

Law Commission

REFORM OF OFFENCES AGAINST THE PERSON

Summary

This paper is a summary of the full Scoping Report, Offences Against the Person, Law Com 361, available at our website at <http://www.lawcom.gov.uk/project/offences-against-the-person/>.

CHAPTER 1

INTRODUCTION

THE OFFENCES UNDER REVIEW

- 1.1 This is a project for the reform of the law of some crimes of violence. The project addresses:
- (1) the offences in the Offences Against the Person Act 1861, such as those concerning wounding and grievous bodily harm, actual bodily harm, threats to kill, encouraging murder, poisoning, causing harm by explosives and many others;
 - (2) assault and battery; and
 - (3) assaulting a constable in the execution of his duty.
- 1.2 It does not address murder, manslaughter, sexual offences, false imprisonment or kidnapping.

THE PROJECT

- 1.3 In November 2014, we published a scoping consultation paper on reforming offences against the person (“the SCP”).¹ The paper examined the existing legal landscape and investigated whether reform was needed and, if so, what form such reform ought to take.
- 1.4 The consultation closed on 11 February 2015. Our final report *Offences Against the Person, Law Com 361*, published on 3 November 2015, gives full details of our recommendations. This document is a summary of that report.

STRUCTURE OF THIS SUMMARY

- 1.5 This summary is divided into three chapters:
- (1) Chapter 1: introduction;²
 - (2) Chapter 2: the principal offences, discussing the offences of assault and battery, assault occasioning actual bodily harm and the two offences of grievous bodily harm;³
 - (3) Chapter 3: other offences, discussing the offences of assaulting or causing harm to particular persons or in particular circumstances,

¹ Reform of Offences against the Person: a Scoping Consultation Paper (2014) Law Commission Consultation Paper No 217.

² Page 1.

³ Page 6.

solicitation to murder and threats to kill, endangerment offences and other miscellaneous offences.⁴

- 1.6 After Chapter 3 we summarise our recommendations, in the form of a table showing the existing offences and the recommended new offences which replace them.⁵

OUTLINE OF KEY RECOMMENDATIONS FOR REFORM

- 1.7 The recommendations in our report are briefly as follows:
- (1) The main injury offences should follow the “correspondence principle”, in which the harm required to be intended or foreseen matches the harm done. For example, for an offence of “recklessly causing serious injury”, it should be a requirement that the defendant foresaw a risk of serious injury.
 - (2) As concerns disease, the 1998 draft Bill should be modified to follow the scheme of the existing law, in which there are no specialised offences of transmitting disease but reckless transmission can fall within general offences of causing injury. If it is desired to consider any other scheme, this should be done in a wider review devoted to this one subject.
 - (3) There should be an offence of “aggravated assault”, meaning any assault which in fact causes an injury: this new offence would sit between the offence of intentionally or recklessly causing harm and the assault offences. The maximum sentence for this summary only offence should be 12 months.
 - (4) There should be no general offence of recklessly endangering people, but the existing endangerment offences involving poisons, explosives and railways should be replaced by similar (but simpler) offences.
- 1.8 The existing offences, and the offences we recommend to replace them, are all shown in a table at page 22 of this summary.

HISTORY OF ATTEMPTS TO REFORM OFFENCES AGAINST THE PERSON

- 1.9 Over the past 35 years there have been a long series of attempts to reform offences against the person. These include:
- (1) Criminal Law Revision Committee, Fourteenth Report, Offences against the Person, in 1980;⁶
 - (2) Codification of the Criminal Law (report with draft code submitted to the Law Commission by a group of academics chaired by Professor Sir John Smith QC), in 1985;⁷

⁴ Page 17.

⁵ Page 23.

⁶ (1980) Cmnd 7844. This was based on a Working Paper published in 1976.

- (3) Draft Criminal Code with commentary (Law Commission report), in 1989;⁸
 - (4) Legislating the Criminal Code: Offences against the Person and General Principles (Law Commission consultation paper), in 1992;⁹
 - (5) Legislating the Criminal Code: Offences against the Person and General Principles (Law Commission report), in 1993;¹⁰ and
 - (6) Home Office Consultation Paper with draft Bill, entitled *Violence: Reforming the Offences against the Person Act 1861*, in 1998.¹¹
- 1.10 The proposal discussed in the SCP was that the Offences Against the Person Act 1861 should be replaced by a modern statute, based on the Home Office's 1998 draft Bill with some modifications. Having considered responses to our consultation, we reach a similar conclusion in our final report.

CRITICISMS OF THE CURRENT LAW

- 1.11 The current law, as set out in the Offences Against the Person Act 1861, has the following defects:
- (1) There are too many narrowly defined offences about the same subject, where fewer and simpler offences would suffice; for example there are three offences of poisoning, four concerning explosives and three concerning railways.
 - (2) In some cases, the same section contains a list of different but related detailed situations, leaving doubt about whether the section creates one offence or several. One example is section 18, which arguably creates four offences, covering ten different factual situations.
 - (3) The order and grading of the offences by seriousness is unclear. Even when it is clear which offences are meant to be the more serious, the differences are not always reflected in sentencing powers. For example, the offence under section 20, involving "grievous bodily harm", carries the same maximum sentence (5 years) as that under section 47, involving only "actual bodily harm".
 - (4) There are many rarely used offences, some of which seem no longer to be necessary: an example is the offence of assaulting a magistrate or other person in the exercise of his or her duty preserving a wreck.

⁷ (1985) Law Com No 143.

⁸ (1989) Law Com No 177 (2 vols).

⁹ (1992) Law Commission Consultation Paper No 122.

¹⁰ (1993) Law Com No 218.

¹¹ Set out in Appendix C of the report and available online at http://www.lawcom.gov.uk/wp-content/uploads/2015/11/51950-LC-HC555_Web.pdf.

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

THE MAIN THEMES FOR REFORM

- 1.12 There was general agreement among our consultees that the 1861 Act should be replaced by a modern statute, on lines similar to the Home Office’s 1998 draft Offences Bill, which would be free from the defects listed in the previous paragraph.
- 1.13 We also had to consider the following questions, which gave rise to a much wider diversity of views among consultees.
 - (1) Most offences of violence require an intention to cause harm, or recklessness about the risk of harm.¹² However, in several offences under the Act the harm that must be intended or foreseen is different from the harm that is actually done. For example, in the section 20 offence the defendant must inflict “grievous bodily harm” or cause a wound, but need only foresee physical harm of some kind, at however low a level. One question we raised in the SCP was whether there should be a closer match between the harm foreseen and the harm done, to ensure that any harm done genuinely reflects the defendant’s fault.
 - (2) Difficult questions arise about the transmission of disease, in particular the reckless transmission of HIV or sexually transmissible infections through consensual sexual intercourse. Possibilities considered were:
 - (a) that transmission of disease should fall within the general offences of causing injury or harm, as in the present law;
 - (b) that there should be specific offences of transmitting disease in general, or particular diseases, as in some other countries; or

¹² “Recklessness” means that a risk of harm was foreseen, and that it was unjustified to take that risk.

- (c) that the transmission of disease should never be criminal unless done intentionally, as in the Home Office's 1998 draft Bill.¹³
- (3) The offence of assault occasioning actual bodily harm, under section 47 of the Act, can be tried either in the Crown Court or in a magistrates' court. In practice, cases involving low level injuries, where a sentence of 6 months or less is expected, are usually charged as common assault rather than under section 47. In the SCP and the final report, we consider ways of creating a special offence to cover these cases, so that they would remain in the magistrates' court but be correctly labelled in terms of the harm caused.
- (4) In the SCP we mentioned the possibility of an offence of recklessly putting a person at risk of injury: this would apply whether or not the injury actually happened.
- (5) We also raised the possibility of dedicated offences of domestic violence: these would be aggravated forms of the general offences of violence, applying when the parties were living together in a family.

¹³ In the draft Bill, injury excludes "anything caused by disease" except in the offence of intentionally causing serious injury.

CHAPTER 2

THE PRINCIPAL OFFENCES

TERMINOLOGY

2.1 In this summary, as in the other project documents, we use the following terminology:

- (1) “The 1861 Act” means the Offences Against the Person Act 1861, and “the draft Bill” means the draft Offences Against the Person Bill published by the Home Office in 1998.¹
- (2) D is the defendant, namely the person being tried for an offence. V is the person against whom the offence is said to have been committed.
- (3) The “external elements” of an offence are the facts which must be proved to show that D is guilty of the offence, other than facts relating to D’s mental fault. They divide into:
 - (a) “conduct elements”: what the D must do or fail to do;
 - (b) “consequence elements”: the result of D’s conduct (for example, in murder, that V dies); and
 - (c) “circumstance elements”: other facts affecting whether D is guilty or not (for example, in rape, that V does not consent).
- (4) The “mental element” (or “fault element”) is the state of mind which must be proved by the prosecution to show that D is responsible for the actions. Examples of mental elements include intention, recklessness, knowledge or belief (or the lack of it).

CURRENT LAW

2.2 The main offences of violence are currently as follows.

- (1) Assault. This is a common law offence. D must cause V to apprehend immediate unlawful violence (meaning any unwanted and unjustified touching). D must either intend to do this or be reckless about whether V apprehends such violence or not.

Maximum sentence: 6 months.

- (2) Battery. This is also a common law offence: it is closely related to assault, and the two are often referred to collectively as “common assault”.² It consists of any unwanted and unjustified touching. This may

¹ Set out in Appendix A of the report and available online at http://www.lawcom.gov.uk/wp-content/uploads/2015/11/51950-LC-HC555_Web.pdf.

² References to “assault” in statute usually mean both offences; confusingly, battery by itself can also be referred to as “assault by beating”.

take the form either of physical contact between D and V or of D causing some object to come into contact with V (for example, by throwing it or setting a trap). Again, D must either intend or be reckless about that contact.

Maximum sentence: 6 months.

- (3) Assault occasioning actual bodily harm. This is an offence under section 47 of the 1861 Act, and can consist of either an assault or a battery, provided that some physical or psychiatric harm is caused to V. There is no need for D either to intend or to be reckless about the risk of that harm.

Maximum sentence: 5 years.

- (4) Malicious wounding or infliction of grievous bodily harm, under section 20 of the 1861 Act.

(a) D must either wound V or cause V serious physical or psychiatric harm.

(b) D must intend to cause some harm, or be reckless about the risk of some harm. For this purpose, awareness of risk of any level of physical harm is sufficient: D need not intend or foresee a serious injury such as the one that occurred.

Maximum sentence: 5 years.

- (5) Wounding or causing grievous bodily harm with intent, under section 18 of the 1861 Act.

(a) D must either wound V or cause V serious physical or psychiatric harm.

(b) D must intend to cause serious physical or psychiatric harm.³

Maximum sentence: life.

ASSAULT AND BATTERY

2.3 The draft Bill proposes a single offence, covering both types of behaviour (causing apprehension of violence and actual violence). After some thought, and following the views of the majority of consultees, we recommend that there should continue to be two separate offences.

2.4 The names “assault” and “battery” are misleading. We recommend that the offence of inflicting violence should be called “physical assault” and that the offence of causing V to think that violence is imminent should be called “threatened assault”.

³ There are further forms of this offence, in which D causes the same harm while intending to resist or escape arrest or detention. We discuss these at para 3.2 below.

- 2.5 We also recommend an offence of “aggravated assault”, consisting of any physical or threatened assault that has the effect of causing injury. We discuss this in detail at the end of this chapter, after our discussion of the main injury offences.

THE INJURY OFFENCES

The draft Bill

- 2.6 The draft Bill contains three new offences of causing injury, as follows:
- (1) Intentionally causing serious injury (clause 1); maximum sentence: life.
 - (2) Recklessly causing serious injury (clause 2); maximum sentence: 7 years.
 - (3) Intentionally or recklessly causing injury (clause 3); maximum sentence: 5 years.
- 2.7 This is different from the current law in three ways:
- (1) There is no specific mention of wounding. A wound can be either a serious injury or an injury, depending on the facts.
 - (2) In the offence of “recklessly causing serious injury”, D must foresee a risk of *serious* injury (unlike the existing section 20 offence, where it is enough to foresee any injury). We discuss this below under the heading “Correspondence”.⁴
 - (3) The offence under clause 3, unlike the existing section 47 offence, does not require an assault or battery to occur; any means of causing injury is sufficient.
- 2.8 The details of these offences are discussed in full in Chapter 4 of the report, and a further issue, concerned with the transmission of disease, is discussed in Chapter 6. Here we present the issues in brief, under the following headings:
- (1) External elements:
 - (a) Omissions;
 - (b) Definition of injury, in particular whether it should include disease.
 - (2) Mental elements:
 - (a) Whether to define intention and recklessness;
 - (b) Correspondence as against other principles of liability.

⁴ Para 2.27 and following, below.

External elements

Omissions

- 2.9 The draft Bill provides that the clause 1 offence (intentionally causing serious injury) can consist of either an act or an omission; the other two injury offences must consist of an act. It also provides that all these offences can include a case where D culpably fails to prevent the consequences of his or her previous act (or omission in the case of clause 1).
- 2.10 In our report we express the view that there is no reason to distinguish between the clause 1 offence and the others. For all of them it is sufficient to speak of “conduct” causing injury; and the rule about failing to prevent consequences is a general rule of law, which does not need to be restated in a statute on offences of violence. However, we explain that this view is only provisional and that the final decision is for those who draft the new statute.

Definition of injury

- 2.11 The main offences in the draft Bill involve “causing injury”. Injury is defined as including both physical and mental injury. Except for the purposes of clause 1 (intentionally causing serious injury), both physical and mental injury exclude “anything caused by disease”. This raises issues both about mental injury and about disease.

MENTAL INJURY

- 2.12 In current law, “grievous bodily harm” and “actual bodily harm” include recognised psychiatric conditions but not other psychological states such as distress or grief. The definition in the draft Bill, including all “mental injury” not caused by disease, may be much wider.
- 2.13 In our report we recommend maintaining the definition as in existing law, because of the difficulty in drawing a boundary defining wider psychological harms. This would apply for the purposes of all the offences in the new statute. We regard this as particularly important as concerns the offence in clause 3 (intentionally or recklessly causing injury) because, unlike the offence under section 47 which it replaces, it does not require any kind of assault. An offence including psychological harm in general, caused by whatever means, would be too broad and go well beyond the domain of offences of violence.

DISEASE

- 2.14 For the purposes of the offences under clauses 2 (recklessly causing serious injury) and 3 (intentionally or recklessly causing injury),⁵ the draft Bill’s definition of injury excludes anything caused by disease. The purpose of this exclusion was to reflect the law as it was believed to be in 1998, when the draft Bill was published.

(1) The offence under clause 2 replaces the offence under section 20 of the 1861 Act (malicious infliction of grievous bodily harm). The section 20

⁵ And of all other offences except that under clause 1.

offence was then understood to require something in the nature of an assault, and therefore to exclude the passing of infection through consensual sexual intercourse.⁶

- (2) The offence under clause 3 replaces the offence under section 47 of the 1861 Act (assault occasioning actual bodily harm). The section 47 offence clearly excludes most cases in which an infection passes, as these will rarely involve an assault.⁷

2.15 It remains the law that the passing of infection does not normally fall within the section 47 offence.⁸ However, the interpretation of section 20 has changed and no longer requires any act in the nature of an assault. In a series of cases starting with *Dica*,⁹ the courts have held that the reckless transmission of HIV or sexually transmissible infections through consensual intercourse does in principle amount to the section 20 offence. The reasoning was that V consented to sex (so D is not guilty of rape) but did not consent to the risk of infection.

2.16 There is a strong body of opinion, especially in the medical profession and groups concerned with HIV and sexually transmissible infections, that the transmission of these diseases should never be criminal unless done intentionally. On this view, it would be preferable to revert to the law as it stood in 1998 and to use the draft Bill as it stands. The arguments for this are as follows.

- (1) an offence of reckless transmission encourages people to choose not to be tested, so as not to have the awareness of risk that might constitute recklessness;
- (2) it discourages openness with (and by) medical professionals, because they may have to give evidence against their patients;
- (3) it encourages people to think that disclosure of HIV status is always a duty, and that if a potential partner has not mentioned his or her status then he or she is not infected;
- (4) because of the difficulty of proving transmission, the existence of the offence leads to very wide-ranging and intrusive investigations affecting a great many people, out of all proportion to the small number who will be found deserving of prosecution; and
- (5) the whole topic of HIV/AIDS is affected by an atmosphere of fear (often irrationally so), and there is still an undesirable stigma against people

⁶ *Clarence* (1888) 22 QBD 23.

⁷ An exception might be a case in which D deliberately spits on V and an infection passes through the saliva. Another example could be an attack with an infected syringe, though this might also constitute a wounding and therefore be covered by s 20.

⁸ In *Golding* [2014] EWCA Crim 889 it was held that the passing of genital herpes through consensual sexual intercourse did not amount to the s 47 offence, though it could amount to the s 20 offence.

⁹ [2004] EWCA Crim 1103, [2004] QB 1257. Later cases are *Konzani* [2005] EWCA Crim 706, [2005] 2 Cr App R 14 and *B* [2006] EWCA Crim 2945, [2007] 1 WLR 1567.

infected with HIV; the existence of an offence reinforces both these phenomena.

2.17 However, there are some problems with this proposal.

- (1) The discussion of this issue has almost exclusively concerned the transmission of disease by consensual sexual intercourse, and the transmission of HIV in particular. (Also, most of the evidence for the harmful effects of criminalisation is drawn from countries where there are specific offences concerned with HIV and STIs, and may not be relevant to the use of general offences of causing injury.) The same reasoning may well not apply to other diseases and other means of transmitting them, but the draft Bill excludes disease as a whole.
- (2) In particular, under the draft Bill it would not be criminal to transmit HIV, an STI or any other disease even in the course of a rape or an assault. In this respect, the draft Bill does not represent the law as it stood in 1998.
- (3) If D is aware of a risk of transmission, and V is not aware of it, it seems reasonable that the major share of responsibility for avoiding the risk should lie on D rather than on V.

2.18 For these reasons, on the evidence we have we do not feel justified in recommending a change to the position in existing law, in which the reckless transmission of disease is in principle included in an offence of causing harm. If there is to be a change, this should follow a wider review which compares the position in different countries and gives full consideration to the transmission of diseases other than by sexual means. We consider that there is merit in such a review; however, reform of offences against the person should not be delayed because of it.

2.19 For similar reasons, we do not recommend the creation of specific offences concerned with disease transmission, either in relation to disease in general or in relation to HIV and STIs in particular: this too would require a wider review of all the available evidence. Nor do we recommend an offence of putting a person in danger of contracting a disease, or an offence of failing to disclose an infection to a sexual partner.

2.20 Accordingly, we recommend that the definition of injury in the new statute should not contain the exclusion for “anything caused by disease”.

2.21 This does mean that transmission of disease could in principle fall within the clause 3 offence (intentionally or recklessly causing injury), and liability would no longer be confined to cases where the disease amounts to “serious injury”.¹⁰ Some consultees therefore raised concerns about whether it could criminalise people who infect others by coming to work with a common cold. In the report we discuss various possible solutions and conclude that this will not be a problem in practice, as the requirement of recklessness will exclude cases in which the risk was a reasonable one to take. The offence will therefore not include the

consequences of encounters that may be expected in the course of normal human interaction.

Mental elements

Definitions of intention and recklessness

- 2.22 Most offences in the draft Bill involve either intention or recklessness as to the causing of some result.
- 2.23 Intention has an established meaning in law. A person intends a result if it is his or her purpose to bring it about. In addition, a jury should in an appropriate case be directed that they may find that D intended a result if they are sure that D realised that that result was virtually certain (barring an extraordinary intervention) if D did what he or she was set upon doing.¹¹ This last kind of intention is known as “oblique intent”.
- 2.24 Recklessness has been authoritatively defined as follows:

A person acts recklessly ... with respect to — (i) a circumstance when he is aware of a risk that it exists or will exist; (ii) a result when he is aware of a risk that it will occur; and it is, in the circumstances known to him, unreasonable to take the risk.¹²

The draft Bill refines this to refer to “the circumstances as he knows or believes them to be”, which we believe to be an accurate statement of the present law.

- 2.25 The draft Bill contains definitions of intention and recklessness which reflect the position as described above.
- 2.26 Following consultation, in our report we conclude that there is no need for such definitions in a new statute on offences of violence. It is preferable to leave these terms to be understood in accordance with the general law, rather than to set out the definitions separately in each area of the criminal law. In particular, a statutory definition of oblique intent would cause confusion, as it might suggest that juries must be directed about it in every case. At present, this direction is seldom needed in trials for non-fatal crimes of violence, as in practice the issue mostly arises in murder cases and is rare even then.¹³

¹⁰ The reason for this is that clause 3, unlike the existing section 47, does not require the harm to be caused by an assault.

¹¹ *Woollin* [1999] 1 AC 82, [1998] 4 All ER 103. The wording used here is adapted from our report on Murder, Manslaughter and Infanticide (2006) Law Com No 304 para 3.14. The standard example is a person who plants a bomb on an aircraft intending to claim on the insurance: it is not done for the purpose of killing the passengers but the person knows that this is the almost inevitable result.

¹² *G* [2003] UKHL 50, [2004] 1 AC 1034, per Lord Bingham of Cornhill at [41].

¹³ *Woollin*, above.

Correspondence

- 2.27 The offences in the draft Bill conform to what academics call the “correspondence principle”. That means that the results which D must intend or foresee should match the results which must actually occur. In other words, D cannot be held liable for a given kind and level of harm unless he or she either meant to do it or at least knowingly ran the risk of it.
- 2.28 That is not the only rule of liability found in criminal law. Several offences, such as assault and criminal damage, do indeed comply with the correspondence principle. But other patterns are found; for example:
- (1) In murder, D must bring about the death of V, but need only intend to cause death or grievous bodily harm. This is known as “constructive liability”.
 - (2) In assault with intent to rob, D must intend to rob, but need not actually carry out a robbery. Offences of this kind are known as offences of “ulterior intent”.
 - (3) Many offences (for example traffic offences such as driving through a red light) do not require any intention or knowledge at all concerning one or more essential ingredients of the offence. This is known as “strict liability”.
- 2.29 In our draft report we argue that, out of these possible rules, the correspondence principle is the fairest, as it ensures that the harm actually caused is genuinely D’s fault, and that it should be the default position unless there is good reason to the contrary. A majority of consultees agreed with this, though some defended the existence of constructive liability in some cases.
- 2.30 It should also be pointed out that tightening the conditions for the clause 2 offence in this way does not weaken the protection afforded by the criminal law.
- (1) At present, if D causes a serious injury, but only foresees the risk of a lesser injury, he or she is guilty of the offence under section 20, with a maximum sentence of 5 years.
 - (2) Under the draft Bill, D will be guilty of the offence under clause 3, which also has a maximum of 5 years.

The net effect of the draft Bill is in fact to make the law tougher. If D both causes and foresees serious injury, the maximum possible sentence is increased from 5 years to 7.

LOW LEVEL INJURIES

Current law and practice

- 2.31 The offence under section 47 covers any assault which has the effect of causing bodily harm, however minor it may be. It is triable either in the Crown Court or in a magistrates’ court.
- (1) In the Crown Court, the maximum sentence is 5 years’ imprisonment.

- (2) In a magistrates' court, the maximum sentence is 6 months.

Both courts may suspend any sentence of imprisonment they impose,¹⁴ or impose a fine or a community order.

- 2.32 A substantial proportion of Crown Court convictions for this offence result in sentences (including suspended sentences) of 6 months or less, non-custodial sentences or discharges, all of which would have been within the power of a magistrates' court. From figures provided by the Ministry of Justice and the Sentencing Council, we calculate that, in 2014, 34.5% of all sentences passed by the Crown Court for this offence were within that bracket.
- 2.33 In practice most cases of assault resulting in low-level injuries, where a sentence of 6 months or less is expected, are charged as assault or battery, in accordance with a CPS charging standard.¹⁵ This ensures that the cases so charged are tried in the magistrates' court, which is cheaper and faster than Crown Court trial. However, this is a stop-gap solution and, having regard to the definitions of the offences, these defendants are under-charged.

Proposals for a new offence

- 2.34 In the SCP we suggested that there should be an offence of causing low-level injuries, triable only in the magistrates' court. This would be used both for those injury cases which are currently charged as assault or battery, following the charging standard, and for the less serious cases among those currently prosecuted under section 47.
 - (1) This would give effect to the view expressed in Sir Brian Leveson's *Review of Efficiency in Criminal Proceedings*¹⁶ that "some cases simply do not merit the more elaborate, costly and time-consuming procedures of the Crown Court". It would allow considerable savings in cost.
 - (2) At the same time, it would label D's conduct correctly, and not make V feel that his or her injuries are not adequately recognised by the legal system.
- 2.35 This proposal received some criticism from consultees, who felt that victims would resent the description of their injuries as "minor" and that distinguishing too many levels of injury would create difficulties in deciding what level of injury D intended or foresaw. We also believe it might create confusion, as the new offence would fall wholly within the scope of the more serious offence under clause 3, of intentionally or recklessly causing injury.

¹⁴ Applicable to sentences up to 6 months in the magistrates' court and up to 2 years in the Crown Court. In both cases, the suspension can last for up to 2 years and have certain requirements attached.

¹⁵ Crown Prosecution Service, *Legal Guidance: Offences Against the Person, Incorporating Charging Standard*. Available from: https://www.cps.gov.uk/legal/l_to_o/offences_against_the_person/#a07 (last visited 19 October 2015).

¹⁶ January 2015, available at <https://www.judiciary.gov.uk/publications/review-of-efficiency-in-criminal-proceedings-final-report/> (last visited 19 October 2015).

- 2.36 In our report, we instead recommend an offence of “aggravated assault”, meaning any physical or threatened assault that in fact caused an injury, whether or not D intended or foresaw the risk of this. This would be clearly distinct from the clause 3 offence, which requires intention or recklessness. In effect, it would be similar to the existing offence under section 47, except that it would be triable only in the magistrates’ court and attract a much lower sentence.
- 2.37 As well as ensuring that less serious cases were tried in the right court, this scheme would have two further advantages.
- (1) The new offence would not apply when V consented to the risk of injury. This would be much simpler than the present law.¹⁷ (A more restrictive rule about consent would still apply to the clause 3 offence.)
 - (2) It would be possible to provide (and we recommend providing) that the maximum sentence for aggravated assault should be 12 months, while the maximum for threatened assault and physical assault would stay at 6 months.¹⁸
- 2.38 This would allow still further savings, as cases in which the expected sentence is 12 months or less would also be charged using the new offence, and therefore remain in the magistrates’ court. We stated, above, that 34.5% of all sentences passed by the Crown Court for this offence in 2014 would have been within the power of a magistrates’ court. If magistrates’ courts had been able to impose a sentence of up to 12 months, this figure would rise to 73.5%.
- 2.39 At present the Crown Court has powers to give alternative verdicts: for example, a defendant charged with a grievous bodily harm offence can instead be found guilty of actual bodily harm or assault. The new offence of aggravated assault would need to be fitted into this scheme.

RECOMMENDATION

- 2.40 We recommend that a new statute on offence of violence should contain the injury and assault offences set out in clauses 1 to 4 of the draft Bill, with the following modifications:
- (1) There should be separate offences of “threatened assault” (assault) and “physical assault” (battery).
 - (2) The definition of injury should include disease, but should not include mental harm other than recognised psychiatric conditions.
 - (3) There should be an offence of “aggravated assault”, triable only in the magistrates’ court, consisting of any threatened or physical assault which causes injury, whether or not the injury is intended or foreseen. The maximum sentence for this offence should be 12 months.

¹⁷ For which see paras 2.20 and following of the report.

¹⁸ The sentencing powers of the magistrates are in any case due to be increased to 12 months: Criminal Justice Act 2003, s 154 (not yet commenced). Our present proposal is that the maximum provided for the new offence should be 12 months whether or not s 154 has been commenced.

CHAPTER 3

THE OTHER OFFENCES

LIST OF OFFENCES

3.1 In the previous chapter we discussed the main crimes of violence, namely assault and battery, assault occasioning actual bodily harm and the two offences of grievous bodily harm. In this chapter we discuss further offences, grouped as follows.

- (1) Some offences of assaulting or causing harm to particular persons or in particular circumstances, in particular:
 - (a) wounding or causing grievous bodily harm with intent to resist or prevent the lawful apprehension or detention of any person;¹
 - (b) assault with intent to resist or prevent the lawful apprehension or detention of any person;²
 - (c) obstructing or assaulting a clergyman in the discharge of his duties;³
 - (d) assault resulting in striking or wounding a magistrate or other person in the exercise of his duty preserving a wreck or any ship in distress;⁴
 - (e) assaulting a constable (or a person assisting him) in the execution of his duty;⁵
 - (f) racially and religiously aggravated crimes of violence;⁶ and
 - (g) domestic violence.⁷
- (2) Solicitation to murder⁸ and threats to kill.⁹
- (3) Offences of causing danger, such as those concerned with:
 - (a) poisoning;¹⁰

¹ OAPA 1861, s 18.

² OAPA 1861, s 38.

³ OAPA 1861, s 36.

⁴ OAPA 1861, s 37.

⁵ Police Act 1996, s 89(1)

⁶ Crime and Disorder Act 1998.

⁷ No such offence exists at present: the discussion concerns the proposal to create one or more such offences. There is an offence of “domestic abuse”, consisting of controlling or coercive behaviour: para 3.8 below.

⁸ OAPA 1861, s 4.

⁹ OAPA 1861, s 16.

- (b) explosives;¹¹ and
 - (c) railways.¹²
- (4) a number of miscellaneous offences, namely impeding a person escaping from a shipwreck,¹³ attempting to choke in order to commit an indictable offence,¹⁴ not providing apprentices or servants with food,¹⁵ exposing children to danger,¹⁶ setting spring guns, man traps etc¹⁷ and causing harm by furious driving.¹⁸

PARTICULAR ASSAULTS

- 3.2 Causing grievous bodily harm or wounding with intent to resist or prevent arrest or detention is at present a branch of the offence under section 18, and therefore carries a maximum sentence of life imprisonment. In the draft Bill this becomes a separate offence of causing serious injury intending to resist, prevent or terminate the lawful arrest or detention of D or a third person, still with a maximum of life imprisonment. We recommend creating an offence as in the draft Bill, but that consideration should be given to a lower maximum sentence.
- 3.3 The draft Bill also contains an offence of assault intending to resist, prevent or terminate the lawful arrest or detention of D or a third person. This too should be contained in the new statute on offences of violence.
- 3.4 Assaulting a member of the clergy should be dealt with by means of one of the general assault offences (physical assault or threatened assault): there is no need for a special offence. The offence in the 1861 Act should be abolished and not replaced.
- 3.5 The offence of assaulting a magistrate or other person preserving a wreck is never encountered in modern practice, and should be abolished and not replaced.
- 3.6 The offence of assaulting a constable in the performance of his duty should be incorporated in the new statute, with two changes:
- (1) At present, it does not require D to know or suspect that V is a police officer. We recommend that the offence should only be committed if D

¹⁰ OAPA 1861, ss 22 to 24.

¹¹ OAPA 1861, ss 28 to 30 and 64.

¹² OAPA 1861, ss 32 to 34.

¹³ OAPA 1861, s 17.

¹⁴ OAPA 1861, s 21.

¹⁵ OAPA 1861, s 26.

¹⁶ OAPA 1861, s 27.

¹⁷ OAPA 1861, s 31; fn 322 to Chapter 2 of the SCP.

¹⁸ OAPA 1861, s 35.

either knows that V is a police officer or is reckless as to whether V is or is not a police officer.

- (2) The maximum sentence for this offence should be increased from 6 to 12 months.
- 3.7 The Crime and Disorder Act 1998 contains offences consisting of racially and religiously aggravated forms of the offences under sections 20 (malicious wounding or infliction of grievous bodily harm) and 47 (assault occasioning actual bodily harm) and common assault (meaning assault and battery). These should be adapted to refer to the new offences under clauses 2 (recklessly causing serious injury) and 3 (intentionally or recklessly causing injury) and physical and threatened assault. The maximum sentence for the racially or religiously aggravated form of the clause 2 offence should be ten years.¹⁹
- 3.8 We do not recommend new offences of domestic violence. In the opinion of the majority of consultees, the principal wrong involved in violence against members of the family is the same as that in the general injury or assault offences, and should be addressed using those offences. One further reason for our view is that there is a new offence of domestic abuse, consisting of “controlling or coercive behaviour”: this is not confined to violence, and does not include all instances of violent behaviour.²⁰ We agree with the view expressed by several consultees that for this offence to exist together with an offence of domestic violence would be a confusing overlap.

SOLICITATION TO MURDER AND THREATS TO KILL

Solicitation to murder

- 3.9 The 1861 Act contains an offence of soliciting or persuading another to commit murder: this includes cases where D is not a British subject and the proposed murder is to take place abroad.
- 3.10 This behaviour might seem to be covered by the offences of assisting and encouraging crime,²¹ making the solicitation offence unnecessary. For this reason, there is no such offence in the draft Bill. However, the offences of assisting and encouraging crime are only committed if D intends or believes that the crime will be carried out. There are cases of incitement against groups, or advice intended only to be followed in certain circumstances, which may not be covered.²²
- 3.11 We therefore recommend that the new statute should contain an updated version of the solicitation offence.

¹⁹ At present the maximum for the aggravated s 20 offence is 7 years; but this is the same as the sentence we propose for the basic form of the clause 2 offence.

²⁰ Serious Crime Act 2015, s 76; not yet commenced.

²¹ Serious Crime Act 2007, ss 44 and 45.

²² An example is *El-Faisal* [2004] EWCA Crim 456, where D was convicted of soliciting the murder of “Hindus, Jews and non-believers”.

Threats to kill

- 3.12 The 1861 Act contains an offence of threatening to kill either the hearer or another person. The draft Bill contains an offence of threatening to kill or cause serious injury.
- 3.13 We recommend that the new statute should contain an offence on these lines, and that this should also include threats to rape. It should be made clear that the offence includes cases where the threat is conditional: “do this, or I will kill you”.

OFFENCES OF CAUSING DANGER

- 3.14 Some countries (France, and some American and Australian states) have an offence of recklessly exposing a person to the danger of injury. In the SCP and the report we discuss the possibility of a similar offence, but decide against it following the results of consultation.
- 3.15 Offences of causing danger may be justified when the danger arises from people choosing to engage in intrinsically dangerous activities. It is for this reason that there are offences of dangerous driving and concerning the use of firearms.

Poisoning offences

- 3.16 The 1861 Act contains one offence of administering a stupefying substance in order to commit another offence,²³ one offence of administering a poison or noxious thing to endanger life or inflict grievous bodily harm²⁴ and one offence of administering a poison or noxious thing with intent to aggrieve or annoy.²⁵
- 3.17 In the draft Bill, the main injury offences under clauses 1 to 3 include causing injury by chemical means as well as in any other way. It also contains a single offence of knowingly or recklessly administering a substance capable of causing injury: for the purposes of this offence, it is irrelevant whether injury was in fact caused. We recommend that the new statute should contain this offence, and do not think that any other offences are necessary to replace those we recommend repealing.

Explosives

- 3.18 The 1861 Act contains offences of:
- (1) doing grievous bodily harm by explosion;²⁶
 - (2) exploding or sending substances with intent to do grievous bodily harm;²⁷
 - (3) placing or throwing explosives with intent to injure;²⁸ and

²³ OAPA 1861, s 22.

²⁴ OAPA 1861, s 23.

²⁵ OAPA 1861, s 24.

²⁶ OAPA 1861, s 28.

²⁷ OAPA 1861, s 29.

(4) possessing or making explosives with intent to commit an offence.²⁹

3.19 The draft Bill recommends replacing the first three of these with two offences:

- (1) using dangerous or explosive substances intending or being reckless about serious injury, and
- (2) using dangerous or explosive substances intending or being reckless about injury.

As with the recommended poisoning offences, it is irrelevant whether injury was in fact caused.

3.20 There is no replacement for the fourth offence, but this behaviour is covered by sections 3 and 4 of the Explosive Substances Act 1883, which respectively cover:

- (1) making or possessing explosives with intent to endanger life or cause serious injury to property;³⁰ and
- (2) making or possessing explosives in suspicious circumstances or without a lawful object.³¹

3.21 We recommend that the new statute should contain the two explosives offences as set out in the draft Bill.

Railways

3.22 There are currently offences of:

- (1) interfering with railway lines (such as by putting obstacles on the track, removing rails or sleepers, interfering with points or signals) with intent to endanger the safety of any person travelling or being on the railway;³²
- (2) throwing things at a train with intent to endanger the safety of a person on the train;³³ and
- (3) endangering the safety of a person on a railway by any unlawful act or wilful omission.³⁴

The draft Bill replaces all these with one offence of causing danger on railways, which is an expanded version of the offence under section 34 of the 1861 Act.

²⁸ OAPA 1861, s 30.

²⁹ OAPA 1861, s 64.

³⁰ Maximum sentence: life.

³¹ Maximum sentence: 14 years.

³² OAPA 1861, s 32; maximum sentence: life.

³³ OAPA 1861, s 33; maximum sentence: life.

³⁴ OAPA 1861, s 34; maximum sentence: 2 years.

3.23 We recommend that the new statute should contain a single offence of causing danger on railways, as in the draft Bill. Given the abolition of the other two offences, we think that the maximum sentence for this offence should be more than 2 years. On the analogy of the new poisoning offence, and of the offence of intentionally or recklessly causing injury, 5 years would be a suitable maximum.

OTHER OFFENCES

3.24 The 1861 Act contains offences of:

- (1) impeding a person escaping from a shipwreck;³⁵
- (2) attempting to choke in order to commit an indictable offence;³⁶
- (3) not providing apprentices or servants with food;³⁷
- (4) exposing children to danger;³⁸
- (5) setting a spring gun, man trap or other engine calculated to destroy life or cause grievous bodily harm;³⁹ and
- (6) causing harm by furious driving.⁴⁰

3.25 Out of these, we recommend the abolition of the offences of impeding a person escaping from a shipwreck, attempting to choke and not providing servants or apprentices with food. The offences relating to shipwrecks and servants and apprentices are never encountered in practice; attempting to choke is sometimes charged but these cases are covered by other offences. The other three offences are still occasionally encountered in practice, and should remain in the 1861 Act.

3.26 The 1861 Act also contains offences of bigamy,⁴¹ attempted abortion,⁴² procuring drugs for abortion⁴³ and concealing birth.⁴⁴ These fall outside the scope of the project and we make no recommendation about them.

³⁵ OAPA 1861, s 17.

³⁶ OAPA 1861, s 21.

³⁷ OAPA 1861, s 26.

³⁸ OAPA 1861, s 27.

³⁹ OAPA 1861, s 31.

⁴⁰ OAPA 1861, s 35.

⁴¹ OAPA 1861, s 57.

⁴² OAPA 1861, s 58.

⁴³ OAPA 1861, s 59.

⁴⁴ OAPA 1861, s 60.

TABLE OF EXISTING AND NEW OFFENCES

Existing offences			New offences		
Section (of OAPA 1861 unless otherwise stated)	Description	Mode of trial and sentence	Clause (of 1998 draft Bill unless otherwise stated)	Description	Mode of trial and sentence
18	Wounding or causing grievous bodily harm with intent to cause grievous bodily harm	Crown Court; life	1	Intentionally causing serious injury <i>Note: wounding is not included unless the wound is a serious injury.</i>	Crown Court; life
20	Malicious wounding or infliction of grievous bodily harm <i>Note: the defendant must intend or be reckless about some harm; not necessarily about a wound or grievous bodily harm.</i>	Either way; 5 years	2	Recklessly causing serious injury <i>Note: D must be reckless about the risk of serious injury; wounding is not included unless the wound is a serious injury.</i>	Either way; 7 years
			3	Intentionally or recklessly causing injury (whether or not by assault) <i>Note: D must intend or be reckless about the risk of some injury.</i>	
47	Assault occasioning actual bodily harm <i>Note: this includes every assault or battery which in fact causes injury, whether or not the defendant intended or was reckless about injury.</i>	Either way; 5 years	recommended in report but not in 1998 draft Bill	Aggravated assault <i>Note: includes every physical or threatened assault which in fact causes injury, whether or not D intended or was reckless about injury.</i>	Magistrates; 12 months
			4 (modified)	Physical assault <i>Note: should not be used for cases of low-level injury, as these may be charged as aggravated assault.</i>	
Common law	Battery <i>Note: this means actual physical violence, including any unlawful touching however slight. At present, this offence is sometimes used for cases of low-level injuries.</i>	Magistrates' court; 6 months			Magistrates; 6 months

Existing offences			New offences		
Section (of OAPA 1861 unless otherwise stated)	Description	Mode of trial and sentence	Clause (of 1998 draft Bill unless otherwise stated)	Description	Mode of trial and sentence
Common law	Assault <i>Note: this means causing a person to apprehend physical violence, in the same sense as for battery above.</i>	Magistrates; 6 months	4 (modified)	Threatened assault	Magistrates; 6 months
Police Act 1996, s 89(1)	Assault on a constable in the execution of his duty <i>Note: the defendant need not know or suspect that the victim is a police officer</i>	Magistrates; 6 months	5 (modified)	Assault on a constable in the execution of his duty <i>Note: the defendant must know that the victim is a police officer, or be reckless as to whether the victim is a police officer or not</i>	Magistrates; 12 months
OAPA 1861, s 18	Wounding or causing grievous bodily harm with intent to resist or prevent the lawful apprehension or detention of any person	Crown Court; life	6	Causing serious harm intending to resist, prevent or terminate the lawful arrest or detention of himself or a third person	Crown Court; not set
38	Assault with intent to resist or prevent the lawful apprehension or detention of any person	Either way; 2 years	7	Assault intending to resist, prevent or terminate the lawful arrest or detention of himself or a third person	Either way; 2 years
37	Assault resulting in striking or wounding a magistrate or other person in the exercise of his duty preserving a wreck or any ship in distress	Crown Court; 7 years	Abolished without replacement		
36	Obstructing or assaulting a clergyman in the discharge of his duties	Either way; 2 years	Abolished without replacement		

Existing offences			New offences		
Section (of OAPA 1861 unless otherwise stated)	Description	Mode of trial and sentence	Clause (of 1998 draft Bill unless otherwise stated)	Description	Mode of trial and sentence
28	Doing grievous bodily harm by explosion	Crown Court; life	8	Using dangerous or explosive substances intending or risking serious injury	Crown Court; life
29	Exploding or sending substance with intent to do grievous bodily harm	Crown Court; life			
30	Placing or throwing explosives with intent to injure	Crown Court; 14 years	9	Using dangerous or explosive substances intending or risking injury	Crown Court; 14 years
64	Possessing or making explosives with intent to commit an offence	Crown Court; 2 years	Abolished without replacement, but same conduct already covered by Explosive Substances Act 1883, ss 3 and 4.		
16	Threats to kill	Crown Court; 10 years	10	Threatening death or serious injury	Either way; 10 years
4	Soliciting murder	Crown Court; life	recommended in report but not in draft Bill	Encouraging murder	Crown Court; life
22	Using stupefying substance in order to commit offence	Crown Court; life	11	Administering a substance capable of causing injury <i>Note: where injury caused, offences under clauses 1 to 3 may also apply. There is also an offence of using a stupefying substance to enable sexual activity, with a maximum sentence of 10 years: Sexual Offences Act 2003, s 61.</i>	Either way; 5 years
23	Administering noxious substance to endanger life or inflict grievous bodily harm	Crown Court; 10 years			
24	Administering noxious substance with intent to injure or annoy	Crown Court; 5 years			

Existing offences			New offences		
Section (of OAPA 1861 unless otherwise stated)	Description	Mode of trial and sentence	Clause (of 1998 draft Bill unless otherwise stated)	Description	Mode of trial and sentence
32	Placing things on railway track with intent to endanger passengers	Crown Court; life	13	Causing danger to a person on a railway	Either way; 2 years in draft Bill (we suggest 5 years)
33	Throwing things at train with intent to endanger passengers	Crown Court; life			
34	Endangering passengers on railway	Either way; 2 years			
17	Impeding person escaping from wreck	Crown Court; life	Abolished without replacement		
21	Attempting to choke in order to commit offence	Crown Court; life	Abolished without replacement		
26	Not providing servants or apprentices with food	Either way; 5 years	Abolished without replacement		
27	Exposing children to danger	Either way; 5 years	Retained in 1861 Act		
31	Setting spring guns, man-traps etc	Crown Court; 5 years	Retained in 1861 Act		
35	Causing harm by furious driving	Crown Court; 2 years	Retained in 1861 Act		
57	Bigamy	Either way; 7 years	Outside scope of project; retained in 1861 Act		
58	Unlawful abortion	Crown Court; life			

Existing offences			New offences		
Section (of OAPA 1861 unless otherwise stated)	Description	Mode of trial and sentence	Clause (of 1998 draft Bill unless otherwise stated)	Description	Mode of trial and sentence
59	Procuring drugs for abortion	Crown Court; 5 years	Outside scope of project; retained in 1861 Act		
60	Concealing birth of child	Either way; 2 years			