The Law Commission

(LAW COM. No. 143)

CRIMINAL LAW

CODIFICATION OF THE CRIMINAL LAW

A Report to the Law Commission

Laid before Parliament by the Lord High Chancellor
pursuant to section 3(2) of the Law Commissions Act 1965

Ordered by the House of Commons *to be printed*
28 March 1985

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HER MAJESTY'S STATIONERY OFFICE

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

The Commissioners are—

The Honourable Mr. Justice Ralph Gibson, *Chairman.*

Mr. Trevor M. Aldridge.

Mr. Brian J. Davenport, Q.C.

Professor Julian Farrand.

Mrs. Brenda Hoggett.

The Secretary of the Law Commission is Mr. J. G. H. Gasson, and its offices are at Conquest House, 37–38 John Street, Theobald's Road, London WC1N 2BQ.

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INTRODUCTION BY THE LAW COMMISSION

To the Right Honourable the Lord Hailsham of St. Marylebone, C.H., Lord High Chancellor of Great Britain

1. This report has been drafted by a group of distinguished academic lawyers chaired by Professor J. C. Smith, C.B.E., Q.C., who have worked under the auspices of the Law Commission. It contains their Report on the General Principles of Law applicable to a Code of Criminal Law together with a Draft Criminal Code Bill which demonstrates how the principles of liability described in the Report might be enacted in legislative form. The Report and Draft Bill are submitted by the Commission as a further stage towards the codification of the criminal law, which it is one of the aims of the Commission to achieve. It is intended by the Commission to be a document for discussion upon which the views of the professions and the public are invited.

2. This Introduction to the Report of Professor Smith and his colleagues (hereafter referred to as the Criminal Code team) does not attempt to analyse or assess the content of the Report. Its principal concern is to point to those issues raised by the Report which, in the Commission's view, will be of greatest importance to public discussion of it and to describe in outline the next stage of the Commission's work upon codification. This discussion is preceded by a brief history of codification of the criminal law in England and Wales and the Commission's work in this field.

Codification of the criminal law: its history in England and Wales

3. Attempts to codify the criminal law of England and Wales have had a long but chequered history. A reference to its principal stages will at least serve as a reminder of why codification in this area of the law has hitherto not met with success. The first such attempt was that of the Criminal Law Commissioners between 1833–1849,[1] whose work it is necessary only to mention in the present context. Two major Bills based on their work covering offences against the person and larceny[2] were introduced in 1853 but made no progress, principally because of the unanimously unfavourable judicial reaction to the prospect of the common law being embodied in statutory form.

4. Their efforts were succeeded by those of Sir James Fitzjames Stephen who, fresh from his codifying labours in India,[3] endeavoured to adapt his Indian models to English uses. His draft Code of Criminal Law and Procedure

[1]See Manchester, "Simplifying the Sources of the Law—I. Lord Cranworth's Attempt to Consolidate the Statute Law of England 1853–1859" (1973)2 Anglo-American L.R. 395; Cross, "The Reports of the Criminal Law Commissioners (1833–1849) and the Abortive Bills of 1853" in Glazebrook (ed.), *Reshaping the Criminal Law* (1978) p.5.

[2]These were more wide-ranging than the consolidating measures of 1861.

[3]He was responsible for the Criminal Procedure Code, an Evidence Act and a Contract Act.

was introduced into Parliament in 1878, read a second time and withdrawn. It was then referred to a Royal Commission of eminent judges (including Stephen himself) which presented its report and draft code in 1879.[4] This reached a second reading in that year and in 1880 and was then referred to a Select Committee, but further proceedings were stopped by the dissolution of Parliament. The part of the draft Code relating to procedure was introduced as a Government measure in 1882 and was the first subject referred to the Grand Committee on Law set up experimentally in that year. But after a few sittings in which little progress was made, the Bill was abandoned. The failure of this measure for long checked the cause of codification of the criminal law in England and Wales. Nevertheless, Stephen's draft Code was the model for several Codes subsequently introduced in the then colonies, including those of New Zealand, Queensland, Western Australia and Tasmania.

5. A number of reasons have been advanced for the failure of Stephen's efforts.[5] Among these may be cited the numerous changes made to the law by the Report of the Royal Commission and concern about the quality of Stephen's work voiced by a number of influential figures; lack of Parliamentary time and the change of government in 1880; and organised labour's reservations about the possible effect upon it of certain of the Code's provisions. Another criticism is particularly noteworthy. The letter of the Lord Chief Justice, Lord Cockburn, to the then Attorney General commenting upon the Code Bill (and published at the same time)[6] criticised the "partial codification" effected by the Bill, which retained certain defences at common law and excluded from the scope of the Bill certain indictable offences. The treatment by the Criminal Code team of these two matters will be noted.[7]

6. A more general reservation lay in the background to these nineteenth century efforts at codification, to which reference has already been made: the reluctance to tamper with the common law for fear that it should deprive that law of its unique characteristics and inhibit its opportunity for growth. The Criminal Code Commissioners themselves commented on this assumption, observing that—

> "the elasticity so often spoken of as a valuable quality [of the common law] would if it existed, be only another name for uncertainty. The great richness of the law of England in principles and rules, embodied in judicial decisions, no doubt involves the consequence that a Code adequately representing it must be elaborate and detailed; but such a Code would not (except perhaps

[4]Report of the Royal Commission on the Law Relating to Indictable Offences (1879), C.2345.

[5]See further Ilbert, *Legislative Methods and Forms* (1901) pp.69–70 and 127–128; Radzinowicz, "Sir James Fitzjames Stephen and his contribution to the development of criminal law" (Selden Society Lecture, 1957) pp.20–21; Manchester, "Simplifying the Sources of the Law–II. James Fitzjames Stephen and the Codification of the Criminal Law of England and Wales" (1973)2 Anglo-American L.R. 527; Cross, "The Making of English Criminal Law (6) Sir James Fitzjames Stephen" [1978] Crim. L.R. 652; Friedland, "R. S. Wright's Model Criminal Code: A Forgotten Chapter in the History of the Criminal Law" (1981)1 O.J.L.S. at pp.319–325.

[6]Paper No. 232, 1879, Parl. Papers (Accounts and Papers 1878–9). It seems that Lord Cockburn wrote more than one letter, of which only one was published: *Hansard* (H.C.), 23 February 1880, vol. 250, col. 1239.

[7]See Report, paras. 2.10 *et seq* and 13.10.

in the few cases in which the law is obscure) limit any discretion now possessed by the judges. It would simply change the form of the rules by which they are bound."[8]

Nevertheless, the point of view which gave rise to these observations has found expression again more recently[9]—

"As codes go, [the Stephen code] was good and worth the trouble of re-amending and revising; but its chances had been wrecked by the deeply rooted hostility against codification *per se* and its threat to the common law . . . The common law of this country, like the forces of growth which determine it, is *sui generis*; it constitutes an integral part of the national heritage, and discharges a political, social and moral function which is much more precious than the shapely codes which the seekers after a legal paradise aspired to create".

Whatever merits there may be in this, two questions may be raised: first, whether the point of view thus expressed meets the perceived needs of today, as distinct from those of the 1880's, and, secondly, whether it can credibly be asserted that, of all common law countries,[10] England and Wales alone is unsuited to have a code of criminal law.

7. In more recent times impetus towards codification was given by a speech in 1967 of the then Home Secretary, Mr Roy Jenkins,[11] who said—

"We have now decided that the time has come to have a complete Criminal Code. Arguments in its favour are no less compelling to-day than they were when the suggestion was first proposed. There are too many archaic principles that have been handed down from precedent to precedent. As a result much of our criminal law is in many areas obscure, confused and uncertain. Yet no area of the law is of greater importance to the liberty of the individual and nowhere is it more important that the law should be stated in clear and certain terms to take account of modern conditions. It is almost impossible for the layman to consult the learned text books and commentaries on the criminal law. It should however be possible for the layman to grasp the broad outlines of his rights and obligations in one comprehensive document which states what the criminal law is.

A comprehensive criminal code should contain the following parts. It should provide a statement of general principles and their application; it should set out clearly the law relating to specific offences; it should contain a code of criminal procedure including a comprehensive statement of the law of criminal evidence and possibly a section on punishment."

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[8]See Report (1879), Cmnd. 2345, pp.6–7.

[9]Radzinowicz, "Sir James Fitzjames Stephen and his contribution to the development of the criminal law" (Selden Society Lecture, 1957) p. 21.

[10]Apart from Scotland (whose system of law is very different), Ireland and certain states of Australia, which do not have codes of criminal law: see further, para. 13, below.

[11]Delivered on 1 July 1967 at a regional Labour Party Conference in Plymouth on Crime and Society.

The Law Commission's role

8. Subsequently, the Commission set out in its Second Programme (1968) its objective of a comprehensive examination of the criminal law with a view to its codification.[12] The first stage of that examination was to include consideration of certain specific offences and, with the assistance of a Working Party, the general principles of the criminal law.[13] While no specific mention was made in the Second Programme of work upon criminal procedure and evidence, it was envisaged that these would find a place within a complete criminal code and that such work would in due course be undertaken.

9. In the years following the Second Programme the Commission made substantial progress in the examination of specific offences. It published a series of reports and working papers upon offences at common law and some statutory offences in need of revision,[14] and this work continues. Some of the reports have been implemented by legislation based upon the draft Bills annexed to them.[15]

10. Some progress was also made in the examination of the general principles of liability to be incorporated in a code of the substantive criminal law. A series of working papers was produced by the Working Party assisting the Commission[16] and some reports by the Commission on these subjects were published.[17] Again, certain of these reports have been implemented by legislation.[18] Some years ago, however, the Commission realised that its limited resources prevented it from making as much progress as it wished in this area.[19] In particular insufficient attention could be devoted to matters which, while in need of clarification and restatement with a view to codification, had not shown themselves to be in pressing need of reform to meet apparent shortcomings in the law. Within this category of subject matter came some of the topics on which the Working Party had earlier produced working papers, and the Commission therefore felt it right formally to set them aside in favour of other matters.[20]

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[12](1968), Law Com. No. 14, Item XVIII.

[13]Work on specific offences was to be undertaken by both the Commission and the Criminal Law Revision Committee, particular items being allocated to each body.

[14]See Reports on Offences of Damage to Property (1970), Law Com. No. 29; Forgery and Counterfeit Currency (1973), Law Com. No. 55; Offences relating to Interference with the Course of Justice (1979), Law Com. No. 96; Offences relating to Public Order (1983), Law Com. No. 123. See also Working Papers Nos. 72, Treason, Sedition and Allied Offences (1977); 79, Offences against Religion and Public Worship (1981) and 84, Criminal Libel (1982). Much work has also been done by the Criminal Law Revision Committee, e.g. their Fourteenth Report, Offences against the Person (1980), Cmnd. 7844.

[15]See Criminal Damage Act 1971 and Forgery and Counterfeiting Act.

[16]Working Papers Nos. 31, The Mental Element in Crime (1970); 43, Parties, Complicity and Liability for Acts of Another (1972); No. 44, Criminal Liability of Corporations (1972); Inchoate Offences: Conspiracy, Attempt and Incitement (1973); Defences of General Application (1974).

[17]See Reports on Conspiracy and Criminal Law Reform (1976), Law Com. No. 76; Defences of General Application (1977), Law Com. No. 83; Mental Element in Crime (1978), Law Com. No. 89; Territorial and Extraterritorial Extent of the Criminal Law (1978), Law Com. No. 91; Attempt, and Impossibility in relation to Attempt, Conspiracy and Incitement (1980), Law Com. No. 102.

[18]See Criminal Law Act 1977 (parts I and II); Criminal Attempts Act 1981.

[19]See Fifteenth Annual Report 1979–1980 (1981), Law Com. No. 107, para. 1.4.

[20]See Sixteenth Annual Report 1980–1981 (1982), Law Com. No. 113, para. 2.32.

11. Consequently the Commission welcomed the initiative of the Criminal Law Sub-Committee of the Society of Public Teachers of Law which in 1980 proposed that a team drawn from its members should consider and make proposals to the Commission in relation to a criminal code. The Commission saw this as an opportunity not only for consideration of subjects upon which it had not itself been able to report but also, and of equal importance, for the systematic examination and synthesis of all the matters which should be incorporated in a code of the substantive law, an aim which up to that time its resources had not enabled it to fulfil. Accordingly, the Commission invited Professor J. C. Smith, C.B.E., Q.C., Head of the Department of Law at the University of Nottingham and co-author of Smith and Hogan's *Criminal Law,* to chair the project. In consultation with the Commission, he chose as the other members of his team Professor Edward Griew, of the University of Leicester, Mr. Peter Glazebrook, lecturer in law at Cambridge University[21] and Mr. Ian Dennis, Reader in Law at University College, London. The breadth of the project may be gauged from the team's terms of reference:

"(1) to consider and make proposals in relation to—
  (a) the aims and objects of a criminal code for England and Wales;
  (b) its nature and scope;
  (c) its contents, structure, layout and the interrelation of its parts;
  (d) the method and style of its drafting; and

(2) to formulate, in a manner appropriate to such a code—
  (a) the general principles which should govern liability under it;
  (b) a standard terminology to be used in it;
  (c) the rules which should govern its interpretation."

The establishment of the Criminal Code team was announced in March 1981. The team has thus worked over a period of more than three years to produce the Report which forms the greater part of the present document, submitting it to the Law Commission in November 1984.

The purpose of codification

12. The terms of reference of the Criminal Code team included the consideration of the aims and object of a criminal code and its nature and scope. These matters have been examined in detail by the team and we see no need to repeat here the objectives and virtues of codification which they have so clearly set out; the reader is referred to the relevant Chapters of their Report.[22] Our own purpose in drawing attention to this aspect of the Report differs in emphasis. We have already mentioned that this Report is essentially a document for discussion upon which the views of others are invited, in particular the views of those who might be expected to make practical use of a Code. The first and most fundamental issue upon which such views are needed is whether codification is indeed an aim which should continue to be pursued. As we have made clear, this has for long been the ultimate aim of the Commission in the sphere of the criminal law. If, however, codification is not an aim which continues to command any substantial support, it is obviously necessary that the Commission should reconsider whether its resources should in future be devoted to it.

[21]Mr. Glazebrook ceased to be a member of the Criminal Code team in January 1984: see Report, para. 0.2.

[22]See Report, Chapters 1 and 2.

13. Hitherto, it has not been possible to pose this issue with sufficient material to support informed public discussion. Thus far we have been able to point to the possible virtues of codification by reference to the largely unsystematic nature of the present law demonstrated by, for example, current practitioners' textbooks contrasted with the improvements effected in certain limited areas of the law by reforming legislation based upon the work of law reform bodies including the Commission. What has been lacking is draft legislation worked out in sufficient detail to demonstrate the nature of the final product which would result from a codification of the law of England and Wales, by reference to which the claimed virtues of that process—the improvement in the accessibility, comprehensibility, consistency and certainty of the law, and so forth—might be tested. It is, of course, true that nearly all other jurisdictions, both common law and civil, possess codes dealing with the substantive criminal law to which it is possible to refer for purposes of comparison. We need do no more than refer to the American Law Institute's Model Penal Code,[23] which has been the model for so many state codes in the United States; to the Indian Penal Code, with its distinguished ancestry in the work of Macaulay;[24] to the penal codes of civil law countries; and, indeed, to the Commonwealth codes based upon the work of Stephen. But apart from the Model Penal Code (which is essentially a model Code and far removed from a codification of English law), the common law Codes to which reference has been made are in origin nineteenth century codes, albeit much amended. The knowledge and understanding of the principles of the substantive law have, through the work of judges and jurists, greatly increased since then. Moreover, while all of these codes are available for assessment by specialist lawyers, they are less readily to hand for the profession as a whole and still less to the general public; and in any event some at least have been drafted in the context of systems of law very different from our own.

14. The Report of the Criminal Code team, and its annexed draft Criminal Code Bill, [25] provides a model for that draft legislation which until now has been lacking. It enables us to submit the issue of codification in the law of England and Wales to a wider audience and with a more direct basis of comparison. In effect, it allows us to say to practitioners and to the general public: "this is what the general principles of criminal liability might be expected to look like if embodied in a code of the substantive criminal law. Is it desirable that it, or something like it, should be incorporated in the law of England and Wales? Is it worthwhile to continue to work on it?"

15. Questions such as these posed without further explanation might well produce answers of limited utility. They require substantial elaboration for the purpose of providing useful guidelines for future work; and the greater part of the remainder of this introduction will indicate the nature of such elaboration.

The substance of the draft Code

16. Codification, as the Criminal Code team points out, is a process which differs from law reform.[26] It is essentially a task of restating a given branch of the law in a single, coherent, consistent, unified and comprehensive piece of

[23]Final draft of 1962.
[24]See generally Cross, "The Making of English Criminal Law (5) Macaulay" [1978] Crim.L.R.519.
[25]See p.263, below.
[26]See Report, para. 1.10.

legislation. Codification does not necessitate reconsideration of the relevant law with a view to reform: it may entail no more than a restatement of existing principles. A substantial part of the draft Criminal Code Bill appended to the team's Report limits itself to such a restatement, with relatively minor changes intended to deal with inconsistencies, gaps, and anomalies in the present law.[27] At an early stage of their work, the team with the approval of the Commission, decided that it would take account of the recommendations made by law reform bodies in recent years which have not yet been implemented by legislation.[28] In these respects the Code Bill departs from the existing law and would represent, if enacted, a substantial reform of the law. Particularly is this so, for example, in the sections of the draft Bill dealing with mentally abnormal offenders and the mental element in crime. For the purpose of codifying the law relating to mental abnormality as it affects liability for the commission of crime, the Criminal Code team has adopted the recommendations of the Butler Committee;[29] thus the relevant clauses of the draft Bill would give effect to those recommendations[30] rather than the existing law, for example, the *M'Naghten* rules,[31] which have been accepted as laying down the law of England and Wales as to insanity at the time of the alleged offence. In relation to the mental element in crime, the team has accepted the principles recommended by the Law Commission in its report on that subject,[32] albeit with some changes of substance and terminology. Here again, the law as restated by the team in its draft Bill differs from the existing law to the extent specified by the team in the Report.[33]

17. It would have been possible for the law in these areas, and in the others where the Criminal Code team has adopted recommendations which would result in changes, to have been restated in terms more nearly consistent with those of the existing law. Indeed, for the purposes of consultation upon the issue of whether codification of the criminal law is a subject which should continue to be pursued, it is possible to take the view that such a restatement would to that extent have made easier the task of those assessing and commenting upon this Report; for in so far as a Code is no more than a reflection of the pre-codified law, it would be a relatively easy task to assess the respective merits, from point of view of coherence and comprehensiveness, of such a Code and the law as stated in current practitioners' works. It would, for example, be feasible to embody the *M'Naghten* rules in a Code, notwithstanding that, as the Butler Committee Report makes clear,[34] those rules have for long been the subject of criticism. Again, the provisions relating to the mental element could be restated using a terminology which reflected, for example, the current interpretation by the courts of the word "recklessness" in statutory offences, even to the extent of reproducing the inconsistencies to which, as the Report points out,[35] such current usage gives rise.

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[27]See Report, paras. 1.11–1.13.
[28]See Report, para. 1.14.
[29]Report of the Committee on Mentally Abnormal Offenders (1975), Cmnd. 6244.
[30]See draft Bill, cll. 37 *et seq.*
[31]The answers by the judges to the House of Lords given in consequence of *M'Naghtens Case* (1843) 10 Cl. & F. 200; 8 E.R. 718.
[32]The Mental Element in Crime (1978), Law Com. No. 89. See draft Bill, cll. 22–24.
[33]See Report, paras. 8.6 *et seq.*
[34]See (1975), Cmnd. 6244, paras. 18.5–18.8.
[35]See Report, paras. 8.18 *et seq.*

18. The solutions referred to did not commend themselves to the Criminal Code team for the reasons given in the Report.[36] It may be that those commenting upon the Report will in turn find the solutions adopted by the team open to criticism. For example, it may be thought that one aspect or another of the Butler Committee recommendations, as embodied in the draft Bill, is not wholly acceptable. Or it may be that there will be disagreement with the terminology adopted by the team to define fault liability and to establish a "hierarchy of culpability." In our view, however, such criticisms, if there are any, will be essentially subsidiary to the principal consideration: that is, whether the codification of the law will result in the substantial improvement in the comprehensibility, consistency and ease of use which is claimed for it. In other words, acceptance of the principle of codification does not necessarily imply acceptance of every aspect of the Code as formulated by the Criminal Code team, nor in particular require the implementation of major programmes of reform such as that contained in the Butler Committee Report. The principle of codification does require a comprehensive and clear statement of the law, in which each provision operates as part of a coherent and internally consistent entity. This the present draft Code may be thought to provide to an outstanding degree; and from study of it a proper assessment may thus be made of the extent to which it might be expected to facilitate the work of the courts and practitioners. This may in turn suggest the consequent benefits which the enactment of such a Code might offer, such as the saving of time and money at all levels, for example, in the provision of advice to a client or the time taken in a court's summing up to a jury, or the elimination of unmeritorious appeals relating to cases of no substantive merit which arise only because of uncertainty in regard to minor obscurities in the law.

19. If the principle of codification is accepted, it is only then, in our view, that it would be appropriate to discuss the degree to which the detailed provisions of a Code, as exemplified by the Criminal Code team's draft Criminal Code Bill, are acceptable or should be subject to reconsideration. In that context we think it would be proper to consider the extent to which a Code should aim at a pure restatement of the law and the extent to which it should aim to embody change. Such considerations are closely linked with possible methods of implementing proposals for a Code to which we refer below.[37] It is sufficient here to point out that there are bound to be difficulties in assessing the content of a Code of general principles before reform of the substantive offences is complete, since it is only when this has been done that choice of the relevant vocabulary to describe such aspects as the fault element or the external elements can finally be made. It is unnecessary in our view to postpone consideration of the principal issues relating to codification for such a lengthy period.[38] Consultation may indicate the need to revise the content of the draft Code and, if this be the case, we do not preclude the publication of

[36]See Report, paras. 8.20 and 12.3.

[37]See para. 26, below.

[38]We pointed out in our Sixteenth Annual Report 1980–1981 (1982), Law Com. No. 113 at para. 1.11 that "if the work towards codification continues at its present pace and implementation is carried out with the normal and necessary lapse of time between report and enactment, it might be expected that in five to seven years' time virtually all indictable criminal offences which are not of a specialised nature would have been restated in modern statutory form."

a revised document. We realise that major issues such as the acceptability of the Butler Report raise questions of timing, judgment and policy and if on consultation it is generally thought that the time is not ripe for such reforms, we ourselves can put in hand the necessary redrafting. But we do not consider that, if such redrafting becomes necessary, it should be thought to detract from arguments favouring the basic purpose and principle of codification.

20. Nor should the need for revision of the draft Code to take account of new developments in the law be thought to detract substantially from the principle of codification. Any restatement of the law such as is represented by the greater part of this draft Code is liable to be overtaken by subsequent changes in the law before enactment, and the present Code is no exception. Such changes must be considered in the course of consultation upon the Report and, if and when a revised document is published, incorporated in a new draft of the Code to the extent that is then considered desirable. The existence of developments in the law subsequent to the preparation of the present Code Report and draft Bill emphasises a possible disadvantage of codification, namely, the limitation upon the ability of the courts to develop the law in directions which might be considered desirable. This possible disadvantage must be weighed against the advantages of codification to which the Criminal Code team has drawn attention and may also indicate the desirability of developing special procedures for the passage of any amending legislation which may be needed after enactment of a criminal code.

21. Other important issues in regard to the substance of the Code must also be considered. How, for example, would the Code actually work in relation to substantive offences? The Criminal Code team has provided an answer in relation to the two important fields of offences against the person and offences of criminal damage[39] and consideration must be given as to the acceptability of the result. Which offences should be included within the Code? The team again provides a tentative scheme to which consideration must be given in the future.[40]

The form of the draft Code

22. In drafting the Code the Criminal Code team has employed various techniques which are unusual in current legislation. They have, for example, used side notes for a particular purpose, which the team explains in the Report[41]; and these are attached not only to each clause but also to each main subsection within each clause. The draft Code Bill also includes illustrations in a Schedule which demonstrate the purpose and working of the provisions of each clause. The latter technique is, as the team points out, not wholly without precedent in the law of England and Wales[42] and, in the context of

[39]See draft Bill, Part II. It should be noted that the draft clauses relating to offences against the person would implement the Criminal Law Revision Committee's recommendations in its Fourteenth Report, Offences against the Person (1980), Cmnd. 7844.

[40]See Appendix A to the Report, below. The team has anticipated the inclusion of some offences by, for example, making provision for definitions of "purpose" and "negligence" in cl. 22 which do not appear in the offences set out in Pt. II of the draft Bill.

[41]See Report, para. 3.7.

[42]See Report, para. 3.6.

codification, has the distinguished precedent of the Indian Penal Code. In addition to these techniques, the team has made provision[43] for reference to a future Law Commission report on codification of the criminal law for the purpose of resolving ambiguities in interpretation. This provision is similar, although by no means identical either in content or purpose, to the recommendations in the Law Commission's Report on *The Interpretation of Statutes,*[44] which have not been implemented by Parliament.

23. In assessing the form of the draft Code, we take the view that similar considerations arise to those to which we drew attention in the context of assessing its substance. The most important issue for consideration is whether, taken as a whole, the drafting technique adopted achieves the purpose of the team in producing a piece of draft legislation which is clear, comprehensible and consistent. In this connection, we do no more at this stage than observe that, apart from the relative novelties to which reference has been made above, the drafting of the provisions may be thought to be largely conventional in form; the techniques adopted by the team do not appear, in the main, to depart radically from those employed elsewhere in legislation. To that extent, if a Bill based on this draft Code were to be introduced into Parliament, the task of the legislature in examining it would be no greater than is the case with any other piece of legislation of comparable size and scope.

24. It is only after this general assessment has been made that, in our view, it is appropriate to concentrate upon the novelties of drafting and aids to interpretation to which we have drawn attention. These novelties are essentially marginal to the central issue of whether the means used achieve the principal purposes of the draft Code. Nevertheless, we do not discount their importance. We think commentators will wish to consider such issues as the use of side notes, the reference as an aid to interpretation to future Law Commission reports on codification, and the desirability of including illustrations as part of legislation. The last mentioned issue may also stimulate comment on whether such illustrative material should be included with the text of each draft clause, following the model of the Indian Penal Code, or, as the Criminal Code team has done, should be hived off in a separate Schedule to the draft Bill.

Consultation

25. We stated at the outset that our purpose in publishing this report is at least in part to stimulate discussion. First and foremost, the Criminal Code team's Report informs the profession and the public how a Code might embody the general principles of the substantive criminal law. We have, however, emphasised the need, as we see it, for a response from them about the value of such legislation. We intend to establish a small working group to assist us in assessing in detail the merits of the present draft Criminal Code Bill and to make proposals for any changes to it which the group considers desirable. Practitioners drawn from all branches of the legal profession will be strongly represented on that group, for our purpose in establishing it is to

[43]See Report, para. 3.8.
[44](1969), Law Com. No. 21; draft Bill, below, cl. 1(1)(a).

ensure that, if a revised document is published, it will reflect the views of those who would, if legislation based upon it were enacted, be its main users. But the establishment of such a group, whose work may take a substantial period, should not be thought to detract from the importance which we attach to more general discussion of the present Report. We hope that the issues touched upon in this introduction will be of assistance to others in formulating their comments upon the important issues which the Report raises; these comments will no doubt be taken into consideration by the working group in the course of its deliberations.

26. In due course, and if response to it is favourable, it will be necessary to give detailed consideration as to how legislation based upon the draft Criminal Code Bill (with any necessary revisions) should be presented to Parliament. It may well be that legislation of the scope and complexity of the draft Bill will require novel means for its introduction. Without at present suggesting what those means might be, it is relevant to note that special procedures have been adopted on more than one occasion in the past, albeit not in recent times. We have referred[45] in brief to the procedure adopted in 1878–1882 for the purpose of Parliamentary examination of Stephen's draft Criminal Code. Reference may also be made here to the history of the Sale of Goods Act 1893, drafted by Chalmers, which was introduced successively in 1888 and 1889 for the purpose of criticism and referred to the Standing Committee on Law; in 1891, when it was again referred to a Select Committee; and again in 1892 and 1893 for the purpose of adapting it to Scottish Law.[46] A draft Criminal Code Bill dealing with the general principles of the substantive criminal law may well be a suitable candidate for special scrutiny by means of such repeated introduction. This is in any event a matter to which we shall have to devote further consideration.

Acknowledgments

27. The standards set by Professor Smith and his distinguished colleagues in the production of this Report and the draft Bill annexed to it do not need commendation from us: we believe that it will be evident to anyone who examines their Report with the attention that it demands that the Criminal Code team has abundantly fulfilled its terms of reference and at the same time demonstrated with great clarity the virtues which it claims for codification of the substantive criminal law. We must, however, put on record the enormous debt which the Commission owes to the team. Its members gave freely of their spare time over a period of more than three years and jointly took a sabbatical term from their respective universities for the purpose of completing their labours. Such an investment of time and resources on behalf of the Commission is a measure of their devotion to the cause of law reform and codification and at the same time a stimulus to the Commission's own commitment to these objectives. We hope that their work will receive the wide public acknowledgment that it deserves.

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[45]See para. 3, above.

[46]See Chalmers, *Sale of Goods* (1890), Introduction pp.iii and iv and *Sale of Goods Act 1893* 2nd ed. (1894), Introduction pp.iii and iv. And for an account of the protracted discussion between the various professional groups concerned before the passage of the Law of Property Acts, see Offer, "The Origins of the Law of Property Acts 1910–25" (1977) 40 M.L.R. 505.

28. Very recently the Lord Chancellor said that "a good codification would save a great deal of anxiety, obscurity, consumption of judicial time, and so of costs."[47] Such a codification remains the objective of the Law Commission's programme for reform of the criminal law, and the present report represents a major step towards that objective. Further progress will be assisted by the widest public response to the Commission's request for discussion of the report.

(Signed) Ralph Gibson, *Chairman*
Trevor M. Aldridge
Brian Davenport
Julian Farrand
Brenda Hoggett

J. G. H. Gasson, *Secretary*

1 February 1985

[47]Address to the Statute Law Society, 27 October 1984.

CODIFICATION OF THE CRIMINAL LAW

A Report to the Law Commission

November 1984

INTRODUCTION

0.1 In March 1981 the Law Commission, responding to a proposal by the Criminal Law Sub-Committee of the Society of Public Teachers of Law, appointed a "team" of four members of the Society with the following terms of reference:

"(1) to consider and make proposals in relation to
  (a) the aims and objects of a criminal code for England and Wales
  (b) its nature and scope
  (c) its contents, structure, lay-out and the inter-relation of its parts
  (d) the method and style of its drafting
and
(2) to formulate, in a manner appropriate to such a code,
  (a) the general principles which should govern liability under it
  (b) a standard terminology to be used in it
  (c) the rules which should govern its interpretation."

0.2 Mr. Peter Glazebrook withdrew from the team in January 1984. We wish to acknowledge the important part he played in our deliberations until that time.

0.3 We reached an early decision that Part (2) of our terms of reference constituted the heart of the matter and that the only appropriate way to respond to it was to prepare a draft Bill, restating the "General Part" of the criminal law. We took as a starting point the Table of Contents of the American Law Institute's Model Penal Code, Articles 1 to 5, though we have found it convenient to depart from this in a number of respects. By far the greater part of the time and effort which we have devoted to this project has been spent in drafting clauses which would constitute Part I of the proposed Code, "General Principles of Liability". These clauses, with the commentary on and illustrations of them, are the principal feature of this report. Some of the principles stated in Part I would, however, apply only to "Code offences"[1], that is, offences defined in Part II or enacted after the Code came into force. It would be impossible to see how Part I would function unless specific offences were drafted in the light of the principles therein stated. We thought it essential to draft some specific offences to enable us to test the adequacy of the provisions of Part I; and so it proved. Consequently we were able to make numerous improvements to Part I as originally drafted. The reader of this report will likewise be enabled to study the effect of the existence of a Code of general principles on the drafting of specific offences.

0.4 For this purpose, we selected the law of offences against the person (or most of it) and the law relating to criminal damage. The former provides an example of the drafting of largely new law—for we have followed the recommendations of the Criminal Law Revision Committee[2]—and the latter an example of the adaptation of a modern statute, the Criminal Damage Act 1971, to the principles and terminology of the Code.

[1]See cl. 2.
[2]Fourteenth Report, Offences against the Person (1980), Cmnd. 7844.

0.5 The draft Bill is not complete as are those which are usually included in Law Commission reports. It does not, for example, contain a schedule of enactments to be repealed. In this and, no doubt, other respects, it would require the expert attention of Parliamentary Counsel. It is offered, however, not with any expectation of its early enactment but as the best catalyst for the informed debate on the structure and contents of a code which the Law Commission wish to be generated; and, if it should meet with approval, as the basis of a Bill or Bills to be prepared thereafter.

0.6 This is not to say that we have ignored the more general considerations mentioned in Part (1) of our terms of reference; and our report continues with a discussion of these.

CHAPTER 1

THE AIMS OF CODIFICATION

The background

1.1 English criminal law is a mixture of common law and statute. Most of the general principles of liability are still to be found in the common law, though some—e.g., the law relating to conspiracy and attempts to commit crime—have recently been defined in Acts of Parliament.[1] The great majority of the crimes are now defined by statute but there are important exceptions. Murder, manslaughter and assault are still offences at common law, though affected in various ways by statute. There is no system in the relative roles of common law and legislation. Thus, incitement to commit crime—though closely related to conspiracy and attempts—is still a matter of common law. Whether an offence is defined by statute is often a matter of historical accident. Rape is defined in the Sexual Offences (Amendment) Act 1976 because of the outcry which followed the decision in *Morgan* v. *D.P.P.*[2] and the subsequent Heilbron report.[3] The legislation in force extends over a very long period of time. The earliest criminal statute in force, according to *Halsbury's Statutes of England* is the Treason Act 1351. It is true that only a very small amount of significant legislation is earlier than the mid-nineteenth century, but that is quite long enough for the language of the criminal law and the style of drafting to have undergone substantial changes.

1.2 There has been much reform of the criminal law in recent years but it has been accomplished in somewhat piecemeal fashion. Much of it is derived from the reports of the Law Commission (which is committed to codification), the Criminal Law Revision Committee (which does not regard codification as one of its functions) and committees, like the Heilbron Committee appointed to deal with particular problems. Other reforms have resulted from the initiative of Ministers or private members of Parliament in introducing Bills. As there is no authoritative statement of general principles of liability or of terminology to which such bodies, or their draftsmen, can turn it would be surprising if there were not some inconsistencies and incongruities in the substance and language of the measures which they propose and which become law. Some examples are pointed out in this report.

The aims

1.3 The aim of codification in our opinion is to make the criminal law more accessible, comprehensible, consistent and certain.

1.4 *Accessibility*. One of the effects of codification would be to make the law much more accessible. The source of the general principles of liability would be found in little more than 50 sections of an Act of Parliament instead of many statutes, thousands of cases and the extensive commentaries on them to be found in the textbooks. While much criminal law would remain outside

[1]The Criminal Law Act 1977 and the Criminal Attempts Act 1981, respectively.
[2][1976] A.C. 182.
[3](1975), Cmnd. 6352.

the Code[4], the law relating to all the gravest crimes should, in due course, be brought within it so that the reader could find it within one volume instead of being scattered through the statute book and in hundreds of volumes of law reports. Provided that the Code is well-drafted with a minimum of ambiguity and the rules proposed for its construction are observed, resort to this mass of case-law should become the very rare exception, rather than the rule. Inevitably, the construction of the Code would generate its own body of case-law which, if left to accumulate, could eventually destroy this beneficial effect. It would be a very long time, however, before the benefit was wholly lost; and the establishment of machinery for keeping the Code up-to-date could ensure that the benefit was a permanent one.[5]

1.5 *Comprehensibility*. To be able to find the law is an essential first step but it is not of much value if what is found is incomprehensible or, worse still, misleading. The second aim of codification must be to ensure that the law is as intelligible as possible. Ideally, it should be capable of being readily understood not only by lawyers but also by lay magistrates, police and, indeed, the ordinary intelligent citizen. We are painfuly aware that the drafting of such legislation is a most difficult task. Some of the law which the Code must state or restate is highly complex. Examples are the law concerning the effect of intoxication on criminal liability, the nature of corporate liability for the acts of members of the corporation and the relationship between murder and manslaughter, and attempts to commit those crimes. This complexity is not necessarily a reproach. A highly developed and sophisticated system of criminal law inevitably involves some difficult concepts and distinctions. Refinements may be necessary to enable the law to deal differently with cases which, in justice, ought to be dealt with differently; but every such refinement adds to the complexity of the law.

1.6 In some areas the law could be greatly simplified. If, for example, English law were to follow that of Australia[6] and South Africa[7] in the matter of the effect of intoxication on liability, one simple rule could replace the highly complex body of law which we, following the recommendations of the Criminal Law Revision Committee, have felt obliged to state. Again, the law of homicide could be enormously simplified by the abolition of the mandatory life sentence for murder and the merging of the crimes of murder and voluntary manslaughter. These are, however, weighty matters of policy on which it is not for us to comment, let alone make proposals in this report. We draw attention to the price which has to be paid in terms of the complexity of the law.

17. This is not to say that the Code cannot achieve a great deal in the way of simplifying the statement of the law. A rule may be stated in a few lines instead of having to be distilled from hundreds of pages of the law reports. It may be expressed in uniform terminology, used as consistently as possible

[4]See below, para. 2.10.
[5]See below, para. 2.34.
[6]*R.* v. *O'Connor* (1980) 54 A.L.J.R. 349 (High Court of Australia).
[7]*S.* v. *Chretien* (1981) (1) S.A. 1097 (A) (Supreme Court, Appellate Division).

throughout the provisions of the Code. Terms may be defined so as to give them as precise a meaning as possible. The Code may avoid legal jargon and use familiar words as nearly as possible in their ordinary sense. We are far from saying that anyone will be able to pick up the Code and immediately ascertain the nature of the law upon any matter with which it deals. There will remain a need for the lawyer's skills of statutory construction; but it should be a lot easier for anyone correctly to understand the Code than it is to understand the present sources of the law.

1.8 *Consistency*. The haphazard development of the law through the cases, and a multiplicity of statutes inevitably leads to inconsistencies, not merely in terminology but also in substance. Codification must seek to remove these. If two rules actually contradict one another they cannot both be the law. The codifier cannot rationally restate both. He must restate one and abolish the other or propose some third rule to replace both. More frequently, the inconsistency is one of principle and policy rather than of mutual contradiction. For example we find that, at various points, the present law affords greater protection to property than it does to the person. This, it appears to us, is an indefensible inconsistency which the Code must eliminate, either by extending the protection afforded to the person or reducing that afforded to property.

1.9 *Certainty.* In some areas of the criminal law there is substantial uncertainty as to its scope. Everyone recognises the importance of certainty in this branch of the law and codification offers the opportunity to make a significant step towards achieving it. At present there are many minor statutory offences where no-one can predict with any confidence whether the offence will be held to impose liability without fault or with a particular kind of fault. The Code can go a long way towards removing such uncertainty, and, we believe, clause 24 would do so. Again, the law determining criminal liability for omissions is most obscure. The Code should clarify the matter and clause 20 is intended to do so. Many more examples could be given.

Codification and law reform

1.10 An assumption underlying this project is that codification is a different process from law reform. This was the basis of the submission made to the Law Commission by the committee of the Society of Public Teachers of Law which led to our appointment. Codification does not have to wait until the whole of the criminal law has been re-considered and, if necessary, reformed. If it did, it would never happen. Our primary purpose has been, therefore, that of re-stating the law. We were not asked to produce a "model penal code" and we have not attempted to do so. The fundamental principles of the law are well settled and it would be neither politically feasible nor desirable to depart from them. There are several reasons, however, why the proposed Code cannot be a mere restatement and the draft clauses embody a substantial body of proposed reform.

1.11 (i) As noted above, the Code cannot reproduce inconsistencies. Where the inconsistency represents a conflict of policies, a choice has to be made to produce a coherent law but it is not for us to determine which policy

is to prevail. The current controversy over the concept of "recklessness"[8] will illustrate the point. This is not the place to go into details of that controversy. Put very broadly, it is between those who say that a person is reckless only if he is aware that he is taking an unreasonable risk (the "subjectivists") and those who say that he is reckless if that risk is one of which any reasonable person would have been aware (the "objectivists"). In the law of offences against the person, the subjectivist view prevails. In the law of criminal damage, the objectivist rule is firmly established. The effect is that the law affords greater protection to a person's property than to his person. This is law which we felt we could not rationally restate. Either the same principle should govern both groups of offences; or the objective rule should apply to offences against the person and the subjective rule to offences of damage to property. We have proposed that the same rule should apply to both and that it should be the subjective rule. But, if another opinion should prevail, the Code offers the means for its ready implementation. Clause 22 provides the appropriate terminology for both schools of thought. Codification affords the opportunity to introduce consistency and coherence instead of the current confusion.

1.12 (ii) There are in the present law a few rules of an arbitrary nature, fulfilling no rational purpose and explicable, if at all, only on historical grounds. An example of such a rule is that applied in *R.* v. *Richards*[9] which distinguishes between parties to a crime who are absent and parties who are present so as to produce wholly anomalous results. The effect of clause 30 would be to overrule that decision.

1.13 (iii) There are gaps in the present law. One of the characteristics of a Code is that it should be as comprehensive as possible. Where there are known gaps in the law, the codifier should fill them, and we have attempted to do so. For example, the relating to liability for omissions is very incomplete. Clause 20 would fill the gap. Obviously there will be more than one view as to how this should be done. Clause 20 represents the view we prefer. That clause with its illustrations and the commentary on it may provide the focus for debate on the issue; but the Code, as ultimately enacted, should settle it, one way or the other.

1.14 (iv) Most important of all, we thought it right to incorporate into the Code recommendations for the reform of the law made by public bodies—the Law Commission, the Criminal Law Revision Committee and ad hoc committees such as the Butler Committee on Mentally Abnormal Offenders. When such expert and responsible agencies have closely scrutinised the law, found it to be defective and recommended reforms, it would be entirely wrong to propose the perpetuation of the existing law. So, for example, we have not restated the M'Naghten Rules but have codified the proposals of the Butler Committee which would replace them; and we have acted on the recommendations of the Criminal Law Revision Committee in respect of intoxicated offenders, self-defence, offences against the person and other matters.

1.15 For all these reasons, the enactment of the proposed Code would effect a very substantial reform of the criminal law.

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[8]See Williams, *Textbook of Criminal Law* 2nd ed., (1983), 96-114, 128-132; Smith and Hogan, *Criminal Law* 5th ed. (1983), 52-57.
[9][1974] Q.B. 776.

CHAPTER 2

THE CODE

Nature and scope of the Code

2.1 The Criminal Code should eventually embrace as much as is practicable of the whole of the law relating to the criminal process. We envisage that it will comprise four parts.

Part I. General Principles of Liability.

Part II. Specific offences.

Part III. Evidence and Procedure.

Part IV. Disposal of Offenders.

2.2 Part I should state all the principles which are applicable to offences generally. As explained below, some clauses of Part I will apply to all offences whenever committed[1], other clauses will apply to all offences committed after the Code has come into effect[2] and still others will apply only to "Code offences"[3]—offences embodied in Part II or enacted after the Code has come into effect. The characteristic of Part I is the generality of its application. It does not create specific offences—except the offences of incitement, conspiracy and attempt to commit crime.[4] They are appropriately placed in Part I because the principles of liability are general in the sense that they operate on all the offences specifically defined in Part II and in other legislation.

2.3 In addition to enunciating the general principles of liability Part I includes certain procedural and evidential matters. In some cases this is because they are matters without which Part II could not function at all. Into this class fall some of the matters concerning prosecution and punishment contained in clause 11. In other cases it is because they embody fundamental principles which should be stated at an early point in the Code, such as the jurisdiction of the courts (clause 8), the provisions against double jeopardy (clause 15) and the rules of burden of proof (clause 17). Other procedural provisions are conveniently placed here because they are closely related to those mentioned above (e.g., clause 12, alternative verdicts, and clause 16, multiple convictions) or are particularly applicable to general principles—like the special procedural provisions relating to accessories or to preliminary offences.

The application of Part I

2.4 The sphere of application of the clauses of Part I is not uniform. They fall into three categories.

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[1]See cl. 2(4).
[2]Cl. 2 (1).
[3]Cl. 2 (3).
[4]Cll. 51-55. Arguments for and against including preliminary offences in Part I are considered below, para. 14.2.

2.5 (i) *Provisions which apply to all offences, whenever committed.* These are listed in clause 2 (4). They relate to matters of procedure or evidence which, in principle, are regulated by the law in force at the time of the trial. They include the rules concerning alternative verdicts, double jeopardy and proof (though clause 17(4) provides an exception in this respect), including proof or disproof of states of mind (clause 18). Rules concerning jurisdiction (clauses 8, 9, 10, 55 and 62) are not included because they are not clearly exclusively procedural in character and they may alter the scope of criminal liability. Nor are the procedural provisions relating to liability as an accessory (clause 32) because they are drafted in the terminology of the Code and could not easily be applied to secondary participation in an offence committed before the Code comes into effect and governed by the common law principles of secondary liability. These provisions fall into the category discussed in the next paragraph.

2.6 (ii) *Provisions which apply to all offences committed after the Code has come into effect.* All the relevant clauses of Part I fall into this category except those which are specifically excepted by clause 2 (3). In addition to the procedural and evidential matters dealt with in the first category, the general principles of substantive law governing liability should be the same for all offences committed after that law comes into force. For example, the law concerning liability for omissions, the effect of intoxication or mental disorder, participation in an offence as an accessory, and so on, should not vary according to whether the offence is a Code offence or a pre-Code offence. The fact that the offence was committed after the general principles of liability came into force should be sufficient to attract their operation.

2.7 (iii) *Provisions which apply only to "Code offences"* (which, of course, can be committed only after the Code has come into effect). In our opinion their must be some exceptions to category (ii). They are the matters dealt with in the clauses excepted by clause 2 (3). To allow these clauses to operate in relation to pre-Code offences would work unconsidered changes in the law by, e.g., turning all offences of strict liability into offences requiring fault. This, in our opinion, should not be done without those interested in the enforcement of each particular offence having the opportunity to consider its effect. Similar considerations apply to vicarious liability. Clause 17 (4) creates a similar exception for similar reasons. Where the burden of proof in a particular offence is presently (and perhaps for many years past) imposed on the defendant, it would be wrong for the burden to be arbitrarily changed without consultation.

2.8 This categorisation seems to lead to no serious problems of application. Category (i) simply reflects the ordinary rule that the relevant law of procedure and evidence is that in force at the date of the trial. Category (ii) is of general application. Category (iii) will, initially, have a limited application; but, in effect, the clauses in question provide an interpretation section for Code offences and there should be no more difficulty in appying this than there is in applying the definition section of a particular Act.

2.9 *Revision and re-enactment of pre-Code offences.* An offence will be a "pre-Code offence" if it is wholly or partly defined in pre-Code legislation (clause 2(2)). If, therefore, an offence is merely *amended* after the Code is enacted it will remain a pre-Code offence and the provisions referred to in

paragraph 2.7 will still not apply to it. This is necessary because it may not be possible in the process of amendment to take account of the effect of those provisions. If, however, the offence is to be re-enacted, it will be essential to undertake its thorough revision in the light of those provisions of Part I of the Code to which it will become subject for the first time. An offence of strict liability, for example, may need to be expressed as such (see clause 24); an offence involving fault may need to be partly rewritten in the light of the fault language of the Code (clause 22). In this connection a problem could arise with a consolidation measure which re-enacts pre-Code offences. Adequate amendment of the definitions of offences may not be possible in such a measure; but if no special step is taken, the offences may be effectively amended by the application of the Code provisions in question. Two steps might be considered. One would be to include in consolidating Acts a declaration that the few excepted provisions of the Criminal Code Act should continue not to apply to offences in those Acts. The other would be to amend the definition of "pre-Code offence" so as to include in that category offences in consolidating legislation which were formerly defined wholly or in part by pre-Code legislation.

The extent of Part II

2.10 The code should be as comprehensive a statement of the criminal law as is reasonably possible; but there are overwhelming reasons for excluding many offences from it—though not, we stress, from the application of Part I. There are several thousands of offences[5] and a code that contained all of them would be impossibly bulky. We considered but rejected a suggestion that the Code might include all indictable offences, excluding the great mass of regulatory offences which are triable only summarily. But there are other considerations besides bulk. A great many offences are contained in legislation which is not primarily penal in character but which regulates activities in a variety of ways, such as licensing, as well as by the provision of criminal sanctions. We are convinced that the governing principle should be that of the convenience of the users of the legislation— that an offence should be incorporated in Part II only if the balance of convenience so dictates. It is obviously true of much regulatory legislation that its typical users—those governed by it and those enforcing it—will wish to be able to consult the legislation as a whole rather than have to go to the Code for the offences it creates and to a more general Act for the larger context. Moreover, many offence-creating provisions, standing alone, would be meaningless. Their incorporation in Part II of the Code would require either the repetition in the Code of technical matters from other legislation (where it would also have to remain for other purposes) or elaborate cross-referencing that would in any case throw the user back to the other legislation. These types of inconvenience are obviously to be avoided.

2.11 *The problem illustrated : road traffic offences.* The problem of the borderline case may be illustrated by considering the more serious driving offences. It is obviously tempting to place causing death by reckless driving in

[5]A Committee of JUSTICE found over 7,200 offences and thought there were probably many more. They concluded that "it is now impossible to ascertain the entire content of the criminal law at any given time": *Breaking the Rules* (1980), 53.

the Code alongside other homicides; to place with it reckless driving, careless and inconsiderate driving, and presumably the corresponding cycling offences; and perhaps to add other "bad driving" offences and offences evincing serious irresponsibility (the drink-driving offences; driving while disqualified; using a motor vehicle without third party insurance). Not everyone who wishes to see serious road traffic offences in the Code will contend for the whole of that list; but every item in the list will have its champions. No-one, however, will claim that all road traffic offences should be in the Code. Apart from the triviality of many of them, there are some which depend upon the most detailed technical regulations. But serious difficulties would attend a division of offences between the Code and the Road Traffic Act. The two most obvious difficulties are, first, that the serous offences which, taken alone, are suitable for the Code, share with some of the other offences complex provisions relating to disqualification from driving and the endorsement of licences, and, secondly, that offences in the former class are commonly associated with other road traffic offences in a group of charges made together. It would not be satisfactory to enact the disqualification and endorsement provisions in two places; on the other hand, if resort to the Road Traffic Act is going to be necessary to find them, there seems little point in placing the offences anywhere else. Similarly, it must be doubtful whether prosecutor, defendant or court should be required to look to two statutes for the full range of offences relating to the same subject-matter. Because the case of causing death by reckless driving, if no other, will be controversial, we place "some offences under the Road Traffic Act 1972" in our list of borderline cases in Appendix A. Our own view is that none of them ought to be designated for inclusion in the Criminal Code Act.

2.12 The process of incorporating into Part II all of those offences which will properly find a place there is one that must last some time. Before it can begin there must be consultations as to what offences ought to be designated for inclusion in Part II in the long run. We make our contribution to that debate by sketching in Appendix A to this Report a possible minimum table of contents for Part II in its eventual form. We go on in that Appendix to give examples of offences which we believe would have to stay outside the Criminal Code Act on our principle of convenience. Finally, we mention in that Appendix, again by way of example only, some borderline cases—that is, some Acts in relation to which powerful arguments might be made either way on the question whether the offences they create should in due course be separated from them and placed in the Code or should remain in their parent legislation.

2.13 *Parts III and IV.* We have not been able to give any detailed consideration to the structure and contents of Parts III and IV of the Code. The intimate relationship which must exist between Parts I and II does not extend to Parts III and IV. Subject to the proposals we have made about burden of proof, the specification of permissible sentences for offences and the various procedural matters covered in Part I, work on these parts could proceed independently. If the present project proves to be of value, we see no reason why similar projects should not be initiated with respect to Parts III and IV.

The style and language of the Code

Style

2.14 We were asked to make proposals as to the method and style of the drafting of the Code. This, of course, has been a constant pre-occupation

during our preparation of the draft clauses. The simplest way to respond to this aspect of our terms of reference will be to draw attention to some stylistic features of our draft.

2.15 *A conventional method.* We have in general employed a conventional method of statutory drafting. It is important that professional users of the Code should feel that they are dealing with an entirely familiar kind of material and should be comfortable and assured in its use. The production of legislation as novel in one way as a criminal code is in this country might have been felt to be a tempting occasion for an experiment in drafting method. We were quite sure that any such temptation ought to be resisted.

2.16 *Clarity and communication.* The matters with which our draft deals are by no means all simple. The concepts of the general part of the criminal law tend to be of an abstract nature; full statement of the law involves the making of quite subtle distinctions and the frequent qualifying of basic propositions; a full understanding of the law often depends upon the reading together of a number of provisions, which cannot always appear alongside one another. We have to insist a number of times in this Report that the law with which we are dealing is complex and that its statement is sometimes inevitably elaborate. But we distinguish what has to be said from the manner of its saying. We have at all times borne in mind the high importance of clarity and have tried to express even the most complex matters in a lucid way; and we have pursued a conscious policy of communicativeness in order to assist the reader. These points may be worth brief illustration.

2.17 (i) *Clarity.* Apart from using language that is as simple as possible, the draft clauses make liberal use of numbered and lettered paragraphs wherever such sub-division will usefully break up the mass of a complex statement and help to expose its logical structure. This is, of course, a drafting method much in use. We refer to it because we have deliberately adopted it for the sake of clarity, always with the reader in mind. Cross-references to other Code provisions almost always include a parenthetic indication of the subject-matter of the provision referred to. The many sidenotes to the text should facilitate the user's grasp of the contents and meaning of long clauses. An obvious purpose of many of the Illustrations in Schedule 1 is to elucidate provisions which may not be easy on first reading.[6]

(ii) *Communication.* We have deliberately included some phrases and even whole provisions for the sake of the avoidance of doubt rather than because they are strictly necessary. An example is clause 34 (1), which relates to the liability of a corporation for a strict liability offence. The bulk of clause 34 concerns fault offences. If subsection (1) were not included some readers might be held up in their reading of the principles of corporate liability by a doubt about offences not involving fault. The liability of corporations for such offences in fact follows from the definition of "person" in clause 5 (1) and the terms of clauses 19 (use of "act") and 33 (vicarious liability)—if not, indeed, from the definition of "person" alone. There is no reason why the reader should be obliged to discover this for himself.

2.18 *Reading a clause as a whole.* It goes without saying that any section of a statute (indeed, any statute) must be read as a whole. One part may qualify

[6]As to the sidenotes and Schedule, see below, paras. 3.6 and 3.7.

or throw light upon another. This makes it in general unnecessary, we believe, to introduce phrases such as "subject to [a later subsection]" into major propositions. Such phrases do more by way of reducing the clarity of a clause than they achieve in communicativeness. With rare exceptions we have eschewed express cross-reference to qualifying provisions. The exceptions are cases where omission of the phrase would demand too much of the reader.

2.19 *Use of the present tense.* One deliberate feature of the style of the Code that should not pass unnoticed is its consistent reference wherever possible, throughout Parts I and II, to the time at which an act is done that may lead to criminal proceedings. Parts I and II (with the exception of a few clauses) establish the circumstances in which people commit offences. They are concerned, that is to say, with the substance of the criminal law rather than with the criminal process. Some statutory provisions, however, state matters of substance as it were retrospectively, from the vantage-point of the trial, or even, if taken literally, make a person's committing an offence or (more commonly) his having a defence depend upon the fact of charge or trial. The defence of dimished responsibility is declared by section 2 of the Homicide Act 1957 by saying that a person who kills another "shall not be convicted of murder if he was suffering from" an appropriate abnormality of mind. Section 5 (2) of the Criminal Damage Act 1971 states conditions under which a person "charged with a offence" is to be treated as having a lawful excuse. We believe that matters of substance should be kept as distinct as possible from matters of process. Accordingly wherever possible we express principles of liability by reference to the time of the events that may give rise to liability—that is, in the present tense. (Very rarely this method cannot be adhered to: see paragraph 12.20 below for a reference to one enforced departure from it.)

Language

2.20 *Simplicity and economy.* We have adopted, so far as possible, a simple relatively spare style, avoiding redundant expressions. Statements should not be longer than they have to be; and even when unavoidably long, they should be easy to read. As an example of our adherence to this precept, and also of the point made in the preceding paragraph, we may refer to our rewriting of part of section 5 (2) of the Criminal Damage Act. That section begins:

> "A person charged with an offence to which this section applies shall, whether or not he would be treated for the purposes of this Act as having a lawful excuse apart from this subsection, be treated for those purposes as having a lawful excuse—
>
> (a) if at the time of the act or acts alleged to constitute the offence he believed that the person or persons whom he believed to be entitled to consent to the destruction of or damage to the property in question had so consented, or would have so consented if he or they had known of the destruction or damage and its circumstances . . ."

Our clause 88 reads:

> "A person does not commit an offence to which this section applies if—
>
> (a) he knows or believes that the person whom he believes to be entitled to consent to the destruction or damage has so consented; or

(b) he believes that that person would so consent if he knew of the destruction or damage and its circumstances."

2.21 *Propositions in the alternative.* Because it aims to be comprehensive, the Code must often provide for a number of alternative situations. We are aware of the extent to which the statement of the propositions in the alternative or in a series of variations is a feature of the draft clauses. This method of drafting is inevitable if excessive repetition is to be avoided. We do not think that it should cause undue difficulty.

Take clause 15 (double jeopardy) by way of example. Subsection (1) looks very elaborate because of the number of alternatives covered. But in a particular case the court will probably be concerned with only one of them. The relevant proposition might be—

"A person shall not be tried for an offence . . . of which he has been acquitted"—

which could hardly be simpler. Only slightly more complex is the proposition—

"A person shall not be tried for an offence . . . when the allegations in the indictment . . . include expressly or by implication all the elements of an offence of which he has been acquitted."

Clause 15(1) and similar provisions in fact consist of a series of quite simple propositions. We believe that the elementary skill involved in reading such a provision so as to extract the relevant proposition is one that can readily be learned by a intelligent layman and that the drafting style should present no problem at all to a trained lawyer.

2.22 *Modern words in familiar senses.* Recent statutes have, of course, begun to modernise the language of the criminal law. In the context of damage to property, for example, the word "maliciously" was abandoned by the Criminal Damage Act 1971; and it is not used in our clauses relating to offences against the person, which, like the 1971 Act, describe offences as being committed intentionally or recklessly. We have pursued this policy of substituting familiar contemporary terms for ancient technical ones. An obvious example is the substitution (in clause 31) of "procures, assists or encourages" (the commission of an offence) for "aids, abets, counsels or procures". We have sought in general to use words as they are used in ordinary speech.

2.23 *Words given technical meanings.* It has been necessary, however, to give some terms special or extended meanings for the purposes of the Code or of particular provisions. This is dictated by the demands of precision, consistency and (above all) brevity. Some words are used as a kind of statutory shorthand, avoiding much verbosity and repetition. Among the words used in special ways for these reasons are the key word "act" (see paragraph 7.3) and the words "intoxicant" (defined widely enough to include many medicinal drugs) and "force" (which in clause 47 includes a threat of force and the detention of a person without the use of force). Some of the "fault terms" defined for Code purposes by clause 22 have meanings slightly wider or narrower than some would normally attribute to them.

2.24 *Terms variously used.* There are some basic items in the vocabulary of the criminal law, much used in our draft, that have slightly different meanings in different contexts. This occasionally produces a minor inelegance. We have preferred to tolerate this rather than face the evils (multiplication of terms or greater complexity of drafting) that would result from attempts to eliminate it. We refer here to the items in question.

(i) *"Offence".* This word refers both to a category of conduct (e.g. murder) and to particular conduct falling within that category (e.g. a murder). It may also refer to conduct that would fall within the category if a certain condition were satisfied (e.g. that it took place within the jurisdiction or after the commencement of the Act). We are satisfied that no ambiguities result from the chameleon nature of this term.

(ii) *"Commits" and "is guilty of".* These terms are used interchangeably in our draft; the choice at any point is dictated by considerations of drafting convenience, familiarity of usage, felicity of expression, and the like. Both terms have two uses. A person may be said to commit or be guilty of an offence if he does the act specified for it with any fault required: this is the common usage of Part II of the Code and of many provisions of Part I. But it may also be said that he does not commit or is not guilty of an offence if (though he does the act with the fault required) he has a given defence; this is the usage in particular of clauses 45-49. Once again, we are satisfied that no ambiguity results.

(iii) *"Act".* If A shoots B, who dies, it is natural to say that A's act is killing B. But it is equally natural to say that firing the gun is his act and B's death its result. And if it is relevant that B is a British citizen, we may describe A's act as firing at, or killing, a British citizen; B's being a British citizen is an element in the act we identify. Far from regretting this adaptability of "act", we build upon it so as to use the term as a highly flexible Code tool (see paragraph 7.3).

Clause 5: Interpretation

2.25 *Clause 5 (1)* does two things. It gathers together all words and phrases which are the subject of interpretation provisions elsewhere in Part I, except those defined or interpreted only for the purposes of the clauses in which the explanations occur. Secondly, it defines or partially defines other words and phrases which require explanation for the purposes of the Code. The reader is able to consult the subsection to see whether any expression used in the Code, although not explained in the clause in which he finds it, has a special Code meaning. The subsection is modelled on section 189 (1) of the Consumer Credit Act 1974.

2.26 *Future enactments relating to offences.* We assume that post-Code legislation creating or relating to offences will use the language of the Code whenever appropriate and will provide that, insofar as it concerns offences, it is to be read as one with the Criminal Code Act.

2.27 *Clause 5 (2)* derives from section 189 (7) of the Consumer Credit Act. It is a very sensible provision (if it is strictly necessary), avoiding the need for phrases like "of this Act" after a reference to a section or "of this section" after a reference to a subsection.

Coping with complex provisions

2.28 *Some practical points.* Finally, we return again to the inescapable fact that the code—especially Part I—cannot be a simple document. At present the general principles of the criminal law are to be found (if found at all) in an untidy variety of sources and to a large extent in imprecise form. It should be no surprise that they prove to demand elaborate expression when brought together in one statutory text. With this in mind we refer to two practical implications of a reduction of the law to a form such as we propose.

(i) *Adjustment to the Code.* We see the need for a generous period between enactment of the Code Bill and its coming into force, so that its professional users may familiarise themselves with it. Since it is largely a work of restatement, they will find in it relatively few new concepts or principles. But there is some new language; some old language put to new uses; and a new organisation of the basic material of the criminal law. Criminal law codification is a big step that will inevitably have some painful short-term consequences.

(ii) *The Code, the judge and the jury.* An objection to draft criminal legislation that is sometimes voiced is: "How can a jury be expected to understand that?" Another is: "That provision has many ingredients, upon all of which in every case the judge would have to direct the jury; there are too many." If objections such as these are well-founded in principle, our draft clauses, like much other legislation, must fail. But the objections are misconceived. The answer to both of them is the same. The judge stands as mediator between the Code and the jury. He filters, translates and renders concrete the rules that the jury must apply. He filters by troubling the jury only with those ingredients of a complex provision that he identifies as raising issues for their consideration in the case in hand, having regard to the state of the evidence. He translates, partly by applying to the controlling provision any other provisions of the Code (such as an interpretation provision) that affect its meaning or application, and partly by adopting a means of expressing its concepts that will suit his particular lay audience in the context of the case. And he renders concrete by reducing abstract language (such as "omission") to the terms of the case (as by referring to the defendant's alleged failure to do a particular act). In the result he may or may not use in addressing the jury the very words of the controlling provisions. Most often, of course, he will; for commonly the statutory language will be simple and untechnical. But the kinds of objections mentioned at the beginning of this paragraph are not raised when such language is used; and the fact is that the technical and the complex are not always avoidable. (What is said here of judge and jury applies also to the justices' clerk and his bench.)

The enactment and revision of the Code

2.29 If the project for a criminal code finds favour, the problem of enacting it arises. The enactment of the four parts envisaged would be a massive operation and is unlikely to be contemplated for many years. But the Code could be enacted in stages. Even the enactment of Part I would be a substantial operation. It has been written as a whole and its clauses are closely inter-related so that it would be difficult to bring it into force in stages without substantial re-writing. It could, however, be enacted, if that were necessary, in several stages (for example the mental disorder provisions could be extracted)

with a view to consolidation and bringing into force as a whole at a later date. Clearly, however, it would be desirable to enact Part I as a whole. If that were done the great majority of its provisions could be immediately operative with, we believe, beneficial effects on the criminal law. Presumably this would not be done unless the government had determined to follow it up by the enactment of some of Part II. Until that were done, a few clauses of Part I would have no function.

2.30 The reformed law of offences against the person (if not already enacted) and criminal damage offences might be suitable candidates to initiate Part II. The draft clauses offered show how these offences can be defined in the style and terminology of the Code. Together, they constitute a sufficiently substantial and important part of the criminal law to allow the Code to have a significant effect in the courts at all levels and to pave the way for further codification. The fact that, initially, most of the substantive law will consist of pre-Code offences is not a fundamental objection. This is inevitable during a transitional period and it would probably be many years before pre-Code offences disappeared. Any objection would be of degree rather than of principle.

The development of Part II

2.31 Assuming that the Code could be brought into operation in this way, there would remain the problem of the incorporation of other particular offences in Part II. Each group of offences will require revision to ensure conformity with the language and style of the Code, apart from any substantive revision that may take place on other grounds. The group might then be enacted in a separate Bill for incorporation into the Code at a later date by a consolidating measure. Alternatively, the group might directly be added to the Code—in much the same way as we propose that the new law of offences against the person should be initially enacted as part of the Code. We recognise that such gradual extension of the Code would involve problems of ordering and numbering sections. It would be undesirable to have constant changes in section numbers. These problems could be resolved only in consultation with the office of Parliamentary Counsel and it would be premature for us to offer suggestions as to how it might be done.

The Code and common law offences

2.32 One of the objects of codification is to define all offences authoritatively and as precisely as possible. An objective of the Law Commission is to eliminate all common law offences and it may be that this will be achieved before the enactment of the Code. In our opinion, however, the abolition of all common law offences, though highly desirable, should not be regarded as a necessary pre-condition of the enactment of the Code. Just as the Code can co-exist with offences in other enactments, so it could co-exist with some surviving common law offences. Codes sometimes provide expressly that all offences are to be found in the Code itself or in other legislation and nowhere else. We have not gone so far. Clause 6 merely provides that no offence shall be created except by, or under the authority of, an Act of Parliament, and this merely re-states the accepted law. We have assumed that the common law of conspiracy to defraud (which is presently

being reviewed by the Law Commission), to corrupt public morals and to outrage public decency will have been abolished; but other provisions of the Code allow for the possible continuation of common law offences for some time after its enactment. Many of the provisions of Part I could be applied to common law offences no less readily than to statutory crimes—e.g., the law relating to proof, parties, mental disorder, intoxication and many other matters. On the other hand, provisions relating to the meaning of particular words—for example, fault terms (clause 22), assume the existence of an enactment and could not apply; but these will not apply to pre-Code statutory offences either so there is no significant difference. The abolition of common law offences has sometimes proved to be a difficult and protracted business. The fact that the process may not have been completed should not be regarded as a bar to the enactment and operation of the Code.

Machinery for revision

2.33 It is inevitable that the construction of the Code will generate a new body of case-law. If this is allowed to accumulate indefinitely the relevance of the Code becomes progressively less and many of the advantages of codification are lost. It is perhaps significant that a recent treatise on *Canadian Criminal Law*[7] contains a 36-page table of cases but no table of statutes or of references to the sections of the Canadian Criminal Code. Canadian textbooks are devoted, no less than their English counterparts, to the discusssion and analysis of case-law.

2.34 Though the proposed rules of construction attempt to guard against it, there is a risk that rules developed through precedent will come to conflict with any ordinary meaning of the words used in the Code. This process can be observed, not only in relation to the Canadian Code, but also in relation to modern English statues. When it occurs, the words of the Code are misleading and a trap for the unwary or uninformed. The remedy this, there should exist machinery for the regular scrutiny, up-dating and reform of the Code. A body might be established under the aegis of the Law Commission whose function it would be to propose amending legislation from time to time so as to ensure that the Code continues to be an up-to-date and accurate statement of the law as applied by the courts and to remedy any defects which have emerged in its operation.

[7] By Don Stuart (The Carswell Co. Ltd.), 1982.

CHAPTER 3

CONSTRUCTION OF THE CODE

Rules of construction

3.1 Our terms of reference require us to consider and make proposals in relation to the rules which should govern the interpretation of the Code. When enacted, the Code will be one statute among the vast number in the statute book and it may be questioned whether it is practicable or appropriate to lay down any special rules for its interpretation. Can the courts be expected, when construing the Code, to put aside general principles applicable to all other statutes and adopt a new approach? We believe that while many of the general principles will, of course, continue to apply to the Code, there are some special considerations which justify certain particular rules.

3.2 *Construction of criminal legislation.* It has long been recognised that statutes creating criminal offences should, in some respects, be approached differently from those dealing only with civil law. The Code will in due course incorporate all of the most important criminal offences. Moreover, post-Code legislation will create other "Code offences" which will be governed by the general principles of liability stated in Part I of the Code. The process will take many years but, eventually, all criminal law will consist of Code offences. Offences, whether for incorporation in the Code or not, should, after its enactment, be drafted with any special Code rules of interpretation in mind. Rules of construction stated in the Code should therefore be seen not simply as rules for the construction of one statute but as rules for the construction of criminal legislation. If they may be so regarded, their existence requires no further justification. We are encouraged in this opinion by the fact that so eminent a lawyer as Lord Wilberforce, in the debates on the Theft Bill 1968[1], thought it appropriate to introduce an amendment laying down special rules for the construction of that Bill. The case for doing so with respect to the Code is immensely greater because of its more general nature and because, unlike the Theft Act, it has been drafted with a particular approach to its construction in mind.

3.3 *The ordinary meaning of the words.* A prime object of codification is the provision of a clear and authoritative statement of the criminal law. Ideally, it should enable the reader, or at least the expert reader, to ascertain the state of the law with as much precision as the English language permits, without reference to any other source. The ideal is unattainable but it is one at which those responsible for the drafting, the enactment, the application and the amendment of the Code should aim. Above all, the Code should not be misleading. It will become misleading, however, if its words are given a meaning which they cannot reasonably bear. Some modern criminal legislation has suffered this fate, with the result that the language of its provisions can no longer truly be said to express the law.[2] We believe that it

[1] *Hansard* (H.L.), 1968, vol. 290, col. 897.

[2] A striking instance is the decision of the House of Lords in *R.* v. *Ayres* [1984] A.C.447, relating to the Criminal Law Act 1977, s. 5(2). For critical commentary, see [1984] Crim. L. R. 353.

is vital for the success of the Code that the courts remain faithful to the trite precept that its provisions should be—

> "interpreted and applied according to the ordinary meaning of the words used read in the context of the Act . . ."

Lord Wilberforce thought it worth proposing this principle for inclusion in the Theft Bill; and we adopt it in clause 3(1) as the first rule for the construction of the Code.

3.4 *"Large and liberal" construction.* Lord Wilberforce's amendment—presumably borrowing from the New Zealand Acts Interpretation Act 1924[3]—went on to provide that the words of the Theft Bill should be "given a fair, large and liberal interpretation." No one could object to "fair" but the words, "large and liberal", seem to be inappropriate, particularly in a criminal statute. Lord Morris of Borth-y-Gest[4] (who approved of the opening words of the amendment) fairly asked, "Do you construe it liberally for the prosecution or liberally for the defendant?"

3.5 *The "purposive" approach.* It is fashionable to adopt a "purposive" approach to the construction of statutes and this has been applied to criminal legislation. It assumes that the court knows what the purpose of the legislator is. We considered whether the Code should begin with a statement of the general purposes governing the definition of offences, such as that in the American Model Penal Code, section 1.02. We decided that this would not be profitable. Some of the purposes stated in the Model Penal Code are inappropriate to English law as it is and will continue to be under the Code and others seem either self-evident, so as not to be worth saying, or potentially dangerous. If the legislator is not able to state general purposes, a purposive rule of construction leaves it to the individual judge or magistrate to apply his own notion of the general purpose of the legislation. This would not be conducive to the consistent approach to construction that we think desirable. As well as setting out general purposes, the Model Penal Code also requires the courts to have regard to "the special purposes of the particular provision involved."[5] It does not state what the special purposes of the particular provisions in the Code are. What could it usefully say? "The purpose of this section is to discourage and punish bigamy?" Everyone knows that, but does it really provide any assistance in the construction of the section? On the other hand there may be dangers. Some of the difficulties which have arisen in construing the Theft Acts might be explained by an assumption that the purpose of the legislation is to punish those who deal dishonestly with property. It was the adoption by the courts of whatever meaning of "appropriation" would lead to the conviction of such a person in the particular case which produced the conflict of authority that the House of Lords had to attempt to sort out in *R.* v. *Morris* and *Anderton* v. *Burnside.*[6] The purpose of the legislature is much more complex. Parliament could have made it an offence simply to deal dishonestly with property but it did not do so. On the

[3]Sect. 24, set out in the Law Commission Report on the Interpretation of Statutes (1969), Law Com. No. 21, para. 33.
[4]*Ibid.* cols. 907-908.
[5]Sect. 1.02 (3).
[6][1983] 3 W.L.R. 697.

contrary, it created an elaborate structure of offences penalising dishonesty when it finds expression in more or less closely defined ways. Where that is the purpose of the legislator, it is best implemented simply by giving a fair meaning to the words used in the particular provision or group of provisions. This brings us back to the rule already stated. We therefore consider it unnecessary and undesirable to state any special rule of purposive construction.

Illustrations, headings and sidenotes

3.6 *The context of the Act: illustrations.* Legislation must be stated in general terms. However well this is done, in a matter of complexity—and the Code has to deal with some very complex matters—the purpose and effect of the resulting abstract propositions may, at first sight, be obscure even to the experienced reader of statutes. Every teacher knows that the quickest and most effective way of illuminating any abstract proposition is by an example. We have therefore provided in Schedule 1 a series of illustrations of the functioning of the clauses of the Code wherever we think it will be helpful to the reader. We believe that the illustrations would be of value to members of Parliament in enabling them to appreciate the effect of the law in the making, to members of the profession in applying the law, to students in learning it, and to everyone concerned in understanding it.

For some time it was our intention that these illustrations should be accompanied by a commentary. We came to the conclusion that this would be incompatible with the status which we hope the illustrations will have. They have been included in a schedule as a permanent aid to the interpretation of the Criminal Code Act. There is a persuasive precedent for this course in the Consumer Credit Act 1974. Schedule 2 of that Act provides "Examples of use of new terminology." As Parliament found this method acceptable, we hope that the not entirely dissimilar "illustrations" which Schedule 1 provides will meet with favour. A textual commentary would however have been a different matter. Parliament might have difficulty in accepting material of that kind as an element in the legislation. If, for example, the Bill should be amended in Parliament, consequential amendments to the illustrations would be a relatively easy matter, compared with the re-writing of parts of a commentary.

Clause 3 therefore provides that "the context of the Act" includes the illustrations in Schedule 1. The court will be entitled to have immediate recourse to the illustrations to satisfy itself as to the meaning of a section of the Act. They are not provided merely to help to resolve ambiguities though, as clause 4 (which is modelled closely on section 188 of the Consumer Credit Act 1974) makes clear, the illustrations are not exhaustive and, if they conflict with any other provision in the Act, that provision shall prevail. They are only a guide to the meaning of the Act; but, after the scrutiny which they may be expected to receive before the Bill becomes law, an unusually authoritative guide.

3.7 *The context of the Act: long title, cross-headings and sidenotes.* In order that there should be no doubt that the court may refer to the long title, cross-headings and sidenotes to ascertain the meaning of any provision, clause 3(2)(b) provides that they too are included in "the context of the Act". It is proposed that recourse to these features may also be immediate, not

conditional upon the discovery of some ambiguity. It is of course essential that these items should be drafted not only with care but also with this possible use in mind if they are to fulfil this role. We draw particular attention to our use of sidenotes. These have been supplied not only to clauses but also to most subsections and, in some cases, even to paragraphs. As will be seen, we contemplate that the first sidenote to a section will serve as the title of the section for the purpose of "Arrangement of Sections" and be printed in roman type (as conventionally); and that subsequent sidenotes will be italicised. All these are intended to be a permanent feature of the Code. Their primary purpose is to assist the reader to find relevant provisions and to enable him rapidly to grasp their general effect. Some sidenotes have a subsidiary function of providing useful terminology which could not easily be accommodated in the particular section or subsection. Examples are "criminal negligence" (clause 22 (b)) and "diminished responsibility" (clause 58 (1)).

Resolution of ambiguities

3.8 When a court has read provisions of the Act in their context, as described in the preceding paragraphs, it may still find some ambiguity. Clause 3 (3)(a) provides that the court may then have resort to the Report of the Law Commission on The Codification of the Criminal Law which, we assume, will precede the enactment of the Criminal Code Bill. If that Report adopts one of the most fundamental of our proposals, namely that the Code should incorporate reforms proposed by public bodies, it will draw upon other reports of its own, of the Criminal Law Revision Committee, the Butler Committee on Mentally Handicapped Offenders and others. The subsection provides that reference may also be made to these other reports. The reports may provide guidance as to the intended meaning or effect of particular provisions; and it is clearly right that they should be taken into account in order to resolve ambiguities. At this stage, purposive construction has a role.

3.9 *Pre-Code law.* Clause 3 (3)(b) provides that, for the resolution of ambiguities, regard may be had to the law in force before the passing of the Code Bill. This is, in effect, a restatement of the rule in *Bank of England* v. *Vagliano Bros.*[7] in relation to the Bill. We noted that Lord Wilberforce in the parliamentary debate referred to above[8], included in his amendment a provision prohibiting absolutely reference to any decisions of the courts prior to the passing of the Theft Act, other than decisions dealing in general terms with the interpretation of statutes. The amendment was of course withdrawn. We do not think it practicable or desirable to include any such provision in the Code. The best illustration of our reasons is the law of theft (which will eventually be an important part of the Code) itself. The Theft Acts assume the existence of the whole law of property, much of which is to be found only in decided cases. But the Theft Acts are not unique in this respect and even the statement of general principles in Part I of the Code assumes the existence of the civil law. No doubt Lord Wilberforce had in mind, not the civil law, but cases on the repealed law of larceny; but the citation of such authorities, with

[7][1891] A.C. 107, H.L.
[8]See para. 3.2, n. 1.

rare exceptions, does not appear to have been a problem under the Theft Acts. There might be more temptation to resort to the earlier law in the case of those parts of the Code which are merely restating it. The clause implicitly prohibits it unless there is an ambiguity; and the provision of illustrations should both reduce the possibility of ambiguity and diminish the temptation to resort to earlier case-law, or indeed, legislation.

Definitions

3.10 It was at one time our intention to provide, by some typographical device, a signal to the reader of the Code that a word or phrase is defined elsewhere in its provisions. At a late stage we abandoned this proposal, though with some regret. It is in the nature of a code of this kind that large numbers of terms are defined. The consequences would have been that some clauses would have contained large numbers of signals; and that frequently the reader would be sent off to a definition which, so far as that section was concerned, added nothing because the word was used in the context in its ordinary meaning.

CHAPTER 4

PRELIMINARY PROVISIONS

Clause 1: Short title, commencement and extent

4.1 *Introduction.* The matters in clause 1 are normally dealt with at the end of statutes rather than the beginning. However, we envisage that it will be a considerable time before the Code is completed. The number of sections in our draft of the Criminal Code Act will inevitably be increased by the inclusion of further offences in Part II, to say nothing of what may appear in Parts III and IV. The numbering of the sections should therefore be such that it can run on in the future. It would be a mistake to close it prematurely by following the usual rule for statutes. Accordingly we think it is right to place this clause at the beginning. In addition we feel that it is perhaps appropriate to begin a new Code with its title.

4.2 *Short title.* We propose that the Code should be cited as the Criminal Code Act 19–. Subsection (1) provides accordingly.

4.3 *Commencement.* We anticipate that some time will elapse between the passing of the Code and its coming into force. This will allow for a period of familiarisation with its provisions and for the making of any necessary procedural rules. The precise commencement date is of course purely speculative at this stage. The opening words of subsection (2), which are based on section 35 (1) of the Theft Act 1968, are no more than an indication of how the commencement provision might be expressed.

4.4 *Transitional provision.* We anticipate that the Code will have effect in relation to offences wholly or partly committed after it comes into force, and subsection (2) so provides. The reference to offences "partly" committed is to allow for cases where a result which is an element of an offence occurs after the commencement of the Code, but the act causing it was done before that date. For example, a person may shoot his intended victim who dies some time later. If in the interval the common law of murder has been replaced by the offence of murder in clause 56 the question arises of which offence he may be convicted. Subsection (2) follows the precedent of section 35 (1) of the Theft Act 1968 in providing that the Code provisions should apply, as being the law in force at the time when the result occurs. There is one qualification to subsection (2) concerning the application of Part I of the Code. This is set out in clause 2 (4) to which subsection (2) is subject.

4.5 *Extent.* Our terms of reference require us to make proposals for a criminal code for England and Wales. It is not intended that the Code should extend to Scotland or Northern Ireland. Subsection (3) provides accordingly.

Clause 2: Application of Part I

4.6 The application of Part I of the Code has been considered above.[1]

[1]See paras. 2.4-2.8.

Clause 6: Creation of offences

4.7 This clause provides that no offence shall be created except by, or under the authority of, an Act of Parliament. It confirms the views expressed by members of the House of Lords in *Knuller* v. *D.P.P.*[2] that there is no longer any power in the courts to create new offences, despite certain dicta apparently to the contrary in the earlier case of *Shaw* v. *D.P.P.*[3] The existence of such a power, with the resulting uncertainty as to the scope of the criminal law, is incompatible with the fundamental aims of a criminal code to which we have referred above.[4]

Clause 7: Law determining liability

4.8 *Introduction.* This clause states general principles for the interpretation of statutes creating offences or providing penalties for offences. These principles are derived from what is sometimes known as the principle of legality, but which is often referred to by the Latin maxim *nulla poena sine lege.* As general principles of interpretation the provisions in this clause would of course yield to express provision to the contrary.

4.9 *Subsection (1).* The effect of the subsection is that an enactment which creates or amends an offence has effect only in relation to conduct taking place wholly or partly after the enactment comes into force. Conduct occurring before that date will thus be dealt with according to the law then in force and will not be affected by a subsequent change in the law.[5] In this way conduct which did not constitute an offence at the time it took place will not be made retrospectively criminal. The subsection thus gives effect for criminal law to the general presumption in English law against the retrospective operation of legislation.[6]

4.10 *Continuing acts.* Subsection (2) provides a refinement of the general principle in subsection (1) for the case of a person engaged in a continuing act which did not constitute an offence when he began to do it. It gives effect to the proposition stated by Baggallay L.J. in *Burns* v. *Nowell*[7]:

> ". . . before a continuous act or proceeding, not originally unlawful, can be treated as unlawful by reason of the passing of an Act of Parliament by which it is in terms made so, a reasonable time must be allowed for its discontinuance. . ."

In that case (which concerned a civil action in respect of the wrongful arrest of a ship) the Court of Appeal took the view that the carrying of native labourers on board a ship under contract with them to return them home, which was lawful in its commencement, did not become unlawful, by virtue of being continued without a licence, as soon as the relevant Act came into operation. The ship's master was unaware of the passing of the Act and was in no position at any time during the voyage to obtain the requisite licence.

[2][1973] A.C. 435, at 457, 464-465, 490, 496.
[3][1962] A.C. 220, at 267-8.
[4]Paras. 1.3-1.9.
[5]Hence an enactment providing that certain conduct shall cease to be an offence will not affect a person's liability in respect of such an offence committed before the enactment came into force. *Cf.* Interpretation Act 1978 s. 16(1); *R.* v. *West London Stipendiary Magistrate, Ex parte Simeon* [1982] 3 W.L.R. 289.
[6]See *Maxwell on the Interpretation of Statutes* 12th ed. (1969), 215.
[7](1880) 5 Q.B.D. 444, 454.

After uttering the dictum set out above Baggallay L.J. went on to say that, while ignorance of the law was no excuse for the master, it could be taken into account in considering how the act came to be continued and when and how it was discontinued, with a view to determining whether a reasonable time had elapsed without its being discontinued.[8]

4.11 The exceptional circumstances of *Burns* v. *Nowell* are unlikely to recur in modern times. However, we feel that the principle stated is of general application and should be incorporated in the Code. Where an enactment creating an offence takes effect immediately it is passed or made, it would be wrong for a person engaged in what had been until that moment a lawful continuing act to become guilty of the offence at that very moment by virtue of still being engaged in the act. The subsection provides him with what is in effect a defence of discontinuance of the act as soon as practicable. If the act is not discontinued as soon as practicable the offence is committed and will subsist from the moment the enactment takes effect.

4.12 It should be emphasised that the principle involved is narrow, and, in particular, that it is not intended to make significant inroads into the general principle that ignorance of the criminal law is no defence (clause 25(2)). The discontinuance is expressed as having to take place as soon as practicable after the passing or making of the enactment, rather than after the enactment takes effect. Hence, if the enactment itself provides for a period of time to elapse before its provisions come into force, as penal enactments usually do, the person doing the act will be put on notice that to avoid liability he will have to discontinue it. The question will then be one of what it was practicable for him to do in the circumstances. We anticipate that cases will be very rare in which it will not be practicable to discontinue the act in time, where the relevant provision takes effect after the enactment is passed or made.

4.13 *Subsection (3).* This subsection is the counterpart to subsection (1) in relation to the penalties which may be imposed on conviction of an offence. It is clear in existing law that the presumption against retrospective operation is applicable to enactments increasing penalties[9], although, as stated above, the presumption may be rebutted by the clear and unambiguous words of the enactment. Where penalties for an offence are decreased between the commission of an offence and conviction of it we think it is right that the person convicted should receive the benefit of the change in the law. The subsection so provides.

Clause 8: Jurisdiction of criminal courts

4.14 *The Law Commission's draft Bill.* Part I of the Code must contain general provisions relating to the jurisdiction of the criminal courts. Full preparatory work has been done by the Law Commission, whose proposals are enshrined in a draft Criminal Jurisdiction Bill appended to their Report on the Territorial and Extraterritorial Extent of the Criminal Law.[10] The greater part of our task has been to extract from the draft Bill those provisions that should appear in Part I[11] and to adapt them to the style of the Code.

[8] *Ibid.*

[9] See e.g. *D.P.P.* v. *Lamb* [1941] 2 K.B. 89; *R.* v. *Oliver* [1944] K.B. 68.

[10] (1978), Law Com. No. 91.

[11] These do not include cll. 5 (creating a new offence of hijacking a ship) or 7 (providing a maximum penalty of life imprisonment for the offence of piracy according to the law of nations).

4.15 Clause 8 achieves a relatively simple statement of the extent of the criminal courts' jurisdiction. It follows, of course, the Law Commission's recommendations as to "the ordinary limits of criminal jurisdiction"—in effect, the meaning of "England and Wales" for criminal law purposes. The method of the draft Bill (clause 1 (1)-(3)) is more complex; in the same passage it reflects the Law Commission's further proposal that the "ordinary limits" should apply equally to proceedings on indictment and to summary proceedings.[12] This additional point ought not, we think, to complicate this clause, in which it should suffice to state the jurisdiction of "the courts administering the criminal law".[13] Part I is not concerned with (though it must here and there refer to) the different courts or their functions.

4.16 *Extraterritorial jurisdiction.* The draft Bill recognises that the territorial limits of jurisdiction may in a particular case "fall to be determined in accordance with [another] enactment". Such other enactments will include clauses 9 and 10, which (following the draft Bill) declare general circumstances in which persons doing acts outside the United Kingdom thereby commit offences. Our reference to extraterritorial jurisdiction (clause 8 (1) (b)) is drafted accordingly: it speaks of "offences declared . . . to be constituted by acts done outside" the ordinary limits of jurisdiction. This formula has proved satisfactory when we have come to draft provisions extending the territorial scope of particular offences: see clauses 55 (2) and (4) (relating to some preliminary offences) and 62 (murder and manslaughter).

Clause 9: Offences on, or by persons employed on British-controlled vessels

4.17 This clause adapts clauses 4 (1) and 9 of the draft Bill in relation to offences on, or by persons employed on, British-controlled vessels.[14] Neither the draft Bill nor our draft, however, refers to offences committed on British-controlled aircraft.[15] These are the subject of section 1 of the Tokyo Convention Act 1967. The Law Commission considered that that Act adequately dealt with such offences and made no relevant recommendations.[16] It would be unfortunate if the Code did not contain all general provisions relating to jurisdiction. On the other hand, the Act of 1967 is a United Kingdom statute; and section 1 is accordingly so drafted that a provision affecting the jurisdiction of the courts of England and Wales only cannot be produced without damage to it. Moreover, the section is part of a code designed for the implementation of an international convention. We realise that there are difficulties about making the criminal Code comprehensive at this point; but we hope that consideration will be given to the possibility of doing so.

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[12]Law Com. No. 91, paras. 25 *et seq.*

[13]We omit "of England and Wales", to which alone the Code will extend.

[14]Cl. 4 (2) of the draft Bill (which relates to the place where a person may be charged with such an offence) is not adopted; it is not the proper concern of Part I of the Code. (We note, by the way, that there is no similar provision in cl. 8 (indictable offences committed abroad by Crown servants)).

[15]Or to hovercraft, to which the Tokyo Convention Act 1967, s. 1, with necessary modifications, is applied by the Hovercraft (Application of Enactments) Order 1972 S.I. 1972 No. 971: see Law Com. No. 91, p. 29, n. 125.

[16]Law Com. No. 91, paras. 71 and 72.

Clause 10: Indictable offences committed by Crown servants

4.18 This clause adapts clause 8 of the draft Bill in relation to indictable offences committed abroad by British citizens who are Crown servants.

4.19 *Subsidiary provisions* of clauses 8 and 9 derive from the draft Bill. It will be seen that we propose the relegation to a Schedule of some matters unsuited to Part I of the Code.

CHAPTER 5

PROSECUTION AND PUNISHMENT

Clause 11 and Schedule 3. Prosecution, punishment and miscellaneous matters

5.1 The function of Part II of the Code is to define offences. To enable it to fulfil that function as clearly and concisely as possible we have excluded from it certain matters that are commonly included in sections defining offences. Instead, these matters are contained in Schedule 3. They are (i) whether the offence is triable only on indictment or only summarily or either way; (ii) the maximum sentence of imprisonment and (where applicable) fine; (iii) any requirement of the consent of the Attorney-General, Director of Public Prosecutions—or anyone else—to the institution or conduct of proceedings; (iv) whether there are any, and if so what, offences of which the defendant may be convicted other than the offence specifically charged; (v) any time limit on the institution of proceedings and (vi) other miscellaneous matters, of which an example is whether the "common form" provision for the liability of officers of corporations (clause 35) applies to the offence. Clause 11 is concerned with matters (i), (ii), (iii), (v) and (vi) and clause 12 with (iv).

5.2 Whether this method achieves its purpose may be considered by examining the "sample offences" which we have drafted for Part II. We think that, in general, it does though its efficiency is limited where an offence or concept (e.g. diminished responsibility—see clauses 58 and 59) requires elaborate procedural provisions of its own. The method has, we believe, the considerable further advantage of enabling the reader of Schedule 3 to see at a glance how, if at all, each of these matters is dealt with by the Code for the offence with which he is concerned.

5.3 *Clause 11 (1) and (2)* require no further comment.

5.4 *Clause 11 (3).* Paragraph (a) provides for a case where the offence is tried on indictment, whether it is only so triable or is triable either way. Column 4 of Schedule 3 states the maximum sentence of imprisonment and any provision regarding a fine which is specially applicable—e.g., where there is some variation from the provision of section 30 of the Powers of Criminal Courts Act 1973 (general power of Crown Court to fine offender convicted on indictment). Paragraph (b) is concerned with offences triable either way which are tried summarily and makes provision only for variations from the general powers of magistrates' courts to imprison or fine. Paragraph (c) relates to the maximum sentence of imprisonment or fine for offences triable only summarily.

5.5 *Clause 11 (4).* This subsection gives effect to column 5 of Schedule 3 which states any requirement of consent to the institution or conduct of proceedings.

Clause 12: Alternative verdicts

5.6 There are various circumstances in which the present law permits a jury which acquits of an offence specifically charged in an indictment to convict of some other offence. Magistrates at present have no such power but

the Criminal Law Revision Committee have proposed[1] that it should be given to them in respect of certain offences against the person. We have adopted those proposals. Clause 12 and Schedule 3, column 6, codify the present and proposed law on this subject, restating the general principles and providing authority under the Code for the special cases. Subsection (1) provides for trial on indictment and subsection (2) for summary trial.

5.7 *Clause 12 (1) (a).* Paragraphs (b), (c) and (d) of subsection (1) state principles which are generally applicable. Paragraph (a) deals with particular cases, not falling within those general principles, where the law allows conviction of an alternative offence. Where the offence charged is included in Part II of the Code, column 6 of Schedule 3 specifies any other offence of which the defendant may be convicted on that charge. Sub-paragraph (i) refers to these cases and sub-paragraph (ii) refers to all other cases, whether of Code or pre-Code offences, where an alternative verdict is permissible.

5.8 *Paragraph (a) (i).* The alternative verdicts for offences against the person follow the recommendations of the Criminal Law Revision Committee (recommendations 20, 34, 36 and 52). Recommendation 36 was that "There should be a provision empowering verdicts of reckless driving and careless driving to be returned on a charge of causing death recklessly." As causing death recklessly is not to be a separate offence but a variety of manslaughter (recommendation 26), Schedule 3 simply allows conviction of these driving offences on an indictment for manslaughter. The Committee's recommendations for alternative verdicts were not comprehensive. They did not recommend, for example, that a jury should be able to convict of manslaughter on an indictment for murder but they can hardly have intended otherwise. The Schedule allows such a conviction.

5.9 *Child destruction and infanticide.* The Committee made no recommendation whether a conviction for child destruction should be allowed on an indictment for infanticide. This is allowed by the existing law; but the Committee propose that the maximum sentence for infanticide should be reduced from life imprisonment to five years.[2] They regarded the offence of child destruction as outside their remit and therefore made no proposal to change the present maximum sentence of life imprisonment. In any event, while the maximum for abortion is life, it is hard to see how the maximum for child destruction could be less—killing the viable child must be more serious than killing the non-viable child. We must assume therefore that the maximum penalty for child destruction will continue to be life imprisonment. A rule allowing a person to be convicted of an offence carrying a higher maximum penalty than that for the offence with which he is charged would be contrary to principle. The Schedule, therefore, does not allow conviction of child destruction on an indictment for infanticide.

[1]Fourteenth Report (1980), Cmnd. 7844, recommendations in paras. 156, 161, 177 and 182.
[2]*Ibid.* recommendation 22.

5.10 *Manslaughter and the "suicide verdicts".* The Committee recommended that the new offence of killing in pursuance of a suicide pact should be an alternative verdict on a charge of murder.[3] They made no such recommendation in the case of an indictment for manslaughter. There is no present law on this matter, since killing in pursuance of a suicide pact *is* manslaughter. Under the present law, however, there may be a conviction of procuring the suicide of another on a charge of manslaughter[4] and, as it is proposed that it shall be permissible to convict of killing in pursuance of a suicide pact on a charge of procuring suicide and vice versa[5], it seems logical that both "suicide verdicts" should be alternatives to manslaughter. The Schedule so provides.

5.11 *Assault on indictment.* Where assault with intent to resist arrest is tried on indictment the Schedule provides that assault is an alternative verdict. Although assault is an included offence, paragraph (b) is not applicable because assault is triable only summarily and so is not an offence within the jurisdiction of the Crown Court.

5.12 *Murder and manslaughter.* Following section 6 (3) of the Criminal Law Act 1967, murder is excluded from the general principle allowing conviction of included offences restated in paragraph (b). Manslaughter, though an included offence, is therefore listed against murder in column 6.

5.13 *Paragraph (a) (ii).* This provides authority under the Code for existing and future enactments, other than the Criminal Code Act, which allow conviction of an offence not specifically charged in the indictment—for example, the provision in section 12 (4) of the Theft Act 1968 that a person indicted for theft may be convicted on that indictment of an offence of taking a conveyance without authority, contrary to section 12 (1) of that Act.

5.14 *Paragraph (b) (i): included offences.* "included offence" is defined in clause 5:

> " 'included offence' in relation to an offence specifically charged means an offence of which all the elements are included, expressly or by implication, in the allegations in the indictment or information."

This definition reproduces, in the terminology of the Code, the concept described in section 6 (3) of the Criminal Law Act 1967. As under section 6 (3), the included offence may be the subject of an alternative verdict only if it is within the jurisdiction of the court. The Crown Court may not convict of an included offence which is triable only summarily.

5.15 *Paragraph (b) (ii)* is best explained by an illustration. If D is charged with robbing P of his car, D might be convicted on that count of theft because robbery includes theft. On an indictment for theft, the jury may, by reason of section 12 (4) of the Theft Act 1968 (preserved by subsection (1) (a) (ii)) convict of an offence of taking the car without authority, contrary to section 12 (1) of the 1968 Act. D may therefore be convicted of an offence under section 12 on the indictment for robbery.

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[3]Fourteenth Report, para. 133.
[4]Suicide Act 1961, s. 2 (2).
[5]Fourteenth Report, recommendation 34.

5.16 *Paragraph (c).* An allegation of an offence does not necessarily include an allegation of an attempt to commit it. Where the fault element of the offence is recklessness the allegation does not include the fault element of intention which must be proved to secure a conviction for an attempt. Paragraph (c) is therefore necessary to state the present law (Criminal Law Act 1967, section 6 (3) and (4)) which is that, on an indictment for any offence, the defendant may be convicted of an attempt to commit the offence charged or of an attempt to commit any other offence of which he might be found guilty on that indictment. A defendant charged with murder could be found guilty on that indictment of manslaughter; so he might be found guilty of attempted manslaughter.

5.17 *Paragraph (d): assisting offenders.* This reproduces the effect of section 4 (2) of the Criminal Law Act 1967. It is included here (rather than left to be incorporated by subsection (1) (a) (ii)) because it is a general provision, applicable to all arrestable offences.

5.18 *Subsection (2).* This subsection implements the recommendations of the Criminal Law Revision Committee in their Report on Offences against the Person[6], paragraphs 156, 161, 177 and 182.

Clause 13: Conviction of preliminary offence when ulterior offence completed

5.19 This clause is based upon the second part of section 6 (4) of the Criminal Law Act 1967. That is a provision that the Criminal Law Revision Committee[7] included for the avoidance of doubt in the draft Bill which became the 1967 Act. The comprehensive nature of the Code requires a similar but substantially wider provision.

5.20 Section 6 (4) applies to attempts but not to incitement or conspiracy. The reason for this probably was that there was no doubt that incitement and conspiracy to commit an offence did not merge in the completed offence whereas there was a view that an attempt to commit a felony merged in the completed felony.[8] Section 6 (4) made it clear that (if there ever was such a rule) it had no application after the abolition of felonies by the 1967 Act. The Code should, however, state the whole law; so clause 13 applies to incitement, conspiracy and attempt. Like section 6 (4), it also applies to assaults and other offences preliminary to some ulterior offence—such as an assault with intent to rob.

5.21 Section 6 (4) applies only to trials on indictment but a similar rule of the common law applies to summary trial: *Webley* v. *Buxton.*[9] Clause 13 therefore applies to summary trial as it does to trial on indictment.

5.22 Section 6 (4) refers to the discretion of the Crown Court to discharge the jury with a view to the preferment of an indictment for the completed offence. Subsection (2) preserves the existing discretion in the Crown Court and any discretion in a magistrates' court to discharge itself with a view to the laying of an information for the completed offence.

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[6]See para. 5.6, n. 1, above.
[7]Seventh Report, Felonies and Misdemeanours (1965), Cmnd. 2659, para. 51.
[8]*Russell on Crime* 12th ed. (1964), 193-195.
[9][1977] Q.B. 481.

Clause 14: Act constituting two or more offences

5.23 This clause is based upon section 18 of the Interpretation Act 1978 (duplicated offences). The purpose of that section was probably merely to ensure that new criminal legislation would not impliedly repeal earlier legislation or make common law offences inoperative.[10] The modified wording used in clause 14 still fulfils that purpose; but it states more clearly the present law, as established in *Bannister* v. *Clark*[11] and *R.* v. *Thomas*[12] that, where an act constitutes two or more offences, the offender may be prosecuted for any or all of those offences, subject to the common law rules against double jeopardy and multiple convictions. The words of section 18, "but [the offender] shall not be liable to be punished more than once for the same offence", are apparently interpreted to incorporate those rules.[13] As they are now codified by clauses 15 and 16, clause 14 is made expressly subject to those provisions.

Clause 15: Double jeopardy

5.24 This clause replaces the common law special pleas in bar of *autrefois acquit* and *autrefois convict* and associated rules, including the analogous rules which apply to summary trial.

5.25 *Subsection (1), (a) and (b),* states the basic rule. It provides that a person shall not be *tried,* that being the effect of the plea in bar, in the circumstances stated in the subsection. The rules cannot be stated so as to bar a prosecution because there must be an indictment or information upon which they can operate. The subsection prevents the trial of a person for an offence of which he has been acquitted or convicted or of which he has been in peril of being convicted. It applies to summary trial as well as trial on indictment. Since, under clause 12 (2) (Alternative conviction by magistrates) it will be possible for a magistrates' court to convict of certain offences other than those specifically charged, paragraph (b) must apply to informations as well as indictments.

5.26 Paragraph (b) protects the defendant from trial for an offence which might have been the subject of an alternative conviction under clause 12 (or the present law which clause 12 will replace) at an earlier trial when he was acquitted. The words, "on sufficient evidence being adduced", make it clear that the paragraph applies where the acquittal was directed by the judge because sufficient evidence had not been adduced. This is a case in which the defendant "might have been convicted" notwithstanding that any conviction would have been quashed.

5.27 *Subsection (1), (c) (i) and (d) (i).* In *Connelly* v. *D.P.P.*[14], Lord Devlin seemed to be of the opinion that the rule of law against double jeopardy was comprehended within the rules stated in paragraphs (a) and (b) of this subsection and that, outside those cases, it was better to rely on the discretion

[10]See Friedland, *Double Jeopardy* (1969), 110-111.
[11][1920] 3 K.B. 598.
[12][1950] 1 K.B. 26.
[13]"Certainly it adds nothing and detracts nothing from the common law:" *per* Humphreys J. in *R.* v. *Thomas* [1950] 1 K.B. 26 at 31.
[14][1964] A.C. 1254 at 1358.

of the court to prevent vexatious prosecutions. Earlier decisions, however, clearly go beyond this and these cases seem to have been accepted as good law by Lord Morris[15], Lord Hodson[16] and probably Lord Pearce. In *Sambasivam* v. *Public Prosecutor of Malaya*[17] the Privy Council also attributed a broader effect to the rule of law; and their decision was accepted as correct by the House of Lords in *D.P.P.* v. *Humphrys.*[18] It seems right, therefore, to propose the broader rule for codification, unless it is fundamentally unsound. In our opinion, however, it is right in principle.

5.28 *Principles.* In the cases dealt with by paragraphs (c) and (d) the defendant has not been in peril of conviction of the offence presently charged because it is a graver offence than the crime of which he has been acquitted or convicted. The present offence, however, includes an offence of which he has been acquitted or convicted. If he was acquitted of the earlier offence his conviction on the present charge would necessarily imply that he was guilty of that offence of which he has been acquitted. If he was convicted on the earlier charge, his conviction on the present occasion would leave him open to punishment for conduct for which he has already been punished. In these circumstances, it is, in our opinion, right in principle that the trial on the second occasion should be barred as a matter of law and not left to judicial discretion.

Cockburn C.J.[19] stated the principle as follows:

> "We must bear in mind the well established principle of our criminal law that a series of charges shall not be preferred and whether a party accused of a minor offence is acquitted or convicted, he shall not be charged again on the same facts in a more aggravated form."

5.29 More recently in *Sambasivam*[20] Lord MacDermott, giving the opinion of the Privy Council, said:

> "The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. The maxim *res judicata pro veritate accipitur* is no less applicable to criminal than to civil proceedings."

This passage was approved by a majority of their Lordships in *D.P.P.* v. *Humphrys.*[21] It related to an acquittal, which is what their Lordships were concerned with in both cases; but the maxim quoted by Lord MacDermott is equally applicable to a conviction.

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[15] *Ibid.* at 1315-1318.
[16] *Ibid.* at 1332.
[17] [1950] A.C. 458.
[18] [1977] A.C. 1.
[19] *R.* v. *Elrington* (1861) 1 B. & S. 688 at 696; 121 E.R. 870 at 873.
[20] [1950] A.C. 458 at 479.
[21] [1977] A.C. 1 at 17 *per* Viscount Dilhorne, at 36 *per* Lord Hailsham, and at 43 and 44 *per* Lord Salmon.

5.30 The principle may be stated as follows: if the offence presently charged consists of elements A, B and C and the defendant has been acquitted or convicted of an offence consisting of A, or B, or C, or A and B, or A and C, or B and C, the trial shall not proceed. It would make no difference that the offence charged on the earlier occasion included one or more other elements, D, E, etc.

5.31 *The allegations in the indictment or information.* Whether the subsection applies depends on the precise nature of the allegations in the indictment or information. If the defendant has been acquitted of driving his motor bike at a particular time and place when disqualified from driving and the present indictment alleges that he committed perjury at his trial by swearing that *he was not driving his motor bike at that time and place while disqualified,* the trial is barred. The allegations in the indictment include (at least by implication) an allegation that he was guilty of the offence of which he has been acquitted. This is in accordance with the decision in *Sambasivam.* If, however, the indictment alleges that the defendant committed perjury by swearing that *he did not drive his motor bike at that time and place,* the trial may proceed. The allegations in the indictment do not include *all* the elements of the offence of which he has been acquitted. This is in accordance with the decision in *D.P.P.* v. *Humphrys.*[22] Far from the trial being barred, there is not even an issue estoppel. Whatever the merits, or lack of them, in this distinction, it seems to represent the law.

5.32 *Subsection (1) (c) (ii) and (d) (ii).* The principle stated above must logically apply not only to offences of which the defendant has been acquitted or convicted but also to offences of which he has been in peril of conviction on an earlier trial for another offence of which he has been acquitted or convicted. For example, if the defendant is presently charged with burglary by entering as a trespasser and attempting to steal a ring, his earlier acquittal of theft of the ring at that time and place must bar the present indictment because he could have been convicted of attempted theft at the earlier trial. His conviction of burglary on the present indictment would, in effect, be a conviction of an offence of which he has been impliedly acquitted. If the defendant has been convicted of theft at the earlier trial he has already been punished for the acts alleged to constitute the attempted theft and should not be put in peril of being twice punished for the same acts. If the defendant is charged with attempted murder, his previous conviction or acquittal for causing serious injury at that time and place would bar the indictment. The previous acquittal would be an implied acquittal of attempting to cause serious injury; so to allow his conviction for attempted murder would be to allow him to be convicted of an offence of which he has been acquitted.

5.33 The draft avoids any consideration of whether the present offence is *substantially* the same as the earlier offence, a matter which troubled Lord Devlin in *Connelly* v. *D.P.P.*.[23] Where the case does not fall within the rules

[22][1977] A.C. 1.
[23][1964] A.C. 1254 at 1340.

stated but the earlier offence is substantially the same as that now charged it will be for the court to decide whether the present proceedings constitute an abuse of its process and, if they do, to stay them under the power preserved by subsection (6).

5. 34 It should be said that the draft is inconsistent with those cases where the court looked not merely at the allegations in the indictment and the elements of the offences in question but also at the evidence adduced to prove those allegations or elements. Though these cases are still cited in *Archbold*[24], they appear irreconcilable with *D.P.P.* v. *Humphrys.* The evidence adduced to prove that Humphrys was guilty of perjury in fact proved that he was guilty of the offence of which he had been acquitted but it was not *necessary* to prove his guilt of the earlier offence in order to convict him of the later; there was no issue estoppel, let alone a bar to the trial. In *Wemyss* v. *Hopkins*[25] the defendant's conviction for striking P's horse was held to be a bar to his trial for striking P. In *Welton* v. *Taneborne*[26] it was held, following *Wemyss* v. *Hopkins,* Jelf J. dissenting, that D's conviction for dangerous driving was a bar to his later trial for exceeding the speed limit, the excessive speed having been evidence of dangerous driving at the first trial. The second trial would not be barred as a matter of law under the provisions of the Code. It would be for the court to exercise its discretion under subsection (6).

5.35 *Where an element of the second offence occurs after the first trial.* Acquittal and conviction are treated separately in paragraphs (c) and (d) of subsection (1) because of the exception to (d) which is inapplicable to (c). If the defendant is acquitted of causing serious injury to P and P thereafter dies of the injury in question, it would obviously be wrong to allow the defendant to be tried for the murder or manslaughter of P. If, however, the defendant has been convicted of causing serious injury to P and P thereafter dies it is established law (and right in principle) that the defendant may properly be charged with homicide.[27] Though the principle will rarely apply outside homicide, it is stated in general terms because other cases are not inconceivable.

5.36 *Subsection (1) (e) (previous conviction by court-martial)* is included because it is desirable that the Code should be comprehensive and as informative as possible. The words, "or any other enactment", are included out of caution.

5.37 *Subsection (2).* This subsection is included for the avoidance of doubt. It is to make it quite clear that a conviction or acquittal for causing injury or serious injury bars a trial for homicide arising out of the same facts, unless the proviso to subsection (1) (d) applies.

5.38 *Subsection (3).* Because different meanings have been attributed to the word "convicted" it is desirable to say what it means for the purposes of subsection (1); and the most convenient and precise meaning seems to be that stated.

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[24]41st ed. (1982), 4-68, 4-90.
[25](1875) L.R. 10 Q.B. 378.
[26](1908) 21 Cox C.C. 702, referred to without disapproval in *R.* v. *Burnham JJ., ex p. Ansorge* [1959] 1 W.L.R. 1041; but cf. *United States* v. *Atkinson* [1969] 3 W.L.R. 1074 at 1087.
[27]*R.* v. *Thomas* [1950] 1 K.B. 26.

5.39 *Subsection (4).* The same general rule is stated in paragraph (a) for acquittals; but "acquittal" must also embrace the circumstances provided for in section 6 (5) of the Criminal Law Act 1967 and cases where a conviction is reversed or quashed by a court of appeal or on judicial review.

5.40 *Subsection (5).* The conviction or acquittal must be "subsisting". If it is quashed, it is no longer subsisting. If the defendant's conviction for causing serious injury is quashed and the victim subsequently dies the case comes within paragraph (c) of subsection (1) (previous acquittal), not paragraph (d) (previous conviction), and the defendant cannot be tried for murder. When a *venire de novo* is ordered there is no subsisting conviction or acquittal as the case may be. Obviously only convictions or acquittals by courts of competent jurisdiction are relevant. There is not a great deal of authority on the effect of convictions by courts outside England and Wales; but what there is supports the rule stated in the subsection.[28] This, however, may be one of those matters which would require further consideration before enactment.

5.41 *Procedure.* The abolition of the pleas in bar of *autrefois acquit* and *convict* would raise the question of the procedure to be applied in implementing the new law. It may well be thought that the procedure of empannelling a jury to try the issue is inappropriate and that the matter should be decided by the judge[29]; but this is not a matter to which we have given any detailed consideration.

Clause 16: Multiple Convictions

5.42 As Lord Morris states in *Connelly* v. *D.P.P.*[30], "Series of charges [in one indictment] are constantly and entirely properly preferred." The defendant may properly be tried on an indictment containing several counts although a conviction or acquittal on any one of those counts would bar a subsequent trial for any of the offences stated in the other counts. The question here considered is whether there is a rule of law which should be stated in the Code precluding conviction on some of a series of charges tried together.

5.43 Friedland's conclusion (in 1968) was that "English and Canadian courts will generally protect an accused from multiple convictions if one offence is included in the other"[31]; and, more positively—

> "All courts would appear to agree that you cannot convict of both the lesser and the greater in such a case. It is technically not possible to do so if only one count is set out in the indictment; and the rule should not differ just because two counts are used."[32]

5.44 In 1976, in *R.* v. *Haddock*[33], where the defendant had been convicted on two counts arising out of the same facts of damaging property with intent to endanger life, contrary to section 1 (2) of the Criminal Damage Act 1971,

[28] *R.* v. *Thomas* (1664) 1 Keble 677; 83 E.R. 1180; *R.* v. *Roche* (1775) 1 Leach 134; 168 E.R. 169; *R.* v. *Aughet* (1918) 13 Cr. App. R. 101; Stephen's *Digest of the law of Criminal Procedure* (1883), Article 265; Kenny, *Outlines of Criminal Law* 18th ed. (1962), 590; Friedland, *Double Jeopardy,* Chapter 12.

[29] See Friedland, *Double Jeopardy,* 114-115.

[30] [1964] A.C. 1254 at 1315.

[31] *Double Jeopardy,* 208.

[32] *Ibid.* at 209.

[33] *The Times* Feb. 5, 1976; [1976] Crim. L.R. 374.

and damaging property, contrary to section 1 (1) of the same Act, the Court of Appeal quashed the conviction on the second count. This was a case where the second offence was included in the first; and the Court (as briefly reported in the *Criminal Law Review*) said it must be wrong to convict of two offences arising out of the same act if one of them was a lesser form of the other.

5.45 In the light of the authorities referred to by Friedland, his cogent argument quoted above and *R.* v. *Haddock,* it seems right to propose a rule against conviction of both an offence and a second offence included within it. It is arguable that there should be a wider rule of exclusion, precluding conviction on a second count whenever the law permits a conviction of the offence therein charged on a charge of the offence in the first count:—i.e., "specified alternatives" within clause 12 (1) (a) and offences of assisting offenders guilty of the offence charged in the first count (clause 12 (1) (d)). We think it would not be right to state this as a rule of law. If the offence in the second count is not an included offence, it requires proof of one or more facts not included in the allegations in the first count. It may be desirable to get the jury's verdict, and thus its finding on that fact or facts, for two reasons.

(i) It may go to sentence.

(ii) If the conviction of the first offence should be quashed on appeal, the Court of Appeal could uphold a conviction on the second charge more readily than it could substitute an alternative conviction under section 3 of the Criminal Appeal Act 1968 because it would have the jury's verdict; and this may be unaffected by the flaw which led to the quashing of the conviction for the first offence.

5.46 *An attempt to commit the offence charged* requires separate consideration. A charge of committing the principal offence does not necessarily include a charge of attempting to commit it. For example, an allegation of murder under the present law as stated in *Hyam* v. *D.P.P.*[34] by killing by an act done with intent to cause serious bodily harm, or under clause 56 (b) or (c) of the Code, does not include attempted murder, although the present and proposed law allows conviction of an attempt on that charge. In this situation, a case can be made for allowing conviction of the offence and the attempt to commit it for the same two reasons as those given above in relation to non-included offences generally. Usually, however, the result would appear so absurd and unfair that it would be wrong to allow it simply for the purpose of covering this exceptional case.

5.47 Clause 16 therefore precludes the court from convicting of both an offence and an included offence or an attempt to commit the first offence. There may be other cases in which it would be undesirable for two or more verdicts of guilty to be returned or for two convictions to be recorded—for example, the defendant is charged with theft and obtaining property by deception on the same facts. Here it should be within the discretion of the judge, on receiving a verdict of guilty on the first count, to order the second to lie on the file.

5.48 *Magistrates' Courts.* The same principles should apply to trial in magistrates' courts; and the clause so provides.

[34][1975] A.C. 55.

CHAPTER 6

PROOF

Clause 17: Burden of Proof

6.1 *Clause 17 (1)* states the rule in *Woolmington* v. *D.P.P.*[1] The burden is on the prosecution to prove all the elements of the offence charged whether by direct or circumstantial evidence and to prove any collateral fact alleged or relied on by the prosecution. Under the present law, where the prosecution allege that the defendant is unfit to plead, they must prove it.[2] Where they tender a confession they must prove that it is voluntary.[3] Where they tender a witness whose competence is challenged they must prove any fact on which they rely to establish his competence.[4] These are instances of the general principle stated in the subsection.

6.2 *Defences and collateral facts.* As under the present law, subsection (1) imposes no burden on the prosecution to disprove a defence until evidence of it is given. Where evidence of a defence emerges in the course of the prosecution's case, the burden is on the prosecution to disprove the defence.[5] Where evidence does not so emerge, the burden is on the defendant to adduce evidence of any defence on which he wishes to rely. Once he has given evidence of a defence, the burden is on the prosecution to disprove it. The same principles apply to collateral facts. If the defendant alleges that he made a confession because a particular inducement was held out to him to confess, he must give evidence of the holding out of that inducement; but when he has done so, it is for the prosecution to prove that it was not held out.

6.3 *Subsection (2). Evidential burden.* This subsection describes what the defendant must do in order to raise the issue of a defence or any other fact. If he tenders such evidence as might lead a court or jury to conclude that there is a reasonable possibility that the elements of a defence existed, the defence must be left to the jury or considered by the magistrates, as the case may be, and upheld if, after taking into account the evidence of the prosecution, they decide that it is reasonably possible that the elements of the defence existed. If the defendant fails to tender such evidence, then the defence will be withdrawn from the jury and magistrates need to consider it no further.

6.4 *Exceptions. Subsections (1) and (4).* Subsection (1) applies only if it is not otherwise expressly provided. It would therefore not affect the numerous enactments relating to pre-Code offences which impose a burden of proof on a balance of probabilities on the defendant. Section 101 of the Magistrates' Courts Act 1980 which imposes a burden of proving defences on the defendant in a summary trial is preserved by subsection (4) but only in relation to pre-Code offences. Section 101 would not apply to Code offences. The burden of disproving special defences in the magistrates' courts would be on the prosecution unless the enactment creating the Code offence and the special defence provided that it should be on the defence.

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[1][1935] A.C. 462, H.L.
[2]*R.* v. *Podola* [1960] 1 Q.B. 325, C.C.A.
[3]*R.* v. *Thompson* [1893] 2 Q.B. 12, C.C.R.
[4]*R.* v. *Yacoob* (1981) 72 Cr. App. R. 313, C.A.
[5]*Palmer* v. *R.* [1971] A.C. 814, P.C.

6.5 Subsection (4) also preserves the rule in *R.* v. *Edwards*[6] (that being a "rule of interpretation whereby the burden of proving a special defence is imposed on the defendant on trial on indictment"), but, again, only in relation to pre-Code offences. The extent of the rule in *R.* v. *Edwards* is uncertain. It is sometimes said to be the same as that of section 101; but that is not clear. For example, section 101 seems clearly to apply to section 5 (2) of the Criminal Damage Act 1971 so as to impose a burden on the defendant to prove "a lawful excuse"; but it is by no means clear that the rule for trial on indictments as stated in *R.* v. *Edwards* applies. Moreover, *R.* v. *Edwards* has been much criticised. Subsection (4) recognises the existence of the rule in that case but leaves it open to the courts to determine its limits, or, if thought appropriate, overrule it.

6.6 *Recommendations by the Criminal Law Revision Committee.* In proposing clause 17 we have not followed the recommendations of the Criminal Law Revision Committee in their Eleventh Report.[7] Clause 8 of the draft Bill proposed by the Committee would convert all existing burdens of proof on the defendant into evidential burdens. We doubt if this would be acceptable. It is open to the same objections as the proposal to abolish strict liability in all pre-Code offences.[8]

6.7 The Committee's draft Bill went further by providing, in effect, that future enactments stating "the burden of proving this fact shall be on the defendant" should be construed as if they imposed merely evidential burdens.[9] We doubt if Parliament would accept that and question the desirability of a provision that particular words in future enactments should bear a meaning quite different from that which they naturally bear. It would be misleading to members of Parliament at the legislative stage and a trap for judges and magistrates. This does not mean, however, that we are out of sympathy with the Committee's arguments against imposing burdens of proof on defendants or their criticism of the view which prevailed in *R.* v. *Edwards.* Clause 17 therefore goes as far as we think practicable in the direction of the reforms proposed by the Committee.

6.8 *Clause 17 (3): Standards of proof.* The subsection states well established principles. We have used the traditional phrase, "beyond reasonable doubt", to define the standard of proof required of the prosecution. Since *R.* v. *Summers*[10] (1952) it has been common practice to direct juries that they must be "satisfied so as to be sure". The traditional formula, however, has

[6][1975] Q.B. 27, C.A. at 40. The rule is "limited to offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with special qualifications or with the licence or permission of specified authorities. Whenever the prosecution seeks to rely on this exception, the court must construe the enactment under which the charge is laid. If the true construction is that the enactment prohibits the doing of acts, subject to provisos, exemptions and the like, then the prosecution can rely on the exception."

[7]Evidence (General) (1972), Cmnd. 4991, 87-91.

[8]See above, para. 2.7.

[9]*Ibid.*, Annex 1, Draft Criminal Evidence Bill, cl.8(3).

[10][1952] 1 All E.R. 1059, C.C.A.

not been disapproved.[11] Indeed, it has the authority of the House of Lords.[12] Whatever the current practice, it would be inaccurate, in our opinion, to state the law in accordance with the *Summers* direction. The dictionary meaning of "sure" is "certain" but the law does not require certainty. Taken literally, the *Summers* direction is too favourable to the defendant but it is probably not taken—nor intended to be taken—quite literally. The enactment of the Code would not preclude judges from directing in accordance with *Summers* if they thought it right—any more than the statement of the law by the House of Lords does so.

Clause 18: Proof or disproof of states of mind

6.9 *Paragraphs (a) and (b)* implement the recommendation of the Law Commission that—

> "the general principle, of which section 8 of the Criminal Justice Act 1967 and section 1 (2) of the Sexual Offences (Amendment) Act 1976 are particular applications, should be given statutory formulation."[13]

The "general principle" is that if the fault element of an offence includes a state of mind, the defendant himself must be proved to have acted with that state of mind. The fact that a reasonable person would have had that state of mind is merely a factor to be taken into account with any other evidence in deciding whether it should be inferred that the defendant had it.

6.10 *Paragraph (c)* declares the corresponding rule for states of mind that are elements of defences. If a defendant asserts that he believed a circumstance to exist, the fact that a reasonable person would not have believed it to exist is merely a factor for the court or jury to take into account in deciding whether the defendant may have done so.

6.11 The whole provision is strictly speaking otiose. It expresses a truism. But a history of error on the point suggests that it would be wise to include it in the Code.

6.12 *Drafting.* We have drafted this clause in a simpler form than that used in clause 7 of the Law Commission's draft Criminal Liability (Mental Element) Bill. We have also abandoned, as apparently redundant, some phrases inherited by the draft Bill from section 8 of the Criminal Justice Act 1967.

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[11]"One would be on safe ground if one said in a criminal case to a jury: 'You must be satisfied beyond reasonable doubt' ": *R.* v. *Hepworth and Fearnley* [1955] 2 Q.B. 600 at 603, per Lord Goddard C.J.

[12]*Woolmington* v. *D.P.P.* [1935] A.C. 462, 481. According to *Archbold* 41st ed. (1982), para. 4-426 ". . . there is a wealth of recent authority of the House of Lords, long after Lord Goddard's dicta were uttered [in *Summers*] in favour of the 'reasonable doubt' direction."

[13]Report on the Mental Element in Crime (1978), Law Com. No. 89, para. 97.

CHAPTER 7

EXTERNAL ELEMENTS OF OFFENCES

Introduction: Elements of offences

7.1 *External and fault elements.* The phrase "fault element" is useful at one or two points in Part I of the Code. The phrase "external elements" merely matches it as a cross-heading under which to collect three clauses concerned with elements other than fault elements. It is not used as a technical term in the Code.

7.2 *Elements and defences.* Our draft distinguishes between the elements of an offence and defences in a way that may surprise some criminal law theorists.[1] If such a distinction is not to be made, however, the inapplicability of every exception admitted by the definition of an offence must be treated as an element of it. This view of exceptions may be justified on theoretical grounds; but our experience suggests that to adopt it rigorously in the Code would have very unhappy drafting consequences both for the codifier and for the user. This might have to be accepted if distinguishing between elements and defences were to produce serious defects in the law. We do not think that it does. Two matters deserve special mention.

(i) *Mistake.* Until recently a mistaken belief in the existence of a circumstance affording a defence (such as self-defence) would not avail a defendant unless it was a belief held on reasonable grounds. A person who foolishly believed that his victim was attacking him was in a different position from one who foolishly believed that the victim was consenting to what would, but for consent, be an assault.[2] Something therefore turned on whether a matter was a "definitional element" (such as absence of consent in assault) or a defence. The Code, however, follows recent Court of Appeal authority,[3] as well as recommendations of the Criminal Law Revision Committee[4] and the Law Commission[5], in no longer requiring beliefs as to matters of defence to be reasonably held.[6]

(ii) *Evidential burden and burden of proof.* Clause 17 places upon the prosecution in general the burden of disproving defences as well as of proving the elements of offences. But in relation to a defence that burden does not arise until there is evidence of the defence before the court; the defendant bears the "evidential burden". Moreover, the burden of proving a special defence may fall on the defendant.[7] This makes it important for the draftsman of a new offence to decide into which category (element or defence) a particular matter is to fall and to draft accordingly. It is not a ground for dispensing with the distinction between elements and defences at all costs.

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[1]Glanville Williams, "Offences and defences" (1982) 2 Legal Studies 233.
[2]*Albert* v. *Lavin* [1982] A.C. 546 (Divisional Court; cf. *per* Hodgson J. at 562).
[3]*R.* v. *Gladstone Williams* (1983) 78 Cr. App. R. 276.
[4]Fourteenth Report: Offences against the Person (1980), Cmnd. 7844, para. 283; cf. Fifteenth Report: Sexual Offences (1984), Cmnd. 9213, paras. 5.12-5.16.
[5]Report on the Mental Element in Crime (1978), Law Com. No. 89, paras. 90-91.
[6]See e.g. para. 13.34, below.
[7]Cl. 17(4). See para. 6.4, above.

Clause 19: Use of "act"

7.3 *External elements.* A person may commit an offence by doing something; or (less often) by omitting to do something. Or he may be guilty of an offence because a state of affairs arises, or because something occurs and he occupies a given position; examples are possession offences, or being the parent of a truanting child[8], or being the owner of a ship from which oil is discharged.[9] The definition of an offence commonly refers to circumstances that must exist if there is to be liability, or to a result that the person's act or omission must cause or fail to prevent, or to both. For the sake of economy of drafting we felt the need for a term that could be used, as appropriate, to refer to omissions, states of affairs and occurrences as well as to physical acts; and not only to these bases of liability but also to their relevant results and attendant circumstances. The term we have adopted is "act", which has the great advantage that it is both noun and verb.

7.4 *Clause 19* is an interpretation clause explaining the use to which the word "act" and associated expressions are put in the Code. It does not define "act". It simply explains: (a) that where the Code refers to "an act" or to a person's "acting" or "doing an act", the reference embraces whatever relevant results and circumstances the context permits; and (b) that "act", as used in the Code, describes any of the bases of liability (physical act, omission, state of affairs, or occurrence) that the context permits it to embrace.

7.5 *For example,* clause 30 (1) provides that a person is guilty of an offence as a principal if (with any fault required) he "does the act or acts specified for the offence." This includes making a specified omission where there is a duty to act; being in possession of something it is an offence to possess; or being the owner of a ship from which oil is discharged. If the offence depends upon the existence of specified circumstances and the occurrence of a specified result, a person "does the act . . . specified" within the meaning of clause 30 (1) when in those circumstances he causes that result.

On the other hand, in clause 21 (1) (causation) a sharp distinction is made between a person's act contributing to the occurrence of a result (paragraph (a)) and his failure, in breach of duty, to do something to prevent the occurrence of a result (paragraph (b)). The context does not permit "act" in paragraph (a) to refer to omissions. Clause 27 (1) (supervening fault) refers to "a person who causes a result by an act done without the fault required". Here, plainly, "act" does not refer to the result of the physical act done. Similarly, clause 31 (4) (a) refers to an accessory's knowing that what he does may assist the principal "to do an act of the kind he does and in the circumstances specified for the offence". "Act" here can include relevant results but not circumstances.

Clause 20: Liability for omissions

7.6 Liability for omissions is the exception rather than the general rule in the criminal law and this is reflected in the opening words of the clause. Liability will be imposed only when two questions are answered affirmatively. First, is the offence in question capable of being committed by an omission? Second, was the defendant under a duty to act?

[8]Education Act 1944, s. 39 (1).
[9]Oil in Navigable Waters Act 1955, s. 1 (1).

Offences which may be committed by omission

7.7 *Paragraph (a) (i).* Some offences are defined in such terms that they may be committed by omission—and perhaps committed only by omission. An example is to be found in section 25 of the Road Traffic Act 1972. The driver of a motor vehicle which has been involved in an accident causing (inter alia) personal injury commits an offence if he fails to stop and, if required, to give his name and address to any person having reasonable grounds to require him to do so. The existence of these offences is recognised by paragraph (a) (i).

Where the enactment creating the offences specifies that it may be committed by an omission it will also, expressly or impliedly, answer the second question—who is under a duty to act? In section 25 of the Road Traffic Act 1972 it is the driver of the motor vehicle.

7.8 *Paragraph (a) (ii).* This paragraph is based upon the recommendations of the Criminal Law Revision Committee in their Fourteenth Report.[10] Their recommendation 67 is as follows:

> "Save where liability for an omission is expressly imposed by statute,
>
> (a) liability for omissions should be restricted to the offences of murder, manslaughter, causing serious injury with intent, unlawful detention, kidnapping, abduction and aggravated abduction; and
>
> (b) such liability for omissions should arise only where the omission amounts to a breach of duty to act which is recognised at common law. The common law duties should not be codified (paragraphs 252-255)."

Paragraph (a) (ii) implements that recommendation. It does not specify the detention offences because they are not defined in the Code. It includes all the Committee intended to be included and by implication excludes everything else. They stated[11]:

> "It has never been shown to be necessary to include omissions resulting in injury which is not serious even though intentional within the criminal law. A line has to be drawn somewhere and we are of opinion it should be drawn between serious injury and injury."

7.9 It will not, therefore, be an offence under the Code for a woman, by omission, to cause the death of a child in such circumstances that she would be guilty of infanticide if she killed it by an act. It would not be an offence for anyone, by omission, to cause serious injury recklessly or to cause injury recklessly or even intentionally. But clause 20 goes much further. The Criminal Law Revision Committee were concerned only with offences against the person and did not consider other offences. The effect of clause 20 would be that no offence other than those covered by subsection (1) would be capable of being committed by omission. The justification for this, at first sight drastic, limitation is as follows.

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[10](1980), Cmnd. 7844, 108-110.
[11]*Ibid.* at 109.

(i) Apart from the cases dealt with in paragraphs (a) (ii) and (b), the common law does not seem to have found it necessary to impose liability outside the field of offences against the person—and even within that field the cases are almost wholly concerned with homicide. There is no broader rule for the codifier to incorporate into the Code.

(ii) The most likely area for potential expansion of liability for omission is that of damage to property. We insist at several points[12] in our report that it would be irrational for the law to afford greater protection to property than it does to the person. The Criminal Law Revision Committee, after very careful consideration, have decided that there is no need to impose liability for omissions resulting in injury less than serious injury to the person. It would be illogical and absurd then for the law to impose such liability for damage to property. There is no existing legal distinction between serious damage to property and other damage; and we think it would be impracticable to seek to introduce one. The consequences are exemplified by illustration 20 (v). As for other offences, we do not think the clause will present any serious difficulties. There are few if any interests higher than that of the safety of the person from injury. One possible exception is in the law of treason where the common law offence of misprision may be committed by omission. But we note that the Law Commission[13] have provisionally recommended that, when the law of treason is codified, misprision should be replaced by an offence of suppressing knowledge that treason has been or is about to be committed. This offence would, no doubt, appear in Part II of the Code. If Part I were enacted before the reform of the law of treason, it might be thought desirable to include a saving for misprision of treason, pending its replacement.

7.10 *Subsection (1) (b)* refers to special cases of liability for omissions, provided for by the clauses referred to.

The duty to act

7.11 *Subsection (2).* This subsection defines the circumstances in which a person is under a duty to act to prevent death, serious injury or detention. The majority of the Criminal Law Revision Committee were of the opinion that the extent of the duty should be left undefined and remain a matter of common law. The main reason was that "the boundaries of the common law are not clearly marked and there would be difficulty in setting them out in statutory form".[14] That Committee, however, does not consider that one of its roles is the codification of the law. Our purpose is to codify; and, with respect, we believe that it is possible to state the established common law principles in a form suitable for codification. A list of duties of the kind appearing on page 108 of the Committee's report would certainly be quite unsuitable; but the principle underlying all of these which are relevant is, we believe, adequately stated in subsection (2).

[12]See e.g. paras. 1.11, 13.33 and 13.37.
[13]Working Paper No. 72 (1977), para. 67.
[14]Fourteenth Report (1980), Cmnd. 7844, p.109.

7.12 The duty arises only where there is risk that death, serious injury, or the detention of another will occur if the relevant act is not done. This is a question to be answered objectively. The question of the fault of the defendant will arise only after the existence of the duty has been determined. Following the common law, the duty to act is imposed on a limited class of persons. "Spouse", "parent", "guardian" and "child" are specifically mentioned because their duty should exist even if they are not members of the same household as the person endangered. For example, where parents are separated and the mother has custody of the children, the father who finds one of his children, or his wife, in a position of danger should be under a duty to save him or her. De facto children of the family, "common law" spouses, the elderly aunt living with her nephew or niece, and so on, would be protected as members of the same household, or as persons under the care and protection of the others. Most of the case-law concerns the duties owed by parents to children but it seems obviously right that children should owe a reciprocal duty to parents. The muscular 15-year old boy who finds his fainting mother drowning in a shallow pool should not be permitted by the criminal law to pass by and allow her to die. The duty must, however, vary in nature, according to the age and other relevant personal characteristics of the defendant. The duty of an 11-year old daughter or a ninety-year old arthritic mother cannot be the same as that of an able-bodied father of thirty.

7.13 *Joint enterprises.* Whether companions in a joint enterprise can be said to have undertaken the care of one another is a matter for the judgment of the court in the particular circumstances of the case. The court might have little difficulty in finding such a mutual undertaking between the members of a mountaineering expedition. Companions in a debauch resulting in the incapacity of one of them through drink or drugs may be a more doubtful case.[15]

7.14 *Subsection (2) (b)* deals with certain cases where there is a duty in the civil law to do the act in question. When there is a risk that death, or serious injury to, or the detention of, another will occur if the duty is not performed, then it becomes a duty in the criminal law as well. There is authority for the application of the rule to a person holding a public office.[16] It clearly should apply to one under a statutory duty. It is also established that a contractual duty, whether owed to the person endangered or not, is sufficient in the circumstances specified in the clause, to create a duty recognised by the criminal law.[17]

7.15 *Attempt by omission.* The clause admits of the possibility of an attempt to commit an offence by omission. For example, a person with a duty to act under subsection (2) could be guilty of attempted murder if he deliberately refrained from acting, hoping that the person endangered would die. Obviously it would be difficult to prove the mental element and such cases would be very rare.

[15]Cf. *People* v. *Beardsley* (1907) 113 N.W. 1128 (Michigan); *R.* v. *Dalby* [1982] 1 W.L.R. 425, C.A.
[16]*R.* v. *Curtis* (1885) 15 Cox C.C. 746.
[17]*R.* v. *Pittwood* (1902) 19 T.L.R. 37.

Clause 21: Causation

7.16 *Introductory comment.* A number of crimes are defined so as to penalise the causing of certain harmful results (whether by act or omission) and problems can arise concerning the notion of causation for which the Code must make provision. The subject has not yet been considered either by the Law Commission or by the Criminal Law Revision Committee, and our provision is designed to restate the principles to be found in the common law. We believe that these principles are relatively well-settled and can be stated quite shortly.

7.17 *Factual causation.* Under existing law a person's act need not be the sole, or even the major, cause of a harmful result. It is enough that the act is a "substantial"[18] or "significant"[19] cause of the result, and in this context this means merely that the accused's contribution must be outside the *de minimis* range.[20] Accordingly it is wrong, for example, to direct a jury that D is not liable if he is less than one-fifth to blame.[21] In subsection (1) (a) we state this requirement in terms that the defendant's act must make a "more than negligible" contribution to the occurrence of the result. It is of course possible on this test for there to be more than one cause of a result, and illustration 21 (ii) is a case of two persons being independently liable in respect of the same death. As with existing law, this test will take no account of a victim's peculiar susceptibility to harm.[22]

7.18 *Omissions.* It is impossible to apply paragraph (a) of subsection (1) satisfactorily in the case of an omission to act. Ex hypothesi the harmful result has been brought about by a factor such as injury, disease or lack of food the effects of which the defendant has failed (perhaps along with many others) to take steps to prevent. Accordingly, paragraph (b) of subsection (1) provides that a person who has a duty to act (see clause 20) "causes" a result when in breach of the duty he fails to take the steps he could take to prevent its occurrence.

7.19 *Supervening causes.* The concluding lines of subsection (1) provide that a person does not cause a result by his act or omission if "some other cause supervenes which is unforeseen, extremely improbable and sufficient in itself to produce the result". We believe that this restates for criminal law the principles which determine whether intervening acts or events are sufficient to break the chain of causation between the defendant's conduct and the result, or as it is sometimes put, whether in the circumstances the defendant's conduct is a cause in law of the result. According to our provision a person will still be liable if his intended victim suffers injury in trying to escape from the threatened attack unless the victim has done something extremely

[18] *R.* v. *Smith* [1959] 2 Q.B. 35; cf. *R.* v. *Malcherek* [1981] 1 W. L. R. 690.
[19] *R.* v. *Pagett* (1983) 76 Cr. App. R. 279.
[20] *R.* v. *Hennigan* [1971] 3 All E. R. 133; *R.* v. *Cato* [1976] 1 W. L. R. 110.
[21] *R.* v. *Hennigan,* above.
[22] See e.g. *R.* v. *Hayward* (1908) 21 Cox C. C. 692.

improbable. [23] Liability will be equally unaffected if the victim refuses medical treatment for a wound caused by the defendant. The refusal may be unforeseeable but it is not sufficient in itself to cause the result of death—in such a case, to use the language of the cases, the original wound is still the "operating and substantial cause" of death.[24]

7.20 *Improper medical treatment.* A particular instance of an intervening act is improper medical treatment of a person injured by the defendant. There has been some controversy over the extent to which, if ever, such treatment when itself a cause of the harmful result can relieve the original wrongdoer of liability.[25] We believe that no special rule is needed for such cases which can be accommodated under the provision described in the preceding paragraph. In almost all cases improper treatment, although unlikely, will be neither extremely improbable in the circumstances nor sufficient in itself to cause the result. In a very exceptional case, such as *R.* v. *Jordan*, it may be both and then the defendant will be held not to have caused the relevant result. Under this provision proper medical treatment can never be a supervening cause sufficient to absolve the defendant.[26]

7.21 *Subsection (2).* This subsection makes a necessary exception for accessories who participate in a result-crime. But for this provision subsection (1) might have the effect of turning them all into principal offenders with consequential difficulties for clauses 30 and 31. However, this exception must itself be subject to exceptions for cases of innocent agency and offences the elements of which consist of the procuring, assisting or encouraging another to cause a result.

[23]The rule is occasionally expressed in terms of foreseeability of the victim's attempt to escape (see *R.* v. *Roberts* (1971) 56 Cr. App. R. 95), but the effect appears to be the same as the formulation suggested here.

[24]*R.* v. *Smith,* above; *R.* v. *Blaue* [1975] 1 W.L.R. 1411.

[25]See *R.* v. *Jordan* (1956) 40 Cr. App. R. 152; *R.* v. *Smith,* above.

[26]As where doctors discontinue the use of a respirator to "keep alive" a person who has suffered irreversible brain damage at the hands of the defendant, and thereby bring about the victim's death (that is, assuming he is not already dead). See *R.* v. *Malcherek,* above.

CHAPTER 8

FAULT (1)—PRINCIPLES OF INTERPRETATION

Introduction

8.1 *Meaning of "fault".* This chapter concerns "fault" in the sense indicated by the definition in clause 5(1) of "fault element". That expression means—

> "any element of an offence consisting
> (a) of a state of mind with which a person acts; or
> (b) of a failure to comply with a standard of conduct; or
> (c) partly of such a state of mind and partly of such a failure."

The "fault" required for an offence will depend upon the definition of the offence (and that definition may prescribe more than one "fault element"). A "state of mind" may be required: e.g. "knowledge" that a circumstance exists, or the "intention" to cause a result. A "failure to comply with a standard of conduct" may suffice: e.g. "negligence" or "carelessness" in respect of some circumstance or result. Or a fault element may be complex, involving both a state of mind and a failure to comply with a standard: e.g. "recklessness" (being aware of a risk and unreasonably taking it) or "dishonesty" (which involves consideration of the actor's state of mind and an assessment of his conduct—of which that state of mind is a part—in relation to prevailing standards[1]). A person does not necessarily commit an offence if he does the act specified for it with any fault required; he may be able to rely on a defence which renders his conduct entirely blameless. The word "fault" is therefore used in a somewhat special sense, though one perfectly familiar to lawyers. It is chosen in preference to the neutral "mental element" because the latter phrase does not embrace non-compliance with standards as well as states of mind.

8.2 *Clauses 22 to 28* are mainly concerned with the fault elements of offences. The provisions are of two kinds.

(i) *Principles of interpretation.* Clauses 22 and 24 establish prima facie rules for the interpretation of Code offences. They aim to avoid, for all offences to be declared in the Code or after its enactment, serious features of uncertainty and inconsistency that have marked English criminal law hitherto. They define (in clause 22) a number of "degrees of fault" (see clause 23) and declare a minimum fault requirement in the absence of other statutory indication (clause 24). Parliament can, of course, use fault terms other than those defined by clause 22 or even, for particular purposes, attribute other meanings to those terms; and it can, of course, create offences requiring no fault or a lower degree of fault than that specified by clause 24. The clauses require the draftsman to give active consideration to the question of fault but do not dictate the outcome of that consideration.

(ii) *Principles relating to fault.* Clauses 25 to 28 restate, as closely as possible, principles of the present law but with some modification in clause 26 in the light of law reform proposals. These principles are the subject of Chapter 9.

[1] We offer no definition of "dishonesty", but it will be necessary to consider whether one should be formulated when theft and related offences are incorporated in the Code.

8.3 *Report on the Mental Element in Crime (Law Com. No. 89).* Clauses 22 and 24 pursue the policy of the Law Commission as declared in their Report in 1978 and given concrete form in a draft Criminal Liability (Mental Element) Bill appended to the Report. None of the recommendations in the Report has been implemented. It is right for us to adopt the Law Commission's policy (with which, happily, we are in sympathy) as the basis of our draft. We have not, on the other hand, felt bound to follow in every respect its method of giving effect to that policy. Clause 22 departs substantially in content from its proposals for the definition of "key words"; and our drafting method in clauses 22 and 24 is not at all like that of the draft Bill—in particular, it is much simpler. We draw attention to particular differences at appropriate points below.

The Report and the Bill are referred to in this chapter and in Chapter 9 as "Law Com. No. 89" and "the draft Bill".

8.4 *The Scottish reaction.* The criminal law of Scotland is very different from that of England and Wales, both in content and in theoretical and practical tradition. There is no proposal for its codification. It is therefore understandable that the Scottish Law Commission do not support the application to the law of Scotland of the recommendations in Law Com. No. 89. It is plain, however, from their Report, *The Mental Element in Crime* (Scot. Law Com. No. 80)[2], that they are sceptical about the merits of those recommendations even from the point of view of England and Wales. We have naturally considered that Report as it concerns topics with which we have been engaged. It is not appropriate for us to respond to the Report in detail. But we can say, first, that we believe that the philosophy and general approach of the Law Commission remain right for the law of England and Wales. No solution for the problems of our criminal law will be without its own disadvantages; but we think that, in relation to the fault element of offences, the policy of the Law Commission promises a substantial advance in relation to the present condition of the law. Secondly, our modifications of the proposals in Law Com. No. 89 and the differences in method and style between our clauses and the draft Bill go a long way towards meeting particular criticisms made by the Scottish Law Commission.

Clause 22: Fault terms

8.5 *Towards consistency and certainty.* This clause would give effect to two main features of the policy declared in Law Com. No. 89:

(i) to encourage consistency in the language of the criminal law, by providing a standard vocabulary of fault terms and rendering it in general unnecessary to resort to other terms when defining offences; and

(ii) to promote certainty as to the meaning of that language. The absence of agreement about the meanings of commonly-used terms has been a particular source of difficulty.

The clause departs from the draft Bill in two important ways: it defines a greater number of fault terms; and it employs a different drafting method.

[2] (1983), Cmnd. 9047.

8.6 *A greater number of fault terms.* The draft bill offers definitions only of intention, knowledge and recklessness. This list seems to us to be inadequate. Developments since the publication of Law Com. No. 89 suggest the need for a more flexible hierarchy of fault terms than has recently been used, in order to permit discrimination between degrees of fault and to avoid the stretching of individual terms to mean more than they are well adapted to convey. This explains the inclusion in our clause of "purpose" (a distinct sub-category of "intention") and "heedlessness" and "negligence" (to do some of the work with which "recklessness" has recently been burdened). Moreover, the Law Commission thought it unnecessary to define simple negligence—which we call "carelessness"—for criminal law purposes.[3] But the potential utility of this familiar concept ought to be acknowledged in the Code. It may feature as an element of an offence; its absence may amount to a defence. In addition, "negligence" being used to refer to very serious deviations from require standards of care, the preferred word for less serious deviations ought to be identified.

8.7 *A different drafting method.* The draft Bill specifies "questions" that are taken to be triggered by the use of the three "key words" (intention, knowledge, recklessness) and their cognates, and provides "standard tests" to answer them. This method is very elaborate. The Bill's four clauses defining only three kinds of fault are not likely to be readily comprehensible to any but the most sophisticated reader. The present clause is much simpler.

8.8 The draft Bill also refers separately to states of mind in relation to circumstances and to results. Some elements of offences are, of course, aptly spoken of as circumstances or as results; and each category is separately referred to here and there in the Code and in these pages. But the distinction is neither a necessary nor a pure one. As the Law Commission point out[4], whether an element appears to be "a prescribed result of the defendant's conduct" or "a prescribed circumstance" may be an accident of drafting. So the present clause, though indeed referring to elements as "existing" or "occurring", minimises the distinction; it is not necessary to identify a particular element as either a circumstance or a result in order to decide whether the actor was at fault in respect of it in one of the defined ways. The effect, once again, is a simpler draft.

8.9 *The function of the clause* should not be misunderstood. The definition in the Code of a substantial number of fault terms will not imply an expectation that they will all be regularly used. Some of them figure in the formulation of general principles in Part I of the Code and are used in the specific offences proposed for immediate inclusion in Part II. Others may in practice be used quite rarely. Again, the terms provided do not exclude others that the draftsman may need to use in the definition of offences. What the clause does is to put at his service a limited lexicon of terms with pre-established meanings, to be used as appropriate. A case can perhaps be made for providing definitions of one or two more terms; but in our view the clause goes far enough.

[3]Law Com. No. 89, para. 68.
[4]*Ibid.* para. 61; and see J. C. Smith (1974) 27 C.L.P. 93 at 103-106.

8.10 *Application of the clause.* The clause cannot affect the definitions of pre-Code offences—that is, offences which survive the enactment of the Code.[5] The terms here defined may have been used in other senses in defining such offences. To apply the Code definitions to them might work unconsidered changes in the law and affect in particular the operation of specialised regulatory legislation. The clause therefore applies only for the purposes of Code offences.[5] As pre-Code offences come to be re-enacted in post-Code legislation, the opportunity can be taken to express them as far as possible in the standard language of the Code.

8.11 *Clause 22* explains seven fault terms by explaining the use of their adverbial forms. Five of the seven degrees of fault, as we define them, relate always to particular elements of offences; they cannot, so to speak, exist in the abstract. "Intention", for example, is always a state of mind in relation to something done or to be done, or to a result of something done, or (more often under the name of "knowledge") to an aspect of the circumstances in which something is done. Our method of explaining these five types of fault is therefore to answer for each of them the question: when is a person said to act with that type of fault in respect of a particular element of an offence? The other two degrees of fault ("negligence" and "carelessness") can also relate to particular elements of offences; one may act carelessly in respect of a result of what one does, or in respect of a circumstance (one should, but does not, realise that the result may occur or that the circumstance may exist). But they can also be used as general descriptions of conduct; and we define them so as to leave such usage available.[6]

8.12 *"Purposely".* The proposal that "purposely" should be part of the standard vocabulary of English criminal law is a new one. The reason for it is as follows. "Intention" must be allowed to refer to something at least slightly wider than merely wanting a circumstance to exist or a result to occur. But if that is done, a draftsman wishing to use "intention" in its narrowest sense would have to exclude the Code definition and provide and *ad hoc* definition. This would be unsatisfactory. There have been cases in which the word "intent", used to describe the fault required for an offence, has been held to bear only the narrow meaning of aim or purpose.[7] The Law Commission, since the publication of Law Com. No. 89, have canvassed two possible new offences which would involve a fault element of purpose. They contemplate the use of the word "purpose" in one of them—sending a poison-pen letter "for the purpose of causing needless anxiety or distress".[8] The other, an offence of insulting religious feelings, they describe as properly requiring an "intent" to wound such feelings, where "intent" would "bear as restricted a meaning as possible".[9] But once "intention" is given a slighty extended Code meaning, it should be avoided in favour of "purpose" where that narrower fault element is proposed.

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[5]The terms "Code offence" and "pre-Code offence" are defined in cl. 2 (2).
[6]See further below, para. 8.24.
[7]*R.* v. *Ahlers* [1915] 1 K. B. 616; *R.* v. *Steane* [1947] K.B. 997.
[8]Working Paper No. 84, Criminal Libel (1982), para. 9.13.
[9]Working Paper No. 79, Offences against Religion and Public Worship (1981), para. 8.11.

8.13. *"Intentionally".* The concept of intention is essentially the same as that proposed by the Law Commission. The differences between the definition proposed in Clause 22 and the corresponding provisions of the draft Bill are differences of drafting only.

(i) Clause 2 (1) of the draft Bill defines intention partly in terms of itself: "The standard test of intention [as to a result] is—Did the person whose conduct is in issue either intend to produce the result or have no substantial doubt that his conduct would produce it?" The first limb of this test plainly refers to the person's purpose to produce the result. In the present definition this is made explicit: one kind of intention is "wanting the result to occur".

(ii) The case where the actor has no substantial doubt becomes the case where he is almost certain. This has two advantages. First, it has been objected that even one who has no state of mind in relation to a matter has, among other things, no substantial doubt. The same cannot be said of being almost certain. Secondly, the amendment avoids the difficulty of having to invite a jury to consider whether they have no reasonable doubt that the defendant had no substantial doubt that something would occur or was the case.[10]

(iii) The definition provides in a more straightforward way than the Bill does[11] for the case of intention as to a circumstance. The Law Commisssion give as an example an offence of intentionally administering a harmful substance.[12] Intention in respect of the fact that the substance is harmful is wanting it to be, or knowledge that it is, harmful; and this should be clear from the definition of "intentionally".

8.14 *"Intention" not related to an element of the offence.* Clause 22 explains what (in relation to a Code offence) is meant by "intention" in respect of an element of an offence. It may be objected that the explanation does not cover any state of mind which, though expressed as an "intention" and required for the commision of an offence, is not related to an element of the offence.[13] Examples are: (i) an intention to do something further (as in burglary: entering a building with intent to steal); (ii) an intention to bring about a result by an act presently done (as under clause 79: assault, intending to resist arrest); (iii) an intention that another person shall do something (as in incitement: see clause 51).[14] We do not think that the clause will lead to difficulty with fault elements such as these. As to (i): an intention to do something is plainly a purpose to do it (and should perhaps be expresed as such in the future drafting of relevant offences). As to (ii) and (iii): the context will usually permit the word "intention" to be construed "in accordance with" clause 22, as clause 5 (1) and the closing words of clause 22 itself require. This merely means that it will cover the rare case in which the actor, although he does not actually "want" the result to occur or the other person to do the thing in question, is "almost certain" that that will be the outcome.

8.15 *"Knowingly".* As with "intentionally", the approach of the Law Commission is followed in substance. The Commission's proposal was that a person should be regarded as knowing of a circumstance if either (i) he actually

[10] Cf. Scottish Law Commission, *op. cit.* n. 2 above, para. 4.11.
[11] Draft Bill, cl. 3 (1) and (2) (c).
[12] Explanatory Note to draft Bill, cl. 3.
[13] Cf. Scottish Law Commision, *op. cit.* n. 2 above, para. 3.5.
[14] See also e.g. Forgery and Counterfeiting Act 1981, s. 1. (forgery); Criminal Attempts Act 1981, s. 9 (1) (interference with vehicles).

knows, or (ii) he has no substantial doubt, that the circumstance exists.[15] Clause 22 avoids defining knowledge in terms of itself; and, as with the definition of "intentionally", it prefers the notion of being almost certain to that of having no substantial doubt.

8.16 *Belief and "wilful blindness".* Criminal liability cannot be confined to one who is directly aware from the evidence of his own senses of the facts that bring his conduct within the terms of an offence. One who is convinced that circumstances exist and yet acts in the manner prohibited in those circumstances must be treated in the same way as one who knows the circumstances from direct observation. This is intended to be achieved by the reference to a person's being "almost certain" that a circumstance exists. This phrase should ensure that the word "knowing" covers those cases now regarded as caught by the phrase "knowing or believing" (as in the offence of handling stolen goods).[16] It will also no doubt include most situations in which a person, having a very strong suspicion that a circumstance exists, "asks no questions" that might give him positive information or "turns a blind eye" to what is available for him to see. Some other cases of "wilful blindness", however, will be cases of recklessness rather than of knowledge; the actor's suspicion will not be so strong that he can be said to be "almost certain".

8.17 *Knowing the future.* In the strictest sense of the word one cannot "know" that something will occur in the future. Nevertheless, in case the fault required for an offence should be specified as knowledge that something will happen or be the case[17], the present definition explains that a person has such knowledge if he is almost certain that the relevent element of the offence will exist or occur.

8.18 *"Recklessly".* The use proposed for "reckless" and related words is the same as that proposed by the Law Commission.[18] Our drafting departs in a number of ways from that of the draft Bill, which seems unnecessarily complex; but no difference of substance is intended.

(i) The Bill, in keeping with its general approach, speaks separately of foreseeing that conduct may produce a result and of being aware that a circumstance may exist. Clause 22, more simply, refers to awareness of a risk that an element of an offence exists or will exist or occur.

(ii) The Bill expressly requires the "assumption" to be made that "any judgment [the actor] may have formed of the degree of risk was correct". Clause 22 does not make this point expressly. Like the Bill, it requires that the actor himself be aware that there is *a* risk. This could not, in good sense, be interpreted to mean that he must be aware of the "degree" of risk. But his perception of the size of the risk is, of course, one of the factors relevant to the question whether it was unreasonable for him to take the risk. This seems adequately covered by the words "in the circumstances known to him".

[15]Draft Bill, cl. 3 (1).
[16]See *R.* v. *Griffiths* (1974) 60 Cr. App. R. 14; *R.* v. *Reader* (1977) 66 Cr. App. R. 33; cf. Law Com. No. 89, para. 48.
[17]See, for an example, Crimimal Law Act 1977, s. 1 (2).
[18]Law Com. No. 89, paras. 50-66; draft Bill, cl. 4.

(iii) According to the Bill, the "question whether it was unreasonable for the person to take the risk is to be answered by an objective assessment of his conduct in the light of all relevant factors". It is thought that the word "unreasonable" conveys in English law the need for an objective assessment and that it goes without saying that all relevant factors must be taken into account.

8.19 *Recent House of Lords decisions* have given "reckless" and "recklessly" a wider meaning than that proposed by clause 22. The leading case of *R.* v. *Caldwell*[19] concerned the Criminal Damage Act 1971. It was held that a person is "reckless as to whether or not any property would be destroyed or damaged" (within the meaning of section 1 (1) of the Act) 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 possibilility of there being any such risk or has recognised that there was some risk involved and has none the less gone on to do it";

and similarly (under section 1 (2)) as to recklessness whether life would be endangered.[20] *R.* v. *Lawrence*[21] applied *R.* v. *Caldwell* in interpreting the offence of driving recklessly. It has indeed been declared in a manslaughter case that "reckless" should be given "the same meaning" (that is, the *Caldwell* meaning) "in relation to all offences which involve 'recklessness' as one of the elements unless Parliament has otherwise ordained"[22]; but the contrary view has since prevailed in the Court of Appeal[23] in relation to the statutory definition of rape, in the light of the modern history of that offence.

8.20 *Explanation of the narrower definition.* The Code must facilitate the application to Code offences of the concept expressed in *R.* v. *Caldwell* and the other House of Lords cases. So a term must be provided to cover the case where a risk is obvious but the actor "has not given any thought to the possibility of there being any such risk". The question is whether "reckless" should be used in the Code to express this case as well as that where the actor recognises "that there [is] some risk involved and . . . nevertheless [goes] on to do" the act which creates the risk. We are sure that it should not and adhere to the Law Commission's narrower concept of recklessness. Our reasons are as follows.

(i) The Code needs a term, for use as necessary in the specification of offences, which refers only to the unreasonable taking of a risk of which the actor is aware. Such conscious risk-taking is the preferred minimum fault element for some modern offences. This appears, for example, from recommendations of the Criminal Law Revision Committee on offences against the person[24] and on sexual offences[25]; from the Law Commission's

[19][1982] A.C. 341; see also *R.* v. *Miller* [1983] 2 A.C. 161.
[20][1982] A.C. 341 at 354-355, *per* Lord Diplock.
[21][1982] A.C. 510.
[22]*R.* v. *Seymour* [1983] 2 A.C. 493 at 506, *per* Lord Roskill.
[23]*R.* v. *Satnam S. and Kewal S.* (1983) 78 Cr. App. R. 149; *R.* v. *Breckenridge* (1983) 79 Cr. App. R. 244.
[24]Fourteenth Report: Offences against the Person (1980), Cmnd. 7844.
[25]Fifteenth Report: Sexual Offences (1984), Cmnd. 9213.

recent proposals for offences relating to public order[26]; and from the modern history of the law of rape referred to above.[27]

(ii) Before *R.* v. *Caldwell* "reckless" had become the conventional term by which to refer to this narrower type of fault. We cannot think of an acceptable alternative.

(iii) The definition of recklessness in *R.* v. *Caldwell* in effect describes two kinds of fault. They need not be conveyed by a single Code expression. It may indeed be of advantage to prosecutors and to sentencing courts to be able to distinguish, by means of a discriminating language of fault, between different modes of committing the same offence. We propose the word "heedless" to cover the variety of recklessness introduced by *R.* v. *Caldwell.*

8.21 Effect on existing offences. Clause 22 will not affect pre-Code offences. But as existing offences are incorporated in the Code or re-enacted in the light of the Code (as they become "Code offences"), consideration will have to be given to the effect of Code terminology upon them. This is true of all offences but particularly of those whose fault elements are now couched in terms of recklessness. It is sufficient to refer, by way of example, to criminal damage and to reckless driving.

(i) *Criminal damage.* If it is desired to retain the effect of *R.* v. *Caldwell* when offences under section 1 of the Criminal Damage Act 1971 are incorporated in the Code[28], it will be necessary to add heedlessness (as defined in clause 22), as an alternative mode of fault, or to replace "recklessly" by "heedlessly" (which is satisfied by proof of recklessness: clause 23 (2)).

(ii) *Reckless driving.* In a phrase like "driving recklessly" the word "recklessly", Lord Diplock observed in *R.* v. *Lawrence*[29], "qualifies the manner in which the act is performed" as well as "[referring] to the state of mind of the doer of the act". Driving is reckless only if it creates a certain kind of risk. A risk of harm is thus an element of the offence. The proposed definition of recklessness as a mode of fault "in respect of an element of an offence" cannot directly apply to reckless driving so understood. Its application would involve the notion of awareness of a risk that a risk exists, which is obviously absurd. Reckless driving has caused difficulty since it achieved prominence with the abolition of dangerous driving by the Criminal Law Act 1977, section 50. The essence of the difficulty is that the offence does not expressly call for a state of mind in respect of a particular kind of harm. The fault required appears to be a more general disregard of safety than the fault involved in offences specifying recklessness in respect of particular harms. If "recklessness" were preserved in a post-Code re-enactment of the offence, it would be used in a sense at best analogous to its Code sense; and if this were done, the addition of "heedlessly" would need to be considered. It might be preferable to re-define the offence altogether; and we make below[30] a suggestion as to how this could be done.

[26]Offences Relating to Public Order (1983), Law Com. No. 123.

[27]*D.P.P.* v. *Morgan* [1976] A.C. 182; Report of the Advisory Group on the Law of Rape (1975), Cmnd 6352; Sexual Offences (Amendment) Act 1976, s. 1 (1). Cf. Criminal Law Revision Committee, Fifteenth Report (see n. 25, above), para. 2.41.

[28]See below, para. 16.4, for some relevant observations.

[29][1982] A.C. 510 at 525.

[30]Para.8.24.

8.22 *"Heedlessly".* In *R.* v. *Caldwell*[31] Lord Diplock suggested that "the popular or dictionary meaning [of 'reckless'] is: careless, regardless, or heedless, of the possible harmful consequences of one's acts". We find that "heedlessness" is the term best suited to expressing the aspect of *Caldwell* recklessness not repeated in the proposed definition of the latter word. We should draw attention to some differences between our formulation and that of Lord Diplock in *R.* v. *Caldwell.*[32]

(i) We refer to the actor's giving no thought "to whether there is a risk" rather than to his giving no thought "to the possibility of there being [a] risk".[33] We take the two expressions to mean the same.

(ii) The risk referrred to is one that "would be obvious to any reasonable person". After *R.* v. *Caldwell* there was uncertainty as to whether this was the test, or whether the risk must be one that would be obvious to the actor himself if he did give thought. The uncertainty was in due course resolved in favour of the former interpretation.[34] We have drafted accordingly.

(iii) The requirement that it be "in the circumstances unreasonable to take the risk" is a necessary limitation of this type of fault; it reflects a passage in Lord Diplock's opinion in *R.* v. *Caldwell,* if not his language.[35]

8.23 *"Negligently".* The concept of "criminal negligence" in the present law of manslaughter is the source of our suggested definition of "negligence" for Code purposes. It is not the ideal word; but there are only so many words available and we have been able to think of no other that will quite serve at this point. We insert "criminal negligence" as a sidenote to the definition as a way of emphasising that "negligence" is here used in a familiar criminal law sense and not in the wider sense that it has in the law of tort. We define it in objective terms; the standard from which the actor very seriously deviates is that of "a reasonable person". An alternative point of comparison would be the standard which the actor himself is capable of attaining; this would be to the advantage of persons suffering from mental handicap and perhaps from some other kinds of disability. But such a concept of individualised negligence has little practical part to play in the criminal law[36]; we do not think that it is necessary to provide a Code term for it.

8.24 *Negligence as a mode of behaviour.* The definitions of "heedlessness" and "negligence" make the former a variety of the latter; to take, unreasonably, an obvious risk through having failed to give any thought to whether the risk exists is an example of a very serious deviation from expected standards of care. But negligence is a wider concept than heedlessness. It covers the case where the actor does give thought to whether a risk attends his act, but is grossly incompetent either in his judgment on that question, or in the taking of measures to avoid or minimise the risk. Moreover, we define "negligence" in such a way that it is not necessarily fault in respect of an element of the

[31][1982] A.C. 341 at 351.

[32]See above, para. 8.19.

[33]For, as has been pointed out (Williams, "Recklessness Redefined" [1981] C.L.J. 252 at 267), a risk is itself a variety of possibility.

[34]*Elliott* v. *C.* [1983] 1 W.L.R. 939; *R.* v. *R.* (1984) 79 Cr. App. R. 334, C.A.

[35][1982] A.C. 341 at 354.

[36]For an isolated example of its use, not imitated in subsequent case law, see *R.* v. *Hudson* [1966] 1 Q.B. 448.

offence. It may be a mode of behaviour without reference to particular circumstances or possible outcomes. It is therefore available as an alternative way of describing the fault required for reckless driving. We suggest that consideration be given to the rewriting of that offence[37] as "driving with criminal negligence".

8.25 *"Carelessly".* Less serious deviations from expected standards of care can conveniently be called "carelessness". An obvious precedent exists in the marginal note to section 3 of the Road Traffic Act 1972: "careless driving".

Clause 23: Degrees of fault

8.26 Clause 22 establishes a hierachy of culpability. Each term defined represents a degree of fault greater than (or, in the case of intention, equal to) that conveyed by the term following it in the clause. Clause 23 derives two useful propositions from this structure.

8.27 *Subsection (1).* The effect of this subsection is that an allegation of one degree of fault defined in clause 22 will normally include an allegation of every lower degree of fault in that clause. This is relevant to the provisions on alternative verdicts (clause 12), double jeopardy (clause 15) and multiple convictions (clause 16); it should be read with the definition in clause 5 (1) of the Code expression "included offence". For illustration, see Schedule 1.

8.28 *Subsection (2)* allows an allegation of one degree of fault to be made good by proof of a higher degree of fault.

Clause 24: General requirement of fault

8.29 *The need for the clause.* A provision creating an offence should ordinarily specify the fault required for the offence or expressly provide that the offence is one of strict liability in respect of one or more identified elements.[38] It is necessary, however, to have a general rule for the interpretation of any offence the definition of which does not state, in repsect of one or more elements, whether fault is required or what degree of fault is required. The absence of a consistent rule of interpretation has been a regrettable source of uncertainty in English law. This clause provides such a rule.

8.30 *Application of the clause.* The clause (like clause 22) applies only to Code offences, so as not to disturb the settled interpretation or understanding of existing legislation.

8.31 *Clause 24 (1).* This subsection produces the same result as clause 5 (2) and (3) of the draft Bill (though it does so in simpler style). It imposes a presumption, in respect of every element of an offence, that liability depends

[37]Road Traffic Act 1972, s. 2; also s. 1 (causing death by reckless driving). Sect. 17 (reckless, and dangerous, cycling) could be revised at the same time. For a different suggestion for the replacement of reckless driving, see the Criminal Law Revision Committee's Fourteenth Report (n. 24, above), paras. 145-147.

[38]Cf. Law Com. No. 89, para. 75.

upon fault of the degree of recklessness at least. That presumption is no doubt more controversial now than it was in 1978, when Law Com. No. 89 was published. For since that time some offences requiring at least "recklessness" for their commission have been so interpreted that heedlessness (as it is defined in clause 22) will suffice.[39] If Parliament, when the Code is enacted, considers that that interpretation achieved an appropriate scope for the serious offences to which it applied, it may, consistently, wish in this clause to specify heedlessness as the presumed fault requirement for the future. That is a point for others to consider. There is no need for purposes of the present draft to depart from the Law Commission's recommendation.

8.32 *Drafting.* The subsection refers to three degrees of fault (intention, knowledge, recklessness) in the alternative. Since a requirement of recklessness will be satisfied by intention or knowledge (clause 23 (2)), the subsection could refer to recklessness alone. The method adopted, however, is justified on the score of clarity. Moreover, the definition of any offence to which the subsection applies will thus refer to the alternative modes of fault; and this will permit any of the alternatives to be alleged in a particular case.

8.33 *Clause 24 (2).* This subsection follows clause 5 (4) of the draft Bill in specifying how the application of subsection (1) may be excluded. Hitherto the courts have relied upon a wide and varying range of considerations as a basis for inferring Parliament's intention. Those considerations have included, for example, the nature of the offence itself and the size of the available penalty. The resulting uncertainty has been a notorious feature of the criminal law[40]; and the intention which is said to be divined by the judicial process has often been one that could only rhetorically be attributed to Parliament. Under subsections (1) and (2), by contrast, it will be possible to refer more accurately to "the intention of Parliament" and to identify that intention without difficulty. The provision creating an offence will normally state expressly, for every element of an offence, what fault is required for liability, or that no fault is required (strict liability), or that liability is excluded in certain circumstances relevant to fault. Failing such express provision, or some other indication of like effect, the presumption stated by subsection (1) will apply. Our draft (perhaps more clearly than the draft Bill) permits "the terms of the enactment creating the offence" to "indicate" the exclusion of subsection (1). This admits reference to the statutory context of the particular provision concerned; a contrast between adjacent sections of an Act, for example, or between different parts of the same section, might exceptionally "indicate" quite plainly the intended meaning of one of them. But only the "terms"of the enactment are admissible aids for this purpose.

[39]See para. 8.19.
[40]Cf. Law. Com. No. 89, paras. 29-39.

CHAPTER 9

FAULT (2)—PRINCIPLES OF LIABILITY

Clause 25: Ignorance or mistake

9.1 *Clause 25 (1). Ignorance or mistake negativing a fault element.* The "principle that a man must be judged upon the facts as he believes them to be is an accepted principle of the criminal law when the state of a man's mind and his knowledge are ingredients of the offence with which he is charged".[1] If knowledge of a certain fact is an element of an offence, it is necessarily the case that ignorance of that fact, or a mistaken belief in the contrary, negatives that fault element. Subsection (1) in fact states a truism. But the fact that it does not state the obvious is apparent from modern decisions in which it has had to be pointed out that if, to constitute an offence, a person's conduct must be intentional in respect of a given circumstance, it is inconsistent to demand that, to exclude liability, a mistake in respect of the circumstance must be based on reasonable grounds.[2] Furthermore, "ignorance of the law is no excuse" is a popular aphorism with a good deal of power to mislead. It seems worthwhile to enshrine in the Code the truth that a mistake as to the law, equally with one as to fact, can be the reason why a person is not at fault in the way prescribed for an offence.

9.2 *Clause 25 (2). Ignorance of the law is no defence.* Subsection (2) makes explicit for the Code one of the best-known maxims of the common law. There is abundant authority that as a general rule the accused's ignorance of the offence he is alleged to have committed[3], or his mistake as to its application[4], will not relieve him of liability. The subsection acknowledges two qualifications to the general rule. The first is the case where knowledge of the criminal law is itself an element of the offence or may be relevant in negating a fault element such as dishonesty.[5] Such cases are covered by subsection (1), to which this subsection is subject. The second is the case where it is expressly provided that ignorance or mistake as to a matter of criminal law is a defence. Such cases are likely to be rare.

9.3 *A matter of criminal law.* This concept is defined in subsection (3). Strictly speaking the word "criminal" in this section is unnecessary, since the rule that ignorance of the law is no excuse applies equally to matters of civil and criminal law. In practice, however, it is the claim that the defendant was unaware of the existence or scope of the offence with which he is charged that must be met. Subsection (2) is drafted accordingly, and subsection (3) then supplies a definition which corresponds to what we take to be the general understanding of matters of criminal law.

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[1] *R.* v. *Taaffe* [1984] A.C. 539 at 546, *per* Lord Scarman.
[2] *D.P.P.* v. *Morgan* [1976] A.C. 182; *R.* v. *Kimber* [1983] 1 W.L.R. 1118. See also *Wilson* v. *Inyang* [1951] 2 K.B. 799 ("wilfully").
[3] *R.* v. *Bailey* (1800) Russ. & Ry. 1; 168 E.R. 651; *R.* v. *Esop* (1836) 7 C. & P. 456; 173 E.R. 203; *R.* v. *Barronet and Allain* (1852) Dears. C.C. 51; 169 E.R. 633.
[4] *Johnson* v. *Youden* [1950] 1 K.B. 544.
[5] Cf. *Moore* v. *Branton* [1974] Crim. L.R. 439.

9.4 *A defence of excusable mistake of law?* The Model Penal Code of the American Law Institute provides in section 2. 04(3) a defence in a number of cases in which the defendant is either ignorant of the existence of the offence because of its non-publication before the relevant act (paragraph (a)), or mistaken as to the law, having acted in reasonable reliance on an official statement of it which is subsequently determined to be erroneous (paragraph (b)). From time to time arguments have been put forward for the recognition in English law of a defence of excusable mistake[6], taking in one or more of the cases referred to in the Model Penal Code and perhaps others. We have some sympathy with these arguments. In particular, we think that there are two types of case with strong claims as excuses for the commission of an offence.

9.5 *Reliance on judicial or official statements.* The first case is where the defendant acts in reasonable reliance on a statement of law contained in the judgment or opinion of a competent court or tribunal. If that statement is subsequently held to be erroneous the defendant may be held to have committed an offence despite the previously authoritative view as to the legality of the act involved. The injustice of a conviction in such a case is apparent.[7] The second type of case is where the defendant acts in reasonable reliance on a statement of law made by a public official charged with responsibility for the administration or enforcement of a particular law creating an offence. In *Surrey County Council* v. *Battersby*[8] the defendant inquired of an official of the children's department of the local authority whether a proposed arrangement for the care of children would amount to a fostering arrangement of which she would have to give notice. She was told that in the official's view the arrangement would not come within the ambit of fostering arrangements and no notice was given. The local authority subsequently preferred an information alleging failure to give notice of a fostering arrangement. The Divisional Court held that the defendant had committed the offence. The question whether her reliance on the official's advice amounted to a defence was not argued. Sachs J. did comment, however, that the circumstances, of which such reliance was one, amounted to "very strong mitigation", and he suggested that the case was one for which an absolute discharge would be appropriate.[9] In our view even such a result is unjust.

9.6 We debated whether we could draft an appropriate defence for the Code. It soon became apparent, however, that to do so would be to embark on a major exercise of law reform. There is no English authority supporting a general defence of excusable mistake of law and no recommendation from an official committee to which we could give effect. The topic has not in fact been considered by either the Law Commission or the Criminal Law Revision Committee. The introduction of a defence to cover even the two cases referred to above raises major questions of policy requiring detailed consideration and extensive consultation. We ourselves cannot do more than draw attention to the case for reform in the hope that the topic will be taken up elsewhere. The Code therefore restates the orthodox position in English law.

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[6]See e.g. Ashworth, "Excusable Mistake of Law" [1974] Crim. L.R. 652.

[7]The point may well become more prominent if the practice of granting declaratory judgments in matters of criminal law continues to develop. See Glanville Williams, *Textbook of Criminal Law* 2nd ed. (1983), 453.

[8][1965] 2 Q.B. 194.

[9]*Ibid.* at 203.

Clause 26: Intoxication

9.7 This clause provides for the effect of intoxication upon the liability of a person who causes the external elements of an offence. The present law, distinguishing between crimes of specific intent and crimes of basic intent, does not rest upon any clear principle which could be incorporated into the Code. Proposals for the reform of the law have, however, been made by both the Butler Committee on Mentally Abnormal Offenders[10] and the Criminal Law Revision Committee.[11] The latter committee had the advantage of being able to scrutinise the recommendations of the former. We agree with the criticisms they made of the Butler proposals. This clause therefore adopts the Criminal Law Revision Committee's recommendations.

9.8 *Subsection (1). Involuntary intoxication.* This matter was not considered by either committee and there is very little authority upon it.[12] Nevertheless, cases do occur from time to time and the Code should provide for them. Voluntary intoxication is defined in subsection (8) (b) and it follows from that definition that the intoxication of a person is involuntary where (i) the intoxicant was administered to him without his knowledge or consent; (ii) he took it not knowing it to be an intoxicant; or (iii) it was properly taken for a medicinal purpose.

The effect of the subsection is that evidence of involuntary intoxication is to be treated like any other evidence tending to show that the defendant lacked the fault required for the offence charged. If the evidence shows no more than that the defendant more readily gave way to passion or temptation than he would have done if he had been sober, it may be a mitigating factor but it will not be a defence.

9.9 *Subsections (2) to (6)* deal with the effect of voluntary intoxication. Generally, the relevance of evidence of intoxication is to show that the defendant lacked some mental element which is required for the offence charged. The recommendations of the Criminal Law Revision Committee require a distinction to be drawn between recklessness and other prescribed mental states. The Committee, reporting before the decision in *R.* v. *Caldwell*[13], were not able to make any recommendation about the fault element designated "heedlessness" in the Code. Whether this is properly described as a state of mind has been much debated.[14] It is unnecessary to consider the rights and wrongs of the debate. It is clear that, for the purposes of this section, if, and insofar as, it involves a mental element, heedlessness must be classed with recklessness. Subsections (2) and (3) are drafted accordingly. For the effect, see illustration 26 (iii) in Schedule 1.

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[10](1975), Cmnd. 6244, paras. 18.51-18.59.
[11]Fourteenth Report: Offences against the Person (1980), Cmnd. 7844, Part VI.
[12]See *R.* v. *Davis* [1983] Crim. L.R. 741.
[13][1982] A.C. 341.
[14]See particularly Glanville Williams, "Recklessness Redefined" [1981] C.L.J. 252 at 256-258.

9.10 *Subsection (2). Mental elements other than recklessness and heedlessness.* When the offence requires proof of other mental elements such as purpose, intention or knowledge, evidence of voluntary intoxication is to be treated like any other evidence tending to show that the defendant lacked the mental element in question. The same mental element may be described by different terminology in pre-Code offences and perhaps in post-Code legislation. The subsection will apply to any mental element, however described, other than recklessness or heedlessness. For example, where the term "wilfully" is used to mean "intentionally", subsection (2) will apply. If, however, "wilfully" is construed to include recklessness[15], then subsection (3) will apply. If any offences requiring "malice" survive the enactment of the Code, they too will be governed by subsection (3) since "maliciously" is satisfied by proof of recklessness, as defined in section 22.[16]

9.11 *Subsection (3). Recklessness and heedlessness.* This subsection applies to any offence requiring a fault element of recklessness or heedlessness even where the offence also requires, expressly or by implication, an element of purpose, intention or knowledge. A charge of rape, being reckless whether the woman consented, implies an intention to have sexual intercourse. If the defendant claims that, because he was intoxicated, he was not aware that the woman might not be consenting he is to be treated as if he were so aware and may be convicted of rape.

A defendant who was intoxicated may, however, deny that he intended to do any act at all, having no control over, or awareness of, his movements. Charged with recklessly causing serious injury by beating a woman, he says that because of his drugged condition he was unconscious.[17] Clause 43 (1) (b) makes it clear that he cannot rely on his condition if it arises from voluntary intoxication. Had he been sober, he would have been aware that there was a risk that acts of the kind he did might cause serious injury. He is to be treated as having beaten the woman, being aware of any risk of causing serious injury of which he would have been aware had he been sober.

9.12 *The exception for murder.* Murder has to be excepted (by subsection (7)) because the mental element required by clause 56 (b) ("A person who kills another . . . intending to cause serious injury and being aware that he may kill") is a variety of recklessness. If murder were not excepted, a person who, because of intoxication, was unaware that he might kill might be treated as being aware of that risk and so liable to conviction for murder. This would be a departure from long-established law and from the recommendation of the Criminal Law Revision Committee.[18] The exception reproduces existing law in accordance with that recommendation. It is justified because manslaughter, being punishable with life imprisonment, is sufficient to protect the public interest.

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[15]Cf. *R.* v. *Sheppard* [1981] A.C. 394.
[16]*W.* v. *Dolbey* [1983] Crim. L.R. 681, D.C.; *R.* v. *Grimshaw* [1984] Crim. L.R. 107, C.A.
[17]Cf. *R.* v. *Lipman* [1970] 1 Q.B. 152.
[18]Fourteenth Report (n. 11, above), para. 268.

9.13 *Subsection (4). Intoxication and reasonableness.* Whereas subsections (2) and (3) are concerned with the mental state of an accused person, subsection (4) relates to objective standards—it is concerned with what a person ought to have known or foreseen and with how he ought to have behaved. It might be thought that, when the law prescribes a standard of reasonable behaviour, it is so obvious that this relates to the standard to be expected of a sober person that it is unnecessary for the Code to say so. This was the view we at first took; but the fact that the point has been argued in the Court of Appeal in two recent cases[19] led us to change our minds. The courts have now established a principle and the enactment of a Code which did not include it might enable the matter to be re-opened. In *R.* v. *Young* the Court of Appeal thought that, in determining whether a person "has reason to suspect", it is "an unnecessary gloss to introduce the concept of the reasonable man".[20] It is, however, impossible to state a principle concerning intoxication or sobriety without a reference to a person. It does not necessarily follow that the judge need refer to such a person in directing the jury, though it may sometimes be convenient to do so.

9.14 *Subsection (5). Intoxication with a view to committing an offence.* This subsection follows the speech of Lord Denning in *Attorney-General for Northern Ireland* v. *Gallagher.*[21] The remainder of their Lordships did not find it necessary to deal with the point, but it is one on which Lord Denning thought the law "should take a clear stand". We respectfully agree. In the absence of this subsection, a person who, having resolved to kill, takes drink to give himself "Dutch courage" and then kills in such a drunken condition that he does not know what he is doing, would be liable to be convicted of manslaughter only. Since he reduces himself to that dangerous condition with intent to kill, it seems right that he should be convicted of murder.

9.15 *Subsection (6). Belief in exempting circumstances.* Just as a person may, because of intoxication, lack the mental element required for an offence, so he may have the mental element required for a defence—as when, being drunk, he mistakenly believes that P is making a murderous attack on him and retaliates, as he supposes, in self-defence. Again it is necessary to distinguish between involuntary and voluntary intoxication. Evidence of involuntary intoxication is to be treated like any other evidence tending to show that the defendant held any belief or other state of mind which is an element of a defence.

9.16 Where intoxication is voluntary, its effect depends on the fault element of the offence charged. This follows the recommendation of the Criminal Law Revision Committee:[22]

> ". . . in offences in which recklessness constitutes an element of the offence, if the defendant because of a mistake due to voluntary intoxication holds a belief which, if held by a sober man, would be a defence to the charge, but which the defendant would not have held had he been sober, the mistaken belief should be immaterial."

[19] *R.* v. *Woods* (1981) 74 Cr. App. R. 312, C.A.; *R.* v. *Young* [1984] 1 W. L. R. 654, Ct.–M.A.C.
[20] [1984] 1 W.L.R. 654 at 658.
[21] [1963] A.C. 349 at 382
[22] Fourteenth Report, paras. 276-278.

If this is to be the rule for offences which may be committed recklessly, it must apply *a fortiori* to offences requiring a lower degree of fault. Subsection (6) (b) (i) therefore provides that, where the offence charged involves a fault element of recklessness, heedlessness, criminal negligence or carelessness, or requires no fault, the defendant is to be treated as if he knew the exempting circumstance did not exist if he would have known this had he been sober. The effect is to reverse *Jaggard* v. *Dickinson.*[23] This is justified, not only on the ground that it follows from the Committee's recommendations, but also because that decision creates an indefensible anomaly[24] which it would be wrong to perpetuate in the Code.

A similar result must apply in the case, envisaged by subsection (5), of the person who becomes intoxicated with a view to committing an offence. Since he is barred from relying on intoxication to negative the mental element of the crime he should also be barred from relying on it to establish the mental element of a defence.

9.17 *Voluntary intoxication and mental disorder in combination.* The courts have accepted that a person's unawareness or mistaken belief may be due to a combination of voluntary intoxication and mental disorder. They have not so far evolved any clear and satisfactory rule as to the legal consequences of this state of affairs. In *R.* v. *Burns*[25], where the defendant's unawareness may have been due partly to brain damage and partly to drink and drugs taken otherwise than on medical advice, the Court of Appeal held that he was entitled to an absolute acquittal. It is difficult to understand this since neither of the concurrent causes entitled the defendant to be absolutely acquitted of the offence of "basic intent" with which he was charged. Other cases cast little light on the matter. There is therefore no established rule which we can offer with confidence as representing the present law.

Moreover, an important new consideration under the Code is that the court, on a mental disorder verdict, will have wide powers of disposal under the Butler recommendations [26] instead of being obliged to order indefinite detention of the offender. It would be reasonable that the mental disorder verdict should be more widely available. Both that verdict and the voluntary intoxication rule have, as their object, the protection of the public. As the mental disorder will, in most cases, be a continuing condition it seems to us that the right outcome is the mental disorder verdict. A court will presumably be more ready to make an order appropriate to the person's condition on a mental disorder verdict than on a verdict of guilty of an offence of recklessness. Subsection (7) (b) accordingly excepts the case of combined mental disorder and voluntary intoxication from relevant provisions of clause 26.

Subsection (8). Definitions

9.18 (i) *"Intoxicant".* The Butler Committee thought a definition of intoxication unnecessary.[27] However, the meaning of the word in the present law and under the Code is probably wider than that attributed to it by laymen.

[23][1981] Q.B. 527.
[24]Smith and Hogan, *Criminal Law* 5th ed. (1983), 195-196.
[25](1973) 58 Cr. App. R. 364, C.A. Cf. *R.* v. *Stripp* (1978) 69 Cr. App. R. 318, C. A.
[26]Cmnd. 6244, para. 18.42. (See below, para. 12.29).
[27]*Ibid.* para. 18.56.

We therefore think it desirable to define "intoxicant" and, by implication, "intoxication" for the purposes of the Code. There is only one aspect of intoxication which is relevant for present purposes and that is its effect on a person's awareness of circumstances and possible results of his conduct and his ability to control his movements. We therefore define an intoxicant in paragraph (a) as anything which, when taken into the body, may impair awareness or control. We refer specifically to alcohol, not only because it is the most common intoxicant but also in order to direct the reader's mind more readily to the kind of effect envisaged by the subsection. The definition is wide enough to include the vapour which is inhaled by a glue sniffer as well as drugs taken orally or by injection.

(ii) *"Voluntary" and "involuntary" intoxication.* Paragraph (b) defines voluntary intoxication and, by implication, involuntary intoxication. The relevance of this distinction has been explained above. It seems accepted in the present law that intoxication arising from the proper use of drugs for medicinal purposes does not have the consequences in the criminal law of voluntary intoxication; and this is clearly right in principle. A person who becomes voluntarily intoxicated may, without any further fault on his part, become guilty of serious crime. It would be entirely wrong that such consequences should follow from acting on medical advice or without medical advice but in all respects properly for a medicinal purpose.

(iii) *"Takes" an intoxicant.* In the interests of economy of statement, a person's permitting an intoxicant to be administered to himself is treated by clause 26 as a case of "taking" it. Paragraph (c) so provides.

9.19 *Subsection (9). Medicinal purpose.* When drugs are taken on medical advice that advice may include conditions as to the circumstances in which the drug is to be taken. The effect of taking drugs and failing to comply with the conditions may be that the taker becomes intoxicated. If, in consequence of something he then does, he is charged with a crime requiring recklessness or some lower degree of fault, the question arises whether the intoxication is to be regarded as "voluntary" so as to attract the operation of subsection (3) or (6) (b) (i). The same question arises where drugs are taken without specific medical advice but for a medicinal purpose and with similar results. The answer provided by subsection (9) is that it depends, in both types of case, on whether the drugs were "properly" taken for a medicinal purpose. If they were properly taken the resulting intoxication is involuntary. Otherwise it is voluntary. Drugs taken on medical advice are properly taken unless (i) the taker has failed to comply with the conditions of the advice *and* (ii) he was aware that the effect might be that he would do an act of the kind involved in the offence charged. Drugs taken without medical advice but for a medicinal purpose are properly taken unless the taker was aware that the result might be that he would do an act of the kind involved in the offence charged.

9.20 The subsection is based on the recent decisions of the Court of Appeal in *R.* v. *Bailey*[28] and *R.* v. *Hardie (Paul Deverall).*[29] In *R.* v. *Bailey* a diabetic was charged with offences of wounding contrary to sections 18 and 20 of the

[28][1983] 1 W.L.R. 760, C.A.
[29][1985] 1 W.L.R. 64.

Offences against the Person Act 1861. His defence was that the attack had taken place during a loss of consciousness due to hypoglycaemia caused by failure to take sufficient food following his last dose of insulin.The court's opinion was that, if this had happened, it was a defence unless the defendant's failure to take food was "reckless" in the sense that he was aware that it might lead to "aggressive, unpredictable and uncontrollable conduct". It was not enough that he knew that it might result in mere loss of consciousness, "unless he put himself in charge of some machine such as a motor car, which required his continued conscious control". In *R.* v. *Hardie (Paul Deverall)* the defendant was charged under section 1 (2) and (3) of the Criminal Damage Act 1971. He had taken valium tablets to calm his nerves without, so far as appears, any medical advice. It was held that the jury should have been directed to acquit him if, because of the valium, he was unable to appreciate risks to persons and property[30] and if the taking of the valium was not itself "reckless". The word "reckless" appears to be again used in the same special sense as in *R.* v. *Bailey*—i.e., was the defendant aware that taking the valium might render him aggressive or incapable of appreciating risks, etc.? And it was again stressed that in other cases, like reckless driving, the taking of a soporific drug might have different results.

9.21 It appears then that the degree of awareness necessary to incur liability varies according to the nature of the offence charged. If the defendant is charged with a wounding offence he must have been aware that he might behave aggressively. If he is charged with reckless driving it is sufficient that he was aware that he might lose control of what he was doing. This is expressed as a general principle that the defendant should be regarded as voluntarily intoxicated only if he was aware that his failure to comply with the condition might result in his doing an act capable of constituting the offence in question.

9.22 *Subsection (10). Burden of proof.* In general, the principles of clause 17 apply to determine the burden of proof of matters arising under this clause. Subsection (10) would create an exception. When there is a dispute whether the defendant's intoxication was voluntary or involuntary the burden will be on him to prove on a balance of probabilities that it was involuntary. Our preference would be to omit this subsection, leaving the general principle to apply. However the Law Commission have taken a different view in their report on Offences relating to Public Order.[31] In the interests of consistency we have, therefore, included subsection (10); but the square brackets indicate that we think this is a matter which deserves further consideration. We note that in both *R.* v. *Bailey*[32] and *R.* v. *Hardie* the court appeared to be of the opinion that, in the circumstances of those cases, the burden of proof was on the Crown.

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[30]This ruling is surprising in the light of the decision in *R.* v. *Caldwell* [1982] A.C. 341, as interpreted in *Elliott* v. *C.* [1983] 1 W.L.R. 939, D. C., and *R.* v. *R.* (1984) 79 Cr. App. R. 334, C. A. The offence charged in *R.* v. *Hardie* was, after all, criminal damage, which, according to the above cases, does not require awareness of risk.

[31](1983), Law Com. No. 123, para. 3.54.

[32][1983] 1 W.L.R. 760 at 765: ". .there is no evidence that it [the effect of not taking food] was known to this appellant." A similar statement is reported in *R.* v. *Hardie* [1985] 1 W.L.R. 64 at 69.

Clause 27: Supervening fault

9.23 This clause restates and generalises the principle applied by the House of Lords in *R.* v. *Miller.*[33]

9.24 *Subsection (1)* deals with most of the cases that will arise. The definition of an offence may suggest as the standard case the doing of a positive act that causes a specified result (e.g. "destroy or damage property. . ."; or "cause injury to another. . ."), the actor being at the time of his act at fault in a particular way in respect of that result (". . .intentionally"; ". . .recklessly"). Such language may also be satisfied where a person without the required fault does an act giving rise to a risk that the specified result will occur and later becomes aware of what he has done. He is now under a duty to "take measures that lie within his power to counteract the danger that he himself has created".[34] Failure to take such steps will constitute the offence if the omission to act is made with the kind of fault in respect of the result that is required for the offence. The principle was applied in *R.* v. *Miller* to a case of arson; and Lord Diplock's speech in *R.* v. *Miller* has since been understood to be "applicable to all result-crimes."[35]

9.25 *Some details.* The drafting of the subsection takes account of the following points:

(i) Nothing in *R.* v. *Miller* limits the principle to a case in which the original act is blameworthy. Although the original act in that case (falling asleep with a lighted cigarette) was no doubt at least careless, the certified question answered in the affirmative by the House of Lords concerned liability for failure to take steps to extinguish, or prevent damage by, a fire started "accidentally"—which must mean "without the fault required for the offence". The question was answered without comment upon this aspect.

(ii) It is necessary, for the principle to apply, that the result specified for the offence should occur, or (if it has already occurred) should continue, after the failure to act. Moreover, the omitted act must be one that might have prevented the occurrence or continuance of the result.

9.26 *Subsection (2)* completes the generalisation from *R.* v. *Miller* by making similar provision for the case of an offence constituted by a state of affairs (rather than by positive conduct) and committed by a person who fails, with the required fault, to put an end to the state of affairs when he realises that it exists. The subsection applies, of course, only to a state of affairs for which the person concerned, if relevantly at fault, may be liable. This need not be expressly stated as the subsection is concerned only with the fault element.

Clause 28: Transferred fault and defences

9.27 This clause restates the doctrine known as "transferred intent" and provides a corresponding rule as to "transferred" defences.

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[33][1983] 2 A.C. 161.
[34]*Ibid.* at 175.
[35]*Wings Ltd.* v. *Ellis* [1984] 1 W.L.R. 731 at 739, *per* Mann J.

9.28 *Subsection (1). Transferred fault.* A general statement on transferred fault has the following practical justifications.

(i) Where a person intends to affect one person or thing (X) and actually affects another (Y), he may be charged with an offence of attempt in relation to X; or it may be possible to satisfy a court or jury, without resort to the doctrine, that he was reckless with respect to Y. But an attempt charge may be impossible (where it is not known until trial that the defendant claims to have had X and not Y in contemplation); or inappropriate (as not describing the harm done adequately for labelling or sentencing purposes). Moreover, recklessness with respect to Y may be insufficient to establish the offence or incapable of being proved. The rule stated by this subsection overcomes these difficulties.

(ii) The drafting of particular offences is simplified. This is illustrated by our redrafting (in clause 82) of section 1 of the Criminal Damage Act 1971.[36]

9.29 *Transfer "only within the same crime".*[37] If an offence can be committed only in respect of a particular class of person or thing, the actor's intention or recklessness, to be "transferred", must relate to such a person or thing—that is, in the words of the subsection, to "a person or thing capable of being the victim or subject-matter of the offence".[38] If, on the other hand, the person or thing actually affected is not so capable, the external elements of the offence are not made out and the question of transferring the actor's fault does not arise.

9.30 *Wording of offences and charges.* The subsection treats an intention to affect X as an intention to affect Y (who is actually affected). So where an offence requires an affecting of a person with intention to affect him (as opposed to "any person"), there can still be a conviction; and a charge of an offence committed against Y with intent to affect Y can be proved by evidence of an intent to affect X. Existing authority is not consistent on these points[39]; but the proposed solution is in keeping with the best authority.

9.31 *Mistake as to victim.* Clause 28 (1) is so worded as to deal also with the case of an irrelevant mistake about the identity of the victim or subject-matter of an offence. The argument, "I thought Y was X; I intended to hit X; therefore I did not intend to hit Y", hardly needs a statutory answer; but this provision incidentally provides one.

9.32 *Subsection (2). Transferred defences.* This provision for the transfer of defences will be useful for the avoidance of doubt. It enables a person who affects an uncontemplated victim to rely on a defence that would have been available to him if he had affected the person or thing he had in contemplation. It is wide enough to apply consistently with a provision such as clause 47 (8) (force against innocent persons), which restricts a defence of lawful force against a person's body to a case where the force is directed against a person to be arrested or one whose unlawful conduct provokes the defensive force. If permissable force is directed against such a person (X), the actor would have a defence if that force found its target; so clause 28 (2) gives the actor the same defence if he misses X and hits Y (who was outside his contemplation).

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[36]Discussed in this respect in para. 16.3, below.

[37]Cf. Williams, *Criminal Law, The General Part* 2nd ed. (1961), 128.

[38]Cf. *R.* v. *Pembliton* (1874) L.R. 2 C.C.R. 119.

[39]See the comment on *R.* v. *Monger* [1973] Crim. L. R. 301 at 302.

CHAPTER 10

PARTIES TO OFFENCES (1)—PRINCIPALS, ACCESSORIES AND VICARIOUS LIABILITY

Introduction

10.1 *Persons who may be liable for an offence.* Clauses 29-33 are concerned with the various ways in which a person may be liable in respect of the commission of an offence. This subject was considered by the Working Party assisting the Law Commission.Their proposals were published by the Law Commission in 1972 as their Working Paper No. 43. The Working Paper has not been followed by a Report. The Working Party found that the law of parties could not be treated satisfactorily without dealing also with liability for the acts of another (the topic often called for convenience vicarious liability). We share this view and have given effect to it in our scheme of arrangement of Part I. The Working Party dealt only with parties to offences actually committed, and did not include in Working Paper No. 43 consideration of the offences of incitement, conspiracy and attempt, all of which have some bearing on the law of complicity. In this context suggestions have been made for absorbing incitement and complicity into a new offence of "facilitation", liability for which would not depend on proof of the commission of the offence facilitated.[1] This suggestion has certain attractions but giving effect to it would involve substantial issues of law reform which we felt, consistently with our general aim of restatement, we were not able to undertake. Our point of departure therefore in considering how the law of complicity should be dealt with in the Code was the proposals made by the Working Party. Those proposals were made with codification in mind and many of them attempted to do no more than state and clarify the existing law. While we have not wished to embody all the Working Party's proposals in the Code it is right to say that we have derived considerable guidance from the Working Paper.

Clause 29: Parties to offences

10.2 *Principal and accessory.* This clause restates the present law by providing that a person may be guilty of an offence either as a principal offender or as an accessory. Since each type of participant is guilty of the offence each is liable to the same penalties.

10.3 *Terminology.* The use of the terms principal and accessory to indicate different modes of participation in an offence was proposed in Working Paper No. 43.[2] This usage is familiar and convenient. There are a number of reasons for maintaining a distinction between these modes of participation. An accessory is not normally indicated directly as an offender by the law creating the offence, so a special provision is needed to make him guilty of it. Secondly, the fault elements are different for a principal and an accessory. Indeed a principal may be convicted of some offences in the absence of any fault on his part, but an accessory can never be guilty in the absence of fault. Thirdly, an accessory may not be liable for an offence, despite an apparent act of

[1] See the articles by Buxton in (1969) 85 L.Q.R. 252; [1973] Crim. L.R. 223 and 656.
[2] Proposition 1.

participation, where he is a "victim", or where he has effectively withdrawn from participation, or where the principal has gone beyond the scope of the common purpose.

Clause 30: Principals

10.4 *Persons who are principals.* This clause provides that a person is a principal offender in three types of case. In summary, these are when he commits an offence by his own act (subsection (1)), when he commits it by virtue of being vicariously liable for the act of another (subsection (2) (a)) and when he commits it by an innocent agent (subsection (2)(b)). These cases represent existing law and their continuation was proposed in Working Paper No. 43.[3] There are two situations, however, in which the doctrine of innocent agency cannot operate satisfactorily, and a special rule is provided for these in subsection (3).

10.5 *Subsection (1).* This subsection sets out, in the context of a general statement of the requirements of liability for any offence, the cases where a person commits an offence as a principal. These cases include, in paragraph (b), joint principals who between them do all the acts specified for an offence (as in illustration 30 (ii)).

10.6 *Subsection (2) (a): liability for the act of another.* There are two cases where a person may be guilty of an offence as a principal despite the fact that he did not perform any of the relevant acts himself. As indicated above, the first arises when a person is liable for the act of another which is attributed to him. Provision for the continued application of the doctrine of vicarious liability (as this form of liability is generally labelled) is made in clause 33. Both that clause and the subsection permit the attribution to another of acts only (including of course any mental element implicit in the relevant verb, such as "sell"). They will not permit the attribution to a person of another's fault, so a person may not have attributed to him the knowledge of his employee who "knowingly sells". This is in accordance with the requirement in subsection (1) that for a person to be guilty as a principal he must act with the fault specified for the offence. The consequences for the doctrine of vicarious liability are discussed in paragraph 10.29 below.

10.7 *Subsection (2) (b): innocent agency.* The second case in which a principal does not himself perform the acts specified for the offence arises when they are done by his innocent agent. An innocent agent is one who is procured, assisted or encouraged to do the relevant acts but who is not guilty of the offence because he is a child, or suffers from mental disorder, or lacks the fault required for the offence or has a defence (for example, of duress). The doctrine of innocent agency thus enables culpability as a principal to attach to the person who was the real perpetrator of the offence in question. It is particularly appropriate for a person who procures a child or a person suffering from mental disorder to do criminal acts. Retention of the doctrine was proposed in Working Paper No. 43.

10.8 *The semi-innocent agent.* The provision here will extend to what may be termed the "semi-innocent agent". He is a person who does an act specified for an offence with some degree of fault, but who lacks the fault

[3] Proposition 2.

required for the offence with which the person who procured, assisted or encouraged him to act is charged. Such an agent is being manipulated in the same way as one who is entirely blameless, and the fact that he may be guilty of some lesser offence should not be an argument for reducing the seriousness of the offence contemplated by the principal. An effect of our provision, therefore, will be to reverse *R.* v *Richards.*[4] In that case a wife procured two men to assault her husband and gave instructions that they should cause serious injury to him. In the event they caused only minor injuries and were convicted under section 20 of the Offences against the Person Act 1861 of unlawful wounding. It was held that since the wife was absent when the assault took place she could not be convicted under section 18 of the same Act of wounding with intent to cause grievous bodily harm. Apparently the decision would have been different had she been present at the assault. We regard this result as indefensible and the rule stated in the case as one which should not be restated in the Code. Under the subsection Richards would be guilty of wounding with intent as a principal acting by an innocent agent. (See also illustration 30 (v)).

10.9 *Subsection (3).* Working Paper No. 43 identified two cases for which the doctrine of innocent agency is inappropriate.[5] A person who cannot comply with a particular description specified for a person committing the offence (for example "licensee") should not be guilty of the offence as a principal, even where he has procured an innocent person of that description to do the relevant act. Nor should a person be guilty as a principal of an offence requiring personal conduct on the part of the offender (for example rape, or driving without due care and attention) where he has procured an innocent person to do the physical act involved. One method of dealing with such exceptional cases is to create specific offences of procuring, assisting or encouraging a person to act in a certain way. This method is cumbersome, time-consuming and potentially inefficient, since it is always possible that certain cases may be over-looked in drawing up the new offences. A more satisfactory solution is a special rule creating liability as an accessory. The subsection provides accordingly. A person who would be guilty as a principal acting by an innocent agent but for the fact that the case falls within one of these two categories is nevertheless guilty as an accessory. Such a solution was suggested by the Criminal Law Revision Committee[6] and by the Court of Appeal in *R.* v. *Cogan and Leak.*[7] In this case the court held also that Leak, a married man, could be guilty of raping his own wife through the innocent agency of Cogan's body. The reasoning on this point has attracted much criticism and it is submitted that liability as an accessory is preferable. *R.* v. *Bourne*[8] affords another example of the utility of the provision. A husband who forced his wife to have connection with a dog could be convicted as an accessory to bestiality.

Clause 31: Accessories

10.10 *Persons liable as accessories.* This clause states the law on accessory liability. In summary, subsection (1) (a) specifies the acts sufficient for the

[4] [1974] Q.B. 776.
[5] See Proposition 3.
[6] Working Paper on Sexual Offences (1980), para. 26.
[7] [1976] Q.B. 217.
[8] (1952) 36 Cr. App. R. 125.

purpose in the usual case and subsection (1) (b) give necessary cross-references to the special accessory provisions set out in clause 30 (3), mentioned above and 35 (1) (liability of officer of corporation). Subsections (2) and (3) restate existing law on the scope of the acts sufficient for accessoryship. Subsection (4) sets out the fault element, and subsections (5) and (6) restate existing law on the scope of the rules relating to the fault of accessories. The remaining subsections (7), (8) and (9) deal with a number of limitations on the liability of an accessory which are not directly related to the elements of act and fault.

10.11 *Acts specified for an accessory.* Subsection (1) (a) restates the present law. Subject to subsections (2) and (3), the words "procure", "assist" and "encourage" are used in their ordinary meanings. Procuring connotes the idea of deliberately causing.[9] A person assists another to commit an offence when, for example, he supplies tools or labour or information to the principal, or when he does any other act which facilitates the offence. A person encourages another to commit an offence when, for example, he incites the principal, or joins in a conspiracy with him to commit the offence, or when his presence is in itself an incentive to the principal to commit the offence.

These terms are familiar and avoid the difficulties of interpretation of the traditional language of aiding, abetting and counselling. The Working Paper suggested the use of "inciting" and "helping" to describe modes of participation as an accessory. However, we think "inciting" is too narrow to encompass satisfactorily all the cases envisaged by the concepts of procuring and encouraging. We prefer "assisting" to "helping" on the grounds that it is a more formal expression and has been used elsewhere in penal statutes with success (for example, section 22 of the Theft Act 1968).

10.12 *Principal's ignorance of procurement or assistance.* Subsection (2) is provided largely for the avoidance of doubt. The Court of Appeal held in *Attorney-General's Reference (No. 1 of 1975)* that it is not necessary in a case of procuring a person to commit an offence that the principal should be aware that he is being so procured. This rule is restated. A person may also be assisted to commit an offence although he is unaware of the help given. The Working Party gave the example[10] of a person who, knowing that the principal is seeking to murder X, takes steps unknown to the principal to prevent X receiving a warning. He should be an accessory to the offence if the principal does murder X, despite the absence of a conspiracy between them and despite the principal's ignorance of the assistance.

The case of encouragement is somewhat different. The ordinary meaning of the verb to encourage is "to inspire with courage . . . to embolden . . . to incite . . . to stimulate". It would therefore be odd to hold that one person encouraged another if the other had been unaware of the former's expression of support, and the Courts-Martial Appeal Court appears to have reached the same conclusion in *R.* v. *Clarkson*.[11] We assume that the court will generally

[9] For consideration of the meaning of "procure", see *Attorney-General's Reference (No. 1 of 1975)* [1975] Q.B. 773, *per* Widgery L.C.J. and *R.* v. *Beck* [1984] 1 W.L.R. 22.

[10] Working Paper No. 43, p. 37.

[11] [1971] 1 W.L.R. 1402.

be able to give effect to the ordinary meaning by drawing a reasonable inference from the facts of the case that the principal was aware that he was receiving encouragement.

10.13 *Passive encouragement.* A person does not become an accessory to an offence merely because he omits to take steps to prevent it. However, a person who has a special authority over the acts of others, arising, for example, by virtue of his management of premises or his ownership of a chattel, may incur accessory liability through a failure to exercise that authority to prevent an offence taking place on those premises or through use of the chattel. This failure to act may then be regarded as encouragement of the offence. Subsection (3) restates existing law by allowing for these cases. We think it is unnecessary and unwise to attempt to provide a comprehensive list of cases in which this special authority may exist.

The Working Party suggested a rule which was effectively the converse of the one provided here, on the ground that it was necessary to prevent erosion of the general principle of no criminal liability for a mere omission.[12] Such a rule would have the effect of reversing the decisions in a number of cases[13], and the Working Party suggested that special provision might be needed for cases of persons in positions of special responsibility who permitted others to commit offences. It appears that this proposal was not well received on consultation on the Working Paper. Most commentators found nothing objectionable in the present law and did not share the Working Party's fear of erosion of the general principle.

10.14 *Fault element for accessories.* Subsection (4) restates the fault element necessary for liability as an accessory. A number of points require comment.

(i) The word "cause" is used in paragraph (a) to convey the same notion as "procure" in subsection (1), because the latter word does not read harmoniously in this context.

(ii) The proposition in paragraph (a) that the accessory has sufficient fault if he knows that what he does "*may* cause, assist or encourage . . ." is designed to cover cases of recklessness. Recklessness may be as to the circumstances specified for the offence (*Carter* v. *Richardson*[14] and see illustration 31 (vii)), or as to the offences which the principal is proposing to commit (see *D.P.P. for Northern Ireland* v. *Maxwell*[15], illustration 31 (v)).

(iii) Illustration 31 (viii) shows that where the principal goes outside the "common purpose", in the sense of doing acts of a different kind from those agreed to or contemplated by the accessory, the latter will not be liable in respect of the offence so committed. Under the present law, for example, an assault with knives is regarded as a different kind of act from an assault with fists[16] and the subsection enables this distinction to be maintained. We think it is impossible

[12] See Working Paper No. 43, Proposition 6(4).
[13] For example, *Du Cros* v. *Lambourne* [1907] 1 K.B. 40; *Tuck* v. *Robson* [1970] 1 W.L.R. 741.
[14] [1974] R.T.R. 314.
[15] [1978] 1 W. L. R. 1350.
[16] *Davies* v. *D.P.P.* [1954] A. C. 378; *R.* v. *Anderson and Morris* [1966] 2 Q. B. 110.

to be precise as to the application of this principle. Occasionally, in the Code a concept has to be used which has an irreducible minimum of uncertainty in its application, and the concept used here to restate existing law may require further development by the courts. A related type of case, where the principle does do the kind of act agreed but does it deliberately in relation to an uncontemplated victim, is dealt with by a separate provision in subsection (6).

(iv) An offence sometimes requires that a certain result be caused. Under the present law for a person to be liable as an accessory he must have in respect of that result the fault required for a principal. Hence he cannot be guilty of murder at common law in the absence of an intention that the victim shall be killed or suffer grievous bodily harm or foresight that the principal's act is likely to cause death or grievous bodily harm.[17] However, he may be liable for manslaughter even though he did not intend or even foresee the causing of death as the result of the principal's unlawful act.[18] Paragraph (b) of the subsection restates the general principle for the Code. An application of it is given in illustration 31 (ix).

(v) The proposals relating to the fault element for accessories which were put forward by the Working Party were extensive and elaborate and are now somewhat out of date. (See Working Paper No. 43, Proposition 7.) We hope that this subsection, when read together with subsections (5) and (6), offers a simpler and clearer method of dealing with this complex topic.

10.15 *Accessory's ignorance of details.* Subsection (5) restates existing law. An accessory need not know such detail appearing in the indictment under the heading "Particulars of offence" as the date of the offence, place of commission, identity of property stolen and so on: *R.* v. *Bainbridge.*[19] He may even be mistaken about these details as long as he knows the kind of act which the principal proposes to do or contemplates such an act as one of a number that the principal may do. It is otherwise where the accessory makes a specific agreement that the principal is to commit the offence in relation to a particular person or to particular property. This case is dealt with by the next subsection, to which the subsection is subject.

10.16 *Principal's change of plan.* The "common purpose" doctrine applies to relieve an accessory from liability where the principal does an act of the kind agreed but does it deliberately against a different victim. An early example is *R.* v. *Saunders and Archer*[20], which forms the basis of illlustation 31 (xi). Under subsection (5) an accessory need not generally know the identity of the victim, hence he would still be guilty, for example, if the plan accidentally miscarried and took effect against a different victim. This would have been the position in *Saunders and Archer* if Saunders had been absent when his wife passed on the apple, i.e., the case would have been one of "transferred intention" (see clause 28) and Archer would have been liable as an accessory to the murder of the child. However, the common law has consistently taken

[17] *R.* v. *Betts and Ridley* (1930) 22 Cr. App. R. 148.
[18] *R.* v. *Baldessare* (1930) 22 Cr. App. R. 70.
[19] [1960] 1 Q.B. 129.
[20] (1576) 2 Plowden 473; 75 E.R. 706.

the view that it is different when the principal takes a deliberate decision to let the plan miscarry. The subsection gives effect to this and so qualifies subsection (5).

This result is sometimes criticised as being unduly favourable to an accessory who has demonstated his willingness to assist in the commission of a murder. However, the principle is well-established and the Working Party proposed that it should continue.[21] The subsection has, however, a limited area of operation. It would not apply, for example, to the facts in the South African case of *S.* v. *Robinson.*[22] In that case D1, D2 and E agreed with P that P should be killed by E to procure insurance money on P's life and avoid P's prosecution for fraud. At the last moment P withdrew his consent to die but nevertheless E killed him. E has deliberately acted outside the scope of the agreement but has not committed the offence against a different person. Whether D1 and D2 are guilty as accessories depends therefore on the application of clause 31 (4). They encouraged E in the commission of murder, but it is debatable whether they intended to encourage E to do an act of the kind he did. Is killing with the consent of the victim a different kind of act from killing without his consent? There is no English authority on the point, and we take the view that this is an example of the need for judicial development which we referred to above.

10.17 *Subsection (7).* The subsection largely restates existing law. Paragraph (a) provides for the case of the police informer or undercover agent who gives assistance, or does some other act of participation, towards the commission of an offence, but whose purpose is to frustrate the offence. If his plan fails and the offence is committed before the police can intervene he is not an accessory. Likewise, where his act is designed to enable the police to intervene after a theft or similar offence to nullify the effects of the offence (by recovering the stolen property and arresting the participants), he should not be guilty of the offence himself. The paragraph follows the proposal made in Working Paper No. 43.

There has been some controversy over cases where a person in possession of an article hands it over to another knowing that the other intends to commit an offence using the article. The question is whether there should be accessory liability even where the recipient has or may have a legal claim to the article. The point is covered in paragraph (b) which makes the answer depend on the state of mind of the transferor. If he believes that he is under a legal obligation to hand over the article, and this is his only reason for so acting, he should not be liable for a subsequent offence involving the article. The case is analogous to a claim of right. It would be going too far to impose a positive duty to resist the transfer, particularly where the transferor could not be certain that an offence would be committed.

10.18 *Protected persons.* Subsection (8) restates a well-established principle, of which *R.* v. *Tyrrell*[23] is the leading illustration. Continuation of

[21] Working Paper No. 43, Proposition 7 (2) (c).
[22] 1968 (1) S.A. 666.
[23] [1894] 1 Q.B. 710.

this principle was proposed in Working Paper No. 43[24] and it has subsequently received the support of the Criminal Law Revision Committee in their Report on Sexual Offences.[25]

10.19 *Incidental participation.* Working Paper No. 43 (Proposition 8) suggested a generalisation of the principle referred to in the previous paragraph. The Working Party proposed that a person should not become an accessory to an offence "if the offence is so defined that his conduct in it is inevitably incidental to its commission and such conduct is not expressly penalised". It was noted that English law at present only applies such a rule where the party whose conduct is "incidental" is a victim of an offence created for his or her protection. The spectator who pays to watch an obscene performance and the knowing buyer of goods from an unlicensed seller are (probably) not exempt from accessory liability. It appears that the balance of opinion on consultation on the Working Paper was against extending immunity in these cases, and it seems right that the spectator or buyer who incites the commission of the offence should not be protected from prosecution. The passive spectator may not be liable in any event if he does nothing to encourage the offence, and other cases of "incidental" participation can be dealt with by prosecutorial discretion. Accordingly, the Code makes no express provision for such cases.

10.20 *Withdrawal from participation.* Subsection (9) attempts to resolve a matter of some uncertainty in existing law. At present it is unclear to what extent a person who has done acts sufficient to make him an accessory to an offence can escape liability by withdrawing or repenting of his participation before the offence is committed. Working Paper No. 43 suggested a rule in wider terms than the subsection (see Proposition 9), but this was not generally well-received on consultation. Critics argued that to allow an alternative of withdrawal in the form of simple communication of that fact to the principal was too generous. It was unrelated to any notion of the accessory undoing his act of participation and was too weak to be justified on the ground that the public interest in the prevention of crime supports a defence of withdrawal. We think the rule stated in the subsection offers the best and simplest solution. It is consistent with the provision for police informers and undercover agents in subsection (7) (a) and allows for flexibility in its application.

Clause 32: Parties—procedural provisions

10.21 This clause deals with a number of procedural matters which would otherwise be included in Part III of the Code dealing with procedure and evidence. However, since they have an important bearing on the practical operation of the substantive rules about parties, it is appropriate to set them out here. The section would replace section 8 of the Accessories and Abettors Act 1861 and section 44 of the Magistrates' Courts Act 1980 which would be repealed.

[24]Proposition 8.
[25]Fifteenth Report (1984), Cmnd. 9213, 101-103.

10.22 *Subsection (1).* This provision, which is the procedural counterpart of clause 29, makes it clear that a party to an offence, whether he is a principal or an accessory, is convicted of the offence irrespective of the capacity in which he is charged. This is the existing law. In *D. P. P. for Northern Ireland* v. *Maxwell*[26] the defendant was charged with the offences as a principal, the particulars in the indictment alleging in effect that he had done the acts forbidden by the offence. The evidence, however, showed that the real case against him was that he had done acts (driving the car) sufficient for aiding and abetting the commission of the offences. This did not prevent his conviction, although members of the House of Lords commented that it was good practice to draft the particulars of the offence so as to show with greater clarity the real nature of the case which the defendant has to meet.

Paragraph (c) of the subsection enables the court to convict both defendants of the offence in a case such as *Ramnath Mohan* v. *R.*[27] (See illustration 32).

10.23 *Subsection (2).* This subsection provides guidance on the form of the charge in a case where a person is alleged to be guilty of an offence as an accessory, and avoids any problems of duplicity arising from the fact that accessory liability may be incurred in different ways. It is unnecessary to provide for the form of the charge where a person is alleged to have committed an offence as a principal. The information or indictment will simply set out the acts alleged to have been done.

10.24 *Subsection (3).* Paragraph (a) of this subsection restates existing law. A possible difficulty might arise in a case where D and E are tried together, it being alleged that E was the principal in an offence and D an accessory. If the evidence tending to show that E committed the offence is the same against both, then it looks at first sight inconsistent to acquit E and convict D. However, the jury might take the view that E was an innocent agent and D was really the principal offender, despite having been charged as an accessory. It is suggested that a case of real inconsistency could be dealt with by a judicial direction that on the evidence the jury must convict or acquit both. A similar rule applies in the law of conspiracy.

The provision in paragraph (b) of this subsection is a corollary of subsection (1), under which a person may properly be convicted of an offence where he is charged with doing acts as a principal but the evidence shows that he did other acts rendering him liable as an accessory. Similarly, a person should be convicted of an offence where he is charged, for example, with having assisted the commission of an offence by providing information, but the evidence shows that he assisted in a different way or did acts of encouragement. Provided that the offence is the same, an error in charging, perhaps induced by a misleading statement to the police, should not affect liability to conviction.

Clause 33: Vicarious liability

10.25 *Cases in which one person may be liable for the act of another.* A person may sometimes be held to have committed an offence not by reason of anything he himself has done, but by reason of an act done by another,

[26][1978] 1 W.L.R. 1350.

[27][1967] 2 A.C. 187.

either (paragraph (a)) because the statute creating the offence expressly so provides, or (paragraph (b)) as a result of the extended interpretation given by the courts to certain words in the definition of the offence. Such words are usually verbs like "sell", "use", "possess" and so on, and their extended interpretation means that both the actual seller, user and possessor and the principal on whose behalf he is acting are held to commit the offence. The offences covered by these paragraphs are often said, though inexactly, to impose "vicarious liability". There is no principle underlying these cases. Their existence is simply the product of statutory interpretation. However, there are certain limits to the interpretative process involved and these are set out in paragraph (b). Paragraph (c) of the subsection cross-refers to a type of case of liability for the act of another which is dealt with in clause 30 (2) (innocent agency).

10.26 *Limits of vicarious liability.* Paragraph (b) provides for two conditions to be satisfied before a provision may be interpreted as applying to a person who did not himself do the prohibited act. The relevant element of the offence must be expressed in terms which are apt for the defendant as well as the person who in fact acted, and some well-known examples are given in the previous paragraph. Secondly, the person who in fact acted must have done so within the scope of his employment or authority (that is, as the defendant's agent). These conditions are in accordance with the results reached in the great majority of cases, and we take the view that in their absence and in the absence of express provision there can be no justification for imposing vicarious liability. Under existing law an employee may disobey an express instruction from his employer and yet still be held to be acting within the scope of his employment.[28] Illustration 33 (ii) anticipates that the same result will be reached under the Code.

10.27 Two particular types of case require further comment. The Law Commission's Working Party proposed that in principle vicarious liability should be restricted to cases where there is a relationship of employer and employee between the defendant and the person who acts.[29] However, the word "employee" was to be defined to include a person acting with the consent of the defendant "as if he were ... employed by him". In this way the Working Party proposed to extend vicarious liability to cases where a member of the defendant's family or a friend performed the relevant act for the defendant at his request. We think it is right to provide for such cases, but it should not be done by characterising them as types of "employment". They are cases where one person is acting for another as his agent. To avoid artificiality the provision should be expressed to reflect this relationship, and we believe that a reference to a person "acting within the scope of authority" is apt for the purpose.

10.28 Such a reference extends of course to cases in which the person acting is doing so not merely at the defendant's request but for valuable consideration as an independent contractor. The Working Party proposed to

[28]See e.g. *Coppen* v. *Moore (No. 2)* [1898] 2 Q.B. 306.
[29]Working Paper No. 43, Proposition 4.

exclude independant contractors from the scope of vicarious liability, and drafted a restrictive definition of the word "agent" accordingly. We have not adopted the proposal. It would change the present law[30] and we are not convinced that the case for change has been made out. We can see no real difference in principle between a person who, for example, "uses" the defendant's vehicle as his employee, and a person who "uses" the defendant's vehicle on a single occasion because the defendant has asked him or paid him to do so.

Our draft clause allows for cases such as *Quality Dairies (York) Ltd.* v. *Pedley* and *F. E. Charman Ltd.* v. *Clow*[31] to be decided as they were. It does not follow that liability for the acts of independent contractors will be extended or made general. The second part of paragraph (b) enables the court to exclude liability in appropriate cases. It is one thing to hold that a person carrying on a business of supplying milk[32] or heavy building materials[33] "uses" a vehicle if he employs an independent contractor to supply those things in the contractor's vehicle. It would be quite another thing to hold that a householder "uses" the removal van owned by the firm of removers whom he employs to carry his furniture to a new residence. The draft also leaves open the possibility that, where an independent contractor does an act incidental to the act he was engaged to do, he will be held not to have acted within the scope of his authority.

10.29 *The delegation principle.* The courts have interpreted some offences requiring knowledge (notably licensees' offences) so as to permit a person's conviction on the basis of the act and knowledge of one to whom he has delegated management of premises or of an activity. This "delegation principle" was regarded as anomalous by members of the House of Lords in *Vane* v. *Yiannopoullos*[34] and the Law Commission's Working Party proposed its abolition.[35] The Code gives effect to this proposal by subsection (1) of clause 30 which states that to be guilty as a principal a person must act with the fault specified for the offence. Accordingly, a person charged with "knowingly selling" must be proved to have had the requisite knowledge. The knowledge of another cannot be attributed to him under clause 33 because this clause, read with clause 30 (2), shows that only the *acts* of another may be attributed to the defendant. Thus the "delegation principle" will not apply to Code offences unless the particular offence expressly provides that a person can commit the offence although personally lacking the fault specified by the definition of the offence.

[30]A principal has been held liable for the act of his independent contractor in such cases as *Quality Dairies (York) Ltd.* v. *Pedley* [1952] 1 K.B. 275 and *F. E. Charman Ltd.* v. *Clow* [1974] 1 W.L.R. 1384.
[31]See n. 30.
[32]As in *Quality Dairies (York) Ltd.* v. *Pedley,* above, n. 30.
[33]As in *F. E. Charman Ltd.* v. *Clow,* above, n. 30.
[34][1965] A.C. 486.
[35]Working Paper No. 43, pp. 29–31.

CHAPTER 11

PARTIES TO OFFENCES (2)—CORPORATIONS AND CHILDREN

Clause 34: Corporations

11.1 *Working Paper No. 44.* Our point of departure in considering how the criminal liability of corporations should be provided for in the Code has been a Working Paper on the subject prepared by the Law Commission's Working Party. This was published by the Law Commission in 1972 as its Working Paper No. 44. It has not been succeeded by a Report. The Working Party reviewed six possible bases of corporate liability (including the option of abolishing such liability altogether). Only three of these six were regarded as "practicable"[1]—namely, "vicarious liability" only (that is, "[making] the liability of a corporation co-extensive with that of . . . natural persons for the acts of others"[2]); "limitation of liability by reference to a particular maximum penalty"[3]; and liability broadly on the same principles as those of the present law ("the status quo"). Neither of the first two candidates was considered in great detail; each—and especially the second—might require the review of a considerable body of legislation in order to identify offences needing exceptional treatment; and the adoption of either of them would be an act of radical law reform. We should not be justified in basing a legislative draft on either of these options even if we were inclined to do so. We therefore proceed from the status quo. In doing so we derive what guidance we can from the Working Paper. The Paper contemplated some limitation of existing corporate liability and some clarification of its key feature, the identification of a corporation with certain of its officers.[4]

11.2 *Gaps to be filled.* The liability of corporations for offences involving fault is a recent development and was not fully discussed in authoritative judgments before the House of Lords decision in *Tesco Supermarkets Ltd.* v. *Nattrass* in 1971.[5] The proliferation of "no fault" or "due diligence" defences under regulatory legislation (with one of which the *Tesco* case was directly concerned) is also a recent phenomenon. So new a subject is no doubt bound to contain areas of uncertainty; but we confess to having been taken aback by the range of situations on which there was (to our knowledge) no direct authority. We have tried to provide comprehensively in clause 34 both as to liability and as to the application of defences.[6]

11.3 *Corporations as "persons".* All corporations other than corporations sole are declared by clause 5 (1) to be "persons" within the meaning of the Code. This follows existing law.[7]

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[1]Working Paper No. 44, para. 61.
[2]*Ibid.* para. 28.
[3]*Ibid.* para. 33.
[4]*Ibid.* paras. 35 *et seq.*
[5][1972] A.C. 153.
[6]For examples of "gap-filling" see paras. 11.10 (iii), 11.15 and 11.16.
[7]Interpretation Act 1978, Sched. 1 ("person") and Sched. 2, para. 4 (5).

11.4 *Clause 34 (1). Offences of strict liability.* Vicarious liability for offences of strict liability may attach to corporations as to other persons. Or a corporation may, for example, be the occupier of a building from a chimney of which dark smoke is emitted; or its activities may cause polluting matter to enter a stream. Then, like any other person, it can be liable for the emission or for causing the pollution, without fault on its part.[8] These propositions are confirmed by subsection (1).

11.5 *Clause 34 (2). Offences involving fault.* The attribution to a corporation of criminal liability for an offence involving fault is achieved by identifying the corporation with its "directing mind and will"—that is, with those of its human agents whose acts and states of mind are (in law) its acts and states of mind.[9] This metaphysical notion of the common law has to be translated into legislative terms without resort to puzzling or misleading metaphor and with as much definition as the subject-matter will allow. The translation is made by subsections (2)–(5). The primary statement is in subsection (2): what is required to make a corporation liable, in any case in which fault is an element, is that "one of its controlling officers, acting within the scope of his office and with the fault required, is concerned in the offence". There are several phrases here which require elaboration.

11.6 *Clause 34 (3). "Controlling officer"* is defined in subsection (3) as—

> "a person participating in the control of the corporation in the capacity of a director, manager, secretary or other similar officer (whether or not he was validly appointed to his office)".

We believe that this (ignoring the parenthesis) comes as close as possible to the meaning of "directing mind and will" as explained in the opinions in the *Tesco* case. The phrase "director, manager, secretary or other similar officer" is taken from the common-form provision for the imposition of liability on company officers, which was recognised by members of the House of Lords as providing a useful indication of the persons concerned.[10] Viscount Dilhorne referred to the person or persons "in actual control of the operations of the company".[11] Any of them "participates" in such control. He may do so as a member of the board of directors, as managing director, or perhaps as some other superior officer (to adapt the language of Lord Reid); or by virtue of a delegation of directors' powers.[12]

11.7 *Invalid appointment.* We follow a hint in Working Paper No. 44 in not requiring the controlling officer to be validly appointed.[13] An over-constitutional test for the identification of "controlling officers" would put a premium on disregard of the formalities of appointment and delegation. This aspect of our definition rebels against some dicta in *Tesco.*[14]

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[8]See, respectively, Clean Air Act 1956, s. 1; Control of Pollution Act 1974, s. 31 (1) (a).
[9]*Tesco Supermarkets Ltd.* v. *Nattrass* [1972] A.C. 153.
[10]*Ibid.* at 180, 187-188, 190-191, 201.
[11]*Ibid.* at 187.
[12]*Ibid.* at 171.
[13]Working Paper No. 44, para. 40.
[14][1972] A.C. 153 at 199-200, *per* Lord Diplock.

11.8 *Question of law.* It is the judge's duty to direct the jury as to the facts necessary to identify a particular person with a defendant company.[15] For it is "a question of law whether . . . a person in doing particular things is to be regarded as the company . . . ".[16] Subsection (3) (c) declares accordingly.

11.9 *"One of its controlling officers, acting. . . with the fault required."* This formula in subsection (2) gives effect to the provisional view of the Working Party, which we believe to be right, that "a corporation should not be taken as having any required mental element unless at least one of its controlling officers has the whole mental element required for the offence".[17]

11.10 *Clause 34 (4) and (5). "Is concerned in the offence".* This shorthand expression in subsection (2) is explained in subsections (4) and (5). There are several ways in which a controlling officer may by his activity or inactivity render a corporation guilty of an offence.

(i) He may *do the acts* specified for the offence. It would be simpler to refer to the officer's committing the offence; but this is not possible, because the offence may be one that only the corporation can commit as principal.

(ii) He may *be a party to* the acts of others—by procuring, assisting or encouraging those acts.

(iii) He may *fail to prevent* relevant acts (of other controlling officers or of subordinates) or relevant events. It seems clear on principle that a company must be guilty of a fraud offence if its managing director knows that company personnel (not being controlling officers) are defrauding customers and turns a blind eye to what is going on. The perpetrators cannot be said to be "encouraged" by his inactivity unless they know of his knowledge. So an additional expression is needed. "Fails to prevent"[18] will cover this kind of case and also some cases involving offences of omission or "situational offences". Some positive duty of a company may be entrusted to a subordinate; but he omits (and therefore the company omits) to do what is required; or a subordinate's actions give rise to a state of affairs capable of constituting an offence on the company's part. If in either case the offence requires fault, the company's liability depends upon some culpable failure on the part of a controlling officer. Subsection (5) makes the point as clear as possible with an explanation of "fails to prevent". The subsection must of course be read together with the reference to "the fault required" in subsection (2).

11.11 *"Acting within the scope of his office."* This phrase in subsection (2) embraces a number of limitations on corporate liability.

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[15]*R.* v. *Andrews Weatherfoil Ltd.* [1972] 1 W. L. R. 118; applying dictum of Lord Reid in *Tesco Supermarkets Ltd.* v. *Nattrass* [1972] A.C. 153 at 173.

[16][1972] A.C. 153 at 170, *per* Lord Reid.

[17]Working Paper No. 44, para. 39d.

[18]The word "connives" (used in a similar context in cl. 35) will not do here. It implies at least recklessness; whereas a corporation's liability for an offence of negligence or carelessness may be based on a controlling officer's merely negligent or careless failure to know what is going on or to act as he should act with such knowledge.

(i) *The officer must be acting as such.* A corporation is not liable for what is done by any of its officers in a personal capacity.[19]

(ii) *The officer must be acting within his sphere.* If only some of the functions of management are delegated to a controlling officer, the criminal liability of the corporation on the basis of identification with him should be limited to his activities in connection with those functions.[20]

(iii) *Clause 34 (6). The officer must not be acting against the corporation.* Subsection (6) declares that an act done by an officer with the intention of harming the corporation is not done "within the scope of his office". This will lay to rest the "inequitable"[21] decision of *Moore* v. *I. Bresler Ltd.*[22]

11.12 *Offences that a corporation cannot commit.* Three groups of offences require consideration.

(i) *Clause 34 (7). Offences not punishable with a fine.* The conventional view is that there can be no question of liability if there can be no punishment. Subsection (7), reflecting this view, declares that a corporation cannot be guilty of murder or of any other offence not punishable with a fine.

(ii) *Offences requiring natural persons as principals.* Sexual offences, bigamy, driving offences (as opposed to offences of "using" vehicles): these, no doubt, cannot be committed by corporations as principal. Accessory liability, on the other hand, is perfectly possible in theory, however unlikely in practice with some of these offences; and in the case of driving offences it has been known.[23] No statutory statement seems called for on either point.

(iii) *Perjury.* It is very doubtful whether a corporation can commit perjury as a principal, since only a human being can take an oath (or, because he has no religious belief or his religion prohibits oath-taking, affirm).[24] A corporation can, of course, be guilty of perjury as an accessory. We do not consider that express provision on the matter is necessary; but the point may bear further consideration in the context of a modernisation of offences against the administration of justice.[25]

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[19]Cf. Working Paper No. 44, para. 39b.

[20]*Ibid.*

[21]*Ibid.* para. 39c.

[22][1944] 2 All E.R. 515. The decision may not have survived *Attorney General's Reference (No. 2 of 1982)* [1984] Q.B. 624; shareholders and directors charged with theft from a company they control cannot, on the ground of identification with the company, claim the company's consent to their acts.

[23]See e.g. *R.* v. *Robert Millar (Contractors) Ltd.* [1970] 2 Q.B. 54.

[24]Cf. *Penn-Texas Corporation* v. *Murat Anstalt* [1964] 1 Q.B. 40 at 53-56, *per* Willmer L. J.

[25]See (1979), Law Com. No. 96, Offences Relating to Interference with the Course of Justice. The offence of perjury proposed by cl. 3 of the draft Administration of Justice (Offences) Bill appended to that Report might in some of its forms be committed by a corporation as principal.

(iv) *Conspiracy.* If a company director, acting as such, decides to perpetrate a fraud, he does not thereby conspire with the company. This is because no "agreement" (the essential feature of conspiracy) is involved, not because of any limitation on corporate liability. See illustration 52 (iii). The point does not call for statement in the present clause.[26]

11.13 *Clause 34 (8). Defences.* The leading case of *Tesco Supermarkets Ltd.* v. *Nattrass*[27] was concerned with a statutory defence of a particular type—namely, a defence under the Trade Descriptions Act 1968 that the offence charged was due to the act or default of another person and that the defendant took all reasonable precautions and exercised all due diligence to avoid the commisision of such an offence by himself or any person under his control.[28] The manager of the Tesco store where the infringement of the Act occurred was held to be "another person" within the first limb of this defence. The company brought itself within the second limb by showing that there had been no failure in the matter of precautions or diligence on the part of those in control of its operations; the company had established an effective system of command and control. Defences are of many kinds, however, and the *Tesco* case seems not to be capable of direct application to all of them. We believe that it is necessary to distinguish, as subsection (8) does, between three classes of defence.

11.14 *Defence involving a state of mind (subsection (8) (a)).* A rule is required as to who must entertain a belief, or have any other state of mind, that affords a defence to an offence charged against a corporation. The possible cases fall into two groups.

(i) *Controlling officers concerned.* There are those in which controlling officers are "concerned in the offence", in the sense established by subsections (4) and (5). In such cases the corporation must be able to rely on the states of mind of those officers, and it cannot matter that other persons concerned in the transaction do not have the belief or intention required for the defence. Such a rule derives readily enough from the *Tesco* case by analogy.

(ii) *No controlling officer involved.* But that case is not, we believe, adequate authority for denying a corporation a defence when everyone concerned in the transaction has the required state of mind. It should not matter that no controlling officer is so concerned and that therefore none has the state of mind. See illustration 34 (vi) in Schedule 1.

11.15 *Defence involving the absence of a state of mind (subsection (8) (b)).* The Misuse of Drugs Act 1971, section 28 (2), usefully illustrates this class of defence as well as the third class. On a charge of possessing a controlled drug, it is a defence that the possessor neither knew nor suspected nor had reason to

[26]Cf. *R.* v. *McDonnell* [1966] 1 Q.B. 233 (no conspiracy between a company and its sole controller).
[27][1972] A.C. 153.
[28]Trade Descriptions Act 1968, s. 24 (1).

suspect that the thing possessed was a controlled drug. The burden of proving this defence is on the defendant. It would be oppressive to require every director of a company to be called as a witness to deny knowledge or suspicion. It should be enough that no controlling officer with relevant responsibilities knew or suspected that the company was in possession of a controlled drug.

11.16 *Defence involving compliance with a standard of conduct (subsection (8) (c)).* The fact that no relevant controlling officer has reason to suspect that the company is in possession of a controlled drug will complete the defence under section 28 of the 1971 Act. This is an example of "compliance with a standard of conduct". Some such expression is needed if the Code is not at this point to become impossibly particularistic. The *Tesco* decision has to be codified by way of a succinct answer to the very general question: what, in the case of a corporation, constitutes compliance with a standard of conduct? Not that a defendant employer (corporate or otherwise) must always show that his own conduct fell within the terms of a statutory exception to liability; a corporation (like any other defendant) may be able to rely on the conduct of the very person for whose act it would otherwise be liable.[29] All depends upon the terms of the defence in question. But if a specified standard must, on the true interpretation of the statute, be complied with by the defendant personally, what does this requires of a defendant corporation? The *Tesco* case is authority for the proposition that such a defence is made out if the standard is complied with by the corporation's controlling officers. This means in practice that relevant controlling officers (which may in some contexts mean the board of directors as a whole) did not fall below the stipulated standard in connection with the matter in question. Subsection (8) (c) states the rule accordingly. It is illustrated in Schedule 1 by reference to a "due diligence" defence simpler than that in issue in the *Tesco* case: see illustration 34 (viii). It will be seen that such an example has to be given in very general terms.

Clause 35: Liability of officer of corporation

11.17 *Need for the clause.* Many statutes contain so-called "directors' liability" clauses. A general clause should be included in Part I of the Code. This will avoid a proliferation of similar provisions in Part II as that Part comes to accommodate various classes of specific offences. Clause 35 offers a modern form of clause conforming to the style of the Code.

11.18 *Clause 35 (1) and (2).* Existing clauses invariably render guilty of a corporation's offence controlling officers with whose "consent or connivance" it is committed. But the word "consent" appears to be otiose. One who *actively* consents—perhaps the very controlling officer whose concern in the offence is what makes the corporation guilty of it under clause 34 (2)—will no doubt be guilty on general principles. The main class requiring special provision is those who "connive at" the offence but do not take part in it. Any who may be described as *passively* consenting are within this class. Clause 35 (1) (a) therefore refers to connivance alone; and subsection (2) spells out the minimum fault involved. Some statutes in addition provide for the

[29]See e.g. Road Traffic Act 1972, s. 40 (6) (a): defence that the driver of an overweight vehicle was proceeding to the nearest available weighbridge.

liability of a director to whose "neglect" an offence is "attributable". Clause 35 (1) (b) (consistently, we believe, both with principle and with modern practice) imposes such liability only for strict liability offences.

11.19 The clause extends to persons "purporting to act" as controlling officers. In this it follows existing clauses. The addition is needed even though a controlling officer may be someone "not . . . validly appointed to his office" (clause 34 (3) (a)). The latter phrase ought not to be understood to render a corporation guilty of an offence because of the act of a mere intermeddler in its affairs; but such a person ought himself to be liable for his own connivance at the criminal activities of corporate officers.

11.20 Clause 35 (3). Application of the clause. Modern penal legislation, although normally including a directors' liability clause, does not always apply the clause to all offences. Section 18 of the Theft Act 1968, for example, applies only to certain offences of deception and to false accounting, apparently on the ground that these offences are "of a kind to be committed by bodies corporate".[30] Almost any offence might be so committed, however; and we believe that a provision such as our clause 35 should in a Code have universal application. This, though, would involve a decision of policy which our draft should not anticipate. We therefore provide in subsection (3) for the selective application of clause 35 to offences under the Act (which may conveniently be indicated in column 7 (miscellaneous) of Schedule 3). Existing clauses in pre-Code enactments would be left untouched.

Clause 36: Children

11.21 *Child under ten.* This clause restates the present law[31]—without expressing the matter, as the present law does, in terms of a conclusive presumption of incapacity.

11.22 *Child over ten but under fourteen.* The law at present is that such a child can be guilty of an offence but only if, in addition to doing the prohibited act with such fault as is required in the case of an adult, he knows that what he is doing is "seriously wrong".[32] It is presumed at his trial that he did not have such knowledge, and the prosecution must rebut this presumption by proof beyond reasonable doubt.[33] The presumption, it has been said, "reflects an outworn mode of thought" and "is steeped in absurdity"[34]; and it has long been recognised as operating capriciously. Its abolition was proposed in 1960 by the Ingleby Committee on Children and Young Persons.[35] We believe that there is no case for its survival in the Code.

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[30]Criminal Law Revision Committee, Eighth Report: Theft and Related Offences (1966), Cmnd. 2977, para. 104.

[31]Children and Young Persons Act 1933, s. 50, as amended by the Children and Young Persons Act 1963, s. 16.

[32]See, most recently, *McC.* v. *Runeckles* [1984] Crim. L.R. 499.

[33]*Ibid.*; *J. B. H. and J. H. (minors)* v. *O'Connell* [1981] Crim. L.R. 632.

[34]Glanville Williams, *Criminal Law, The General Part* 2nd ed. (1961), 820.

[35](1960), Cmnd. 1911, para. 94.

11.23 The Children and Young Persons Act 1969, section 4 provides: "A person shall not be charged with an offence, except homicide, by reason of anything done or omitted while he was a child" (that is, under fourteen). The intention of the government of the day was that the minimum age for prosecution should in fact be raised to fourteen by stages; and the Act contains provisions enabling this to be done.[36] No government, however, has acted to bring section 4 into force; it appears to be a dead letter. It ought no doubt to be repealed with the enactment of the Code (if not before). It is not, however, strictly speaking inconsistent with the present clause. The clause specifies the lowest age at which a person can commit an offence, while section 4 specifies an age below which, although committing an offence[37], a person does not thereby render himself liable to prosecution.

[36]Children and Young Persons Act 1969, ss. 34 (1) (a) and 73 (2).
[37]See *ibid.* ss.1 (2) (f) and 3 ("the offence condition" in care proceedings).

CHAPTER 12

MENTAL DISORDER AND INCAPACITY

Mental disorder

Present law

12.1 The defendant's mental disorder may under existing law be relevant in a number of ways.

(i) *Disability in relation to the trial.* The defendant's mental disorder (or his being a deaf-mute) may operate as a bar to his trial on indictment or to the the progress of his trial beyond the end of the prosecution case.[1] If the defendant is found to be "under disability" the court will order his admission to a hospital to be specified by the Secretary of State.[2] He passes for the time being out of the criminal justice system and into the hospital system; he may or may not later come to be tried. There is no equivalent procedure in the magistrates' court. But where the court is satisfied that a person charged before it with an offence punishable with imprisonment did the act or made the omission charged and is suffering from mental illness or severe mental impairment such as to justify the making of a hospital order, the court may make such an order without convicting him[3]; and this power may sometimes be used without embarking on a trial.[4]

(ii) *Insanity defence.* The defendant's mental disorder at the time of the alleged offence may affect his liability to conviction according to principles of general application. These principles are contained in the so-called *M'Naghten Rules* of 1843.[5] The Rules assert a presumption that the defendant was sane and responsible for his actions; but they permit proof that he was "insane" in a legal sense, which the Rules define. If he is proved to have been insane within the meaning of the Rules at the time of doing the act charged, he is found "not guilty by reason of insanity".[6] This "special verdict" leads to an order that the defendant be detained in a hospital to be specified by the Secretary of State with the status of a "restricted patient" for the purposes of the Mental Health Act 1983.[7]

(iii) *Provisions relating to particular offences.* The defendant's mental disorder may have significance within the law relating to a particular offence, justifying either an outright acquittal or a conviction of a lesser offence only. The only examples occur in the law of homicide; proof of mental disorder may lead to a conviction of infanticide, or of manslaughter on the ground of diminished responsibility, rather than of murder.[8] Any such provisions should appear in Part II of the

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[1]Criminal Procedure (Insanity) Act 1964, s. 4.
[2]*Ibid.* s. 5 (1).
[3]Mental Health Act 1983, s. 37 (3).
[4]*R.* v. *Lincoln (Kesteven) J. J., ex p. O'Connor* [1983] 1 W.L.R. 119.
[5]10 Cl. & F. 200; 8 E.R. 718.
[6]Trial of Lunatics Act 1883, s. 2 (as amended by Criminal Procedure (Insanity) Act 1964, s. 1).
[7]Criminal Procedure (Insanity) Act 1964, s. 5 and Sched. 1 (as amended by the Mental Health Act 1983).
[8]Infanticide Act 1938, s. 1; Homicide Act 1957, s. 2.

Code (Specific Offences). See clauses 57 (1) (a) and 58 (diminished responsibility) and 67 (infanticide).

(iv) *Disposal after conviction.* The defendant's mental disorder may enable the court to use special disposal powers upon conviction. Such powers exist under the Mental Health Act 1983, sections 37 and 41 (hospital and guardianship orders; restriction orders) and under the Powers of Criminal Courts Act 1973, section 3 (probation orders requiring treatment for mental condition). Provisions relating to such powers are appropriate to the part of the Code dealing with the disposal of offenders, or to specialised mental health legislation. They are not further discussed here.

12.2 *Provisions required.* Part I of the Code must contain general provisions relating to the effect of mental disorder on liability to conviction. It will be convenient to deal at the same point in the Code with any associated matters of procedure and evidence and with disposal (see clauses 39-42). It will probably be convenient also to place provisions concerning disability in relation to the trial alongside those concerning disorder as a ground of acquittal, especially if (as has been proposed) a finding of disability and an acquittal based on mental disorder are to give rise to similar disposal powers.

12.3 *Existing law reform proposals.* The Committee on Mentally Abnormal Offenders, appointed by the Home Secretary and the Secretary of State for Social Services in 1972 with Lord Butler as its Chairman, gave elaborate consideration to "disability in relation to the trial" and "the special verdict". In its Report[9] the Committee proposed substantial reform of the law and procedure relating to both topics. None of its relevant recommendations has yet been implemented. The necessity of incorporating in the projected Criminal Code an appropriate provision to replace the outdated "insanity" defence was one justification given by the Committee for an overhaul of the law on the subject.[10]

The Butler Committee's proposals form the basis of our draft clauses. It is therefore unnecessary to review the existing law here. It would equally be inappropriate to rehearse the Committee's reasons in support of all of its proposals. There are, however, some matters on which we have to suggest modification of the Butler scheme or to question whether some modification ought not to be considered, and on these matters some degree of argumentation will be necessary.

Clause 37: Disability in relation to trial

12.4 This clause is allocated to this topic as an indication of its preferred place in the Code. But no text is supplied, for two reasons:

(i) Some aspects of the Butler Committee's proposals as to the procedure to be followed in a case of alleged disability are very controversial and have caused misgivings in the Home Office. This was made clear in a consultative document on the proposals which the Home Office issued in April 1978. In particular, serious doubts

[9](1975), Cmnd. 6244 (hereafter referred to as "the Butler Report"), Chapters 10 and 18.
[10]*Ibid.* para. 18.1.

exist as to the practicability of a recommendation that if the defendant is found to be under disability there should nevertheless be a "trial of the facts"—at once if there is no prospect of the defendant's recovering, or as soon (during periods of adjournment not exceeding six months in total) as he may prove unresponsive to treatment.[11] It is not appropriate to attempt here to resolve the undoubted difficulties to which this recommendation gives rise. On the other hand, it would be equally inappropriate to restate the existing law; for the Committee made a cogent case for change on a number of issues, including the extension of a disability procedure to the magistrates' court and the provision of flexible disposal powers in relation to a defendant under disability.

(ii) Implementation of the Butler Committee's proposals, or of some variant of them, will require quite complex provisions of a procedural nature.

Clause 38: Mental disorder verdicts

12.5 Clause 38 gives effect to the main substantive proposal in Chapter 18 of the Butler Report: namely, to substitute for the existing "special verdict" based on insanity within the meaning of the *M'Naghten Rules* a verdict of "not guilty on evidence of mental disorder", to be returned in either of two kinds of situation. One situation is that in which the defendant committed the offence charged but was at the time suffering from severe mental disorder (clause 38(1)(a)). The other is that in which evidence of the defendant's mental disorder at the time of his act is the reason why he is not proved to have committed the offence charged (clause 38(1)(b)). On the return of a mental disorder verdict the court would have flexible disposal powers (see paragraph 12.29 below), the availability of which would undoubtedly give clause 38 greater practical importance than the insanity defence now has.

12.6 *Clause 38(1)(a).* The defendant has done the act specified for the offence with the fault required. He has no defence other than that he was suffering from severe mental illness or severe subnormality. The proposal that he should be acquitted on proof of such severe disorder is controversial. The Butler Committee acknowledged that—

> "it is theoretically possible for a person to be suffering from a severe mental disorder which has in a causal sense nothing to do with the act or omission for which he is being tried";

but they found it "very difficult to imagine a case in which one could be sure of the absence of any such connection".[12] The Committee proposed, in effect, an irrebuttable presumption that there was a sufficient connection between the severe disorder and the offence. This certainly simplifies the tasks of psychiatric witnesses and the court. Some people, however, take the view that it would be wrong in principle that a person should escape conviction if, although severely mentally ill, he has committed a rational crime which was uninfluenced by his illness and for which he ought to be liable to be punished. They believe that the prosecution should be allowed to persuade the jury (if it can) that the offence and the disorder were unconnected. If such a person were

[11] *Ibid.* paras. 10.24, 10.25, 10.27.
[12] *Ibid,* para. 18.29.

to remain ill at the time of his conviction, he could of course be made the subject of a hospital order. There is undoubtedly force in this point of view. We have been bound to draft in accordance with the Butler Committee's proposal; but clause 38 could readily be amended to reflect the view of the Committee's critics if that view should prevail.

12.7 *"Severe mental illness"*, for the purpose of this exemption from criminal liability, ought, in the Butler Committee's view, to be closely defined and restricted to serious cases of psychosis (as that term is currently understood). The Committee recommended, as the preferable mode of definition, the identification of "the abnormal mental phenomena which occur in the various mental illnesses and which when present would be regarded by common consent as being evidence of severity".[13] The definition offered by the Committee is reproduced in subsection (2) (e). It is placed in square brackets because it is certain to receive close professional scrutiny and may well call for amendment before it is enacted.

12.8 *"Severe subnormality"*. The Butler Committee adopted this category of disorder from the Mental Health Act 1959, section 4. Its definition in that Act was apt for the Committee's purpose. But the expression "severe mental impairment" has since replaced "severe subnormality" in mental health legislation (the latter term having fallen out of favour). "Severe mental impairment" has the following meaning:

> "a state of arrested or incomplete development of mind which includes severe impairment of intelligence and social functioning and is associated with abnormally aggressve or seriously irresponsible conduct on the part of the person concerned".[14]

The new definition is not a happy one for present purposes; exemption from criminal liability on the ground of severe mental handicap ought not to be limited to a case where the handicap is associated with aggressive or irresponsible conduct. It is clear that further consideration will have to be given both to terminology and to definition at this point. Meanwhile we have simply followed the Butler Committee and the definition in the Mental Health Act 1959.

12.9 *Evidence of severe mental disorder.* Clause 38 (3), providing that such evidence must be given by appropriately qualified doctors, is as recommended by the Butler Committee.[15]

12.10 *Clause 38 (1) (b).* Evidence of mental disorder may be the reason why the court or jury is at least doubtful whether the defendant acted with the fault required for the offence. The Butler Committee recommended that, although in such a case there must be an acquittal, this acquittal should be in the qualified form "not guilty on evidence of mental disorder" where it is proved that the defendant was in fact suffering from mental disorder at the time of his act.[16] Subsection (1) (b) gives effect to this recommendation.

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[13]*Ibid.* paras. 18.30—18.36.
[14]Mental Health Act 1983, s. 1 (1).
[15]Butler Report, para. 18.37.
[16]*Ibid.* para. 47 of Summary of Recommendations.

12.11 *Cases covered by subsection (1) (b).* Subsection (1) (b) adapts the Committee's proposal to the conceptual structure of the Code. First, it provides that the mental disorder verdict is not to be returned unless evidence of mental disorder is the *only* reason for an acquittal. The provision must not affect a case in which the defendant is entitled to an acquittal on some additional ground having nothing to do with mental disorder. Secondly, it refers not only to absence of fault but also (a) to automatism and (b) to a belief in a circumstance of defence. (a) Automatism is mentioned because the acquittal of one who acted in a state of automatism is not grounded only in absence of "fault" (see clause 43). (b) A person may commit an act of violence because of a deluded belief that he is under attack and must defend himself. Within the scheme of the Code—which draws a distinction between elements of offences (including fault elements) and defences—such a person would not, when relying on his delusion, be denying "the fault required for the offence". His mentally disordered belief must therefore be separately mentioned in the paragraph.

Subsection (1) (b) deals also with the case where the defendant lacked the required fault because of the combined effects of mental disorder and intoxication. This case has been discussed in paragraph 9.17, above.

12.12 *"Mental disorder"* is defined in two stages by subsection (2) (a) and (b). The former paragraph, following the Butler Committee, adopts the Mental Health Act definition.[17] The Committee recognised, however, that not every "disorder or disability of mind" should lead to the proposed verdict and give rise to the court's special disposal powers. The Committee suggested the exclusion of—

> "transient states not related to other forms of mental disorder and arising solely as a consequence of (a) the administration, mal-administration or non-administration of alcohol, drugs or other substances or (b) physical injury."[18]

Subsection (2) (b) applies the logic of this proposal to a somewhat larger range of transient states. The principle appears to be that where a purely transient "disorder of mind" occurs that is not associated with some underlying condition that may lead to a recurrence, there is no need for protective measures to be available to the court. If this is the principle, there seems to be no reason why it should not apply to transient disorders caused by illness, shock or hypnosis or occurring during sleep, so long as they are not liable to recur. One example notably absent from the short list of exceptions stated by the Butler Committee is the somnambulistic episode. A person who commits a harm by an act done in sleep is not under present law normally regarded as suffering from "a defect of reason from disease of the mind" within the meaning of the *M'Naghten Rules;* he is acquitted on the basis of so-called "sane automatism". Under the definition of "mental disorder" that we propose the same result would obtain, unless indeed it were proved that the episode was a feature of an underlying condition from which a similar occurrence was to be feared in the future.

12.13 *Intoxication.* The Butler Committee proposed to exclude from the category of "mental disorder" transient states caused by "the administration,

[17] *Ibid.* para. 18.20 (See now, Mental Health Act 1983, s. 1 (2)).
[18] *Ibid.* para. 18.23.

mal-administration or non-administration of alcohol, drugs and other substances". Our draft implements this proposal so far as "administration" is concerned. A reference to "mal-administration" would not be an error; but it seems unnecessary. It might, on the other hand, be an error to except cases of "non-administration". If a disorder of mind occurs because (for example) a medicine is not taken, the true "cause" of the disorder must be the condition giving rise to a need for the medicine. That condition may or may not justify treating the disorder as the occasion for a mental disorder verdict (see next paragraph). The exclusion of any disorder caused by the non-administration of any substance might prevent its being so treated. Our solution is simply to exclude, by subsection (2) (b) (i), cases of "intoxication, whether voluntary or involuntary". ("Intoxicant" is widely defined by clause 26 (8) (a) so as to include a drug or medicine capable of impairing a person's awareness or control.)

12.14 *Disorder liable to recur.* The general effect of subsection (2) (b) (ii) has already been described in paragraph 12.12. But we must refer further to the case of a "disorder caused by illness", where the illness is "a condition... that may cause a similar disorder on another occasion". The purpose of the Butler Committee's exclusion of disorder consequent upon non-administration of a substance (see preceding paragraph) was to protect from a mental disorder verdict a diabetic who causes a harm in a state of confusion after failing to take his insulin. We have been unable, however, to distinguish between the different conditions that may cause repeated episodes of disorder. Nor do we think it necessary to do so. There is not, so far as we can see, a satisfactory basis for distinguishing between (say) a brain tumour or cerebral arteriosclerosis on the one hand and diabetes or epilepsy on the other. If any of these conditions causes disorder of the mind (such as an impairment of consciousness) so that the sufferer does an otherwise criminal act without fault, his acquittal of the apparent offence should be "on evidence of mental disorder". Whether a diabetic so affected has failed to seek treatment, or forgotten to take his insulin, or decided not to do so, may affect the court's decision whether to order his discharge or to take some other course. There will not, as in the past, be a mandatory hospital commitment; and the offensive label of "insanity" will no longer be used. So the verdict should not seem preposterous in the way that its present counterpart does.

12.15 *"Psychopathic disorder"* is included in the definition of "mental disorder". The Butler Committee did not comment on the apparent oddity of including psychopathy as a possible basis of acquittal. The oddity is in fact more apparent than real. No form of mental disorder will have any effect under clause 38 (1) (b) except as a cause of the defendant's having acted without fault or in a state of automatism, or having believed that an exempting circumstance existed. We believe that psychopathic disorder would rarely, if ever, be found to be such a cause. We follow the Butler Committee in repeating this element of the definition of "mental disorder"; but consideration might be given to its deletion.

12.16 *Automatism.* Clause 38 preserves a distinction equivalent to that between "sane" and "insane" automatism. As said above, a person who injures another by a blow unconsciously delivered in (for example)

a state of post-epileptic automatism[19] will receive a mental disorder verdict. By contrast, one who assaults another when in a hypoglycaemic episode of impaired consciousness resulting from insulin treatment will not fall within subsection (1) (b): see illustration 38 (iv) in Schedule 1. He should receive an ordinary acquittal—assuming, that is, that the insulin was "properly taken" within the meaning of clause 26 (8) (b) and (9).

12.17 *Proof of mental disorder.* A mental disorder verdict will not be appropriate unless the court or jury are satisfied (in a case under clause 38 (1) (a)) that the defendant was suffering from severe mental disorder or (in a case under clause 38 (1) (b)) that the evidence of mental disorder that has prevented proof of fault—to take the most likely example—in fact establishes that he was suffering from such disorder. If the court or jury are not so satisfied, there must be a conviction in the former case and an ordinary acquittal in the latter. The Butler Committee recommended for both cases a standard of proof on the balance of probabilities.[20] Clause 38 (1) does not allocate either to prosecution or to defence the burden of proving the relevant disorder. Indeed, to avoid doubt it expressly provides that proof may be made by either side. No doubt evidence adduced by each side might contribute to proof. The point requires explanation.

12.18 Clause 38 has to be read with clause 40 (4), which will in some circumstances enable the prosecution to adduce evidence of mental disorder (even, where a mental disorder defence has been notified, as part of its own case). Against the background of that provision it can readily be seen that proof of mental disorder might come from a prosecution or a defence source, in a case under either paragraph of clause 38 (1). It will be convenient to consider four cases, two under each paragraph, taking paragraph (b) first.

(i) *Cases under clause 38 (1) (b).* In Case 1 the defendant leads evidence, including some evidence of mental disorder, which raises a doubt as to whether he acted with the fault required for the offence charged. But it is not compelling evidence and might not justify a positive finding that he lacked the fault required or that he actually suffered from mental disorder. The prosecution, not risking an absolute acquittal for failure of proof of fault, adduces evidence that establishes on the balance of probabilities that the defendant was indeed suffering from mental disorder at the time of the act. In Case 2 the defendant leads evidence plainly demonstrating that he lacked the fault required for the offence (or acted in a state of automatism) because he was suffering from mental disorder. The prosecution unsuccessfully tries to undermine this evidence rather than to reinforce it. A mental disorder verdict is required in both cases.

(ii) *Cases under clause 38 (1) (a).* In Case 3 the defendant does not deny that he committed the offence. His only escape from conviction lies in proof of severe mental disorder. He makes such proof and receives a mental disorder verdict. In Case 4 the events leading to such a verdict take a different course. The defendant seeks an acquittal on the issue of fault. On this issue he introduces evidence of mental

[19]Cf. *R.* v. *Sullivan* [1984] A.C. 156.
[20]Butler Report, para. 18.39.

disorder. The prosecution adduces such evidence of its own (compare Case 1). In the event the jury have no doubt that the defendant acted with the fault required for the offence; but the prosecution evidence has satisfied them that the defendant was indeed suffering from severe mental illness. (This would no doubt be a rare case.)

The point may be summarised by saying that it is less a question of a party's burden than of the court's duty on a given state of the evidence. We believe that the correct result is reached in each of the four cases described.

12.19 *Magistrates' courts.* The Butler Committee recommended that a magistrates' court should acquit on evidence of mental disorder in the same circumstances as a jury.[21] Clause 38 so provides.

12.20 *Terminology.* (i) Clause 38 abandons the language of *"insanity"*, as recommended by the Committee.[22]

(ii) Our draft dispenses with the phrase *"special verdict"*. It is less informative than "mental disorder verdict". "Special verdict" has another usage, to which it is better confined (see paragraph 12.21 below).

(iii) The word *"verdict"* is strictly speaking inapt to refer to the determination of a magistrates' court. But it greatly simplifies drafting to refer to the "return" of a "mental disorder verdict" as the relevant outcome of summary trial as of trial on indictment, and to explain that language in a subsidiary provision (clause 38 (2) (d)).

(iv) Clause 38 (1) (a) describes the defendant as having *"committed an offence"*. Yet he is to be found *"not guilty"* ("on evidence of mental disorder") if proved to have been suffering from severe mental disorder at the time of the offence. It is clear from the context that "committed an offence" must here mean: did the act charged, with the fault required, and without any defence other than severe mental disorder. This could, of course, be spelt out if that were thought desirable.

(v) The terms *"defence of mental disorder"* and *"defence of severe mental disorder"*, suggested by the Butler Committee[23], are not adopted. The word "defence" is inappropriate in a case within clause 38 (1) (b) where a required fault element has not been proved. In such a case proof of mental disorder does not provide a defence; it produces a qualified acquittal rather than the absolute acquittal to which the defendant would otherwise be entitled. Severe mental disorder, on the other hand, could be said to afford a "defence" in a case within clause 38 (1) (a); the acquittal is attributable entirely to the disorder. But it is plainly preferable to deal with both types of case by a single provision. So the word "defence" is abandoned and the clause is expressed as a direction for the return of a particular verdict in either case. The drafting is in this respect out of keeping with the style of the Code (see paragraph 2.19 above). The departure is dictated by the structure of the Butler recommendations.

12.21 *Complexity of clause 38.* The clause is inevitably complex. The jury will, of course, be protected from its complexity; the trial judge will identify the

[21] *Ibid.* para. 18.19.
[22] *Ibid.* para. 18.18.
[23] *Ibid.*

issues arising in the particular case and trouble the jury with these only. This will be true of the application of the Code as a whole (see paragraph 2.29 (ii) above); but in the context of mental disorder we draw attention to the suggestion of the Butler Committee that the judge might in a complicated case take a special verdict from the jury—that is, that he might submit a series of questions to it and record the verdict that is required by its answers.[24]

Clause 39: Plea of not guilty by reason of mental disorder[25]

12.22 This clause gives effect (with a verbal amendment) to the Butler Committee's recommendation that a defendant should be allowed to plead "not guilty on evidence of mental disorder". This recommendation was not in terms limited to the case of trail on indictment; and subsection (1) is therefore not so limited. It should, however, be observed that the Committee's detailed discussion of the matter is couched entirely in the language of a Crown Court trial, and that whether the special plea should be possible on summary trial requires further consideration.

12.23 The court must obviously be satisfied that "the facts charged can be substantiated"[26] the defendant must be protected against a plea to which his mental disorder may have contributed. Moreover, in a case in which act and fault are not denied, the prosecution might wish to dispute the suggestion that the defendant was suffering from severe mental disorder. Such considerations suggest the need for a prescribed procedure to be followed before acceptance of the plea. Subsection (1) expresses the essence of the safeguards required.

12.24 The Committee recognised that "the plea would not be accepted if the court had reason to believe that the defendant may [sic] be under disability in relation to the trial".[27] Subsection (3) is provided for the avoidance of doubt.

Clause 40: Evidence of mental disorder and automatism[28]

12.25 This clause mainly gives effect, in reasonable detail, to recommendations of the Butler Committee as modified in the light of some considerations that are alluded to below.

12.26 *Clause 40 (1). Question of law.* The purpose of the subsection is to put it beyond doubt that it is the function of the court (and not, in particular, of medical witnesses) to interpret the definitions of "mental disorder" and "automatism" in clauses 38 (2) and 43 (1) respectively. The allocation of this function to the court is important for the purposes of clauses 38 (1) (b) and 43 (1) as well as subsections (2) and (4) of the present clause.

12.27 *Clause 40 (2) and (3). Notice of defence evidence.* The Butler Committee proposed that the defence should be required to give notice of an intention "to adduce psychiatric or psychological evidence on the mental element—whether in relation to the [mental disorder] verdict or the defence of

[24] *Ibid.* para. 18.41.
[25] *Ibid.* para. 18.50.
[26] *Ibid.*
[27] *Ibid.*
[28] *Ibid.* paras. 18.48, 18.49.

automatism".[29] But the evidence to be adduced might go, not to "the mental element", but to the existence of severe mental disorder in a case where commission of the offence is not denied (clause 38 (1) (a)). Advance notice should equally be required in such a case. Another difficulty with the proposal as formulated is the reference to "psychiatric or psychological evidence". This seems unduly narrow, as well as presenting formidable problems of definition. Subsection (2) for these reasons applies to any case in which the defendant intends to "give or adduce evidence of mental disorder or automatism"—that is, of course, evidence tending to show that he suffered from mental disorder or was in a state of automatism at the time of the act charged. The subsections suggest how the procedural rules may be designed. In relation to trial on indictment the suggestion is modelled on section 11 of the Criminal Justice Act 1967 (notice of alibi).

12.28 *Clause 40 (4) and (5). Prosecution evidence.* Subsection (4) (a) goes beyond what the Butler Committee expressly proposed. It is not clear why, once a mental disorder or automatism defence has been notified (or, in a murder case, a defence of diminished responsibility[30]), the prosecution should not from the beginning (subject to judicial control: see subsection (5)) present the case as one justifying a mental disorder verdict. Paragraph (a) is provided in order to ensure that this possibility is considered. Subsection (4) (b) gives effect to the Committee's recommendation. Subsection (5) is based on section 6 of the Criminal Procedure (Insanity) Act 1964 (evidence by prosecution of insanity or diminished responsibility).

Clause 41: Disposal after mental disorder verdict

12.29 The Butler Committee proposed that the court should have quite flexible powers when a mental disorder verdict is returned, including the power to order in-patient treatment in hospital (with or without a restriction order), out-patient treatment, certain forfeitures, or a driving disqualification, and the power to discharge the acquitted defendant without any order.[31] It is assumed that this crucial recommendation will be implemented, with whatever detailed modifications may be found necessary. Implementation will require elaborate provisions, most of which, we think, can best be scheduled.

Clause 42: Further effect of mental disorder verdict

12.30 This clause gives effect to a recommendation of the Butler Committee (which, however, refers to indictments only).[32] Paragraph (b) follows the language of rule 9 of the Indictments Rules 1915 in preference to the Committee's doubtful formula ". . . relating to the same offence".

Incapacity

Clause 43: Automatism and physical incapacity

12.31 *"Automatism"* is a useful expression for the purposes of the Code as in the common law; and it means essentially the same as it does at common

[29] *Ibid.* para. 18.49.

[30] The subsection here partially replaces the Criminal Procedure (Insanity) Act 1964, s. 6 (see also cl. 59 (4)).

[31] Butler Report, paras. 18.42-18.45.

[32] *Ibid.* para. 18.38.

law—an "involuntary movement of the body or limbs of a person".[33] For Code purposes such a movement is treated as an "act" but as one done "in a state of automatism". This permits flexible use of the word "act" as a key term in the Code. Subsection (1) (a) refers to acts of two kinds. There are those over which the person concerned, although conscious, has no control: the "reflex, spasm or convulsion". And there are those over which he has no control because of a "condition" of "sleep, unconsciousness, impaired consciousness or otherwise". The reference to "impaired consciousness" is justified[34] by the facts of several leading cases in which it is far from clear, or even unlikely, that the defendants were entirely unconscious at the time of acts which were treated as automatous.[35] The test must be whether a person lacks power to control his movements and not whether he happens to be completely unconscious.

12.32 *Clause 43 (1). Automatism.* The main function of clause 43 (1) is to protect a person who acts in a state of automatism from conviction of an offence of strict liability. It is conceded that he does "the act" specified for the offence; but the clause declares him not guilty. One charged with an offence requiring fault in the form of heedlessness, negligence or carelessness may also have to rely on the clause. On the other hand, a state of automatism will negative a fault requirement or intention of knowledge or (normally) recklessness; a person charged with an offence of violence against another, or of criminal damage, committed when he was in a condition of impaired consciousness, does not rely on this clause for his acquittal but on the absence of the fault element of the offence.

12.33 *Prior fault.* Excepted from the protection of clause 43 (1) are cases in which the state of automatism itself is the result of relevant fault on the part of the person affected. Under clause 26 (3), for example, a person who is unaware of a risk by reason of voluntary intoxication is credited with the awareness that he would have had if sober; and clause 43 (1) (b) ensures that he cannot use clause 43 (1) to escape liability for an offence of recklessness. A person charged with an offence that may be committed negligently or carelessly can be convicted if his state of automatism was the result of his own negligent or careless conduct. Paragraph (b) is intended to produce the same results as the common law. In one kind of case, however, it slightly departs from the common law. A driver who falls asleep at the wheel is presently regarded as guilty of careless driving in the period before he falls asleep; he ought to stop at that time.[36] Under the Code he might be convicted even in respect of any period after he falls asleep during which he can be said to be still "driving". Clause 43 (1), read as a whole, implies that he continues "driving" until his vehicle comes to rest.

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[33] *Watmore* v. *Jenkins* [1962] 2 Q.B. 572 at 586, *per* Winn J.
[34] *Pace* Neill J. in *Roberts* v. *Ramsbottom* [1980] 1 W.L.R. 823 (a civil case).
[35] *R.* v. *Charlson* [1955] 1 W.L.R. 317; *R.* v. *Kemp* [1957] 1 Q.B. 399; *R.* v. *Quick* [1973] Q.B. 910.
[36] *Kay* v. *Butterworth* [1945] L.T. 191.

12.34 *Clause 43 (2). Physical incapacity.* Subsection (2) provides the necessary corresponding rules for a case in which physical incapacity prevents the doing of that which there is a duty to do. The law does not condemn a person for not doing what cannot possibly be done—unless, once again, it is in a relevant way his fault that he cannot possibly do it.

CHAPTER 13

DEFENCES

Introduction

13.1 *Clauses 44-50* deal with most of the matters of defence that are appropriate for treatment in Part I. Before considering the clauses some general observations are in order.

(i) *Special and general defences.* The Code distinguishes between a "special defence" (a technical Code term defined in clause 5 (1)) and general defences. A "special defence" is "a defence, exception, exemption, proviso, excuse or qualification specified in relation to a particular offence". One general provision concerning special defences is made by clause 44. General defences are the subject of clauses 45-50 and of a few other provisions.[1]

(ii) *"Justification" and "excuse".* The Code refers (in clause 49 (1)) to these two concepts; but the words are not employed as Code terms. There is a growing literature on the distinctions to be made between two classes of defence, but no rule that we propose requires express reference to any distinction between justification or excuse or the separate use of either term.

(iii) *Elements and defences.* The distinction made in our draft between elements of offences and defences has been referred to in paragraph 7.2.

Clause 44: Belief in circumstance affording a special defence

13.2 *Subsection (1).* If knowledge of a particular circumstance is an element of an offence, a belief that that circumstance does not exist means that the offence is not committed. This truism is asserted by clause 25 (1). The present clause provides a presumption in favour of a corresponding rule for special defences (defined by clause 5 (1): belief in a circumstance that would give a defence itself gives the defence). The two clauses between them give effect (except in relation to general defences) to the principle that a person is to be judged, for purposes of criminal liability, on the facts as he believed them to be. In the case of general defences the same principle is carried (so far as appropriate) by the wording of those defences themselves: see clauses 45-48. Clause 44 corresponds to clause 6 of the Law Commission's draft Criminal Liability (Mental Element) Bill.[2]

13.3 *Mistake as to one element of a defence.* A defence may have two or more elements, each of which is, in the language of the Code, an "exempting circumstance" (see clause 5 (1)); and a person's mistaken belief may be as to the existence of one such circumstance. Clause 44 places him in the position that he would be in if his belief were true. For example, a person may be guilty of manslaughter rather than murder if he kills under provocation—that is, if something done or said causes him to lose his self-control (clauses 57 (1) (a) and 60). If he mistakenly believes that just such a thing has been done or said,

[1]Defences may properly be said to be provided by cll. 31 (7) and (9) (relating to accessories), 38 (1) (a) (severe mental disorder) and 43 (some cases of automatism and physical incapacity).
[2]Appended to Report on the Mental Element in Crime (1978), Law Com. No. 89.

the supposed provocation is treated as actual provocation, and other elements of the special defence to murder (the alleged loss of self-control and the question whether the provocation was sufficient ground for the loss of self-control) are then considered on that basis. See illustration 60 (i).

13.4 *Voluntary intoxication.* Subsection (1) is to read subject to clause 26 (6) (b) (i). Under that provision a person who is voluntarily intoxicated is credited (for the purpose of an offence requiring recklessness, heedlessness, criminal negligence or carelessness) with the understanding of the relevant matter that he would have had if he had been sober.

13.5 *Application of the clause.* The clause applies to Code offences only. Its application to pre-Code offences might disturb the settled interpretation or understanding of existing legislation.[3]

13.6 *Subsection (2).* The rule may, of course, be expressly excluded. Or it may be excluded by a provision inconsistent with it, of which the most obvious example would be a provision that the offence is not committed if a given circumstance exists or is *reasonably* believed by the actor to exist.

13.7 *Subsection (3)*, putting the burden of proof in relation to a belief in a special defence where it lies in relation to the defence itself, follows clause 6 (5) of the draft Bill.

General defences

13.8 Clauses 45 to 49 are concerned with defences to crimes generally. There are many rules, both common law and statutory, which, in particular circumstances, require, justify or excuse the doing of acts which, in the absence of those circumstances, would be criminal offences. Some of these rules, like the defence of duress, have been developed particularly in relation to criminal law but many of them are part of the civil as well as of the criminal law. Whether the issue arises in a civil or a criminal court, the conduct in question is equally required, justified or excused, as the case may be. Examples are the law relating to the chastisement of children or that which would justify a surgeon in operating on an unconcious patient without his consent. If particular conduct is required, justified or excused by the civil law, it would clearly be wrong for it to amount to an offence. The converse, however, does not follow. The criminal law might properly afford a defence when the civil law does not, as in cases where the defendant's unreasonable mistake negatives the fault which must be proved to convict him of crime although he is left liable in the civil law for his negligence. The Code must assume the continued existence of rules of this kind. It would be impossible to list them all and therefore some general provision is required. It is provided by clauses 48 and 49.

13.9 *Particularity and generality of the clauses.* Clause 49 alone would be sufficient to incorporate by reference all general defences. To rely solely on

[3]Cf. para. 8.30.

this clause, however, would be quite incompatible with codification. It would leave a mass of detailed rules to the common law and various statutes and would fail to resolve inconsistencies and uncertainties. The general provision in clause 49 is necessary for the reason given below; but it is far from sufficient. Where rules concerning particular defences are established, the Code must state them. Clause 48 requires special mention at this point because it is also expressed in general terms, though less general than those of clause 49. It relates to a category of defence which has long been recognised in the books[4] and is not different in principle from the defences spelt out in more detail in clauses 45 to 47. It is more particular than clause 48 and therefore merits inclusion on the principle that the Code should be as informative as possible. It directs the reader to particular areas of the civil law which are relevant.

13.10 *Development of common law defences.* Common law principles of justification and excuse are not static. They are developed by the judges as occasion arises and attitudes change. The development of the law relating to duress in recent years is a striking example of this. Clause 49 preserves the power of the courts to determine the existence, extent and application of any justification or excuse provided by the common law. Similar provisions are to be found in section 7 (3) of the Canadian Criminal Code and section 20 of the New Zealand Crimes Act 1961. The case (in our opinion, overwhelming) for the inclusion of a provision of this kind was made by Stephen J. in 1880, defending the corresponding provision of the Draft Code of 1879. The relevant passage is conveniently quoted in the Criminal Law Review for 1978[5] and need not be repeated here.

13.11 *Definitive and open-ended defences.* In the case of some defences, the law appears to have attained such a degree of maturity and completeness that a definitive statement of it is possible. Duress, in our opinion, has now reached that stage and clause 45 (following a recommendation of the Law Commission[6]) provides such a statement. Any further development of the defence of duress would have to be made by Parliament. It is otherwise with necessity. Though we have taken the exceptional course of departing from a recommendation of the Law Commission[7] in proposing a limited defence of necessity, this defence is left open-ended, to be developed or not as the courts may decide. It may be noted that the examples given by Stephen of cases where the courts should have this power all fall under the broad head of necessity.

13.12 *The potential of clause 49* is not limited to necessity. The courts have occasionally recognised impossibility of compliance with the law as a good defence.[8] Again, the limits of any such defence are extremely uncertain. The authorities do not justify the statement of any general principle which could be incorporated into the Code. The cases represent the law for the particular offences in issue and no more. What would be wrong, for the reasons so cogently developed by Stephen, would be for the Code arbitrarily to put an

[4]See below, para. 13.58.
[5]Glanville Williams, "Necessity" [1978] Crim. L. R. 128 at 129.
[6](1977) Law Com. No. 83, Part II.
[7](1977) Law Com. No. 83, Part IV.
[8]Smith and Hogan, *Criminal Law* 5th ed. (1983), 220.

end to this and other possible developments, such as a defence of superior orders[9] or *"de minimis"*.[10] If the stage were reached at which it was possible to enunciate a general principle, then that principle should be incorporated into the Code at its next revision.

13.13 *The use of "unlawfully" and "without lawful excuse".* General defences are sometimes thought to be admitted into the present law by the use of the words "unlawfully" or "without lawful excuse" in the definition of offences. There is no consistency in this usage and it may well be that the same principles would apply even if no such words were used.[11] We noted that the Criminal Law Revision Committee proposed to rely on the word "unlawful" in the statutory definition of murder to cover the phrase, "under the Queen's Peace", in the traditional common law definition.[12] Although that phrase is never mentioned in connection with any crime other than homicide, the principle is equally applicable to a large number of crimes. It is not only killing but also wounding and other injuries to the person, imprisonment, and appropriation of and damage to property which are justified when they are committed against the Queen's enemies in the lawful conduct of war. If "unlawful" is necessary to achieve this result in homicide, it is equally necessary in many other crimes.

13.14 *"Unlawfully" and "without lawful excuse" unnecessary in the Code.* The use of the word "unlawfully" in the definition of crimes has been justly criticised.[13] We found that consistent use of it would cause considerable drafting difficulties, sometimes requiring its repetition within the same sentence. The use of "without lawful excuse" would present even greater problems. Moreover, the Code can and should be more specific. Defences such as duress and necessity which are defined in the Code will, by their terms, apply to offences generally. Other matters of justification or excuse are made generally applicable by clauses 48 and 49. These clauses ensure that it is unnecessary to use the word "unlawfully" or any similar word or phrase in the definition of any Code offence.

Clause 45: Duress

13.15 The Law Commission's Report on Defences of General Application (Law Com. No. 83) proposes for the Code a defence of duress, applicable to all offences, similar to that available at common law. A draft Criminal Liability (Duress) Bill appended to the Report gives effect to the proposal. Our clause follows the Law Commission's recommendations and the method of the draft Bill, save in a few respects.

13.16 The function of *subsection (1)* is simply to make available the phrase "acting under duress" for use elsewhere (as in clause 47 (3)).

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[9]*Ibid.* at 219.
[10]Glanville Williams, *Textbook of Criminal Law* 2nd ed. (1983), 619–622.
[11]Williams, *The Criminal Law, The General Part* 2nd ed. (1961), 28–29.
[12]Fourteenth Report, Cmnd. 7844, para. 38.
[13]Williams, *The Criminal Law, The General Part* 2nd ed. (1961), 27.

13.17 *Subsection (2)* states the elements of the defence. It adapts clause 1 (3) of the draft Bill to the style of the Code. The following departures from the Bill should be mentioned.

(i) According to the Law Commission draft, there must be an *actual* threat of harm, which the actor may wrongly *believe* to be one of death or serious injury. We do not understand this distinction. Consistently with what is provided for other defences (compare clause 44 as to special defences and, for example, clause 47), a person should be able to rely for the defence on all the facts as he believes them to be. It would be strange if a person seeking to rely on the defence of duress were in a worse position in this respect than one relying (by way of defence to a murder charge) on a supposed provocation.

(ii) We refer to "serious injury" where the draft Bill has "serious personal injury (physical or mental)". The intended meaning is the same, as is made clear in paragraph 15.43 below.

(iii) The draft Bill refers to the actor's having to act before he can "have any real opportunity of seeking official protection". We substitute "before he can obtain official protection". It is clear from subsection (3) that this does not mean effective protection[14]; but we believe that the question must be whether the actor believes that he can make actual contact with the police or other relevant authorities and ask for protection, not whether he has a chance to look for a policeman (as "seeking" might be taken to suggest). (We do not think that a definition of "official protection" is necessary; contrast clause 1 (6) of the draft Bill.)

(iv) The passage in clause 1 (3) of the draft Bill corresponding to our subsection (2) (b) refers to "any of his personal circumstances which are relevant". We think that our reference to "personal characteristics" that effect the "gravity" of the threat is more precise and informative.

13.18 *Subsection (3)* corresponds to clause 1 (4) of the draft Bill. We should not be justified in rejecting the recommendation of the Law Commission that the possible ineffectiveness of any protection that might be available to the person under duress is immaterial. But we beg leave to doubt whether this recommendation is sound. A person's belief that the authorities will be unable to give him effective protection against the duressor is surely relevant to the effect of the threat on his freedom of action. We do not think that is can properly be ignored as one of the circumstances in the light of which the question whether he could reasonably be expected to resist the threat is to be answered.

13.19 *Subsection (4)* (voluntary exposure to risk of duress) corresponds to clause 1 (5) of the draft Bill. It is very much shorter than clause 1 (5) but we believe it has the same effect.

13.20 *Subsection (5)* (no separate defence of marital coercion) corresponds to clause 3 (1) of the draft Bill.

[14]If the view we advance in para. 13.18 were to prevail, the word "effective" could be inserted before "official protection" in subs. (2) (a) (ii).

13.21 *Subsection (6)* (notice of defence) corresponds to clause 2 (1) of the draft Bill. We have slightly modified the suggested requirement of notice so as to achieve consistency with clauses 40 (2) and 59 (2) (relating to notice of evidence of mental disorder or automatism or of a defence of diminished responsibility); but we realise that procedural provisions of this kind will in due course be settled by those with the relevant expertise. The notice requirements that we have included flow from the recommendation of other bodies or relate to matters directly analogous to those for which such requirements have been suggested. No doubt the matters in question are peculiarly apt for such requirements. It would not be appropriate for us to make similar proposals in relation to any other defences. We may draw attention, however, to the desirability of general consideration of the subject of notice of defences, lest it should develop in an unsatisfactory piecemeal fashion.

13.22 *Subsection (7)* (leave of court) corresponds to section 11 (3) of the Criminal Justice Act 1967 (relating to notice of alibi) and to clauses 40 (3) and 59 (3); no such provision appears in the draft Bill.

13.23 *Other parties.* A person (whether or not the duressor himself) who procures, assists or encourages the act of the person under duress is liable for the offence as a principal by virtue of clause 30 (2) (b) (iv), or, exceptionally, as an accessory by virtue of clause 30 (3). These general provisions (which are explained in paragraphs 10.7 and 10.9) render unnecessary the inclusion of a special provision equivalent to clause 1 (7) of the draft Bill, which expressly preserves the liability of a party to an act done by another under duress. The concern of the draftsman was plainly with secondary parties and not with joint principals, whose liability, despite the co-principal's defence, could not on any ground be doubted.

13.24 *Proof.* Clause 17 (1) (b) and (2) contain general provisions corresponding to clause 2 (2) of the draft Bill.

Clause 46: Defence of necessity

13.25 *Law Commission's Report.* The recommendations of the Law Commission in Law Com. No. 83, on the subject of necessity as a defence were, quite simply:

> "There should be no general defence of necessity and, if any such general defence exists at common law, it should be abolished."[15]

This was in striking contrast to the provisional proposals of the Law Commission's Working Party, who had made a case for a general defence available to a person who believes that his conduct is necessary to avoid some greater harm that he faces, that harm being "out of all proportion" to the harm actually caused by his conduct.[16] In view of the difficulties which the Law Commission found with this suggestion[17], it would not be appropriate for us now to revive it; nor, in fact, do we wish to do so. On the other hand, the

[15](1974), Law Com. No. 83, para. 6.4.
[16]Working Paper No. 55; for summary of this provisional proposal, see para. 57.
[17]Law Com. No. 83, 25–31.

Commission's own negative proposals have attracted severe criticism.[18] Two criticisms in particular will point the way towards our own suggested solution to the very difficult problem that necessity presents to a codifier.

(i) *The analogy with duress.* The impact of some situations of imminent peril upon persons affected by them is hardly different in kind from that of threats such as give rise to the defence of duress. The late Professor Cross was moved to describe the proposal to "provide for a defence of duress while excluding any general defence of necessity" as "the apotheosis of absurdity".[19]

(ii) *Saving the common law.* The critics are agreed that, if there is to be no general defence of necessity, the power of the judges at common law to recognise a situation of necessity as affording a defence must be preserved. It will not do either to suppose that all offences can or will be so drafted as to incorporate all appropriate exceptions for cases of necessity, or to leave any residue of cases not taken care of in this way to the discretion of the prosecutor or the sentencing court. We have already referred[20] to the case made by Stephen J. a century ago, with particular reference to cases of necessity, for a Code provision allowing for the development of defences.

13.26 *The solution proposed.* Necessity is not a topic to which we can apply our normal procedure of restatement, for which the present law does not provide suitable material.[21] We cannot ourselves conduct a law reform exercise and propose a general defence of necessity of our own devising. And, as indicated above, we cannot support the Law Commission's totally negative proposals. In these circumstances our main proposal is that necessity should remain a matter of common law. That is, to the extent that the defence is now recognised, it should be unaffected by the Criminal Code Act; and (probably more important, because the present status of the defence is so limited and uncertain) the courts should retain the power that they now have to develop or clarify the defence. Necessity, that is to say, would fall within the general saving for common law defences declared by clause 49. Our only specific necessity provision is clause 46, which admits a defence in circumstances so closely analogous to those of the duress defence that it might indeed be "the apotheosis of absurdity" to admit the one and to deny the other. The kind of situation catered for by clause 46 has, indeed, sometimes been called "duress of circumstances".

13.27 *Clause 46 (1)* provides the phrase "acting out of necessity" for use elsewhere. The opening words ("Without prejudice to the generality of section 49 . . . ") make clear that application or development of the necessity defence under clause 49 will not be "inconsistent with this . . . Act" (see clause 49 (1) (b)). In this respect clause 46 deliberately differs from clause 45, which states the whole of the duress defence.

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[18]See Williams [1978] Crim. L. R. 128; Huxley, *ibid.* 141.

[19]28 Univ. of Toronto L. J. 377 (cited by Williams, *Textbook of Criminal Law* 2nd ed. (1983), 602).

[20]See above, para. 13.10.

[21]In particular, "such reference to the defence as there has been in recent cases is either contradictory or uncertain in effect": Law Com. No. 83, para. 4.1.

13.28 *Clause 46 (2)* states the elements of the defence. Like duress, it is limited to cases where death or serious injury is threatened. The danger must be imminent. Like duress, the defence is limited "by means of an objective criterion formulated in terms of reasonableness"[22]; though once again the standard of conduct required is that applicable to one having the actor's personal characteristics so far as they affect the gravity of the danger.

13.29 *Clause 46 (3).* Paragraphs (a) and (b) avoid the overlap between this and other defences that would otherwise occur. Paragraph (c) sustains the analogy with duress by excluding the case where the actor has knowingly and without reasonable excuse exposed himself to the danger.

Clause 47: Use of force in public or private defence

13.30 This clause defines circumstances in which a person has a defence to a charge of committing a crime involving the use of force. It applies to the use of force against property as well as against the person, to threats of force and to the detention of a person without the use of force. The clause could be involved, for example, on a charge of murder or any violent offence against the person, or any offence of criminal damage to property.

13.31 The clause states principles of the criminal law. It does not (as section 3 of the Criminal Law Act 1967 does) affect civil liability in any way. A person may have a defence under the section yet remain liable in damages for assault or negligence.

13.32 The present law on the subject-matter of the clause is to be found in a variety of sources. Self-defence and the defence of others are governed by the common law as is the use of force to prevent a breach of the peace or a trespass. Defence of property is governed by the provisions of the Criminal Damage Act 1971; and the use of force in the prevention of crime by section 3 of the Criminal Law Act 1967.

13.33 The substance of the present law varies according to the circumstances in respects which are impossible to defend. If a person is charged with damaging property belonging to another and his defence is that he was defending his own property the Criminal Damage Act 1971 applies and the test is whether he *believed* that what he did was reasonable; but if his defence is that he was defending his person, or that of another, the test at common law is whether what he did *was* reasonable. If he is charged with criminal damage by killing or injuring an aggressive dog, the test will vary according to whether he was defending his trousers or his leg—and he is likely to have a better chance of acquittal if it was his trousers. Clause 47 (together with clause 89) would eliminate such absurd distinctions by the application of a common principle to all cases of this kind.

13.34 *The principle.* Section 3 (1) of the Criminal Law Act 1967 provides that—

> "A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large."

[22]*Per* Lord Lane C. J. in *R.* v. *Graham* [1982] 1 W.L.R. 294 at 300.

Where the use of force is reasonable in the circumstances the user commits no criminal offence or civil wrong. Where it is unreasonable, he is probably liable in tort but it does not follow that he commits a criminal offence because questions of *mens rea* arise in the criminal trial which are irrelevant in the civil proceedings. The case of *R.* v. *Gladstone Williams*[23] has established that a person charged with a crime has a defence of self-defence at common law if he uses such force as is reasonable *in the circumstances as he believes them to be* in the defence of himself or any other person. The court made it clear that the defence applies even though the use of that force was unreasonable in the actual circumstances; and even if the defendant's belief was not based on reasonable grounds. In so deciding the court held that a recommendation made by the Criminal Law Revision Committee for reform in fact represents the existing law.[24] Clause 47 follows *Gladstone Williams* and the Committee by using the words, "in the circumstances . . . which he believes to exist."

13.35 *The "Dadson principle".* The test in *R.* v. *Gladstone Williams,* like that proposed in the Criminal Law Revision Committee's report, is stated exclusively in terms of the defendant's belief. As expressed, it would not apply where the defendant was unaware of existing circumstances which, if he knew of them, would justify his use of force. In this respect the test accords with that applied in *R.* v. *Dadson.*[25] The defendant was charged with shooting at P, an escaping felon, with intent to cause him grievous bodily harm. He was unaware of the facts constituting the felony. He argued unsuccessfully that the force was justifiable because it was used to arrest an escaping felon. The court held that the alleged felony, "being unknown to the prisoner", constituted no justification.

13.36 *The Criminal Law Act 1967 and the Police and Criminal Evidence Bill.* On the other hand, section 2 (2) of the Criminal Law Act 1967 provides that—

> "Where an arrestable offence has been committed, any person may arrest without warrant anyone who is, or whom he, with reasonable cause, suspects to be in the act of committing an arrestable offence."

It seems clear that the arrest is lawful if the arrested person is in fact committing an arrestable offence, even though the arrester does not, with reasonable cause, suspect that he is doing so. The subsection provides alternative justifications. Subsection (3) (arrest where an arrestable offence has been committed) and (5) (arrest of person about to commit an arrestable offence) of the 1967 Act are in similar terms; and the dual nature of the justification for arrest is emphasised by the form of the Police and Criminal Evidence Bill, clause 21 (arrest without warrant for arrestable and other offences). These provisions, when read with section 3 of the 1967 Act[26], seem to exclude (and, we understand, were intended to exclude) the *Dadson*

[23](1983) 78 Cr. App. R. 276, C.A.
[24]Fourteenth Report (1980), Cmnd, 7844, 119–122.
[25](1850) 2 Den. 35; 169 E.R. 407.
[26]Above, para. 13.34.

principle so far as force used to make an arrest in concerned. We think that there is much to be said in favour of the *Dadson* principle but that sections 2 and 3 of the Criminal Law Act 1967, reinforced by the Police and Criminal Evidence Bill, preclude us from adopting it so far as force used in making an arrest is concerned. We considered whether force used in making an arrest should be distinguished from the other cases but concluded that this is impracticable. A person making an arrest is frequently also acting in the prevention of crime; and a person acting in the prevention of crime is frequently also acting in self-defence or in the defence of others. To have different rules according to the purpose of the user of force when the purposes may be indistinguishable would defeat one of the primary objects of codification, namely the enactment of a consistent and coherent body of law. We therefore concluded that the *Dadson* principle must be excluded, throughout. This is achieved by subsection (1) which provides a defence if the force is immediately necessary and reasonable either in the circumstances which exist or in those which the defendant believes to exist.

13.37 *Necessity and reasonableness objectively determined.* The force used must be "immediately necessary and reasonable" in the circumstances which exist or which the defendant believes to exist. The test of necessity and reasonableness is objective. This is in accordance with the Criminal Law Revision Committee's proposal[27] and *R.* v. *Gladstone Williams*.[28] It changes the law as stated in the Criminal Damage Act 1971, section 5. Under that section, the defendant has a lawful excuse if, when he destroys or damages property belonging to another, he believes that other property is in immediate need of protection and he believes that the means of protection adopted are reasonable having regard to all the circumstances; and it is immaterial whether his belief is justified or not if it is honestly held (section 5 (3)). Under that provision it is the defendant's judgment whether the force used was reasonable which governs. Under clause 47 it is the judgment of the court or jury. It is wrong in principle, in our view, for the law to afford greater protection to a person's trousers than his leg, or his spectacles than his eye. The special defence provided by clause 89 (defence of protection of property)[29] is in some respects wider than provided by clause 47 but the test of "necessary and reasonable" in that clause is also objective.

13.38 *Clause 47 (1) (a).* This paragraph reproduces the effect in criminal law of section 3 (1) of the Criminal Law Act 1967.

13.39 *Clause 47 (1) (b) and (4).* A common justification for the use of force is the prevention or termination of a breach of the peace. The prevention of a breach of the peace is clearly regarded as being, in some respects, wider than the prevention of crime, though the two concepts overlap. "Breach of the peace" is a somewhat vague notion but a valuable description of it was formulated in *R.* v. *Howell*[30] and this is the basis of the definition proposed in

[27]See n. 24, above.
[28]See n. 23, above.
[29]See below, para. 16.15.
[30][1982] Q.B. 416, at 427, C.A., *per* Watkins L.J.

subsection (4). It would not be appropriate for the Code to use the term without definition. When harm is done by unlawful violence there will almost always be a crime; but this is not so where a person merely fears, on reasonable grounds, that unlawful violence likely to cause harm is imminent. The effect of paragraph (b) is that it is not an offence to use force which is immediately necessary and reasonable to prevent a person being put in such fear or to remove the cause of the fear where it already exists.

13.40 *Clause 47 (1) (c).* This paragraph states the law as proposed by the Criminal Law Revision Committee and as decided in *Gladstone Williams.*

13.41 *Clause 47 (1) (d), (e) and (f).* These paragraphs all relate to well established occasions for the proper use of force.

13.42 *Clause 47 (2)* provides that "force" includes force against property and extends to a threat of force against person or property and the detention of a person without the use of force.

13.43 *Clause 47 (3).* Subsection (1) is limited to the use of force against something which is "unlawful"—thought not necessarily criminal, for example, a trespass. Subsection (3) is concerned with cases where the person against whom the defendant acts is probably behaving unlawfully in the civil law but where it would be imprudent for the Code to leave the issue of criminal liability in any doubt or dependent on the establishment of civil unlawfulness. For example, if the defendant is attacked by a nine-year old wielding a dagger, he ought to be allowed to use reasonable and necessary force in self-defence, whether or not the child is committing a tort.

It will be necessary to rely on subsection (3) only where the defendant is aware of the facts which would be a ground for the acquittal of the person against whom he uses force. Where he is unaware of these facts, he may rely on his belief in the circumstances in which it would be necessary and reasonable to use force to prevent the *unlawful* result. The circumstances in which paragraphs (a), (c) and (d) apply require no further explanation. For paragraph (b), see the examples in Schedule 1.

13.44 *Clause 47 (5). Preparatory acts.* This subsection is suggested by *Attorney-General's Reference (No. 2 of 1983).*[31] It goes somewhat further than the actual decision in that case, which is simply to the effect that a person who has an intention to use force in lawful self-defence has a lawful object. Where clause 47 provides a defence to a charge of committing a crime it must also, inevitably, provide a defence to a charge of attempting to commit it; so that any act which is "more than merely preparatory to the commission of the [alleged] offence" must also be excused. This much must surely be implicit in subsection (1). It is however, desirable for the Code to go a little further because acts immediately preceding the use of force may be capable of constituting other offences, particularly those involving possession of firearms, offensive weapons, etc. If the use is justified, it would be illogical to prohibit the possession which immediately precedes and accompanies that use. This is

[31][1984] Q.B. 456, C.A., discussed in [1984] Crim. L.R. 290–291.

not out of line with *Evans* v. *Wright*[32] and other cases under the Prevention of Crime Act 1953 which hold that there is no lawful authority or reasonable excuse for carrying an offensive weapon in a public place for self-defence, "unless there is an imminent particular threat affecting the particular circumstances in which the weapon was carried".

13.45 *Clause 47 (6)*. This subsection provides for the case where force is lawfully but mistakenly used against an innocent person, and the defendant—the innocent person or someone coming to his defence—uses force which he believes to be immediately necessary to prevent injury to himself or the innocent third party, as the case may be. For example, P, a police officer, reasonably but wrongly believing D to be an armed, dangerous criminal, X, points a revolver at him. D seizes P's wrist and twists it until he drops the revolver. P's act is lawful in every sense. It is not a case within subsection (3) where P merely has a defence to a criminal charge. The effect of subsection (6) is that D is not guilty of an offence if he believes the use of force to be immediately necessary and if the force used is, in the circumstances which exist or which he believes to exist, immediately necessary and reasonable. This is so although D is aware of all the circumstances giving rise to P's reasonable suspicion. (If he were not aware of those circumstances, he could simply rely on subsection (1)—the force would, in the circumstances which he *believed* to exist, be used to prevent *unlawful* injury.)

13.46 We have found no authority for this proposition. There is, indeed, a dictum to the contrary[33]; but it seems right in principle that an innocent person should not commit an offence by using reasonable and necessary force to prevent injury to himself. The subsection would leave entirely open the question of civil liability.

13.47 The subsection applies only where the defendant is acting to prevent injury to the person. He may not use force merely to resist an arrest which, in the circumstances known to him, is lawful, even though based on a mistake. While it would be unreasonable for the criminal law to require an innocent person to submit to personal injury, it is not unreasonable for it to require him to submit to lawful, though mistaken, arrest. For example, P finds D climbing through a window and, reasonably suspecting that he is committing burglary, arrests him. In fact, D has an assignation with P's daughter and is not a burglar. D, being aware of the grounds for P's reasonable suspicion, is not entitled to use force to resist lawful arrest.

13.48 It is arguable that the subsection should be extended to apply to cases where the defendant is protecting property against lawful damage about to be done under a mistake; but such cases are likely to be very rare.

13.49 *Clause 47 (7)*. This subsection limits the defence where the force is used against a person known to be a constable or a person assisting a constable. If the defendant, because of a mistake of fact, believes the constable is acting outside the execution of his duty, he would, but for this subsection, be entitled

[32][1964] Crim. L.R. 466.
[33]*Per* Lowry L.C.J. in *R.* v. *Browne* [1973] N.I. 96 at 107.

to use reasonable force to resist. The subsection is therefore necessary to incorporate the effect of *R.* v. *Fennell*.[34]

If the constable is in fact acting in the execution of his duty the defendant may not use force to resist unless he believes circumstances to exist which (but for this subsection) would justify the use of force *and* he believes the force to be immediately necessary to prevent injury to himself or another. The principle underlying *Fennell* appears to be that the citizen should submit to arrest and other acts which are unlikely to cause injury and which are done by a policeman in the execution of his duty, even if the citizen believes them to be unlawful. If he uses force to resist arrest, he does so at his peril if it turns out that the constable is acting in the execution of his duty.

13.50 *Clause 47 (8).* This subsection offers a solution to a point on which there appears to be little authority. To what extent should a person acting in the prevention of crime, etc., be immune from conviction where he causes injury to an innocent person or his property? Section 3 of the Criminal Law Act 1967 is not, in terms, confined to the use of force against a person acting unlawfully. Is a constable, pursuing an offender, entitled to knock down an innocent person who inadvertently gets in his way? Or to seize an innocent person's car to make a road block to stop escaping bank robbers?

13.51 Section 2 (6) of the Criminal Law Act 1967 provides that—

> "For the purposes of arresting a person under any power conferred by this section a constable may enter (if need be, by force) and search any place where that person is or where the constable, with reasonable cause, suspects him to be."

If force used in accordance with this subsection damages the property of an innocent third party, it appears that the constable will commit no civil or criminal offence. If an innocent person's house is not immune from reasonable and necessary damage done by an arresting officer it would be surprising if his personal property were immune.

13.52 In principle it seems obviously right that the police, or anyone else, should not be guilty of an offence of damage to property if it is necessary to cause that damage to save an innocent person from death or serious injury at the hands of a criminal. This would in any event be covered by clause 46 (defence of necessity) but damage done to prevent lesser harms would not. Subsection (8), by implication, leaves it open to the courts to hold that damage to property or a threat of force against the person is excused as being necessary and reasonable for the purposes mentioned in subsection (1). This would leave entirely open the question of civil liability. The subsection would, however, exclude the defence where force was directed against an innocent person. We recognise that this is a controversial proposal and will require further discussion, particularly as it would inevitably imply that the person using force would also be civilly liable. It would mean that a police officer would be guilty of battery if he pushed aside a pedestrian who happened to be in his way while he was pursuing a dangerous criminal.

[34][1971] 1 Q.B. 428.

13.53 *Clause 47 (9)*. In *R.* v. *Browne*[35] Lowry L.C.J. said, with regard to self-defence:

> "The need to act must not have been created by the conduct of the accused in the immediate context of the incident which was likely or intended to give rise to that need."

It is clearly right that a person should not be able to invoke the defence if he has deliberately provoked the attack with a view to using force to resist or terminate it; and subsection (9) so provides. It seems to be going too far, however, to say that the defendant may not act in self-defence because his conduct was likely (or even foreseen to be likely) to give rise to that need. This part of the dictum would infringe the important principle of *Beatty* v. *Gillbanks*[36], and is not followed. Instead, that principle is preserved by the second part of the subsection. When the Salvation Army embarked on their famous march they must have known well enough that they were likely to be attacked by the Skeleton Army. They were nevertheless entitled to march and presumably to defend themselves if unlawfully attacked. In *R.* v. *Field*[37] it was held that a person is not deprived of his right to self-defence because he goes to a place where he may lawfully go, knowing that he is likely to be attacked. The underlying principle appears to be a general one—there is no reason why the right should be confined to taking part in processions or going to particular places; so the subsection applies to anything that the person relying on the defence may lawfully do.

13.54 The effect of the subsection as a whole then is that the defendant may not rely on the defence if it was his purpose to provoke an attack; but he may do so if this was not his purpose even if he knew that he would almost certainly be attacked.

13.55 *Clause 47 (10)*. This subsection states the law as laid down in *R.* v. *McInnes*.[38] It does not require as a condition of the defence that the defendant "must demonstrate that he is prepared to temporise and disengage and perhaps to make some physical withdrawal", as stated in *R.* v. *Julien*.[39] The circumstances in which force is used in self-defence may vary greatly and sometimes there will be no question of "temporising". The only way to deal with this matter seems to be to leave it to the court or jury to determine whether it was reasonable, in the light of all the circumstances of the case, to stand and fight.

13.56 *Clause 47 (11)*. This subsection states the effect of *R.* v. *Cousins*.[40]

13.57 *Clause 47 (12)*. The special defence to charges of offences of criminal damage provided by clause 89 (protection of person or property) overlaps the general defence provided by clause 47 and this subsection makes it clear that clause 89 is to be given its full effect.

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[35][1973] N.I. 96 at 107.
[36](1882) 9 Q.B.D. 308.
[37][1972] Crim. L.R. 435.
[38][1971] 1 W.L.R. 1600, C.A.
[39][1969] 1 W.L.R. 839.
[40][1982] Q.B. 526.

Clause 48: Acts authorised by law

13.58 Works on English criminal law have traditionally included a section on "Homicide in the Advancement or Execution of the Laws".[41] This is a well recognised category of justification for killing. It is illogical to deal with it in the context of homicide because, if the advancement or execution of justice justifies or excuses homicide, it must also justify or excuse lesser crimes. Clause 48 is therefore applicable to offences generally. It contains nothing which would not fall within the more general provision of clause 49 but its inclusion is justified on the ground that the Code should be as informative as possible and, where there are established particular rules, it should spell them out.

13.59 Consistently with clause 47 the clause applies where the defendant's act is or would be authorised "in the circumstances which exist or which he believes to exist". That is, the *Dadson*[42] principle is excluded; and the principle of *R.* v. *Gladstone Williams*[43] is adopted. This is essential because defences under the two sections overlap and sometimes both may be applicable.

13.60 The clause is based on section 3.03 of the American Model Penal Code. Its substance appears to be uncontroversial, indeed largely self-evident. If the defendant is authorised to do an act by any rule of law, it cannot be an offence for him to do it. It will, however, be necessary to refer to the particular branch of the law mentioned in order to determine whether the particular act is or is not authorised. For example, during the Falklands war it was reported that a British officer had ordered a soldier to shoot an Argentinian soldier who was burning to death and in agony. It may be that the laws of war authorise such an act. It is not a question to which the Code can provide a specific answer.

13.61 In determining whether an act is authorised, it will sometimes be necessary for a court to exercise its judgment as to which of two competing laws shall prevail. If a police officer directs a motorist to reverse the wrong way down a one-way street to clear the way for an ambulance there is an apparent conflict between the motorist's obligation to obey traffic signs[44] and his obligation to obey the directions of a police officer directing traffic.[45] If the law defining the duties and functions of a police officer allows him to override the law relating to traffic signs, then the motorist commits no offence by obeying the direction and may be guilty of obstructing the officer in the execution of his duty if he refuses to obey.[46]

13.62 It would be impossible to produce a definitive list of public duties. Hence the need for paragraph (e). This is, however, confined to public duties and would not extend to a mere contractual duty.

13.63 *Clause 48 (2). Meaning of "armed forces".* More elaborate definitions of "armed forces" for particular purposes are to be found in the

[41]See e.g. East, *Pleas of the Crown* (1803), vol. 1, 294.
[42]See above, para. 13.35.
[43]See above, para. 13.34.
[44]Road Traffic Act 1972, s. 22 (1) (b).
[45]Road Traffic Act 1972, s. 22 (1) (a).
[46]Cf. *Johnson* v. *Phillips* [1976] 1 W.L.R. 65, D.C.

Race Relations Act 1976 section 75 (10) and the Customs and Excise Management Act 1979, section 1. Whether the definition for present purposes needs to be more detailed than that proposed in subsection (2) is a matter for consideration.

Clause 49: Acts justified or excused by law

13.64 *Preservation of defences.* The principal purpose of this clause is that explained above[47] of preserving and allowing the possibility of the continuing development of defences at common law. The provision is necessary to take account of such common law rights as those of the parent or schoolteacher to detain or chastise a child; that of a doctor to render medical aid to, or practise surgery on, an unconcious patient; or that of anyone to use force against another person within the rules of a lawful game. Some of these are particularly referred to in the definition of assault (clause 77 (2))[48] but they are of general application.

13.65 *Clause 49 (1).* Paragraph (a) is included for the sake of completeness. If a statutory provison justifies or excuses the doing of any act, it is plain that the act does not amount to an offence. The effect of paragraph (b) is that the common law is excluded in the case of defences, such as duress, which are definitively stated in the Code. It is different with necessity, as clause 46 (1) makes clear, or any defence at common law which has not been articulated by the courts or has been overlooked in drafting the Code.

13.66 *Clause 49 (2).* This subsection has effect in relation to any rule of the common law, justifying or excusing an act, which is not inconsistent with the Code or any other Act and which therefore continues in force after the enactment of the Code. The subsection preserves any power which the courts now have to determine the existence, extent and application of any such rule.

13.67 The preservation of the common law defence must necessarily preserve the power of the courts to determine its limits, perhaps by deciding that it extends more widely than has hitherto been supposed. It would be impossible, however, to limit the power of the court to *extending* the ambit of a defence. They might decide that the ambit is narrower than previously stated. For example, the courts—certainly the House of Lords—could decide that a blow struck in the course of a properly organised boxing match complying with the Queensberry rules is, in the light of modern medical knowledge, not excusable. It might be objected that this would, in effect, enable the court to create new crimes. It certainly leaves open the possibility of some extension by the courts of potential criminal liability; but that is a price which must be paid for the preservation of common law defences.

Clause 50: Non-publication of statutory instrument

13.68 *The Statutory Instruments Act 1946* provides a defence in section 3 (2) for a person charged with an offence consisting of a contravention of a

[47]Paras. 13.9–13.12.

[48]This reference is required because the absence of the victim's consent is included as an element in the definition of assault and it cannot be left unqualified.

statutory instrument. The defence is that at the date of the alleged contravention the instrument had not been issued by Her Majesty's Stationery Office, the burden of proof being on the accused. The defence may be rendered ineffective by proof that at the relevant date reasonable steps had been taken to bring the purport of the instrument to the notice of the public or of persons likely to be affected by the instrument or of the accused himself. This is a general defence, and it is therefore appropriate to include it in Part I of the Code. Subsection (1) accordingly reproduces the defence in Code style. The changes made are matters of language, not substance. Thus the subsection refers to a person being "not guilty of an offence" rather than having "a defence", and to "the time of his act" rather than "the date of the alleged contravention". The law remains the same.

13.69 *Burden of proof.* Subsection (2) restates the rule referred to above that the burden of proving that the instrument had not been issued by H.M.S.O. is on the defendant. It is unnecessary to make special provision for the burden of proof in relation to the matters referred to in paragraph (b) of subsection (1). Since these are facts relied on by the prosecution the burden of proving them is on the prosecution (clause 17 (1) (a)).

13.70 *Definition of statutory instrument.* Subsection (3) restates the existing law.

13.71 *Non-publication of statutes.* Section 3 (2) of the Statutory Instruments Act 1946 applies only to an offence consisting of a contravention of a statutory instrument. There is no comparable defence in existing law in respect of offences in contravention of a statute. We take the view that in principle no-one should be punished for breaking a law of which he could not have known because the text of it had not been published or otherwise been made availabe to him. This might happen, for example, where a strike caused a delay in publication of penal legislation. However, the provision of a defence to this effect raises a number of policy questions such as the time when statutes come into force, the machinery for their publication and so forth. We feel that it is not appropriate for us to deal with such questions. Pending their consideration by a more suitably-based committee, we suggest that any problems arising from the non-publication of statutes are best dealt with by discretion in prosecution.

CHAPTER 14

PRELIMINARY OFFENCES

Introduction

14.1 Clauses 51–55 are concerned with the offences of incitement, conspiracy and attempt, referred to collectively in the Code as preliminary offences because they are all concerned with conduct preliminary to the commission of a substantive offence. All three were originally common law offences and as such were considered by the Law Commission's Working Party whose proposals for their codification were published in 1973 in Law Commission Working Paper No. 50.[1] The Working Paper was followed by two Law Commission Reports. Law Com. No. 76, published in 1976, dealt only with conspiracy. The recommendations in the Report formed the basis for the statutory restatement of this offence in Part I of the Criminal Law Act 1977. Law Com. No. 102, published in 1980, dealt with attempt and with the issue of impossibility in relation to attempt, conspiracy and incitement. The Criminal Attempts Act 1981 subsequently restated the law of attempt substantially in accordance with the Law Commission's recommendations. There has been no Report on and no legislative provision for incitement which thus remains a common law offence.

14.2 We debated whether these offences should appear in Part I or Part II of the Code. In favour of their inclusion in Part II are the arguments that they are offences in their own right and that they could conveniently form part of a larger grouping of offences concerned with conduct likely or intended to lead to the commission of other offences. Such a grouping could include, for example, possession of an offensive weapon and going equipped for stealing. On the other hand, incitement, conspiracy and attempt have traditionally been regarded as part of the general principles of criminal liability with strong links with the law of complicity. A party to a substantive offence will in many cases have committed one or more preliminary offences beforehand, although of course it is not necessary for conviction of a preliminary offence that the substantive offence intended should have been committed. We concluded that the balance of convenience probably lay in favour of including the preliminary offences in Part I. The typical user of the Code will expect to see them there, and we think he will find it helpful to have them dealt with before the specific offences in Part II. The clauses relating to offences against the person, for example, make a number of references to attempts to commit such offences.

14.3 The specification of conspiracy and attempt has been determined by the recent legislation, although in drafting the relevant clauses we have had to undertake a certain amount of revision of the statutory text to achieve uniformity of Code style. Several of the policy issues now settled for conspiracy and attempt arise also in the context of incitement, and in relation to these we have drafted so as to achieve maximum consistency within the offences. On other questions relating to incitement we have restated what we believe to be the applicable principles of common law, taking account where appropriate

[1] Entitled Inchoate Offences: Conspiracy, Attempt and Incitement.

of the guidance provided by Working Paper No. 50. On two matters, impossibility and jurisdiction, we have been able to draft provisions which apply to all three offences. Clauses 51–55 in Part I deal only with principles of liability; provisions relating to prosecution and punishment are tabulated for convenience in Schedule 3.

Clause 51: Incitement to commit an offence

14.4 *Incitement to commit an offence or offences*. The clause deals only with incitement of a person to commit an offence. We have not sought to deal with statutory offences of incitement to certain conduct which may not itself be an offence.[2] We share the view of the Law Commission's Working Party that such offences have to be considered under the class of specific offences to which they relate.[3]

The clause is drafted so as to make it clear that, as in the case of conspiracy, an incitement may be to commit more than one offence. For example, an article in a newspaper may call on its readers generally to commit murders[4], or murder and arson, but there is only one act of incitement involved and this may be charged as a single offence. It is immaterial that the incitement is not directed to any particular person.

14.5 *The external elements of incitement*. These are set out in paragraph (a) of subsection (1). We have chosen the word "encourages" to signify the act of a person who incites another to the commission of an offence. This word is apt to describe the element of persuasion which it is necessary to prove[5], and indicates that if the offence is committed the incitor will be liable as an accessory. It should be noted though that in the context of incitement the ordinary meaning of encouragement will not include the kind of passive encouragement described in clause 31 (3) for the purposes of that section. Similarly, although assistance in the commission of an offence is sufficient for accessory liability, it will not, without the element of encouragement, incur liability for incitement.[6]

Paragraph (a) of subsection (1) then explains what is involved in the notion of inciting another person "to commit an offence". The language of this draft and the comparable provision for conspiracy in clause 52 is derived from section 1 (1) of the Criminal Law Act 1977, but with some modifications for Code style. The condition of liability expressed in this paragraph is that the person incited, if he were to act as encouraged with the fault required for the offence, would commit the substantive offence involved. It follows that if the person incited could not himself commit such an offence there can be no liability for incitement to commit it. This restates existing law whereby there is no liability for the incitement of a child under the age of ten or of a victim

[2]See the examples listed in n. 143 in Working Paper No. 50.
[3]Working Paper No. 50, para. 92.
[4]See *R.* v. *Most* (1881) 7 Q.B.D. 244.
[5]R. v. *Hendricksen and Tichner* [1977] Crim. L.R. 356; *R.* v. *Fitzmaurice* [1983] Q.B. 1083 at 1089.
[6]As the Court of Appeal acknowledged in *Fitzmaurice*, above, 1089.

in relation to an offence created for his or her protection.[7] This rule has occasionally exposed gaps in the law, particularly in relation to sexual offences. One such gap was filled by section 54 of the Criminal Law Act 1977, providing that it should be an offence for a man to incite to have sexual intercourse with him a girl under sixteen whom he knows to be his granddaughter, daughter or sister. The Criminal Law Revision Committee have recently proposed an analogous offence of incitement of a child under sixteen to an act of gross indecency.[8]

14.6 *The fault requirement for incitement*. Paragraph (b) of subsection (1) provides that the incitor is guilty if "he intends that the other person shall commit the offence or offences". In relation to conspiracy and attempt Parliament has now determined that intention is the requisite fault element. We take the view that the interests of consistency and simplicity indicate the same rule for incitement. Under this paragraph therefore it would have to be proved that the incitor intended any consequences specified by the definition of the offence incited and knew of any specified circumstances. These requirements are implicit in the use of the word "intend" in this context (see clause 22) and we do not think that any further definition is necessary. Also implicit is a third requirement peculiar to incitement. In order for a person to intend another to commit what will be an offence by the other, he (the incitor) must know or believe that the person incited will act with whatever fault is required for the offence. In *R.* v. *Curr*[9] the Court of Appeal quashed convictions for inciting women to commit offences under the Family Allowances Act 1945 because the prosecution failed to prove that the women (who had done the acts incited) had the mental element required for such offences. We share the view of the Law Commission's Working Party that the decision states the wrong test.[10] It is not necessary that any offence should be committed or even intended by the person incited, therefore it is irrelevant and confusing to ask whether that person had the mental element for the offence. The correct test is whether the incitor knows or believes that, if the incited person is induced to act, he will do so with the fault specified for the offence. In this respect we propose to depart from the decision in *Curr*.[11]

If the incitor does not know or believe that the person incited will act with the required fault, but nonetheless intends that the external elements of the offence shall occur, then he may be guilty of attempting to commit the offence through an innocent agent. The act of encouragement will in most cases amount to a more than preparatory act as required by clause 53, and the requisite intent for an attempt is present. The Working Party envisaged that a person who incites a child under ten to shoplift would be guilty in this way of an attempt to steal through an innocent agent.[12] We agree.

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[7]*R.* v. *Whitehouse* [1977] Q.B. 868.
[8]Fifteenth Report, Sexual Offences (1984), Cmnd. 9213, paras. 7.12 and 7.23.
[9][1968] 2 Q.B. 944.
[10]Working Paper No. 50, Para. 93.
[11]The Working Party proposed that recklessness as to the mental element of the person incited should be sufficient. This proposal has been overtaken by the Parliamentary decisions to make the other preliminary offences crimes of intention only. As indicated above, we regard these decisions as settling the policy for incitement also.
[12]Working Paper No. 50, para. 102.

14.7 *Offences which can be incited*. Under existing law incitement to commit an indictable or a summary offence is itself an offence.[13] The opening two lines of subsection (2) restate the general principle. The subsection then provides two exceptions. Incitement to commit the offence of conspiracy was abolished by section 5 (7) of the Criminal Law Act 1977; this is confirmed by paragraph (a). It is very doubtful whether incitement to attempt is a charge known to the law, since all such charges would seem to amount to incitement to commit the substantive offence. The Law Commission's Working Party proposed that no such charge should be possible, and paragraph (b) gives effect to this proposal. However, an attempt to incite will, under clause 53, still be an offence; it is apt to cover cases where an intended incitement is intercepted before it has reached the person for whom it is intended.

14.8 *Protected persons*. Subsection (3) restates for incitement the principle deriving from *R.* v. *Tyrrell*[14] which has been referred to already in connection with clause 31 (8). The principle was applied to conspiracy by section 2 (1) of the Criminal Law Act 1977, now restated in clause 52 (4). It has recently received the support of the Criminal Law Revision Committee.[15]

14.9 *Spouses*. Section 2 (2) (a) of the Criminal Law Act 1977 provides in effect that a person cannot be guilty of conspiracy if the only other person with whom he agrees to commit an offence is his spouse. The rule is restated in clause 52 (5). We think that for consistency a similar rule should be provided for incitement. It would be anomalous if a person could be liable for inciting his wife to commit an offence, while enjoying an exemption from conspiracy if she agreed to his plan. Subsection (4) provides accordingly.

14.10 *Identity of the person incited is immaterial*. Subsection (5) is provided largely for the avoidance of doubt. As indicated above, an incitement need not be directed towards any particular person, and so it would seem to follow that the identity of any person actually incited is immaterial. An analogous rule is provided for conspiracy in clause 52 (8) (b).

14.11 *Accessories and incitement*. Under existing law it is probable that a person may aid, abet, counsel or procure another to incite a third person to commit an offence, but that incitement to aid, abet, etc. is not an offence known to the law.[16] Subsection (6) restates this position for the Code. The subsection is consistent with clause 53 (6) which makes a similar provision in the case of an attempt to commit an offence. The latter provision restates the decision of the Court of Appeal in *R.* v. *Dunnington*[17], construing section 1 (1) and (4) of the Criminal Attempts Act 1981.

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[13]*Ibid*. para. 93.

[14][1894] 1 Q.B. 710. The defendant in this case was acquitted both of aiding and abetting the man's offence of having unlawful carnal knowledge of her and of inciting the offence.

[15]Fifteenth Report, Sexual Offences (1984), Cmnd. 9213, Appendix B.

[16]See Smith in *Crime, Proof and Punishment* (ed. Tapper, 1981) at 27–28, 29–32.

[17][1984] Q.B. 472.

14.12 *Other statutory incitements*. A number of statutes create specific offences of incitement to commit other offences.[18] Subsection (7) provides that clause 51 shall apply in determining whether a person is guilty of such a specific offence of incitement. We believe that this restates existing law, particularly as similar provisions were made in the cases of conspiracy and attempt by section 5 (6) of the Criminal Law Act 1977 and section 3 of the Criminal Attempts Act 1981 respectively. The concluding words of the subsection make it clear that such specific offences of incitement are alternatives to the general offence under clause 51; this adopts the rule laid down for conspiracy in the Criminal Law Act 1977. When the relevant statutes are revised, whether or not for inclusion of offences in Part II, it may well be found unnecessary to retain these specific offences of incitement.

Prosecution and punishment of incitement

14.13 *Use of Schedule 3*. In one respect we have found it helpful to treat the preliminary offences in the same way as the specific offences in Part II of the Code. Schedule 3 sets out in tabulated form various provisions relating to the prosecution, trial and punishment of Part II offences. As explained earlier in our Report, we hope that this will prove a great convenience to the user of the Code. We found that the relevant procedural provisions for preliminary offences, although somewhat more complex, could also be fitted in to the Schedule without difficulty. The same argument of convenience applies to justify this, and there is no doubt that removing these provisions to the Schedule facilitates the clear presentation of the law in clauses 51–53.

14.14 *Mode of trial*. The provision in column 3 of Schedule 3 states a general rule that the incitement is triable in the same way as the offence incited. This accords with existing law. Special rules are then given in paragraphs (a) and (b) for cases where the incitement is to commit two or more offences which may themselves have different modes of trial. Paragraph (c) of the special rules gives effect to a proposal of the Law Commission's Working Party.[19]

14.15 *Punishment*. The provision in column 4 of Schedule 3 states a general rule that the (maximum) penalty for incitement is the same as for the offence incited. This is in accordance with the proposal of the Law Commission's Working Party[20] and with the rules established by Parliament for conspiracy and attempt. Paragraph (a) then restates the special rule for incitement to murder (and any other offence the sentence for which is fixed by law) providing for a maximum penalty of life imprisonment.[21] Paragraph (b) makes it clear that when an incitement to commit the same summary offence

[18]For example, s. 7 (2) of the Perjury Act 1913 and s. 7 of the Official Secrets Act 1920. The offence of solicitation to murder under s. 4 of the Offences against the Person Act 1861 was recommended for abolition by the Criminal Law Revision Committee (Fourteenth Report, para. 223), and accordingly does not appear in our scheme of offences against the person in Part II of the Code.

[19]Working Paper No. 50, para. 124.

[20]*Ibid*. para. 125.

[21]See the Criminal Law Act 1977 s. 5 (10), amending s. 4 of the Offences against the Person Act 1861.

on more than one occasion is tried on indictment there is no limit to the amount of the fine that may be imposed on conviction. The sentencer will thus not be restricted by the limit applicable on summary conviction for the offence incited. Any sentence of imprisonment which may be imposed for the summary offence will of course continue to be available for the incitement under the general rule. The paragraph does not, however, implement the Working Party's proposal for a maximum of two years' imprisonment for this type of incitement when tried on indictment.[22] We take the view that in this respect the provision for incitement should be consistent with that for conspiracy, and the penalty for conspiracy to commit summary offences, established in section 3 of the Criminal Law Act 1977, does not extend to the imposition of a term of imprisonment greater than that which could be imposed for the most serious summary offence involved. Under section 3, however, the maximum fine which can be imposed on conviction of such a conspiracy is without limit. As indicated above, we propose the corresponding rule for incitement. Paragraph (c) clarifies the penalty available when two or more offences are incited with different maximum penalties.

14.16 *Restrictions on the institution of proceedings*. The effect of the provision in column 5 of Schedule 3 is that any requirement of consent to the institution or conduct of proceedings for a substantive offence will apply in respect of proceedings for incitement to commit that offence, and that any time limit applicable to the institution of proceedings for the substantive offence will apply to proceedings for incitement to the extent stated. The provision is consistent with the equivalent rules established for attempt (in relation to consents to prosecution) and conspiracy (in relation to time limits) respectively.

Clause 52: Conspiracy to commit an offence

14.17 *Codification of conspiracy*. Clause 52 restates relevant provisions of Part I of the Criminal Law Act 1977, with some additions which appear to us to be necessary for a more complete statement of conspiracy as a codified offence. We have, however, said nothing about the offence at common law of conspiracy to defraud, to corrupt public morals or to outrage public decency, preserved by section 5 (2) and (3) of the Criminal Law Act 1977. This is because we assume that in the course of time these remaining forms of common law conspiracy will be abolished in accordance with the general aims of codification and replaced by substantive offences in Part II of the Code. If this does not happen before the Code is enacted, consideration will have to be given to whether these forms of conspiracy should in effect be codified as substantive offences, or whether they should continue to exist in their present form. In the latter case, a provision clarifying their relationship to clause 52 will be necessary.

14.18 *The external elements of conspiracy*. These are set out in paragraph (a) of subsection (1). The paragraph draws on but does not exactly reproduce the language of section 1 (1) of the Criminal Law Act 1977. This is because the extended Code concept of "doing an act" (see clause 19) enables us to

[22]Working Paper No. 50, para. 124.

dispense with the imprecise notion of pursuing a course of conduct[23], and because our clarification of the fault element (explained below) renders the reference to such conduct "necessarily" amounting to an offence superfluous. Because of the extended meaning of "act" it will be possible on our draft for there to be a conspiracy to commit an offence by omission, assuming that the offence agreed on can be so committed (see clause 20). An example of such a conspiracy is given in illustration 53 (iii). The subsection follows section 1 (1) of the Criminal Law Act 1977 by making clear that a conspiracy may be between two or more persons and may involve an agreement to commit more than one offence. The question of impossibility is dealt with separately in clause 54.

The words "agrees" and "agreement" are used here in their ordinary meaning. No further definition seems to be necessary or even desirable. We assume that the courts will continue to reach such commonsense conclusions as, for example, that an agreement requires two human minds, and therefore that a corporation cannot be guilty of a conspiracy with its sole controlling officer.[24] In other cases the question may arise whether parties had reached an agreement or were still negotiating; this seems essentially a question of fact on which there are no principles suitable for codification.

14.19 *The fault requirement for conspiracy*. Section 1 (2) of the Criminal Law Act 1977 settled that, in respect of circumstantial elements of the substantive offence agreed on, intention or knowledge in relation to such elements was necessary for conspiracy.[25] The Act said nothing expressly about the mental element for conspiracy in relation to consequences specified in the definition of the substantive offence. However, it is generally agreed that, on the construction of section 1 (1), an intention that such consequences shall occur is required for a conspiracy to commit the offence.[26] This was certainly the recommendation of the Law Commission whose draft Bill annexed to their Report on Conspiracy contained a subsection expressly to this effect. Clause 52 (1) (b) restates the law by providing that for a person to be guilty of conspiracy he and at least one other party to the agreement must intend that the substantive offence be committed. Accordingly, a police informer who joins a conspiracy in order to frustrate it will not be guilty of conspiracy himself.[27] Subsection (2) clarifies the point left obscure by the Criminal Law Act 1977 by stipulating that the relevant intention is an intention in respect of all the elements of the substantive offence.

As indicated above, this method of drafting the fault requirement renders superfluous the word "necessarily" in section 1 (1) of the Criminal Law Act 1977. To take an example based on the common law of murder, if D and E agree to put poison in P's drink intending to cause him serious injury, it would

[23]For a discussion of the problems of this language see Smith and Hogan, *Criminal Law* 5th ed. (1983), 230–234.

[24]*R.* v. *McDonnell* [1966] 1 Q.B. 233.

[25]Sect. 1 (2) is in fact expressed to apply only to offences not requiring knowledge of such elements, but in order to avoid absurdity the same rule must apply to all offences containing circumstantial elements.

[26]Smith and Hogan, *op. cit.* 233–234; Glanville Williams, *Textbook of Criminal Law* 2nd ed. (1983), 430–431.

[27]Cf. *R.* v. *Thomson* (1965) 50 Cr. App. R. 1.

be immaterial for conspiracy whether the dose to be administered would necessarily kill P and thus create liability for murder when death took place. To be guilty of a conspiracy to murder both D and E would have to intend the result of P's death. Under clause 22 (a) this would involve proof that they wanted it to occur or were almost certain that it would occur.

14.20 *Subsection (3)*. This subsection deals with the substantive offences which may be the object of a conspiracy. It restates section 1 (3) and (4) of the Criminal Law Act 1977.

14.21 *Protected persons*. Subsection (4) restates section 2 (1) of the Criminal Law Act 1977. The provision, which gives effect to the principle established by *R*. v. *Tyrrell*[28], is consistent with clauses 31 (8) and 51 (3).

14.22 *Other restrictions on liability for conspiracy*. Section 2 (2) of the Criminal Law Act 1977 provided exemptions from liability for conspiracy for a person who agreed only with his spouse or a child under the age of criminal responsibility or an intended victim of the substantive offence involved. Subsection (5) restates these exemptions, but is more explicit as to the meaning of "victim" in this connection.

We have made no special provision for the case of an agreement with a mentally disordered person. If the person is so disordered as not to know what he is doing he is unlikely either to be able to "agree" or to have the fault required by subsection (1) (b). In either event the non-disordered person will not be guilty of conspiracy, although, depending on the acts he has done, he might be guilty of attempting to commit the substantive offence by an innocent agent. Where a person is capable of making an agreement and of having the fault required, but might be the subject of a mental disorder verdict because of severe disorder (see clause 38 (1) (a)), there is no difficulty in holding the non-disordered person guilty of conspiracy. He has agreed with another to do acts which will involve the commission of the offence by one or both, and they intend that the offence shall be committed.

14.23 *Conspiracy as a continuing offence.* In *Director of Public Prosecutions* v. *Doot*[29] the House of Lords held that although the offence of conspiracy is complete on the making of an agreement, the conspiracy continues to exist thereafter until, as Lord Pearson put it, "it is discharged (terminated) by completion of its performance or by abandonment or frustration or however it may be". Paragraph (a) of subsection (6) restates this principle and paragraph (b) spells out the corollary that a person may become a party to a subsisting conspiracy by joining the agreement which constitutes the offence.

14.24 *Subsection (7)*. This subsection sets out for conspiracy a provision equivalent to clauses 51 (6) (accessories and incitement) and 53 (6) (accessories and attempts). A person may be an accessory to a conspiracy by, for example, doing an act of assistance in the knowledge that it will or

[28][1894] 1 Q.B. 710.
[29][1973] A.C. 807.

may help the conspirators to commit their intended offence[30], even though he does not himself intend the offence to be committed and is thus not a principal in the conspiracy.

There is no English authority that a conspiracy to aid and abet is possible, although a decision of the Supreme Court of Hong Kong[31] holds that such a conspiracy can exist at common law. Parliament has so far made no provision on the matter. The Code should not, however, leave a gap in the law on this point. We put forward our proposal in subsection (7)—that there should be no liability for conspiracy to be a secondary party to an offence—for three reasons. Firstly, it is consistent with the equivalent provisions for incitement and attempt. Secondly, we think that it probably reproduces existing law, although the point of statutory interpretation involved is not a simple one. Clause 52 (1), like clause 1 (1) of the Criminal Law Act 1977, requires an agreement that acts shall be done which will involve the "commission" of the offence by one or more of the parties to the agreement. In this context "commission" means commission as a principal offender, since it is contemplated that only one of the parties may "commit"; but all the parties to the agreement will be guilty of the offence if it is committed. Accordingly, clause 52 (1) does not allow for conspiracy to be accessory to the commission of an offence by a principal offender who is not a party to the agreement. Thirdly, putting the matter as we have done will raise it for consideration as part of the general debate on the proposals for the Code.

14.25 *Subsection (8)*. This subsection makes provision for a number of matters relating to the conviction of a person for conspiracy.

(i) Paragraph (a) restates existing law whereby it is immaterial that the defendant is the only person who has been charged. As long as the elements of conspiracy can be proved as against him he may be convicted of the offence. The provision is consistent with clause 32 (3) (a) which states an equivalent rule for an accessory to an offence. Given that a conspirator will invariably be an accessory to the substantive offence when committed, consistency is highly desirable.

(ii) Paragraph (b) restates existing law whereby a person may be charged with conspiracy with a person or persons unknown and convicted accordingly if the elements of conspiracy can be proved as against him.

(iii) Paragraph (c) restates section 5 (8) of the Criminal Law Act 1977. We believe that it is not necessary to repeat the elaborate language of that provision and that the point involved can be expressed more clearly and concisely.

14.26 *Other statutory conspiracies*. Subsection (9) restates section 5 (6) of the Criminal Law Act 1977.

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[30] *R.* v. *Anderson* [1984] Crim. L.R. 550, C.A.
[31] *Po Koon-tai* [1980] H.K.L.R. 492.

Prosecution and punishment of conspiracy

14.27 Provisions relating to the prosecution, trial and punishment of offences of conspiracy are set out in Schedule 3. Columns 3 and 4 restate in simpler language the rules laid down by section 3 of the Criminal Law Act 1977, and column 5 restates the rules laid down by section 4 of the Act.

Clause 53: Attempt to commit an offence

14.28 *The Criminal Attempts Act 1981*. This Act provided for the abolition of the common law of attempt and its replacement by a statutory offence of attempt created by section 1 of the Act. The provisions relating to the statutory offence are largely based on the recommendations made by the Law Commission in their Report on Attempt.[32] The Act has greatly simplified our task of codification. In relation to this offence we have needed to do little more than incorporate the relevant provisions of the Act in the language of the Code, although on two matters we have sought to provide some clarification of the law.

14.29 *The external elements of attempt*. These are set out in subsection (1) which is closely modelled on section 1 (1) of the Criminal Attempts Act 1981. Some changes of wording have been necessary for Code style; the only change of any substance has been the use of "indictable" to indicate directly the type of offence to which the section applies. The question of impossibility, dealt with in section 1 (2) and (3) of the Act, is covered in the Code in clause 54.

14.30 *The fault requirement for attempt*. Subsection (1) restates the Act by stipulating that for an attempt a person must have the "intention" of committing an offence. This accords with the recommendation of the Law Commission who thought that "the concept of the mental element in attempt should be expressed as an intent to bring about each of the constituent elements of the offence attempted. Put more simply, this may be stated as an intent to commit the offence attempted".[33] However, some doubt has arisen about the interpretation of section 1 (1) of the Act as a result of the decision of the Court of Appeal in *R*. v. *Pigg*.[34] In that case a conviction for attempted rape was upheld on the basis that the accused was reckless whether the woman consented to intercourse. The case was decided on the common law, but it has been argued[35] that the principle involved—that where recklessness as to a circumstance suffices for the substantive offence it should suffice for the attempt—should apply under the Act also. We take the view that this would be contrary to the considered proposal of the Law Commission and inconsistent with the fault requirements proposed for the other preliminary offences. Accordingly subsection (2) seeks to resolve the matter by providing that the intention required for an attempt is an intention in respect of all the elements of the offence. In the case of attempted rape, for example, this means that it would have to be proved that the accused was aware or was almost certain that the woman was not consenting.

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[32](1980), Law Com. No. 102.
[33]*Ibid.* para. 2.14.
[34][1982] 1 W.L.R. 762.
[35]See Glanville Williams, *op. cit.* 409.

14.31 *Attempt by omission*. The extended meaning given to the word "act" in the Code allows for the possibility of an attempt being committed by an omission. The general view is that the interpretation of "act" in the Criminal Attempts Act 1981 is not so extensive, although it was the intention of the Government that in certain cases an attempt by omission could be charged under the Act.[36] We take the view that in the two types of case set out in clause 20 (1) (a) it would be appropriate to allow for the possibility of an attempt by omission. Subsection (3) provides accordingly. Such cases are likely to be rare, but where there is clear evidence, for example, of an attempt to cause the death of a child or elderly member of the household by starvation or neglect, it seems right that a charge of attempted murder should be available.

14.32 *Issues of law and fact.* Subsection (4) restates section 4 (3) of the Criminal Attempts Act 1981 with some simplification of wording. The proposition is now stated directly instead of by reference to subsection (1). The words "sufficient in law" in the Act are superfluous because if the evidence cannot support the finding then it is not sufficient in law.

14.33 *Offences which may be attempted*. Subsection (5) restates paragraphs (a) and (c) of section 1 (4) of the Criminal Attempts Act 1981. Paragraph (b) of that section has been taken over to subsection (6). If any offence of conspiracy at common law is still in existence when the Code is enacted the words "at common law or" will need to be reinstated in the parenthesis in paragraph (a).

14.34 *Accessories and attempts*. The principle underlying section 1 (4) (b) of the Criminal Attempts Act 1981 is that it is not an offence to attempt to aid, abet etc. an offence which is actually committed. The provision is not aptly worded, however, since aiding, abetting etc. is not as such an offence in the same sense as the other offences referred to. In *R*. v. *Dunnington*[37] the Court of Appeal was faced with the argument that the provision had in fact achieved the quite different effect of abolishing liability for aiding and abetting an attempt. After referring to the Law Commission's Report on Attempt, the court concluded that as a matter of construction section 1 (4) did not have the effect contended for, and that it continued to be possible for a person to be liable as an accomplice to an attempt. Subsection (6) restates this principle together with a clarification of the intended effect of section 1 (4) (b).

14.35 *Other statutory attempts*. A number of statutes create specific offences of attempt to commit other offences. Paragraph (a) of subsection (7) provides that clause 53 shall apply in determining whether a person is guilty of such a specific attempt. The paragraph replaces section 3 of the Criminal Attempts Act 1981 which is to similar effect but which contains much needless repetition. Section 3 applies to "an offence which . . . is expressed as an offence of attempting to commit another offence". This wording was apparently designed to exclude (i) offences, which, although they may involve attempts to commit other offences, are not cast in the language of attempt;

[36]See Dennis in [1982] Crim. L.R. 7–8.
[37][1984] Q.B. 472.

and (ii) offences expressed as attempts to do acts that are not, or are not described as, substantive offences.[38] We believe that our phrase "attempt to commit a specified offence" achieves the same effect.

Most of these other statutory attempts are attempts to commit summary offences, and there is no overlap with the offence created by clause 53. Where there is a potential overlap, paragraph (b) of subsection (7) provides in effect that clause 53 and the other statutory attempt are alternatives. Similar provisions are made for incitement and conspiracy.

Prosecution and punishment of attempt

14.36 Provisions relating to the prosecution, trial and punishment of offences of attempt are set out in Schedule 3. Columns 3 and 4 restate the rules laid down by section 4 (1) of the Criminal Attempts Act 1981. We have not included any reference to the matters dealt with in section 4 (5) of the Act which is expressed as a gloss on section 4 (1). The saving made in paragraph (a) of section 4 (5) for certain provisions of the Sexual Offences Act 1956 will be rendered obsolete if the recommendations of the Criminal Law Revision Committee in their Report on Sexual Offences[39] are accepted. The Committee propose that the maximum penalty for attempted rape should become imprisonment for life, and that attempts to commit the other offences recommended in the Report should follow the general rule that the penalty is the same as for the full offence. On the assumption that the proposals will be implemented section 4 (5) (a) can be dispensed with. Section 4 (5) (b) is somewhat obscure. Its effect appears to be that if offences are created with penalties which depart from the principles laid down in the enactments referred to, those principles will equally not apply to attempts to commit such offences. We believe that the simple statement in Schedule 3 that the penalty for attempt follows the offence attempted makes this provision unnecessary.

14.37 Column 5 (dealing with consents to the institution or conduct of proceedings and time limits on the institution of proceedings) restates section 2 (1) and (2) (a) and (d) of the Criminal Attempts Act 1981.

14.38 Column 7 (miscellaneous) restates three further paragraphs (namely (b), (c) and (i)) of section 2 (2) of the Act.

14.39 Paragraphs (e) to (h) of section 2 (2) of the Act deal with matters inappropriate for inclusion either in Part I or in Schedule 3. We propose that when the Code (i.e. Parts I and II) is enacted these provisions should be preserved either in the existing legislation or in a miscellaneous provisions enactment.

Clause 54: Impossibility and preliminary offences

14.40 *Subsection (1)*. Before 1981 the law on this matter was notoriously complex and unsatisfactory. It was reviewed by the Law Commission in their Report on Attempt, and Impossibility in relation to Attempt, Conspiracy

[38]See Law Com. No. 102, paras. 2.127–2.129.
[39]Fifteenth Report (1984), Cmnd. 9213, paras. 2.51–2.54.

and Incitement.[40] Their conclusion was that the fact that it was not possible to commit a particular substantive offence should not preclude conviction for a preliminary offence intended to result in the commission of that substantive offence, provided of course that the accused had done the relevant act required for the preliminary offence with which he was charged. In the cases of conspiracy and attempt legislation was necessary to achieve this objective. After some hesitation on the part of the Government[41] the Law Commission's proposals were enacted in the Criminal Attempts Act 1981. Impossibility is ruled out as a defence to attempt by subsections (2) and (3) of section 1, and as a defence to conspiracy by paragraph (b) of the revised definition of conspiracy in section 1 (1) of the Criminal Law Act 1977. In relation to incitement the Law Commission thought that legislation was unnecessary on the ground that the common law, as stated in *R.* v. *McDonough*[42] and *D.P.P.* v. *Nock*[43], was already in accordance with the position recommended for conspiracy and attempt. This assumption has subsequently been falsified by the decision of the Court of Appeal in *R.* v. *Fitzmaurice.*[44] It was held in that case that the common law principles relating to impossibility, laid down in the leading cases of *Haughton* v. *Smith*[45] and *D.P.P.* v. *Nock* and which it was the concern of the Law Commission to reverse, applied to the offence of incitement. The result therefore is that impossibility may in some cases be a defence to incitement but not to conspiracy or attempt.

It would be absurd for the Code to perpetuate this distinction. We share the view of the Law Commission that the same principle should apply to the three offences, and this means that the position for incitement must be brought into line with that for conspiracy and attempt. At the same time we believe that it is unnecessary to make separate provision for each offence. It needs only one provision to rule out impossibility as a defence to any of the preliminary offences. We have sought to make the requisite provision in subsection (1) of clause 54. The effect of the subsection is that the defendant is to be treated as if the circumstances were as he believed or hoped them to be (or as he believed or hoped they would be at the relevant time). If in those supposed circumstances he would be guilty of the preliminary offence charged, the impossibility of achieving his intention is immaterial.

14.41 *Subsection (2).* This provides that subsection (1) extends both to the general offences created by clauses 51-53 and to any other statutory offences of incitement, conspiracy or attempt to commit a specified offence.

Clause 55: Jurisdiction and preliminary offences

14.42 The first three subsections of this clause give effect to certain recommendations of the Criminal Law Revision Committee contained in paragraph 303 of their Fourteenth Report.[46] Subsection (1) deals with incitement, conspiracy and attempt in this country to commit an offence

[40](1980), Law Com. No. 102.
[41]See Dennis in [1982] Crim. L.R. 5–6.
[42](1962) 47 Cr. App. R. 37.
[43][1978] A.C. 979.
[44][1983] Q.B. 1083.
[45][1975] A.C. 476.
[46]Offences against the Person (1980), Cmnd. 7844.

abroad. Subsection (2) deals with the converse case of incitement, conspiracy and attempt abroad to commit an offence in this country. Subsection (3) sets out the offences to which these provisions, which have the effect of extending the jurisdiction of the English courts, apply.

14.43 The fourth subsection which applies only to conspiracy states the principle of the common law laid down by the House of Lords in *D.P.P.* v. *Doot.*[47] Reversing the Court of Appeal, the House held that an agreement made outside the ordinary limits of criminal jurisdiction to commit an unlawful act within those limits was a conspiracy triable in England if the agreement was subsequently performed wholly or in part in England. The effect of the clause is that a conspiracy abroad to commit an offence in England is indictable here if, during the subsistence of the conspiracy, one of the conspirators enters the jurisdiction and does any act in pursuance of the agreement. All the conspirators, including those who have remained abroad, will be triable here. If a conspirator enters the jurisdiction for some purpose other than that of executing the agreement, subsection (4) will not apply and the conspirators will not be triable here unless the case falls within subsections (2) and (3).

Possible defence of withdrawal

14.44 The Law Commission have recommended that there should be no defence of withdrawal in relation to the preliminary offences of attempt and conspiracy.[48] We accept this view and have made no provision in the Code for such a defence. We have, however, proposed what is in substance a defence of withdrawal for a person who would otherwise be an accessory to an offence actually committed (see clause 31 (9)). As explained above, that provision draws on a proposal made by the Law Commission's Working Party in the Working Paper on Parties.[49] The essential difference is that the potential accessory, when he withdraws, has an opportunity to prevent the commission of the substantive offence and thus to nullify, as it were, his participation. The preliminary offence, however, is complete before withdrawal and thus cannot be prevented. As the Law Commission pointed out, the justification for the preliminary offences then suggests that efforts to nullify the effects of the acts done should be reflected by mitigation of penalty.[50]

[47][1973] A.C. 807.
[48]Law Com. No. 102, para. 2.133.
[49]Working Paper No. 43 (1972), Proposition 9.
[50]Law Com. No. 102, para. 2.132.

CHAPTER 15

OFFENCES AGAINST THE PERSON

Introduction

15.1 Clauses 56 to 81 implement the recommendations of the Criminal Law Revision Committee (in this part of this Report called "the Committee") in their Fourteenth Report,[1] except those relating to false imprisonment, kidnapping and child stealing. We omitted these recommendations because, at the time when we were preparing this part of the draft Code, the Child Abduction Bill was being considered by Parliament and the decision of the Court of Appeal in *R.* v. *D.*[2] on the scope of kidnapping was under appeal to the House of Lords. The Committee's recommendations now require reconsideration in the light of the passage of that Bill and the decision of the House.

Clause 56: Murder

15.2 This clause implements recommendation 1 of the Committee's report. Paragraph (b) does not contain the phrase, "by an unlawful act", as the Committee recommended. This is unnecessary because of clause 49.[3] An act intended to cause serious injury is, *prima facie,* unlawful. It will be a lawful act only if it is justified or excused by the provision of this or another Act or a rule of the common law.

15.3 *Paragraph (c)* is in square brackets because the Committee did not make a firm recommendation about it. They said that, if Parliament favours a provision of this type, it should be on these lines.

15.4 Although all the elements of murder are proved, the defendant will not be guilty of that crime if any of five specified mitigating factors is also present. Where there is (i) diminished responsibility, or (ii) provocation, or (iii) the killer was using excessive force in public or private defence, he will be liable to conviction only of manslaughter; where (iv) he was acting in pursuance of a suicide pact he will be liable to conviction only of an offence under clause 65; and where (v) the elements of infanticide are present, a woman will be liable to conviction only of that offence. The definition of murder is accordingly qualified by the concluding words of the section.

Clause 57: Manslaughter

15.5 Manslaughter at common law is a complex crime. In some respects its complexity will be reduced by implementation of the Committee's proposals. "Constructive manslaughter" and "gross negligence manslaughter" will cease to be offences and "killing in pursuance of a suicide pact" will cease to be manslaughter. On the other hand, a new form of manslaughter—killing

[1]Offences against the Person (1980), Cmnd 7844.
[2][1984] 2 W.L.R. 112.
[3]See discussion of this clause, above, paras. 13.9-13.14.

by using excessive force in public or private defence—will be introduced. As appears in paragraph 15.4 above, there will be three forms of manslaughter which really amount to murder in mitigating circumstances. The sidenote to clause 57 (1) (a) retains the convenient phrase, "voluntary manslaughter", to comprehend all of these. Involuntary manslaughter comprises (clause 57 (1) (b) and (c)) the other instances of manslaughter where the defendant does not have the fault required for murder.

15.6 *Clause 57 (1) (b)* makes special provision for the defendant who is not guilty of murder (under clause 56 (b)) by reason only of the fact that because of voluntary intoxication he either was not aware that he might kill or believed that an exempting circumstance existed. Under the general rules stated in clause 26, lack of awareness of a probable result or belief in an exempting circumstance caused by intoxication is no defence to a charge of a crime which may be committed recklessly—as murder may be under clause 56 (b) or (c). The Committee, following the common law, proposes that such unawareness or belief should be a defence to murder leaving the defendant liable to be convicted of manslaughter. Paragraph (b) so provides.

15.7 *Clause 57 (1) (c)* implements recommendation 26 of the Committee's report.

15.8 *Manslaughter a single offence.* There will thus be three forms of voluntary manslaughter and three forms of involuntary manslaughter. Manslaughter at common law takes many forms but there is only one common law offence. There is no indication in the Committee's report that they intended to depart from this concept. Clause 57 therefore creates the single offence of manslaughter. Whatever form of manslaughter is alleged or proved, the defendant will be convicted of manslaughter contrary to clause 57 of the Code. If four jurors should think the defendant intended to kill but was acting under provocation, four that he intended to kill but was using excessive force in self-defence and four that he only intended to cause serious injury, the jury is unanimous that he is guilty of manslaughter and that should be their verdict. It may appear that this presents serious problems of sentencing for the judge, but, as under the present law, he will not usually know of the reasons of the jury, still less of particular members of it, for their verdict and will have to act on his own impressions.

Diminished responsibility

15.9 *Clause 57 (2). Form of verdict.* This subsection makes provision for a verdict of manslaughter by reason of diminished responsibility. There are two reasons for this. The first is that it is, we understand, the practice of the courts to direct the jury that, if they find a verdict of manslaughter on a murder charge, they should state whether it is on the ground of diminished responsibility to assist the judge in imposing sentence. The second is the proposal of the Committee that it should in future be possible to indict a person for manslaughter by reason of diminished responsibility. If a person can be convicted of an offence so designated on being charged with it, it seems right that he should be similarly convicted when he is found not guilty of murder by reason of diminished responsibility. The subsection would confirm the practice referred to above.

15.10 As with the present practice, there might be a difficulty if the jury was divided, but the answer seems reasonably simple. They should then return a verdict simply of manslaughter. It would not be appropriate to invoke the majority verdict procedure to distinguish between one verdict of manslaughter and another.

15.11 *Clause 58. Definition.* This clause adopts the Committee's preferred definition of diminished responsibility (which was also favoured by the medical advisers to the Department of Health and Social Security) with one modification. We have used the term "mental abnormality" instead of "mental disorder" because the latter phrase is defined more narrowly in clause 38 for the purposes of mental disorder verdicts. "Mental disorder", as thus defined, does not include—

> "any disorder caused by illness, injury, shock or hypnosis, or occurring during sleep, unless it is a condition (whether continuing or recurring) that may cause a similar disorder on another occasion."

Clearly disorders so caused, though not continuing or recurring, might ground diminished responsibility under the existing law and no change is intended in this respect. The term, "mental abnormality" is, of course, derived from section 2 of the Homicide Act 1957 but there is no special virtue in it except that it is an alternative to mental disorder.

15.12 The definition of "mental abnormality" in subsection (2) is the definition of "mental disorder" in section 4 of the Mental Health Act 1959 which the Committee,[4] after some hesitation, were persuaded was appropriate for this purpose. Intoxication (the condition of being stupefied or disordered by alcohol or other drugs) is excluded. It is a disorder or disability of mind but is not in itself a ground for reducing murder to manslaughter. The courts have, however, in a number of cases dealt with the situation where the abnormality of mind at the time of killing arose from a combination of intoxication and inherent causes.[5] The rule appears to be that the jury must be told to ignore the effect of the alcohol on the defendant's mind. This means that they must answer a hypothetical question. Would the defendant have been suffering from a mental abnormality amounting to diminished responsibility if he had not been intoxicated? This is the effect of subsection (3).

15.13 *Clause 59. Evidence of mental abnormality.* The provisions of this clause are largely dictated by those of clause 40. The Committee (dissenting from the Butler report) saw no need for a requirement of advance notice of a defence of diminished responsibility, but, as they acknowledged, they did not go into the wider aspects of the Butler report.[6] The relationship between mental disorder which will result in a mental disorder verdict and mental abnormality amounting to diminished responsibility is so close that it would be highly inconvenient if the same procedure did not apply. Subsections (1), (2) and (3), therefore, follow the corresponding subsections of clause 40, except that clause 59 does not, of course, have to allow for the possibility of summary

[4]Fourteenth Report (1980), Cmnd. 7844, para. 92.
[5]*R.* v. *Fenton* (1975) 61 Cr. App. R. 261; *R.* v. *Turnbull* (1977) 65 Cr. App. R. 242; *R.* v. *Gittens* [1984] Q.B. 698; [1984] Crim. L.R. 553.
[6]Fourteenth Report, para. 97.

trial. Subsections (4) and (5) are in accordance with the opinion of the Committee that "established policy requiring the defendant to raise the defence should continue". Subsection (4)—corresponding to subsection (4) of clause 40—limits the right of the prosecution to adduce evidence of mental abnormality. The two subsections together have the same effect as section 6 of the Criminal Procedure (Insanity) Act 1964. Subsection (5) precludes a verdict of diminished responsibility unless the defendant has adduced, or the prosecution has been given leave to adduce, evidence of mental abnormality.

15.14 *Burden of proof.* The provisions of the Code relating to diminished responsibility make no reference to burden of proof. The effect is that the general principles stated in clause 17 are applicable. The defendant may bear an evidential burden but when he satisfies it the burden will be on the prosecution to disprove the facts alleged to constitute the defence. This is in accordance with the recommendations of the Committee and the Butler report.[7]

15.15 *Subsections (6) and (7). Trial for manslaughter by reason of diminished responsibility.* At present diminished responsibility, like the defences of provocation and suicide pact, is only available as a defence to a charge of murder. Subsections (6) and (7) give effect to the Committee's recommendations[8] that a magistrates' court should be able to commit for trial for manslaughter by reason of diminished responsibility and that, after committal for trial for murder, the prosecution should be able to indict the defendant for that form of manslaughter. As recommended, the consent of the defendant is required to the tendering of evidence of mental abnormality by the prosecution at the committal proceedings and to the indictment for manslaughter by reason of diminished responsibility, as the case may be. These proposals give rise to some difficulties of proof and verdict which are discussed in an appendix to this report.

Clause 60: Provocation

15.16 This clause gives effect to recommendations 9 to 13 of the Committee's report. A person can be "provoked by" something only when he is aware of it. The question whether there was sufficient provocation is to be decided solely on the basis of the facts as the defendant perceived them. Provocation is a "special defence" which attracts the operation of clause 44 (1). A person who acts in the belief that a provocative fact exists has any defence that he would have if it existed. The Committee recommended that "the defendant should be judged with due regard to all the circumstances, including any disability, physical or mental from which he suffered. . .". We believe this is appropriately summed up in the phrase, "any of his personal characteristics that affect its [sc. the provocation's] gravity". This is the same phrase as is used in clauses 45 (duress) and 46 (necessity). A characteristic which is relevant for the purpose of one defence will not necessarily be relevant for the purpose of another. The phrase should be sufficient to enable the judge to direct the jury so that they will take into account only relevant characteristics. If the provocation consisted in an assault with intent to rob, the fact that the defendant was sexually impotent would not affect its gravity. If the provocation consisted in taunts of sexual impotence it would be highly relevant.

[7] *Ibid.* para. 94.
[8] Fourteenth Report, paras. 95 and 96.

15.17 *Burden of proof.* The clause makes no reference to burden of proof so the general rule stated in clause 17 applies. This abolishes the rule under the Homicide Act 1957, section 3, that the judge may not withdraw the defence from the jury on the ground that no reasonable jury could find that the alleged provocation was a sufficient ground for the loss of self-control. This is in accordance with the Committee's recommendation 12. Unless evidence capable of amounting to provocation is adduced by the prosecution, there will be an evidential burden on the defendant who wishes to rely on the defence; once he has satisfied that, the burden of disproving the defence will be on the prosecution.

Killing by the use of excessive force in public or private defence

15.18 *Clause 61.* This clause implements the Committee's recommendation 73. Under clause 47 a person using force for one of the purposes mentioned in that clause will have a complete defence if the force used was (a) reasonable in the actual circumstances (whether the defendant knew of them or not) or (b) reasonable in the circumstances which he believed to exist. He does not need to rely on clause 61 unless the force used is unnecessary or unreasonable according to both tests. Where that is so, he has a defence to a charge of murder if he believed the force to be necessary and reasonable to achieve the purpose in question. He is then liable to conviction of manslaughter.

15.19 *Burden of proof.* There will usually be an evidential burden on the defendant when he has used force which was unnecessary or unreasonable. If he satisfies this, the burden is on the prosecution to prove that he did not believe the force used to be both necessary and reasonable for the purpose in question.

Jurisdiction over murder and manslaughter

15.20 *Clause 62.* This clause implements the Committee's recommendations 76 to 78. As the words in parentheses make clear, the clause only applies when the other conditions for murder or manslaughter are satisfied. By this clause, murder and manslaughter are declared to be constituted by acts (including results occurring: clause 19 (a)) done outside the ordinary limits of criminal jurisdiction within clause 8 (1) (b). In paragraph (a) it is necessary to distinguish between the causing of any injury resulting in death and the death itself because it is the fact that the injury occurs within the ordinary limits of criminal jurisdiction which is material. It may be murder or manslaughter under this paragraph where—

(i) the defendant in England fatally injures P in England but P is taken to hospital abroad and dies there;

(ii) the defendant in, e.g., France, despatches a bomb, poison, or other dangerous thing to England where P is killed by it; and

(iii) P, having been fatally injured by something sent from abroad as in (ii), is taken to France and dies there.

15.21 *Paragraph (b).* Here the material fact is that the act is done within the ordinary limits of criminal jurisdiction. If a person within the ordinary limits of criminal jurisdiction despatches a bullet, bomb or other dangerous thing so

as to cause death anywhere in the world, he may be convicted of murder or manslaughter under English law. It is clear from the context that "act" is here used in its narrower sense so as not to include the results of the act.

15.22 *Paragraph (c).* Paragraphs (a) and (b) apply to anyone. Paragraph (c) provides for a wider jurisdiction over British citizens. It is unneccessary that the injury be caused or the act done within the ordinary limits of criminal jurisdiction.

15.23 *Foreign law.* The Committee recommended that "On a charge of murder or manslaughter a defendant should not be able to plead that his act was not an offence in the country where it was done or that he had a partial defence under the law of that country."[9] We do not believe that any special provision is necessary to achieve this result. The Code provides that killing in the circumstances described in clause 62 is murder or manslaughter by the law of England and Wales, and there are no grounds for introducing any question of foreign law.

15.24 *Preliminary offences.* The Committee's recommendations 80 and 81 concerning preliminary offences are dealt with in relation to those offences in clause 55.

Attempted manslaughter

15.25 *Clause 63.* The Committee recommended that there should be an offence of attempted manslaughter by reason of provocation or diminished responsibility.[10] They made no such recommendation in respect of the third type of voluntary manslaughter, killing by the use of excessive force in public or private defence (clause 61). There appears to be no difference in principle between this and the other two types of voluntary manslaughter. Consistency requires that it should be treated in the same way. Clause 63 therefore creates an offence of attempted manslaughter where a person attempts to kill under diminished responsibility or provocation or when using excessive force in public or private defence. It will be noted that the existence of attempted manslaughter is taken into account in the drafting of clauses 59 (4) (5) (6) and (7) and 73 (3).

Clause 64: Liability of party not having a defence

15.26 Clauses 58, 60 and 61 all refer to a party to the killing as well as the actual killer because a person alleged to be an accessory to murder may be able to invoke the defence of diminished responsibility or provocation or that he was using force in public or private defence. The accessory may be convicted of manslaughter though the principal is convicted of murder; and vice versa. This is made clear by clause 64 which is based upon section 2 (4) of the Homicide Act 1957. That subsection applies only to killing under diminished responsibility. This is not surprising because provocation—though somewhat modified by section 3 of the Homicide Act 1957—remains a defence to murder at common law. It seems clearly right, however, that the same principle should apply to all forms of voluntary manslaughter.

15.27 Clause 64 also applies to infanticide (clause 67). This is required by principle and for consistency. If a woman is procured to kill her child in such

[9]Recommendation 79.
[10]Recommendation 17.

circumstances that she is guilty not of murder but of infanticide, it is clearly right that the procurer should be liable to conviction of murder if he acted with the appropriate fault and has no other defence. Conversely, a mother who was accessory to the killing of her child should be liable to conviction only of infacticide if clause 67 applies.

15.28 *Attempts.* Clause 64 also applies to attempts to commit any form of voluntary manslaughter or infanticide. A person may be convicted of attempted murder though other parties to the killing, whether principals or accessories, are convicted only of attempted manslaughter or attempted infanticide.

Clause 65: Killing in pursuance of a suicide pact

15.29 This clause implements the Committee's recommendation 29 that killing in pursuance of a suicide pact should no longer be manslaughter but should be a particular offence punishable with a maximum of seven years' imprisonment. The existing law in section 4 of the Homicide Act 1957 merely creates a partial defence to murder with the onus of proof on the defendant and does not create an offence which can be charged as such. Following the Committee's recommendation, clause 65 creates such an offence (though it may be charged only with the consent of the Director of Public Prosecutions) and the usual rules about burden of proof apply. The Committee recommended that the existing offence of aiding, abetting, counselling or procuring suicide should continue to be an offence but with a maximum of seven years' imprisonment and that it should be permissible to return a verdict of killing in pursuance of a suicide pact on the aiding and abetting charge and vice versa. In view of the interchangeable nature of the offences and the fact that they are to have the same maximum sentence, we considered whether it was practicable to consolidate them into a single offence. We concluded that the most convenient course was to maintain the present and proposed distinction between the two. The definition of "suicide pact" in subsection (2) reproduces that in section 4 of the Homicide Act 1957.

15.30 *Attempt.* Subsection (3), following the Committee's recommendation 30, provides that it is a defence to charge of attempted murder that the defendant attempted to kill in pursuance of a suicide pact; but the defendant will be guilty of an attempt to commit the offence under clause 65.

Clause 66: Complicity in suicide

15.31 This clause reproduces the effect of section 2 of the Suicide Act 1961 but in the terminology of the Code and with the reduced penalty recommended by the Committee. It is made clear that the offence is committed only when the suicide is committed or attempted. A person who attempts to procure the suicide of another will be guilty of an offence under clause 53 (1). Clause 53 (6) does not apply because this is not a case of an attempt to procure the commission *of an offence.* Where, in pursuance of a suicide pact, the defendant procures, assists or encourages another to kill or to attempt to kill himself, the case comes within this clause and not within clause 65.

[11]Fourteenth Report, para. 36.

Clause 67: Infanticide

15.32 This clause implements the Committee's recommendations 18 to 24. It operates as a defence to a charge of murder or attempted murder, manslaughter or attempted manslaughter. It also creates an offence which can be charged as such. The clause makes clear that a woman who is a party to homicide committed by others may be convicted of infanticide. As the clause makes no special provision about the burden of proof, clause 17 applies and the defendant bears no more than an evidential burden.

15.33 Subsection (3) provides for the case where the jury is satisfied that a defendant charged with infanticide is guilty either of infanticide or of child destruction. Because it is uncertain whether, at the material time, the child had been born and had an existence independent of its mother it is impossible to say which crime has been committed. The Committee thought there should be provision for cases of this kind.[11] As we have followed their recommendation that the penalty for infanticide should be reduced to five years, infanticide is the less serious offence under the Code.[12] The subsection therefore provides that the jury should convict of infanticide in the situation envisaged. The subsection also provides for the case of an attempt. Here the material time is that of the act constituting the attempt.

If, in the case envisaged, the jury were satisfied that the child had not been born at the material time the defendant would have to be acquitted. The defendant would be guilty of child destruction; but it would be wrong to allow conviction of an offence punishable with life imprisonment on a charge of an offence punishable with only five years. Where such a difficulty is foreseen, the prosecution could include alternative counts. It would be possible to provide for the case where it is not foreseen by amending the subsection to allow the defendant to be convicted of infanticide where she is charged only with that offence and is proved to be guilty of child destruction.

Clause 68: Threats to kill or cause serious injury

15.34 This clause implements the Committee's recommendation 63 extending the scope of the present section 16 of the Offences against the Person Act 1861 to include threats to cause serious injury.

Clause 69: Causing the death of another

15.35 This clause implements the Committee's recommendations 2 and 5. *Paragraph (a)* replaces the common law rule that the victim of criminal homicide must be "in being" in the language proposed by the Committee. The relevant time is the time when death occurs. So a person may be guilty of murder or manslaughter if he causes an injury to a child in the womb which is born alive and dies of the injury.[13]

15.36 *Paragraph (b)* implements the Committee's recommendation that the common law "year and a day" rule should be preserved and that time should run "from the infliction of injury as opposed to the act which causes death". In some cases it is unreal to distinguish between the act and the infliction of injury—e.g., the defendant decapitates P by a blow with a sword.

[11]Fourteenth Report, para. 36.

[12]If the life penalty for infanticide were retained, the Committee wished child destruction to be regarded as the less serious offence: Fourteenth Report, para. 36, n.1.

[13]*R.* v. *West* (1848) 2 Cox C. C. 500.

Under the paragraph the defendant is liable for homicide if the death occurs within a year and a day of his act or within a year and a day of the occurrence of any injury resulting from the act.

15.37 *Paragraph (b)* provides also for the special case where the defendant causes injury to the child in the womb. The Committee recommended (paragraph 40) that time should run from the birth as is apparently the case at common law.

Clause 70: Abortion

15.38 The Committee thought that offences of abortion and child destruction, though technically within their terms of reference, involved moral, social and medical issues which could not satisfactorily be resolved by a committee consisting entirely of lawyers. We have to assume the continuance of the present law under the Code but it should be incorporated, at least by reference, within its provisions. Clause 70 would replace section 58 of the Offences against the Person Act 1861, except that part of it which relates to a woman attempting to procure her own miscarriage. The cross-heading above section 58 is "Attempts to procure Abortion" and the offence is framed so as to penalise the doing of certain acts with intent to procure miscarriage. With the codification of the law relating to attempts, this seems an inappropriate way to proceed. Clause 70 therefore simply makes it an offence to terminate the pregnancy of a woman (the terminology of the Abortion Act 1967) otherwise than in accordance with the provisions of that Act. Under the Code it is then an offence under clause 53 to attempt to terminate the pregnancy otherwise than in accordance with the 1967 Act. Section 58 of course specifies the use of poison or a noxious thing or any instrument; but it adds "or other means whatsoever" so it seems that it would make no difference of substance to leave it to the general law relating to attempts. It is unnecessary to retain the words "whether she be or be not with child" because it is plain that, under clause 54, an attempt to procure the abortion of a woman who is not in fact pregnant will be an indictable attempt.

15.39 *Clause 71. Self-abortion.* This clause replaces that part of section 58 which relates to a woman attempting to procure her own miscarriage. It seems appropriate that this should follow rather than precede (as it does in the 1861 Act) the much more important case where the act is done by another person. Its separation may highlight the question whether it should continue to be an offence punishable with life imprisonment—but that is not a matter for us. It seems improbable that a woman attempting to terminate her own pregnancy will ever be acting in accordance with the provisions of the Abortion Act 1967 but, as a matter of principle, the clause should allow for the possibility. Subsection (2) excluding clause 54, is necessary to preserve the rule in the 1861 Act that a woman who is not pregnant cannot be guilty of the offence.

Clause 72: Supplying article for abortion

15.40 This clause reproduces the effect of section 59 of the Offences against the Person Act 1861 in language appropriate to the Code. "Any article" replaces "any poison or other noxious thing, or any instrument or thing whatsoever". There is no change in substance.

Clause 73: Child destruction

15.41 This clause reproduces the effect of section 1 of the Infant Life Preservation Act 1929 in language appropriate to the Code.

15.42 *Subsection (3)* provides for the case where a person is charged with murder or manslaughter of a child and the jury are satisfied of all the elements of the offence except that they are uncertain whether the child had been born and had an existence independent of his mother when his death occurred. They are then satisfied that she is guilty of *either* murder *or* child destruction (or manslaughter *or* child destruction) but it is impossible to say which crime has been committed. The Committee thought that in these circumstances the jury should be empowered to convict of the lesser offence[14], i.e. child destruction. The subsection so provides.

Clause 74: Intentional serious injury

15.43 Subsection (1) of this clause implements the Committee's recommendation 39 (1), replacing section 18 of the Offences against the Person Act 1861. We have followed the recommendation of the Committee in not defining "injury" or "serious injury".[15] We assume that the word "injury" is wide enough to include injury to the state of a man's mind—it is more apt to do so than "bodily harm", the term currently used. It will be for the court or jury in each case to determine whether what has been done amounts to an injury or to serious injury.[16]

15.44 *Subsection (2)* provides for what appears to be an oversight in the Committee's proposals. They make no recommendation for the extension of the ordinary limits of criminal jurisdiction in respect of this crime. Recommendation 80, however, is that it should be an offence to incite, conspire or attempt in this country to commit an act abroad which, if committed here would amount, *inter alia,* to the offence under subsection (1); and that it should be an offence to incite, conspire or attempt abroad to commit that offence in this country. This proposal is implemented by clause 55. If it is an offence to incite, conspire or attempt to commit an act, it follows logically that the act must constitute the offence the commission of which has been incited, conspired at, or attempted. Subsection (2) gives effect to this logical conclusion. Similar provision will need to be made for kidnapping if it should be decided to codify that offence; and an amendment to the Explosive Substances Act 1883 is required.

Clause 75: Reckless serious injury

15.45 This implements the Committee's recommendation 39 (1).

Clause 76: Intentional or reckless injury

15.46 This clause implements the Committee's recommendation 39 (3) (except that it does not provide that this shall be an arrestable offence, this part of the Code not being the appropriate place for such a provision).

Clause 77: Assault

15.47 The Committee recommended (no.42) that assault should remain an offence and the definition should be left to the common law. The Committee, as noted earlier, does not regard codification as one of its functions. The Code

[14]Fourteenth Report, para. 36.
[15]Fourteenth Report, para. 154.
[16]Cf. *R.* v. *Miller* [1954] 2 Q.B. 282 where Lynskey J. held that a hysterical and nervous condition resulting from an assault was "actual bodily harm".

clearly requires a definition of this offence. We have, however, taken note of the view of the majority of the Committee (paragraph 159) that "there should continue to be a single offence covering assault, whether or not there is battery". Clause 77 (1) is drafted accordingly. *Paragraph (a)* covers cases of the application of force to, or the causing of and impact on, the body of another where no injury is caused. If any injury occurs there will be an offence under clause 76. The paragraph does not require the application to be direct, so that it will be an assault if the defendant sets a "booby trap" for P which causes water to be poured over him or leads him to fall into a pit.[17] *Paragraph (b)* provides for the case where there is no battery. It covers the obvious examples where a blow is aimed at P or a pistol which he believes to be loaded is pointed at him. It does not extend to a mere threat to strike in the future because it must cause the person at whom it is aimed to fear that the force or impact is imminent.

15.48 The clause requires that the act be done "without that other's consent". It is of the essence of an assault, as traditionally understood, that it is done without the consent of the victim. The definition would look odd without it. Yet no reference is made to lack of consent in the definition of the other offences of causing injury, although consent may be a defence. A boxer who tries to knock out his opponent clearly intends to cause injury—possibly even serious injury—and if this is not an offence it is because of a rule of common law that justifies or excuses blows struck in the course of properly organised boxing. This rule is preserved under the Code by clause 49. If the boxer is charged with an offence under clause 74,75 or 76, it is to clause 49 that he must resort. A reference to consent might therefore have been left out of the definition of assault without affecting the substance of the law under the Code; but then clause 77 would have been decidedly less informative. Minor applications of force and impacts not leading to any injury, if consented to, should not require any justification or excuse—they should not appear, *prima facie*, to be offences.

15.49 *Subsection (2).* The introduction of the reference to consent, however, brings another problem because it must be qualified. The case-law[18] seems to agree that the victim of an assault cannot give an effective consent to an act which is likely or intended to cause injury, unless there is some public interest to justify it. It is well recognised that there is a public interest in lawful games, sports, entertainment and medical treatment; but it would be a mistake to attempt to draw up a closed list. These are all matters which, on charges of other offences under the Code, would come under the general umbrella of clause 49. Subsection (2) refers specifically to these cases but leaves it open to the courts to recognise other public interests which will justify or excuse acts done to another with his consent, although they are likely or intended to cause injury.

15.50 *Clause 78. Assault on a constable.* This clause implements the Committee's recommendations 46 and 47. As recommended, the clause

[17] *R.* v. *Clarence* (1888) 22 Q. B. D. 23 at 36 *per* Stephen and Wills JJ., *R.* v. *Martin* (1881) 8 Q. B. D. 54.

[18] *R.* v. *Coney* (1882) 8 Q. B. D. 534 at 539 (*per* Cave J.), *R.* v. *Donovan* [1934] 2 K. B. 498 at 507-508, *Attorney-General's Reference (No. 6 of 1980)* [1981] Q. B. 715 at 719.

requires intention or recklessness as to the fact that the person assaulted or assisted is a constable; but no fault is required with respect to the fact that he is in the execution of his duty.

15.51 *Clause 79. Assault to resist arrest.* This clause implements the Committee's recommendation 51.

Clause 80: Administering a substance without consent

15.52 This clause implements the Committee's recommendations 53 and 54. It follows the recommended wording closely except that it does not provide that the administration must be "without lawful excuse". To include such words would be inconsistent with the general principles on which the offences in the Code are drafted. For this offence, as for others, a "lawful excuse" may be found in reliance on clause 49. This should enable the courts to achieve the effect contemplated by the Committee—"in any case before the courts it would be for the judge to decide whether the excuse put forward was capable of being lawful and for the jury to decide whether the defendant had acted for the reason he said he had".

Endangering traffic

15.53 *Clause 81.* This clause implements the Committee's recommendation 56. The Committee did not refer to waterways but it would be inconsistent to omit them. They are therefore included and a definition of "waterway" (as well as "conveyance") is offered by subsection (2).

CHAPTER 16

OFFENCES OF DAMAGE TO PROPERTY

Introduction

16.1 *Adaptation of Criminal Damage Act 1971.* No substantial work is needed to prepare for the inclusion of offences of damage to property in Part II of the Code. For this area of the criminal law was modernised in 1971 as "a part of the overall scheme of codification of the criminal law".[1] The Criminal Damage Act requires relatively little amendment to adapt it to the Code that we propose. Some changes of structure and style have of course to be made. In addition there are inconsistencies between the defence of protection of property as embodied in the Act and that of use of force in public or private defence as codified in clause 47. Such inconsistencies, once noticed, must be eliminated: see paragraph 16.15. The substance of the Criminal Damage Act is, we believe, otherwise unaffected by our amendments. In one respect, however, it is affected by our leaving the wording of the Act unchanged. We explain this apparent paradox in paragraph 16.4.

16.2 *Mode of trial and punishment.* These matters (dealt with by section 4 of the 1971 Act) are consigned to Schedule 3 in accordance with the method proposed for the Code.[2]

Clause 82: Destroying or damaging property

16.3 This clause corresponds to section 1 of the 1971 Act. It is slightly simpler than section 1, mainly in stating the fault element more economically. The rather elaborate drafting of section 1[3] may have derived from a desire to ensure that the effect of the common law rules on "transferred intent" were reproduced in the Act. The way in which those rules are stated for general purposes in clause 28 permits the relative simplicity of the present clause.

16.4 *The fault required* is stated as intention or recklessness. This repeats the language of section 1, but not its effect as explained by the House of Lords in *R.* v. *Caldwell.*[4] For recklessness as defined by clause 22 for the purposes of the Code is narrower than recklessness in section 1 as explained in *R.* v. *Caldwell.* To reproduce the effect of section 1 since *R.* v. *Caldwell* it would be necessary to add heedlessness (also defined by clause 22) as an alternative mode of fault. This could of course be done. If it were done, however, it would be necessary, in order to avoid a serious anomaly, to make a similar extension of the offence of intentional or reckless injury (clause 76), and perhaps of some other offences against the person. Without such a corresponding change a person who by the same act damaged both the eye and the spectacles of another would be more readily convicted of criminal damage to the spectacles

[1]Law Commission Report on Offences of Damage to Property (1970), Law Com. No. 29, para. 91.

[2]See cl. 11.

[3]Sect. 1(1), for instance, reads: "A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence."

[4][1982] A. C. 341. See para. 8.19, above.

than of recklessly injuring the eye. A similar anomaly exists at present, in a case of wounding or inflicting grievous bodily harm, because of the different minimum fault requirements under section 1 of the Criminal Damage Act and section 20 of the Offences against the Person Act 1861.[5] Nor at present could there be a conviction of assault occasioning actual bodily harm, under section 47 of the 1861 Act, without proof of intention or recklessness in respect of the assault[6]; and recklessness here appears to have the narrower sense adopted in clause 22.[7] To include heedlessness as a mode of committing offences against the person would be to depart from the existing law as well as from the recommendations of the Criminal Law Revision Committee upon which we have based our draft offences. It is not for us to propose such a departure. Nor can we propose perpetuation of the anomaly whereby the criminal law responds more vigorously to damage to property than it does to injury to the person.

16.5 *"Without lawful excuse".* The phrase "without lawful excuse" does not appear in this or the following clauses as it does in sections 1, 2 and 3 of the 1971 Act (with a partial explanation in section 5). It is not appropriate in a Code of the kind we propose.[8] Lawful excuse—so far as not defined as a matter of special defence (see clauses 88 and 89)—is covered by the provision of general defences in Part I of the Code (e.g. duress in clause 45) and by a general saving of any justification or excuse available by statute or at common law (clause 49). One "excuse" that no doubt excludes an offence under section 1(1) of the 1971 Act (clause 82(1)) is the owner's known consent to the destruction or damage.[9] This is worth referring to explicitly; it is stated as a matter of defence by clause 88. This being done, the phrase "without lawful excuse" can disappear from all the offence-creating sections (with some minor drafting consequences).

16.6 *Implications of* R. *v.* Courtie.[10] The principle of this recent House of Lords case is that where greater maximum punishment can be imposed if a particular factual ingredient is established than if it is not, two distinct offences exist. On this principle clause 82 embodies three offences—1. an offence under subsection (1), committed otherwise than by fire: maximum, ten years imprisonment; 2. an offence under subsection (1), committed by fire (arson): maximum, life imprisonment; 3. an offence under subsection (2), whether arson or not: maximum, life imprisonment. The question is whether the clause should be restructured so as to be more explicit in this respect. We think it need not. The point is quite clear when the relevant entries in Schedule 3 are consulted.

Clause 83: Threats to destroy or damage property

16.7 This clause reproduces section 2 of the 1971 Act with minor drafting changes.

[5]For the 1971 Act, s.1, see *R.* v. *Caldwell* [1982] A. C. 341; *Elliott* v. *C.* [1983] 1 W. L. R. 939. For the 1861 Act, s. 20, see *W. (A Minor)* v. *Dolbey* [1983] Crim. L. R. 681; *R.* v. *Grimshaw* [1984] Crim. L. R. 108.

[6]*R.* v. *Venna* [1976] Q. B. 421.

[7]Smith and Hogan, *Criminal Law* 5th ed. (1983), 354; Glanville Williams, *Textbook of Criminal Law* 2nd ed. (1983), 171.

[8]See paras. 13.13 and 13.14 above.

[9]Cf. *R.* v. *Denton* [1981] 1 W. L. R. 1446.

[10][1984] A. C. 463.

Clause 84: Possessing anything with intent to destroy or damage property

16.8 This clause reproduces section 3 of the 1971 Act. The consent aspect of "lawful excuse" is once again transferred to clause 88.

Clause 85: Meaning of "belonging to another"

16.9 This clause reproduces in simpler form the provisions of the Criminal Damage Act 1971, section 10(2)–(4).

Clause 86: Fungi and plants growing wild

16.10 The word *"property"* will occur in other parts of the Code (see, for example, clause 47(1)(e)). So a general definition is called for. That which appears in clause 5(1) (interpretation) will serve the purposes of the criminal damage offences.[11]

16.11 Section 10(1)(b) of the 1971 Act excludes from the definition of "property" the things referred to in this clause. This is unsatisfactory; the fruits and flowers of wild shrubs must surely be property for the purposes of clause 89 (*defence* of protection of property). The method of the present clause is to declare that none of the wild things mentioned can be the subject of *an offence* under clauses 82 to 84.

Clause 87: Application of special defences

16.12 This clause reproduces section 5(1) of the 1971 Act (we hope in slightly clearer form).

Clause 88: Consent or belief in consent

16.13 This clause reproduces section 5(2)(a) of the 1971 Act. It applies where the actor *knows* that he has the owner's consent—his belief is true—as well as where he mistakenly believes that the owner has consented or would consent if he knew of the circumstances. The clause does not apply where the owner in fact consents (or would consent) if the actor is unaware that this is so.

16.14 We have drawn attention elsewhere to the drafting of this clause as an example of the style proposed for the Code.[12]

Clause 89: Protection of persons and property

16.15 This clause replaces sections 5(2)(b) of the 1971 Act, but not without significant amendment. The need to achieve consistency between the treatment of persons and of property and between defences permitting the use of protective measures has been mentioned elsewhere in this Report.[13] This explains all the differences of substance between the 1971 provision and the present clause. The changes are as follows:

(i) The protection of the person from force, injury or imprisonment is permitted, as well as the protection of property.

[11]"Property" includes things in action and other intangible property—but irrelevantly for present purposes. The definition refers separately to "any right or interest in property or any privilege over land, however created", in order to preserve for the purposes of cl. 88 the effect of s. 5(4) of the 1971 Act.

[12]Para. 2.20.

[13]See paras. 1.8, 13.32, 13.33 and 13.37, above.

(ii) Property may be protected from appropriation as well as from destruction or damage.

(iii) Action immediately necessary and reasonable in the circumstances which exist (even unknown to the actor) is permitted, and not only action called for in the circumstances which he believes to exist.[14]

(iv) The test of the immediate necessity for, and the reasonableness of, the action taken is made objective.

16.16 *Relationship to clause 47* (use of force in public or private defence). The result is harmony between clauses 47 and 89 in all the respects just listed. But there are two differences between them. First, clause 89 is not limited to measures taken against "unlawful" acts, as clause 47 in general is. Clause 89 (like the 1971 Act) permits the defence of sheep against a marauding dog, even though the dog's attack may involve no crime or tort on the part of its owner. Secondly, clause 89 is not limited to the use of force; property might exceptionally be destroyed or damaged by means not involving force.

Clause 90: Ancillary provisions

16.17 The 1971 Act contains various provisions[15], concerned with law enforcement, procedure and evidence, that belong more properly to other parts of the Code. Pending the completion of the Code they could be left (suitably amended) as the remnants of an emasculated Criminal Damage Act. Or they could be scheduled to the Code Act. This clause assumes that the latter technique will be adopted. Our draft does not offer the text of the schedule.

CONCLUDING REMARKS

In conclusion we wish to thank all those who have helped us in the preparation of this Report. Our universities have been generous in allowing us to devote so much time as we have to the work. Our colleagues have been unfailing in their support. In particular we wish to thank our secretaries, Mrs. Jan Goodman, Miss Lisa Goulding and Miss Barbara Harris who have cheerfully and patiently typed draft after draft of the clauses and a very large number of working papers as well as the draft of the Report itself.

J. C. Smith
I. H. Dennis
E. J. Griew

15 November 1984.

[14]Cf. paras. 13.35 and 13.36, above.
[15]In ss. 6, 7(2) and 9.

APPENDIX A

The contents of Part II of the Code

1. A possible arrangement of Part II

The following offences at least, perhaps arranged as shown, should in due course be collected in Part II of the Criminal Code Act. The list assumes: (a) the enactment of offences to give effect to existing proposals (whether final or provisional) of the Law Commission and the Criminal Law Revision Committee; and (b) otherwise the modernisation, in conformity with the style of the Code, of statutory offences. We also assume that some extant common law offences will be replaced by statutory offences and that the latter will find their places in Part II.

A. Offences against the International Community

Genocide
Piracy[1]
Offences under the Aviation Security Act 1982
Hijacking ships[2]

B. Offences against the State

Treason etc.[3]
Incitement to disaffection
Offences under the Foreign Enlistment Act 1870
Offences under the Official Secrets Acts
Offences under Part II of the Forgery and Counterfeiting Act 1981
Offences relating to public stores

C. Offences relating to the Administration of Justice

Offences proposed in the draft Administration of Justice (Offences) Bill[4]
Contempt of court

D. Offences against Public Peace and Safety

Offences under the draft Criminal Disorder Bill[5]
Other public disorder offences
Offences relating to unlawful drilling and quasi-military organisations
Explosives, firearms and offensive weapons offences
Bomb hoaxes

E. Offences against the Person

Offences against the personal security of the Sovereign[6]
General offences against the person[7]

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[1]See (1978), Law Com. No. 91, paras. 99 *et seq.*, and draft Criminal Jurisdiction Bill, cl. 7.
[2]*Ibid.* paras. 106 *et seq.* and cl. 5.
[3]See Law Commission Working Paper No. 72 (1977), provisionally proposing (*inter alia*): (a) new offences of treason and of conduct aimed at the overthrow or supplanting, by force, of constitutional government; and (b) the abolition of sedition.
[4]See (1979), Law Com. No. 96.
[5]See (1983), Law Com. No. 123.
[6]See Law Commission Working Paper No. 72 (1977), paras. 62–66.
[7]See cll. 56–81 of the draft Criminal Code Bill.

Offences under the Child Abduction Act 1984
Other offences of unlawful detention, kidnapping and abduction[8]
Concealment of birth
Cruelty to children
Sexual offences[9]
Criminal defamation[10]

F. Offences against property

Criminal damage and related offences[11]
Offences under Part II of the Criminal Law Act 1977
Offences under the Theft Acts 1968 and 1978
Offences under Part I of the Forgery and Counterfeiting Act 1981
Other general fraud offences[12]

G. Offences against Public Morals and Decency

Offences under the Public Bodies Corrupt Practices Act 1889 and the Prevention of Corruption Act 1906
Offences under the Honours (Prevention of Abuses) Act 1925
Bigamy
Offences relating to prostitution and allied offences[13]
Offences of indecency
Offences against religion and public worship[14]

2. Examples of presumed exclusion from Part II

The principle of convenience referred to in paragraph 2.10 would seem to dictate the exclusion from Part II of (for example) offences under—

Bankruptcy Act 1914
Companies Acts
Customs and Excise legislation
Food and Drugs legislation
Health and Safety legislation
Immigration Act 1971
Licensing Act 1974
Misuse of Drugs Act 1971
Representation of the People Act 1983
Road Traffic Act 1972 (with possible exceptions)[15]
Legislation concerned with protection of the environment
Legislation concerned with public registers

[8]See Criminal Law Revision Committee, Fourteenth Report (1980), Cmnd. 7844, Summary of Recommendations, para. 65.
[9]See Criminal Law Revision Committee, Fifteenth Report (1984), Cmnd. 9213.
[10]See Law Commission Working Paper No. 84 (1982).
[11]See cll. 82–84 of the draft Criminal Code Bill.
[12]The subject of conspiracy to defraud (preserved as an offence at common law by the Criminal Law Act 1977, s. 5 (2)) is under review by the Law Commission. See Working Paper No. 56 (1974) and (1976), Law Com. No. 76, paras. 1.14–1.16. The study may widen to embrace fraud offences generally: Eighteenth Annual Report (1982-83) (1984), Law Com. No. 131 para. 2.25.
[13]See Criminal Law Revision Committee Working Paper (1982) on this subject.
[14]See Law Commission Working Paper No. 79 (1981).
[15]See above, para. 2.11.

3. Examples of borderline cases

Having regard on the one hand to the desirability of the Code's being as comprehensive as possible and on the other hand to the principle of convenience, a case can be made both for and against the inclusion in Part II of (for example) offences under—

Obscene Publications Act 1959
Prevention of Fraud (Investments) Act 1958
Protection of Animals Act 1911
Trade Descriptions Act 1968

and some offences under the Road Traffic Act 1972.[15]

[15]See above, para. 2.11.

APPENDIX B

Proof and verdict at a trial for "murder in mitigating circumstances"

This appendix draws attention to a problem which we did not feel able to solve within the context of our terms of reference but which deserves further consideration.

The problem exists in the present law of infanticide but has been generally overlooked and does not seem to have given rise to any difficulties in practice. Under the Code (following the recommendations of the Criminal Law Revision Committee) it will arise not only in relation to infanticide (clause 67) but also in relation to manslaughter by reason of diminished responsibility (clauses 57–59) and killing in pursuance of a suicide pact (clause 65). The reason is that it will be possible, under the Code, to indict a person for manslaughter by reason of diminished responsibility or for killing in pursuance of a suicide pact. These will no longer be merely "fall-back" offences of which a defendant must be convicted when a defence to a charge of murder is established on the ground that the defendant was acting under diminished responsibility or in pursuance of a suicide pact.

When a person is indicted for any of these three offences the prosecution has to prove that he acted with the fault required for murder. In substance, they are cases of murder in particular mitigating circumstances to which the law gives effect. The question is whether the prosecution then have to go on to prove what are really the elements of a defence to a charge of murder. If a woman is indicted for infanticide, the prosecution may prove that she intentionally killed her child aged six months but be unable to prove that the balance of her mind was disturbed as required either by the present law or by the Code. If a person is charged under the Code with killing in pursuance of a suicide pact, the prosecution may prove that he intentionally killed the deceased but be unable to prove that he did so in pursuance of a suicide pact as defined by clause 65 (2). It is unthinkable that the defendant in such cases should be simply acquitted when she or he, if charged with murder, would have been convicted either of murder or of infanticide or killing in pursuance of a suicide pact, as the case may be. In such cases the defendant clearly ought to be convicted of the offence charged. This could be achieved by a provision that the defendant should be liable to conviction of any of these offences on proof by the prosecution of the elements of murder, without more.

The position with regard to diminished responsibility is more complicated. It is true that the problem may rarely arise because the defendant, having consented to the admission of evidence of mental abnormality (see clause 59(6) and (7)), may be expected to plead guilty. He cannot, however, be denied his right to plead not guilty at the trial and contend that he did not kill or that, if he did kill, it was without the fault required for murder. Nor, it seems, is there anything to prevent him arguing that he was not suffering from mental abnormality.

If the defendant simply pleads not guilty and the jury hear the evidence relating to the commission of the alleged offence and of his alleged mental abnormality, they may reach one of the following conclusions.

(1) Satisfaction beyond reasonable doubt that the defendant killed with the fault required for murder and—

(a) satisfaction beyond reasonable doubt that he was suffering from mental abnormality; or

(b) satisfaction on the balance of probabilities that he was suffering from mental abnormality; or

(c) satisfaction on the balance of probabilities that he was not suffering from mental abnormality; or

(d) satisfaction beyond reasonable doubt that he was not suffering from mental abnormality.

(2) Satisfaction beyond reasonable doubt that the defendant killed and that he did so with the fault required for involuntary manslaughter (clause 57 (1)(c)); and, as to mental abnormality, as in (1) (a)–(d) above.

(3) No satisfaction beyond reasonable doubt that the defendant killed; or, if so satisfied, no satisfaction beyond reasonable doubt that he did so with either the fault required for murder or that required for involuntary manslaughter.

Case (3) presents no problems. The defendant must be acquitted. In case (1) (a) it seems obvious that the verdict should be guilty of manslaughter by reason of diminished responsibility. Then the difficulties begin. If the burden is to be on the prosecution to prove mental abnormality according to the usual standard, the verdicts in cases (1) (b) and (1) (c) should be simply guilty of manslaughter. It is arguable, however, that the standard required of the prosecution on this issue should be only that of the balance of probabilities. If that were so, a diminished responsibility verdict would be given in (1) (b) but not in (1) (c). Yet in (1) (c) the jury is satisfied only on the balance of probabilities that there was no mental abnormality. Their finding is therefore one that under the general burden of proof provisions of the Code (clause 17 (1) (b)) would, on a murder charge, result in a diminished responsibility verdict. Arguably then, the same result should follow when the defendant is charged with manslaughter by reason of diminished responsibility. In effect, the burden of proof should be on the defendant to prove that he was *not* suffering from mental abnormality. On the other hand it may be said that, by charging the defendant (even with his co-operation) with manslaughter by reason of diminished responsibility, the prosecution have undertaken the duty of proving mental abnormality and should be required to satisfy the jury, at least on a balance of probabilities. In case (1) (d) the defendant is proved to be guilty of murder and must be convicted of the offence charged, manslaughter.

In case (2) it seems that, in principle, the verdict should be simply guilty of (involuntary) manslaughter, whatever the findings on mental abnormality. The diminished responsibility verdict is applicable only in the case of a defendant who, in the absence of mental abnormality, would be convicted of murder. On the other hand it is arguable that if the jury is satisfied beyond reasonable doubt that the defendant is guilty of manslaughter and that he was suffering from a mental abnormality which would have reduced any liability for murder to manslaughter, this fact should be reflected in the verdict.

These complex problems may rarely arise in practice but they are real enough and the Code should provide for their solution. It is a matter which requires consideration by a more broadly based body than the codification team.

Draft

Criminal Code Bill

ARRANGEMENT OF CLAUSES

PART I

GENERAL PRINCIPLES OF LIABILITY

Preliminary provisions

Jurisdiction

Prosecution and Punishment

Proof

Clause

External elements of offences

Fault

Parties to offences

Mental disorder and incapacity

Defences

Clause

Preliminary offences

PART II

SPECIFIC OFFENCES

Offences against the Person

DRAFT

OF A

B I L L

TO

Codify and to revise in part the law of England and Wales as to general principles of liability for offences and as to offences against the person and offences of damage to property; to repeal certain enactments relating to such principles and to such offences; and for connected purposes.

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

PART I

GENERAL PRINCIPLES OF LIABILITY

Preliminary provisions

Short title, commencement and extent.

1.—(1) This Act may be cited as the Criminal Code Act 19—.

(2) This Act shall come into force on 1st January 19— and, subject to section 2 (4), has effect only in relation to offences committed wholly or partly after that date.

(3) This Act does not extend to Scotland or Northern Ireland.

Application of Part I to pre-Code offences.

2.—(1) Part I, except as provided by subsection (3), applies to pre-Code offences as well as to Code offences.

"Code offence" and "pre-Code offence".

(2) (*a*) "Code offence" means an offence the elements of which are prescribed in this Act or in any Act passed after this Act was passed, or in any subordinate legislation made under this or any such Act, or in any combination thereof.

(*b*) "Pre-Code offence" means an offence any element of which is prescribed—

(i) in an Act, or in subordinate legislation made at any time under an Act, passed before this Act was passed; or

(ii) by common law.

Provisions not applying to pre-Code offences.

(3) The following sections do not apply to pre-Code offences (whenever committed), which shall in relation to the relevant matters be interpreted and applied as if those sections had not been enacted:

section 22 (fault terms);
section 23 (degrees of fault);
section 24 (general requirement of fault);
section 33 (vicarious liability);
section 35 (liability of officer of corporation);
section 44 (belief in circumstance affording a special defence).

Procedural provisions.

(4) The following provisions have effect (so far as applicable) to proceedings for pre-Code offences whenever committed:

section 7 (3) (law determining penalties);
section 12 (1) (alternative verdicts);
section 13 (conviction of preliminary offence when ulterior offence completed);
section 14 (act constituting two or more offences);
section 15 (double jeopardy);
section 16 (multiple convictions);
section 17 (proof);
section 18 (proof or disproof of states of mind);
section 37 (disability in relation to trial).

Construction of the Code.

3.—(1) The provisions of this Act shall be interpreted and applied according to the ordinary meaning of the words used read in the context of the Act, except insofar as a definition or explanation of any word or phrase for the purposes of the Act or any provision of it requires a different meaning.

Context of the Act.

(2) The context of the Act includes—

(*a*) the illustrations contained in Schedule 1; and

(*b*) the long title, cross-headings and side-notes.

Resolution of ambiguities.

(3) Where a provision, read in the context of the Act, is reasonably capable of more than one meaning, regard may be had—

(*a*) to the Report of the Law Commission on the Codification of the Criminal Law (Law Com. No. —) and any other document referred to therein; and

(*b*) to the law in force before the passing of this Act.

Illustrations.

4.—(1) Schedule 1 has effect for illustrating the operation of the Act.

(2) The illustrations contained in Schedule 1 are not exhaustive.

(3) In the case of conflict between Schedule 1 and any other provision of this Act, that other provision shall prevail.

(4) The Secretary of State may by order amend Schedule 1 by adding further illustrations or in any other way.

Interpretation.

5.—(1) In this Act, unless the context otherwise requires—

"act", "acting", "does an act", and like expressions, in reference to an element of an offence, shall be construed in accordance with section 19;

"automatism" shall be construed in accordance with section 43(1);

"breach of the peace" shall be construed in accordance with section 47(4);

"British-controlled vessel" has the meaning given by section 9(2);

"carelessness" and like words shall be construed in accordance with section 22;

"Code offence" has the meaning given by section 2(2);

"controlling officer", in relation to a corporation, has the meaning given by section 34(3);

"corporation" means a body of persons incorporate;

"defence" means a defence provided by Part I or a special defence;

"duress" shall be construed in accordance with section 45;

"enactment" means any Act or any subordinate legislation or any provision of either;

"enactment creating an offence" means an enactment or combination of enactments prescribing the elements of an offence and providing any special defences thereto;

"exempting circumstance" means any circumstance amounting to a defence or any element of a defence;

"fault element" means any element of an offence consisting—

(*a*) of a state of mind with which a person acts; or

(*b*) of a failure to comply with a standard of conduct; or

(*c*) partly of such a state of mind and partly of such a failure;

and "fault", "degree of fault" and like words shall be construed accordingly;

"heedlessness" and like words shall be construed in accordance with section 22;

"included offence", in relation to an offence specifically charged, means an offence of which all the elements are included, expressly or by implication, in the allegations in the indictment or information;

"indictable offence" means an offence which, if committed by an adult, is triable on indictment, whether it is exclusively so triable or triable either way;

"injury" includes unconsciousness;

"intention" and like words shall be construed in accordance with section 22;

"intoxicant" has the meaning given by section 26(8)(*a*);

"involuntary intoxication" has the meaning given by section 26(8)(*b*);

"knowledge" and like words shall be construed in accordance with section 22;

"mental disorder" has the meaning given by section 38(2);

"mental disorder verdict" shall be construed in accordance with section 38(2)(*d*);

"necessity" shall be construed in accordance with section 46;

"negligence" and like words shall be construed in accordance with section 22;

"offence triable either way" means an offence which, if committed by an adult, is triable either on indictment or summarily; and this definition is to be construed without regard to the effect of any enactment (such as section 22 of the Magistrates' Courts Act 1980) prescribing the mode of trial in a particular case or class of cases;

"ordinary limits of criminal jurisdiction" shall be construed in accordance with section 8(2);

"out of necessity" shall be construed in accordance with section 46(2);

"person" includes a body of persons incorporate but not a body of persons unincorporate;

"pre-Code offence" has the meaning given by section 2(2);

"property" means—

(*a*) property of every description, whether real or personal, including—

(i) money, things in action and other intangible property;

(ii) wild creatures which have been tamed or are ordinarily kept in captivity, and any other wild creatures or their carcasses if, but only if, they have been reduced into possession which has not been lost or abandoned or are in the course of being reduced into possession; and

(*b*) any right or interest in property or any privilege over land, however created;

"psychopathic disorder" has the meaning given by section 38(2)(*c*);

"purpose" and like words shall be construed in accordance with section 22;

"recklessness" and like words shall be construed in accordance with section 22;

"return a mental disorder verdict" has the meaning given by section 38(2)(*d*);

"sentence" shall be construed in accordance with section 50(1) of the Criminal Appeal Act 1968;

"severe mental illness" has the meaning given by section 38(2)(*e*);

"severe subnormality" has the meaning given by section 38(2)(*f*);

"special defence" means a defence, exception, exemption, proviso, excuse or qualification specified in relation to a particular offence;

"state of automatism" shall be construed in accordance with section 43(1);

"summary offence" means an offence which, if committed by an adult, is triable only summarily;

"territorial waters" has the meaning given by section 8(3)(*b*);

"under duress" shall be construed in accordance with section 45(2);

"voluntary intoxication" has the meaning given by section 26(8)(*b*).

References to numbered sections etc.

(2) In this Act, except where otherwise indicated—

(*a*) a reference to a numbered Part, section or Schedule is a reference to the Part or section of, or the Schedule to, this Act so numbered;

(*b*) a reference in a section to a numbered subsection is a reference to the subsection of that section so numbered; and

(*c*) a reference in a section, subsection or Schedule to a numbered paragraph is a reference to the paragraph of that section, subsection or Schedule so numbered.

Creation of offences.

6. No offence shall be created except by, or under the authority of, an Act of Parliament.

Law determining liability.

7.—(1) An enactment creating or amending an offence has effect only in relation to such an offence wholly or partly committed after the enactment comes into force.

Continuing acts.

(2) A person doing a continuing act which did not constitute an offence when he began to do it is not thereby guilty of an offence created after the act began, provided that he discontinues it as soon as practicable after the passing or making of the enactment creating the offence.

Law determining penalties.

(3) The law relating to the sentence for an offence shall be the law in force at the time of its commission, save to the extent that less severe penalties may be provided by the law in force at the time of conviction.

Jurisdiction

Jurisdiction of criminal courts: *Territorial extent.*

8.—(1) The courts administering the criminal law shall have jurisdiction over—

(*a*) offences committed within the ordinary limits of criminal jurisdiction; and

(*b*) offences declared by this or any other enactment to be constituted by acts done outside those limits.

"The ordinary limits of criminal jurisdiction".

(2) The following offences are committed within "the ordinary limits of criminal jurisdiction" (and that phrase in this Act and in any subsequent enactment creating or relating to an offence shall be construed accordingly):

(*a*) offences committed on, under or above any land or water—

(i) within the territorial waters baseline;

(ii) outside that baseline but within the seaward limits of territorial waters;

(*b*) offences committed outside the seaward limits of territorial waters—

(i) in a submarine tunnel accessible only from land in England or Wales; or

(ii) in a lighthouse under the management of the Trinity House and situated off the coast of England and Wales.

Meaning of other terms.

(3) (*a*) "Lighthouse" has the meaning assigned to it by section 742 of the Merchant Shipping Act 1894.

(*b*) "Territorial waters" means the part of the territorial sea adjacent to the United Kingdom, the Channel Islands and the Isle of Man which is adjacent to England and Wales.

(*c*) "Territorial waters baseline" means the part of the United Kingdom baseline which is adjacent to England and Wales.

(*d*) "United Kingdom baseline" means the baseline established by the Territorial Waters Order in Council 1964 or by any subsequent Order of Her Majesty made in Council under Her royal prerogative for establishing a baseline from which the breadth of the territorial sea adjacent to the United Kingdom, the Channel Islands and the Isle of Man is measured.

Certificate as to territorial waters baseline.

(4) If in any criminal proceedings any question arises as to the location of the territorial waters baseline, a certificate relating to its location issued by or under the authority of the Secretary of State shall be conclusive evidence of the facts stated in it.

Consent of Director of Public Prosecutions.

(5) The provisions of Part I of Schedule 2 shall have effect for restricting the institution of certain proceedings for offences committed on, under or above territorial waters.

Offences on, or by persons employed on, British-controlled vessels.

9.—(1) A person who does outside the United Kingdom an act which would constitute an offence if done in England or Wales commits that offence—

(*a*) if he does the act on a British-controlled vessel; or

(*b*) if he is employed at the time on such a vessel and he does the act—

(i) on shore; or

(ii) on board a vessel which is not British-controlled but is in the same port as the vessel on which he is employed.

British-controlled vessels.

(2) A vessel is British-controlled if it is—

(*a*) a ship registered in the United Kingdom under section 2 of the Merchant Shipping Act 1894;

(*b*) a ship not registered under that section, but required to be so registered, which is owned—

(i) by a British citizen; or

(ii) by a company established under and subject to the laws of some part of the United Kingdom, and having its principal place of business in the United Kingdom;

(*c*) a ship in relation to which a provisional certificate is in effect under section 22 of the Merchant Shipping Act 1894 (ships becoming British-owned abroad);

(*d*) a ship in relation to which a temporary pass under section 23 of that Act is in effect for it to pass, without being previously registered, from any port in the United Kingdom to any other port there;

(*e*) a British fishing boat registered under section 373 of that Act;

(*f*) a government ship within the meaning of subsection (3) of section 80 of the Merchant Shipping Act 1906 (whether or not it is registered under subsection (1) of that section);

(*g*) one of Her Majesty's ships or Her Majesty's vessels as defined in section 132 of the Naval Discipline Act 1957;

(*h*) a vessel employed solely in navigation on the rivers or coasts of the United Kingdom; or

(*j*) a vessel launched after completion or partial completion in the United Kingdom and not registered either in the United Kingdom or elsewhere.

Other definitions.

(3) In subsection (2)—

"fishing boat" has the meaning assigned to it by section 370 of the Merchant Shipping Act 1894; and

"ship" and "vessel", except in paragraph (*g*), have the meanings assigned to them by section 742 of that Act.

Evidence.

(4) The provisions of Part II of Schedule 2 (evidence) shall have effect in relation to proceedings for offences committed aboard British-controlled vessels.

Indictable offences committed by Crown servants.

10. Any British citizen employed in the service of the Crown under Her Majesty's Government in the United Kingdom who, outside the United Kingdom, when acting or purporting to act in the course of his employment does any act which would constitute an indictable offence if done in England or Wales, is guilty of that offence.

Prosecution and punishment

Prosecution, punishment and miscellaneous matters.

11.—(1) Schedule 3 has effect, in relation to each offence referred to in columns 1 and 2 of that Schedule, with respect to the matters mentioned in this section and in column 7 of that Schedule.

Mode of trial.

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

Penalties.

(3) Column 4 of Schedule 3—

(*a*) in the case of an offence tried on indictment—

(i) specifies the longest term of imprisonment that may be imposed (except in the case of murder, where, subject to subsection (6) of this section and section 8(1) of the Criminal Justice Act 1982 (person under the age of 21), a sentence of life imprisonment shall be imposed);

(ii) makes any provision relating to the imposition of a fine that is specially appliable to the offence;

(*b*) in the case of an offence triable either way, specifies any maximum sentence of imprisonment or fine that may be imposed on summary conviction, if different from those specified by section 32 of the Magistrates' Courts Act 1980 (penalties on summary conviction for offences triable either way);

(*c*) in the case of an offence triable only summarily, specifies the maximum sentence of imprisonment or fine that may be imposed.

Restrictions on proceedings.

(4) Column 5 of Schedule 3 states—

(*a*) any requirement of the consent of any person to the institution or conduct of proceedings for an offence; and

(*b*) any time limit applicable to the institution of such proceedings.

Life imprisonment.

(5) A sentence of life imprisonment means a sentence to imprisonment and to remain liable to imprisonment for the rest of the offender's life; and the sentence shall be imposed in that form.

(6) Where a person convicted of murder appears to the court to have been under the age of eighteen years at the time the offence was committed he shall be sentenced to detention in such place and for such period and subject to such conditions as to release as the Secretary of State may determine. *Person committing murder when under 21.*

12.—(1) Where the jury find a person not guilty of an offence specifically charged in the indictment, they may find him guilty— Alternative verdicts.

(*a*) (i) of any offence specified in column 6 of Schedule 3 in respect of the offence specifically charged; or *Specified alternatives.*

(ii) of any offence of which any other enactment provides that he may be convicted on that indictment; or

(*b*) except where the offence specifically charged is treason or murder, of any offence within the jurisdiction of the court— *Included offences.*

(i) which is an included offence; or

(ii) of which he might be found guilty on an indictment specifically charging him with an included offence; or

(*c*) of an attempt to commit— *Attempts.*

(i) the offence specifically charged; or

(ii) any other offence of which he might on that indictment be found guilty; or

(*d*) where the offence specifically charged is an arrestable offence (as defined in section 116 of the Police and Criminal Evidence Act 1984) and the jury are satisfied that it (or some other arrestable offence of which he might on that charge be found guilty) was committed, of an offence of assisting an offender guilty of the offence specifically charged (or that other offence) under section 4(1) of the Criminal Law Act 1967. *Assisting an offender.*

(2) Where a magistrates' court finds a person not guilty of an offence specifically charged in an information, it may find him guilty— *Alternative conviction by magistrates.*

(*a*) where the offence specifically charged is an offence under section 75 (reckless serious injury), of an offence under section 76 (intentional or reckless injury) or 77 (assault); or

(*b*) where the offence specifically charged is an offence under section 76 (intentional or reckless injury), 78 (assault on a constable) or 79 (assault to resist arrest), of an offence under section 77 (assault).

13.—(1) Where the offence specifically charged in an indictment or information is an incitement, conspiracy or attempt to commit, or an assault or other act preliminary to, an offence, the defendant may be convicted of the offence specifically charged notwithstanding that he is shown to be guilty of the completed offence. Conviction of preliminary offence when ulterior offence completed.

Discretion of court.

(2) Nothing in subsection (1) shall limit any discretion of the court to discharge the jury or itself with a view to the preferment of an indictment or the laying of an information for the completed offence.

Act constituting two or more offences.

14. Where an act constitutes two or more offences (whether under any enactment or enactments or at common law or both) the offender shall, subject to section 15 (double jeopardy) and 16 (multiple convictions), be liable to be prosecuted and punished for any or all of those offences.

Double jeopardy:

15.—(1) A person shall not be tried for an offence—

Previous conviction or acquittal.

(*a*) of which he has been convicted or acquitted;

(*b*) of which he might (on sufficient evidence being adduced) have been convicted on an indictment or information charging him with another offence of which he has been convicted or acquitted;

Previous acquittal of included offence.

(*c*) when the allegations in the indictment or information include expressly or by implication all the elements of an offence—

(i) of which he has been acquitted; or

(ii) of which he might (on sufficient evidence being adduced) have been convicted on an indictment or information charging him with another offence of which he has been acquitted;

Previous conviction of included offence.

(*d*) when the allegations in the indictment or information include expressly or by implication all the elements of an offence—

(i) of which he has been convicted; or

(ii) of which he might (on sufficient evidence being adduced) have been convicted on an indictment or information charging him with another offence of which he has been convicted,

except where an element of the offence presently charged is alleged to have occurred after the day of the conviction; or

Previous conviction by court-martial.

(*e*) which a civil court is debarred from trying by section 133 of the Army Act 1955, section 133 of the Air Force Act 1955, section 129 of the Naval Discipline Act 1957, section 3 of the Visiting Forces Act 1952, or any other enactment.

"Kill" includes "cause injury".

(2) For the purposes of subsection (1), "kill" as an element of an offence includes "cause serious injury" and "cause injury".

Time of conviction.

(3) A person is convicted of an offence when the court of trial or a court of appeal records the conviction.

Time of acquittal.

(4) A person is acquitted of an offence—

(*a*) when the court of trial records the acquittal;

(*b*) when section 6(5) of the Criminal Law Act 1967 has effect in relation to it; or

(*c*) when his conviction of it is reversed or quashed by a court of appeal or on judicial review.

(5) "Convicted" and "acquitted" in subsection (1) relate to a subsisting conviction or an acquittal by a court of competent jurisdiction in England and Wales or elsewhere. *"Convicted" and "acquitted".*

(6) Nothing in this section shall limit any power of a court to stay the proceedings on the ground that they constitute an abuse of the process of the court. *Discretion of court.*

16. Where a person is convicted of an offence specifically charged in an indictment or information he shall not on the same occasion be convicted of— Multiple convictions:

(*a*) an included offence, whether or not it is charged in a distinct count or information; or *Included offences.*

(*b*) an attempt to commit the offence specifically charged or an included offence. *Attempts.*

Proof

17.—(1) Unless otherwise expressly provided— Proof:

(*a*) the burden of proving every element of an offence and any other fact alleged or relied on by the prosecution shall be on the prosecution; *Burden (offences).*

(*b*) where evidence is given (whether by the defendant or by the prosecution) of any defence or any other fact relied on by the defendant the burden shall, unless subsection (4) applies, be on the prosecution to prove that an element of the defence or such other fact did not exist. *(defences).*

(2) Evidence is given of a defence or of any other fact alleged or relied on by the defendant when there is such evidence as might lead a court or jury to conclude that there is a reasonable possibility that the elements of the defence or such other fact existed. *Evidential burden.*

(3) Unless otherwise expressly provided— *Standards.*

(*a*) where the burden of proof is on the prosecution the standard of proof required shall be proof beyond reasonable doubt;

(*b*) where the burden of proof is on the defendant the standard of proof required shall be proof on the balance of probabilities.

(4) Nothing in this section shall affect the application in relation to any pre-Code offence of section 101 of the Magistrates' Courts Act 1980 or any rule of interpretation whereby the burden of proving a special defence is imposed on the defendant on trial on indictment. *Special defences—saving for contrary rules.*

Proof or disproof of states of mind:

18. A court or jury shall not be bound to infer—

Results.

(*a*) that a person intended a result of an act or was aware that it might occur by reason only of its being a probable result of the act; or

Circumstances (elements of offences).

(*b*) that a person was aware or believed that a circumstance existed or might exist by reason only of the fact that a reasonable person would have been aware or would have believed that it existed; or

Exempting circumstances.

(*c*) that a person did not believe that an exempting circumstance existed by reason only of the fact that a reasonable person would not have believed that it existed,

but shall determine by reference to all the evidence whether the person had or (in the case of paragraph (*c*)) may have had the state of mind in question, drawing such inferences from the evidence as appear proper.

External elements of offences

Use of "act".

19. A reference in this Act to an "act" as an element of an offence refers also, where the context permits, to—

(*a*) any result of the act, and any circumstance in which the act is done or the result occurs, that is an element of the offence;

(*b*) any omission, state of affairs or occurrence by reason of which a person may be guilty of an offence;

and references to a person's acting or doing an act shall be construed accordingly.

Liability for omissions.

20.—(1) A person does not commit or attempt to commit an offence by omitting to do an act unless—

(*a*) (i) the enactment creating the offence specifies that it may be committed by such an omission; or

(ii) he is under a duty to do the act and either the offence is murder (section 56), manslaughter (section 57) or intentional serious injury (section 74), or an element of the offence is the detention of another;

and with the fault required for the offence, he omits to do the act; or

(*b*) either section 27 (supervening fault) or 31(3) (passive encouragement) applies.

Duty to act.

(2) For the purposes of subsection (1)(*a*)(ii), a person is under a duty to do an act where there is a risk that the death of, or serious injury to, or the detention of, another will occur if that act is not done and that person—

(*a*) (i) is the spouse or a parent or guardian or a child of; or

(ii) is a member of the same household as; or

(iii) has undertaken the care of,

the person endangered and the act is one which, in all the circumstances, including his age and other relevant personal characteristics, he could reasonably be expected to do; or

(*b*) has a duty to do the act arising from—

(i) his tenure of a public office; or

(ii) any enactment; or

(iii) a contract, whether with the person endangered or not.

Causation.

21.—(1) A person causes a result when—

(*a*) his act makes a more than negligible contribution to its occurrence; or

(*b*) in breach of duty, he fails to do what he might do to prevent it occurring,

unless in either case some other cause supervenes which is unforeseen, extremely improbable and sufficient in itself to produce the result.

Exception for accessories.

(2) But a person who procures, assists or encourages another to cause a result that is an element of an offence does not himself cause that result so as to be guilty of the offence as a principal except when—

(*a*) the other is his innocent agent under section 30(2)(*b*) and section 30(3) does not apply; or

(*b*) the offence consists in the procuring, assisting or encouraging another to cause the result.

Fault

Fault terms:

22. For the purposes of this Act and of any Code offence—

(*a*) a person acts in respect of an element of an offence—

Purpose.

"purposely" when he wants it to exist or occur;

Intention.

"intentionally" when he wants it to exist or occur, is aware that it exists or is almost certain that it exists or will exist or occur;

Knowledge.

"knowingly" when he is aware that it exists or is almost certain that it exists or will exist or occur;

Recklessness.

"recklessly" when—

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

(ii) it is, in the circumstances known to him, unreasonable to take the risk;

Heedlessness.

"heedlessly" when—

(i) he gives no thought to whether there is a risk that it exists or will exist or occur although the risk would be obvious to any reasonable person; and

(ii) it is in the circumstances unreasonable to take the risk;

(*b*) a person acts—

Criminal negligence.

"negligently" when his act is a very serious deviation from the standard of care to be expected of a reasonable person;

Carelessness.

"carelessly" when his act is a deviation from the standard of care to be expected of a reasonable person;

and these and like words shall be construed accordingly unless the context otherwise requires.

Degrees of fault:

23.—(1) An allegation in an indictment or information of—

Allegation of higher degree includes allegation of lower.

intention or knowledge includes an allegation of recklessness, heedlessness, negligence or carelessness;

recklessness includes an allegation of heedlessness, negligence or carelessness;

heedlessness includes an allegation of negligence or carelessness;

negligence includes an allegation of carelesness,

except where two or more such allegations are included in an indictment or in informations as alternatives to one another.

Lower degree satisfied by higher.

(2) A requirement of—

recklessness is satisfied by intention or knowledge;

heedlessness is satisfied by intention, knowledge or recklessness;

negligence is satisfied by intention, knowledge, recklessness or heedlessness;

carelessness is satisfied by intention, knowledge, recklessness, heedlessness or negligence.

General requirement of fault.

24.—(1) Unless a contrary intention appears, a person does not commit a Code offence unless he acts intentionally, knowingly or recklessly in respect of each of its elements other than fault elements.

Contrary intention.

(2) A contrary intention appears in relation to an element only if the terms of the enactment creating the offence indicate—

(*a*) that some other fault is required in respect of that element; or

(*b*) that no fault is required in respect of that element; or

(*c*) that a person does not commit the offence if in relation to that element he has or does not have a specified state of mind or complies with a specified standard of conduct.

25.—(1) Ignorance or mistake whether of fact or of law may negative a fault element of an offence. Ignorance or mistake.

(2) Subject to subsection (1), ignorance or mistake as to a matter of criminal law is not a defence except where expressly so provided. *Of law.*

(3) "A matter of criminal law" means

(*a*) the existence or definition of an offence or a defence; or

(*b*) any rule of law relating to the prevention or prosecution of offences or the apprehension of offenders.

26.—(1) Evidence of involuntary intoxication shall be taken into account in determining whether a person acted with the fault required for the offence with which he is charged. Intoxication: *Involuntary.*

(2) Evidence of voluntary intoxication shall be taken into account in determining whether a person acted with a fault element (however described) consisting in a state of mind other than recklessness or heedlessness. *Voluntary (mental element other than recklessness or heedlessness).*

(3) Where an offence requires a fault element (however described) of recklessness or heedlessness a person who was voluntarily intoxicated shall be treated as having been aware of any risk of which he would have been aware had he been sober. *(recklessness) or heedlessness).*

(4) Where the definition of a fault element or of a defence refers, or requires reference, to the state of mind or conduct to be expected of a reasonable person, such person shall be understood to be one who is not intoxicated. *Intoxication and reasonableness.*

(5) Where a person becomes intoxicated with a view to doing an act specified in the definition of an offence and, while intoxicated, does that act, he shall be treated as having done it intentionally. *Intoxication with a view to committing an offence.*

(6) In determining whether a person believed that an exempting circumstance existed, there shall be taken into account— *Belief in exempting circumstance resulting from intoxication.*

(*a*) any evidence of involuntary intoxication;

(*b*) any evidence of voluntary intoxication, except that where—

(i) the offence charged involves a fault element of recklessness, heedlessness, criminal negligence or carelessness, or requires no fault; or

(ii) the person became intoxicated with a view to committing the offence charged,

he shall be treated as if he knew that the exempting circumstance did not exist if he would have known this had he been sober.

(7) Subsections (3) and (6)(*b*)(i) do not apply— *Exceptional cases: murder, mental disorder.*

(*a*) to murder (to which section 57(1)(*b*) applies); or

(*b*) to the case (to which section 38(1)(*b*) applies) where the person's unawareness or belief arises from a combination of mental disorder and voluntary intoxication.

"Intoxicant".

(8) (*a*) "Intoxicant" means alcohol or any other thing which, when taken into the body, may impair awareness or control.

"Voluntary" and "involuntary" intoxication.

(*b*) "Voluntary intoxication" means the intoxication of a person by an intoxicant which he takes, otherwise than properly for a medicinal purpose, knowing that it is an intoxicant; and "involuntary intoxication" means any other intoxication.

"Takes" an intoxicant.

(*c*) For the purposes of this section, a person "takes" an intoxicant if he permits it to be administered to him.

"Properly for a medicinal purpose".

(9) An intoxicant, although taken for a medicinal purpose, is not properly so taken if—

(*a*) (i) it is not taken on medical advice; or

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

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

and accordingly intoxication resulting from such taking or failure is voluntary intoxication.

Burden of proof.

(10) [Where a defendant adduces or relies on evidence that he was involuntarily intoxicated it shall be for him to prove that the alleged intoxication was involuntary.]

Supervening fault: *Omission after act.*

27.—(1) Where it is an offence to be at fault in causing a result, a person who causes the result by an act done without the fault required commits the offence if, after doing the act and with the fault required, he fails to take reasonable steps which might have prevented the result occurring or continuing.

Omission after state of affairs arises.

(2) Where it is an offence to be at fault in respect of a state of affairs, a person who was not at fault when the state of affairs arose commits the offence if, with the fault required, he fails to take reasonable steps which might have ended it.

Transferred fault and defences:

Fault.

28.—(1) In determining whether a person is guilty of an offence, his intention to cause, or his recklessness whether he causes, a result in relation to a person or thing capable of being the victim or subject-matter of the offence is to be treated as an intention to cause or, as the case may be, recklessness whether he causes that result in relation to any other person or thing affected by his conduct.

(2) Any defence on which a person might have relied on a charge of an offence in relation to a person or thing within his contemplation is open to him on a charge of the same offence in relation to a person or thing not within his contemplation. *Defences.*

Parties to offences

29. A person may be guilty of an offence as a principal or as an accessory. Parties to offences.

30.—(1) A person is guilty of an offence as a principal if, with the fault required for the offence, he— Principals.

(*a*) does the act or acts specified for the offence; or

(*b*) does at least one such act, any other such acts being done by another.

(2) For the purposes of subsection (1), a person does an act not only when he does it himself but also when— *When a person "does an act".*

(*a*) an act of another is attributed to him under section 33; or

(*b*) he does the act by an innocent agent, that is, by one whom he procures, assists or encourages to do it and who is not guilty of the offence because—

(i) he is under ten years of age; or

(ii) he is suffering from mental disorder; or

(iii) he does the act without the fault required for the offence; or

(iv) he has a defence.

(3) A person is not guilty of an offence as a principal by reason of an act that he does by an innocent agent if— *Act done by innocent agent —special cases.*

(*a*) the offence can be committed only by a person complying with a particular description which does not apply to him; or

(*b*) the offence is defined in terms implying that that act must be done by the offender personally;

but a person who is not guilty of an offence as a principal by virtue only of this subsection is guilty of that offence as an accessory.

31.—(1) A person is guilty of an offence as an accessory— Accessories.

(*a*) where the offence is committed by a principal, if he procures, assists or encourages the commission of the offence and does so with the fault specified in subsection (4); or

(*b*) if section 30(3) or section 35(1) (liability of officer of corporation) applies.

Principal unaware of procurement or assistance.

(2) In determining whether a person is guilty of an offence as an accessory it is immaterial that the principal is unaware of that person's act of procurement or assistance.

Passive encouragement.

(3) For the purposes of this section, encouragement includes encouragement arising from a failure by a person to take reasonable steps to exercise any authority he has to control the relevant acts of the principal in order to prevent the commission of the offence.

Fault required.

(4) A person has the fault referred to in subsection (1)(*a*) if he—

(*a*) intends that what he does shall, or is aware that it will or may, cause, assist or encourage the principal to do an act of the kind he does and in the circumstances specified for the offence; and

(*b*) where a result is an element of the offence, is, in respect of that element, at fault in the way required for liability as a principal.

Ignorance of details.

(5) For the purposes of subsection (4), and subject to subsection (6), it is immaterial that the accessory does not know the particulars of the offence committed by the principal.

Principal's departure from agreement.

(6) Notwithstanding section 28(1) (transferred fault), a person who assists or encourages a principal in pursuance of an agreement between them that an offence shall be committed in relation to a particular person or thing is not guilty as an accessory to an offence intentionally committed by the principal in relation to some other person or thing.

Exceptions from liability.

(7) A person is not guilty of an offence as an accessory by reason of anything he does—

(*a*) with the purpose of preventing the commision of the offence or of nullifying its effects; or

(*b*) only because he believes that he is under a legal obligation to do it.

Exemption for protected persons.

(8) Where the purpose of an enactment creating an offence is the protection of a class of persons no member of that class who is a victim of such an offence can be guilty of that offence as an accessory.

Later steps to prevent offence.

(9) A person who has procured, assisted or encouraged the commission of an offence is not guilty as an accessory if after his act and before the commission of the offence he took all reasonable steps to prevent it.

Parties—procedural provisions:

32.—(1) A person may be convicted of an offence whether he is charged as a principal or as an accessory if the evidence shows that—

Evidence of participation.

(*a*) he was a principal; or

(*b*) he was an accessory; or

(*c*) he was either a principal or an accessory.

(2) An information or indictment may charge a person with being an accessory to an offence by express words to that effect or by alleging that he procured and assisted and encouraged the commission of the offence, or did one or more of those acts; and any such charge shall be deemed to be the charge of a single offence. *Form of charge as accessory.*

(3) A person may be convicted of an offence as an accessory notwithstanding— *Conviction of accessory.*

(*a*) that the principal has not been convicted of or charged with the offence or that his identity is unknown; or

(*b*) that the evidence shows that he did acts other than those alleged in the indictment or information rendering him guilty of the offence.

33. An element of a Code offence may be attributed to a person by reason of an act done by another only if that other is— Vicarious liability.

(*a*) specified in the definition of the offence as a person whose act may be so attributed; or

(*b*) acting within the scope of his employment or authority and the definition of the offence specifies the element in terms which apply to both persons; or

(*c*) his innocent agent under section 30(2)(*b*).

34.—(1) A corporation may be guilty of an offence not involving a fault element by reason of— Corporations: *Liability for offence not requiring fault.*

(*a*) an act done by its employee or agent, as provided by section 33; or

(*b*) an omission, state of affairs or occurrence that is an element of the offence.

(2) A corporation may be guilty— *Liability where fault required.*

(*a*) as a principal, of an offence involving a fault element; or

(*b*) as an accessory, of any offence,

only if one of its controlling officers, acting within the scope of his office and with the fault required, is concerned in the offence.

(3) (*a*) "Controlling officer" of a corporation means a person participating in the control of the corporation in the capacity of a director, manager, secretary or other similar officer (whether or not he was validly appointed to his office). *"Controlling officer".*

(*b*) In this subsection "director", in relation to a corporation established by or under any enactment for the purpose of carrying on under national ownership any industry or part of an industry or

undertaking, being a corporation whose affairs are managed by the members thereof, means a member of the corporation.

(*c*) Whether a person acting in a particular capacity is a controlling officer is a question of law.

"Concerned in an offence".

(4) A controlling officer is concerned in an offence if he does, procures, assists, encourages or fails to prevent the acts specified for the offence.

"Fails to prevent".

(5) For the purposes of subsection (4), a controlling officer fails to prevent an act when he fails to take steps that he ought to take—

(*a*) to ensure that the act is not done; or

(*b*) where the offence may be constituted by an omission to do an act or by a state of affairs or occurrence, to ensure that the omission is not made or to prevent or end the state of affairs or occurrence.

Controlling officer acting to harm corporation.

(6) A controlling officer does not act "within the scope of his office" if he acts with the intention of doing harm or of concealing harm done by him or another to the corporation.

Offence not punishable with fine.

(7) A corporation cannot be guilty of murder or of any other offence not punishable with a fine.

Availability of defences.

(8) A corporation has a defence consisting of or including—

(*a*) a state of mind only if—

(i) all controlling officers who are concerned in the offence; or

(ii) where no controlling officer is so concerned, all other employees or agents who are so concerned,

have that state of mind;

(*b*) the absence of a state of mind only if no controlling officer with responsibility for the subject-matter of the offence has that state of mind;

(*c*) compliance with a standard of conduct required of the corporation itself only if it is complied with by the controlling officers with responsibility for the subject-matter of the offence.

Liability of officer of corporation.

35.—(1) Where a corporation is guilty of an offence to which this section applies, a controlling officer of the corporation or person purporting to act as such who is not apart from this section guilty of the offence is guilty of it as an accessory if—

(*a*) he connives at its commission; or

(*b*) the offence does not involve a fault element and its commission is the result of his careless performance or neglect of his duties.

Connivance.

(2) A person does not connive at the commission of an offence unless he knows that or is reckless whether it is being or will be committed.

(3) This section applies to any offence to which it is said to apply by column 7 of Schedule 3. *Application of section.*

36. A child is not guilty of an offence by reason of anything he does when under ten years of age. Children.

Mental disorder and incapacity

37. [No draft clause on this topic is provided. See Report, para. 12.4.] Disability in relation to trial.

38.—(1) A mental disorder verdict shall be returned where— Mental disorder verdict: *Cases for mental disorder verdict.*

(*a*) the defendant is proved to have committed an offence but it is proved on the balance of probabilities (whether by the prosecution or by the defendant) that he was at the time suffering from severe mental illness or severe subnormality; or

(*b*) (i) the defendant is found not to have committed an offence on the ground only that, by reason of mental disorder or a combination of mental disorder and intoxication, he acted or may have acted in a state of automatism, or without the fault required for the offence, or believing that an exempting circumstance existed; and

(ii) it is proved on the balance of probabilities (whether by the prosecution or by the defendant) that he was suffering from mental disorder at the time of the act.

(2) (*a*) "Mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder, and (subject to paragraph (*b*)) any other disorder or disability of mind. *"Mental disorder".*

(*b*) "Mental disorder" does not include—

(i) intoxication, whether voluntary or involuntary; or

(ii) any disorder caused by illness, injury, shock or hypnosis, or occurring during sleep, unless it is a feature of a condition (whether continuing or recurring) that may cause a similar disorder on another occasion.

(*c*) "Psychopathic disorder" means a persistent disorder or disability of mind (whether or not including significant impairment of intelligence) which results in abnormally aggressive or seriously irresponsible conduct. *"Psychopathic disorder".*

(*d*) "Return a mental disorder verdict" means— *"Return a mental disorder verdict".*

(i) in relation to trial on indictment, return a verdict that the defendant is not guilty on evidence of mental disorder; and

(ii) in relation to summary trial, dismiss the information on evidence of mental disorder.

"Severe mental illness".

(*e*) "Severe mental illness" means [a mental illness which has one or more of the following characteristics—

(i) lasting impairment of intellectual functions shown by failure of memory, orientation, comprehension and learning capacity;

(ii) lasting alteration of mood of such degree as to give rise to delusional appraisal of the defendant's situation, his past or his future, or that of others, or to lack of any appraisal;

(iii) delusional beliefs, persecutory, jealous or grandiose;

(iv) abnormal perceptions associated with delusional misinterpretation of events;

(v) thinking so disordered as to prevent reasonable appraisal of the defendant's situation or reasonable communication with others.]

"Severe subnormality".

(*f*) "Severe subnormality" means a state of arrested or incomplete development of mind which includes subnormality of intelligence and is of such a nature or degree that the patient is incapable of living an independent life or of guarding himself against serious exploitation, or will be so incapable when of an age to do so.

Finding of severe mental disorder.

(3) A court or jury shall not find that the defendant was suffering from severe mental illness or severe subnormality unless two medical practitioners approved for the purposes of section 12 of the Mental Health Act 1983 as having special experience in the diagnosis or treatment of mental disorder have given evidence that he was so suffering.

Plea of "not guilty by reason of mental disorder".

39.—(1) A defendant may plead "not guilty by reason of mental disorder"; but the court shall not accept the plea unless satisfied that evidence is available that would justify a mental disorder verdict.

(2) (*a*) If the court accepts the plea the acceptance shall have the same effect as a mental disorder verdict.

(*b*) If the court does not accept the plea the defendant shall be treated as having pleaded not guilty.

Defendant under disability.

(3) Nothing in this section affects the duty or power of the court under section 37 to determine as soon as it is raised the question whether the defendant is under disability in relation to trial.

Evidence of mental disorder and automatism.

40.—(1) Whether evidence is evidence of mental disorder or automatism is a question of law.

Notice.

(2) The defendant shall not, without the leave of the court, give or adduce evidence of mental disorder or of automatism unless he has given to the prosecution—

(*a*) in the case of trial on indictment, not more than — days after the end of the committal proceedings; and

(*b*) in the case of summary trial, not less than — days before giving or adducing the evidence,

notice in writing of his intention to do so and of the nature of the mental disorder or automatism alleged.

Leave of court.

(3) The court shall not refuse leave—

(*a*) on trial on indictment, if it appears to the court that the defendant was not informed in accordance with Rules of Court of the requirements of subsection (2);

(*b*) on summary trial, without first adjourning the trial to enable — days' notice to be given.

Restrictions on prosecution evidence.

(4) The prosecution shall not adduce evidence of mental disorder, or contend that a mental disorder verdict should be returned, unless the defendant—

(*a*) has given notice of his intention, or has been given leave, to give or adduce evidence of mental disorder or automatism, or (on a charge of murder) of mental abnormality pursuant to section 59(2); or

(*b*) has given evidence that he acted without the fault required for the offence or believing that an exempting circumstance existed.

(5) The court may give directions as to the stage of the proceedings at which the prosecution may adduce evidence of mental disorder.

Disposal after mental disorder verdict.

41. Schedule 4 has effect with respect to the orders that may be made upon the return of a mental disorder verdict, to the conditions governing the making of those orders, to the effects of those orders and to related matters.

Further effect of mental disorder verdict.

42. A defendant shall not, while a mental disorder verdict subsists, be found guilty of any other offence of which, but for this section, he might be found guilty—

(*a*) on the information or count to which it relates; or

(*b*) on the same occasion, on any other information or count founded on the same facts.

Automatism and physical incapacity: *Automatism.*

43.—(1) A person is not guilty of an offence if—

(*a*) he acts in a state of automatism, that is, his act is a reflex, spasm or convulsion, or occurs while he is in a condition (whether of sleep, unconsciousness, impaired consciousness or otherwise) depriving him of all control of his movements; and

(*b*) the act or condition is the result neither of anything done or omitted with the fault required for the offence nor of voluntary intoxication.

Physical incapacity.

(2) A person is not guilty of an offence by virtue of an omission to act if—

(*a*) he is physically incapable of acting in the way required; and

(*b*) his being so incapable is the result neither of anything done or omitted with the fault required for the offence nor of voluntary intoxication.

Defences

Belief in circumstance affording a special defence. *Contrary intention.*

44.—(1) Unless a contrary intention appears, a person who acts in the belief that a circumstance exists has any special defence to a Code offence that he would have if it existed.

(2) A contrary intention appears in relation to a circumstance only if—

(*a*) the contrary is expressly provided in relation to it; or

(*b*) it is provided that a person has the defence if in respect of the circumstance he has a specified state of mind (other than a belief that it exists) or complies with a specified standard of conduct.

Proof or disproof of belief.

(3) Any requirement as to proof or disproof of a special defence applies to proof or disproof of a belief mentioned in subsection (1).

Defence of duress.

45.—(1) A person is not guilty of an offence when he does an act under duress.

When an act is done under duress.

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

(*a*) he does it because he believes—

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

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

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

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

(3) The fact that any official protection available in the circumstances might be ineffective to prevent the threat being carried out is immaterial.

Voluntary exposure to risk of duress.

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

No separate defence of marital coercion.

(5) A wife has no defence (except under this section) by virtue of having done an act under the coercion of her husband.

(6) On a trial on indictment the defendant shall not, without the leave of the court, give or adduce evidence that he acted under duress unless he has given to the prosecution not more than — days after the end of the committal proceedings notice in writing— *Notice of defence.*

(*a*) stating his intention to do so;

(*b*) giving particulars of the words or conduct constituting the threat which induced him to act in the way he did; and

(*c*) giving any information then in his possession to identify or assist in identifying any persons making the threat and any persons other than himself on whom the harm threatened would have been inflicted if the threat had been carried out.

(7) Leave shall not be refused if it appears to the court that the defendant was not informed in accordance with Rules of Court of the requirements of subsection (6). *Leave of court.*

46.—(1) Without prejudice to the generality of section 49, a person is not guilty of an offence when he does an act out of necessity, as defined in subsection (2). Defence of necessity.

(2) A person does an act out of necessity if— *When an act is done out of necessity.*

(*a*) he does it believing that it is immediately necessary to avoid death or serious injury to himself or another; and

(*b*) the danger which he believes to exist is such that in all the circumstances (including any of his personal characteristics that affect its gravity) he could not reasonably be expected to act otherwise.

(3) This section does not apply— *Exclusions:*

(*a*) to a person who uses force for any of the purposes referred to in section 47(1) or 89; or *Use of force in public or private defence.*

(*b*) to a person who acts in the belief that a threat of a kind described in section 45(2)(*a*)(i) (duress) has been made; or *Acts done as a result of threats.*

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

47.—(1) A person does not commit an offence by using such force as, in the circumstances which exist or which he believes to exist, is immediately necessary and reasonable— Use of force in public or private defence:

(*a*) to prevent or terminate crime, or effect or assist in the lawful arrest of an offender or suspected offender or of a person unlawfully at large; *Prevention of crime and effecting arrest.*

(*b*) to prevent or terminate a breach of the peace; *Prevention of breach of the peace.*

(*c*) to protect himself or any other person from unlawful force or unlawful injury; *Defence of person.*

Prevention of unlawful imprisonment.

(*d*) to prevent or terminate the unlawful imprisonment of himself or any other person;

Defence of property.

(*e*) to protect property (whether belonging to himself or another) from unlawful appropriation, destruction or damage; or

Prevention of trespass.

(*f*) to prevent or terminate a trespass to his person or his property.

"Force".

(2) In this section, except where the context otherwise requires, "force" includes, in addition to force against a person—

(*a*) force against property;

(*b*) a threat of force against person or property; and

(*c*) the detention of a person without the use of force.

"Unlawful".

(3) For the purposes of this section, an act is "unlawful" notwithstanding that a person charged with an offence in respect of it would be acquitted on the ground only that he—

(*a*) was under ten years of age;

(*b*) lacked the fault required for the offence or believed that an exempting circumstance existed;

(*c*) was acting under duress or out of necessity; or

(*d*) was in a state of automatism or suffering from mental disorder.

"Breach of the peace".

(4) A breach of the peace occurs when, by unlawful violence, harm is done to a person, or in his presence to his property, or a person fears on reasonable grounds that unlawful violence likely to cause such harm is imminent.

Preparatory acts.

(5) A person does not commit an offence by doing an act immediately preparatory to the use of such force as is referred to in subsection (1).

Resistance to lawful but mistaken acts.

(6) Subsection (1)(*c*) applies also to the use of force to resist or prevent an act which is not unlawful where—

(*a*) the person using force believes it to be immediately necessary to prevent injury to himself or another; and

(*b*) the act to be resisted or prevented is not unlawful only because it is done in pursuance of a reasonable but mistaken suspicion or belief.

Force against a constable in the execution of his duty.

(7) A person who believes circumstances to exist which would otherwise justify or excuse the use of force under subsection (1) has no defence if—

(*a*) he knows that the force is used against a constable or a person assisting a constable; and

(*b*) the constable is acting in the execution of his duty,

unless he believes the force to be immediately necessary to prevent injury to himself or another.

(8) Where force is directed against a person's body, subsection (1) applies only if that person is or is believed to be the person to be arrested or a party to the act or state of affairs to be prevented or terminated. *Force against innocent persons.*

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

(10) In determining whether the use of force by a person in defence of person or property was immediately necessary and reasonable, regard shall be had to any opportunity he had to retreat before using force. *Defence of person or property: opportunity to retreat.*

(11) A threat of force may be reasonable although the use of the force would not be. *Reasonable threats.*

(12) This section is without prejudice to the generality of section 89 (criminal damage: protection of person or property) or any other special defence. *Saving for special defences.*

48.—(1) A person does not commit an offence by doing an act which, in the circumstances which exist or which he believes to exist, he is authorised to do by— Act authorised by law.

(*a*) the judgment or order of a competent court or tribunal; or

(*b*) the law governing the execution of legal process; or

(*c*) the law governing the armed forces or the lawful conduct of war; or

(*d*) the law defining the duties or functions of a public officer or the assistance to be rendered to such an officer in the performance of his duties; or

(*e*) any other rule of law imposing a public duty.

(2) In this section "armed forces" means any of the naval, military or air forces of the Crown.

49.—(1) A person does not commit an offence by doing an act which is justified or excused by— Act justified or excused by law.

(*a*) any enactment; or

(*b*) any rule of the common law, except insofar as the rule is inconsistent with this or any other enactment.

(2) Nothing in this Act shall limit any power of the courts to determine the existence, extent or application of any rule of the common law referred to in subsection (1) and continuing to apply after the commencement of this Act. *Rules of the common law.*

Non-publication of statutory instrument.

50.—(1) A person is not guilty of an offence consisting of a contravention of a statutory instrument if—

(*a*) at the time of his act the instrument has not been issued by Her Majesty's Stationery Office; and

(*b*) by that time reasonable steps have not been taken to bring the purport of the instrument to the notice of the public, or of persons likely to be affected by it, or of that person.

Burden of proof.

(2) The burden of proving the matter referred to in paragraph (*a*) of subsection (1) shall be on the defendant.

"Statutory instrument".

(3) "Statutory instrument" has the meaning given by section 1 of the Statutory Instruments Act 1946.

Preliminary offences

Incitement to commit an offence.

51.—(1) A person is guilty of incitement to commit an offence or offences if—

(*a*) he encourages any other person to do an act or acts which, if done with the fault required for the offence or offences, will involve the commission of the offence or offences by the other person; and

(*b*) he intends that the other person shall commit the offence or offences.

"Offence".

(2) Subject to section 55(1), "offence" in this section means any offence triable in England and Wales other than—

(*a*) conspiracy (under section 52 or any other enactment);

(*b*) attempt (under section 53 or any other enactment).

Exemption for protected persons.

(3) Where the purpose of an enactment creating an offence is the protection of a class of persons no member of that class who is the intended victim of such an offence can be guilty of incitement to commit that offence.

No liability for incitement of spouse.

(4) A person cannot be guilty of incitement to commit an offence if the only person whom he incites to commit the offence is his spouse.

Identity of person incited.

(5) A person may be convicted of incitement to commit an offence notwithstanding that the identity of the person incited is unknown.

Accessories and incitement.

(6) A person may be guilty as an accessory to the incitement by another of a third person to commit an offence; but it is not an offence under this section or under any enactment referred to in subsection (7) to incite another to assist, encourage or procure the commission of an offence by a third person.

(7) This section shall apply in determining whether a person is guilty of an offence of incitement to commit a specified offence created by any enactment other than this section; but conduct which is an offence under any other such enactment shall not also be an offence under this section. *Offences of incitement under other enactments.*

52.—(1) A person is guilty of conspiracy to commit an offence or offences if— Conspiracy to commit an offence.

(*a*) he agrees with any other person or persons that an act or acts shall be done which, if done, will involve the commission of the offence or offences by one or more of the parties to the agreement; and

(*b*) he and at least one other party to the agreement intend that the offence or offences shall be committed.

(2) For the purposes of subsection (1), an intention that an offence shall be committed is an intention in respect of all the elements of the offence. *Intention.*

(3) Subject to section 55(1), "offence" in this section means any offence triable in England and Wales, provided that— *"Offence".*

(*a*) it extends to an offence of murder which would not be so triable;

(*b*) it does not include a summary offence, not punishable with imprisonment, constituted by an act or acts agreed to be done in contemplation or furtherance of a trade dispute (within the meaning of the Trade Union and Labour Relations Act 1974).

(4) Where the purpose of an enactment creating an offence is the protection of a class of persons no member of that class who is the intended victim of such an offence can be guilty of conspiracy to commit that offence. *Exemption for protected persons.*

(5) A person cannot be guilty of conspiracy to commit an offence if the only other person or persons with whom he agrees is or are throughout the currency of the agreement— *Other restrictions on liability for conspiracy.*

(*a*) his spouse;

(*b*) a child under ten years of age;

(*c*) an intended victim of that offence who is a member of such a class of persons as is referred to in subsection (4).

(6) (*a*) An offence of conspiracy subsists until the agreed act or acts is or are done or until all or all save one of the parties to the agreement have abandoned the intention that such act or acts shall be done. *Subsistence of offence.*

(*b*) A person may become a party to a subsisting offence of conspiracy by joining the agreement constituting the offence.

(7) A person may be guilty as an accessory to a conspiracy by others; but it is not an offence under this section or under any enactment referred *Accessories and conspiracy.*

to in subsection (9) to agree to assist, encourage or procure the commission of an offence by a person who is not a party to the agreement.

Conviction.

(8) A person may be convicted of conspiracy to commit an offence notwithstanding that—

(*a*) no other person has been or is charged with such conspiracy;

(*b*) the identity of any other party to the agreement is unknown;

(*c*) any other person appearing from the indictment to have been a party to the agreement has been or is acquitted of such conspiracy, unless in all the circumstances his conviction is inconsistent with the acquittal of the other.

Offences of conspiracy under other enactments.

(9) This section shall apply in determining whether a person is guilty of an offence of conspiracy to commit a specified offence created by any enactment other than this Act; but conduct which is an offence under any other such enactment shall not also be an offence under subsection (1).

Attempt to commit an offence.

53.—(1) A person who, with the intention of committing an indictable offence, does an act that is more than merely preparatory to the commission of the offence is guilty of attempt to commit the offence.

Intention.

(2) An "intention of committing an offence" means an intention in respect of all the elements of the offence.

Omissions.

(3) "Act" in this section includes an omission only where the offence intended is one to which section 20 (1) (*a*) applies.

Issues of law and fact.

(4) Where there is evidence to support a finding that an act was more than merely preparatory to the commission of the offence intended, the question whether that act was more than merely preparatory is a question of fact.

Offences which may be attempted.

(5) Subject to section 55 (1), this section applies to any offence which, if it were completed, would be triable in England and Wales as an indictable offence, other than—

(*a*) conspiracy (under section 52 or any other enactment);

(*b*) offences under section 4 (1) (assisting offenders) or 5 (1) (accepting or agreeing to accept consideration for not disclosing information about an arrestable offence) of the Criminal Law Act 1967.

Accessories and attempts.

(6) A person may be guilty as an accessory to an attempt by another to commit an offence; but it is not an offence under this section or under any enactment referred to in subsection (7) (*a*) to attempt to assist, encourage or procure the commission of an offence by another.

(7) (*a*) In determining whether a person has committed an offence created by an enactment other than this section of attempt to commit a specified offence, this section shall apply with the substitution in subsection (1) of a reference to the specified offence for the words "an indictable offence". *Offences of attempt under other enactments.*

(*b*) Conduct which is an offence under any other such enactment shall not also be an offence under this section.

54.—(1) A person may be guilty of incitement, conspiracy or attempt to commit an offence although the commission of the offence is impossible, if it would be possible in the circumstances which he believes or hopes exist or will exist at the relevant time. Impossibility and preliminary offences.

(2) Subsection (1) applies to—

(*a*) offences under sections 51, 52 and 53;

(*b*) any offence created by any other enactment of incitement, conspiracy or attempt to commit a specified offence.

55.—(1) A person may be guilty of incitement, conspiracy or attempt to commit an offence specified in subsection (3) notwithstanding that the act incited, agreed upon or attempted is intended to be done outside the ordinary limits of jurisdiction, provided that that act, if done within those limits, would constitute such an offence. Jurisdiction and preliminary offences: *Ulterior offence abroad.*

(2) A person may be guilty of incitement, conspiracy or attempt to commit an offence specified in subsection (3) notwithstanding that the incitement, conspiracy or attempt occurs outside the ordinary limits of criminal jurisdiction, provided that the act incited, agreed upon or attempted is intended to be done within those limits and, if so done, would constitute such an offence. *Preliminary offence abroad.*

(3) The offences referred to in subsections (1) and (2) are murder (section 56), manslaughter (section 57), intentional serious injury (section 74), causing an explosion likely to endanger life or property (section 2 of the Explosive Substances Act 1883) and [kidnapping]. *Specified offences for above purposes.*

(4) A person may be guilty of conspiracy to commit any offence, notwithstanding that the agreement is made outside the ordinary limits of criminal jurisdiction, if— *Conspiracy entered into abroad.*

(*a*) the offence is to be committed within those limits; and

(*b*) while the agreement subsists any act in pursuance of it is done within those limits.

PART II

SPECIFIC OFFENCES

Offences against the person

Murder.

56. A person who kills another—

(*a*) intending to kill; or

(*b*) intending to cause serious injury and being aware that he may kill; [or

(*c*) intending to cause fear of death or serious injury and being aware that he may kill,]

is guilty of murder, unless section 58, 60, 61, 65 or 67 applies.

Manslaughter:

Voluntary manslaughter.

57.—(1) A person is guilty of manslaughter where—

(*a*) he kills or is a party to the killing of another with the fault specified in section 56 but section 58 (diminished responsibility), 60 (provocation) or 61 (use of excessive force) applies; or

Involuntary manslaughter.

(*b*) he is not guilty of murder by reason only of the fact that, because of voluntary intoxication, he is not aware that death may be caused or believes that an exempting circumstance exists; or

(*c*) he kills another—

(i) intending to cause serious injury; or

(ii) being reckless whether death or serious injury will be caused.

Form of verdict.

(2) Where section 58 applies the jury shall return a verdict of "guilty of manslaughter by reason of diminished responsibility" and in any other case they shall return a verdict of "guilty of manslaughter".

Diminished responsibility.

58.—(1) This section applies where the person who kills or is a party to the killing of another is suffering from a form of mental abnormality which is a substantial enough reason to reduce his offence to manslaughter.

"Mental abnormality".

(2) In this section "mental abnormality" means mental illness, arrested or incomplete development of mind, psychopathic disorder, and any other disorder or disability of mind, except intoxication.

Mental abnormality and intoxication.

(3) Where the person suffering from mental abnormality is also intoxicated this section applies only where it would apply if he were not intoxicated.

Evidence of mental abnormality.

59.—(1) Whether evidence is evidence of mental abnormality is a question of law.

(2) The defendant shall not, without the leave of the court, give or adduce evidence of mental abnormality unless, not more than — days after the end of the committal proceedings he has given to the prosecution notice in writing of his intention to do so and of the nature of the mental abnormality alleged. *Notice.*

(3) The court shall not refuse leave if it appears to the court that the defendant was not informed in accordance with Rules of Court of the requirements of subsection (2). *Leave of court.*

(4) Where on a charge of murder or attempted murder the defendant has given notice of his intention, or has been given leave, to give or adduce evidence of mental disorder or automatism pursuant to section 40 (2), the prosecution may adduce evidence of mental abnormality; but the court may give directions as to the stage of the proceedings at which it may do so. *Evidence adduced by prosecution.*

(5) Where a person is charged with murder (or attempted murder) the jury shall not return a verdict of guilty of manslaughter (or attempted manslaughter) by reason of diminished responsibility unless— *Finding of mental abnormality.*

(*a*) the defendant has given, adduced or relied on evidence of mental abnormality; or

(*b*) the prosecution has adduced such evidence pursuant to subsection (4).

(6) Where a person is charged with murder (or attempted murder) the prosecution may, with his consent, adduce evidence of mental abnormality at the committal proceedings, whereupon the magistrates' court may commit him for trial for manslaughter (or attempted manslaughter) by reason of diminished responsibility. *Evidence at committal proceedings.*

(7) Where the defendant has been committed for trial for murder (or attempted murder) the prosecution may, with the consent of the defendant, serve notice in accordance with Rules of Court of evidence of mental abnormality and indict him for manslaughter (or attempted manslaughter) by reason of diminished responsibility. *Notice of evidence after committal.*

60. This section applies where— Provocation.

(*a*) the person who kills or is a party to the killing of another is provoked (whether by things done or by things said or by both and whether by the deceased person or by another) to lose his self-control; and

(*b*) the provocation is, in all the circumstances (including any of his personal characteristics that affect its gravity), sufficient ground for the loss of self-control.

61. This section applies where the person kills or is a party to the killing of another by the use of force which he believes to be necessary Use of excessive force.

and reasonable to effect a purpose referred to in section 47 (use of force in public or private defence) but which exceeds the force which is necessary and reasonable in the circumstances which exist and (where there is a difference) in those which he believes to exist.

Jurisdiction over murder and manslaughter.

62. A person is guilty of murder or manslaughter (if section 56 or 57 applies) where—

(*a*) he causes a fatal injury to another person to occur within the ordinary limits of criminal jurisdiction, whether his act is done within or outside and whether the death occurs within or outside those limits;

(*b*) he kills another person anywhere in the world by an act done within the ordinary limits of criminal jurisdiction; or

(*c*) being a British citizen, he kills another person anywhere in the world by an act done anywhere in the world.

Attempted manslaughter.

63. A person who attempts or is a party to an attempt to kill another, where section 58, 60 or 61 would apply if death were caused, is not guilty of attempted murder but is guilty of attempted manslaughter.

Liability of party not having defence.

64. The fact that one person is, by virtue of section 58, 60, 61, 63 or 67, not guilty of murder or attempted murder shall not affect the question whether any other person is so guilty.

Killing in pursuance of suicide pact.

65.—(1) A person who, with the fault specified in section 56, kills another or is a party to the other being killed by a third person is not guilty of murder but is guilty of an offence under this section if he is acting in pursuance of a suicide pact between him and the other.

"Suicide pact".

(2) "Suicide pact" means a common agreement between two or more persons having for its object the death of all of them, whether or not each is to take his own life, but nothing done by a person who enters into a suicide pact shall be treated as done by him in pursuance of the pact unless it is done while he has the settled intention of dying in pursuance of the pact.

Attempt to carry out suicide pact.

(3) A person who in pursuance of a suicide pact attempts or is a party to an attempt to kill another is not guilty of attempted murder but is guilty of an attempt to commit an offence under this section.

Complicity in suicide.

66. A person who procures, assists or encourages suicide committed or attempted by another is guilty of an offence.

Infanticide.

67.—(1) A woman who, with the fault specified in section 56 or section 57 (1) (*c*), kills or is a party to the killing of her child by an act done when the child is under the age of twelve months and when the balance of her mind is disturbed by reason of the effect of giving birth or

of circumstances consequent upon that birth, is not guilty of murder or manslaughter but is guilty of infanticide.

Attempted infanticide.

(2) A woman who, in the circumstances specified in subsection (1), attempts or is a party to an attempt to kill her child is not guilty of attempted murder but is guilty of attempted infanticide.

Conviction where birth uncertain.

(3) A woman may be convicted of infanticide (or attempted infanticide) although the jury is uncertain whether the child had been born and had an existence independent of her when his death occurred (or, in the case of an attempt, when the act was done).

Threat to kill or cause serious injury.

68. A person who makes to another a threat, intending that other to fear that it will be carried out, to kill or cause serious injury to that other or a third person is guilty of an offence.

Causing death:

69. For the purposes of sections 56 to 62, 65 and 67, a person does not cause the death of another unless—

Victim born and existing independently.

(*a*) that other has been born and has an existence independent of his mother when his death occurs (whether or not he was born or had an independent existence at the time of the infliction of any injury causing death); and

Death within a year and a day.

(*b*) the death occurs within a year and a day after the day on which any act causing death was done by that person or on which any fatal injury resulting from such an act was sustained by that other (and, where the fatal injury was done to an unborn child, within a year and a day after the day on which he was born and had an independent existence).

Abortion.

70. A person who terminates the pregnancy of a woman otherwise than in accordance with the provisions of section 1 of the Abortion Act 1967 is guilty of an offence.

Self-abortion.

71.—(1) A pregnant woman who terminates her pregnancy otherwise than in accordance with the provisions of section 1 of the Abortion Act 1967 is guilty of an offence.

Non-pregnant woman.

(2) Notwithstanding section 54 (impossibility), a woman who is not pregnant cannot be guilty of an attempt to commit an offence under this section.

Supplying article for abortion.

72. A person who supplies or procures any article knowing that it is to be used with intent to terminate the pregnancy of a woman, whether she is pregnant or not, commits an offence.

Child destruction.

73.—(1) A person who intentionally kills a child capable of being born alive before it has an existence independent of its mother is guilty of child destruction, unless the act which causes death is done in good faith for the purpose only of preserving the life of the mother.

Proof of viability.

(2) The fact that a woman had at any material time been pregnant for twenty-eight weeks or more shall be *prima facie* proof that she was at that time pregnant of a child capable of being born alive.

Conviction where birth uncertain.

(3) A person who is found not guilty of murder or manslaughter (or attempted murder or manslaughter) of a child by reason only of the fact that the jury are uncertain whether the child had been born and had an existence independent of his mother when his death occurred (or, in the case of an attempt, when the act was done) shall be convicted of child destruction (or attempted child destruction).

Intentional serious injury.

74.—(1) A person who intentionally causes serious injury to another is guilty of an offence.

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

(*a*) the act causing serious injury is done; or

(*b*) the serious injury occurs,

within the ordinary limits of cirminal jurisdiction.

Reckless serious injury.

75. A person who recklessly causes serious injury to another is guilty of an offence.

Intentional or reckless injury.

76. A person who intentionally or recklessly causes injury to another is guilty of an offence.

Assault.

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

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

(*b*) causes another to fear that any such force or impact is imminent,

without that other's consent or, where the act is likely or intended to cause injury to another, with or without that other's consent, is guilty of an assault.

Acts justifiable in the public interest.

(2) A person does not commit an offence under subsection (1) by an act done to another with his consent if it is a reasonable act to do in the course of a lawful game, sport, entertainment or medical treatment or is otherwise justified or excused by any provision or rule referred to in section 49.

Assault on a constable.

78. A person who assaults a constable acting in the execution of his duty, or anyone assisting a constable so acting, knowing that or being reckless whether the person assaulted or the person being assisted is a constable, is guilty of an offence, whether or not he is or ought to be aware that the constable is so acting.

Assault to resist arrest.

79. A person who assaults another, intending to resist, prevent or terminate the lawful arrest of himself or another, is guilty of an offence.

Administering a substance without consent.

80.—(1) A person who administers to another without his consent any substance which he knows to be capable of interfering substantially with the other's bodily functions is guilty of an offence.

(2) For the purposes of this section—

(*a*) a substance capable of inducing unconsciousness or sleep is capable of interfering substantially with bodily functions; and

(*b*) administering a substance to a person includes causing him to take it.

Endangering traffic.

81.—(1) A person who—

(*a*) intentionally places any dangerous obstruction upon a railway, road, waterway or aircraft runway, or interferes with any machinery, signal, equipment or other device for the direction, control or regulation of traffic thereon, or interferes with any conveyance intended to be used thereon; and

(*b*) is or ought to be aware that injury to the person or damage to property may be caused thereby,

is guilty of an offence.

"Conveyance" and "waterway".

(2) In this section—

(*a*) "conveyance" means any conveyance constructed or adapted for the carriage of a person or persons or of goods by land, water or air;

(*b*) "waterway" means any route upon water regularly used by any conveyance.

Offences of damage to property

Destroying or damaging property:

82.—(1) A person who intentionally or recklessly destroys or damages any property belonging to another is guilty of an offence.

Intention or recklessness as to endangering life.

(2) A person who intentionally or recklessly destroys or damages any property (whether belonging to himself or another), intending by the destruction or damage to endanger the life of another or being reckless whether the life of another will be thereby endangered, is guilty of an offence.

Fire.

(3) An offence committed under this section by destroying or damaging property by fire shall be charged as arson.

Threats to destroy or damage property.

83. A person who makes to another a threat, intending that other to fear that it will be carried out—

(*a*) to destroy or damage any property belonging to that other or a third person; or

(*b*) to destroy or damage his own property in a way which he knows is likely to endanger the life of that other or a third person,

is guilty of an offence.

Possessing anything with intent to destroy or damage property.

84. A person who has anything in his custody or under his control, intending to use it or cause or permit another to use it—

(*a*) to destroy or damage any property belonging to some other person; or

(*b*) to destroy or damage his own or the user's property in a way which he knows is likely to endanger the life of some other person,

is guilty of an offence.

"Belonging to another".

85.—(1) For the purposes of sections 82 to 84 and 89, property belongs to any person—

(*a*) having the custody or control of it;

(*b*) having in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest);

(*c*) having a charge on it; or

(*d*) having a right to enforce a trust to which it is subject.

Property of corporation sole.

(2) Property of a corporation sole belongs to the corporation for those purposes notwithstanding a vacancy in the corporation.

Fungi and plants growing wild.

86. A person cannot commit an offence under sections 82 to 84 in respect of the destruction of or damage to any mushrooms or other fungi growing wild on any land or flowers, fruit or foliage of any shrub, tree or other plant growing wild on any land.

Application of special defences.

87. Sections 88 and 89 apply to—

(*a*) any offence under section 82 (1); and

(*b*) any offence under section 83 or 84 other than one involving—

(i) in the case of section 83, a threat; or

(ii) in the case of section 84, an intent to use or cause or permit the use of a thing, to destroy or damage property in a way the person making the threat or having the intent knows is likely to endanger the life of another.

Consent or belief in consent.

88. A person does not commit an offence to which this section applies if—

(*a*) he knows or believes that the person whom he believes to be entitled to consent to the destruction or damage has so consented; or

(*b*) he believes that that person would so consent if he knew of the destruction or damage and its circumstances.

Protection of person or property.

89. A person does not commit an offence to which this section applies by doing any act which, in the circumstances which exist or which he believes to exist, is immediately necessary and reasonable—

(*a*) to protect himself or any other person from force or injury;

(*b*) to prevent or terminate the imprisonment of himself or any other person; or

(*c*) to protect property (whether belonging to himself or another) from appropriation, destruction or damage.

Ancillary provisions.

90. The provisions of Schedule 5 (provisions ancillary to sections 82 to 84) shall have effect.

SCHEDULES

Section 4.

SCHEDULE 1

ILLUSTRATIONS

Section	Illustration
15 (1)(a) and (b).	15 (i) D is acquitted or convicted of the murder of P. He may not be tried thereafter in respect of the same act for murder or manslaughter, killing in pursuance of a suicide pact, complicity in suicide, infanticide, child destruction or intentional serious injury (subs. (1)(b) and s. 12 (1)(a) and Schedule 3, col. 6), or an attempt to commit any of these offences (subs. (1)(b) and s. 12 (1) (c) and Schedule 3, col. 6), because he might (on sufficient evidence being adduced) have been convicted of any of these offences on the indictment for murder.
	15 (ii) D is charged with the murder of P. The prosecution offer no evidence, the judge directs the jury to acquit and they do so. The effect is the same as in illustration 15 (i).
	15 (iii) D is acquitted by a magistrates' court on an information charging him with assault on a constable, contrary to s. 78. He may not thereafter be tried in respect of the same act for assault (subs. (1)(b) and s. 12 (2) and Schedule 3, col. 6). If he is charged with assault to resist arrest, it is for the court to exercise any discretion it has to stay the proceedings (s. 1 (6)).
15 (1)(c)(i) and (d)(i).	15 (iv) D is acquitted or convicted of theft. He may not thereafter be tried in respect of the same act for robbery (subs. (1)(c)(i) and (d)(i)), because robbery includes all the elements of theft; nor for burglary by entering and attempting to steal (subs. (1)(c)(ii) and (d)(ii)) because he might have been convicted of attempting to steal on the theft charge.
	15 (v) D is acquitted or convicted of recklessly causing injury to P (s. 76). He may not thereafter be tried in respect of the same act for intentionally causing injury (s. 76), intentionally or recklessly causing serious injury (ss. 74 and 75), manslaughter (s. 57) or murder (s. 56): (subs. (1)(c)(i)) except where he was convicted and, on a subsequent day, the injury became a serious injury or death occurred (subs. (1)(d), exception).
15 (1)(c)(i).	15 (vi) D is indicted for perjury in swearing that he did not while disqualified from driving drive his motor-bike in Nottingham on April 1, 1984. D has been charged with and acquitted of driving while disqualified on that occasion. The allegations in the indictment include all the elements of an offence of which he has been acquitted and the trial may not proceed.
	15 (vii) D is indicted for perjury in swearing that he did not drive his motor bike in Nottingham on April 1, 1984. D has been charged with and acquitted of driving while disqualified on that occasion. The allegations in the indictment do not include all the elements of the offence of which he has been acquitted and the trial must proceed.

Section	Illustration
15 (1)(d)(ii).	15 (viii) An information alleges that D, a motorist, was exceeding the speed limit in Leicester at 11 p.m. on April 1, 1984. D has been convicted of reckless driving at that time and place after the court heard evidence that he was driving at an excessive speed. The allegations in the information do not include all the elements of the offence of which he has been convicted and the trial must proceed unless stayed on the ground that it would be an abuse of the process of the court.
18 (a).	18 (i) D sets fire to a house in which, as he knows, P is asleep. P dies in the fire. There was an obvious risk that this would occur. But a finding either that D intended P's death or that he was aware that it might occur depends on a consideration of all the evidence, including the fact that that result was probable and any evidence given by D as to his state of mind.
18 (b).	18 (ii) D buys from E, at a very favourable price, goods which E describes to him as "hot". D is charged with receiving stolen goods knowing or believing them to be stolen. The court or jury may be satisfied that most people would have realised from the use of the word "hot" that the goods were stolen. If so, they will take this into account in deciding whether D realised that fact, though they will not be bound to conclude that he did.
18 (c).	18 (iii) D is charged with assaulting P. D in evidence says that he misinterpreted a gesture made by P as an act of violence and that he hit P in self-defence. The court or jury are satisfied that there were no reasonable grounds for the mistake D claims to have made. They will take this into account in deciding whether it is possible that D did make that mistake.
20.	20 (i) D and E, the parents of a child, P, do not feed P, intending that he shall die. If P dies as a result of not being fed, D and E are guilty of murder (s. 56). If P survives but sustains serious injury, they are guilty of intentional serious injury (s. 74). If the omission is "more than merely preparatory" to the commission of murder, they are also guilty of attempted murder (s. 53 (1) and (3)). 20 (ii) As in illustration 20 (i) except that D and E do not intend P to die but they are aware that there is a risk that he will sustain serious injury. It is, in the circumstances known to them, unreasonable to take this risk. If P dies as a result of not being fed, D and E are guilty of manslaughter (s. 57 (1)(c)(ii)). If P survives but sustains serious injury, they are not guilty of reckless serious injury (s. 75). 20 (iii) P is about to cross a frozen lake, believing it to be safe to walk on the ice. D knows the ice to be fragile but does not give the warning which he could give to P. P falls through the ice and D does not take any steps to save him from drowning. P is seriously injured or killed. Unless D is a person mentioned in subsection (2), he commits no offence. 20 (iv) As in illustration 20 (iii) but D is— (a) P's father; (b) a scoutmaster in charge of the troop of which P is a member;

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	(c) a parkkeeper employed by the local authority and responsible for supervising skating on the lake; or (d) a person employed by Q, the owner of the lake, to supervise the skating. In each case D is under a duty to do all that he could reasonably be expected to do to save P from death or serious injury and, if he fails so to do with the fault required by section 56 (murder), 57 (manslaughter) or 74 (intentional serious injury), he may be guilty of the offence in question.
	20 (v) D is employed as a night watchman at a factory. His duties are to take all reasonable steps to ensure the safety of the building. D sees that a small fire has broken out. There is an adjacent bucket of sand with which, as he knows, he could easily put out the fire. Having a grievance against his employer, he walks away and lets the fire burn. The factory is destroyed. He is not guilty of arson.
	20 (vi) As in illustration 20 (v), but D knows that P is also in the building. There is a risk that P might be killed or seriously injured. D may be guilty of offences as in illustration 20 (iv).
	20 (vii) D is employed to spread polish on the floor of the office corridor. It is his duty to display a prominent notice, warning that the floor is dangerous until the polish has dried. Knowing that the first person to arrive at the office is invariably P, whom he detests, he omits to display the notice. P falls on the polished floor and sustains injury. D is not guilty of intentionally or recklessly causing injury (section 74 and 75), but, if he hopes to cause serious injury, he is guilty of an attempt to do so.
	20 (viii) As in illustration 20 (vii) but P dies. D is guilty of manslaughter if he hopes that, or is reckless whether, serious injury will be caused (s. 57 (1)(c)).
21 (1)(a).	21 (i) D hits P who falls against Q, knocking Q down. Q suffers injuries from which she later dies. Assuming D intended to cause serious injury to P, but was not aware he might kill, D is guilty of the manslaughter (s. 57) of Q. His act has contributed to her death and, by section 28, his intention to cause serious injury to P is to be treated as an intention to cause that result to Q.
	21 (ii) It is made a code offence to cause death by "driving with criminal negligence". D drives on a main road at an excessive speed to impress his girlfriend P. E drives out of a side road in front of D's car without keeping a proper lookout. P is killed in the ensuing collision. Assuming D and E to have been negligent (see s. 22), both are guilty of the offence (irrespective of how civil liability would be apportioned between them) provided that the manner of driving of each was a more than negligible contribution to P's death.
21 (1)(b).	21 (iii) D, E's mistress, lives with E and P, E's child by his wife. While E is away P falls seriously ill. D, wishing P to die, fails to call a doctor. P dies. P's life might have been prolonged by medical attention. D is guilty of murder (s. 56). She is under a duty to act (s. 20) and in breach of that duty has failed to do what she might do to prevent death occurring.

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21 (1).	21 (iv) D, the driver of a moving car, produces a knife and tells his passenger P that he intends to have sexual intercourse with her whether she consents or not. Greatly alarmed, P jumps out of the moving car and sustains injury. D may be guilty of intentionally or recklessly causing injury (s. 76). His acts have contributed to P's injury notwithstanding that the injury was also caused by P's own act in jumping out of the car. Although this is a supervening cause, it may not be an extremely improbable response to D's behaviour.
	21 (v) D stabs P who is taken to hospital. P refuses the blood transfusion which he is told is necessary to save his life. P dies. D has killed P. The refusal of the transfusion may be unforeseen and extremely improbable, but it is not sufficient in itself to cause death. The death would not have occurred without the wound inflicted by D.
	21 (vi) D stabs P who is taken to hospital. P is given negligent medical treatment which aggravates his condition and he dies of the ill-treated wound. His life might have been saved by proper treatment. D has killed P. Hospital treatment is unlikely to be negligent but negligent medical treatment is neither extremely improbable nor (save in an exceptional case) sufficient in itself to cause the result of death.
	21 (vii) D hits P during a quarrel. P is lying dazed when he is stabbed by E. P dies later. D has not killed P since E's supervening act was unforeseen, extremely improbable and sufficient in itself to cause death.
22. "Purpose".	22 (i) It is made a Code offence to telephone a false message for the purpose of causing annoyance to another. D telephones P and tells a lie which causes P to cancel a planned holiday. D does this because he believes P will be in danger if he goes on holiday and not because he wants to annoy P (although he knows that P will be annoyed). D does not commit the offence.
"Intention".	22 (ii) D plants a bomb on an aeroplane with the purpose of destroying the aeroplane in flight and recovering the sum for which the cargo is insured. It is not D's purpose to kill the crew; but he is almost certain that they will die. He "intends" to kill them, within the meaning of section 56 (murder).
	22 (iii) Attempt to commit rape requires an "intention in respect of all the elements" of rape (s. 53 (1) and (2)). D attempts to have sexual intercourse with P, who does not consent. He is guilty of attempted rape only if he is aware, or is almost certain, that she does not consent.
"Know-ledge".	22 (iv) D is handed a packet by E. The packet contains heroin. D does not open the packet and therefore does not see what it contains. But from all the circumstances he firmly believes that it contains heroin; he has no real doubt about the matter. He is "knowingly" in possession of heroin.
"Reckless-ness".	22 (v) D, without justification or excuse, throws a brick at O, who is standing not far from a window belonging to P. D realises that the brick may break the window (or damage some other property belonging to another). He is guilty of recklessly destroying or damaging the window (s. 82 (1)) if the brick breaks it. (Compare illustration 22 (vii).)

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	22 (vi) D, shooting at a bird on his estate, injured P, a poacher who was crouching in the undergrowth. D knew that poachers sometimes operated in this part of the estate and was aware that there was a risk of such injury. Whether D caused the injury recklessly depends on whether it was reasonable for him take the risk. That is the question for the court or jury to decide. They are to have regard to all the circumstances that were known to D (including the size of the risk as, in their opinion, D perceived it).
"Heedlessness".	22 (vii) D, without justification or excuse, throws a brick at O. Any reasonable person would realise that the brick might damage property in the vicinity; but this risk does not occur to D. The brick breaks P's window. D has broken the window heedlessly.
"Negligence".	22 (viii) It is made a Code offence to drive a motor vehicle on a road "with criminal negligence". The offence is committed when a person drives in a manner falling far below acceptable driving standards; or when he drives a vehicle that is so defective, or when he himself is so disabled or so incompetent to handle it, that driving it at all is a very serious deviation from acceptable standards of care.
"Recklessness", "Heedlessness", "Negligence", "Carelessness".	22 (ix) D makes a statement which is false. (a) D is not confident of the truth of the statement; he realises that it may be false. In these circumstances it may be unreasonable to make the statement without first checking its truth; and if so, D, not having checked, acts *recklessly* in respect of the falsity. (b) D believes the statement to be true. He therefore does not, in making it, act *recklessly* in respect of the falsity. If, however, it would be obvious to any reasonable person that the statement might be false and this possibility does not occur to D, he acts *heedlessly* in respect of the falsity. (c) D makes the statement *carelessly* if his failure to realise that it is false (whether or not he gave thought to the matter) is judged to render his act in making it a deviation from the standard of care to be expected of a reasonable person. He makes it *negligently* if his failure is judged to render his act a very serious deviation from that standard. Whether his act is negligent or merely careless, or whether he is not at fault within the meaning of terms defined in clause 22, depends on a consideration of all the circumstances.
23 (1).	23 (i) D is indicted for intentionally causing serious injury to P (under s. 74). He may be convicted of recklessly causing serious injury (s. 75) or recklessly causing injury (s. 76) to P (see s. 12 (1) (b)); the allegation of recklessness being included in that of intention, these offences are "included offences" in relation to the offence charged.
23 (2).	23 (ii) Carelessness in respect of a circumstance is specified as an element of an offence (a person is guilty if he should have known of the circumstance). D is proved to have known of the circumstance. The fault requirement is satisfied.

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24.	24 (i) It is made a Code offence (burglary) to enter a building as a trespasser with the purpose of stealing therein. Nothing is said as to any fault required in respect of the fact that the entrant is a trespasser. The offence is committed only if the entrant knows that, or is reckless whether, he is trespassing.
	24 (ii) It is made a Code offence to cause polluting matter to enter a watercourse. In the absence of an indication to the contrary of a kind listed in subsection (2), the offence requires (a) an intention to cause the matter to enter the watercourse or recklessness whether it will do so, and (b) knowledge that the matter is a pollutant or recklessness whether it is.
25.	25 (i) D, removing property from a flat at the end of his tenancy, intentionally damages a fixture. It is a landlord's fixture but D thinks that it belongs to himself. He is not guilty of intentionally damaging property belonging to the landlord (under s. 82 (1)).
	25 (ii) D picks up a loaded gun. He does not examine it. (a) D believes that the gun is not loaded. He pulls the trigger and the gun fires. His mistake (however unreasonable: see s. 18) negatives any fault element of *knowledge* in respect of the gun's being loaded or of *intention* in respect of its firing. (b) It does not occur to D that the gun may be loaded. This (however unreasonable) negatives any fault element of *recklessness* in respect of the gun's being loaded or of its firing; but it does not negative *heedlessness* of which ignorance of a risk is a component.
	25 (iii) It is an offence for a person to act as auditor of a company at a time when he knows that he is disqualified from appointment to that office. D, a director of X Ltd., does not know that a director of a company is disqualified from appointment as its auditor. He acts as auditor of X Ltd. He is not guilty of the offence.
26 (1) and (10).	26 (i) D is charged with recklessly causing injury to P (s. 76). He testifies that, being intoxicated, he was not aware that there was any risk of injuring anyone; and that he was intoxicated because someone had added vodka to his lemonade without his knowledge. If it is found that, on the balance of probabilities (subs. (10)), this story is true, he must be acquitted.
26 (2) and (3).	26 (ii) D is charged with intentionally causing serious injury to P (s. 74). He testifies that he was drunk and that he intended to break a window but was not aware of any risk that he might injure any person. If it is found that this story may reasonably be true he must be acquitted of the offence charged; but, if he would have been aware of a risk of injuring a person had he been sober, he may be convicted of recklessly causing injury to P (s. 75).
26 (3).	26 (iii) A statute makes it an offence heedlessly to cause injury to a person by driving a motor vehicle. D drove his car in such a manner that the risk of causing injury would be obvious to any reasonable person. D says that he gave thought to the question whether there was a risk of causing injury and decided there was none. If this is true, he was not heedless; but, if he was voluntarily intoxicated and would have been aware of the risk had he been sober, he will be treated as having been aware of it. If he had been aware of it, he would have been reckless. A requirement of heedlessness is satisfied by recklessness (s. 23 (2)) and he may therefore be convicted of heedlessly causing injury.

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26 (4).	26 (iv) D is charged with rape. He claims that he believed, wrongly, that P was consenting and relies on section 1 (1)(2) of the Sexual Offences (Amendment) Act 1976 which requires the jury to have regard to the presence or absence of reasonable grounds for such a belief in conjunction with any other relevant matters. D was intoxicated at the time. The jury must have regard to the presence or absence of reasonable grounds for such a belief in a sober person in D's situation.
26 (5).	26 (v) D resolves to kill P and, to give himself "Dutch courage", drinks a bottle of whisky. When he kills P he is intoxicated and does not know what he is doing. He is to be treated as having killed P intentionally and may be convicted of murder (s. 56).
26 (6)(a).	26 (vi) D is charged with the murder of P. He intentionally killed P because he mistakenly believed that P was making a murderous attack on him and that there was no other way in which he could save his life. He would not have made the mistake had he been sober, but his intoxication arose from drugs taken in accordance with a medical prescription. His belief, however unreasonable, will be taken into account in determining whether he has a defence under section 47.
26 (6)(b)(i).	26 (vii) D is charged with intentionally causing serious injury to P (s. 74). D mistakenly believed that P was making a murderous attack on him and that there was no other way in which he could save his life. He was voluntarily intoxicated and would not have made the mistake had he been sober. For the purposes of the defence under section 47, he can rely on his belief in relation to the offence specifically charged but not in relation to the included offence of recklessly causing serious injury (s. 76).
	26 (viii) D is charged with recklessly damaging property belonging to P. D, who was voluntarily intoxicated, damaged the property intentionally, believing that it belonged to his friend, E, who would not have objected to his doing so. If he had been sober, he would have realised that the property in question was not E's. He will be treated as if he knew that the property did not belong to E and will not be able to rely on the defence in section 88.
26 (6)(b)(ii).	26 (ix) D resolves to kill P and, to give himself "Dutch courage", drinks a bottle of whisky. He claims that when he killed P he mistakenly believed that P was making a murderous attack on him and that he could save his own life only by killing P. He would not have made this mistake if he had been sober. For the purposes of any defence under section 47 he will be treated as if he knew that P was making no such attack.
26 (7)(b).	26 (x) D, who suffers from brain damage, drank alcohol and then caused serious injury to P. He is charged under section 74. He claims that he did not know what he was doing and the medical evidence is that his lack of awareness was due to the combined effect of the brain damage and the alcohol. If D may not have known what he was doing he must be acquitted and if, on the balance of probabilities, the medical evidence is correct, a mental disorder verdict should be returned (s. 38 (1)(b)).

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26 (9).	26 (xi) D, a diabetic, having taken insulin in accordance with his doctor's instructions, omits to take food as directed. He knows from experience that this may result in his behaving in an aggressive and uncontrollable way. He loses consciousness due to hypoglycaemia and, while unconscious, strikes P. The insulin is not taken "properly for a medicinal purpose" and D is voluntarily intoxicated. If he is charged with recklessly causing injury, he may not rely on section 43 (automatism and physical incapacity) and shall be treated as having struck the blow, being aware that it might cause injury.
	26 (xii) As in illustration 26 (xi) but D, though aware that failure to take food may result in loss of consciousness, is not aware that it may cause him to do any act. If charged with recklessly causing injury, he is regarded as having been involuntarily intoxicated and may rely on section 43 and on section 26 (1). If charged with careless driving he may not rely on these provisions because of his awareness that failure to take food might result in unconsciousness and loss of control of a motor vehicle if he drove one.
27 (1).	27 (i) D falls asleep while smoking a cigarette. He wakes up to find that the mattress on which he is lying has caught fire. He realises that other property may be destroyed if the fire is not put out. He leaves the scene, taking no steps that he might take to put out the fire. The house burns down. D has recklessly destroyed the house and is guilty of arson under section 82 (1) and (3).
	27 (ii) As in illustration 27 (i), except that, although it should be obvious to D that other property may be destroyed if the fire is not put out, this does not occur to him. In this case D has heedlessly destroyed the house.
	27 (iii) D is driving a car which, without fault on his part, comes to rest on P's foot. D realises what has happened but fails to move the car off P's foot. He is guilty of assault under section 77 (1), by allowing an application of force to P to continue.
27 (2).	27 (iv) It is an offence to be in possession of a substance knowing it to be a controlled drug. D takes possession of a tablet believing it to be aspirin. He finds out that it is heroin. He must now take reasonable steps to get rid of it and commits an offence when he fails to do so.
28 (1).	28 (i) D does an act by which he intends to injure O. He misses O but injures P, whom he does not intend to injure or have in mind as likely to be injured. He is guilty of intentionally causing injury to another under section 76. He may be convicted of this offence on an indictment or information alleging an intention to injure P.

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	28 (ii) D, intending to frighten O, plants a bomb to explode where he expects O to be. He realises that O may be seriously injured. D's child, P, comes to the place at the time of the explosion and is killed. D is guilty of manslaughter (under s. 57 (1)(c)).
	28 (iii) D wishes to injure O. He aims a blow at P, believing him to be O. He is guilty of attempting to injure P (under s. 53 (1)). If he hits and injures P, he is guilty of intentionally injuring him (under s. 76).
28 (2).	28 (vi) D, under provocation, aims a shot at O with intent to kill him. The shot misses O and kills P. D may raise the plea of provocation under section 60.
30 (1)(a).	30 (i) It is an offence (robbery) for a person to steal, using force or the threat of force in order to do so. D orders P, a wages clerk, to drop the money he is carrying and threatens to use violence if P does not obey. P drops the money and D takes it. D is guilty of robbery as a principal.
30 (1)(b).	30 (ii) As in illustration 30 (i) except that the money is taken by E acting in concert with D. D and E are guilty of robbery as principals.
30 (2)(a) and 33 (b).	30 (iii) It is made a Code offence for a person to sell to the prejudice of the purchaser any food which is not of the nature or quality demanded by the purchaser. No fault is required for this offence. E, an assistant in D's shop, sells a mouldy pie to P. D and E are guilty of the offence as principals.
30 (2)(b).	30 (iv) It is an offence (burglary) for a person to enter a building as a trespasser with intent to steal therein. D instructs his son E, aged nine, to climb through a window of a house and take some jewellery. E does so while D keeps watch outside. E is not guilty of burglary because he is under ten years of age (s. 36). D is guilty of burglary as a principal.
	30 (v) D encourages E to trip up P. D knows, but E does not, that P suffers from a bone condition which makes him peculiarly vulnerable to fractures. D intends that P shall break his leg. E foresees only that P may be cut or bruised by the fall. E trips P who breaks his leg in the fall. E is guilty of recklessly causing injury (s. 76), but is not guilty of the more serious offences under sections 74 and 75 since he lacks both intention and recklessness in respect of the causing of serious injury. D is guilty as a principal of intentionally causing serious injury.
30 (3)(a).	30 (vi) It is an offence for a licensee knowingly to supply alcohol to a police officer on duty. D induces E, a licensee, to supply alcohol to P, a police officer on duty. If E does not know that P is on duty he is not guilty of the offence. D cannot be guilty of the offence as a principal acting by an innocent agent because he is not a licensee, and thus he does not comply with the description of the class of persons who can commit this offence. He is guilty of the offence as an accessory.

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30 (3)(b).	30 (vii) A man commits rape when he has sexual intercourse with a woman without her consent, either knowing that she does not consent to it, or being reckless whether she consents to it. D induces E to have intercourse with P by telling E that P will consent to it despite her apparent reluctance. E then has intercouse with P believing, despite her protests, that she is consenting. E is not guilty of rape because his mistake negatives the fault element of knowledge of or recklessness as to non-consent. D cannot be guilty of rape as a principal acting by an innocent agent because the definition of the offence implies personal conduct on the part of the principal offender. He is guilty of rape as an accessory.
31 (1) and (4).	31 (i) It is an offence to use an overloaded lorry on the highway. D, a weighbridge operator at a colliery, hands over a ticket to E, the driver of a lorry which has just been loaded with coal. The ticket records the weight of the load which is in excess of that permitted for the lorry. D knows that possession of the ticket will enable E to leave the colliery and drive the lorry on the highway. E does so. E is guilty of the offence as a principal. D is guilty as an accessory.
	31 (ii) D hears screams and the sounds of a struggle from E's room. He enters and watches silently while E rapes P. D is guilty of rape as an accessory if his presence is an encouragement to E to commit the rape and if he knows that his presence will or may encourage E to do so.
31 (2).	31 (iii) It is an offence for a person to drive a motor vehicle on a road with a level of alcohol in his blood in excess of that permitted. D, knowing that E will shortly be driving home, surreptitiously laces E's drinks. E drives home with an excessive level of alcohol in his blood. If the definition of the offence indicates that no fault is required on the part of the driver E is guilty of the offence as a principal. D is guilty as an accessory. (If fault of the driver is required and E is acquitted D is guilty of the offence as an accessory by virtue of s. 30 (3)).
31 (3).	31 (iv) It is an offence to consume alcohol on licensed premises outside permitted hours. D, a licensee, fails to take steps to collect the drinks of customers who are drinking in his public house outside the permitted hours. D may be guilty as an accessory to the offence committed by the customers.
31 (4)(a).	31 (v) D is ordered to drive E to a remote public house. He knows that E is a member of an illegal organisation and that E is "on a job". He knows further that E has with him in the car the means for mounting an attack upon the public house inevitably involving danger to life or damage to property. E has a bomb with him in the car and throws it into the public house. D is guilty as an accessory of possession of explosives with intent and doing an act with intent to cause an explosion. He intends that his act of driving E to the scene shall assist E to do whatever acts, among those which D knows E may do, E has in mind.

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	31 (vi) It is made an offence to sell a house at a price in excess of a permitted maximum. D and E are partners in a firm of solicitors acting for the builder of a house. E advises the builder that he may lawfully sell the house at a price which is in fact above the maximum permitted. D has no knowledge of the transaction. E is guilty as an accessory to the offence committed by the builder. His mistaken interpretation of the law is no defence (s. 25). D is not guilty. Even if D knows that the firm is acting for the builder, he does not know that the firm is assisting the builder to act in the circumstances specified for the offence.
	31 (vii) It is an offence dishonestly to obtain property belonging to another by a deliberate or reckless deception. At D's suggestion E tells P that a picture which E is selling is painted by Constable. Neither D nor E knows whether this statement is true. It is false. P buys the picture in reliance on the statement. E is guilty of dishonestly obtaining the price by deception. D is guilty as an accessory because he encourages E and is reckless whether E obtains the price by deception.
	31 (viii) D and E agree to assault P using their fists. During the assault E stabs P with a knife which D does not know E is carrying. P dies from the wound. E is guilty of murder under section 56 if he intended the stabbing to kill or if he intended it to cause serious injury and was aware that it might kill. D is not guilty as an accessory to murder because he did not intend to assist or encourage E to do the kind of act (stabbing) E did. He is not guilty of manslaughter as an accessory for the same reason. He is guilty of assault (s. 77) and an attempt to commit an offence under section 74 or 76 if he intended the assault to cause serious injury or injury respectively.
31 (4)(b).	31 (ix) A person commits manslaughter under section 57 (1)(c) when he kills being reckless whether death or serious injury be caused. D and E agree that E shall put a certain substance in P's drink. D believes that it will cause P diarrhoea and vomiting but he does not foresee that P may suffer death or serious injury. E realises that the substance may cause serious injury to P. E puts the substance into P's drink and P dies. E is guilty of manslaughter. D is not guilty as an accessory to manslaughter. Although he encouraged E to act as he did, in respect of the result of death D did not have the fault required for a principal. D is guilty as an accessory to recklessly causing injury (s. 76) and administering a substance without consent (s. 80).
31 (5).	31 (x) D lends E oxy-acetylene equipment, knowing that E intends to use it to break into premises. E uses it a week later to break into a bank in London. D is guilty as an accessory to burglary. He intended to assist E to do the acts specified for the offence and it is immaterial that he did not know which premises were to be entered and when.

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31 (6).	31 (xi) D advises E, who wants to kill his wife, to give her a poisoned apple. E does so, but his wife passes the apple to their child in E's presence. D is not present. E remains silent, not wishing to reveal his criminal intention, while the child eats the apple. The child dies. E is guilty of murder (s. 56). D is not guilty as an accessory to murder of the child but is guilty of conspiracy to murder E's wife (s. 52).
31 (7)(a).	31 (xii) E and F agree to carry out a robbery at a warehouse. They approach D for assistance. Unknown to them D is an informer. D supplies advice in order to learn details of the plan. He subsequently passes the details to the police in the expectation that they will prevent the robbery. The police fail to arrive in time and the robbery takes place. D is not guilty as an accessory.
	31 (xiii) As in illustration 31 (xii) except that D supplies a van for removal of the stolen goods. D has fitted the van with a signalling device to enable the police to track it to the premises of the intended handler of the goods. If the robbery takes place D is not guilty as an accessory. His assistance was given with the purpose of nullifying the effects of the offence (that is, of enabling the goods to be recovered).
31 (7)(b).	31 (xiv) D hands over a jemmy to E on request, knowing that E intends to commit a burglary with it. In fact the jemmy belongs to E and D believes that he is legally obliged to return it. If this is his sole reason for giving it up he will not be guilty as an accessory to any subsequent burglary committed by E.
31 (8).	31 (xv) It is an offence to have sexual intercourse with a girl under sixteen, and her consent is no defence. E has intercourse with D, a girl under sixteen, who consents to the intercourse. D is not guilty as an accessory to E's offence.
31 (9).	31 (xvi) D and E agree to burn down an empty building. D procures petrol which he gives to E. D later repents of the plan and informs E of his decision to take no further part in it. E sets fire to the building using the petrol. E is guilty of arson (s. 82 (1) and (3)). D is guilty as an accessory. Despite his repentance and withdrawal from the plan he has not taken reasonable steps to prevent the arson. The result would be different if beforehand he informed the police of E's intentions.
32 (1).	32 D and E jointly attack P with knives. P suffers serious injury. D and E are jointly charged with intentionally causing serious injury (s. 74). The evidence shows that P suffered only one stab wound and it is uncertain which of the defendants inflicted it. Both may be convicted of the offence provided that the jury is satisfied in the case of each that he either did the act of stabbing himself or encouraged the other to do it.
33 (a).	33 (i) It is made a Code offence for the holder of a justices' licence whether by himself, his servant or agent to supply intoxicating liquor on licensed premises outside permitted hours. No fault is required for this offence. D is the licensee of a public house.

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	E, his barman, serves a drink to a friend outside the permitted hours. In the absence of any special defence D is guilty of the offence as a principal. Assuming fault on E's part, E is guilty as an accessory.
33 (b).	33 (ii) It is made a Code offence for a person to sell goods to which a false trade description is applied. No fault is required for this offence. E, an assistant employed in D's shop, sells a ham as a "Scotch" ham. D has previously given instructions that such hams are not to be sold under any specific name of place of origin. The ham is in fact an American ham. Both D and E are guilty of the offence as principals.
34 (1).	34 (i) It is an offence to use a motor vehicle on a road in breach of construction and use regulations. No fault is required. C, an employee of D Ltd., drives one of its lorries on a road. The lorry's condition does not comply with the regulations. D Ltd. commits the offence.
	34 (ii) If dark smoke is emitted from a chimney, the occupier of the building is guilty of an offence although he is not at fault. D Ltd. occupies a factory from the chimney of which dark smoke is emitted. It commits the offence.
34 (2)-(5).	34 (iii) C, a director of D Ltd., conspires with others to obtain by deception for D Ltd. payments of a subsidy to which it is not entitled. D Ltd. is a party to the conspiracy and to any subsequent offence of obtaining the subsidy by deception.
	34 (iv) The carriage of a coach party without a special licence is an offence if, as the carrier knows or ought to know, the trip has been publicly advertised. A theatre club books a coach trip with D Ltd. The club then advertises spare seats in the local newspaper. C, a director of D Ltd., sees the advertisement and realises that it may relate to a company trip. He takes no action. The trip goes ahead without a special licence. If C ought to have discovered the facts, D Ltd. is guilty of the offence.
34 (8)(a)(i).	34 (v) D Ltd. owns a sheep farm. C, a director, acting as such, orders the killing of a neighbouring farmer's dog. D Ltd. is not guilty of an offence under section 82 (1) (destroying or damaging property) if C believes the circumstances to be such that the killing would be justifiable for the protection of the company's sheep (see s. 89).
34 (8)(a)(ii).	34 (vi) The manager of a store belonging to D Ltd. finds a controlled drug among groceries which have just been delivered to the store. He takes possession of it, intending to deliiver it to the police. D Ltd. may rely upon this intention on a charge under the Misuse of Drugs Act 1971, s. 5 (1), of possessing the drug (see s. 5 (4)(b) of that Act).
34 (8)(b) and (c).	34 (vii) D Ltd. has a parcel of heroin in its warehouse. It is guilty of having a controlled drug in its possession, unless it neither knows nor suspects nor has reason to suspect that the parcel contains such a drug (see Misuse of Drugs Act 1971, s. 28 (2)). No director of D Ltd. with responsibility for warehousing operations knows or suspects or has reason to suspect that fact. D Ltd. is not guilty.

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34 (8)(c).	34 (viii) Goods are supplied in a store belonging to D Ltd., although safety regulations prohibit their supply. This is an offence under the Consumer Safety Act 1978, s. 2, unless D Ltd. can prove that it took all reasonable precautions and exercised all due diligence to avoid commiting the offence. This requires the company to show that no fault on the part of controlling officers was involved in failing to maintain effective systems designed to avoid such an offence.
35 (1)(a).	35 As in illustration 34 (iii). D, the managing director of D Ltd., is not a party to the conspiracy, but he knows of it and could take steps to thwart it. He turns a blind eye to it and does nothing. He is an accessory to any offence involved in obtaining the subsidy by deception, provided that it is a Code offence to which section 35 has been applied.
38 (1)(a).	38 (i) D intentionally sets fire to P's house when suffering from mental illness with one or more of the severe features listed in section 38 (2)(e). On a charge of arson he is entitled to a mental disorder verdict.
38 (1)(b) and (2).	38 (ii) D is charged with intentionally causing injury to P. He was unaware of his violent act. It occurred when he was in a state of impaired consciousness during an epileptic episode of a kind to which he is prone. The impairment of consciousness was a "disorder of mind" caused by illness but liable to recur. A mental disorder verdict must be returned. The court has power to make any of a number of orders or to discharge D.
38 (1)(b).	38 (iii) The same charge as in illustration 38 (ii). A similar explanation of the attack is given. The medical evidence leads the court or jury to think that the explanation may be true; D must therefore be acquitted. But they are not satisfied (on the whole of the medical evidence, including any adduced by the prosecution) that it is in fact true; so there will not be a mental disorder verdict, mental disorder not having been proved.
38 (2)(b)(i).	38 (iv) The same charge as in illustration 38 (ii). There is evidence that D, who suffers from diabetes, had taken insulin on medical advice. This had caused a fall in his blood-sugar level which deprived him of control or awareness of his movements. If D is acquitted, a mental disorder verdict is not appropriate. His "disorder of mind" was caused by the insulin, an "intoxicant" (see s. 26 (8)(a)). It was therefore a case of "intoxication" and not of "mental disorder".
38 (2)(b)(ii).	38 (v) The same charge as in illustration 38 (ii). There is evidence that D's violent act occurred while he was asleep. If this may be true he will be acquitted. If it is proved that the "sleep-walking" episode was a feature of an underlying condition and might recur, the acquittal will be in the form of a mental disorder verdict; if not, it will be an ordinary acquittal.

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40 (1).	40 (i) A medical witness testifies at D's trial on indictment that D was suffering at the time of the alleged offence from a condition having characteristics and effects which he describes. It is for the judge to decide, and if necessary to direct the jury, whether the condition so described (if it is found to have existed) is a form of "mental disorder" as defined in section 38 (2).
40 (4) and (5).	40 (ii) D is charged with an offence of causing injury. He gives notice that he will adduce evidence that the act was done in a state of automatism—namely, in a condition of impaired consciousness arising from temporary illness. The prosecution may give evidence (as part of its original case or, if the court should so direct, in rebuttal) that D suffers from a condition of which similar episodes are likely to be a recurring feature.
42.	42 D is charged with assault on a constable, P (under s. 78). It is proved that he was suffering from mental illness because of which he may not have realised that P was a constable. A mental disorder verdict is accordingly returned. D cannot be convicted of assault (under s. 77) in respect of the same incident.
43 (1).	43 (i) D, driving a car, has a sudden "black-out", as a result of which the car mounts the kerb and comes to rest against a wall. D is not guilty of driving without due care and attention.
43 (1)(b).	43 (ii) D, driving a car, feels himself becoming drowsy. He continues driving and in due course falls asleep at the wheel. He is guilty of driving without due care and attention both before and after falling asleep.
	43 (iii) D is charged with recklessly causing injury to P when in a condition of impaired consciousness caused by alcohol, drugs or medicine. He cannot rely on his "state of automatism" if he was "voluntarily intoxicated". See illustration 26 (xi).
43 (2).	43 (iv) As in illustration 43 (i). The car also passes a red traffic light. D is not guilty of failing to comply with a traffic sign.
	43 (v) D is involved in a traffic accident which he is under a duty to report to the police within twenty-four hours. He is seriously injured in the accident and spends more than a day in intensive care. He is not guilty of the offence of failing to report the accident.
44 (1).	44 (i) It is made a Code offence knowingly to supply liquor to a child. An exception is made for liquor in a properly corked and sealed vessel. A supplier has a defence if he believes the liquor to be in a properly corked and sealed vessel.
44 (2).	44 (ii) The same offence as in illustration 44 (i). It is provided that the offence is not committed if the liquor is in a properly corked and sealed vessel or the supplier believes on reasonable grounds that it is. Subsection (1) does not apply.

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45 (1) and (2).	45 (i) D takes part in a terrorist attack on a public house. He does so because E, the leader of the terrorist group, has told him that he (D) will be "severely punished" if he does not. D knows E's reputation for extreme violence and believes that E is threatening serious injury to himself or a member of his family. He does not believe that he has time to put himself under police protection before he must take part in the attack or suffer his "punishment". If section 45 (4) does not apply (see illustration 45 (iv)), whether D has the defence of duress in respect of offences to which he is a party depends on a question to be answered by the jury: could D reasonably be expected to resist the threat as he understood it? The jury must have regard to all the circumstances, some of which would be: (a) the nature of the offences; (b) the part played by D; (c) D's age and any other personal characteristics affecting the gravity of the threat; (d) current attitudes to what may properly be expected of citizens facing threats from terrorists.
	45 (ii) As in illustration 45 (i), except that E communicates no threat to D. D is falsely told by F, and believes, that E will "severely punish" him if he does not take part in the raid. The result is the same as if the threat were actually made—that is, the same as in illustration 45 (i).
45 (2)(a) (ii) and (3).	45 (iii) As in illustration 45 (i), except that D realises that he has time to put himself under police protection. He believes, however, that the police cannot effectively protect him and his family from E. This belief, even if justified, is immaterial. The defence of duress is not available to D.
45 (4).	45 (iv) As in illustration 45 (i), except that D is himself a member of the terrorist group. When he joined he knew that the group sometimes violently punished its members for disobedience. If he had no reasonable excuse for joining the group (see illustration 45 (v)), the defence of duress is not available to him.
45 (2) and (4).	45 (v) As in illustration 45 (iv). D is a police officer. He joined the group in that capacity, posing as a committed terrorist. If this constituted "reasonable excuse" for joining the group, the defence of duress may be available to him. If it is, the jury may wish to take the fact that he is a police officer into account in deciding whether he could reasonably have been expected to resist the threat.
46 (1) and (2).	46 (i) It is an offence to drive a motor vehicle on a road with a proportion of alcohol in the blood in excess of a prescribed limit. "Driving" for this purpose includes steering. The proportion of alcohol in D's blood is above the limit. Having gone to sleep in the passenger seat of E's car, he wakes to find himself alone in the car, which is running out of control down a steep hill towards children playing on the street. D, to avoid serious injury to himself or the children, steers the car into a wall, damaging the car. The defence of necessity may be available to him on a charge of the driving offence or of damaging property (s. 82(1)). It is a question for the tribunal of fact whether he could reasonably have been expected to act otherwise than as he did.

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	46 (ii) A fire breaks out in a prison in which D is serving a sentence. D flees from the prison. It is an offence for a prisoner to escape from prison. D is not guilty of this offence if (a) he believes that his escape is immediately necessary to avoid serious injury; and (b) he could not reasonably be expected to remain in the prison in the circumstances as he believes them to be.
	46 (iii) D finds P on the ledge of a high building. Believing P to be on the point of committing suicide, and thinking that no other means of preventing him is available, D grabs P and, struggling with him, causes him minor injuries. If, in the circumstances as D believed them to be, he could not reasonably have been expected to act otherwise, he must be acquitted on a charge of assault (s. 77) or intentional or reckless injury (s. 76).
	46 (iv) D and P, after a shipwreck, are alone in an open boat without food. D, supposing that they will both die if not rescued within a few days, kills P in order to feed on his flesh. D has not under this section a defence to a charge of murder, if only because he did not believe his act to be immediately necessary to save his own life. If he had thought it immediately necessary, it would be a question for the jury whether he could reasonably have been expected to act otherwise than as he did.
46 (3).	46 (v) D and P are mountaineers, roped together. An emergency arises in which D realises that both of them will be killed if he does not cut the rope. He does so, thus hastening P's death by some minutes but saving his own life. He may have a defence of necessity on a charge of murder; but it is open to the jury to find that he exposed himself to the danger of such an emergency without reasonable excuse, and thus to deny him the defence.
47 (1) (a) and (c).	47 (i) D shoots P who is about to attack him with a knife. If this action is necessary and reasonable to prevent P from killing or causing serious injury to D, D commits no offence, even though he is unaware that P is armed with a knife, or is about to attack.
	47 (ii) D shoots P whom he believes to be about to attack him with a knife. If this action would have been necessary and reasonable to prevent P killing or causing serious injury to D, had D's belief been true, D commits no offence, even if P was unarmed, or was not in fact about to attack.
47 (1)(b) and (4).	47 (iii) During a strike, D, a police constable, uses force to prevent P, one of a large number of strikers, from approaching a works entrance. If D's action is necessary and reasonable to prevent workers entering the premises from being put in fear of unlawful violence to themselves or their property, D commits no offence.
47 (3)(a).	47 (iv) D, a shopkeeper, sees P, whom he knows to be under the age of 10, take a watch from the counter and run off with it. D seizes P and takes the watch from him by force. If it is necessary to use force to prevent P from appropriating the watch and the force used is reasonable, D commits no offence.

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47 (3)(b).	47 (v) D's tenant, P, is about to destroy certain fixtures in the leased premises. P wrongly believes that the fixtures belong to him. Although P lacks the fault for the offence of causing criminal damage to property belonging to another, D may use reasonable and necessary force to protect his property.
	47 (vi) Wrongly believing that D is about to attack him, P makes what he believes to be a counter-attack on D. If P is using no more force than would be necessary and reasonable if the circumstances were as he believed them to be, he is not committing any offence; but D may use necessary and reasonable force to repel P's attack.
47 (3)(c).	47 (vii) Believing that he will be killed if he does not obey orders to "knee-cap" D, P attempts to do so. Even if P would have a defence of duress to a charge of causing serious injury, D may use reasonable and necessary force in self-defence.
47 (5).	47 (viii) P, an armed criminal, shoots a policeman who drops his revolver. D, a bystander, fearing that P is about to shoot him, picks up the revolver to use it in self-defence. D is not guilty of being in possession of a firearm without a firearm certificate; or of having with him an offensive weapon, contrary to the Prevention of Crime Act 1953.
47 (6).	47 (ix) P, a police officer, reasonably but wrongly believing D to be an armed, dangerous criminal, X, points a revolver at him. D, believing that he is about to be shot, strikes P and severely injures him. If, in the light of D's belief, this action is necessary and reasonable to prevent injury to D, he commits no offence, even though P is acting lawfully and D knows that.
47 (7).	47 (x) P, a constable, is arresting Q. D, who believes that P has no grounds for making the arrest, uses force against P to free Q. In fact P has reasonable grounds for suspecting that Q has committed an arrestable offence. D has no defence under this section to a charge of assault or causing injury.
	47 (xi) As in (x), but D also believes that P is about to injure Q. If the force used by D would have been necessary and reasonable to prevent the apprehended injury to a person wrongfully arrested, D commits no offence.
47 (8).	47 (xii) D, a police officer driving a patrol car in pursuit of a notorious rapist, crosses a pedestrian crossing against a red light and kills or injures a pedestrian. The facts that it is necessary to cross the light (i.e., otherwise the rapist would escape) and that a jury might regard it as a reasonable thing to do, do not amount to a defence under this section to a charge involving proof of an intention to cause injury or serious injury to the person.
	47 (xiii) A notorious rapist is making an escape in a car. D, a police constable, seeing no other way of preventing the rapist's escape, commandeers P's car, threatens P with his truncheon when P demurs, and rams the rapist's car causing damage to P's car. If this is necessary to prevent the rapist's escape and a reasonable thing to do, D commits no offence.

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47 (9).	47 (xiv) A gang of white youths, looking for a fight, shout taunts at a group of black youths until the black youths attack them. D, a white youth, is attacked by P, a black youth, with a knife. D, who also has a knife, stabs P and kills or injures him. D has no defence under subsection (1) to a charge of murder, manslaughter or causing injury. 47 (xv) Members of a political group, X, hold a lawful meeting. They know from experience that they are almost certain to be attacked by members of the rival group, Y. They are so attacked, and D, a member of the X group, kills or injures P, a member of the Y group. D may rely on subsection (1).
48 (1).	48 No offence is committed by— (a) the public executioner who kills a person sentenced to death for treason; (b) the bailiff who seizes P's goods in pursuance of an order of the court; (c) the soldier who, in the course of battle with the Queen's enemies, wounds or kills an enemy soldier; (d) any person who is called on by a police officer to assist him in arresting a suspected offender, P, and who injures P in the course of taking reasonable action to assist the officer.
49 (1)(a).	49 (i) Parliament passes an Act empowering local authorities to take and destroy unlicensed dogs. D, the properly-appointed dog catcher, takes and destroys P's unlicensed dog. D is not guilty of an offence of criminal damage.
49 (1)(b).	49 (ii) D, a schoolmaster, canes P, a delinquent pupil. If the chastisement is reasonable, it is justifiable (or excusable) at common law and D is not guilty of assault, intentionally causing injury or any other offence. 49 (iii) P, aged 5, who has been visiting his grandmother, refuses to return home. D, his father, carries him off by force. D, exercising his parental rights at common law, is not guilty of kidnapping, false imprisonment or any other offence provided that the force used is reasonable. 49 (iv) D, a doctor, finds P seriously injured and unconscious by the roadside. D applies a tourniquet to save P from bleeding to death. Assuming that D's act is lawful at common law, he commits no offence.
49 (2).	49 (v) D, a professional boxer taking part in a fight conducted in accordance with the Queensberry rules, seriously injures P by a blow allowed by those rules. Any power which the courts have at common law to hold that such a blow is unlawful is preserved.
51 (1).	51 (i) D offers E money to shoot P in the leg. E refuses. D is guilty of inciting E intentionally to cause injury (s. 76) and, if the injury he intends is "serious", of inciting E intentionally to cause serious injury (s. 74).

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	51 (ii) It is an offence dishonestly to handle stolen goods knowing or believing them to be stolen. D suggests to E that E should purchase a gold watch for £5 from F who is offering it for sale in a public house. D knows that the watch is stolen and believes that E knows this also. D is guilty of inciting E to handle stolen goods.
	51 (iii) D tells E, aged nine, to put a certain powder in P's drink "to make him feel ill". D is not guilty of inciting E to administer a substance without consent (s. 80); even if E does this act with the fault required (knowledge that the substance is capable of interfering substantially with the other's bodily functions) he will not commit the offence because he is under ten (s. 36). D may be guilty of attempting to commit the offence by an innocent agent depending on whether he has done an act which is more than merely preparatory to the commission of the offence.
51 (3).	51 (iv) It is an offence to have sexual intercourse with a girl under the age of sixteen. D, a girl aged fifteen, proposes to E that he should have intercourse with her. D is not guilty of inciting the commission of an offence by E. If intercourse does take place she is not guilty as an accessory to E's offence (s. 31 (8)).
51 (5).	51 (v) It is an offence (burglary) to enter a building as a trespasser with intent to steal therein. D, the secretary of an animal welfare organisation, writes an article in the organisation's newsletter describing methods of breaking into laboratories in order to release into the wild animals used for research. D is guilty of incitement to burglary if his article is an encouragement to its readers to commit that offence and if he intends that one or more of them shall do so.
51 (6).	51 (vi) E writes a note to F ordering him to kill P. The note is delivered to F by D who knows its contents. D is guilty as an accessory to E's offence of incitement to murder.
	51 (vii) D, who knows that F intends to commit a burglary, suggests to E that E should leave a ladder at a convenient place so as to facilitate F's entry to the building. D is not guilty of inciting E to commit an offence as he does not encourage E to commit burglary as a principal. If E does place the ladder as suggested and F uses it to effect an entry D and E will be guilty of burglary as accessories (s. 31 (1) and (2)).
52 (1).	52 (i) D and E agree that E shall shoot P. Both wish to cause P serious injury and both realise that the shot may kill. They are guilty of conspiring intentionally to cause serious injury (s. 74). If P dies as a result of the shooting they will be guilty of murder (s. 56). They are not guilty of conspiracy to murder because they do not intend that that offence shall be committed.
	52 (ii) A statute provides that it is an offence (kidnapping) to take a child without his or her consent out of the possession of a person having lawful custody of the child. It is further provided that the offence may be committed by any person other than the child's natural mother. D, the natural mother of P, a child in the lawful

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	custody of her divorced father, hires E to snatch P on her way home from school. D and E are guilty of conspiracy to kidnap P. They have agreed that an act shall be done which will involve the commission of the offence by E and they intend that the offence shall be committed.
	52 (iii) It is an offence dishonestly to obtain property belonging to another by deception. D, a controlling officer of a limited company, agrees with E, the company's accountant, to write a letter to P, a supplier, containing false representations as to the company's creditworthiness in order to induce P to supply goods to the company on credit. D and E are guilty of conspiracy with the company to obtain property by deception. The result would be different if there were no agreement between D and E. D could not then be guilty of conspiracy with the company because the ordinary meaning of agreement requires a meeting of two minds and only one would be involved in this case.
52 (1) and (2).	52 (iv) It is an offence (abduction) for a person acting without lawful authority or excuse to take an unmarried girl under the age of sixteen out of the possession of her parent or guardian against his will. D agrees to help E to elope with P. D knows that P's father has forbidden contact between E and P but believes P to be eighteen. P is in fact fifteen. D and E are not guilty of conspiracy to abduct P. D does not act intentionally in respect of P's age (s. 22), and therefore does not intend that the offence shall be committed.
52 (4) and (5)(c).	52 (v) As in illustration 51 (iv). D and E are not guilty of conspiracy to commit the offence.
52 (6).	52 (vi) D and E agree that an armed robbery shall be carried out by a person to be recruited by E. E subsequently hires F to carry out the robbery. D, E and F are guilty of conspiracy to rob.
52 (7).	52 (vii) It is an offence to escape from prison. E and F agree to effect the escape of G, a prisoner. D agrees to supply a car to be used in the escape and is paid £500. He does not intend to supply the car or that the agreement to effect the escape should be carried out. D is guilty as an accessory to the conspiracy of E and F.
	52 (viii) D and E know that F intends to burgle the house where they are employed. Without F's knowledge they agree to leave a ladder positioned so as to facilitate F's entry to the house. They are not guilty of conspiracy to be accessories to the commission of burglary by F.
52 (8)(a) and (b).	52 (ix) As in illustration 52 (vi). F is charged with conspiracy with persons unknown to rob. It is immaterial that D and E are not charged or that their identity is unknown.

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52 (8)(c).	52 (x) The facts are as in illustration 52 (vi). D, E and F are charged with conspiracy to rob. There is some circumstantial evidence against all three and a confession admissible only against F. D and E are acquitted and F is convicted. F's conviction is not inconsistent in the circumstances with the acquittal of D and E. If the evidence against D and E were substantially the same, and D were convicted and E acquitted, D's conviction would be inconsistent in the circumstances with E's acquittal.
53 (1) and (4).	53 (i) D puts poison in P's tea with the intention of killing P. J throws the tea away before P drinks it. D will be guilty of attempted murder (s. 56) if his act is capable in law of being more than merely preparatory to the murder of P and the jury then find that it was in fact more than merely preparatory to the commission of that offence.
53 (1) and (2).	53 (ii) It is an offence (rape) for a man to have sexual intercourse with a woman without her consent, either knowing that she does not consent to it, or being reckless whether she consents to it. D, who is voluntarily intoxicated, tries to have sexual intercourse with P but fails. P does not consent to intercourse with D. D claims that because he was intoxicated he gave no thought to whether P was consenting to intercourse. D is not guilty of attempted rape; he was neither aware nor almost certain that P was not consenting to intercourse (s. 22 (a): intention).
53 (3).	53 (iii) D has custody of P, her mentally handicapped child by her divorced husband. E moves in to live with D and P. The police visit the house some weeks later and find P emaciated and very ill. D and E confess that, hoping P would die, they had agreed not to feed P or to call medical attention when P fell ill. D (P's parent) and E (a member of the same household as P) are guilty of the attempted murder of P.
53 (6).	53 (iv) As in illustration 53 (i). The poison is supplied to D by E, who knows of D's intention. Assuming that D is guilty of attempted murder, E is guilty as an accessory to D's attempt.
	53 (v) D, knowing that E intends to burgle the house where D is employed, leaves a ladder positioned so as to facilitate E's entry to the house. The ladder is subsequently blown over by the wind and E does not see it. E enters the house using a duplicate key. D is not guilty of an attempt to be an accessory to the burglary committed by E.
54 (1).	54 (i) It is an offence dishonestly to handle stolen goods knowing or believing them to be stolen. D proposes to E that E should store a consignment of cigarettes which both believe are to be stolen by F. Unknown to them the cigarettes have been destroyed in a fire. D is guilty of inciting E to handle stolen goods, since the commission of the offence would be possible in the circumstances which D hopes will exist, namely that the cigarettes will be stolen by F.

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	54 (ii) It is an offence to produce a controlled drug without a licence. Cocaine is a controlled drug. D and E agree to produce cocaine from a substance which, unknown to them, contains no cocaine and from which cocaine cannot be produced. Neither D nor E has the relevant licence. They are guilty of conspiracy to commit the offence, since the commission of it would be possible in the circumstances which they believe exist, namely that the substance is capable of yielding cocaine.
	54 (iii) It is an offence dishonestly to obtain property belonging to another by deception. D sells to P goods which he represents as being of a certain weight but which he believes to be underweight. In fact D has miscalculated and the goods are of the weight described. D is guilty of an attempt to obtain the price of the goods by deception, since the commission of this offence would have been possible in the circumstances which D believed to exist at the relevant time.
55 (1) and (3).	55 (i) D and E agree in England to kill P in France. They are guilty of conspiracy to murder.
55 (2) and (3).	55 (ii) D tries to persuade E in France that E should plant a bomb in the centre of London. D is guilty of inciting E to cause an explosion likely to endanger life or property.
55 (4).	55 (iii) It is an offence to import cannabis into England without a licence. D and E agree in Morocco to import cannabis into England. Neither D nor E has the relevant licence. E travels to London and makes arrangements for the importation. D and E are guilty of conspiracy to commit the offence.
56 (a).	56 (i) See illustration 22 (ii).
56 (a) and (b).	56 (ii) D leaves a powerful bomb in a car set to go off at a time when he knows the street is crowded with pedestrians. P is killed by the explosion of the bomb. D's only object was to damage property. Applying section 22 the questions for the jury are, (a) was D aware that someone was almost certain to be killed? (s. 56 (a)). If not, (b), was he aware that someone was almost certain to be seriously injured and that there was a risk that someone might be killed? (s. 56 (b)).
[56 (c)].	56 (iii) [D, wishing to frighten P away from the district, puts blazing newspaper through the letter box of P's house. P's child is burned to death. D does not intend to kill or cause serious injury. The question for the jury is, (i) did he want to cause, or was he aware that his action was almost certain to cause, fear of death or serious injury and (ii) was he aware that someone might be killed?]
[56 (c)].	56 (iv) [D plants a bomb in a department store. He notifies the police that the bomb is timed to go off in one hour's time. The store is cleared but a bomb disposal expert is killed when the bomb explodes. Although D did not intend to kill or cause serious injury, he is guilty of murder if he was aware—

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	(i) that his actions would almost certainly cause fear of death or serious injury to someone and (ii) that there was a possibility that someone would be killed.]
57 (1)(b).	57 (i) D, who is charged with murder, admits that he hit P over the head with an iron bar and that he knew this would cause serious injury, but he says that being very drunk, he did not realise there was any possibility of causing death. If his evidence may reasonably be true, he should be acquitted of murder and convicted of manslaughter.
57 (1)(c) (i).	57 (ii) D, having kidnapped P, cuts off P's ear and sends it to P's father, demanding a ransom. The amputation is done with care and skill but it causes P's death. If the removal of the ear is a "serious injury" D is guilty of manslaughter even if he thought there was no possibility that the amputation would cause death. 57 (iii) D, a burglar, hits a night-watchman, P, on the head intending to stun him. P dies from the blow. If stunning is a "serious injury" (a question for the jury) D is guilty of manslaughter even if he thought there was no possibility of killing P.
57 (1)(c)(ii).	57 (iv) D sets fire to a building with the intention of claiming insurance monies. He knows that there is a possibility that someone may be in the building and may suffer serious injury or death. There is evidence that he is reckless and guilty of manslaughter of P who dies in the fire.
58.	58 (i) D intentionally kills a woman, P. There is medical evidence that he was acting under the impulse of perverted and violent sexual desires, much stronger than the normal impulse or urge of sex. If the judge rules that this is evidence of mental abnormality (s. 59 (1)) and the jury think it may be true, it is for them to decide whether it is a substantial enough reason to reduce D's offence to manslaughter. 58 (ii) D, a diabetic, having taken insulin, failed to take food in accordance with medical advice. In consequence he became aggressive and attacked and intentionally killed P. He was not aware that failure to take food could have consequences of this kind. D's intoxication is involuntary (cl. 26 (8)(b)) but it does not amount to "mental abnormality" and, if he is charged with murder, the defence of diminished responsibility should not be left to the jury. 58 (iii) D, who is suffering from depression, kills P after taking drink and drugs. If the depression amounts to a mental illness or other disorder or disability of mind the jury must decide whether it would have been a substantial enough reason to reduce the offence to manslaughter if he had killed P when not intoxicated.
60.	60 (i) D meets his lodger, P, leaving his wife's (Q's) bedroom. Believing that P has committed adultery with Q, D loses his self-control and attacks and kills him. In fact P had only taken Q a cup of tea. The question for the court is whether, if the facts had been as D believed them to be (see s. 44), there would have been sufficient ground for the loss of self-control.

Section	Illustration
	60 (ii) D finds his lodger, P, sitting on the sofa with his wife, Q. Enraged, he loses his self-control and kills P. Unknown to D, P and Q had just committed adultery. The question for the court is whether the facts known to D amounted to sufficient ground for the loss of self-control.
61.	61 D, a chicken farmer, has suffered grave losses through nocturnal thefts of his birds. He wakes in the middle of the night to see P running away with a chicken under his arm. Being unable to prevent P's escape in any other way, he shoots at him with a shotgun. He intends to cause serious injury and is aware that he may kill. P is killed. D believes that the thief is the cause of his previous heavy losses but in fact he is a tramp who has never been there before. Assuming that the judge rules that any reasonable jury would find, or the jury finds, that the force used was unreasonable in the circumstances and would have been unreasonable even if P had been the persistent thief, D is guilty of murder unless he may have believed that the force used was reasonable; in which case he is guilty of manslaughter.
62.	62 In the following illustrations D, provided that he acted with the fault required, is guilty of murder or manslaughter under the Code and may be tried in England.
62 (a).	(a) D, in England, shoots P and fatally injures him. P is taken to hospital in France and there dies of the wound.
	(b) D, in France, despatches a letter bomb to P in England. P opens the letter in England and is killed instantly.
	(c) As in illustration 62 (b) except that P is fatally injured when the bomb explodes, is taken to France and there dies of the injury received.
62 (b).	(d) D, in England, despatches a parcel bomb to P in France. P is killed when the parcel explodes in France.
62 (c).	(e) D, a British citizen, shoots and kills P, a Brazilian citizen, in Brazil.
63.	63 D shoots at P, intending to kill him, but misses. D is guilty of attempted manslaughter if, when he fired the shot—
	(a) he was suffering from a form of mental abnormality which, in the opinion of the jury would have been sufficient, if he had killed, to reduce his offence to manslaughter (s. 58); or
	(b) he had been provoked to lose his self-control and the provocation was, in the opinion of the jury, sufficient ground for the loss of self-control (s. 60); or
	(c) he was acting in self-defence and may have believed that it was necessary and reasonable to kill P; but the jury is satisfied that this went beyond what was necessary or reasonable.
65 (1).	65 (i) D and P have agreed to die together. In pursuance of the agreement—
	(a) D intentionally kills P but is prevented from killing himself; or
	(b) E, a third person, intentionally kills P but is arrested before he can kill D.

Section	Illustration
	D is not guilty of murder but is guilty of an offence under section 65. E, who has no intention of dying in pursuance of the agreement, may be convicted of murder.
65 (3).	65 (ii) As in illustration 65 (i) except that the attempt to kill P fails. D is guilty of an attempt to commit an offence under section 65. E may be convicted of attempted murder.
66.	66 D is guilty of an offence under this section when P commits or attempts to commit suicide if— (a) P does so because D, intending that P shall commit suicide, has falsely told him that his illness has been diagnosed as cancer. If D's statement is true, he is guilty unless section 49 (1)(b) applies. (b) D, knowing that P intends to commit suicide, provides him with the means by which P kills or attempts to kill himself. (c) D has advised him to do so.
67 (1).	67 (i) The balance of D's mind is disturbed by the effect of giving birth to a child, P. When P is eleven months old, D intending to kill him, causes a serious injury. Two months later P dies of the injury. D is not guilty of murder or manslaughter but is guilty of infanticide.
67 (2).	67 (ii) As in illustration 67 (i) except that P does not die. D is guilty of attempted infanticide.
69 (a) and 73.	69 (i) D is charged with the murder of an infant, P. There is conflicting evidence as to whether the death occurred before or after P was born and had an existence independent of his mother. Assuming that the other conditions of liability are satisfied, the judge must direct the jury (a) to convict of murder if they are satisfied that the death occurred after the birth; (b) to convict of child destruction if they are satisfied that the death occurred before the birth; (c) to convict of child destruction if they are uncertain whether death occurred before or after birth.
69 (b).	69 (ii) D leaves a bomb under the floor of an office. It fails to go off at the expected time but explodes two years later, injuring P. P dies from the injury 364 days after the explosion. D has caused P's death for the purposes of the sections mentioned.
69 (b).	69 (iii) D strikes a pregnant woman, Q, injuring the child in her womb, P. P is born two months later and dies from the injury thirteen months after it was inflicted. D has caused P's death for the purposes of the sections mentioned.
70 and 53.	70 (i) D, a person with no medical qualifications, uses an instrument upon, or administers an abortifacient to, P, a pregnant woman, with intent to procure an abortion. D is guilty under section 53 of an attempt to commit an offence under section 70.

Section	Illustration
70, 53 and 54.	70 (ii) As in illustration 70 (i) except that P is in fact not pregnant. D is guilty under section 53 of an attempt to commit an offence under section 70.
71 (1) and 53.	71 (i) D, a pregnant woman, uses an instrument upon herself, or takes an abortifacient, intending to procure an abortion. D is guilty under section 53 of an attempt to commit an offence under section 71.
71 (1) and (2).	71 (ii) As in illustration 71 (i) except that D is in fact not pregnant. D is not guilty under section 53 of an attempt to commit an offence under section 71.
73.	73 D, a registered medical practitioner, terminates P's pregnancy in accordance with the terms of section 1 of the Abortion Act 1967, knowing that P has been pregnant for 28 weeks. D is guilty of child destruction unless (i) the evidence raises a reasonable doubt whether the child was capable of being born alive; or (ii) D may have believed the child was not capable of being born alive; or (iii) D may have acted in good faith for the purpose only of preserving the life of the mother.
74 (1).	74 (i) D punches P, breaking his nose. Whether this is a "serious injury" is a question for the jury. If it is, D is guilty if he wanted to cause, or knew that his action was almost certain to cause, that injury or some other serious injury.
74 (2)(a).	74 (ii) D, in England, despatches a letter bomb to P in France. When P opens the letter, two of his fingers are blown off. If this is a serious injury and D intended to cause it (see illustration 74 (i)) D is guilty of an offence under section 74 and may be tried in England.
	74 (iii) D, in France, despatches a letter bomb to P in England. When P opens the letter, two of his fingers are blown off. If this is a serious injury and D intended to cause it, (see illustration 74 (i)) D is guilty of an offence under section 74 and may be tried in England.
75.	75 D, without justification or excuse, throws a brick through Q's window, knowing that members of Q's family may be in the room and, if so, may be hit by the brick or broken glass. P is hit by glass and seriously injured. D is guilty of recklessly causing serious injury if he knew that an injury of this kind might be caused.
76.	76 (i) D strikes P with a cane, causing weals on P's hand. If D wanted such a result to occur, or was almost certain that it would occur, he is guilty, in the absence of justification or excuse, of intentionally causing injury.
	76 (ii) See illustration 22 (vi).

Section	Illustration
77 (1)(a).	77 (i) In the absence of justification or excuse, an offence is committed where— (a) D grips P's wrist to prevent P from doing something he might lawfully do. (b) D slaps P's face. (c) D stretches out a leg, knowing that P may fall over it. P does so. (d) D gestures, as if about to punch P's nose. P flinches from the expected impact. (e) D points an unloaded gun at P knowing that P may believe the gun to be loaded and be alarmed. P does so believe and is alarmed.
77 (1)(a) and (b).	77 (ii) In the absence of justification or excuse, an offence is committed where— (a) D and P agree to fight with bare fists. D (i) punches P; (ii) aims at P a punch which misses. (b) At P's request, D beats him with a cane.
77 (2).	77 (iii) If the following are reasonable acts to do in the circumstances, no offence is committed. (a) D, in the course of a properly organised wrestling match, throws P to the floor. (b) D, in the course of stage performance, throws a series of knives which narrowly miss his partner, P. (c) D, a doctor, inserts a hypodermic needle in P's arm in order to inoculate him against disease.
78.	78 See illustrations 47 (x) and 47 (xi). In 47 (x) D is guilty of an offence under section 78. In 47 (xi) section 47 (1) and (7) afford a defence to a charge under section 78.
79.	79 D grips the wrist of a policeman, P, who, as D knows, is lawfully arresting or has lawfully arrested E, intending to enable E to escape arrest. D is guilty of the offence.
80.	80 (i) D, believing it to be an aphrodisiac, secretly puts cantharides into P's tea, causing P to be ill. D is guilty of the offence. 80 (ii) D puts vodka into P's lemonade intending to make him "merry". P, a teetotaller, becomes intoxicated. D is guilty of the offence. 80 (iii) D, believing it to be an aphrodisiac, secretly puts powdered rhinoceros horn in P's drink. P consumes it but it has no discernible effect and there is no evidence that the dose is capable of interfering substantially with bodily functions. D is not guilty of the offence; but he may be guilty of an attempt (ss. 53 and 54). 80 (iv) D, being concerned about her husband's insomnia, secretly puts into his drink sleeping pills which she knows he would refuse to take. In consequence he sleeps soundly. D is guilty of the offence unless her conduct is justified or excused by any rule of the common law (s. 49).

Section	Illustration
	80 (v) D, a doctor, finding P trapped and unable to speak after a road accident, injects a pain-killing drug. D is guilty of an offence unless his conduct is justified or excused by any rule of the common law.
82 (1).	82 (i) D, in a quarrel with P, angrily kicked the door of P's car, denting it. This was an offence under section 82 (1) if D intended to damage the car—wanted to do so or realised that he almost certainly would; or if he was reckless whether he would do so—was aware that he might do so and unreasonably took the risk (s. 22). The fact that his act was obviously likely to damage the car, although not in itself satisfying the fault element of the offence, is a fact from which (due regard being had to any other evidence) D's awareness of the risk may be inferred (s. 18).
	82 (ii) D, removing property from a flat at the end of his tenancy, intentionally damages a fixture. It is a landlord's fixture but D thinks that it belongs to himself. He does not commit an offence under section 82 (1); he does not intentionally or recklessly damage "property belonging to another".
82 (1) and (3).	82 (iii) D, without justification or excuse, intentionally sets fire to P's house. No one is thereby endangered. This offence must be charged as "arson, contrary to section 82 (1) and (3)".
82 (2) and (3).	82 (iv) D deliberately damages a building belonging to himself in which his employees are working. If his intention is thereby to endanger their lives, or if he is aware that he is thereby putting their lives at risk, he is guilty of an offence under section 82 (2). If he causes the damage by fire, the offence must be charged as "arson". If he is unaware of any risk to life, he commits no offence under section 82.
85 (1).	85 D destroys goods owned by P but in the possession of Q under a hiring agreement. D may be charged with destroying property "belonging to P" or "belonging to Q".
88 (a).	88 (i) D is the porter in a university department. He is asked by E to shred certain papers stacked in an office shared by E and P. D assumes that the papers are E's; in fact they are P's and E has no authority to deal with them. D does as directed. He commits no offence under section 82 (1).
88 (b).	88 (ii) D, seeking shelter for the night, breaks into the house of P, a social acquaintance. In doing so he damages a door. If he believes that P would consent to this act if he knew of it, D is not guilty of an offence under section 82 (1).
89.	89 D intentionally kills P's dog. He is not guilty of an offence under section 82 (1) in any of the following cases, provided that his act would be judged to be immediately necessary and reasonable to prevent the harm threatened (or, in case (c), the harm thought to be threatened). (a) The dog is about to attack D's child. (b) The dog is worrying D's sheep. (c) D sees the dog in the vicinity of his child (or his sheep). A dog has been attacking children (or sheep) in the neighbourhood and D believes, wrongly, that this is the dog in question.

SCHEDULE 2

Sections 8 (5) and 9 (4).

JURISDICTION—ANCILLARY PROVISIONS

[This Schedule will contain provisions corresponding to clauses 3, 9, 10 and 11 of the draft Criminal Jurisdiction Bill appended to the Law Commission's report on the Territorial and Extraterritorial Extent of the Criminal Law (1978), Law Com. No. 91].

SCHEDULE 3

PROSECUTION, PUNISHMENT AND MISCELLANEOUS MATTERS

Sections 11 and 12 (1).

1 *Provision creating offence*	2 *Nature of offence*	3 *How triable*	4 *Punishment*	5 *Restriction on institution of proceedings*	6 *Alternative verdicts*	7 *Miscellaneous*
51.	Incitement.	As in the case of the offence incited, except that where the incitement is to commit two or more offences the following rules apply: (a) if one of the offences incited is triable only on indictment, the incitement is triable only on indictment; (b) if one of the offences incited is triable only summarily and one is triable either way, the incitement is triable either way; (c) if the incitement is to commit the same summary offence on more than one occasion, the incitement is triable either way.	As in the case of the offence incited, except that— (a) where the offence or one of the offences incited is murder or any other offence the sentence for which is fixed by law, the maximum penalty is life imprisonment; (b) where the incitement is to commit the same summary offence on more than one occasion, there is no limit to the amount of the fine that may be imposed on conviction on indictment; (c) where, in any other case, two or more offences are incited, the penalty is that of the offence for which is provided the most severe penalty.	As in the case of the offence incited, except that any time limit applicable to the institution of proceedings for the offence incited applies only to the extent that, where the offence incited has been committed and the time limit applicable to it has expired, proceedings shall not be instituted for incitement to commit that offence.		

52.	Conspiracy.	Only on indictment.	As in the case of the offence involved, except that— (a) where the offence or one of the offences involved is murder or any other offence the sentence for which is fixed by law, the maximum penalty is life imprisonment; (b) where the only offences involved are summary offences, there is no limit to the amount of the fine that may be imposed; (c) where, in any other case, two or more offences are involved, the penalty is that of the offence for which is provided the most severe penalty.	As in the case of the offence involved, except that— (a) where the offence is a summary offence the prosecution of which does not require the consent of the Attorney-General, proceedings for conspiracy shall not be instituted except by, or on behalf or with the consent of, the Director of Public Prosecutions; and (b) any time limit applicable to the institution of proceedings for the offence involved applies only to the extent that, where the offence involved has been committed and the time limit applicable to it has expired, proceedings shall not be instituted for conspiracy to commit that offence.		
53.	Attempt.	As in the case of the offence attempted.	As in the case of the offence attempted except where that offence is murder or any other offence the sentence for which is fixed by law, when the maximum penalty is life imprisonment.	As in the case of the offence attempted.		(a) Where section 18 applies to the offence attempted it applies also to the attempt. (b) Provisions conferring power to institute proceedings for the offence attempted apply to the institution of proceedings for the attempt. (c) Provisions as to the venue of proceedings for the offence attempted apply in relation to proceedings for the attempt.

SCHEDULE 3

PROSECUTION, PUNISHMENT AND MISCELLANEOUS MATTERS *(continued)*

Sections 11 and 12(1).

1 *Provision creating offence*	2 *Nature of offence*	3 *How triable*	4 *Punishment*	5 *Restriction on institution of proceedings*	6 *Alternative verdicts*	7 *Miscellaneous*
56.	Murder.	Only on indictment.	Life.		Manslaughter (s. 57). Killing in pursuance of suicide pact (s. 65). Complicity in suicide (s. 66). Infanticide (s. 67). Child destruction (s. 73). Intentional serious injury (s. 74).	
57.	Manslaughter.	Only on indictment.	Life.		Killing in pursuance of suicide pact (s. 65). Complicity in suicide (s. 66). Infanticide (s. 67). Child destruction (s. 73). Reckless driving (Road Traffic Act 1972, s. 2). Careless driving (Road Traffic Act 1972, s. 3).	
65.	Killing in pursuance of suicide pact.	Only on indictment.	7 years.	Only by or with the consent of the Director of Public Prosecutions.	Complicity in suicide (s. 66).	
66.	Complicity in suicide.	Only on indictment.	7 years.	Only by or with the consent of the Director of Public Prosecutions.	Killing in pursuance of suicide pact (s. 65).	

67.	Infanticide.	Only on indictment.	5 years.			
68.	Threat to kill or cause serious injury.	Either way.	10 years.			
70.	Abortion.	Only on indictment.	Life.		Child destruction (s. 73).	
71.	Self-abortion.	Only on indictment.	Life.		Child destruction (s. 73).	
72.	Supplying article for abortion.	Only on indictment.	5 years.			
73.	Child destruction.	Only on indictment.	Life.		Abortion (s. 70). Self-abortion (s. 71).	
74.	Intentional serious injury.	Only on indictment.	Life.		Assault (s. 77).	
75.	Reckless serious injury.	Either way.	5 years.		Assault (s. 77).	
76.	Intentional or reckless injury.	Either way.	3 years.		Assault (s. 77).	
77.	Assault.	Only summarily.	6 months £1,000			
78.	Assault on a constable.	Only summarily.	6 months £1,000			
79.	Assault to resist arrest.	Either way.	2 years.		Assault (s. 77).	
80.	Administering a substance without consent.	Either way.	3 years.			

SCHEDULE 3

PROSECUTION, PUNISHMENT AND MISCELLANEOUS MATTERS *(continued)*

Sections 11 and 12(1).

1 *Provision creating offence*	2 *Nature of offence*	3 *How triable*	4 *Punishment*	5 *Restriction on institution of proceedings*	6 *Alternative verdicts*	7 *Miscellaneous*
81.	Endangering traffic.	Either way.	2 years.			
82. (1).	Destroying or damaging property.	Either way (but to be tried summarily where value involved does not exceed "the relevant sum": Magistrates' Courts Act 1980, s. 22).	On indictment: 10 years. On summary conviction, where court proceeded to summary trial in pursuance of Magistrates' Courts Act 1980, s. 22: 3 months; £500.	Where the property belongs to the defendant's spouse, only by or with the consent of the Director of Public Prosecutions; but this restriction does not apply— (i) if the defendant is charged with the offence jointly with the spouse; or (ii) if by virtue of any judicial decree or order (wherever made) the defendant and the spouse are at the time of the offence under no obligation to cohabit.		
82. (1) and (3).	Arson.	Either way.	Life.			
82. (2).	Intentionally or recklessly endangering life.	Only on indictment.	Life.			
82. (2) and (3).	Arson.					

83.	Threats to destroy or damage property.	Either way.	10 years.				
84.	Possessing anything with intent to destroy or damage property.	Either way.	10 years.				

Sections 37 and 41.

SCHEDULE 4

DISPOSAL AFTER FINDING OF DISABILITY OR MENTAL DISORDER VERDICT

[This Schedule will contain the powers of the Courts in relation to defendants found under disability or not guilty on evidence of mental disorder, provisions relating to the exercise of these powers and the consequences of their exercise, and related provisions.]

Section 90.

SCHEDULE 5

CRIMINAL DAMAGE – ANCILLARY PROVISIONS

[This Schedule will contain provisions corresponding to sections 6, 7 (2) and 9 of the Criminal Damage Act 1971.]

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