



PROPOSED REFORM OF THE OFFENCES AGAINST THE PERSON ACT 1861

CONSULTATION BY THE LAW COMMISSION

12 February 2015

Introduction

1. The Criminal Bar Association (CBA) represents approximately 4,000 employed and self-employed members of the Bar who prosecute and defend in the most serious criminal cases across England and Wales. It is the largest specialist bar association. The high international reputation enjoyed by our criminal justice system owes a great deal to the professionalism, commitment and ethical standards of our practitioners. Their technical knowledge, skill and quality of advocacy guarantee the delivery of justice in our courts, ensuring on our part that all persons enjoy a fair trial and that the adversarial system, which is at the heart of criminal justice, is maintained.

PROBLEMS IN THE 1861 ACT

1. *Do consultees agree that the number and level of detail of the offences in the 1861 Act is unsatisfactory? In their experience, does this cause problems in practice?*¹ **We agree that the offences set out at paragraph 3.5 of the Consultation Paper do not deal with wrongdoing that arises commonly enough in the 21st Century to require specific provision. We think that each type of harm in these provision is or can be dealt with by other offences.**
2. *Do consultees consider that the grading of offences in the 1861 Act is illogical? In their experience, are there practical problems associated with the grading of the offences?*² **We note the Law Commission itself [at para. 3.23] doubts that the hierarchy of offences *per se* is a problem. We agree. In practice, problems do not result from the grading of the offences. The requisite harm and requisite intent for the offences set out in the 1861 Act are clear. Courts routinely apply, and are familiar with, the distinctions in seriousness at sentence between those offences. Prosecutors in the Crown Courts and Magistrates Courts are duty-bound to review charging decisions and prosecutions (including at sentence) according to both evidential sufficiency and public interest limbs of the Code for Crown Prosecutors. Judges can superintend that exercise by asking questions of prosecutors that are relevant to assessments (by the Crown Prosecution Service) under those two limbs. We doubt that a tidying-up exercise would be a valuable use of Parliamentary time.**
3. *Do consultees consider that, in principle, it is desirable that offences of violence to the person should be defined in such a way that the offender must intend or foresee the type and level of harm specified in the external elements of the offence? Or should the mental element of offences be set in accordance with a different principle?*³ **As a broad statement of principle, we agree it is desirable that offences of violence to the person should be so defined. We note, and we endorse, the correspondence principle, which best enshrines this broad statement of principle. The correspondence principle [summarised at para. 3.40] entails a basic pre-condition of criminal responsibility: *D should be held criminally liable (only) where D was aware of prevailing circumstances – or was at least aware of the risk that those circumstances may prevail*. This is a principled starting-point. However, we agree with the academic justification of constructive liability [see para. 3.38], provided its limits**

¹ Para 3.15.

² Para 3.27.

³ Para 3.43.

are clearly defined and it accords with common-sense and sound public policy. Though it is not strictly within the terms of this consultation, we would point to the development of ‘parasitic’ secondary liability in joint enterprise cases, from *Powell & English* [1999] 1 AC 1. We regard the open-ended nature of this form of liability, as it has developed through the common-law, as unclear, draconian, and too remote from the core principles of criminal liability. We note the distinction drawn between offences of ulterior intent and offences of constructive liability. However, we agree that offences of ulterior intent do not violate the correspondence principle in a way that causes unfairness to a defendant, again provided they are defined with sufficient clarity. This is our position for the cogent reasons set out in the consultation at para. 3.42.

4. *Do consultees consider that the offences under sections 20 and 47 of the 1861 Act are unsatisfactory because they do not require intention or foresight of the type and level of harm that must occur? In their experience, does this give rise to problems in practice?*⁴ **Our view is that the distinction between these offences does not represent a significant difference between the types of harmful conduct that they penalise. Each is punishable with a maximum sentence of five years imprisonment, so the distinction is not based on the seriousness of the harm that is caused. We recognise that there is sound public policy in legislating against unjustified acts of violence in which the ultimate consequence may not have been specifically intended, because a relatively trivial act may disproportionately lead to serious harm, and such acts should be discouraged. We think that a single offence of assault, with a maximum sentence of five years, and without an element of a specific intent to do serious harm, would suffice.**

5. *Do consultees consider that there is benefit in pursuing reform of the law of offences against the person including offences of endangering others?*⁵ **Save as set out above, we do not see any benefit in pursuing reform of the law of offences against the person insofar as offences of endangering others are concerned. We note the Law Commission [at para. 3.65] characterises the existing law as ‘reflect[ing] a middle position’. That middle position is such that the existing law provides for endangerment offences where activities intrinsically involve a high degree of risk. The Law Commission [also at para. 3.65] records that those offences include conduct in connection with driving and the use of explosives and firearms. We agree with the view [set out at para. 3.64] that excessive criminalisation of conduct is not in the public interest.**

⁴ Para 3.59.

⁵ Para 3.67.

6. *If so, should these offences be general or restricted to specific fields of activity?*⁶ For reasons we have set out immediately above [see our answer to question five], we do not advocate the creation of such further offences.
7. *Do consultees consider that the language of the 1861 Act is in need of updating?*⁷ We do not. Criticisms that the language of the 1861 Act is ‘archaic’ and ‘imprecise’ [at para. 3.69] are purely confined to the academic. We note the concern in the consultation [at para. 3.70, 3.72 and 3.77] that some words used in the 1861 Act are not everyday, ordinary words – such as ‘bodily’ and ‘grievous’ and ‘detainer’. However, we do not agree that the courts need to apply ‘creative interpretation’ [as is the criticism at para. 3.71] to those words. The criticisms made of the language of the 1861 Act are misconceived. The courts have not hesitated to construe that Act by way of purposive, constructive interpretations. Decisions of the courts have long breathed currency and life into the language of the 1861 Act. The case of *Regina v. Burstow; Regina v Ireland* [1997] UKHL 34, decided by the House of Lords in July 1997, held it was right that the words ‘bodily harm’ included psychiatric illness *per* sections 18, 20 and 47 of the 1861 Act. An offence under section 20 could be committed in the absence of a direct or indirect application of force to the body, and silent telephone calls were capable of constituting an assault under section 47. In so doing, the House of Lords affirmed the decision of the Court of Appeal to interpret the language of the Act in this way.

Moreover, juries are given approved directions if and when questions of interpretation arise with which the court should assist. An immediate example is that a jury must be directed, and so assisted, if it asked, “*What does ‘grievous’ mean?*”, by a direction that it means ‘really serious’. The consultation notes this [at para. 3.76].

8. *Do consultees consider that the language of the 1861 Act is obscure and contains redundancies, and would there be benefits in making it more explicit?*⁸ For reasons we have set out immediately above [see our answer to question seven], we do not invite statutory modernising of the language of the 1861 Act. The Act has routinely and readily been construed such that it is fit for purpose in courts today. In theory, a statute that did not use out-dated expression would be desirable, but we doubt that the value of an exercise to tidy up the language of the 1861 Act would be proportionate to the expense and Parliamentary time that would be required.

⁶ Para 3.68.

⁷ Para 3.78.

⁸ Para 3.91.

1.9

10. *Do consultees consider that legal references in any statute governing offences against the person should be updated to reflect the current state of the law to which they refer?*⁹ **We agree with the analysis of the Law Commission [at para. 3.94] ‘This situation does not cause problems in practice.’ We consider that there are serious problems in the drafting of the 1861 Act, and that there would be substantial benefit in pursuing reform of the offences now contained in that Act. Do consultees agree?¹⁰ **See our response to questions 7-9.****
11. *Are consultees aware of further theoretical or practical problems in connection with the 1861 Act other than those addressed above?*¹¹ **No, and neither is it useful to look for further theoretical problems.**

REFORM: GENERAL PRINCIPLES

12. *We consider that there would be benefit in pursuing reform of the law of offences against the person in the form of a modern statute replacing all or most of the Offences Against the Person Act 1861. Do consultees agree?*¹² **We would suggest removing some of the offences that have no relevance to contemporary life (such as those set out in paragraph 3.5 of the Consultation Paper). We would suggest a new, single offence of assault to replace sections 20 and 47 of the 1861 Act, for the reasons set out above.**
13. *We consider that any comprehensive statutory reform of offences against the person should involve consideration of the previous proposals, and specifically the Home Office’s 1998 draft Bill. Do consultees agree?*¹³ **We do not seek to add anything.**
14. *We consider that there would be benefit in pursuing reform with a modern statute that included a definition of injury, subject to further consideration of:*
- (1) *the breadth of “mental injury”;*
 - (2) *the exclusion of disease (see **Error! Reference source not found.**).*

⁹ Para 3.95.

¹⁰ Para 3.96.

¹¹ Para 3.97.

¹² Para 4.5.

¹³ Para 4.8.

*Do consultees have any views on this?*¹⁴ **We do not seek to add anything.**

15. *We consider that there would be benefit in pursuing reform with a modern offences against the person statute which included a definition of the term “intention”. However, we consider that a formula similar to that in our report on Murder, Manslaughter and Infanticide would be preferable to that in the 1998 Bill. Do consultees have any views on this?*¹⁵ **We do not seek to add anything.**
16. *We consider that there would be benefit in pursuing reform with a modern offences against the person statute including a definition of “recklessness” similar to that in the draft Bill. Do consultees agree?*¹⁶ **We do not seek to add anything.**

ASSAULT AND BATTERY

17. *We consider that there would be benefit in pursuing reform of psychic assault and battery. Do consultees agree?*¹⁷ **Surely this question refers to ‘psychiatric’, not ‘psychic’. See our answer to question seven, above. We refer again to the case of Regina v. Burstow; Regina v Ireland, decided by the House of Lords in July 1997. No reform is needed.**
18. *Do consultees consider that it would be preferable to pursue reform based on:*
- (1) *a single offence covering the scope of both of the present offences, as in clause 4 of the 1998 draft Bill; or*
 - (2) *separate offences (under whatever names) of psychic assault and physical attack?*¹⁸

We do not seek to add anything.

OFFENCES OF CAUSING INJURY

19. *We consider that there would be benefit in pursuing reform consisting of a modern statute with a hierarchy of offences based on causing injury,*

¹⁴ Para 5.18.

¹⁵ Para 5.29.

¹⁶ Para 5.32.

¹⁷ Para 5.49.

¹⁸ Para 5.50.

*similar to that in the draft Bill. Do consultees agree?*¹⁹ **We refer to our answer to question two, above. We note the Law Commission itself [at para. 3.23] doubts that the hierarchy of offences *per se* is a problem. We agree.**

20. *We consider that there would be benefit in pursuing reform in which the scheme of the 1998 draft Bill would be modified to include a summary offence of causing minor injury. Do consultees agree?*²⁰ **We do not agree. The offence of common assault is sufficient.**
21. *Do consultees have views on the way in which an offence of causing minor injury should be incorporated into the hierarchy of offences?*²¹ **We do not seek to add anything.**
22. *We consider that there would be benefit in pursuing reform of offences against the person in which it is specified in what circumstances offences of causing injury can be committed by omission. Do consultees have views on whether any of these offences should include causing injury by omission?*²² **We note the Law Commission do not [at paras. 5.110 and 5.111] propose examples of conduct to which any such reform should (and needs to) be addressed. We think this is the best demonstration of how very theoretical and moot this really is.**

PARTICULAR ASSAULTS

23. *Do consultees consider that there would be benefit in pursuing reform in which it is specifically provided that conduct in England and Wales causing injury abroad falls within the offences of causing injury?*²³ **No. In practice, the laws of extradition and extra-territoriality cater for these scenarios.**
24. *We consider that there would be benefit in pursuing reform including offences of assaulting a police constable, causing serious injury while resisting arrest and assault while resisting arrest in the form contained in the draft Bill, subject to consideration being given to:*
- (1) *the maximum sentence for the offence of causing serious injury while resisting arrest;*

¹⁹ Para 5.87.

²⁰ Para 5.100.

²¹ Para 5.101.

²² Para 5.112.

²³ Para 5.122.

(2) *the possibility of introducing a requirement that D knew that or was reckless as to whether V was a police constable, as in the 1993 report.*

*Do consultees agree?*²⁴ **No. There is no case for revising the maximum sentence. There is no case for introducing a requirement that D knew, or was reckless as to whether, V was a police constable.**

25. *Do consultees consider that there would be benefit in considering the abolition of the offences of assaulting or obstructing clergy and of assaulting magistrates and others preserving a wreck?*²⁵ **Yes. These offences are obsolete and have no place in 21 century criminal law.**
26. *We consider that there would be benefit in pursuing reform including revised offences of racially and religiously aggravated violence, based on the offences of assault and causing injury defined in the draft Bill. Do consultees agree?*²⁶ **We disagree. Very significantly, we note that no such reform was proposed by the Law Commission in its relatively recent consultation, which concluded in 2013, ‘Hate Crime: The Case for Extending the Existing Offences’ (consultation paper no. 213). We do not seek to argue differently.**
27. *Do consultees consider that there is benefit in examining whether reform of offences against the person should include specific offences of domestic violence?*²⁷ **Our view is that no benefit would be gained by either complainants or the general public were such law reform to be implemented. There is some significant political impetus for introduction of such a specific offence. We note the Law Commission made a public statement, in November 2014, that there should be a specific and discrete offence to deal with domestic violence. We surmise that what prompted that were the comments made in 2014 by both the prime minister, David Cameron, and Labour’s shadow home secretary, Yvette Cooper, both of whom supported the introduction of an offence dedicated to dealing with domestic violence incidents. Our view is that there would be no benefit to anyone were such reform to be introduced. This is our view for reasons as follows. Police and prosecutors already mark with a red flag on the Police National Computer central database, and so record, where convictions resulted from domestic violence. Police record, and prosecutors (and thereby courts) have access to, a factual record of the circumstances of a given case of domestic violence. That is *per* the approved record-keeping of**

²⁴ Para 5.138.

²⁵ Para 5.139.

²⁶ Para 5.143.

²⁷ Para 5.153.

police forces and prosecuting authorities. Trial and sentencing courts routinely require sufficient information about the factual circumstances of a conviction whenever a defendant is before a court who has an antecedent forensic record featuring an offence of domestic violence. Accordingly, there is no need to label an offence one of domestic violence. That much is already apparent with the current system whereby records are kept of convictions. Those records are made available easily and readily to prosecutors, the defence and courts. No law reform as proposed is in fact required.

OTHER OFFENCES UNDER THE 1861 ACT

28. *Do consultees consider that there would be benefit in pursuing reform including a revised and clarified offence of encouraging murder?*²⁸ **No practical benefit (or benefit in principle) would be gained by any such reform. The maximum sentence for assisting and encouraging an offence is the same as that for the offence for which assistance or encouragement is given. The Law Commission has made this very point [at para. 5.162].**
29. *We consider that there would be benefit in pursuing reform including an offence of threatening to kill or cause serious injury, in the form given in clause 10 of the 1998 Bill, amended to cover the case where the threat is conditional. Do consultees agree?*²⁹ **We disagree. There would be no advantage to introducing this reform. Where making threats to kill is not, or can not be, proved, then, typically, other offences will be under consideration based on the conduct with which police and prosecutors are presented.**
30. *We consider that there would be benefit in considering whether reform of the law of offences against the person should include an offence of administering a substance capable of causing injury, similar to that in clause 11 of the draft Bill. Do consultees have views about such an offence?*³⁰ **We disagree. No additional benefit could be gained to that which already exists with sections 22 and 24 of the 1861 Act, both of which are concerned with noxious substances. Where a substance is capable of causing injury, that is a relevant factor to which sentencing courts, properly, will have regard.**
31. *We consider that there is benefit in pursuing reform including offences relating to explosives and dangerous substances, in the form given in the*

²⁸ Para 5.170.

²⁹ Para 5.174.

³⁰ Para 5.187.

*draft Bill. Do consultees agree?*³¹ **We disagree. The panoply of existing offences, for which the 1861 and other Acts provide, are adequate. No case has been presented in the consultation to persuade us to the contrary.**

ALTERNATIVE VERDICTS

32. *We consider that there would be benefit in pursuing reform including a provision about included offences, similar to clause 22 of the draft Bill, amended to take account of the offence structure decided upon. Do consultees agree?*³² **No difficulties present in practice. We do not seek to add anything.**

TRANSMISSION OF DISEASE

33. *We consider that future reform of offences against the person should take account of the ramifications of disease transmission. Do consultees agree?*³³ **Current sentencing guidelines and appellate authorities and guidance provide for this. The risk, and actual transmission, of disease are both factors relevant to, and capable of aggravating, sentence. Both the Sentencing Council and the Court of Appeal have clearly provided for this. There is no lacuna in the existing law.**
34. *We also consider that in such reform consideration should be given to:*
- (1) *whether disease should in principle fall within the definition of injury in any reforming statute that may be based on the draft Bill;*
 - (2) *whether, if the transmission of sexual infections through consensual intercourse is to be excluded, this should be done by means of a specific exemption limited to that situation. This could be considered in a wider review; alternatively*
 - (3) *whether the transmission of disease should remain within the offences as in existing law.*

³¹ Para 5.195.

³² Para 5.211.

³³ Para 6.81.

*Do consultees agree?*³⁴ **No difficulties present in practice. We do not seek to add anything.**

35. *If the transmission of disease is to be included in any future reform including offences of causing injury, it will be necessary to choose between the following possible rules about disclosure of the risk of infection, namely:*

- (1) *that D should be bound to disclose facts indicating a risk of infection only if the risk is significant; or*
- (2) *that D should be bound to disclose facts indicating a risk of infection in all circumstances; or*
- (3) *that whether D was justified in exposing V to that risk without disclosing it should be a question for the jury in each particular case?*³⁵

Do consultees have any preference as between these possible rules? **No difficulties present in practice. We do not seek to add anything.**

36. *We consider that reform of offences against the person should consider the extent to which transmission of minor infections would be excluded from the scope of the injury offences. Do consultees agree?*³⁶ **Sentencing judges are already very capable of determining threshold questions such as this, on a case-by-case basis, assisted by counsel for both parties.**

37. *Do consultees consider that future reform should pursue the possibility of including specialised offences of transmission of infection, endangerment or non-disclosure?*³⁷ **There is no need for specific offences. Existing offences and existing sentencing guidelines and guidance are sufficient.**

38. *Do consultees have observations on the use of ASBOs, SOPOs or other means of penalising non-disclosure?*³⁸ **No. No case has been presented in the consultation to suggest there is need in practice to reform these orders.**

³⁴ Para 6.82.

³⁵ Para 6.98.

³⁶ Para 6.99.

³⁷ Para 6.110.

³⁸ Para 6.111.