Legislating the Criminal Code
OFFENCES AGAINST THE PERSON
AND GENERAL PRINCIPLES
The Law Commission

(LAW COM. No. 218)

CRIMINAL LAW

LEGISLATING THE CRIMINAL CODE

OFFENCES AGAINST THE PERSON
AND GENERAL PRINCIPLES

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# LEGISLATING THE CRIMINAL CODE OFFENCES AGAINST THE PERSON AND GENERAL PRINCIPLES

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ABBREVIATIONS

In this Report the following abbreviations are used:

“1861 Act”: The Offences against the Person Act 1861 (c 100)

“CLRC”: the Criminal Law Revision Committee


“Code Report”: the remainder of Volume 1, and Volume 2, of Law Com No 177


“Criminal Law Bill”: the draft Bill implementing the recommendations of this Report, contained in Appendix A to this Report.
THE LAW COMMISSION

Item 5 of the Fourth Programme: Criminal Law

LEGISLATING THE CRIMINAL CODE

OFFENCES AGAINST THE PERSON AND GENERAL PRINCIPLES

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

PART I

INTRODUCTION

The history and purpose of this project

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

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

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

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

² LCCP 122, paragraphs 1.4-1.8.
³ The matter is dealt with generally in A Criminal Code for England and Wales (Law Com No 177, 1989). In this Report we will refer to this document as the "Code Report" and the draft Bill which it contains as the "Draft Code". The public response to the Commission's initial consultation on the codification project, and the Commission's policy conclusions resulting from that response, are described in Part 2 of the Code Report: "The Case for a Criminal Code."
⁴ We explained in paragraphs 2.10-2.14 of LCCP 122 our reasons for not including homicide in the present exercise. The law of murder, including voluntary manslaughter, had recently been reviewed by the Select Committee of the House of Lords (the Nathan Committee). We see great force in the Nathan Committee's proposals, but since there continues to be no indication that government is minded to legislate to implement those, or any other, reforms of that part of the law, we were unable to justify a further consideration of the subject by this Commission so soon. That is not the case in respect of involuntary manslaughter (causing death by an unlawful act or by "gross negligence"), which has not recently been considered and which recent events have shown to be very badly in need of review. The law of involuntary manslaughter does not overlap with the law considered in this Report, and therefore can conveniently be addressed separately from it. We will accordingly be publishing, in the early part of 1994, a Consultation Paper on involuntary manslaughter, as the next step in the programme of criminal law reform that is described above.
urgent attention, and that a Bill putting the law on a rational and simple basis would be widely welcomed. That belief was strongly borne out on consultation.⁵ In our view such a Bill should, however, deal not only with the separate offences against the person, but also with the general principles (such as “transferred fault”) and general defences (such as duress and self-defence) that most commonly arise in connexion with offences against the person. These principles and defences, although of crucial importance in many trials, have never been put on a proper statutory basis. The Criminal Law Bill presented in this Report accordingly brings together, in one place, and in comprehensive terms, most of the rules of law, both the rules defining offences and the rules creating and limiting defences, that a court will need to refer to when it is trying charges of non-fatal offences against the person.

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

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

⁵ See paragraphs 3.1–3.7 below.
⁶ “The CLRC.”
⁷ Offences against the Person (Cmnd. 7844 of 1980).
⁹ See Code Report, paragraphs 1.15–1.17.
PART II
THE NEED FOR ACTION

Introduction

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

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

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

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

10 See paragraphs 12.1–12.13 and 12.21–12.35 below; and LCCP 122, paragraphs 7.4–7.13.
11 Lord Ackner in Savage [1992] 1 AC 699 at p 752C.
12 Note, however, that the Bill does deal with the major policy question of whether the defence of duress should be available in cases of murder: see paragraphs 30.1–30.22 below.
14 Gladstone Williams (1983) 78 Cr App R 276, per Lord Lane CJ; Beckford v R [1988] AC 130, PC.
15 See further paragraphs 36.1–40.4 below.
16 We expanded on these points in paragraphs 2.1–2.6 of LCCP 122; there was in effect no disagreement on consultation on the validity of those aims.
The response on consultation on LCCP 122

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

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

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

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

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

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

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

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

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

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

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

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

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

26 "Reforms are urgently required."

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

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

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

30 As to which see paragraph 3.3 above.
Schiemann J, Wright J\textsuperscript{31} and Curtis J\textsuperscript{32} expressed, subject to points of detail, very clear approval of the proposals. We should add that our Chairman tells us that in his informal discussions with his senior judicial colleagues many of them express their exasperation with the state of the law that they are still being required to interpret and apply.

3.6 Academic and periodical comment strongly supported the proposals. That included the Criminal Law Committee of the Society of Public Teachers of Law;\textsuperscript{33} submissions by the criminal law groups at Cardiff and Leeds Universities; and an editorial\textsuperscript{34} and a major article in the Criminal Law Review.\textsuperscript{35} In a further article in the Modern Law Review Mr Simon Gardner, whilst expressing reserve about some aspects of the recommendations,\textsuperscript{36} agreed that they would be clearly preferable to the present law.\textsuperscript{37}

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

Justice and practicality

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

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

4.3 A nation whose basic rules of criminal law are in this condition is sending the wrong message to those who engage in violence or who are minded to engage in it. If their conduct is addressed only by laws cast in language that was already quaint and
dated when Parliament adopted it in 1861,\textsuperscript{40} and which present day lawyers themselves have great difficulty in explaining, then it is hardly surprising that doubts are entertained as to whether society takes the control and punishment of violence seriously.

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

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

4.6 In 1991, 16,485 defendants were dealt with in the Crown Court for offences under sections 18, 20 and 47 of the Offences against the Person Act 1861.\textsuperscript{42} In addition, 532 defendants were dealt with in that Court for assault and battery,\textsuperscript{43} and 36 for assault on a constable.\textsuperscript{44} In the same year, the corresponding figures for the persons proceeded against for the same offences or groups of offences in the magistrates' courts were, respectively, 73,092,\textsuperscript{45} 8,666\textsuperscript{46} and 14,822.\textsuperscript{47} Such figures confirm what is common experience, that offences of violence take up a considerable volume of the courts' work.

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

\textbf{Estimated cost of trial and sentence}

\begin{tabular}{lrr}
\hline
Court costs (Circuit Judge, staff, accommodation) & \ldots & \ldots & \ldots & \ldots & \ldots & \ldots & £12,360 \\
Legal Aid costs & \ldots & \ldots & \ldots & \ldots & \ldots & \ldots & £11,938 \\
Prosecution costs & \ldots & \ldots & \ldots & \ldots & \ldots & \ldots & £10,850 \\
\hline \end{tabular}

\textbf{Estimated cost of Appeal}

\begin{tabular}{lrr}
\hline
Bench costs & \ldots & \ldots & \ldots & \ldots & \ldots & \ldots & £1,260 \\
Legal Aid costs & \ldots & \ldots & \ldots & \ldots & \ldots & \ldots & £3,262 \\
Prosecution costs & \ldots & \ldots & \ldots & \ldots & \ldots & \ldots & £2,500 \\
\hline
\textit{Total} & \ldots & \ldots & \ldots & \ldots & \ldots & \ldots & £42,170 \\
\hline
\end{tabular}

\textsuperscript{40} See LCCP 122, paragraph 7.5.

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

\textsuperscript{42} Home Office Statistics.

\textsuperscript{43} Home Office Statistics.

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

\textsuperscript{45} Home Office Statistics.

\textsuperscript{46} Home Office Statistics.

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

\textsuperscript{48} The figures do not include possible police costs at trial, costs of staff of the Lord Chancellor's Department, or costs of accommodation and security on appeal.
In addition, Mr Scarlett was in prison for some 18 weeks before being released on the order of the Court of Appeal. As a category C prisoner, the costs of his imprisonment were approximately £387 per week.\textsuperscript{49} Quite apart from the injustice and human costs involved, therefore, Mr Scarlett's imprisonment may well have cost the taxpayer something approaching £7,000 in unjustified expenditure.

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

\textsuperscript{49} Prison Service Provisional Statistics.
PART III
NON-FATAL OFFENCES AGAINST THE PERSON

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

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

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

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

"Intention"

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

"a person acts . . . 'intentionally' with respect to a result when—

(i) it is his purpose to cause it; or

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

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

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51 See for instance paragraphs 7.2 and 9.2-10.4 below.
52 CLRC Fourteenth Report, paragraphs 6-7.
that the defendant did not desire the relevant result of his actions, are only told that they may nevertheless infer his intention to cause that result if he recognised that result to be a “virtually certain” consequence of his actions. This form of direction falls short of asserting that such recognition of virtual certainty is in law a case of intention; and thus does not clarify the nature of the state of mind that the jury may “infer”.

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

The basic definition: intention as “purpose”

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

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

A special and limited case

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

7.7 The point was formulated by Lord Hailsham of St Marylebone in Hyam.59 A person must be treated as intending “the means as well as the end and the inseparable consequences of the end as well as the means.” If he acts in order to achieve a particular purpose, knowing that that cannot be done without causing another result, he must be held to intend to cause that other result. The other result may be a pre-condition: as where D, in order to injure P, throws a brick through a window behind which he knows P to be standing; or it may be a necessary concomitant of the first result: as where (to use a much-quoted example) D blows up an aeroplane in flight in order to recover on the insurance covering the cargo, knowing that the crew will inevitably be killed. D intends to break the window and he intends the crew to be killed.

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

54 Nedrick [1986] 1 WLR 1025 at p 1028C-D.
55 LCCP 122 at paragraph 5.5.
56 Code Report, paragraph 8.16.
57 Paragraph 69 of the Nathan Committee Report, Report of the House of Lords Select Committee on Murder and Life Imprisonment (HL Paper 78-1, 1989); hereafter referred to as the Nathan Report.
It is desirable to stress, because the point has been misunderstood in some quarters, that this way of defining "intention" does not have the effect of treating some cases of recklessness as cases of intention by extending liability for an offence requiring intention to every case where the actor foresees the further result as highly likely to occur. On the contrary, the definition extends the meaning of "intention" only very slightly beyond the primary meaning adopted in clause 1(a)(i) of "purpose". The point of the phrase "in the ordinary course of events" is to ensure that "intention" covers the case of a person who knows that the achievement of his purpose will necessarily cause the further result in question in the absence of some wholly improbable supervening event. The phrase had earlier been used by the CLRC in explaining their use of the word "intention" in the context of offences against the person. The Nathan Committee recommended adoption of the Draft Code definition for the purpose of the law of murder. The Lord Chief Justice expressed approval of it in the House of Lords debate on that committee's report.

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

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

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

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

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

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63 Nathan Report, paragraph 71.

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

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

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

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

“Recklessness”

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

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

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

“For the purposes of this Part a person acts—

(b) “recklessly” with respect to—

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

(ii) a result, when he is aware of a risk that it will occur,

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

8.2 The Criminal Law Bill’s definition of “recklessly” thus does no more than provide
for the mental element in the particular offences to which that definition applies. Whether
or not that definition of the mental element is appropriate for those offences is a matter
to be considered in relation to each of those offences separately; and that consideration
is addressed when the specific offences are discussed later in this Report. That is particularly
so in respect of the new offences of unlawful violence created by clauses 24 of the
Criminal Law Bill, which are surveyed at length in paragraphs 12.1-17.1 below.

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

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

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

68 Section 47 of the 1861 Act specifically requires the commission of an “assault” as, fairly obviously, does the separate
common law crime of common assault. It was never in doubt that assault at common law required the defendant to be
subjectively aware that he was creating a risk of the victim suffering or apprehending personal violence: see eg CLRC
Fourteenth Report, paragraph 158.
Act, has always been taken to be Cunningham.\textsuperscript{69} The judges in that case however made use of the concept of recklessness, in the sense of subjective awareness of risk, by holding that “malice” in a statutory definition of a crime requires:

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

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

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

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

“(1) he does an act which in fact creates an obvious risk that property will be destroyed or damaged and (2) when he does the act he either has not given any thought to the possibility of there being any such risk or has recognised that there was some risk involved and has nonetheless gone on to do it”.\textsuperscript{76}

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

9.5 Subsequent cases went further, it being suggested in the House of Lords case of Seymour,\textsuperscript{78} in 1983, that the approach in Caldwell should be taken to the word “recklessly” when used in any statutory or indeed other offences. That observation was, however, obiter;\textsuperscript{79} and it was generally understood, though without there being any conclusive authority on the point, that the “Caldwell” formulation had not been intended to supplant Cunningham in respect of offences against the person. That issue was however the subject of detailed and specific argument before the House of Lords in Savage, and was subjected to lengthy analysis\textsuperscript{80} in the leading speech of Lord Ackner, with which
the remainder of the House specifically agreed. The House of Lords concluded that in *Caldwell* the House had manifestly intended to accept that Cunningham correctly stated the law in relation to the 1861 Act.

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

**The need for definition**

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

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

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

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

OFFENCES COMMITTED BY OMISSION

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

Offences subject to liability by omission

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

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

Duties to act

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

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

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92 "Driving a motor vehicle is potentially an extremely dangerous activity, requiring a high degree of self-discipline. Those who fail to display the requisite degree of self-discipline through failing to give any thought to the possibility of the serious risks they are creating may reasonably be regarded as no less blameworthy than those who consciously appreciate a risk but nevertheless go on to take it": per Lord Keith of Kinkel in Reid[1992] 1 WLR 793 at p 796B. In the same case Lord Goff of Chievely commented, in similar vein, that "the unsaid premise which seems to me to underlie Lord Diplock's statement of the law in Lawrence (and perhaps also in Caldwell) is that the defendant is engaged in an activity which he knows to be potentially dangerous": ibid, at p 811B.
It therefore does not follow that breach of such duties should necessarily entail liability for the serious general offences to which we provisionally recommended that liability by omission should be limited. Nothing in the consultation persuaded us that these objections were unfounded, or were of lesser weight than we feared. In particular, there appeared to be no satisfactory answer to the objection that where Parliament in creating the duty has provided a specific and limited sanction for its breach, it is not appropriate also to treat such breach as founding liability for a general offence.

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

**OFFENCES OF VIOLENCE**

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

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

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

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

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

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

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

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93 CLRC Fourteenth Report, paragraph 3.
94 Lord Lowry in *Brown* [1993] 2 WLR 556 at p 576C, adopting the observations in paragraph 7.4 of LCCP 122. See also the observations of Lord Ackner in *Savage* cited in paragraph 2.1 above.
95 We have endeavoured to set out in this Report no more of the detailed criticism of the 1861 Act than is required for a fair appraisal of our recommendations. Readers who seek a somewhat fuller treatment are referred to paragraphs 7.1–7.13 of LCCP 122: a survey that attracted virtually no dissent, and some significant expressions of agreement, on consultation.
96 Draft Code, clauses 70–72. As we explained in paragraph 1.13 of the Code Report, these and other clauses in the Draft Code were checked for conformity with the policy recommended by the CLRC by a special group of judicial members of the CLRC: Lawton LJ, Waller LJ, Lloyd LJ, McCullough J, Hazan J, and Judge Lawrence.
97 See paragraphs 3.1–3.7 above.
and to those commenting on LCCP 122. However, our Report would not be complete if we did not include an account of the main lines of argument that inform those views. Many of the points that follow are dealt with at greater length in paragraphs 7.1–7.41 of LCCP 122, to which readers who require a fuller treatment are referred.

The need for reform

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

Section 18:
"Whosoever shall unlawfully and maliciously by any means whatsoever wound or cause any grievous bodily harm to any person with intent to do some grievous bodily harm to any person or with intent to resist or prevent the lawful apprehension or detention of any person, shall be guilty of [an offence], . . . and shall be liable . . . [to a maximum penalty of life imprisonment]."

Section 20:
"Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of [an offence], . . . and shall be liable . . . [to a maximum penalty of 5 years' imprisonment]."

Section 47:
"Whosoever shall be convicted upon an indictment of any assault occasioning actual bodily harm shall be liable . . . [to a maximum penalty of 5 years' imprisonment]."

12.6 As explained in detail in LCCP 122 the language of the Act is so complicated, obscure and old-fashioned; and the structure of the three sections is so complicated and technical; that mistakes by lawyers and complete unintelligibility to the layman were eventually bound to result. This is in part the predictable outcome of legislation which was never intended to be more than a consolidation of older rules and principles, and which, even as such, did not seek to alter the theory, content and arrangement of those rules and principles. But with the natural aggravation of the problem through time, it has for long been plain that the failure to reform and codify these sections has caused repeated difficulty in the administration of this branch of the law.

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

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

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

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

98 Paragraphs 7.4 to 7.13.
99 See further the discussion in LCCP 122 paragraphs 7.4–7.5 and the footnotes to those paragraphs.
100 DPP v K[1990] 1 WLR 1067; Spratt[1990] 1 WLR 1073; Savage[1992] 1 AC 714. The two latter cases were decided by different divisions of the Court of Appeal on the same day. Both concerned the mental element necessary to be established in a charge under section 47 of the 1861 Act; the two courts unwittingly contradicted each other in their interpretation of that section.
and magistrates can use the definitions of the crimes it contains to decide cases. For example, the Court of Appeal has suggested that in section 18 the word “maliciously” adds nothing, and that in directing a jury about an offence under that section the word is best ignored. Nevertheless, the House of Lords in Savage confirmed that in section 20 “the mens rea [of the] crime is comprised in the word ‘maliciously’”; though there was no suggestion that the Court of Appeal had been wrong in thinking that a judge in summing up a section 20 case should probably not mention the word “maliciously” or try to explain to the jury what it means.

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

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

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

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

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

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

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102 Mowatt [1968] 1 QB 421, at p 426B.
103 Savage [1992] 1 AC 699 at p 752D.
104 [1968] 1 QB 421 at pp 426C-427D.
107 [1992] 1 AC 699 at p 706F.
108 As to the origins, dating back as far as 1829, of the wording of the 1861 Act, see LCCP 122 paragraph 7.5 footnote 78.
The present law

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

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

12.15 18. A person is guilty of an offence, punishable by life imprisonment, if he wounds,110 or causes any serious111 bodily harm to, another, intending either (i) to cause serious bodily harm to any person or (ii) to resist the lawful arrest or detention of any person.

20. A person is guilty of an offence, punishable by 5 years' imprisonment, if he wounds, or inflicts112 serious bodily harm upon, another, either (i) intending to cause some physical harm113 to any person or (ii) foreseeing that some physical harm to any person may be caused.

47. A person is guilty of an offence, punishable by 5 years' imprisonment, if he causes any hurt or injury calculated to interfere with the health or comfort114 of another by an act115 by which he intended to cause, or that he foresaw might cause116 either (i) any person to fear immediate and unlawful violence117 or (ii) any physical contact with any person.118

Section 47: the meaning of "assault"

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

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

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


111 Metharam [1961] 3 All ER 200.

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

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

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

115 Paragraph 12.16 below.

116 See paragraph 12.16 footnote 120.

117 Paragraph 12.16 below.

118 Paragraphs 12.17–12.19 below.

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


121 Savage [1992] 1 AC 699 at p 732C.
where the father's liability under section 47 must thus have rested on battery only. Plainly, therefore, and despite the House of Lords' apparent formulation of assault in exclusively psychic terms,122 battery as well as psychic assault must be included within the definition of assault under section 47.

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

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

Section 47: causation

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

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

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

122 See paragraph 12.16 above.
123 Ibid.
125 Savage [1992] 1 AC 699 at pp 741A–742G.
126 The court in Roberts cited with approval, on the causation point, Beech (1912) 7 Cr App R 197. That was a case under section 20 of the 1861 Act, and thus not directly in point. It did, however, involve only a threat of violence, and it seems likely that if the court in Roberts had seen an important, or any, distinction between battery and psychic assault in the context of section 47 they would have treated Beech with more reserve.
127 Savage [1992] 1 AC 699 at p 736A. The House's formulation is not a verbatim quotation from the judgment in the Court of Appeal in Parmenter, but rather a statement of the effect of the remarks of that court at [1992] 1 AC 709G–711B.
128 Savage [1992] 1 AC 699 at p 742F.
The difficulties of the present law

Introduction

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

The mental element

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

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

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

Degrees of Injury

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

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131 [1982] AC 341; see paragraph 9.5 above.
132 Cunningham [1957] 2 QB 396: see paragraph 9.2 above.
133 [1992] 1 AC 699 at p 751D.
134 Even a very minor incident can amount to a wounding: the interference with the victim does not have to be in any way sufficient to count as “serious” were that interference to be analysed under the alternative categorisation of bodily harm. What may be the quite fortuitous causing of a minor wound will, therefore, radically alter the level of seriousness attributed by the law to the results of the accused’s conduct.
135 See the Court of Appeal in Parmenter [1992] 1 AC 699 at p 711F.
least if the injury to the accused can be characterised as a wound, there is little difference between the forbidden consequence under section 20 and the forbidden consequence, actual bodily harm, under section 47.

Erratic application of the accused's fault

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

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

12.28 In section 20, for example, the accused who foresees only minor physical harm is nevertheless criminally liable for causing serious harm that may have been quite unforeseeable. Thus, for instance, an accused might push someone aside roughly in the street: unknown to him, they have unusually brittle bones, and suffer a fracture; or they step on to a concealed hole in the pavement, fall through, and break their leg. Similarly in section 47, all that the accused has to foresee is any physical contact: the actual bodily harm for which he is punished may equally arise entirely unforeseeably. Thus in Savage itself, Mrs Savage would have been liable even if it had been proved that the injury to Miss Beal occurred only because of an entirely unforeseeable structural weakness that itself was supportable. We did not discuss this further.

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

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

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

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

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

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


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

144 See paragraph 12.20 above.
caused the glass to splinter when vigorously handled: that the injury was unforeseeable would not avail her, once it had been established that she foresaw some physical contact to Miss Beal emanating from her handling of the glass, albeit contact in the quite different form of Miss Beal having beer poured over her.

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

The practical effect of the law

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

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

Conclusion

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

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

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

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

147 See paragraph 12.6 above.
single out those who contemplate violence as proper objects of deterrence and punishment because of the violence that they contemplate rather than the harm that they accidentally cause; nor does it distribute that punishment according to the subjective intentions, and thus the social fault, of the accused. Such a law, resting as much as it does on chance or the causing of unintended harm, does not properly convey society's message that a propensity to engage in violence is taken very seriously, and will be punished according to the seriousness of the harm that the accused consciously causes.

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

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

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

13.1 The response on consultation overwhelmingly supported both the general structure of the offences which we proposed to replace sections 18, 20 and 47 of the 1861 Act, and the terms of each offence as it appeared in the Bill accompanying LCCP 122. The final versions differ only in minor matters of technicality and arrangement, which are indicated later in this Report.

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

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

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

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

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

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

The general structure and its rationale

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

(i) The distinctions in the 1861 Act between wounding and various types of "bodily harm" should be swept away, in favour of the simpler concept of "causing injury"; 149

(ii) there should be a distinction between serious injury and other injury;

(iii) in respect of serious injury there should be a distinction between intentionally causing such injury and (subjectively) recklessly causing such injury.

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

146 See paragraphs 3.2-3.6 above.

149 CLRC Fourteenth Report, paragraph 154.
would overcomplicate the law. Subject only to minor amendment, the scheme of offences proposed in the draft Code and in LCCP 122 therefore followed that proposed by the CLRC, which the Committee had expressed as follows:

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

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

The terms of the new offences

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

Intention and recklessness

Introduction

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

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

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

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

150 Clauses 70–72.
152 For the erratic nature of the present law on this point, see paragraph 12.26 above.
153 See paragraph 13.4(a) above.
154 See paragraph 12.31 above.
he was not aware of the risk so specified. Although, as we indicate below, there was little dissent from that conclusion on consultation, the importance of the point requires us to treat it at some greater length.

LCCP 122 and the response on consultation

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

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

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

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

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

\textsuperscript{155} Draft Code, clause 18(c).

\textsuperscript{156} LCCP 122, paragraphs 5.12–5.13.

\textsuperscript{157} See paragraphs 12.22–12.23 above.

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

\textsuperscript{159} LCCP 122, at paragraph 7.22.

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

\textsuperscript{161} See paragraph 9.5 above.
acknowledged that concern had been expressed that a "subjectivist" approach to the definition of offences might lead to the public being insufficiently protected, but they were unable to say how widely such a view might be held amongst their members, or how offences against the person might be alternatively defined. The Association did however point out that a definition of offences against the person in objectivist terms would mark a radical departure from the current law of offences against the person, which departure, they considered, should not be undertaken without further detailed consultation: a consultation that our own experience with LCCP 122 suggests would not lead to any change in the law. The Metropolitan Police suggested that the definition in the Bill excluded a case of "wilful refusal" of a person to consider a consequence or risk: though the example they gave was of a person driving dangerously without considering the potential risk to others where, as we have indicated, different considerations arise that are not dealt with in the present Bill. The Association of Chief Police Officers queried whether the part of the test of recklessness that requires the offender's conduct to have been unreasonable in the circumstances known to him would be judged subjectively, not objectively, thus giving rise to specious claims that the offender's conduct had been reasonable in his own eyes. Of the academic lawyers who commented on LCCP 122 only one expressed reserve about the definition of recklessness. It will be recalled that the Criminal Law Committee of the representative body of academic lawyers, the Society of Public Teachers of Law, strongly supported legislation in the terms adopted in LCCP 122.

Recklessness in clauses 2-4 of the Criminal Law Bill

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

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

162 See paragraph 10.4 above.
163 "A person acts recklessly with respect to ... a result when he is aware of a risk that it will occur and it is, in the circumstances known to him, unreasonable to take that risk".
164 This fear is, with respect, unfounded. The definition in the Bill makes a clear distinction between the accused's actual awareness of the existence of the risk, and the question that, like all issues of reasonableness, has to be judged objectively, of whether it was reasonable for him to take that risk.
165 See footnote 160 above.
166 See footnote 33 to paragraph 3.6 above. The Committee in fact went even further, by urging the adoption of the Bill's definition of recklessness throughout the criminal law, and not just in respect of offences against the person.
167 See paragraph 12.1 above.
168 See the report of the overall response on consultation that is given in paragraphs 3.3-3.6 above.
not already covered by the criminal law that were generally thought to merit criminal sanctions would involve difficulty, complexity and the great danger of extending the reach of the criminal law to an unacceptable degree.

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

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

Principle

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

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

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

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

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

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

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

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

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

One of the most criticised aspects of the *Caldwell* approach is that it creates criminal liability in every case in which there is a risk of injury that is “obvious” to a reasonable prudent person, even though the risk would not have been obvious to the defendant (by reason of age, lack of experience or lack of understanding) if he had given thought to the matter. That was the position in *Elliot v C*, where a fourteen year old girl was charged with setting fire to a shed, being reckless as to whether it would be destroyed, under section 1(1) of the Criminal Damage Act 1971, by igniting white spirit: despite the facts that she was in a remedial class at school; lacked understanding of the characteristics of white spirit; and was at the time tired and exhausted, having been out all night.
14.21 The Divisional Court held that it was coerced by Lord Diplock’s definition in *Caldwell* to hold her behaviour to have been reckless. Robert Goff LJ however made clear that he reached that conclusion with great reluctance, and only because *Caldwell* left no room in its definition of recklessness for consideration of whether the risk would have been obvious to the actual defendant if she had thought about the matter.\textsuperscript{181}

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

*Usability and effectiveness*

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

14.24 A further concern, however, that formed part of Lord Diplock’s reasoning in *Caldwell*, is that a subjective test might exclude from the ambit of the criminal law those who acted in a (culpable) state of rage, excitement or intoxication.\textsuperscript{185} A few of our own commentators took the same view.\textsuperscript{186} However, there is every reason to think that the comparatively low level of cognition required by the CLRC’s test\textsuperscript{187} is only rarely excluded by the presence of the factors referred to, and that courts have no difficulty in recognising that practical fact. Indeed, even in the case of intoxication, which one would expect to be the most potent agent in preventing awareness of risk on the part of the actor, it is very difficult to find cogent examples of persons with sufficient motor control to commit the *actus reus* of an offence whilst lacking, through intoxication, the modest degree of awareness that the rules of subjective liability require.\textsuperscript{188}

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

\begin{footnotesize}
\textsuperscript{181} Ibid, at p 949H.
\textsuperscript{182} Bill, clause 1(b)(ii): “[A] person acts ‘recklessly’ with respect to . . . a result, when he is aware of a risk that it will occur” [and it is unreasonable, having regard to the circumstances known to him, to take that risk].
\textsuperscript{183} [1992] 1 WLR at pp 795H–796A and 810E. It might be difficult for a jurymen to be sure that the reckless driver recognised that his mode of driving created a risk of injury, because it is entirely possible to be *driving* ”recklessly” whilst simply not thinking at all. But, save in very unusual cases, a normal person who engages in violence that carries a risk of injury will not be able plausibly to say that that risk never crossed his mind.
\textsuperscript{184} “[T]he court or jury will be entitled to take into account the probability of the result and might infer that he appreciated the risk of bringing it about by his acts”*: CLRC Fourteenth Report, paragraph 12.
\textsuperscript{185} [1982] AC at p 352D.
\textsuperscript{186} See paragraph 14.9 above.
\textsuperscript{187} See paragraph 14.12 above.
\textsuperscript{188} This issue is extensively discussed in the Commission’s Consultation Paper No 127, *Intoxication and Criminal Liability* (1993), in particular at paragraphs 1.10–1.21.
\end{footnotesize}
trials. The practising lawyer members of the CLRC who adopted that test were certainly not merely theoretical observers, unaware of the need to provide effective measures against personal violence. Neither were the judges who first gave formal expression to that test in Cunningham.\(^{189}\) Neither are our own correspondents who supported the CLRC's approach.

14.26 This body of opinion fully reinforces our own view that a rule as proposed by the CLRC would be an effective, simple and practical way of adjudicating upon cases of personal violence. Any other rule would threaten to introduce the uncertainty, complexity and indeed metaphysical abstraction\(^{190}\) that has burdened other parts of the criminal law. That cannot be right in respect of an area of the law, offences against the person, that, above all others, should be clear, straightforward and practically useable. For those reasons in particular we cannot possibly recommend any deviation from the course proposed by the CLRC and subjected to further review by commentators on LCCP 122.

Injury

Introduction

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

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

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

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

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

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

whether there should be a statutory provision excluding minor injuries from the offence of intentionally or recklessly causing injury (paragraphs 8.13–8.14);

whether "serious" injury should be defined, or be left to the judgment of the jury (paragraph 8.15);

whether the express inclusion of pain and unconsciousness, and specific reference to any other impairment of a person's physical condition in the last part of the definition of physical injury, were necessary and justified (paragraph 8.18);

whether "injury" should include any, and if so what, injury to the mind, and whether injury to the mind would be satisfactorily limited if it were defined in terms of "impairment of mental health" (paragraphs 8.20–8.33).

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

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

\(^{190}\) See Lord Browne-Wilkinson, cited in footnote 88 to paragraph 10.2 above.
“Injury” or “personal harm”

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

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

Inclusion of minor injuries

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

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

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


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

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

15.8 The response on consultation supported, with similarly near unanimity, our provisional agreement with the CLRC\textsuperscript{195} that it should be left to the jury in each case to decide whether a particular harm is serious. Accordingly, we make no attempt in the final draft Bill to define “serious” injury.

Unusual forms of physical injury

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

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

15.10 It should first be noted that, in the vast majority of cases, there will be no dispute as to whether or not what has occurred is an “injury”. Broken bones, bruises, cuts and abrasions, which are the subject of almost all cases of offences against the person, all evidently fall within the description of physical injury. There may, however, be other conditions the causing of which should be criminally punishable, but which do not so clearly fall under that rubric. Two examples are pain and unconsciousness\textsuperscript{196} which the Commission, following the CLRC, first specified in clause 6 of the Draft Code. A further case is the intentional or reckless inflicting of illness or disease.\textsuperscript{197} There are other conditions the causing of which the criminal law might wish to punish: for instance, the inducement of vomiting.

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

(b) Pain and unconsciousness

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

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

(1) We would expect prosecutions for pain alone to be rare, first because the victim’s pain will normally be contained within, and be an integral part of, the complaint of another (physical) injury, and secondly because pain (alone), being subjective, may sometimes be difficult to prove. We would expect the latter point also to limit prosecutions for high levels of pain as serious injury.

(2) We see no special difficulty in relation to minor pain, or the borderline between pain and serious pain. In both cases, we believe it is right for the Bill to follow through our recommendations not to exclude minor injuries, and not to define serious injury.

\textsuperscript{195} CLRC Fourteenth Report, paragraph 154.

\textsuperscript{196} See paragraphs 15.12–15.14 below.

\textsuperscript{197} Clarence (1888) 22 QBD 23; see paragraphs 15.15–15.19 below.
(3) As we stress in paragraph 15.11 above, the definition of injury adopted in the Criminal Law Bill will prevent the jury in the ordinary case from having to hear unnecessary explanations about other unusual forms of injury, including pain.

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

c) Illness or disease

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

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

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

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

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

\(^{198}\) (1888) 22 QBD 23.

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

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

\(^{201}\) Eg allegations that the defendant's coughing in a tube train caused the victim's cold.