of considerable controversy. There is a strong body of opinion to the effect that the transmission of infection through intercourse should never be criminal unless intentional and that the present law militates against public health, for example by discouraging frank disclosure to medical professionals. However, England and Wales and many other countries do criminalise some forms of transmission. Indeed, several countries have stricter laws than England and Wales. For example there may be offences of reckless endangerment, whether or not the infection is transmitted; or offences of failing to disclose HIV status.

6.5 In this chapter we offer only an outline of the issues because our focus is limited to establishing whether there is a case for considering law reform on the subject. Given the range of problems with the 1861 Act which we have discussed in Chapter 3 and on the assumption that further reform of offences against the person is desirable, and on the further assumption that the model based on the 1998 draft Bill is worth pursuing, in this chapter we examine possible schemes which law reform of the transmission of disease might consider.

6.6 The following schemes could be considered.

1 Para 6.47 and following, below.
2 Para 6.52 and following, below.
(1) The draft Bill could be adopted as it stands, so as to exclude disease from the definition of injury except for the purposes of the offence of intentionally causing serious injury.

(2) The draft Bill could be modified so as to reflect the present law, in which the transmission of disease can be an offence whether caused intentionally or recklessly.

(3) Other possibilities could be explored, such as:

(a) offences of endangerment or non-disclosure, as in some other countries;

(b) a scheme where the transmission of infection can in principle amount to causing injury for the purpose of all the offences, but there is a specific exemption for the unintentional transmission of HIV or sexual infections through consensual intercourse.

6.7 In this chapter we first describe the current law. We then consider the position under the draft Bill, and how the Bill might be amended to meet current requirements.

BACKGROUND

6.8 The transmission of disease, whether through sexual intercourse or otherwise, might theoretically fall within any of the following offences under the 1861 Act.

(1) Causing grievous bodily harm with intent, under section 18. This would apply if D intends\(^3\) to infect V. This is a rare situation,\(^4\) and so far there appear to have been no prosecutions on this basis.\(^5\)

(2) Maliciously inflicting grievous bodily harm under section 20. This has been the offence usually used to prosecute the reckless transmission of HIV,\(^6\) and has recently been used in a case involving the transmission of genital herpes.\(^7\)

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\(^3\) Either directly intending (D acts in order to infect V) or obliquely intending (D acts with some other purpose, but knows that if that purpose is achieved infection will be virtually certain to result in the normal course of events): para 2.23 and following, above.

\(^4\) C Ashford, “Barebacking and the ‘cult of violence’: queering the criminal law” [2010] Journal of Criminal Law 339, 344 refers to a culture of “bugchasers” who deliberately seek to “give” (or “receive”) “the gift”, that is to say, to transmit or receive HIV.

\(^5\) According to the National Aids Trust, there have been 27 prosecutions for the transmission of disease since 2005: see fn 10. None of these have been brought under s 18.


\(^7\) Golding [2014] EWCA Crim 889, para 6.15 below.
(3) Assault occasioning actual bodily harm under section 47. There have been no successful prosecutions for this so far, as an act of consensual intercourse will not normally constitute an assault.8

(4) For completeness we should also mention the possibility of invoking section 23, administering a poison or noxious thing so as to endanger life or inflict grievous bodily harm.9 We are not aware of any prosecutions on this basis.

Of these, only the offences under sections 18 and 20 are likely to be relevant in practice.

6.9 According to the National AIDS Trust there have been a total of 27 prosecutions to date for the reckless transmission of disease, resulting in 5 acquittals, 17 pleas of guilty and 4 convictions following trial: the remaining case was discontinued because of the illness of the defendant. All the cases relate to HIV except for one case of herpes and one of Hepatitis B.10

6.10 These figures should be compared with the total numbers of people infected by diseases that can be transmitted by sexual intercourse.

(1) In 2012 there were 5,971 new diagnoses of HIV in England and Wales,11 and it was estimated that a total of around 92,000 people in England and Wales were living with HIV, diagnosed or undiagnosed.12

(2) In 2013 there were a total of 446,253 new diagnoses of sexually transmitted infections excluding HIV. These included:

(a) 208,755 cases of chlamydia;
(b) 29,291 cases of gonorrhoea;
(c) 32,279 cases of anal or genital herpes;
(d) 3,249 cases of syphilis.13

8 In Golding (see previous footnote) the defence initially offered a plea of guilty to the s 47 offence, but the judge made it clear that this offence was not appropriate.
9 Para 6.35 below.
10 Most of them are listed individually at http://www.nat.org.uk/media/Files/Policy/2014/Sept_2014_criminalprosecutionsHIVtable.pdf (last visited 30 October 2014). The figures given in the text include two further cases, mentioned to us by the National AIDS Trust on 24 September 2014.
PRESENT LAW\(^{14}\)

6.11 The leading case in this area is *Dica*.\(^{15}\) In that case D, knowing that he was HIV positive, had unprotected sex with two women, both of whom contracted the infection. He was charged with malicious infliction of grievous bodily harm under section 20 and convicted. On his appeal to the Court of Appeal, the court held as follows.

(1) The previous law, as laid down in *Clarence*,\(^{16}\) was that infecting a partner through a consensual act of intercourse could never amount to “inflicting” grievous bodily harm, as that word suggested something in the nature of a hostile attack. That case was no longer good law: since *Wilson*\(^{17}\) it was clear that the section 20 offence did not require anything like an assault.\(^{18}\)

(2) There was, on the facts, consent to sexual intercourse. That consent was not vitiated by the deception involved in non-disclosure of D’s infected status, as that deception did not concern the nature of the act performed.\(^{19}\) The relevant point in an offence under section 20 was not whether there was consent to the intercourse but whether there was consent to the risk of infection.

In our view, on the assumed fact now being considered, the answer is entirely straightforward. These victims consented to sexual intercourse. Accordingly, the defendant was not guilty of rape. Given the long-term nature of the relationships, if the defendant concealed the truth about his condition from them, and therefore kept them in ignorance of it, there was no reason for them to think that they were running any risk of infection, and they were not consenting to it. On this basis, there would be no consent sufficient in law to provide the defendant with a defence to the charge under section 20.\(^{20}\)

(3) The trial judge was wrong to hold that, following *Brown*,\(^{21}\) there was no consent because the women legally could not consent to harm of that kind. It is true that they cannot consent to the deliberate infliction of that harm; but it would be an unwarrantable interference with sexual

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16 (1888) 22 QBD 23.


18 Para 2.81 above.

19 For the “nature of the act” test, see *Smith and Hogan*, p 632, under heading “Consent procured by fraud”.

20 Para 39 of judgment, Lord Justice Judge.
autonomy to hold that they could not consent to a risk of such harm. The appeal was therefore allowed and the case was sent back for re-trial.

On the second trial, D was again convicted.

6.12 Another case on similar facts was Konzani.\(^{22}\) This confirmed that for D to avoid liability V must be informed of D’s status and give consent with that knowledge: it is not sufficient for V to know that, in general terms, unprotected sex is a risky activity.

6.13 The same distinction applies to D’s belief that V consented.

1. It is no excuse that D believed that V consented to intercourse and to the general risks involved in unprotected sex. That is, D’s ignorance of what the law means by consent is no excuse.

2. On the other hand, D will be excused if D genuinely believed that V knew of D’s status and had consented despite that knowledge.\(^{23}\)

6.14 The second point in Dica (distinguishing between consent to intercourse and consent to the risk of harm)\(^{24}\) was affirmed in B,\(^{25}\) in which it was held that B’s failure to disclose HIV status did not vitiate consent to intercourse, and was therefore inadmissible in evidence on a charge of rape, despite the fact that a more elastic approach to lack of consent for the purposes of sexual offences had been introduced since Dica was decided.\(^{26}\)

6.15 In Golding,\(^{27}\) concerning the transmission of genital herpes through consensual intercourse, D pleaded guilty to a charge of inflicting grievous bodily harm, but in terms which suggested that he had the section 47 offence in mind. After further medical evidence it was decided that the facts could not amount to the section 47 offence, as there was no assault, but that there was a valid plea of guilty to the offence under section 20.

\(^{21}\) [1994] 1 AC 212.


\(^{24}\) Para 6.11(2) above.


\(^{26}\) While failure to disclose HIV status is not of itself relevant to consent under Sexual Offences Act 2003, s 74, “there may be circumstances in which the failure to disclose would, when considered with other evidence, be relevant to the issue of consent”. (Rook and Ward on Sexual Offences, First Supplement to the Fourth Edition (2014) para 1.206: emphasis ours.)

6.16 One of the issues in the appeal was whether it was right to classify infection with genital herpes as “grievous bodily harm”. The court held that “the assessment of harm done in an individual case in a contested trial will be a matter for the jury, applying contemporary social standards”; there was no requirement that the victim should require treatment or that the harm should have lasting consequences. The test, in cases of disease as in all other instances of grievous bodily harm, was the effect of the disease or injury on the particular victim, not the general characterisation of the disease. However, purely psychological feelings of anguish on finding herself infected should be left out of account unless they amounted to a recognised psychiatric condition. One of the medical witnesses had described the symptoms of the disease, pointing out that it was both painful and incurable and describing it as “a devastating condition”. Given this evidence, the jury was entitled, though not bound, to find that the infection amounted to grievous bodily harm in that particular case.

Crown Prosecution Service legal guidance

6.17 The CPS has issued guidance for prosecutors. This was published in 2008, following a consultation exercise in 2006. This process took place against a background of complaints of poor police and prosecutorial management of these cases.

6.18 The present guidance emphasises the following points.

(1) There must be medical or scientific evidence (preferably both) that the infection was in fact transmitted from D to V: a bare admission by D is not sufficient, as D is not generally in a position to know. This will require a

28 Lord Justice Treacy, para 64 of judgment.
30 Para 62 of judgment.
- poor understanding of HIV leading to inappropriate management of cases;
- lack of clarity about use of the Offences Against the Person Act 1861;
- lack of understanding regarding privacy of medical information;
- long drawn out investigations, ranging between 4 and 12 months for cases that did not result in prosecution, and between 6 and 34 months for those that did;
- difficulties in reconciling the realities of HIV transmission with the requirements of the charge; and
- difficulties in management of complex scientific evidence.
detailed investigation of the sexual history of V and others, which must be done sensitively.

(2) There is a defence if V gave informed consent to the risk. This does not always mean that D must have disclosed his or her condition. V might be aware of the risk for other reasons, such as being informed by a third party, being present while D is being treated in hospital or noticing sores on D’s genitals.

(3) In general, recklessness requires both that D knew that he or she was infected and that D did not take the necessary precautions against infecting others (following the prescribed treatment, using a condom etc). Normally this implies that D has been tested and that the result is positive. However there may be cases in which D is found to have the necessary knowledge because he or she has deliberately closed his or her mind by not undergoing testing, despite an obvious indication that he or she is infected. The guidance does not specifically address the case where D only knew that there was a risk that he or she was infected, that should have led D not to take the risk of infecting another person.

Other procedures

6.19 Apart from prosecution under section 20 of the 1861 Act, court orders may be made against people who transmit disease.

(1) An Anti-Social Behaviour Order (ASBO) can be made where a person has acted in a manner causing or likely to cause harassment, alarm or distress to persons not in the same household, and the order is necessary to protect those persons from further acts of this kind.35 These orders may be made whether or not the person is being or has been prosecuted for any offence.

(2) A Sexual Offences Prevention Order (SOPO) can be made where necessary to protect the public or particular members of the public from “serious sexual harm” from the defendant.36 These orders can only be made if a person has been convicted of certain sexual offences,37 or has performed the act constituting such an offence but has been acquitted by reason of insanity or disability.

6.20 To date there have been one ASBO and two SOPOs made in connection with the transmission of disease: in all three cases the person was forbidden to have

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35 Crime and Disorder Act 1998, s 1. The Anti-social Behaviour, Crime and Policing Act 2014, s 1, replaces these with injunctions, but has not yet come into force.

36 Sexual Offences Act 2003, s 104. The Anti-social Behaviour, Crime and Policing Act 2014, Sch 5, replaces these with sexual harm prevention orders and sexual risk orders, but has not yet come into force.

37 By the court making the order, or in the past if a chief police officer complains that since the conviction the defendant has behaved in such a way as to give reasonable cause for the order.
sexual relations without disclosing his HIV status, and in one of them he was also required to use protection.  

**Unresolved legal issues**

6.21 There are some points that have not so far been tested in the courts. In some cases a view may be expressed in the CPS guidance above, and below we give relevant references to academic literature.

**The meaning of “maliciously”**

6.22 The description of the present law given above mostly concerns consent, as that was the issue raised in the cases. But before the question of consent even arises, it is necessary to prove that D caused harm "maliciously". This means that D either intended harm or was reckless about the risk of causing harm.

6.23 As stated in Chapter 2 above, 39 “reckless” here means that D was aware of the risk of harm but nevertheless went on to take it. There is some doubt whether there is a further requirement that the decision to take the risk must be unjustified in the circumstances as D knows or believes them to be. 40 We believe that the better view is that there is such a requirement, but this remains an area of uncertainty.

**Recklessness: knowledge or suspicion?**

6.24 In every case that has so far been successfully prosecuted, recklessness has been established on the basis that D knew of his or her infected status at the time of the act of intercourse. There has not yet been a prosecution where D knew of circumstances which meant that he or she was highly at risk but did not take a test to establish whether he or she was infected or not. 41 As mentioned above, 42 the CPS guidance expresses the view that D could be reckless in such a case. The same argument is put by Professor John Spencer QC: 43

> A person is aware of the risk of passing on a sexually transmissible disease not only where he knows he is infected, but also where, although not certain, he knows that he may be.

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38 National AIDS Trust (fn 10 above).
39 Para 2.94 above.
40 Para 2.96 above.
41 With the possible exception of Adaye, The Times 10 January 2004; but this was a guilty plea so the point was not tested. See S Ryan, “Reckless transmission of HIV: knowledge and culpability” [2006] Criminal Law Review 981.
42 Para 6.18(3) above.
On the other hand, it has been argued that the court in *Dica* expressly confined the new principle to cases of those who, “knowing that they are suffering HIV or some other serious sexual disease,” recklessly transmit it through consensual sexual intercourse.

**Recklessness: low level risks**

6.25 In some cases, a person may be HIV positive, but the risk of transmission may be reduced to a very low level. This may be because that person is using a condom; or it may be that the person is undergoing therapy that reduces the viral load to an undetectable level.

6.26 The offence under section 20 is not committed unless the infection was in fact transmitted, so until that is proved the question of recklessness does not arise. It follows that in the cases with which we are concerned, though the risk may have been very low, it must have existed, and D will probably have been aware of it. The question arises whether awareness of this low level risk can amount to recklessness.

6.27 It is argued that, at least in some cases, the risk is so low that D is justified in taking it on the facts as D knows or believes them to be, even without disclosing it to V. If so, D (according to this argument) is not reckless and therefore cannot be guilty of the offence under section 20, whether or not V is aware of the facts.

6.28 As mentioned above, it is not certain whether liability under section 20 is subject to any exception for justified risks. If not, it follows that even the smallest risk of transmitting the virus is sufficient for the offence, provided that D is aware that it exists (and V is not). In the rest of this discussion we assume that the exception does apply.

6.29 This argument has not been tested in the courts in England and Wales. This is not surprising; the offence under section 20 requires that the infection is in fact transmitted. For a criticism of this argument, see S Ryan, “Reckless transmission of HIV: knowledge and culpability” [2006] *Criminal Law Review* 981; G Mawhinney, “To be ill or to kill: the criminality of contagion” [2013] 77(3) *Journal of Criminal Law* 202. Para 6.43 below.


46 Para 6.43 below.


48 Given that the justification for D’s decision depends on the facts “as D knows or believes them to be”, it follows that a low viral load can only excuse D if D was aware of it at the time: K Smith, “Sexual Etiquette, Public Interest and the Criminal Law” (1991) 42 *Northern Ireland Law Quarterly* 309, 328; Hughes (above).

49 Para 6.23 above.

50 Lord Justice Judge, in *Dica*, suggests that levels of precaution, such as condom use, may be sufficient to exclude liability, and that it is for the jury to decide whether the protection was sufficient.
transmitted, but in the hypothesis we are discussing the risk of this happening is very low. Some guidance can be obtained from the law of other countries in which actual infection is not a requirement.

(1) In Canada, where endangerment and non-disclosure are offences in themselves whether or not the infection is transmitted, it has been held that condom use, and the level of viral load, are relevant in establishing whether there is a risk of harm.51

(2) Similarly in New Zealand the use of safe sex techniques has been held to negate an offence of criminal nuisance52 by risking infection.53

6.30 In conclusion, we believe that it is not possible to lay down a fixed rule about this, and that under the present law it is a jury question whether, in any particular case, the low level of risk justified D in taking that risk without obtaining V’s informed consent.

Recklessness as to what?

6.31 Applying Mowatt,54 the malice (recklessness) requirement in section 20 means only that D was aware of the risk of some physical harm, not necessarily of the kind or degree of harm that occurred. It follows that, in theory at least, if D, in the course of rough consensual sex, foresees the risk of causing one type of harm (e.g. vaginal or anal injury), but in fact transmits an infection, he is guilty of the offence,55 even though D does not know, and has no reason to suspect, that he carries an infection.56

Need D know that V’s consent is informed?

6.32 Another question concerns consent. The offence is not committed if V gives informed consent to the risk, or if D believes that V has given such consent. So certainly the offence is not committed if D discloses his or her HIV status to V and V consents on this basis. But suppose that V knows about D’s status from other sources, but D is not aware of this. Can D still rely on V’s consent? The CPS guidance states that D can, and this appears to be supported by Konzani.

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51 Mabior 2012 SCC 27; Hughes (above). According to the court in Mabior the risk is only reduced below the level of “significant” if there is both low viral load and condom use, but this has been criticised: Canadian HIV/Legal Network, HIV Non-Disclosure and the Criminal Law: An analysis of two recent decisions of the Supreme Court of Canada (2012). For a recent prosecution for aggravated assault endangering life, see Bear 2011 MBQB 191 (in which a person infected with HIV spat in a policeman’s eye: the infection did not in fact pass but the policeman had to undergo an unpleasant and debilitating course of prophylactic treatment).

52 Para 6.53(3) below.


55 Unless the court decides that it was reasonable to take that risk.

56 A similar point is made by Chalmers, p 144: D might be aware that he is infected with another sexually transmissible disease.
6.33 However, this conclusion has been questioned by Cooper and Reed:\(^\text{57}\) in *Dadson*\(^\text{58}\) it was held that D could not rely on facts that were unknown to him at the time of the offence to justify his acts, even though those facts would have provided him with a defence had he known of them. By analogy to this, they argue that D cannot rely on V’s state of knowledge when D was not aware of it at the time.

6.34 As against this, one could argue that, in *Dadson*, the defence relied on depended on the act being carried out for a lawful purpose, in that case preventing a felon from escaping. This necessarily depended on D’s state of mind at the time. Consent is an excusing circumstance of an entirely different kind, unconnected with D’s purpose in acting: if there was consent in fact, no wrong is done to V.

**Other offences**

6.35 Transmission of disease could theoretically constitute an offence under section 23, administering a poison or noxious thing so as to endanger life or inflict grievous bodily harm.\(^\text{59}\) As against this, it may seem strange to describe the bodily fluids of an infected person as a “poison, or other destructive or noxious thing”. On the other hand, the offence would presumably cover injecting a virus into a person by using an infected syringe.\(^\text{60}\)

**PROBLEMS AND POLICY ISSUES**

**Knowledge or suspicion**

6.36 As mentioned above, it is not certain whether the principle in *Dica* is confined to cases where D knew he was infected. The problem was certainly posed in those terms: the question for the decision of the court was whether the offence under section 20 covers the case of those who, “knowing that they are suffering HIV or some other serious sexual disease”,\(^\text{61}\) recklessly transmit it through consensual sexual intercourse. This does not in itself answer the question whether it also extends to those who know they may be infected but have not been tested.

6.37 Under the current law, the meaning of “malice” includes subjective recklessness, namely that D was aware of the existence of a risk.\(^\text{62}\) It does not extend to cases where D was not aware of the risk but ought to have been (“objective recklessness”).\(^\text{63}\)

(1) On one side, it could be argued that to extend the principle beyond cases of known infection would be in effect to adopt an objective recklessness test, in which D is guilty because he or she ought to have been tested, and therefore ought to have known. Therefore, such an extension cannot

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\(^\text{58}\) (1850) 2 Den 35, 169 ER 407, (1850) 3 Car & Kir 148, 175 ER 499.

\(^\text{59}\) Para 6.8(4) above.


\(^\text{62}\) Paras 2.92 and 2.94 above.

\(^\text{63}\) Para 2.25 above.
represent the current law, as it is well established that the test of recklessness is subjective. Equally, as a proposal for new law, it might be an undesirable infringement of the principle of subjectivity.64

(2) On the other side, it could be argued (as e.g. by Spencer65 and Ryan66) that, to be subjectively reckless, D need only be aware of a risk of some bodily harm. If D knows D is infected, D knows there is some risk of transmitting the infection to a partner. If D knows D may be infected, D is aware of a compound risk: D may be infected, and if so D may transmit the infection. The difference between these two states of mind is one of degree. In short, the ground of liability is that D knows that D may be infected; not that D ought to know that D is infected.

6.38 If the principle does extend beyond cases of known infection, it will only be to cases where D deliberately decides against being tested, despite being aware of evidence of a risk affecting him or her that is significantly greater than the general background risk that must be assumed for any random sexual encounter.67

(1) The obvious example is where D has already received a preliminary diagnosis and been advised that he or she should be tested, but has not followed that advice.

(2) Another might be where a previous partner of D has contracted the infection, in circumstances that strongly indicate that D is the likely source though other possibilities have not been conclusively eliminated.

It will not extend to all cases where a responsible person would have thought about the possibility of being tested,68 or to cases where the only indication of risk is the fact that D belongs to a high risk group.

6.39 We therefore believe that there may be cases in which D is reckless by deliberately closing his or her mind to an obvious risk that he or she is infected.69 However, given the asymptomatic nature of HIV infection, we believe that these cases will be few. (They may be more numerous in the case of other sexually transmissible infections, where symptoms appear at an early stage.)

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64 For this principle, see A Ashworth and J Horder, Principles of Criminal Law (7th ed 2013) p 155.
67 There will inevitably be evidential difficulties in proving that this was in fact D’s process of thought.
68 Chalmers (above) p 142.
69 This is related to the point in the CPS guidance, para 6.17 above, about cases where D can be held to know that he or she is infected, despite not being tested. The current discussion concerns whether the same principle applies when D only knows that there is a strong risk that he or she may be infected.
Proof of transmission

6.40 As pointed out in the CPS guidance, the fact that D was infected with HIV or a sexually transmissible disease and that V develops symptoms following intercourse with D does not necessarily prove that D transmitted the infection to V. If D and V have two different strains of the disease, that is conclusive evidence against transmission. If they have the same strain, one still needs to eliminate the possibility that V transmitted it to D or that they both acquired it directly or indirectly from a common source or indeed separate sources. Where V has had several sexual partners, it is often difficult to prove which one of them transmitted the disease.

6.41 Nevertheless, in these situations there is a tendency for D to assume that V's infection must be D's fault and to offer a confession at an early stage. There is, we consider, a need for wider public education.

   (1) The primary need is to educate prosecutors and police, so that they do not accept these confessions at face value and instead carefully explain to suspects the kind of investigation that is needed. This is the purpose of the CPS guidance already mentioned.

   (2) In the longer term, there is a need for education of the general public concerning the way the disease works, the availability of testing and treatment and the requirements of responsible sexual behaviour.

6.42 One result of this is that, of all the cases investigated, only a very small proportion come to trial, and still fewer result in conviction. It has been argued that one disadvantage of the present law is that it gives rise to numerous lengthy and intrusive investigations, out of all proportion to the small number of cases deserving prosecution which are finally isolated.

State of medical knowledge

6.43 At present, HIV appears to be incurable. However, there are therapies which enable the condition to be managed to such an extent that those infected can have a near normal life expectancy and symptoms can be reduced or eliminated.

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70 Para 6.17 above.

71 For a detailed analysis of some of the scientific problems, see E Bernard and others, “HIV forensics: pitfalls and acceptable standards in the use of phylogenetic analysis as evidence in criminal investigations of HIV transmission” (2007) HIV Medicine 382.

72 Terrence Higgins Trust, Policing Transmission (fn 34 above).

73 One person was cured following a bone marrow transplant from a person with natural immunity, but this is not a generally usable treatment: http://www.newscientist.com/article/dn16032-hiv-cure-wont-save-sick-millions.html#.VAnVHVMf1SN (last accessed 30 October 2014).
These therapies can also have the effect of reducing the viral load to so low a level that it is safe to engage in sex even without using a condom.\(^{74}\)

(1) The usual treatment is by using what are known as anti-retroviral drugs; for this reason the treatment is called anti-retroviral therapy, ART for short. Anti-retroviral drugs are now generally administered in combination, as different drugs inhibit different phases of the retrovirus life cycle. In this form, the treatment is called HAART (highly active anti-retroviral therapy).

(2) The primary effect of these drugs is to inhibit the virus from reproducing. This allows the patient’s immune system to recover to some extent, thus suppressing the most damaging symptoms.

(3) Another advantage of the treatment is denoted by the phrase “treatment as prevention”. That is, the quantity of the virus in the system (“viral load”) is less, and the patient is therefore less likely to transmit it to others. In some cases the viral load can be reduced to a level so low as to be undetectable.

(4) There are also prophylactic drugs which can be taken by those at risk of exposure to HIV, though these are often expensive and have to be taken daily.\(^{75}\) They are not available on the NHS, though patients may enrol on ongoing clinical trials.

(5) Finally, testing for HIV has become much simpler, as there are point of care tests in clinical settings and self-test kits for private use, both of which can give a result in a few minutes. However, no self-test kit has yet been approved by the regulatory authorities in the United Kingdom,\(^{76}\) though there are home sampling tests in which the patient takes the sample at home and sends it to a certified laboratory for analysis.

6.44 One result of the availability of these treatments and tests is that an infected person is generally most at risk of infecting others in the early stages of the infection, when it has not been diagnosed and the person is not aware of any reason to be tested. In cases of this kind, the recklessness requirement is not met and there is no criminal liability.

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\(^{75}\) Francis and Francis (above), citing J Jay and L Gostin “Ethical Challenges of Preexposure Prophylaxis for HIV” (2012) *Journal of the American Medical Association* 308(9) 1-2.
6.45 There have also been changes in the medical treatment of other sexually transmitted infections. At the time of *Clarence*\(^{77}\) there could be no doubt that gonorrhoea was serious enough to amount to grievous bodily harm: for example, if untreated it can lead to infertility. The same was still more strongly the case with syphilis. Historically, syphilis was considered as one of the major global plagues, as it could lead to blindness, disability and serious mental illness and was frequently fatal. However, it has been argued\(^{78}\) that, since both conditions are now readily treatable, they may not amount to grievous bodily harm today.\(^{79}\)

**Effect on public health**

6.46 The criminal law can play no more than a small part in the improvement of public health, and this is not its primary purpose.\(^{80}\) The question is whether the criminalisation of reckless transmission actively hinders health protection.

6.47 There is a strong body of opinion on the part of medical professionals, international organisations\(^{81}\) and organisations of HIV sufferers that criminalising the reckless transmission of HIV and STIs is counterproductive in public health terms and contributes to the marginalisation of minority groups.\(^{82}\) The arguments raised are, very briefly, as follows.

6.48 The principle in *Dica* criminalises those who, “knowing that they are suffering HIV or some other serious sexual disease”,\(^{83}\) recklessly transmit it through consensual sexual intercourse. This could be a deterrent to being tested: the very fact that a positive diagnosis *can* be a factor in criminal liability contributes to a stigma on HIV that can make people reluctant to face the possibility that they have it, or to acknowledge the need for testing. However, should D deliberately avoid being tested in order to argue that he or she did not have the knowledge necessary for recklessness, that is itself an indicator that D was aware of the risk

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\(^{76}\) That is, under the In Vitro Diagnostic Medical Devices Directive (98/79/EC) and the Medical Devices Regulations 2002.

\(^{77}\) (1888) 22 QBD 23.

\(^{78}\) Chalmers (above), p 138.

\(^{79}\) This may not be the correct test to apply. A broken arm is readily treatable, but is certainly grievous bodily harm.


\(^{83}\) [2004] QB 1257, 1273, para 59.
of infection. To then do nothing could well be reckless, though it will be almost impossible to prove that this was in fact D’s process of thought.

6.49 It is also argued that the prospect of criminal liability is an impediment to openness between people who may be infected and their medical advisers. People may withhold information from medical professionals, so as not to provide evidence against themselves; or if they give the information, the medical professionals may not record it, so as to avoid giving evidence against their patients.

6.50 Finally, it is argued that criminalising the person who recklessly transmits an infection sends a message that the burden of avoiding the spread of disease rests solely with the infected person and negates the principle that both partners should share responsibility for sexual health. It has also been argued that “the de facto obligation to disclose for the purpose of gaining consent may cause people to interpret non-disclosure of status by a partner as meaning that the partner is free from infection”. As argued by Vanessa Munro:

Surely, few of us would wish to challenge a policy that encourages communication and disclosure in advance of intercourse. But as the Court of Appeal itself hinted at, there is a danger in assuming that criminalising non-conformance will in itself bring this about.

6.51 Contrary arguments are as follows.

(1) If one partner knows that he or she is infected, while the other does not know that, it is reasonable to expect the partner who is aware of the risk to take a greater share of the responsibility for it. Any responsibility of infected people is on the basis that they knew of the risk, not that they ought to have known about it. It is only fair that the same should be true of the responsibility of their uninfected partners.

(2) If there is no criminal liability in these circumstances, that does not leave the responsibility equally divided between the parties. In practice it imposes the major share of responsibility on the not-yet-infected party to safeguard his or her own health: the onus will on that party both to

84 Glanville Williams, *Textbook of Criminal Law* (1st ed 1978) p 79: “a person cannot, in any intelligible meaning of the words, close his mind to a risk unless he first realises that there is a risk; and if he realises that there is a risk, that is the end of the matter”; cited by Lord Edmund-Davies in his dissenting opinion in *Caldwell* [1982] AC 341, 358.


ascertain whether there is any risk and to decide whether to consent to it.\textsuperscript{89}

(3) As mentioned above, the highest risk of infection comes from those who do not know that they are infected. If this fact becomes more widely known, people in general are less likely to rely on the fact that their partners have not said anything about their sexual health.

\textbf{International comparisons}

6.52 In England and Wales, criminal liability in these cases is confined to situations where the disease is actually transmitted.\textsuperscript{90} This is only one of several possible schemes for penalising this type of behaviour.

6.53 In this scoping exercise we are not in a position to attempt a comprehensive international survey: we mention the position in some other countries simply as examples of other possible schemes.

(1) In Scotland there is a common law offence of “reckless endangerment”. This criminalises a person who engages in unprotected sex while knowing that he is (or may be)\textsuperscript{91} HIV positive, even if no infection in fact passes. Similarly in Sweden there is an offence of exposing a person to infection, though this can only be committed by someone who knows his or her HIV status.\textsuperscript{92}

(2) In Canada, non-disclosure of HIV status is an offence in itself, whether or not transmission occurs.\textsuperscript{93} Sexual intercourse without disclosure is treated as a sexual assault; in one case, where death resulted, the defendant was convicted of murder.\textsuperscript{94}

(3) In New Zealand, a statutory offence of “criminal nuisance” has been used when a person knowing of his or her HIV positive status endangers the

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\textsuperscript{90} Where D intends to transmit the infection but fails, D is guilty of attempt to commit the offence under OAPA 1861, section 18.


\textsuperscript{94} Aziga [2008] OJ No 2431, 2008 CanLII 60336 (ON SC).
health of another by risking infection, whether or not the infection is in fact transmitted.  

6.54 In 2013 UNAIDS published a document entitled “Ending overly broad criminalization of HIV non-disclosure, exposure and transmission: Critical scientific, medical and legal considerations”. The stated aim was to urge member states:

   to (i) concentrate their efforts on expanding the use of proven and successful evidence-informed and rights-based public health approaches to HIV prevention, treatment and care; and (ii) limit any application of criminal law to truly blameworthy cases where it is needed to achieve justice.

6.55 Some of the recommendations in that document were as follows.

   (1) In cases involving the actual transmission of HIV, liability should preferably be limited to cases of intentional transmission. In countries where recklessness is sufficient, it should be narrowly defined and confined to cases of:

   a “conscious disregard” in relation to acts that represent, on the basis of best available scientific and medical evidence, a significant risk of HIV transmission.

   (2) If there is to be liability in any cases not involving the actual transmission of HIV, it should be limited to cases where the risk of infection is significant. Thus, non-disclosure as such should not be an offence.

6.56 In this connection, it should be pointed out that the definition of intention accepted in England and Wales is, by international standards, fairly narrow: it is confined to cases where either:

   (1) D acted in order to bring about a forbidden result, or

   (2) it is a virtually certain result of the purpose D wishes to achieve and D foresees that virtual certainty.

The scope of this second type of intention, known as oblique intent, has narrowed over the years as the courts have made it clear that it is confined to cases of virtual certainty. This standard will never be met in cases of sexual transmission

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97 UNAIDS document, para 33.

98 UNAIDS document, para 38.

99 UNAIDS document at fn 94, p 20, “Key Considerations”.

100 Paras 2.23 and 2.24 above.
of disease: the figures provided by UNAIDS\textsuperscript{101} show that the risk of transmitting HIV in a single act of intercourse is less than 1\% (and in most cases, less than 0.1\%). The risk with some other diseases may be greater, but still falls a long way short of certainty.

6.57 In Continental European countries, and civil law countries like South Africa, a third category of intention is recognised, namely \textit{dolus eventualis} (conditional intent), where the forbidden result is neither desired nor certain but D is willing to accept it if it occurs.\textsuperscript{102} This covers some, but not all, of the same ground as the English concept of subjective recklessness.\textsuperscript{103}

6.58 Accordingly, it seems that the law in England and Wales comes fairly close to the recommendations of UNAIDS. There is no criminal offence of endangerment or non-disclosure; there is an offence that includes reckless transmission, but the meaning of “recklessness” is confined to “conscious disregard” and is not far from what some other countries regard as intention.

THE 1998 DRAFT BILL

6.59 Before Wilson\textsuperscript{104} the 1861 Act was not interpreted as containing any general offence of recklessly causing serious harm. Rather, there was a series of specialised offences: “inflicting” grievous bodily harm (in effect, by assault),\textsuperscript{105} causing grievous bodily harm by poisoning\textsuperscript{106} and causing grievous bodily harm by explosions.\textsuperscript{107}

6.60 The general scheme of the reforms recommended in our 1993 report\textsuperscript{108} was to replace all these with one general offence of recklessly causing serious injury. The report specifically discussed the transmission of disease and concluded that this was as worthy of inclusion as any other way of causing injury. It noted that the only reason that transmission of disease was not currently included was the use of the word “inflict” in section 20, and went on to say:\textsuperscript{109}

The effect of the new offences would therefore be to remove this technical bar to conviction in cases currently otherwise falling within those sections.

\textsuperscript{101} UNAIDS document, table on p 17.
\textsuperscript{102} A Cassese (ed), \textit{The Oxford Companion to International Criminal Justice} (2009) p 302, entry for “dolus eventualis”. For a full discussion, see J Blomsma, \textit{Mens rea and defences in European criminal law} (2012), pp 99 to 134. The application of dolus eventualis to infection with HIV in Dutch and German law is discussed at p 105 and following.
\textsuperscript{103} For the differences between \textit{dolus eventualis} and recklessness, see Blomsma (above) pp 142 to 144.
\textsuperscript{104} [1984] AC 242.
\textsuperscript{105} OAPA 1861, s 20.
\textsuperscript{106} OAPA 1861, s 23.
\textsuperscript{107} OAPA 1861, s 28.
\textsuperscript{108} Legislating the Criminal Code: Offences Against the Person and General Principles (1993) Law Com No 218.
\textsuperscript{109} Paras 15.16 and 15.17 of report.
15.17 We believed this result to be right as a matter of policy; and, after careful reflection, we remain of that view. We have in mind particularly the recent public concern over the possibility of the deliberate or reckless infection of others with life-threatening conditions, including the HIV virus. In this connection, we are very much aware that the criminal law is not the most obvious or principal means of addressing the problem of containing the spread of such diseases. Nonetheless, our view remains that the deliberate or reckless causing of disease should not be beyond the reach of the criminal law as restated by clauses 2 to 4 of the Criminal Law Bill. Accordingly, all the Bill does is to remove the technical bar to conviction referred to in paragraph 15.16 above, thus at least ensuring the availability of a serious sanction for a serious form of irresponsible behaviour.

6.61 In some quarters it was pointed out that this went beyond the removal of a technical bar and amounted to the introduction of a new offence of reckless transmission of disease. The Home Office in its consultation paper took the view that it was not appropriate to extend the law in this way without comprehensive consideration of the public health policy aspects.

6.62 The Home Office paper further argued that the effect of the Law Commission’s 1993 recommendations would be to criminalise the transmission of minor infections as well. At present, the sexual transmission of minor infections is not criminal because the only possible offence is assault occasioning actual bodily harm, and consensual intercourse is not an assault. The draft Bill replaces this with an offence of intentional or reckless causing of injury, which does not require an assault to take place.

6.63 As a compromise, the Home Office proposed that the transmission of disease should be criminal only if intentional, as this came closest to the effect of the law as it then stood. The draft Bill accordingly provides that “injury” does not include anything caused by disease, except in the offence of intentionally causing serious injury.

6.64 This was intended to reproduce the law as it then stood, but there are significant differences. Even before Dica, it was not doubted that gonorrhoea and other

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


112 Home Office CP, para 3.16.

113 Home Office CP, para 3.15.

114 Home Office CP, paras 3.18 and 3.19.

115 Para 5.11 above.
sexual infections could in principle amount to grievous bodily harm. Under the law as it stood in 1998, the offence under section 20 would therefore have been committed if the infection had been transmitted by means of a rape or other sexual assault, or by injecting V with an infected needle. This would no longer be the case under the draft Bill.

FURTHER OPTIONS FOR REFORM

6.65 As explained, the definition of “injury” adopted in the draft Bill was chosen in order to reflect the law as it then stood. However, the law has since changed. The question is therefore whether it is worth pursuing reform which would:

1. adopt the scheme in the draft Bill as it stands;
2. adopt the scheme in the draft Bill, modified to conform with the present law; or
3. adopt some other scheme, such as a special offence of transmission of disease.

The scheme of the draft Bill

6.66 In the draft Bill, clause 15 provides that:

(2) Physical injury does not include anything caused by disease but (subject to that) it includes pain, unconsciousness and any other impairment of a person’s physical condition.

…

(4) In its application to section 1 this section applies without the exceptions relating to things caused by disease.

Accordingly, the effect of adopting the draft Bill as it stands is that:

1. there would be criminal liability for the intentional transmission of disease amounting to serious injury, but
2. there would not be criminal liability:
   (a) for the reckless transmission of serious disease, or
   (b) for the intentional or reckless transmission of any disease that is not serious.

This would reverse the decision in Dica and approximately reinstate the law as it stood in 1998.

6.67 Such a scheme would be in accordance with the recommendations of UNAIDS, of bodies such as the National AIDS Trust and the Terrence Higgins Trust, and of eminent academics including Professor Matthew Weait and Dr Catherine Dodds, all of whom consider that liability for transmitting HIV and sexual infections should

116 For the differences, see para 6.68 below.
be confined to cases of intentional transmission. We have summarised some of
the arguments for this, and some of the counter-arguments, above.\textsuperscript{117}

6.68 One argument against the scheme of the draft Bill is that it would go further than
required to meet these recommendations. The exclusion would not apply only to
sexual infections transmitted through consensual intercourse. It would apply
equally when an infection of any kind is transmitted through a rape or other non-
consensual sexual activity, or even by a physical attack with a syringe. Quite
simply, there would be no liability for causing any disease whatever unless D
intended to cause V to become infected by the disease.\textsuperscript{118}

6.69 If the 1998 Bill was considered as a reform option worth pursuing, it would need
further consideration to ensure that the criminal law could protect against
reckless transmission of infection otherwise than by consensual sexual
intercourse. In addition, if the 1998 Bill was to be developed in a further law
reform project, a detailed review would be necessary since professionals in the
relevant fields are by no means unanimous.\textsuperscript{119} This review would have to
consider both the consequences for public health policy and the broader ethical
question of whether public health considerations should be the main policy factor.
Pending such a review, the safer course might be for the new offences to follow
the broad principles governing offences against the person, and preserve the
breadth of the present law.

\textbf{Modifying the draft Bill to take account of present law}

6.70 In short, if further reform based on the draft Bill is to be considered, it will be
necessary to consider specific provision for disease. The present common law
cannot be left as it stands since that has developed on the foundation of the 1861
Act. If the 1861 offences are replaced, consideration needs to be given to how
the transmission of disease sits within whatever model of offences is to be
adopted.

\textbf{Arguments for including disease}

6.71 The general principle of the draft Bill is that intentionally or recklessly causing
injury is wrong in itself, and should be covered by broad offences that do not
distinguish between particular ways of causing injury.

6.72 The offence under clause 2 is one of “recklessly causing serious injury” by
whatever means. The logical consequence of this is that causing a serious
disease, by whatever means, should be included, as indeed it was in the draft
attached to the 1993 report. To avoid that consequence, a special exclusion had
to be incorporated into the 1998 draft Bill.

6.73 In short, within the context of any reform based on the draft Bill, the question that
would need to be considered is not “shall we create an offence of recklessly

\textsuperscript{117} Paras 6.48 to 6.58 above.

\textsuperscript{118} Para 6.63 above.

\textsuperscript{119} For some contrary views, see U Schuklenk, “Should we use the criminal law to punish HIV
transmission?” [2008] International Journal of Law in Context 277; G Mawhinney, “To be ill
or to kill: the criminality of contagion” [2013] Journal of Criminal Law 202; J Spencer
(articles already quoted).
transmitting disease?” but “here is an offence of recklessly causing injury: should causing disease be any different?”

6.74 The difference is more than a purely verbal distinction. How an offence is presented may have a significant impact on its deterrent and communicative effect. We are not speaking, here, of the narrow question of whether punishment deters re-offending by the particular offender.120 Rather, the question concerns the general function of any prohibition in discouraging the prohibited conduct.121

6.75 It is doubtful how far the present law on transmission of disease influences the behaviour of those at risk of transmitting or receiving a disease.122 In general in criminal law, however, research suggests that a broadly expressed prohibition has a greater deterrent effect than a narrow one.123 If so, a conviction for “recklessly transmitting disease” will deter only other instances of recklessly transmitting disease. A conviction for “recklessly causing injury” in any form may deter recklessly causing injury in any other form.124

6.76 The main argument for including the transmission of disease within the new offences in any reformed scheme is that, morally, causing disease is no different from causing harm of any other kind. As observed by John Spencer:125

To infect an unsuspecting person with a grave disease you know you have, or may have, by behaviour that you know involves a risk of transmission, and that you know you could easily modify to reduce or eliminate the risk, is to harm another in a way that is both needless and callous. For that reason, criminal liability is justified unless there are strong countervailing reasons. In my view there are not.

6.77 In other words, the purpose of the law in this area is not to prevent the spread of disease. Rather, it is to give potential victims the assurance that the community recognises irresponsible transmission as wrong and will vindicate their right to safety.

Arguments against including disease

6.78 As mentioned above,126 there is a strong body of informed opinion to the effect that the unintentional transmission of HIV and STIs ought not to be criminal, even if it is performed recklessly. Briefly, the reasons advanced are:

124 Chalmers, pp 149 and 150.
(1) an offence of reckless transmission encourages people to choose not to be tested, so as not to have the knowledge necessary for recklessness;

(2) it discourages openness with (and by) medical professionals, because these may have to give evidence against their patients;

(3) it encourages people to think that disclosure of HIV status is always a duty, and that if a potential partner has not mentioned his or her status then he or she is not infected;

(4) because of the difficulty of proving transmission, the existence of the offence leads to very wide-ranging and intrusive investigations affecting a great many people, out of all proportion to the small number who will be found deserving of prosecution;

(5) the whole topic of HIV/AIDS is affected by an atmosphere of fear which is often irrational, and there is still an undesirable stigma against sufferers; the existence of an offence reinforces both these phenomena.

6.79 This scoping exercise is not the place for a detailed assessment of the strength of these arguments. That would follow in a full scale reform project. What we can say is that, assuming these arguments to be correct, excluding disease from the scope of injury is not the answer, as it would leave a gap in the law far wider than necessary to accommodate the concerns mentioned. If it is desired to exclude the transmission of HIV and sexually transmissible diseases by consensual sexual intercourse, this should be done by way of a specific exemption.

6.80 That still leaves the question of whether it is worth pursuing a reformed scheme containing a specific exemption, as recommended by UNAIDS, the HIV charities and other commentators on public health grounds. This would require a far wider consultation with health professionals and others.

Consultation questions 33 and 34

6.81 We consider that future reform of offences against the person should take account of the ramifications of disease transmission. Do consultees agree?

6.82 We also consider that in such reform consideration should be given to:

(1) whether disease should in principle fall within the definition of injury in any reforming statute that may be based on the draft Bill;

(2) whether, if the transmission of sexual infections through consensual intercourse is to be excluded, this should be done by means of a specific exemption limited to that situation. This could be considered in a wider review; alternatively

(3) whether the transmission of disease should remain within the offences as in existing law.

126 Paras 6.48 to 6.58 above.

127 Paras 6.68 and 6.69 above (the non-consensual sex and infection by syringe cases).
Do consultees agree?

**How the draft Bill might be adapted**

6.83 In the draft Bill attached to the 1993 report, there is no exclusion equivalent to that in the 1998 draft Bill. Accordingly, the transmission of disease potentially falls within all three of the main injury offences: intentionally causing serious injury, recklessly causing serious injury and intentionally or recklessly causing injury.

6.84 This is different from the existing law in two respects.

1. In the offence of recklessly causing serious injury, D would only be liable if he or she foresaw the risk of serious injury: it would not be sufficient to foresee the risk of some injury, as at present. Accordingly, D would not be liable in the case, described above, where he foresaw causing injury in the course of consensual rough sex but did not foresee the risk of harm by transmission because he did not know that he might be HIV positive.128

2. There would also be liability for transmission of non-serious diseases. At present, these are excluded from the section 47 offence by the fact that that offence must include an assault.

6.85 The first result is entirely desirable. The case mentioned is a good example of the general proposition129 that injustice is caused when the mental element of an offence fails to correspond to its objective elements, and that a person should not be held liable for unforeseen results.

6.86 The second result is more problematic. It raises the prospect of a person committing an offence by coming into the office with a common cold and infecting fellow workers, or by transmitting oral herpes while kissing.

6.87 One way of avoiding this would be by relying on the principle that recklessness means not only that D foresaw the risk but also that it was unreasonable to take it.130 In the case of really serious injury, almost any risk is unreasonable if clearly foreseen, unless there is a very strong reason for running it such as the need for surgery. In the case of minor infections, one could argue that they are a normal part of social life and that it is not unreasonable to run some risk of causing them in the course of one’s ordinary activities. Intentionally transmitting minor infections would however be criminal.

6.88 Alternatively, any future reform based on the draft Bill could be altered as to exclude the transmission of disease that is not serious. For example, legislation could provide that, for the purposes of these offences, “injury” does not include a disease that is not a serious one. In that case the transmission of minor infections would not be criminal, even if intentional.

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128 Para 6.21 and 6.31 above.

129 Paras 3.34 to 3.58, above.

130 Para 2.95 and following, above; clause 14(2) of the draft Bill.
Should disclosure always be required?

6.89 As explained above, for the offence under section 20 to be committed, it is necessary both that D was reckless (or intended harm) and that V did not consent to it. D is therefore free of liability either if the risk was so low that D was justified in taking it or if D disclosed the risk to V and V consented to be exposed to it.

6.90 The unresolved question is whether, if the risk is low because D is using a condom or is undergoing treatment which reduces the viral load to an undetectable level, this is sufficient to justify D in taking that risk without consulting V.

(1) If the answer is yes, it follows that, to be free of liability, D must either reduce the risk by using a condom or following the prescribed treatment (possibly both) or disclose his or her condition to V.

(2) If the answer is no, D must always disclose his or her condition to V.

6.91 If any form of criminal liability for reckless transmission is to be retained, this question will equally have to be answered under the new law; either in the statute creating that law or in cases decided under it.

ARGUMENTS AGAINST ALWAYS REQUIRING DISCLOSURE

6.92 One argument against requiring disclosure is that, in the cases with which we are concerned in this part of the discussion, the risk has been reduced to so low a level that, statistically speaking, sexual intercourse with an HIV positive person who is undergoing treatment (case 1) is actually safer than sex with a person with no apparent problem (case 2).

(1) In case 1 one can be certain that the viral load is low and that the risk of transmitting infection is insignificant.

(2) In case 2 the person may be infected without knowing it, and it is in the early (and undiagnosed) stages of infection that one is most likely to infect others.

Consent to intercourse implies consent to the normal level of risk; and in the cases with which we are concerned the level of risk is no more than normal, and may be less.

131 Assuming that the test for malice is subject to the justified risk exception: para 6.22 above.

132 Para 6.27 and following, above.

133 The test of recklessness will then be one of pure foresight, equivalent to the view that malice in s 20 contains no exception for justified risk.

134 Or more so: the justified risk exception certainly forms part of the offences under the draft Bill, whether or not it forms part of the existing s 20 offence.

135 It is estimated that there are between 15,000 and 30,000 individuals with undiagnosed HIV infections in England and Wales: http://webarchive.nationalarchives.gov.uk/20140722091854/http://www.hpa.org.uk/webc/HPAwebFile/HPAweb_C/1287145128738 (last visited 30 October 2014).
Another argument is that requiring disclosure in all cases in effect means that, once a person has contracted the virus, he or she is bound from then on always to warn others however insignificant the actual risk. This leads to the stigmatisation of HIV positive people and compromises their sexual freedom.

Finally, there are cases in which disclosure will seriously threaten one’s personal safety, for example by inviting a violent response from one’s partner. Other risks are that one will be abandoned or evicted, or that this sensitive personal information will be passed on to others, with serious social consequences.

ARGUMENTS FOR ALWAYS REQUIRING DISCLOSURE

The argument on the other side is that, even if the risk is a low one, D does not have the right to decide to take it on V’s behalf. Respecting each individual’s personal autonomy, V has the right to decide that the risk is unacceptable however low, even if from an objective medical point of view V’s fear may be exaggerated and irrational. And since V, in a case coming within the scope of the offence, must in fact have become infected, it follows that the fear was not quite irrational.

The argument that low risk precludes recklessness has one other undesirable consequence. Any offence covering the transmission of disease, whether under the existing law or under any possible replacement, will presumably require either intention to transmit or recklessness as to the risk of transmission. If low risk in itself precludes recklessness, it follows that the offence will not be committed even if V has specifically asked about D’s HIV status and D has lied about it. It is possible, however, that in these circumstances D has committed rape or some other sexual offence.136

Consultation question 35

As this is a scoping exercise, we do not need to decide between these arguments but only to invite views on them.

If the transmission of disease is to be included in any future reform including offences of causing injury, it will be necessary to choose between the following possible rules about disclosure of the risk of infection, namely:

(1) that D should be bound to disclose facts indicating a risk of infection only if the risk is significant; or

(2) that D should be bound to disclose facts indicating a risk of infection in all circumstances; or

(3) that whether D was justified in exposing V to that risk without disclosing it should be a question for the jury in each particular case.

136 That is, the jury may find that V did not consent to sexual activity if V has made it clear to D that the question of HIV status is of crucial importance and that V’s consent is subject to D being HIV negative: see R (F) v Director of Public Prosecutions [2013] EWHC 945 (Admin), [2014] QB 581, [2013] 2 Cr App R 21.
Do consultees have any preference as between these possible rules?

Consultation question 36

6.99 We consider that reform of offences against the person should consider the extent to which transmission of minor infections would be excluded from the scope of the injury offences. Do consultees agree?

Other schemes

Specialised offences of transmission

6.100 A further option for consideration would be to exclude the transmission of disease from the general injury offences in the draft Bill but to create one or more specialised offences.

6.101 The advantage of doing this would be that the new offences could be tailored in the light of medical and scientific knowledge. They would also be more certain, as the statute creating them would state whether D must be aware of his or her infection in order to be liable, and what measures D should take in order to reduce the risk to a reasonable level. For example, the new offence could clarify whether, if D has reduced the risk by means of treatment, he or she is still required to disclose his or her condition to V to be exempt from liability.137

6.102 One disadvantage is that medical and scientific knowledge changes, and the offences could become obsolete unless constantly updated. Under the current law, whether D is reckless, what risks are reasonable and how far V was aware of them are broad jury questions, which can be answered in the light of expert evidence. To set detailed rules risks an insensitive approach to the questions of whether D was in fact reckless and whether V in fact consented in a particular case.

6.103 A more important point is that a specialised offence obscures the basic reason for criminalising transmission, which is that to cause disease is to do physical harm, and deserves the same reprobation as causing physical harm in any other way.138 As argued above,139 a broad offence has a greater deterrent effect: for this reason, there is a single offence of murder rather than separate crimes of killing by particular means.140 An offence limited to the transmission of sexual infections would give an undesirable impression of being primarily concerned with the control of sexual behaviour.

6.104 It should be noted that countries that have a specialised offence of transmission of infection usually also have offences of endangerment or non-disclosure. As compared with the present law, this creates a far greater risk of intrusive policing of private sexual behaviour and discrimination against groups perceived as being high-risk. For this reason, many in the decriminalisation lobby are critical of the

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137 Para 6.25 and following (present law); para 6.89 and following (if law is reformed).
138 Para 6.76 above.
139 Para 6.73 above.
140 Apart from causing death by dangerous driving. For the choice between fewer broad offences and many narrower offences, see paras 3.10 to 3.14 above.
law in England and Wales but regard it as far preferable to the law in many other countries.

6.105 Finally, offences specific to HIV and sexual infections would have a greater tendency to stigmatise those infections and those who suffer from them than general offences of doing harm, as the infection would form part of the label of the offence. In a global review, UNAIDS has recommended the repeal of existing HIV-specific criminal laws.141

**Offences of endangerment and non-disclosure**

6.106 We discuss the general merits of endangerment offences above.142 Briefly, the principle behind both the 1861 Act and the draft Bill is that endangerment offences are only justified in relation to unusual and intrinsically dangerous activities, such as handling drugs and explosives, where the public has an interest in discouraging irresponsible behaviour. It seems both strange and offensive to equate normal sexual behaviour, albeit by infected people, with such activities. We therefore do not favour creating offences of putting people in danger of infection, as opposed to actually infecting them.

6.107 For similar reasons, we do not favour offences of non-disclosure. We discuss above143 the question whether, in cases where infection has in fact passed, non-disclosure should indicate guilt only if the risk of transmission was significant or also if the risk existed but was minimal. To extend the scope of the criminal law yet further, to cases where no infection has passed, is unfair and over-inclusive.

**The use of court orders**

6.108 There has been criticism of the use of ASBOS and SOPOs in connection with disease transmission.144 Professor Matthew Weait, for example, argues that imposing a requirement of disclosure in all cases has no proven effectiveness in promoting safer sexual practices. It is also unfair because it penalises non-disclosure even if no transmission occurs, even if the risk of transmission is negligible (because D is undergoing ART) and even if V knows of D’s condition by other means.145 The arguments are the same as those against creating an offence of non-disclosure.

6.109 This however is a criticism of the way the orders are used rather than of the existence of the power. It would for example be possible, instead of making orders requiring disclosure, to make orders requiring D to undergo treatment and use protection.

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142 Para 3.60 and following, above.

143 Para 6.89 and following, above.

144 For the present law and practice, see para 6.19 and 6.20 above.

Consultation questions 37 and 38

6.110 Do consultees consider that future reform should pursue the possibility of including specialised offences of transmission of infection, endangerment or non-disclosure?

6.111 Do consultees have observations on the use of ASBOs, SOPOs or other means of penalising non-disclosure?
CHAPTER 7
CONSULTATION QUESTIONS

PROBLEMS IN 1861 ACT

1. Do consultees agree that the number and level of detail of the offences in the 1861 Act is unsatisfactory? In their experience, does this cause problems in practice?¹

2. Do consultees consider that the grading of offences in the 1861 Act is illogical? In their experience, are there practical problems associated with the grading of the offences?²

3. Do consultees consider that, in principle, it is desirable that offences of violence to the person should be defined in such a way that the offender must intend or foresee the type and level of harm specified in the external elements of the offence? Or should the mental element of offences be set in accordance with a different principle?³

4. Do consultees consider that the offences under sections 20 and 47 of the 1861 Act are unsatisfactory because they do not require intention or foresight of the type and level of harm that must occur? In their experience, does this give rise to problems in practice?⁴

5. Do consultees consider that there is benefit in pursuing reform of the law of offences against the person including offences of endangering others?⁵

6. If so, should these offences be general or restricted to specific fields of activity?⁶

7. Do consultees consider that the language of the 1861 Act is in need of updating?⁷

8. Do consultees consider that the language of the 1861 Act is obscure and contains redundancies, and would there be benefits in making it more explicit?⁸

9. Do consultees consider that legal references in any statute governing offences against the person should be updated to reflect the current state of the law to which they refer?⁹

¹ Para 3.15.
² Para 3.27.
³ Para 3.43.
⁴ Para 3.59.
⁵ Para 3.67.
⁶ Para 3.68.
⁷ Para 3.78.
⁸ Para 3.91.
⁹ Para 3.95.
10. We consider that there are serious problems in the drafting of the 1861 Act, and that there would be substantial benefit in pursuing reform of the offences now contained in that Act. Do consultees agree?\(^{10}\)

11. Are consultees aware of further theoretical or practical problems in connection with the 1861 Act other than those addressed above?\(^ {11}\)

**REFORM: GENERAL PRINCIPLES**

12. We consider that there would be benefit in pursuing reform of the law of offences against the person in the form of a modern statute replacing all or most of the Offences Against the Person Act 1861. Do consultees agree?\(^ {12}\)

13. We consider that any comprehensive statutory reform of offences against the person should involve consideration of the previous proposals, and specifically the Home Office’s 1998 draft Bill. Do consultees agree?\(^ {13}\)

14. We consider that there would be benefit in pursuing reform with a modern statute that included a definition of injury, subject to further consideration of:

   (1) the breadth of “mental injury”;

   (2) the exclusion of disease (see Chapter 6).

Do consultees have any views on this?\(^ {14}\)

15. We consider that there would be benefit in pursuing reform with a modern offences against the person statute which included a definition of the term “intention”. However, we consider that a formula similar to that in our report on Murder, Manslaughter and Infanticide would be preferable to that in the 1998 Bill. Do consultees have any views on this?\(^ {15}\)

16. We consider that there would be benefit in pursuing reform with a modern offences against the person statute including a definition of “recklessness” similar to that in the draft Bill. Do consultees agree?\(^ {16}\)

**ASSAULT AND BATTERY**

17. We consider that there would be benefit in pursuing reform of psychic assault and battery. Do consultees agree?\(^ {17}\)

18. Do consultees consider that it would be preferable to pursue reform based on:

\(^ {10}\) Para 3.96.
\(^ {11}\) Para 3.97.
\(^ {12}\) Para 4.5.
\(^ {13}\) Para 4.8.
\(^ {14}\) Para 5.18.
\(^ {15}\) Para 5.29.
\(^ {16}\) Para 5.32.
\(^ {17}\) Para 5.49.
(1) a single offence covering the scope of both of the present offences, as in clause 4 of the 1998 draft Bill; or

(2) separate offences (under whatever names) of psychic assault and physical attack?\(^{18}\)

**OFFENCES OF CAUSING INJURY**

19. We consider that there would be benefit in pursuing reform consisting of a modern statute with a hierarchy of offences based on causing injury, similar to that in the draft Bill. Do consultees agree?\(^{19}\)

20. We consider that there would be benefit in pursuing reform in which the scheme of the 1998 draft Bill would be modified to include a summary offence of causing minor injury. Do consultees agree?\(^{20}\)

21. Do consultees have views on the way in which an offence of causing minor injury should be incorporated into the hierarchy of offences?\(^{21}\)

22. We consider that there would be benefit in pursuing reform of offences against the person in which it is specified in what circumstances offences of causing injury can be committed by omission. Do consultees have views on whether any of these offences should include causing injury by omission?\(^{22}\)

**PARTICULAR ASSAULTS**

23. Do consultees consider that there would be benefit in pursuing reform in which it is specifically provided that conduct in England and Wales causing injury abroad falls within the offences of causing injury?\(^{23}\)

24. We consider that there would be benefit in pursuing reform including offences of assaulting a police constable, causing serious injury while resisting arrest and assault while resisting arrest in the form contained in the draft Bill, subject to consideration being given to:

(1) the maximum sentence for the offence of causing serious injury while resisting arrest;

(2) the possibility of introducing a requirement that D knew that or was reckless as to whether V was a police constable, as in the 1993 report.

Do consultees agree?\(^{24}\)

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\(^{18}\) Para 5.50.

\(^{19}\) Para 5.87.

\(^{20}\) Para 5.100.

\(^{21}\) Para 5.101.

\(^{22}\) Para 5.112.

\(^{23}\) Para 5.122.

\(^{24}\) Para 5.138.
25. Do consultees consider that there would be benefit in considering the abolition of the offences of assaulting or obstructing clergy and of assaulting magistrates and others preserving a wreck? 

26. We consider that there would be benefit in pursuing reform including revised offences of racially and religiously aggravated violence, based on the offences of assault and causing injury defined in the draft Bill. Do consultees agree? 

27. Do consultees consider that there is benefit in examining whether reform of offences against the person should include specific offences of domestic violence? 

**OTHER OFFENCES UNDER THE 1861 ACT**

28. Do consultees consider that there would be benefit in pursuing reform including a revised and clarified offence of encouraging murder? 

29. We consider that there would be benefit in pursuing reform including an offence of threatening to kill or cause serious injury, in the form given in clause 10 of the 1998 Bill, amended to cover the case where the threat is conditional. Do consultees agree? 

30. We consider that there would be benefit in considering whether reform of the law of offences against the person should include an offence of administering a substance capable of causing injury, similar to that in clause 11 of the draft Bill. Do consultees have views about such an offence? 

31. We consider that there is benefit in pursuing reform including offences relating to explosives and dangerous substances, in the form given in the draft Bill. Do consultees agree? 

**ALTERNATIVE VERDICTS**

32. We consider that there would be benefit in pursuing reform including a provision about included offences, similar to clause 22 of the draft Bill, amended to take account of the offence structure decided upon. Do consultees agree? 

**TRANSMISSION OF DISEASE**

33. We consider that future reform of offences against the person should take account of the ramifications of disease transmission. Do consultees agree?

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25 Para 5.139.
26 Para 5.143.
27 Para 5.153.
28 Para 5.170.
29 Para 5.174.
30 Para 5.187.
31 Para 5.195.
32 Para 5.211.
33 Para 6.81.
34. We also consider that in such reform consideration should be given to:

(1) whether disease should in principle fall within the definition of injury in any reforming statute that may be based on the draft Bill;

(2) whether, if the transmission of sexual infections through consensual intercourse is to be excluded, this should be done by means of a specific exemption limited to that situation. This could be considered in a wider review; alternatively

(3) whether the transmission of disease should remain within the offences as in existing law.

Do consultees agree?34

35. If the transmission of disease is to be included in any future reform including offences of causing injury, it will be necessary to choose between the following possible rules about disclosure of the risk of infection, namely:

(1) that D should be bound to disclose facts indicating a risk of infection only if the risk is significant; or

(2) that D should be bound to disclose facts indicating a risk of infection in all circumstances; or

(3) that whether D was justified in exposing V to that risk without disclosing it should be a question for the jury in each particular case?35

Do consultees have any preference as between these possible rules?

36. We consider that reform of offences against the person should consider the extent to which transmission of minor infections would be excluded from the scope of the injury offences. Do consultees agree?36

37. Do consultees consider that future reform should pursue the possibility of including specialised offences of transmission of infection, endangerment or non-disclosure?37

38. Do consultees have observations on the use of ASBOs, SOPOs or other means of penalising non-disclosure?38

34 Para 6.82.
35 Para 6.98.
36 Para 6.99.
37 Para 6.110.
38 Para 6.111.