The Law Commission

(LAW COM. No. 177)

CRIMINAL LAW

A CRIMINAL CODE FOR ENGLAND AND WALES

VOLUME 2

COMMENTARY ON DRAFT CRIMINAL CODE BILL

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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.

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THE LAW COMMISSION

Item XVIII of the Second Programme

CRIMINAL LAW

A CRIMINAL CODE FOR ENGLAND AND WALES

VOLUME 2: COMMENTARY ON DRAFT CRIMINAL CODE BILL

Introduction to Volume 2

Parts 4 to 18 of our Report, contained in this Volume, take the form of a commentary upon the draft Criminal Code Bill (set out in Volume 1, Appendix A) which we have discussed in general terms in Part 3 of Volume 1.

The draft Bill is in two parts.

Part I is concerned with "General Principles" — with introductory matters and with the so-called "general part" of the criminal law. It includes a specification of the "preliminary" offences of incitement, conspiracy and attempt to commit other offences.

Part II contains a statement of "Specific Offences" in five Chapters. The recommendation of these Chapters for inclusion in the Code as first promulgated, and the general criterion of user convenience employed to justify the omission of some offences, have been explained in Volume 1 at paras. 3.3 — 3.6 and 3.25 — 3.26.

Report relating to Part I of the Draft Bill

The immediately following pages (Parts 4 to 13) concern Part I of the draft Bill. Many passages in this section of our Report draw freely upon corresponding passages in the Code team's commentary on their draft Bill in Law Com. No. 143.

PART 4

PRELIMINARY PROVISIONS

Introduction

4.1 *Location of these provisions.* Some of the provisions in the opening clauses (interpretation; repeals, amendments and effect on existing law; short title, commencement and extent) are of a kind normally found at the end of a statute rather than at the beginning. This statute, however, will be of a somewhat special kind. It is hoped that its enactment will be but a first step in the creation of a more complete Criminal Code, containing further offences in Part II and additional Parts dealing with procedure, evidence and the disposal of offenders. It would therefore be unsatisfactory to create a Part III at this stage simply to receive some of the matter in clauses 1 to 5. Moreover, there is a positive case for having near the beginning of the Code both the general interpretation clause (clause 6) and the provisions concerning the relationship of the Code to the common law (clause 4).

Clause 1: Short title, commencement and extent

4.2 This clause does not require comment.

Clause 2: Application of this Act and other penal legislation

4.3 *Provision against retrospective operation.* Subsection (1) applies to the Code, and states for subsequent legislation, the important general presumption in English law against the retrospective operation of penal legislation. The Code in general applies only to offences committed wholly or partly after it comes into force; and similarly with subsequent legislation creating or amending an offence. 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 (or other legislation), 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 homicide has been replaced by the relevant provisions of Part II, Chapter I, of the Code, his liability will be determined by those provisions, as being the law in force at the time when the result occurred.[1]

4.4 *Exception for adjectival provisions*. Matters of procedure and evidence are in principle regulated by the law in force at the time of the proceedings in which they are relevant. Subsection (2) therefore provides that most of the provisions in Part I dealing with such matters will have effect in proceedings in respect of offences committed even before the Code comes into force. The provisions listed in subsection (2) include those concerning alternative verdicts (clause 8), double jeopardy (clause 11) and proof (clauses 13 and 14—though cl. 13 (6) provides an exception in this respect). They do not, however, include the procedural provisions relating to liability as an accessory (clause 28), because these 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.

4.5 *Subsection (3): provisions not applying to "pre-Code offences"*. Part I of the Code provides a "general part" of the criminal law, applicable to all offences. In addition to the procedural and evidential matters referred to in the preceding paragraph, 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 governing the effect of intoxication or mental disorder, participation in an offence as an accessory, or the availability of general defences, should not vary according to whether the offence was created by the Code or by subsequent legislation or already existed when the Code was enacted.

4.6 To this principle, however, there have to be some exceptions. There are a few provisions in Part I which, if allowed universal application, might improperly affect the interpretation or operation of very many existing offences. Subsection (3) therefore provides that "pre-Code offences" — that is, offences wholly or partly defined in pre-Code legislation (or in subordinate legislation made under pre-Code legislation) and subsisting common law offences[2] — shall continue to apply as if the provisions in question had not been enacted. So, for example, if one of the fault terms defined by clause 18 is used in an enactment defining a pre-Code offence, it will continue to have its former meaning in that context, rather than its meaning under clause 18 if that is different; and existing offences of strict liability will not be converted by clause 20 into offences requiring fault.[3]

4.7 *Law determining penalties*. Subsection (4) 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,[4] although 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 offender should receive the benefit of the change in the law. The subsection so provides.

Clause 3: Creation of offences

4.8 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.*[5] 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.*[6] 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.[7]

[1]Clause 2(1) follows in this respect the precedent of the Theft Act 1968, s. 35(1).
[2]See clause 6 for the formal definition of "pre-Code offence".
[3]A similar exception to the general application of Part I is created by clause 13 (6), which concerns the burden of proving some statutory defences.
[4]See, e.g., *D.P.P.*v. *Lamb*[1941] 2 K.B. 89; *Oliver*[1944] K.B. 68.
[5][1973] A.C. 435, at 457-458, 464-465, 490, 496.
[6][1962] A.C. 220, at 267-268.
[7]See Report, Vol. 1, para. 2.11.

Clause 4: Effect on common law

4.9 The relationship of the proposed Code to the common law has been considered earlier.[8] This clause makes the necessary provision. Subsection (1) abolishes common law offences (listed in Schedule 8)[9] replaced by new offences created by the Code.[10] Subsection (2) abrogates common law rules corresponding to or inconsistent with Code provisions. Subsection (3) ensures that existing statutory references to replaced common law offences and common law rules will hereafter be understood to be references to corresponding Code offences and rules. Subsection (4) expressly preserves other rules of the common law and the power of the courts to determine their existence, extent or application.[11]

Clause 5: Amendments and repeals

4.10 This clause provides for repealing and amending Schedules.[12] Work on identifying the enactments to be listed in these Schedules would be premature and we have not undertaken it.

Clause 6: General interpretation

4.11 This clause provides for the interpretation of words and phrases requiring explanation or partial explanation for the purposes (i) of two or more clauses in Part I, or (ii) of provisions in Part I and Part II, or (iii) of provisions in two or more Chapters of Part II. It provides those explanations or cross-refers to the provisions in which they are to be found.

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[8] *Ibid.*, paras. 3.36-3.38.

[9] A consequence of our decision (see para. 4.1 above) to put these provisions in the opening clauses is that the Schedule abolishing the common law offences, together with the amending and repeal Schedules, would appear as Schedules 1, 2 and 3 respectively. We think that these Schedules should appear (in their usual position) at the end of the Bill (as Schedules 8, 9 and 10).

[10] The common law offences in question and the provisions which replace them are: incitement (replaced by clause 49); murder (clause 54); manslaughter (clause 55); mayhem (clause 70); assault and battery (clause 75); false imprisonment (clause 80); kidnapping (clause 81); and buggery (clauses 95-99).

[11] For examples of matters left to the common law, see below, paras. 7.9 (duties to act creating liability for omission to act), 10.24 (unincorporated bodies—principles of liability) and 12.40 (justification and excuse other than those expressly provided by the Code or by enactments concerned with particular offences).

[12] See Schedules 9 and 10 (and see further n. 9 above).

PART 5

PROSECUTION AND PUNISHMENT

Introduction

5.1 It is necessary to prescribe for each offence included in the Code its classification so far as concerns mode of trial; the maximum penalties that may be imposed; any restrictions on proceedings; any special power to convict of other offences; and any other matters peculiar to the offence. We have adopted the Code team's suggestion that all this material should be relegated to a comprehensive Schedule.[1] This will enable the user to see at a glance how these matters are dealt with by the Code for any offence or group of offences with which he is concerned; and it will avoid cluttering Part II with material that would make it unduly difficult to use.

5.2 The enacting clause giving effect to the Schedule cannot conveniently be placed at the beginning of Part II. For, first, the Schedule will refer to the preliminary offences of incitement, conspiracy and attempt, and these, we propose, will appear in Part I (see clauses 47 to 49). Secondly, special provisions for conviction of other offences are part of the larger topic of "alternative verdicts", which ought, we think, to be stated in full in the Code for offences generally; and it is convenient to associate the provisions on that topic with others on double jeopardy and multiple convictions, if only because they share the concept of "included offences". The result is a group of clauses in Part I which, although procedural, ought to be of considerable assistance to users of Part II of the Code and of other criminal legislation.

Clause 7: Prosecution, punishment and miscellaneous matters

5.3 *Schedule 1* contains for each offence stated in the Code the matters referred to in paragraph 5.1 above. We contemplate that, as future legislation adds offences to Part II of the Code, the Schedule will be enlarged accordingly. Clause 7, together with clause 8 (1)(a)(i), gives effect to the Schedule.

5.4 *Mode of trial* for each offence is stated in column 3 of the Schedule (subsection (2)).

5.5 *Maximum penalties* for each offence are the concern of subsections (3) and (4).

Paragraph (a) of subsection (3) provides for a case where an offence is tried on indictment (whether it is only so triable or is triable either way). It refers to column 4 of the Schedule, which states (except for murder[2]) 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) concerns offences triable either way which are tried summarily. It provides for column 4 to state any variations from the normal powers of the magistrates' court to imprison or fine. Those normal powers are provided for Code offences by subsection (4).[3]

Paragraph (c) provides for column 4 to state the maximum sentence of imprisonment or fine for an offence that is triable only summarily.

5.6 *Restrictions on proceedings* (any consent required or time limit) are stated in column 5 of the Schedule (subsection (5)).

5.7 *Ancillary and miscellaneous matters* relating to particular offences are stated or conveniently cross-referenced in column 7 of the Schedule.

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[1]Cf. Sexual Offences Act 1956, Sched. 2; Companies Act 1985, Sched. 24; Road Traffic Offenders Act 1988, Sched. 2.

[2]Murder requires special provisions that are more conveniently carried in the clause stating that offence (cl. 54). There is an informative cross-reference in column 4.

[3]Imprisonment not exceeding six months or a fine not exceeding the "statutory maximum" (defined in Criminal Justice Act 1982, s. 74(1) and currently £2,000) or both. These are the powers provided by Magistrates' Courts Act 1980, s. 32(1), in relation to offences listed in Schedule 1 to that Act, and commonly provided by other enactments creating offences triable either way.

Clause 8: Alternative verdicts

5.8 There are various circumstances under the present law in which an accused person on trial on indictment may be convicted of an offence other than that with which he is specifically charged. Magistrates at present have no such power; but the Criminal Law Revision Committee has proposed that it should be given them in respect of certain offences against the person,[4] and our draft Bill, which in Chapter I of Part II implements the recommendations of the Committee's Fourteenth Report, provides accordingly. Clause 8 and column 6 of Schedule 1 codify the present law on the subject, restating the general principles and providing authority under the Code for special cases. Subsections (1)-(3) provide for trial on indictment and subsection (4) for summary trial.

5.9 *Subsection (1)(a).* Paragraphs (b), (c) and (d) of this subsection state principles applying to offences generally. Paragraph (a) deals with particular cases (not falling within those general principles) where the law allows conviction of an alternative offence on trial on indictment.

Sub-paragraph (i) of paragraph (a) refers to column 6 of Schedule 1 which specifies, in relation to any offence included in Part II of the Code, any other offence of which a jury may convict when acquitting a person of the offence itself. Some of the entries in column 6 reproduce the effect of statutory provisions re-enacted in Part II.[5] Some follow corresponding provisions of the Sexual Offences Act 1956. (The Criminal Law Revision Committee, whose recommendations on sexual offences are in general implemented in Chapter II of Part II, made no reference to alternative verdicts in its relevant reports.) And some, relating to offences against the person, give effect to recommendations in the Fourteenth Report of the Criminal Law Revision Committee.[6]

Sub-paragraph (ii) simply refers, for completeness, to cases in which alternative verdicts are permissible under legislation other than the Code.

5.10 *Subsection (1)(b)* reproduces the law currently stated in section 6(3) of the Criminal Law Act 1967. A person acquitted on indictment of the offence charged[7] may be found guilty of an offence within the jurisdiction of the court[8] (i) which is (in Code language) "included" in the offence charged; or (ii) of which he might be found guilty on an indictment charging him with an included offence.[9]

5.11 *"Included offence"* is defined in clause 6:

> "'included offence', in relation to an offence charged, means an offence an allegation of which is included (expressly or by implication) in the allegations in the indictment or information."[10]

This employs the language of the Criminal Law Act 1967, section 6(3). But it abandons as otiose that provision's separate reference to the case where the actual allegations "amount to" an allegation of another offence; for it seems plain that an allegation of one offence cannot "amount to" an allegation of another offence without "including" an allegation of that other offence.[11] It is true that in *Wilson*[12] Lord Roskill assumed that the words "amount to" must have a separate function. But it is not clear from his opinion what that function is; and it has to be said that the analysis of the subsection in *Wilson* has been the subject of exceptionally severe criticism.[13]

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[4]Fourteenth Report (1980), Cmnd. 7844, recommendations in paras. 156, 161, 177 and 182.

[5]See the entries in column 6 against the offences created by clauses 140 (theft), 199 (violent disorder) and 200 (affray).

[6]Some additions to, and departures from, those recommendations are explained by the Code team in Law Com. No. 143, paras. 5.8-5.10.

[7]Other than treason and murder. These exceptions follow s. 6(3) of the 1967 Act. Manslaughter, though an included offence in relation to murder, is therefore listed against murder in column 6.

[8]Not, therefore, of an offence triable only summarily.

[9]See Appendix B, Example 8.

[10]The words "or information" are necessary for the purposes of clauses 11 (double jeopardy) and 12 (multiple convictions). But for this the definition would be more conveniently located in clause 8, as some critics of the Code team's Bill suggested.

[11]The same phrase in the Criminal Law Act 1977, s. 1 (1), is abandoned in clause 48(1) (conspiracy), where "involve" suffices.

[12][1984] A.C. 242 at 258.

[13]See J.C. Smith [1984] Crim. L.R. 37 and [1987] Crim. L.R. 473; C. Emmins [1984] Crim. L.R. 152; Glanville Williams [1984] C.L.J. 290.

5.12 *Subsection (1)(c)* continues the re-enactment of provisions of the Criminal Law Act 1967 by permitting a jury, when acquitting a person of an offence, to find him guilty of an attempt to commit either that offence or any other offence of which it has power to find him guilty.[14]

5.13 *Subsection (1)(d)* reproduces the effect of section 4(2) of the Criminal Law Act 1967 by providing for conviction of assisting an offender guilty of the offence charged. It is right to transfer this provision to the Code alongside other alternative verdict provisions of general application.

5.14 *Jury disagreement.* Subsection (2) applies subsection (1) to a case in which the jury cannot agree and is therefore discharged from returning a verdict in respect of the offence charged. It appears to be a proper generalisation from the decision of the House of Lords in *Saunders.*[15] But the court will wish to discharge the jury from returning any verdict if there ought to be a retrial on the major charge on which the jury has failed to agree; and the subsection expressly preserves the court's power to do so.

5.15 *More than one count.* Subsection (1) assumes acquittal of "an offence charged in the indictment". Subsection (3) states that each count in an indictment is an "indictment" for this purpose.[16]

5.16 *Summary trial.* Subsection (4) implements the recommendations of the Criminal Law Revision Committee relating to conviction of alternative offences on summary trial of some offences against the person.[17]

5.17 *Abolition of alternative verdicts?* Before leaving clause 8 we ought to mention some general views on alternative verdicts that were advanced on consultation. The Western Circuit Scrutiny Group argued for the abandonment of all powers to return alternative verdicts (other than the power to convict of an attempt to commit the offence charged). All alternatives which the prosecution might wish to be considered ought, in the Group's view, to be expressly charged. We do not think that it is necessary to debate the merits of this view, for even if we were attracted by it we could not properly adopt it without prior consultation.

5.18 *Scheduling all possible alternative verdicts.* Some commentators, alarmed by the complexity of this clause in the Code team's Bill and no doubt seeking maximum clarity in the Code, proposed that all alternative verdicts available on a charge of an offence should be listed against that offence in the Schedule. This, as we understand the proposal, would mean applying the concept of an "included offence", as it were in the abstract, to every offence in Part II. The application of that concept, however, depends in some cases on the factual allegations in the indictment; the job cannot be completely done in the abstract. For that reason alone we have not been able to adopt the proposal. But in any case a full statement of the general principles on alternative verdicts is needed for the purposes of existing offences not carried into Part II ("pre-Code offences") and, if the proposal were adopted, would probably also be needed for the guidance of those drafting future offences. So a relatively complex clause codifying those principles cannot be avoided.

Clause 9: Conviction of preliminary offence when ulterior offence completed

5.19 This clause permits conviction of a "completed offence" on a charge of incitement, conspiracy or attempt to commit, or an assault or other act preliminary to, that offence. It 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[18] 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. This was probably because 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

[14]Criminal Law Act 1967, s. 6(3) and (4) (part). This provision is needed in addition to subsection (1)(b)(i) because an allegation of an attempt (involving the intention to cause a result which is an element of the full offence) is not necessarily included in an allegation of the full offence (which may not involve that intention).

[15][1988] A.C. 148.

[16]Cf. Criminal Law Act 1967, s. 6(7), in its application to s. 6(3).

[17]See para. 5.8 above.

[18]Seventh Report, Felonies and Misdemeanours (1965), Cmnd. 2659, para. 51.

felony merged in the completed felony.[19] Section 6 (4) made it clear that that rule (if it ever existed) had no application after the abolition of felonies by the 1967 Act. The Code, however, should state the whole law; so clause 9 applies to incitement, conspiracy and attempt. Like section 6 (4), it also applies to an assault or other offence preliminary to some ulterior offence — such as an assault intending 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.[20] Clause 9 therefore applies to summary trial as it does to trial on indictment.

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

Clause 10: 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. The modified wording used in clause 10 still fulfils that purpose; but it states more clearly the present law, as established in *Bannister* v. *Clark*[21] and *Thomas*,[22] 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.[23] So clause 10 is made expressly subject to those rules, which are now codified by clauses 11 and 12.

Clause 11: Double jeopardy

5.24 *A fundamental principle.* The principle of no double jeopardy — that a person ought not to be twice put in peril of suffering conviction of, and punishment for, the same offence — is stated in clause 11 in the form of a rule that a person is not to be tried for an offence in respect of which he has formerly been convicted or in peril of conviction. It has the appearance of a rule of procedure. But we are sure that the Code team were right to regard it as a fundamental principle of English criminal law that ought to be included in Part I of the Code. Clause 11 substitutes a reasonably simple statutory statement for a mass of common law materials. It replaces the special pleas in bar of *autrefois acquit* and *autrefois convict* and associated rules, including the analogous rules which apply to summary trial.

5.25 *The Code team's Report.* The subject of double jeopardy is somewhat technical and the Code team were at pains to defend in some detail the clause that they proposed for its statutory expression. As that clause escaped substantial criticism on consultation and forms the basis of our clause 11, we do not think that it is necessary here to repeat the whole of the Code team's treatment of the subject.[24] In the following paragraphs we content ourselves for the most part with a summary of the clause now proposed.

5.26 *Previous conviction or acquittal.* The basic rule is stated by subsection (1)(a) and (b): a person shall not be tried (a) for an offence of which he has been convicted or acquitted, or (b) for an offence of which he has been in peril of being convicted.[25] Paragraph (b) has thus to be read with clause 8 on the subject of alternative verdicts. The rule applies to summary trial as well as to trial on indictment.

5.27 *Previous acquittal or conviction of "included offence".* Paragraphs (c) and (d) of subsection (1), read with subsection (2), prohibit the trial of a person for an offence if the allegations in the indictment or information include the allegation of an offence of which he has been acquitted (paragraph (c)(i)) or convicted (paragraph (d)(i)), or of which he might

[19] *Russell on Crime* 12th ed., (1964), 193-195.
[20] *Webley v. Buxton* [1977] Q.B. 481.
[21] [1920] 3 K.B. 598.
[22] [1950] 1 K.B. 26.
[23] "Certainly it adds nothing and detracts nothing from the common law": *per* Humphreys J. in *Thomas* [1950] 1 K.B. 26 at 30.
[24] See Law Com. No. 143, especially at paras. 5.25-5.34.
[25] See Appendix B, Examples 11(i) and (ii).

have been convicted on an indictment or information charging him with an offence of which he has been acquitted (paragraph (c)(ii)) or convicted (paragraph (d)(ii)).[26]

5.28 To this rule there is one exception, applying only to paragraph (d), that is best explained by means of an example. A person who has been convicted of causing serious personal harm to another may be tried for homicide if the victim subsequently dies,[27] even though the indictment for homicide includes an allegation of an offence of intentional or reckless serious personal harm.[28] The exception to paragraph (d) to cater for this case is stated in general terms, because cases other than homicide where an element of the offence charged occurred after the previous conviction are not inconceivable.

5.29 *An exception for perjury?* The Western Circuit Scrutiny Group suggested that trial for perjury should be excepted from the operation of subsection (1)(c). The Group regarded it as unacceptable that a person who commits perjury when giving evidence on his own behalf on a criminal charge, and is acquitted, should then escape trial for that perjury. Paragraph (c) does indeed protect him where the perjury alleged is the false denial of all the elements of the offence previously charged. This is an application of the proposition that the prosecution cannot, at a later trial, take steps to challenge the correctness of a verdict of acquittal.[29] It can, on the other hand, be argued that some members of the House of Lords in *D.P.P.* v. *Humphrys*[30] appear to have considered that principles of double jeopardy do not bar a subsequent trial for perjury. Whatever the position on the present authorities (which is not an easy question to determine), we do not think that it is appropriate or necessary to make an express exception for perjury in paragraph (c). To do so might be inappropriate as an act of controversial law reform. And it is unnecessary because a prosecutor may in almost all conceivable circumstances avoid the effect of paragraph (c) by careful drafting of the perjury charge — that is, by alleging perjury in respect of one or some, but not all, of the elements of the offence of which the defendant was acquitted at his former trial. If this is done the allegation of perjury will not involve the allegation that the defendant actually committed that offence.[31]

5.30 *Previous conviction by court-martial.* For the sake of completeness, subsection (1)(e) refers to the prohibition under other legislation of the trial of an offence after conviction by court-martial.

5.31 *"Cause death" includes "cause personal harm".* Subsection (3) makes clear, for the avoidance of doubt, that a conviction or acquittal of an offence of causing personal harm or serious personal harm bars a trial for homicide arising out of the same facts (unless the exception to subsection (1)(d) applies).

5.32 *"Convicted" and "acquitted".* These words in subsection (1) refer to a "subsisting" conviction or acquittal: subsection (4)(a). So, for example, if a conviction of causing serious personal harm is quashed it is no longer subsisting. If 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 homicide. When a *venire de novo* is ordered there is no subsisting conviction or acquittal as the case may be.

5.33 *Courts outside England and Wales.* Such authority as there is supports the general application of the principles stated in subsection (1) to prior convictions and acquittals by courts of competent jurisdiction outside England and Wales[32] and subsection (4)(a)(ii) so applies them. It does so with two modifications.

(i) The criminal law of the foreign jurisdiction will almost inevitably differ from that of England and Wales. It must therefore suffice, for the purposes of a double jeopardy rule, that the prior conviction or acquittal (or the conviction of which the defendant was in peril) was, in the language of subsection (4)(a)(ii),

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[26]See Appendix B, Examples 11(iii)-(v).
[27]*Thomas* [1950] 1 K.B. 26.
[28]See para. 14.5 below.
[29]See *Sambasivam* v. *Public Prosecutor of Malaya* [1950] A.C. 458, *per* Lord MacDermott at 479.
[30][1977] A.C. 1: see especially *per* Viscount Dilhorne at 21-22; *per* Lord Hailsham at 31-32. This case concerned issue estoppel rather than double jeopardy and does not constitute direct authority on the point under consideration.
[31]See Appendix B, Example 11(vi). Cf. *D.P.P.* v. *Humphrys* itself.
[32]For the authorities relied on by the Code team, see Law Com. No. 143, para. 540, n. 28.

"of an offence substantially similar to that now charged and based on the same facts."[33]

(ii) Subsection (4)(b) provides that conviction by a court outside the United Kingdom cannot bar a subsequent trial in England and Wales if the foreign conviction occurred in the absence of the defendant and, because of his absence, the defendant is not in peril of suffering any punishment that the foreign court has ordered or may order. That was the situation in *Thomas*[34], where the defendant's plea of *autrefois convict* failed. Paragraph (b) states a slightly wider principle than any actually enunciated by the Court of Appeal in its judgment in *Thomas*, where the *ratio decidendi* is expressed[35] in a manner more precisely fitting the exact facts of the case before the court. No narrower generalisation than that in paragraph (b) would, we think, be appropriate in a codification of the law.

5.34 *Time of conviction or acquittal.* A conviction is stated to occur, for the purposes of this section, when it is recorded by the court of trial or by a court of appeal: subsection (5). An acquittal of an offence occurs when it is recorded by the court of trial; when the defendant is convicted without trial on his plea of guilty of some other offence of which he might be found guilty (for this has the effect of an acquittal of the offence charged by virtue of section 6(5) of the Criminal Law Act 1967); or when a person's conviction of it is reversed or quashed by a court of appeal or on judicial review (unless a retrial is ordered): subsection (6).

5.35 *Abuse of process.* Subsection (7) makes clear, for the avoidance of doubt, that a court's power to stay proceedings on the ground that they constitute an abuse of the process of the court is unaffected by the section.

5.36 *Offences taken into consideration.* It was suggested to us on consultation that this clause might expressly prohibit trial for any offence which has been taken into consideration ("t.i.c.") in sentencing the defendant for another offence. This, however, would be a departure from appellate statements in *Nicholson*[36] and in *North.*[37] Although it was said in the latter case that no additional penalty should be imposed on conviction of an offence that had formerly been t.i.c., even the impossibility of imposing a penalty, and *a fortiori* a bar on trial, might not be uncontroversial in a case where the original conviction was quashed and no part of the sentence had taken effect. We are satisfied that it would not be right, otherwise than in the context of a wider review of the t.i.c. procedure, to propose the extension of the double jeopardy rule in the way suggested.

Clause 12: Multiple convictions

5.37 This clause prohibits conviction on the same occasion both of the offence charged and of (a) an included offence[38] or (b) an attempt to commit the offence charged or an included offence. The clause is in all essentials as proposed by the Code team. As it was not the subject of any doubt or criticism on consultation, we do not burden this Report with repetition of the team's arguments for it (or for limiting paragraph (a) to included offences).[39]

[33]In *Thomas* [1985] Q.B. 604, D pleaded *autrefois convict* in bar of an indictment for theft, relying on a conviction in Italy of an offence of fraud based on substantially the same facts. The plea failed on another ground (see text, next paragraph); nothing was made of the fact that the Italian conviction was, inevitably, not for the same offence as that now charged. See also *Lavercombe and Murray* [1988] Crim. L.R. 435.

[34][1985] Q.B. 604.

[35]At 611.

[36](1947) 32 Cr.App.R. 98 and 127 (two divisions of the Court of Criminal Appeal).

[37]C.A., 9 July 1971; unreported, but extracted in Thomas, *Current Sentencing Practice*, L3.1(b).

[38]Cf. *Haddock* [1976] Crim.L.R. 374.

[39]See Law Com. No. 143, paras. 5.42-5.48.

PART 6

PROOF

Clause 13: Proof

6.1 *Burden of proof: the general rule.* Subsection (1) states the general rule in *Woolmington* v. *D.P.P.*[1] The burden is on the prosecution to prove every fact which it alleges or relies on. When the defendant wishes to set up a defence or to rely on any other fact, he bears, at most, an "evidential burden". When the evidential burden is satisfied, the burden is on the prosecution to disprove the fact in question. The nature of the evidential burden is described in subsection (2). Unless such evidence is already before the court, the defendant must adduce evidence which might lead a court or jury to conclude that there is a reasonable possibility that the fact alleged existed.

6.2 *Exceptions to the general rule.* The general rule applies "unless otherwise provided", whether expressly or by necessary implication, and subject to subsections (3) and (6). Subsection (3) provides for three cases where, under the present law, the burden of proof is, or probably is and, in our opinion, ought to be, on the defendant: to establish any fact necessary to prove (a) a plea in bar,[2] (b) the competence of a witness called by him,[3] (c) the admissibility of evidence tendered by him.[4] The House of Lords in *Hunt*[5] has confirmed that section 101 of the Magistrates' Courts Act 1980 imposes the burden of proving certain defences on the defendant at a summary trial and that there is a corresponding common law rule of interpretation which achieves the same effect at a trial on indictment. Subsection (6) preserves these rules.

6.3 *Standard of proof.* Subsection (4) states the general rule for standard of proof — for the prosecution, proof beyond reasonable doubt and, for the defendant, proof on the balance of probabilities. The general rule applies "unless otherwise provided", whether expressly or by necessary implication, and subject to subsection (5). This is concerned with the rare case of a special defence of the kind found in the Food Act 1984, section 100. An element of the defence is that a third person is guilty and liable to conviction in the same proceedings. The third person ought not to be convicted of the offence unless his guilt is proved beyond reasonable doubt and it is therefore necessary that that should be the standard of proof for this element of the defence.

Clause 14: Proof or disproof of states of mind

6.4 This clause implements our recommendation 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."[6]

The principle is expressed in shorter and simpler terms than in clause 18 of the Code team's Bill but the effect is the same. Our clause uses the words "had or may have had" because a party with the burden of proof must prove that the person in question *had* the state of mind[7] whereas it will be sufficient for the defendant, except where he bears the burden of proof, to show that the person *may have had* the state of mind.[8]

6.5 The clause states a truism and is therefore strictly unnecessary to the functioning of the Code. Nevertheless, in view of the history of English law in this matter,[9] it is desirable to include the provision, both as a reminder to the courts and as a reassurance to the public that it is not sufficient for a defendant simply to assert that he held a particular belief — e.g., that a woman was consenting to sexual intercourse when she was not.

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[1][1935] A.C. 462.
[2]*Coughlan and Young* (1976) 63 Cr. App. R. 33.
[3]R. Cross and C. Tapper, *Cross on Evidence* 6th ed., (1985), pp. 162-163.
[4]*Ibid.*
[5][1987] A.C. 352.
[6]Report on the Mental Element in Crime (1978), Law Com. No. 89, para. 97.
[7]See Appendix B, Examples 14(i) and (ii).
[8]Example 14(iii).
[9]See *D.P.P.* v. *Smith* [1961] A.C. 290; the Law Commission's report (1967) Law Com. No. 10, Imputed Criminal Intent (Director of Public Prosecutions v. Smith); Criminal Justice Act 1967, s. 8; *Hyam* v. *D.P.P.* [1975] A.C. 55; *D.P.P.* v. *Morgan* [1976] A.C. 182; Sexual Offences Act 1976, s.1(2); *Frankland* v. *R.* [1987] A.C. 576, P.C.

PART 7

EXTERNAL ELEMENTS OF OFFENCES

Introduction

7.1 *External and fault elements of offences.* The phrase "fault element" (which is defined in clause 6) is useful at a number of points in Part I of the Code. The phrase "external elements" merely matches it as a cross-heading under which to collect two clauses concerned with elements of offences other than fault elements. It is not used as a technical term in the Code.

7.2 *Offences and defences.* It is convenient to remark at this point that the Code makes a distinction between an offence (in the sense of the elements of "act"[1] and "fault" that must be proved if a person is to be convicted of it) and any defence that may be provided in the enactment defining it. This distinction, although controversial on theoretical grounds, is in practice indispensable in the statement of existing principles. For example, the prosecution has the burden of proving all the elements of an offence[2] but disproves a defence by disproving any element of it.[3] Moreover, to refuse to admit a distinction between "definitional elements" and defences would have unhappy drafting consequences both for the codifier and for the user of the Code.

7.3 Whether a particular circumstance is a matter of definition or of defence may occasionally be uncertain, and require judicial decision as a matter of statutory interpretation, especially if offences are not carefully drafted with an eye to the distinction. But we believe that the problem should arise only rarely (as it can do at present); for the Code is so drafted that very little will turn on this point of classification. 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 generally 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.[4] Something therefore turned (and, exceptionally, does so still[5]) 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[6] and Privy Council[7] authority, as well as recommendations of our own[8] and of the Criminal Law Revision Committee,[9] in no longer requiring beliefs as to matters of defence to be reasonably held.[10]

(ii) *Evidential burden and burden of proof.* Clause 13 (1)(b) 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". This makes it desirable for the draftsman of a new offence to decide into which category (offence 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.

External elements

7.4 *A problem of terminology.* The only substantive Code provision relating to the external elements of offences is clause 17, on the subject of causation. That subject apart, the main problem has been to settle upon a consistent and economical language by which to refer

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[1]See clauses 15 and 16.
[2]Clause 13 (1)(a).
[3]*More* (1987) 86 Cr.App.R. 234 at 247.
[4]*Albert* v. *Lavin* [1982] A.C. 546 (Divisional Court; decision affirmed by House of Lords on another ground).
[5]See, as to the defence of duress, para. 12.15 below.
[6]See especially *Gladstone Williams* (1983) 78 Cr.App.R. 276.
[7]*Beckford* v. *The Queen* [1988] A.C. 130.
[8]Report on Defences of General Application (1977), Law Com. No. 83, para. 2.27; Report on the Mental Element in Crime (1978), Law Com. No. 89, paras. 90-91.
[9]Fourteenth Report: Offences against the Person (1980), Cmnd. 7844, para. 283; cf. Fifteenth Report: Sexual Offences (1984), Cmnd. 9213, paras. 5.12-5.16.
[10]See clauses 41 (belief in circumstance affording a defence), 42 (duress by threats), 43 (duress of circumstances), 44 (use of force in public or private defence). The Code departs from this policy only where it reproduces existing legislation expressly requiring a belief to be held on reasonable grounds; see, e.g., cl. 196(4) (eviction and harassment of occupier).

to the varied elements of different kinds of offences. 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,[11] or being the owner of a ship from which oil is discharged.[12] 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. The Code team recommended, for the sake of economy of drafting, the use of a single term that could be understood to refer, where the context permitted, 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 that they adopted was "act", which, as they pointed out, is an adaptable word in ordinary use [13] and has the advantage for drafting purposes of being both noun and verb.[14]

7.5 Some reservations were expressed on consultation about this proposal and the way in which it was executed in the Code team's Bill.[15] We are persuaded, however, of the general convenience of having a term by which to refer both to the "*actus reus*" of the common law and to its constituent elements; and of being able to provide without repetition for offences requiring positive action, for offences of omission and for "status" and "situational" offences. And we are satisfied that the adaptability of the word "act" makes it the best available. The word is accordingly employed in the Code as a shorthand expression which is to be understood in context in the light of the guidance given by clauses 15 and 16. We hope that any difficulties attending the Code team's use of the method may have been reduced by drafting changes that have taken place in the preparation of the present Bill.

Clause 15: Use of "act"

7.6 This clause, then, is an interpretation clause. It does not define "act". It simply explains 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. This clarification of the use of the word "act" is not in fact essential; for we believe that no provision of the Code is on a fair reading truly ambiguous in its use of the term. But the clause may prove useful for the avoidance of doubt in those inexperienced in the reading of criminal statutes and as a protection against perverse reading or hopeless argument.

Clause 16: Offences of omission and situational offences

7.7 This also is an interpretation clause. In effect, it instructs the user of the Code that, when he is concerned with an offence of omission or with a situational offence, he should substitute a reference to the omission or situation in question (or to making that omission or being in that situation) for a Code provision referring to an act (or to acting or doing an act). He should do so, to be more precise, "where the context permits".

7.8 For example, clause 26 (1)(a) 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. Thus clause 16 permits clause 26 (to take but one example) to apply to exceptional classes of offence without resort to elaborate drafting or to excessive repetition. On the other hand, in clause 17 (1) (causation) a 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)). Here the context does not permit "act" to be read as referring to an omission.

Omissions

7.9 *No Code provision.* Criminal liability for failing to act is exceptional. Parliament sometimes makes it an offence to fail to do something (as with wilful neglect of a child, the failure of a motorist to exchange particulars after an accident or the failure of a company to

[11]Education Act 1944, s. 39(1).
[12]Oil in Navigable Waters Act 1955, s. 1(1).
[13]Law Com. No. 143, para. 2.24(iii): the word may describe a physical action (firing a gun), that action and its direct result (killing a person) or the action, the result and a relevant circumstance (killing a British citizen). This does not exhaust the versatility of the word.
[14]*Ibid.*, para. 7.3.
[15]See Buxton, "Codifying Action and Inaction" in Dennis (ed.), *Criminal Law and Justice* (1987), 87.

make an annual return). Most other instances of liability for omissions depend upon judicial construction of statutory language as referring to omissions as well as to acts, or upon common law (that is, judicial) recognition, in limited and rather ill-defined circumstances, of a duty to act to prevent a particular kind of harm (notably certain harms to the person) or to prevent the commission of an offence.[16] The Criminal Law Revision Committee, in its Report on Offences against the Person, identified the offences against the person that should be capable of being committed by omission — that is, by failure to act despite a duty to do so — but preferred to leave the scope of the duty to act undefined.[17] It was against this background that the Code team included in their Bill an elaborate clause on liability for omissions. The clause provided that criminal liability for omitting to do an act could not arise except in certain categories of case specified by the clause. One such category, referred to only because of the negative character of the primary proposition, was that of certain cases for which other clauses in the team's Bill provided; no more need be said of this category. The other categories are mentioned in the following paragraphs, in which we explain why we have found ourselves unable to include a provision relating to omissions in our draft Bill.

7.10 *Express provision for liability for omission.* The Code team first provided for liability for omitting to do an act where "the enactment creating the offence specifies that it may be committed by such an omission". But Professor Glanville Williams, in a detailed commentary on the Code team's clause from which we have derived much assistance,[18] has referred to a number of decisions holding offences to be capable of being committed by omission although the relevant enactments do not so provide in express terms. They include decisions on offences of "causing"[19] and "obstructing".[20] A requirement that the enactment "specify" the possibility of liability for omission might well be held to reverse these decisions. That would be a measure of law reform on which there has been no consultation and which could not be justified.

7.11 Nor would this difficulty be met by confining the effect of a Code provision on omissions to offences created by the Code and by subsequent legislation. We are proposing that the Code should incorporate a reformed law of offences against the person as recommended by the Criminal Law Revision Committee.[21] If liability for omissions depended upon express "specification", it would be necessary at least to specify the offences against the person that could be committed by omission. But to do so would seem to imply the need to decide what other offences in Part II of the Code are capable of commission by omission and to specify accordingly. This would require a multitude of decisions of a law reform character without the opportunity for appropriate study and consultation. An obvious and striking example of the difficulty is presented by the offences of damage to property.[22] We cannot assert that no such offences can be committed by omission[23]; nor can we specify what offences of that kind can be so committed.

7.12 *Offences against the person.* The Code team, secondly, listed the offences against the person specified by the Criminal Law Revision Committee as capable of commission by breach of a duty to act; and they proposed a definition of the cases in which a duty to act would exist. Both the Committee's recommendation and the team's definition of duties are controversial. But it is not necessary for us to review either of these matters here. For the reasons just given we decided to make no attempt to define which offences in Chapter I (Offences against the Person) or elsewhere in Part II of the Code (other than offences so defined as to consist in an omission) should be capable of commission by omission. This must remain a matter of construction and, so far as duties to act are concerned, of common law.[24]

7.13 *Drafting implications.* This has implications, however, for the drafting of some offences, most obviously of murder and manslaughter. At common law homicide may be

[16]For a useful summary, see Criminal Law Revision Committee, Fourteenth Report: Offences against the Person (1980), Cmnd. 7844, paras. 252-253.

[17]*Ibid.*, paras. 254-255.

[18]Glanville Williams, "What should the Code do about omissions?", (1987) 7 Legal Studies 92.

[19]Referring to Williams, *Criminal Law: The General Part* 2nd ed., (1961), 5.

[20]Referring to Williams, *Textbook of Criminal Law*, 2nd ed. (1983), 202-205; see, e.g., *Stunt* v. *Bolton* [1972] R.T.R. 435, [1972] Crim. L.R. 561 ("obstructing" constable by refusing, in spite of duty to do so, to hand over car keys). See also *Yuthiwattana* (1985) 80 Cr.App.R. 55 (failure to supply key to lodger as an "act" calculated to interfere with his peace and comfort; referred to by Professor Williams as a decision on the word "harass").

[21]See Part 14 below; draft Bill, Part II, Chapter I.

[22]Criminal Damage Act 1971, s. 1; draft Bill, cl. 180.

[23]The point is uncertain and controversial. See the Code team's Report, para. 7.9; Schedule I to their Bill included provocative illustrations of the effect of the Criminal Law Revision Committee's recommendations as compared with the law relating to offences of damage to property.

[24]As preserved by clause 4 (4) of the draft Bill.

committed by omission. Under the Code murder and manslaughter will be defined by statute for the first time. It is essential that they should not be so defined as to exclude liability for omission. The courts have in the past had no difficulty in holding the words "kill" and "slay" in an indictment capable of satisfaction by proof of an omission to act; but it does not necessarily follow that they would reach the same conclusion when construing the word "kill" in a statute. Clause 17 (1) makes it clear that, under the Code, results may be "caused" by omission. The draft Bill therefore defines homicide offences in terms of "causing death" rather than of "killing"; and other offences against the person similarly require the "causing" of relevant harms. It seems to us to be desirable to draft some other offences at least (most obviously, offences of damage to property) in the same way, in order to leave fully open to the courts the possibility of so construing the relevant (statutory) provisions as to impose liability for omissions. For to prefer "cause death" to "kill" while retaining "destroy or damage property" might be taken to imply an intention to exclude all liability for omissions in the latter case.

Clause 17: Causation

7.14 Some 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 should make provision. The subject has not undergone law reform consideration, either by ourselves or by the Criminal Law Revision Committee. Clause 17 is therefore designed to restate the principles to be found in the common law. These principles are reasonably well settled and can be stated quite shortly.

7.15 *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"[25] or "significant"[26] cause of the result, and in this context this means merely that the defendant's contribution must be outside the *de minimis* range.[27] Accordingly it is wrong, for example, to direct a jury that the defendant is not liable if he is less than one-fifth to blame.[28] Clause 17 (1)(a) states this requirement in terms that the defendant's act must make a "more than negligible" contribution to the occurrence of the result.[29] It is of course possible on this test for there to be more than one cause of a result, two persons being independently liable in respect of the same harm. As under the existing law, this test will take no account of a victim's peculiar susceptibility to harm.[30]

7.16 *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 "causes" a result if, being under a duty to do an act which might prevent the occurrence of the result, he omits to do that act.[31]

7.17 *Supervening causes*. Subsection (2) provides that a person does not cause a result if, after his own act or omission, an act or event occurs which satisfies three conditions: (i) it is the immediate and sufficient cause of the result; (ii) he did not foresee it; and (iii) it could not in the circumstances reasonably have been foreseen.[32] This appears to restate satisfactorily 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 this 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 so improbable that it can properly be said not to have been reasonably foreseeable.[33] Equally, liability for homicide will be unaffected if the victim refuses medical treatment for a wound caused by the defendant. Even if the refusal could be said to be unforeseeable, it is not sufficient in itself to cause the victim's death — in such a case, to use

[25] *Smith* [1959] 2 Q.B. 35; cf. *Malcherek* [1981] 1 W.L.R. 690, [1981] 2 All E.R. 422.
[26] *Pagett* (1983) 76 Cr.App.R. 279.
[27] *Hennigan* [1971] 3 All E.R. 133; *Cato* [1976] 1 W.L.R. 110, [1976] 1 All E.R. 260.
[28] *Hennigan*, above.
[29] See Appendix B, Example 17(i).
[30] See, e.g., *Hayward* (1908) 21 Cox C.C. 692.
[31] See Appendix B, Example 17(ii). A duty to act, relevant to criminal liability, may appear from the terms of the enactment creating the offence or may exist at common law. See para. 7.9 above.
[32] Example 17(iii).
[33] Cf. *Roberts* (1971) 56 Cr.App.R. 95.

the language of the cases, the original wound is still the "operating and substantial cause" of death.[34]

7.18 *Improper medical treatment.* A particular instance of an intervening act is improper medical treatment of a person injured by a wrongdoer. 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. No special rule appears to be needed for such cases, which can be accommodated under the provision described in the preceding paragraph.[35] Only in the most exceptional cases will improper treatment satisfy the two conditions of not being reasonably foreseeable and of being an immediate and sufficient cause of the relevant result; but if it does so the wrongdoer will be held not to have caused the result.[36] Under the clause proper medical treatment can never be a supervening cause sufficient to absolve the defendant.[37]

7.19 *Exception for accessories.* Subsection (3) 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 26 and 27. 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.

7.20 *Should the Code contain a provision on causation?* Some commentators on consultation questioned the necessity or wisdom of including in the Code a provision such as clause 17. They offered two kinds of objection: that such a provision is unnecessary, because the issue of causation is one of fact for the jury and rarely presents a problem; and that it is undesirable, because it will tend to generate unproductive argument among the jury and because it is in any case too complex to be read to a jury. We have given these objections careful consideration; but in the end we offer the clause in spite of them, for the following reasons.

7.21 Like any other legal issue, causation involves questions of fact and of judgment for the jury (did an act of the defendant contribute to the occurrence of the result? Was the third party's or the victim's intervening act reasonably foreseeable?). But this does not make causation wholly a question of fact. The questions for the jury to answer derive from principles of law, which appellate courts sometimes take occasion to state[38] and to which resort may be required in some, admittedly unusual, cases. An obvious example is the case of improper medical treatment following a wrongful act causing injury. If the Code does not state the relevant principles, it will be necessary for trial judges and others to go back to the common law to discover them. One of the main aims of codification — to state the known law clearly in a modern statute — will thereby be defeated.

7.22 Only, of course, where causation is in issue will the jury need to be troubled with clause 17. In the great majority of cases it will not be in issue and no direction on it will be required. Nor, when it is in issue, will the jury inevitably be troubled with the whole of the provision or with the provision verbatim. The judge, in language suitable to the jury's needs, will trouble them only with such aspects of the provision as are relevant in the light of the evidence. He will, for instance, if the point requires attention, express in appropriate language the idea of an intervening event being itself "an immediate and sufficient cause of the result".[39] The jury may exceptionally, therefore, have to be directed on the law codified in the clause; but its experience ought to be no different in principle from that of a jury applying the corresponding common law rule on which the judge has had to direct them.

[34] *Smith*, above; *Blaue* [1975] 1 W.L.R. 1411, [1975] 3 All E.R. 446; Appendix B, Example 17(iv).
[35] See Example 17(v).
[36] See *Jordan* (1956) 40 Cr.App.R. 152; *Smith*, above.
[37] 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 *Malcherek* [1981] 1 W.L.R. 690, [1981] 2 All E.R. 422.
[38] For a recent example, see the judgment of Robert Goff L.J. in *Pagett* (1983) 76 Cr.App.R. 279.
[39] For this point more generally, see Report, Vol. 1, para. 3.43.

PART 8

FAULT: PRINCIPLES OF INTERPRETATION AND LIABILITY

Introduction

8.1 *Meaning of "fault".* The sense in which the word "fault" is used in the Code is indicated by the definition of "fault element" in clause 6. "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."

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. a failure to take reasonable care to know of relevant circumstances or to avoid some 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: see clause 18(c)) 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]).

8.2 A person does not necessarily commit an offence if with any fault required he does the act specified for it; he may be able to rely on a defence which renders his conduct entirely blameless. The word "fault" is therefore not ideal. But its use as a rough translation of the traditional Latin phrase "*mens rea*" is perfectly familiar; and the neutral expression "mental element" will not do, because it does not embrace non-compliance with standards as well as states of mind.

8.3 *Clauses 18 to 24* contain provisions of two kinds relating to the fault elements of offences.

(i) *Principles of interpretation.* Clauses 18 and 20 establish *prima facie* rules for the interpretation of offences (other than pre-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 marred English criminal law hitherto. They define three important kinds of fault (clause 18) and declare a minimum fault requirement in the absence of other statutory provision (clause 20). These clauses therefore give effect to the policy we recommended in 1978 in our Report on the Mental Element in Crime.[2]

(ii) *Principles of liability.* Clauses 21 to 24 restate some principles of the present law, slightly modified in clause 22 (intoxication) in the light of law reform proposals.

Clause 18: Fault terms

8.4 *Towards certainty and consistency.* This clause gives effect to two main features of the policy declared in our Mental Element Report:[3]

(i) to encourage consistency in the language of the criminal law, by providing a standard vocabulary of key fault terms; 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.

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[1]See *Ghosh* [1982] Q.B. 1053.

[2](1978), Law Com. No. 89. But the drafting method of the present clauses is much simpler than that adopted in cll. 1-5 of Draft Criminal Liability (Mental Element) Bill appended to that Report. See also cl. 41 of the present draft Bill and cl. 6 of the 1978 Bill.

[3]See n. 2 above. Cf. Criminal Law Revision Committee, Fourteenth Report: Offences against the Person (1980), Cmnd. 7844, paras. 6-7, adopting the same policy as "essential" in relation to the terms "intention" and "recklessness".

8.5 The basic vocabulary of fault provided by clause 18 is not, of course, either exclusive or binding. Future legislation, like the Code itself, can use fault terms other than those defined by the clause; Parliament can continue to create offences requiring no fault or a lower degree of fault than that specified by clause 20; and the meaning of any of the Code terms can be modified for the purpose of any offence. Clauses 18 and 20 require the draftsman of any future offence to give active consideration to the question of fault but do not dictate the outcome of that consideration.

8.6 Those who commented on the Code team's Bill offered a variety of criticisms of the clause (clause 22) corresponding to clause 18, to some of which the present redraft responds. But we believe that there was general support for the proposal to provide definitions of a limited number of fault terms that would be used as key terms in the Code itself and would be likely to be used in defining future offences.

8.7 *The vocabulary of fault terms.* No less than seven terms were defined in clause 22 of the Code team's Bill. Only three of them ("knowledge", "intention" and "recklessness") find a place in the present draft; we comment on them below. If the concept intended to be conveyed by any of the others ("purpose", "heedlessness", "(criminal) negligence" and "carelessness") had been needed for a number of offences in Part II of the Code, we should very likely have wished to include a Code definition, in pursuance of our general policy of promoting certainty and consistency. But none of them has proved to be required for the definitions of offences proposed for inclusion in the Code as first enacted. We have therefore excluded them; and we are aware that this will give satisfaction to a number of critics of the Code team's Bill.[4] On the other hand, the list of terms defined in clause 18 is not a closed one and we contemplate that it may come to be added to in the future if that would be useful for the purposes of the Code as a whole.

8.8 *Application of the clause.* Clause 18 does not apply to "pre-Code offences"—that is, existing offences which survive the enactment of the Code. 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 offences defined in the Code itself and, in the absence of contrary provision, in subsequent legislation. As pre-Code offences come to be re-enacted in the future, the opportunity can be taken to express them as far as possible in the standard language of the Code.

8.9 *Method of the clause.* The degrees of fault defined by clause 18 (knowledge, intention and recklessness) relate always to particular elements of offences. "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. Clause 18 explains the three types of fault by answering the question: when is a person said to act "knowingly", "intentionally" or "recklessly" with respect to a circumstance or a result that is an element of an offence? The fault terms are explained by definition of their adverbial forms.

8.10 *"Knowingly": knowledge and "wilful blindness".* In the draft Bill appended to our Report on the Mental Element in Crime[5] we proposed that a person should be regarded as knowing of a circumstance if either (i) he actually knows, or (ii) he has no substantial doubt, that the circumstance exists. This proposal, however, was open to two possible objections of form and one of substance. It was questionable in point of form, first, because it defined knowledge partly in terms of itself, and secondly, because it threatened the tribunal of fact with the confusing question "Are you satisfied beyond reasonable doubt that the defendant had no substantial doubt that such and such was the case?" The possible objection of substance is one that could also be taken to the question "Was the defendant almost certain?" that was preferred by the Code team. Neither formula, it may be said, makes sufficiently clear that the state of mind which is to be assimilated to "actual knowledge" for the purposes of criminal liability is that of so-called "wilful blindness".[6] English criminal law has commonly treated a person as knowing something if, being pretty sure that it is so, he deliberately avoids making an examination or asking questions that might confirm the fact — he avoids taking advantage of an available means of "actual knowledge". It is this state of

[4]For further reference to the concept of "heedlessness", see below, para. 17.6.
[5](1978), Law Com. No. 89; Draft Criminal Liability (Mental Element) Bill, cl. 3(1).
[6]Called "knowledge of the second degree" by Devlin J. in a famous passage: *Roper* v. *Taylor's Central Garages (Exeter)* [1951] 2 T.L.R. 284.

mind which, we believe, has to be captured by a short form of words. Clause 18 (a) therefore treats a person as acting "knowingly" with respect to a circumstance "not only when he is aware that it exists or will exist, but also when he avoids taking steps that might confirm his belief that it exists or will exist."[7]

8.11 *Knowing the future.* In the strictest sense of the word one cannot "know" that something will be the case in the future. Nevertheless, in case an offence should be defined in terms requiring a state of mind, called knowledge, with respect to future facts,[8] the present definition includes reference to knowledge that a circumstance "will exist".

8.12 *"Intentionally".* We have given careful consideration to comments made upon earlier attempts to prescribe a meaning for "intention" as a key term in the Code, in particular those in the draft Bill appended to our Mental Element Report[9] and in the Code team's Bill.[10] Despite differences of wording, those two drafts and clause 18(b) of the present draft Bill aim to express essentially the same conception.

8.13 *Intention with respect to circumstances.* A person intentionally damages property belonging to another if, most obviously, he intentionally damages property that he knows belongs to another. His knowledge, for the purpose of an offence so worded, is intention with respect to the circumstance that the property belongs to another. But one damaging property without actually knowing that it belongs to another rather than to himself neverthleless acts intentionally with respect to that circumstance if he hopes that it is so. Clause 18(b)(i) provides accordingly; and in that sub-paragraph the word "knows" has the meaning given by paragraph (a), discussed above.

8.14 *Intention with respect to results.* Clause 18(b)(ii) provides that for Code purposes, and for the interpretation of offences subsequently enacted, a person acts intentionally with respect to a result "when he acts either in order to bring it about or being aware that it will occur in the ordinary course of events."[11] Acting in order to bring about a result is, as it were, the standard case of "intending" to cause a result. But we are satisfied that a definition of "intention" for criminal law purposes must refer, as Lord Hailsham of St. Marylebone L.C. expressed it in *Hyam*[12] to "the means as well as the end and the inseparable consequences of the end as well as the means." Where a person acts in order to achieve a particular purpose, knowing that this cannot be done without causing another result, he must be held to intend to cause that other result. The other result may be a pre-condition — as where D, in order to injure P, throws a brick through the window behind which he knows P to be standing; or it may be a necessary concomitant of the first result — as (to use a much quoted example) where D blows up an aeroplane in flight in order to recover on the insurance covering its cargo, knowing that the crew will inevitably be killed. D intends to break the window and he intends to kill the crew. But there is no absolute certainty in human affairs. P *might* fling up the window while the brick is in flight. The crew *might* make a miraculous escape by parachute. D's purpose *might* be achieved without causing the second result — but these are only remote possibilities and D, if he contemplates them at all (which may be unlikely), must know that they are only remote possibilities. The result will occur, and D knows that it will occur, "in the ordinary course of events ... unless something supervenes to prevent it."[13] It is, and he knows it is, "a virtual certainty." We have adopted the phrase, "in the ordinary course of events" to ensure that "intention" covers the case of a person who knows that the achievement of his purpose will necessarily cause the result in question, in the absence of some wholly improbable supervening event.[14]

8.15 A person's awareness of any degree of probability (short of virtual certainty) that a particular result will follow from his acts ought not, we believe, to be classed as an "intention" to cause that result for criminal law purposes. This accords with the general

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[7]See Appendix B, Example 18(i).

[8]See, for an example, Criminal Law Act 1977, s. 1(2).

[9](1978), Law Com. No. 89: Draft Criminal Liability (Mental Element) Bill, cl. 2(1).

[10]Cl. 22(a).

[11]See Appendix B, Example 18(ii).

[12][1975] A.C. 55 at 74.

[13]The language of Lord Bridge of Harwich in *Moloney* [1985] A.C. 905 at 929.

[14]Cf. the C.L.R.C.'s Fourteenth Report (above, n. 3), para. 10, proposing a similar definition of "intention". The Committee put the example of "a person conceal[ing] a bomb under a seat in a pub knowing that it was timed to explode at a time when the seat was invariably occupied by a group of soldiers....In the unlikely event of a jury believing [his] story that all he wanted to do was damage property, they would...have little difficulty in finding that he knew (and therefore, on the second part of the...definition, intended) that the explosion would cause death or at least serious bodily harm".

tendency of modern decisions on offences defined in terms of intention.[15] Liability based on the awareness of a probable result can be provided for by casting the offence in terms of recklessness.

8.16 *"Intention" as a term of art.* The proposal to define "intention" involves a departure from recent statements of the House of Lords on the law of murder. In *Moloney*[16] the House discouraged attempts by trial judges, in directing juries, to define the "intention" (to cause death or serious bodily harm) required for that offence. Instead, their lordships offered guidance, which was soon afterwards modified in *Hancock and Shankland*,[17] on the evidence from which the jury may infer that that intention existed. Where it is proved that the defendant's purpose was to cause a particular result, he intended it and it is immaterial whether the result was, or was believed by the defendant to be, certain, probable or merely possible. The guidance given by the House of Lords, as explained by the Court of Appeal in *Nedrick*,[18] relates to the case where the result was not "the primary desire or motive" of the defendant. In *Nedrick* –

> "if the jury are satisfied that...the defendant recognised that death or serious harm would be virtually certain (barring some unforeseen intervention) to result from his voluntary act, then that is a fact from which they may find it easy to infer that he intended to kill or do serious bodily harm, even though he may not have had any desire to achieve that result."

In short, foresight of the virtual certainty of the result is not intention but evidence from which intention may be inferred. The concept of a state of mind that falls short of "desire or motive" that the result be caused but is something more than foresight that the result is a virtual certainty is difficult to grasp. A judge, who was asked by a perceptive juror to tell him what that state of mind is, would be in some difficulty. The practical effect seems to be to leave the jury to characterise the defendant's foresight of the virtual certainty of result as "intention", or not, as they think right in all the circumstances of the case. We remain of the opinion that it is in the interest of clarity and the consistent application of criminal law to define intention; and that justice requires the inclusion of the case where the defendant knows that his act will cause the relevant result, "in the ordinary course of events", as explained above. It is possible that, under the Code, juries will, in a few cases, find intention to be proved where, under the existing law, they might not have done so.

8.17 *"Recklessly"*. Clause 18(c) provides that a person acts "recklessly" with respect to a circumstance when he is aware of a risk that it exists or will exist, and with respect to a result when he is aware of a risk that it will occur, it being, in either case, "in the circumstances known to him, unreasonable to take the risk".[19] The use thus proposed for "reckless" and related words is the same as that which we proposed in our Mental Element Report.[20]

8.18 Recent House of Lords' decisions have given "reckless" and "recklessly" a wider meaning than that proposed by clause 18(c). The leading case of *Caldwell*[21] 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 possibility 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.[22] *Lawrence*[23] applied *Caldwell* in interpreting the offence of driving recklessly. It was indeed soon afterwards 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";[24] but the

[15] *Moloney* [1985] A.C. 905; *Belfon* [1976] 1 W.L.R. 741, [1976] 3 All E.R. 46; *Pearman* (1985) 80 Cr.App.R. 259.
[16] [1985] A.C. 905.
[17] [1986] A.C. 455.
[18] [1986] 1 W.L.R. 1025 at 1028.
[19] See Appendix B, Examples 18(iii)-(v).
[20] Draft Criminal Liability (Mental Element) Bill, cl. 4 (employing a very different drafting technique); see also the Code team's Bill, cl. 22(a).
[21] [1982] A.C. 341; see also *Miller* [1983] 2 A.C. 161.
[22] [1982] A.C. 341 at 354-355, *per* Lord Diplock.
[23] [1982] A.C. 510.
[24] *Seymour* [1983] 2 A.C. 493 at 506, *per* Lord Roskill.

contrary view prevailed in the Court of Appeal[25] in relation to the statutory definition of rape, in the light of the modern history of that offence.

8.19 *Explanation of the narrower definition.* If the *Caldwell* concept of giving no thought to the possibility of there being a risk, where the risk is in fact obvious, is to be a basis of liability for some offences governed by the Code, the Code ought to have a term to express it.[26] But the question that must first be faced is whether "reckless" should be used in the Code to express this concept as well as that of the actor's recognising "that there [is] some risk involved and...nevertheless [going] on to do" the act which creates the risk. We are sure that it should not and we adhere to the narrower meaning for the term which we recommended in our Mental Element Report and which seemed to have become the judicially accepted meaning before *Caldwell*.[27] 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 most serious modern offences. This appears, for example, from recommendations of the Criminal Law Revision Committee on offences against the person[28] and on sexual offences;[29] from the recently enacted public order offences;[30] and from the modern history of the law of rape.[31]

(ii) Before *Caldwell*, "reckless" had become the conventional term by which to refer to this narrower type of fault. We do not know of an acceptable alternative.

(iii) We understand that trial courts have experienced considerable difficulties in using the complex *Caldwell* definition of recklessness. That definition in effect describes two kinds of fault. Even if both kinds were to be needed for some offences, they need not be conveyed by a single Code expression. We believe, indeed, that it may be of advantage to prosecutors and to sentencing courts to be able to distinguish, by means of a discriminating language, between different modes of committing the same offence.

8.20 *The "subjectivist" approach to criminal liability.* "Knowledge", "intention" and "recklessness" (and cognate words) are terms used throughout the draft Bill with the meanings given by clause 18. The modern English criminal law tradition tends to require a positive state of mind with respect to the various external elements of an offence of any seriousness; and the three key terms are the obvious terms, because of their familiarity in criminal law usage, by which to refer to some of the most common states of mind required. Although this "subjectivist" tradition is not without its critics, we are proposing a Code that stays within the mainstream of English criminal law. But in doing so we do not exclude the possibility that Parliament may hereafter wish to create offences constructed upon a different foundation of liability. The group of House of Lords' cases led by *Caldwell*[32] can, indeed, be interpreted as having placed some serious offences upon such a different foundation. It will, of course, be open to Parliament to pursue the line followed by those cases by rejecting or modifying the fault requirements proposed for particular offences in Part II of our draft Bill and by providing further key terms to supplement the three that we have defined.

8.21 The Code team, in their Bill,[33] did in fact provide a term ("heedlessness") to convey the extended sense of recklessness laid down in *Caldwell*. We have not found occasion to use that expression in the definitions of offences in Part II of our Bill;[34] but it remains available if there should prove to be a use for it.

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[25] *Satnam S. and Kewal S.* (1983) 78 Cr.App.R. 149; *Breckenridge* (1983) 79 Cr.App.R. 244.

[26] As to this, see para. 8.21 below.

[27] *Cunningham*[1957] 2 Q.B. 396; *Stephenson* [1979] Q.B. 695.

[28] Fourteenth Report: Offences against the Person (1980), Cmnd. 7844; see Part II, Chapter I, of our draft Bill.

[29] Fifteenth Report: Sexual Offences (1984), Cmnd. 9213; see Part II, Chapter II.

[30] Public Order Act 1986, s. 6(1)-(4), requiring, for an offence under any of ss. 1-5, that the actor at least be aware that his conduct may have the character required for the offence in question; following our Report on Offences Relating to Public Order (1983), Law Com. No. 123, paras. 3.41-3.54; see cl1. 198 to 202 of our draft Bill.

[31] *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. 29 above), para. 2.41.

[32] [1982] A.C. 341; see above, para. 8.18.

[33] Cl. 22(a); see their Report, para. 8.22.

[34] See in particular para. 17.6 below, as to the fault element of the offence of destroying or damaging property.

Clause 19: Degrees of Fault

8.22 Knowledge or intention is a higher degree of fault than recklessness. This yields two useful propositions stated in clause 19.

8.23 *Subsection (1).* An allegation of knowledge or intention includes an allegation of recklessness. This is relevant to the provisions on alternative verdicts (clause 8), double jeopardy (clause 11) and multiple convictions (clause 12); it should be read with the definition in clause 6 of the Code expression "included offence".[35]

8.24 *Subsection (2)* allows an allegation of recklessness to be made good by proof of knowledge or intention.

Clause 20: General requirement of fault

8.25 *The need for the clause.* An enactment 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. It is necessary, however, to have a general rule for the interpretation of any offence the definition of which does not state, in respect 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. Clause 20 provides such a rule. It would implement a policy that we recommended in our Report on the Mental Element in Crime,[36] though in a manner a good deal less complex than that suggested in the draft Bill appended to that Report.[37] The proposal to include this provision was well supported on consultation.

8.26 *Application of the clause.* Clause 20 (like clause 18, defining fault terms) will apply only to offences in the Criminal Code Act and to offences subsequently created: subsection (2). Thus the settled interpretation or understanding of existing legislation will not be disturbed.

8.27 *Presumed fault requirement.* Clause 20(1) imposes a presumption that the commission of an offence requires recklessness with respect to each of its external elements.[38] Some will regard this as more controversial now than it was in 1978, when we made the same proposal in our Mental Element Report. For since that time some offences requiring at least "recklessness" for their commission have been so interpreted that fault of a lower degree than "recklessness" as our clause 18(c) would define it suffices for their commission.[39] If Parliament should consider that that interpretation achieved an appropriate scope for serious offences such as those to which it applied, it might wish to modify the present clause to provide a presumed requirement of such a lower degree of fault. This could be done either by defining "recklessness" in clause 18(c) so as to embrace that lower degree of fault (we have already given reasons for rejecting that course[40]) or by adding to clause 18 an additional fault term[41] to which, instead of to recklessness, the present clause could refer. Our recommendation, however, is that recklessness in the "subjective" sense should remain the presumed minimum requirement for criminal liability.

8.28 *Displacing the presumption.* We considered a suggestion that the clause should seek to make the presumption displaceable only by *express* provision requiring some fault other than recklessness, or stating that no fault is required, with respect to an element of an offence. We do not think that this would be appropriate. We are mindful of the "constitutional platitude" pointed out by Lord Ackner in *Hunt*[42] that the courts must give effect to what Parliament has provided not only "expressly" but also by "necessary implication". If the terms of a future enactment creating an offence plainly implied an intention to displace the presumption created by clause 20 (1), the courts would no doubt feel obliged to give effect to that intention even if the present clause were to require express provision for the purpose.

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[35]See Appendix B, Example 19.
[36](1978), Law Com. No. 89.
[37]Draft Criminal Liability (Mental Element) Bill, cl. 5; cf. the Code team's Bill, cl. 24.
[38]See Appendix B, Examples 20(i) and (ii). "A requirement of recklessness is satisfied by knowledge or intention": cl. 19 (2); so that clause 20 (1) effectively lays down a presumed requirement of intention or recklessness with respect to results and of knowledge or recklessness with respect to circumstances, as the Examples illustrate.
[39]See para. 8.18 above.
[40]See para. 8.19 above.
[41]See the reference to "heedlessness" in para. 8.21 above.
[42][1987] A.C. 352 at 380.

Clause 21: Ignorance or mistake of law

8.29 *Ignorance of the law is no defence.* There is abundant authority that the accused's ignorance of the offence he is alleged to have committed,[43] or his mistake as to its application,[44] will not relieve him of liability. This principle appears to be an absolute one.[45] So it seems appropriate to make explicit in the Code one of the best known maxims of the common law. The effect will be to preclude any attempt to stimulate judicial recognition of exceptions to the general rule by reliance on clause 45(c), under which common law defences can be developed, but only if they are not inconsistent with other Code provisions.[46]

8.30 The Code team in their Report drew attention to the case for the recognition of a defence of excusable mistake of law, particularly where the act that constitutes an offence has been done in reliance upon a statement of law made by a competent court or a responsible official.[47] Such a defence, as the team acknowledged, could only be introduced in the light of a major law reform exercise involving detailed consideration and extensive consultation. We have not been able to undertake such an exercise in the context of the present project.

8.31 *Express defence of ignorance or mistake of law.* Paragraph (a) contemplates the possibility that such a defence might be provided in relation to a particular offence. Examples are likely to be rare.

8.32 *Ignorance or mistake negativing a fault element.* "Ignorance of the law is no defence" is a popular aphorism with a good deal of power to mislead. It therefore seems worthwhile to state, in paragraph (b), 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. A simple example occurs where a person destroys property in the mistaken belief that it is his own to do with as he wishes. He does not intentionally or recklessly destroy property belonging to another within the meaning of clause 180.[48]

Clause 22: Intoxication

8.33 This clause provides for the effect of intoxication upon the liability of a person who causes the external elements of an offence. It aims to reproduce the present law on this topic with modifications recommended by the Criminal Law Revision Committee.[49] It is a somewhat complex clause because it restates relatively complex law. We have kept it as simple as possible by omitting aspects of the corresponding clause in the Code team's Bill that we regarded as strictly speaking redundant (as we explain below). The provision of a simpler clause on intoxication could only result from a major law reform exercise. That was not in question as an aspect of the present project. But, like the majority of the Criminal Law Revision Committee,[50] we are not in any case persuaded that the law as stated in clause 22 would be seriously unsatisfactory.

8.34 *Involuntary intoxication; offences requiring intention, knowledge, etc.* The legal position in relation to situations not referred to by clause 22 is to be deduced from the rest of the Code, read with the enactment creating the offence charged. Thus, the clause has

[43] *Bailey* (1800) R. & R. 1; 168 E.R. 651; *Esop* (1836) 7 C. & P. 456; 173 E.R. 203; *Barronet and Allain* (1852) Dears. 51; 169 E.R. 633; *Grant* v. *Borg* [1982] 1 W.L.R. 638 (a "fundamental" principle: *per* Lord Bridge at 646).

[44] *Johnson* v. *Youden* [1950] 1 K.B. 544.

[45] In *Surrey County Council* v. *Battersby* [1965] 2 Q.B. 194 at 203, reliance upon a public official's advice as to the law was acknowledged to be "very strong mitigation".

[46] See clause 4 (4), to which clause 45(c) refers.

[47] Law Com. No. 143, paras. 9.4-9.6.

[48] Cf. *David Smith* [1974] Q.B. 354; Appendix B, Example 21(i). See also Example 21(ii). The Code team included in the corresponding clause of their Bill the proposition that "ignorance or mistake ... of fact ... may negative a fault element of an offence." But the real point of this statement was that even a mistake for which there are no reasonable grounds may be the reason why a person lacks the fault required for an offence. That this has not always been 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 with respect to a given circumstance, it is inconsistent to demand that, to exclude liability, a mistake with respect to the circumstance must be based on reasonable grounds: *D.P.P.* v. *Morgan* [1976] A.C. 182; *Kimber* [1983] 1 W.L.R. 1118, [1983] 3 All E.R. 316; see also *Wilson* v. *Inyang* [1951] 2 K.B. 799 ("wilfully"). We do not think it appropriate to state at this point in the Code what is in fact a truism. The point is made in a different form in clause 14: a court or jury is to have regard to *all* the evidence in determining whether a person had a particular state of mind. That evidence may include the defendant's evidence that he made a relevant, though unreasonable, mistake. The present clause is therefore confined to ignorance or mistake of law.

[49] Fourteenth Report: Offences against the Person (1980), Cmnd. 7844, Part VI.

[50] Fourteenth Report, para. 274.

nothing to say about evidence of *involuntary* intoxication, which is accordingly 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. Again, when the offence charged requires proof of intention, knowledge or belief, evidence of *voluntary* intoxication is to be treated like any other evidence tending to show that the defendant lacked the state of mind in question. This is presently the position in relation to any offence classified as an offence of "specific intent". And once again, with such an offence as with any other, intoxication will have no bearing on liability to conviction if it merely affected the defendant's emotional reaction or reduced his inhibitions. There is no need for express provision on these matters.[51]

8.35 *Offences of recklessness.* So far as proof of the fault element of an offence is concerned, the law at present has a special rule for the effect of voluntary intoxication where the offence charged is one of so-called "basic intent". We agree with the view of the Criminal Law Revision Committee that this should be replaced by a rule, modelled upon the corresponding provision of the American Law Institute's Model Penal Code,[52] relating to any offence requiring a fault element of recklessness. Subsection (1)(a) provides that a person who was voluntarily intoxicated is to be treated, for the purposes of such an offence, as having been aware of any risk of which he would have been aware had he been sober.[53] Subsection (1) applies to an offence requiring recklessness "however described".[54] So, for example, if any offences requiring "malice" survive the enactment of the Code, they will be governed by the subsection since "maliciously" is satisfied by proof of recklessness, as defined in clause 18(c);[55] and the same will be true of any offences enacted after the Code which employ the concept of recklessness but use different terminology to describe it.

8.36 Subsection (1) applies to an offence requiring a fault element of recklessness even where it also requires, expressly or by implication, an element of intention or knowledge. So, for example, any charge of rape no doubt implies an allegation of an intention to have sexual intercourse; but paragraph (a) nonetheless applies to an alleged "fault element of recklessness" constituted by the defendant's having been aware that the woman was not consenting to the intercourse.[56]

8.37 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 personal harm by beating a woman, he says that because of his drugged condition he was unconscious. Clause 33 (1)(b) makes it clear that he cannot rely on his condition as a "state of automatism" if it arose from voluntary intoxication. He is to be treated as having beaten the woman, being aware of any risk of causing harm of which he would have been aware had he been sober.

8.38 *Belief in exempting circumstances.* Just as a person may, because of intoxication, lack the state of mind required for an offence, so he may have the state of mind 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. As with the fault elements of offences, we believe that it is unnecessary to refer in this clause to the relevant effect of involuntary intoxication. Evidence of involuntary intoxication will, without special provision, be treated like any other evidence tending to show that the defendant held any belief or had any other state of mind which is an element of a defence.

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[51] In this we depart from the view taken by the Code team (cl. 26(1) and (2) of their Bill) and in part, apparently, by the Criminal Law Revision Committee: Fourteenth Report, para. 267. In addition, we do not regard it as necessary to make express provision for the improbable case of the 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: see *Attorney-General for Northern Ireland* v. *Gallagher* [1963] A.C. 349, *per* Lord Denning at 382; Code team's Bill, cl. 26(5).

[52] Proposed Official Draft, s. 2.08(2); cf. *Majewski* [1977] A.C. 443, *per* Lord Elwyn-Jones L.C. at 475; *Caldwell* [1982] A.C. 341, *per* Lord Diplock at 355.

[53] See Appendix B, Examples 22(i) and (ii). Exceptionally, taking account of some special characteristic of the defendant, the court or jury may have a doubt as to whether he, if sober, would have been aware of the relevant risk, although there would have been no such doubt in the case of a person without that characteristic.

[54] See also clause 88, (explained in para. 15.11 below) for a similar rule applying to aspects of some sexual offences closely related to recklessness.

[55] *W. (A Minor)* v. *Dolbey* (1989) 88 Cr. App. R. 1, [1983] Crim.L.R. 681; *Grimshaw* [1984] Crim. L.R. 108.

[56] See note 54, above. Rape is defined in clause 89.

8.39 Where intoxication is voluntary, its effect depends on the fault element of the offence charged. Subsection (1)(b) follows the recommendation of the Criminal Law Revision Committee:[57]

> "...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."

8.40 A slightly stricter rule must apply to offences not requiring a fault element of recklessness. Subsection (2) therefore provides that, where the offence charged involves a fault element of failure to comply with a standard of care, or requires no fault, the defendant is to be treated as not having believed in the existence of an exempting circumstance if a reasonable sober person would not have so believed.

8.41 In *Jaggard* v. *Dickinson*[58] the defendant was allowed to rely on a drunken belief that she was damaging property belonging to a person who would consent to her doing so. The effect of subsection (1)(b) is to reverse this decision. This is justified, not only on the ground that it follows from the Committee's recommendations, but also because that decision creates an anomalous distinction (between mistake as to the non-existence of an element of an offence and mistake as to the existence of a circumstance affording a defence) which it would be wrong to perpetuate in the Code.

8.42 *Mistake and offences requiring intention.* The same anomaly would be introduced if the Code were to adopt a dictum of the Court of Appeal in *O'Grady*[59] to the effect that a defendant, on a charge of an offence of "specific intent" equally with one of "basic intent", would not be able to rely upon evidence of an intoxicated mistaken belief in an occasion for self-defence. The court was concerned that one who kills because of a drunken mistake should not be "entitled to leave the court without a stain on his character". But a conviction of manslaughter will of course be available (and similarly, in a case of serious personal harm, a conviction of an offence of recklessly causing such harm); and it would, we believe, be unthinkable to convict of murder a person who thought, for whatever reason, that he was acting to save his life and who would have been acting reasonably if he had been right. Moreover, the Code should if possible provide consistently for all defences; it would not be appropriate to try to devise a special rule for self-defence alone, or generally for the use of force in public or private defence (clause 44) or in defence of property (clause 185). In all the circumstances we are satisfied that the dictum referred to must be ignored in framing the present clause. The result is consistent with the view of the Criminal Law Revision Committee on this topic.[60]

8.43 *Intoxication and reasonableness.* It would seem obvious that, when the law prescribes a standard of reasonable behaviour, this must relate to the standard to be expected of a sober person. But the fact that the point has been argued in the Court of Appeal in two modern cases[61] suggests the desirability of including in the Code the principle that those cases establish, to avoid the matter being reopened. The principle is stated in subsection (3). In *Young*[62] 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". 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.

8.44 *Exceptions from subsection (1): (a) murder.* Murder has to be excepted (by subsection (4)(a)) from the application of subsection (1) because the fault required by clause 54(b) ("A person who causes the death of another...intending to cause serious personal harm 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 of murder. This would be a

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[57]Fourteenth Report, paras. 276-278; cf. *O'Grady* [1987] Q.B. 995; *Fotheringham* [1988] Crim. L.R. 846. See Appendix B, Examples 22(iii) and (iv).
[58][1981] Q.B. 527.
[59][1987] Q.B. 995 at 999.
[60]Fourteenth Report, paras. 276-278.
[61]*Woods* (1981) 74 Cr.App.R. 312; *Young* [1984] 1 W.L.R. 654, [1984] 2 All E.R. 164.
[62][1984] 1 W.L.R. 654, [1984] 2 All E.R. 164.

departure from long established law and from the recommendation of the Criminal Law Revision Committee.[63] 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.

8.45 *(b) 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. In *Burns*[64] 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. Yet neither of the concurrent causes alone would have entitled him to an absolute acquittal of the offence of "basic intent" with which he was charged. Some such cases would be better dealt with by a mental disorder verdict under clause 36: the defendant is acquitted but made amenable to the special disposal powers available to the court. A mental disorder verdict will be returned (so long as clause 22 (1) does not apply) where the defendant was suffering at the time of the act from "mental disorder" as defined in clause 34. The kind of mental disorder relevant in practice[65] would be a state of automatism (not resulting only from the intoxication itself) that is associated with an underlying condition and likely to recur. A mental disorder verdict would be more satisfactory than an "insanity" verdict under the present law because the court will have wide powers of disposal under the recommendations of the Butler Committee[66] instead of being obliged to order indefinite detention of the offender. Subsection (4)(b) therefore provides that subsection (1) shall not apply in a case of combined intoxication and mental disorder.[67]

8.46 *Definitions.* (a) "*Intoxicant*". It is desirable to define "intoxicant" (and, by implication, "intoxication") for the purposes of the Code because the meaning it has to bear, like its meaning under the existing law, is probably wider than that attributed to it in ordinary speech. 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 of the possible results of his conduct and on his ability to control his movements. Subsection (5)(a) therefore defines an intoxicant as anything which, when taken into the body, may impair awareness or control. The paragraph makes specific reference 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. 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.

(b) "*Voluntary intoxication*". When a person who takes an intoxicant knows that it is or may be an intoxicant his resulting intoxication is in general "voluntary", as subsection (5)(b) provides. But it seems to be 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 a consequence should follow from acting either on medical advice or without medical advice but in all respects properly for a medicinal purpose.

(c) "*Takes" an intoxicant.* In the interests of economy of statement, a person's permitting an intoxicant to be administered to himself is said by subsection (5)(c) to be a case of "taking" it.

8.47 *When an intoxicant is not taken "properly for a 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 an offence requiring recklessness or a lower degree of fault, or with an offence of strict liability, the question arises whether the intoxication is "voluntary" so as to attract the operation of subsection (1) or (2).

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[63]Fourteenth Report, para. 268.

[64](1973) 58 Cr.App.R. 364; cf. *Stripp* (1978) 69 Cr.App.R. 318.

[65]"Mental disorder" as defined in clause 34 also includes "severe mental illness", which would produce a mental disorder acquittal under clause 35 even if the fault element of the offence were proved, and "a state of arrested or retarded development of mind".

[66]See para. 11.34 below.

[67]See Appendix B, Example 22(v).

8.48 The same question arises where drugs are taken without specific medical advice but for a medicinal purpose and with similar results. As stated in the preceding paragraph, the answer is that it depends, in both types of case, on whether the drugs were taken "properly" for a medicinal purpose (subsection (5)(b)). Subsection (6) explains that drugs taken on medical advice are properly taken unless (i) the taker fails to comply with the conditions of the advice *and* (ii) he is aware that he may as a result do an act capable of constituting an offence of the relevant kind. Drugs taken without medical advice but for a medicinal purpose are properly taken unless the taker is aware he may as a result do such an act.

8.49 Subsection (6) is based on the decisions of the Court of Appeal in *Bailey*[68] and *Hardie (Paul Deverall)*.[69] It appears from these decisions[70] that what the taker of the drugs must be aware of in order to incur liability varies according to the nature of the offence charged. If he is charged with an offence of violence 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 his conscious control of what he was doing might be affected. This is expressed as a general principle that the defendant should be regarded as voluntarily intoxicated only if he was aware that his taking of the drugs (if not on medical advice), or his failure to comply with a condition of the advice under which he took them, might result in his doing an act capable of constituting an offence of the kind in question.[71]

8.50 *Evidential burden as to nature of intoxication.* It would, we believe, be arguable, in the absence of special provision, that whenever there is evidence of the defendant's having been so intoxicated that he did not form the intention required for the offence charged, the burden lies on the prosecution to prove that the intoxication was "voluntary" within the meaning of subsection (5)(b) (see clause 13 (1)(a)). We do not think that such a burden should rest on the prosecution in the absence of any evidence tending to show that the intoxication was involuntary. Subsection (7) therefore puts an evidential burden to that effect upon the defence.

8.51 The subsection does not go so far as to require the defence to prove that the intoxication was involuntary. The Code team included a provision imposing such a requirement in their Bill[72] (in square brackets in view of their doubts about its correctness). They had regard in doing so to a recent provision to the same effect in section 6(5) of the Public Order Act 1986, based on a Law Commission recommendation.[73] The question whether intoxication was involuntary, whenever it is relevant, will in effect be the question whether the defendant acted without the fault required for the offence charged or had a defence based on a belief that an exempting circumstance existed. We do not now think that it would be appropriate to place on the defence a burden of proving absence of fault or to distinguish, in respect of the incidence of the burden of proof, between a defence of mistaken belief that involuntary intoxication may exceptionally provide and other defences of general application. There was some support on consultation for abandonment of the Code team's bracketed provision; and relevant judicial statements appear to assume that the burden is on the prosecution.[74]

Clause 23: Supervening fault

8.52 This clause restates and generalises the principle applied by the House of Lords in *Miller*.[75] The definition of an offence may suggest as the standard case the doing of a positive act that causes a specified result (e.g. "cause the destruction of or damage to property..." (see cl. 180); or "cause personal harm to another..."(see cl. 71)), 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

[68][1983] 1 W.L.R. 760, [1983] 2 All E.R. 503.
[69][1985] 1 W.L.R. 64, [1984] 3 All E.R. 848.
[70]They are analysed in the Code team's Report, para. 9.20.
[71]See Appendix B, Examples 22(vi) and (vii).
[72]Cl. 26(10).
[73]Offences relating to Public Order (1983), Law Com. No. 123, para. 3.54.
[74]*Bailey* [1983] 1 W.L.R. 760 at 765, [1983] 2 All E.R. 503 at 507; *Hardie* [1985] 1 W.L.R. 64 at 69, [1984] 3 All E.R. 848 at 853.
[75][1983] 2 A.C. 161.

power to counteract the danger that he himself has created."[76] 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.

8.53 The principle was applied in *Miller* to a case of arson.[77] We believe that it must apply to all "result crimes",[78] although the courts may since *Miller* have seemed disinclined to apply it. The offence in question in *Wings Ltd.* v. *Ellis*,[79] in which Lord Hailsham of St. Marylebone L.C. expressed the view[80] that *Miller* turned on the fact that it concerned a fault requirement of recklessness, was an offence of making a statement known to be false (Trade Descriptions Act 1968, s. 14 (1)(*a*)).[81] This is not a "result crime" and the scope of the *Miller* principle did not call for consideration in that case.[82] In *Ahmad*[83] D, P's landlord, was charged with doing acts calculated to interfere with P's peace or comfort with intent to cause P to give up occupation. D's only offending "acts" were done without that intent; but when he came to have the intent D took no steps to rectify what he had done. The Court of Appeal held that this omission could not, in spite of *Miller*, satisfy the requirement of "doing acts" with the required intent. This case, again, did not concern a "result crime"; neither actual interference with health or comfort nor an actual giving up of occupation was an element of the offence. Both *Wings Ltd.* v. *Ellis* and *Ahmad*, we believe, would be decided in the same way under the Code.

8.54 *Some details.* The drafting of the clause takes account of the following points:

(i) Nothing in *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 (in the terms of clause 23) "[lacking] the fault required [for the offence]". The question was answered without comment upon this aspect.

(ii) For the principle to apply, the actor must become aware of what he has done and of the risk thereby created (paragraph (a)); the act that he then fails to do must be one that might prevent the occurrence or continuance of the result (paragraph (b)); and the result specified for the offence must occur, or (if it has already occurred) must continue, after the failure to act (paragraph (c)).

8.55 *States of affairs offences.* The Code team's Bill contained a further subsection applying a similar principle to an offence involving a state of affairs. The example they gave was an offence of unlawful possession. We believe that such a provision is unnecessary. Suppose that D is charged with knowingly possessing, or knowingly being concerned in dealing with, contraband goods. It appears that he did not at the outset know the nature of the goods; but it is proved that in due course he came to know of their nature and that he did not then get rid of them (although he could have done so), or that he nevertheless continued to take part in the transaction. His commission of the offence is thus clearly established without resort to a "supervening fault" provision.

Clause 24: Transferred fault and defences

8.56 Subsection (1) restates the doctrine known as "transferred intent" and subsection (2) provides a corresponding rule as to "transferred" defences.

8.57 *Transferred fault.* A general statement on transferred fault has the following practical justifications:

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[76] *Ibid.*, at 175.
[77] The facts were those of Appendix B, Example 23(i); see also Example 23(ii).
[78] *Wings Ltd.* v. *Ellis* [1984] 1 W.L.R. 731 at 739; decision reversed on another ground, [1985] A.C. 272.
[79] [1985] A.C. 272.
[80] *Ibid.*, at 286.
[81] The company had put out a brochure containing a false statement but only learnt of the falsity later. The brochure was used after knowledge of the falsity was acquired and without correction of the offending statement. The company's conviction was upheld on the ground that the false statement was made when a customer read it after the company learnt of its falsity.
[82] See especially *per* Lord Scarman, [1985] A.C. 272 at 297.
[83] (1987) 84 Cr.App.R. 64.

(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 may be seen by comparing section 1 of the Criminal Damage Act 1971 with its Code equivalent in clause 180, which is written with the present subsection in mind.

8.58 *Transfer "only within the same crime".*[84] 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".[85] 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.

8.59 *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 the intention of affecting Y can be proved by evidence of an intention to affect X.[86] Case law on these points is not consistent; but the results achieved by the subsection are convenient and are in keeping with the best authority.[87]

8.60 *Mistake as to victim.* Clause 24 (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.[88]

8.61 *Transferred defences.* Subsection (2), providing 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.[89]

[84]Cf. Williams, *Criminal Law, The General Part* 2nd ed., (1961), 128.
[85]Cf. *Pembliton* (1874) L.R. 2 C.C.R. 119.
[86]See Appendix B, Example 24(i).
[87]See the comment on *Monger* [1973] Crim. L.R. 301 at 302.
[88]See Appendix B, Example 24(ii).
[89]See Example 24(iii).

PART 9

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

Introduction

9.1 *Clauses 25 to 29* are concerned with the ways in which a person may be liable in respect of the commission of an offence. The common law relating to participation in crime is partly expressed in an ancient technical language which is haphazardly used and variously interpreted. Its principles have to be distilled from a large, complex and not entirely consistent case law. This is an outstanding example of an aspect of the common law of crime that is overdue for modern statutory restatement.

9.2 *Working Paper No. 43.* The Code team, in preparing their draft clauses on this subject, took as their point of departure the proposals made in 1972 by the Working Party then assisting the Law Commission in connection with the criminal law codification project.[1] The Working Paper yielded a helpful body of comments from correspondents, and, although no Report followed, it is appropriate that both the Working Paper and the consultation upon it should be taken into account in framing the relevant Code provisions. Many of the Working Party's proposals in fact amounted to restatement and clarification of the existing law; and the same is generally true of the revised versions of the Code team's clauses to be presented in this Part.

9.3 *Restatement of the law.* The draft Bill adheres, in this area as in most others, to the familiar structure and concepts of the criminal law. It provides for the liability of the actual perpetrator of an offence and for that of one who, in the traditional language, aids, abets, counsels or procures its commission. The liability of such a secondary party will depend upon the occurrence of the offending conduct, as it does under existing law. A person who encourages another to commit an offence which is not in fact committed will, as at present, be guilty of the separate offence of incitement (clause 47). On the other hand, an act tending, and even intended, to facilitate the commission of an offence will not in general attract criminal liability if no such offence happens in the result to be committed.

9.4 This structure has been subjected to searching criticism in modern times; and suggestions have been made for creating, and even for absorbing incitement and complicity into, a new offence of "facilitation", liability for which would not depend upon commission of the offence facilitated.[2] Such a radical approach, however, could not be pursued without elaborate study of the arguments for and against the suggested offence[3] or without wide consultation. There has been no question of undertaking such a project in connection with the present exercise.

Clause 25: Parties to offences

9.5 *Paragraph (a)* restates the present law by providing that a person may be guilty of an offence either as a "principal" or as an "accessory".[4] The enactment creating an offence will invariably specify the conduct (the acts and fault) that will entail liability as a principal; but the present clause makes clear that a person whose conduct falls within that specified by clause 27 for an accessory will equally be guilty of the offence. Being so guilty, he is of course liable to the same penalties.

9.6 *Separate provision for principals and accessories.* The proposal to maintain the distinction between classes of participant, although generally accepted on consultation, did not pass without question. It might in theory be possible to collapse the distinction by producing a uniform set of conditions of liability applying to all participants in an offence. This, however, would involve a major change in the law. It would have the effect, for example, of extending strict liability to accessories and of abolishing certain defences available to accessories but not to principals.[5] The distinction is unavoidable in a code that seeks to restate the law; and we have no doubt that it is right in principle.

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[1] Working Paper No. 43 (1972), Parties, Complicity and Liability for the Acts of Another.

[2] Buxton, "Complicity in the Criminal Code", (1969) 85 L.Q.R. 252 (and in comments on Law Commission Working Papers at [1973] Crim.L.R. 223 and 656); Spencer, "Trying to Help Another Person to Commit a Crime" in Peter Smith (ed.), *Criminal Law: Essays in Honour of J.C. Smith* (1987), 148.

[3] The arguments are summarised in our Working Paper No. 104, Conspiracy to Defraud (1987), Appendix C.

[4] The use of these terms was proposed in Working Paper No. 43: see Proposition 1.

[5] Accessory liability is always fault based (see cl. 27 (1)); for defences, see cl. 27 (6)-(8).

9.7 *Application of defences.* Paragraph (b) makes clear that defences apply equally to principals and to accessories. This facilitates the drafting of provisions creating defences, which it may be convenient to express, as offences themselves are commonly expressed, in terms referring to the act of the principal. The common law (which governs the liability of accessories) undoubtedly assumes such defences to be generally applicable although we are unaware of explicit authority on the point. Paragraph (b) means merely that a person may rely on a defence to avoid liability as an accessory if he himself satisfies its requirements. It does not mean, as clause 27 (1)(c) makes clear, that he can take the benefit of a defence the requirements of which are satisfied by another who would but for the defence be guilty as a principal. Indeed, by assisting or encouraging such another he may himself be guilty as a principal.[6]

Clause 26: Principals

9.8 *Persons who are principals.* In summary, this clause declares that a person is guilty of an offence as a principal if he commits it entirely by his own act (subsection (1)(a)); or if he commits it in part by his own act and is party to another's doing whatever else is required to complete it (subsection (1)(b)); or if he commits it by an "innocent agent" (subsections (1)(c) and (3)); or if he is guilty of it on a basis of "vicarious liability" (subsection (2), referring to clause 29).

9.9 Subsection (1)(a) and (b) reflect existing law. Paragraph (a) needs no comment. Paragraph (b) is necessary to cover the case of joint commission of an offence by two or more persons, where each of them does some of the specified acts.[7] The paragraph does not include a conspirator who is present at the commission of the offence but does not himself do any of the specified acts. He will be liable as an accessory. It would unduly complicate the present clause, without practical advantage, to designate him a principal, as was suggested to us. On the other hand, the wording of paragraph (b) does respond to the advice that it should clearly be restricted to joint participation. It is not enough that D does one act (say, striking P with the object of stealing his bag), that E happens to do another (E, who is an opportunist thief not acting in concert with D, steals the bag that P has dropped) and that thus all the acts specified for an offence (robbery in this example) are done. To be guilty of the offence D must procure, assist or encourage E's act. In the example given, D will of course be guilty of attempted robbery.

9.10 *Acting through an "innocent agent".* The topic of liability for an offence committed through the instrumentality of a person who is himself not guilty of it presents a difficult technical problem to the codifier; but there is no serious controversy about the results to be achieved. If D procures E (a child under ten) to steal, or F (a mentally disordered person) to commit an assault, or G to have sexual intercourse with a woman whom G believes to be consenting but whom D knows not to be, D must be guilty of theft, assault or rape although the person whom he procures to act is not guilty.

9.11 *Liability as principal or accessory?* The technical problem is whether persons acting through innocent agents are to be guilty as principals in all cases, or as accessories in all cases, or as principals in some cases and as accessories in others. The problem is partly doctrinal and partly one of drafting. Although it has proved troublesome to resolve, it can be briefly summarised.

(i) *Principal?* It is plainly acceptable to regard as principals most persons who commit offences through innocent persons. It is D who "steals" or "assaults" by using the child under ten or the mentally disordered adult as his instrument. A designation of "principal", however, is somewhat artificial where the offence requires personal conduct on the part of the perpetrator (as with offences involving sexual intercourse or driving) or where the definition of the offence requires the offender to comply with a description (such as "licensee") with which the innocent agent but not the guilty party complies.

(ii) *Accessory?* An alternative, to meet this difficulty, would be to designate the guilty party an accessory in all cases. But this course is open to serious objections. First, it might well be difficult for lay persons to understand the description as an "accessory" to murder of someone who, for instance, killed another by causing an innocent nurse to administer poison or a postman to deliver a letter bomb. Secondly, the special fault requirements and defences applying to accessories

[6]See para. 9.12 below.
[7]See Appendix B, Example 26(i).

would apply inappropriately in innocent agency cases, unless their application was excluded by drafting of unacceptable complexity.

(iii) *A mixed solution?* The solution proposed by the Code team was to declare most persons acting through innocent agents to be principals but to designate as accessories those whom it is, or might seem, artificial so to describe (see paragraph (i) above).[8] The resulting draft was criticised on consultation as complex and it was pointed out that the draft did not deal with the problem presented by the application of accessorial fault requirements and defences. We are not able to adopt this solution.

9.12 *The solution proposed* achieves, we believe, the maximum available of clarity, simplicity and consistency. It is to treat all persons acting through innocent agents as principals (subsection (1)(c)) and to make clear for the avoidance of doubt that this includes those in the troublesome exceptional cases (subsection (3)) — thereby incidentally acknowledging by implication that the designation of principal is somewhat odd in those cases. But in truth the oddity is one of nomenclature and not of substance.

9.13 *The categories of "innocent agent".* The phrase "innocent agent" is not used in clause 26. It does not accurately describe all the cases with which subsection (1)(c) is concerned and is used here only for convenience as familiar shorthand. Paragraph (c) identifies three groups of cases. (i) The case of the child under ten requires no comment.[9] (ii) Secondly, there is the person who, although he acts in the way specified for the offence, is not guilty because he lacks the fault required for the offence. Included in this category are the person who lacks the required fault because of a mistake,[10] a "state of automatism"[11] or mental disorder;[12] and the "semi-innocent" agent, who has the fault required for a less serious offence but not "the fault required for the offence" in question.[13] (iii) Thirdly, there is the person who "has a defence". This phrase covers a variety of cases, including a person acting under duress by threats (paragraph (c) ensures that the duressor is guilty of the offence;[14]) one who believes in the existence of a circumstance that would afford a defence;[15] one who, although having the fault required for the offence, is not guilty because of mental disorder;[16] and one whose "state of automatism" prevents liability for an offence not requiring fault.

9.14 *Application to assisting and encouraging.* A doubt was raised on consultation as to whether subsection (1)(c) should apply where D does not procure the innocent person's act but merely assists it or encourages it (the encouragement not amounting to procuring). In the absence of authority on the point, we regard it as desirable for the sake of consistency and simplicity to provide similarly for acts of procurement, assistance or encouragement.

9.15 *Subsection (1)(c) and an offence of negligence.* In *Thornton* v. *Mitchell*[17] D, a bus conductor, negligently directed E, the driver of the bus, in a reversing manoeuvre and an accident occurred. E, not being at fault, was not guilty of driving without due care and attention. It was held that D could not be convicted of aiding and abetting an offence that had not been committed. Nor would D be guilty as an accessory under the Code: see clause 27 (1)(a), which requires a guilty principal for that purpose. Would D himself be guilty as a principal under clause 26 (1)(c)? The better view, we believe, is that a failure of due care and attention is, in the context of this offence, an aspect of "the act specified for the offence", as well as being "the fault required for the offence".[18] If that is so, E has not done that act, as paragraph (c) requires, and the result in *Thornton* v. *Mitchell* is preserved. But the point is not entirely clear and may require to be resolved by the courts. The offence in question, as an

[8]See Law Com. No. 143, para. 10.9; cl. 30(2)(b) and (3) of the team's Bill. This solution for the exceptional cases followed a suggestion of the Criminal Law Revision Committee in their Working Paper on Sexual Offences (1980), para. 26.

[9]See Appendix B, Example 26 (ii).

[10]E.g., *Cogan and Leak* [1976] Q.B. 217; Appendix B, Example 26(iv).

[11]See cl. 33 (1).

[12]See cl. 36; cf. *Tyler and Price* (1838) 8 Car. & P. 616, 173 E.R. 643.

[13]See Appendix B, Example 26(iii). Liability of the other person for the more serious offence, at least where that person was not present assisting at the time, was denied in *Richards* [1974] Q.B. 776; but this decision was overruled by the House of Lords in *Howe* [1987] A.C. 417.

[14]Cf. *Bourne* (1952) 36 Cr.App.R. 125.

[15]See cl. 41.

[16]See cl. 35 (1).

[17][1940] 1 All E.R. 339.

[18]Cf. Lord Diplock's account, in *Lawrence* [1982] A.C. 510 at 525, of the double role of "recklessly" in reckless driving. To the same effect is the argument that "the fault required for the offence", which D must have to be guilty under clause 26 (1)(c), is failure to exercise due care in the act of driving and not in some other act.

offence of negligence, is exceptional; general propositions such as those in clauses 26 and 27 have difficulty in catering plainly for it without an undue sacrifice of general clarity.

9.16 *Person vicariously liable.* Subsection (2) refers to clause 29, which enables an element of an offence to be attributed to a person in certain circumstances by reason of the act or (exceptionally) the fault of another. It makes clear that the person who is on this basis "vicariously" liable for the offence is liable as a principal.[19] This accords with existing law.

Clause 27: Accessories

9.17 *Contents of the clause.* This clause states the law on accessory liability.[20] Subsection (1) identifies the acts and the fault required. Subsections (2) to (5) restate existing law on some subsidiary points by way of elaboration of the principles stated in subsection (1). Subsections (6) to (8) provide defences available to accessories but not to principals.

9.18 *Acts specified for an accessory.* Subsection (1)(a) restates the present law in non-technical language. Subject to subsections (2) and (3), the words "procure", "assist" and "encourage" are used in their ordinary meanings. We do not believe that attempts to define them are either necessary or desirable. *Procuring* connotes the idea of deliberately causing.[21] 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.

9.19 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. But we think that "inciting" is too narrow to encompass satisfactorily all the cases envisaged by the concepts of procuring and encouraging; and we prefer "assisting" to "helping" on the grounds that it is a more formal expression, has a useful associated noun ("assistance") and has been used elsewhere in penal statutes with success (for example, in the offence of handling stolen goods[22]).

9.20 *Principal's ignorance of procurement or assistance.* Subsection (2) provides that the principal need not be aware of the accessory's act of procurement or assistance. This is stated largely for the avoidance of doubt. It restates, so far as procuring is concerned, the ruling of the Court of Appeal in *Attorney-General's Reference (No. 1 of 1975)*[23], that a person may be guilty of procuring an offence of driving with excessive alcohol in the blood although the driver was unaware of the act of lacing his drinks which brought about the offence. And it is clear that a person may be assisted to commit an offence although he is unaware of the assistance given. The Working Party gave the example 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.[24] 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.

9.21 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 be odd to hold that one person encouraged another if the other was unaware of the former's expression of support. The Courts-Martial Appeal Court appears to have reached the same conclusion in *Clarkson*.[25]

9.22 *Passive assistance or encouragement.* Subsection (3) states a more controversial principle, which is, however, well supported by authority.[26] A person does not ordinarily become an accessory to an offence merely by omitting to take steps to prevent it. But he may

[19]See Appendix B, Example 26(v).
[20]Another case of accessory liability is stated by cl. 31 (liability of officer of corporation).
[21]"To procure means to produce by endeavour": *per* Widgery L.C.J. in *Attorney-General's Reference (No. 1 of 1975)* [1975] Q.B. 773 at 779.
[22]Theft Act 1968, s. 22; cl. 172.
[23][1975] Q.B. 773.
[24]Working Paper No. 43, p. 37.
[25][1971] 1 W.L.R. 1402.
[26]*Du Cros* v. *Lambourne* [1907] 1 K.B. 40; *Rubie* v. *Faulkner* [1940] 1 K.B. 571; *Harris* [1964] Crim. L.R. 54; *Tuck* v. *Robson* [1970] 1 W.L.R. 741, [1970] 1 All E.R. 1171; *Bland* [1988] Crim. L.R. 41.

incur accessory liability through failure to exercise some special authority or duty that he has to control the act of another that constitutes an offence. Having such an authority, for example, by virtue of his management of premises [27] or his ownership of a chattel,[28] he may fail to take steps to prevent an offence taking place on those premises or through use of the chattel. This failure to act may in the circumstances constitute assistance, or be a source of encouragement, to the principal. This seems to be the effect of the case law, although the language of the judgments is not always easy to interpret.

9.23 The principle has been criticised by the Working Party, who proposed its abolition,[29] by Professor Glanville Williams[30] and by the Society of Public Teachers of Law in its submission to us on the Code team's Bill. But most commentators on the Working Paper and on the Bill found nothing objectionable in the principle, although some concern was expressed about the width of what is now clause 27(3). As that provision is an attempt to state a principle of the common law which we are satisfied does exist, its inclusion is consistent with our general restatement aim. As regards the statement of the principle, we believe, first, that on the authorities it is rightly stated in terms of a person's having either an authority or a duty to control the conduct of the principal; and, secondly, that it is not possible to express it more narrowly by any formula limiting the range of cases in which a relevant authority or duty arises.

9.24 *Fault required for accessory liability.* Subsection (1) states three separate aspects of the fault required if a person is to be guilty of an offence as an accessory. This reflects the complexity of the common law.[31]

9.25 *Subsection (1)(a): with respect to accessory's own act.* Paragraph (a) requires the procurement, assistance or encouragement of the principal's act to be intentional. In the case of procuring the point might be adequately conveyed by the verb itself.[32] But it is as well to make clear that it is not enough to do an act that in fact assists or encourages the principal; the act must be done with the intention of having that effect. Intention here has its Code meaning, given by clause 18(b). D will intend his act to assist E if he does the act in order to assist E or if he knows that its effect in the ordinary course of events will be to assist him (and similarly with encouragement). A motive to assist or encourage the principal is not necessary.[33]

9.26 *Acts within accessory's contemplation.* The accessory's intention may, of course, be conditional in the sense that he may intend to assist the principal to act in a certain way *if* the principal decides to act in that way. It is enough that the accessory has such an act in contemplation as an act that the principal may do.[34] On the other hand, one who assists or encourages another in an enterprise cannot be guilty of an offence constituted by the other's doing an act of a kind that is not foreseen as a part of that enterprise, for he does not, even conditionally, intend to assist or encourage such an act. Under the present law, for example, if two people agree to assault a third with their fists and one of them in the course of the attack kills the victim by using a knife, the other, who did not anticipate the use of a knife, is not an accessory to any offence of homicide.[35] We believe that paragraph (a) (together with paragraph (c), concerning the accessory's awareness of the principal's state of mind) will preserve the effect of the cases on the scope of a "joint enterprise" or "common purpose".

9.27 *Subsection (1)(b): with respect to circumstances.* Even if the offence is in some respects one of strict liability in the case of a principal, there is no question of strict liability for an accessory. It is commonly said that an accessory must know the facts that make the principal's conduct an offence. But there is some authority suggesting that recklessness suffices where strict liability obtains for the principal;[36] and we believe that there is strong ground for providing that recklessness suffices whenever it suffices in the case of the principal. It should suffice for liability as an accessory to rape, for example, that D is aware that the victim may not be consenting to the intercourse that he is encouraging. Provision to this effect will clarify the law rather than clearly change it. Of course, if the offence requires

[27]See *Tuck* v. *Robson*, above; Appendix B, Example 27(vi).
[28]e.g. a motor car: *Du Cros* v. *Lambourne*, above (dangerous driving).
[29]Working Paper No. 43, Proposition 6(4).
[30]Glanville Williams, "What Should the Code do about Omissions?", (1987) 7 Legal Studies 92.
[31]See Appendix B, Examples 27(i)-(v).
[32]See n. 21 above.
[33]*National Coal Board* v. *Gamble* [1959] 1 Q.B. 11; *D.P.P. for Northern Ireland* v. *Lynch* [1975] A.C. 653.
[34]*D.P.P. for Northern Ireland* v. *Maxwell* [1978] 1 W.L.R. 1350, [1978] 3 All E.R. 1140.
[35]*Davies* v. *D.P.P.* [1954] A.C. 378; *Anderson and Morris* [1966] 2 Q.B. 110.
[36]*Carter* v. *Richardson* [1974] R.T.R. 314, [1974] Crim. L.R. 190; *Smith* v. *Mellors and Soar* [1987] R.T.R. 210.

knowledge in the principal, the accessory must equally know the relevant fact. Paragraph (b) provides accordingly.

9.28 *Subsection (1)(c): with respect to principal's act and fault.* Paragraph (c) provides that the accessory must intend that the principal shall act, or be aware that he is or may be acting, or that he may act, with the fault (if any) required for the offence. The accessory will usually know perfectly well the criminal state of mind with which the principal is acting or may act. In many cases, indeed, it is his intention that the principal shall act with that state of mind. This is obviously so in most cases of procuring another to commit an offence; and it is no doubt also true in most joint enterprise cases. But such knowledge or intention is not necessary; recklessness with respect to the principal's fault will suffice. This has recently been made clear by decisions of the Judicial Committee of the Privy Council and of the Court of Appeal on secondary liability for murder. The Judicial Committee held in *Chan Wing-siu* v. *The Queen*[37] that where D embarks with E upon a criminal enterprise (in that case, robbery) aware of the possibility that in the course of it E may commit another offence (aware, in the instant case, that E may kill with the fault required for murder), D is guilty of that other offence if E does commit it. The point was confirmed for English law in *Ward*.[38]

9.29 *Accessory's ignorance of details.* Subsection (4) restates existing law. An accessory need not know such details, 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.[39] 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, however, where a particular person or thing is specifically referred to as the intended victim or object of an offence. This case is dealt with by subsection (5), to which subsection (4) is subject.

9.30 *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 contemplated by the accessory but does it deliberately against a victim other than one who has been specifically referred to. An early example is *Saunders and Archer*.[40] Archer advised Saunders, who wanted to kill his wife, to give her a poisoned apple. Saunders did so, but his wife passed the apple to their child in Saunders' presence (Archer not being present). Saunders remained silent, not wishing to reveal his criminal intention, while the child ate the apple. The child died. Archer was not guilty as an accessory to murder.[41] Under subsection (4) an accessory need not generally know the identity of the victim, so that he would still be guilty, for example, if the plan accidentally miscarried and took effect against an unintended victim. This would have been the position in *Saunders and Archer* if Saunders had been absent when his wife passed on the apple; the case would have been one of "transferred intention" (see clause 24) and Archer would have been liable as an accessory to the murder of the child. The common law, however, has consistently taken the view that it is different when the principal takes a deliberate decision to let the plan miscarry. Subsection (5) gives effect to this and so qualifies subsection (4).

9.31 This result is sometimes criticised as being unduly favourable to an accessory who has demonstrated his willingness to assist in the commission of just such an offence as is in the result committed; and the corresponding provision in the Code team's Bill was objected to by some critics on consultation. The principle is well-established, however, and the Working Party proposed that it should continue.[42] The subsection has only a limited area of operation. It would not apply, for example, to the facts in the South African case of *S.* v. *Robinson*.[43] 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 had deliberately acted outside the scope of the agreement but had not committed the offence against a different person. Whether in such a case D1 and D2 are guilty as accessories depends therefore on the application of clause 27 (1). They encourage E in the commission of murder; but do they (within the meaning of subsection (1)) intentionally encourage the act that E does? Is killing P without

[37][1985] A.C. 168.

[38](1986) 85 Cr.App.R. 71. This case was cited and discussed in argument, although, not mentioned in the judgment, in *Smith* [1988] Crim.L.R. 616, which required an accessory to have the same intention as the principal with respect to the prohibited result (there an intention to do grievous bodily harm). See also [1989] Crim. L.R. 236.

[39]*Bainbridge* [1960] 1 Q.B. 129; Appendix B, Example 27(i).

[40](1576) 2 Plowden 473; 75 E.R. 706.

[41]He would, of course, be guilty under clause 48 (1) of conspiracy to murder E's wife.

[42]Working Paper No. 43, Proposition 7(2)(c).

[43]1968 (1) S.A. 666.

his consent in the circumstances a different act from killing him with his consent? The point is not one which the present clause can resolve without descending to a quite unacceptable degree of particularity. The Code, here as elsewhere, attempts to restate the essentials of the common law but inevitably leaves a potential for judicial development of the law in the interpretation of concepts having an irreducible minimum of uncertainty in their application.

9.32 *Exceptions from liability.* A person who does an act in the knowledge that it will inevitably assist or encourage another in the commission of an offence that he knows the other is proposing, or is likely, to commit does not always become guilty of the offence if the other goes on to commit it. In particular, subsection (6) makes express provision for three kinds of case in which the apparent accessory is protected against liability by the purpose or motive with which he acts.

9.33 *Law enforcement defence.* Subsection (6)(a) provides for the case of the police informer or undercover agent who does acts that in fact assist the commission of an offence but whose purpose is to frustrate its commission. If his plan fails and the offence is committed before the police can intervene he is not guilty as an accessory.[44] Subsection (6)(b) similarly protects one whose act is designed to avoid or limit the harmful consequences of an offence — for example, by enabling the police to intervene after a theft or similar offence to recover the stolen property and arrest the participants. He is not guilty as an accessory if he acted without the purpose of forwarding the commission of the offence. Paragraphs (a) and (b) in these applications follow a proposal made in Working Paper No. 43.[45] They ought not to be read as an exclusive statement on the immunity of undercover agents. It is not difficult to think of cases outside the terms of the paragraphs in which persons, most obviously police officers, working bona fide in the interest of law enforcement, ought arguably to be protected against liability for offences with which they become involved. But such liability is in any case likely to be theoretical only: and the common law on this topic, perhaps for this reason, is not fully developed. It can be further developed under clause 45(c).[46]

9.34 *Purpose of limiting harmful consequences.* Another example of an act of assistance done only to limit the harmful consequences of an offence was contemplated in some of the speeches in *Gillick* v. *West Norfolk and Wisbech Area Health Authority*:[47] that of the doctor who provides contraceptive advice or treatment to a girl under sixteen.[48] Lords Fraser of Tullybelton and Scarman agreed that whether the doctor would be guilty as an accessory to an offence of unlawful sexual intercourse subsequently committed by the girl's boyfriend would depend on the doctor's "intention".[49] Lord Fraser thought it unlikely that a doctor giving such advice or treatment with the intention of acting in the best interests of the girl would commit an offence.[50] Lord Scarman referred to circumstances in which "[t]he bona fide exercise by a doctor of his clinical judgment must be a complete negation of the guilty mind which is an essential ingredient of the criminal offence of aiding and abetting the commission of unlawful sexual intercourse."[51] It is plain that their lordships were using the word "intention" in the sense of "purpose", which is the word employed in subsection (6)(b).

9.35 We believe that the conduct contemplated as innocent in *Gillick* must be seen, although it was not in that case expressed, as an example of a more general category of accessory acts done for the sole purpose of containing the harm done by the principal. The generalisation that such acts do not attract criminal liability seems plainly right although, perhaps unsurprisingly, authority for it is lacking. We should perhaps refer to some topical examples. The supply of condoms to prisoners, or of sterile hypodermic needles to drug abusers, if done solely for the purpose of limiting the risk that the prisoners or addicts will be infected by the AIDS virus as a result of anticipated acts of buggery or injection, would, on that ground alone if on no other, not attract accessory liability for any offences that those acts might involve.

9.36 *Belief in legal obligation.* 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

[44]See Appendix B, Example 27(viii).
[45]Proposition 7(1).
[46]Referred to more generally below, para. 9.37.
[47][1986] 1 A.C. 112.
[48]See Appendix B, Example 27(ix).
[49]At 174-175 (Lord Fraser), 190 (Lord Scarman). This assumes that the doctor's act will, to his knowledge, assist or encourage that of the boyfriend, which is no doubt unlikely (see *per* Woolf J. at first instance, [1984] 1 Q.B. 581 at 593-595, in a passage adopted by Lord Bridge of Harwich, [1986] A.C. 112 at 194) but not impossible.
[50]At 175.
[51]At 190.

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 subsection (6)(c), which makes the answer depend on the state of mind of the transferor. If he hands over the article because he believes that he is under a legal obligation to do so and not for the purpose of furthering commission of an offence involving the article, he should not be liable for such an offence when it is committed.[52] 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.

9.37 *Other possible defences.* Subsection (6) is not necessarily an exhaustive statement of the cases in which a person's act in assisting or encouraging the commission of an offence is regarded by the law as justified or excused in the circumstances, whether because (or in part because) of an acceptable purpose with which the act is done or otherwise. The preservation by clause 4(4) (referred to by clause 45(c) in the context of defences[53]) of common law defences, whether existing or still to be developed, of course applies to defences peculiarly available to accessories as it does to any others.

9.38 *Protected persons.* Subsection (7) exempts from liability as an accessory a victim of an offence who is a member of a class of persons whom it is the purpose of the enactment creating the offence to protect. This principle is well established in the context of sexual offences, from which the leading illustration derives.[54] Continuation of the principle in that context was recommended by the Criminal Law Revision Committee in their Fifteenth Report.[55] Its incorporation in a wider proposition was proposed in Working Paper No. 43.[56]

9.39 We have had some difficulty in deciding whether to give effect to that proposal. It can be argued that the principle leads to anomalies, at least in the field of sexual offences;[57] that the existing authorities do not justify the statement of a general rule; and that the application of the rule in any particular context ought to be left to ad hoc declaration of parliamentary intention or to the discovery of that intention by judicial interpretation. On balance, however, we favour the enactment of a general rule. We are influenced in part by the enactment in the Criminal Law Act 1977, section 2(1), of a similar rule for conspiracy; and we in fact propose rules for all the preliminary offences in terms closely corresponding to that in clause 27 (7). We think that it is right in principle to exempt even from theoretical liability a person whom it was the very purpose of the legislation to protect so long as the definition of the offence does not describe his or her conduct as that of a principal. The exemption ought not to depend upon the courts' divining the existence of implicit meanings in the legislation creating the offence. The principle, although expressed as a generalisation, will be of very narrow application if the word "victim" is understood as we intend. A person upon whose body a sexual offence is committed is plainly a "victim" of that offence. Not so, as we understand the word, a factory worker who happens to be injured by an unfenced dangerous machine; the failure to fence, although against the interests of the group of which the worker is a member, is not directed against that worker as a "victim".

9.40 *Incidental participation.* Working Paper No. 43 suggested a wider principle than that just discussed. 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".[58] 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. The spectator or buyer who incites the commission of the offence should not be protected from prosecution. The passive

[52]See Appendix B, Example 27(x). Cf., on being knowingly concerned in a prohibited exportation of goods with intent to evade the prohibition, *Garrett* v. *Arthur Churchill (Glass) Ltd.* [1970] 1 Q.B. 92 at 100, *per* Parker L.C.J.: "Did he ... only hand over because he felt that he had to, or did he ... lend himself ... to the idea of [the prohibited exportation]?"

[53]See paras. 12.40, 12.41 below.

[54]*Tyrrell* [1894] 1 Q.B. 710; Appendix B, Example 27(xi).

[55]Fifteenth Report: Sexual Offences (1984), Cmnd. 9213, Appendix B.

[56]See para. 9.40 below.

[57]Criminal Law Revision Committee, Fifteenth Report, above. For example, it will protect against liability a girl who initiates a sexual offence against herself, while leaving vulnerable to prosecution a younger boy whose role, according to the definition of the offence, is that of principal offender.

[58]Proposition 8.

spectator may not be liable in any event if he does nothing to encourage the offence. Other cases of "incidental" participation can be dealt with by prosecutorial discretion. On these grounds, and in view of the response to the Working Paper, the Code team's Bill made no provision for the suggested immunity. Nor does our draft Bill.

9.41 *Withdrawal from participation.* Subsection (8) provides a defence to one kind of accessory who seeks to undo the effect of an earlier act of participation. The proposed defence is limited to one who has encouraged the commission of an offence. Recent Court of Appeal authority recognises such a defence based on the countermanding of encouragement formerly given so as to show that the encourager no longer supports the enterprise.[59] This is narrowly restated in paragraph (a): the encourager may escape liability by countermanding his encouragement "with a view to preventing [the commission of the offence]".[60] Paragraph (b) provides for a case which, it seems clear, cannot be less generously treated — namely, where the encourager has taken all reasonable steps to prevent commission of the offence.

9.42 The Code team proposed to extend the defence to any accessory who takes such steps. This was by way of attempting to resolve the undoubted obscurity of this area of the law with a compromise between denying any defence of withdrawal and allowing a more generous defence which had been proposed in Working Paper No. 43[61] but which had not been well received on consultation. In view, however, of the unclear state of the authorities and of some lingering disquiet expressed on consultation concerning the Code team's proposal, we do not feel able to recommend any broader statement than that made in subsection (8). The subsection will not rule out further judicial development of the defence of withdrawal under clause 45(c).

Clause 28: Parties — procedural provisions

9.43 This clause deals with some procedural matters which have an important bearing on the practical operation of the substantive rules about parties. Their appearance alongside clauses 25 to 27 will be helpful although in due course they may be expected to figure in that part of the Code dealing with procedure and evidence.

9.44 *Evidence of participation.* Subsection (1), which is the procedural counterpart of clause 25, makes it clear that a party to an offence, whether he is a principal or an accessory, may be 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*[62] 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 offences. 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.

9.45 Paragraph (c) enables the court to convict both defendants of the offence in a case such as *Ramnath Mohan* v. *R.*[63]

9.46 *Conviction of accessory.* Subsection (2)(a) restates existing law. Subsection (2)(b) is a corollary of subsection (1); 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 29: Vicarious liability

9.47 *Liability 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. Such liability is often called, somewhat loosely, "vicarious liability". It may arise either (paragraph (a) of subsection (1)) because the statute creating the offence expressly so

[59] *Whitefield* (1984) 79 Cr.App.R. 36.
[60] See Appendix B, Example 27(xii).
[61] Proposition 9.
[62] [1978] 1 W.L.R. 1350, [1978] 3 All E.R. 1140.
[63] [1967] 2 A.C. 187; see Appendix B, Example 28.

provides, or (paragraph (b)) as a result of an extended interpretation given by the courts to a word or phrase in the definition of the offence. Among the words commonly so interpreted are verbs like "sell", "use", "possess". They are interpreted as applying both to the person who actually sells, uses or possesses and to the principal on whose behalf he does so.[64] There is no principle underlying these cases. Their existence is simply the product of statutory interpretation. There are, however, certain limits to the interpretative process involved and these are set out in paragraph (b).

9.48 *Limits of vicarious liability.* Subsection (1)(b) provides for two conditions to be satisfied before an offence 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 for the person who in fact acted; some well-known examples are given in the preceding 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. In their absence there can be no justification for imposing vicarious liability (unless, of course, Parliament has expressly provided for it). 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.[65]

9.49 *Independent contractors.* The reference in paragraph (b) to a person's "acting within the scope of his authority" extends, of course, to a case in which the person who does the prohibited act is acting for the defendant not as an employee but as an independent contractor. It was proposed in Working Paper No. 43 to exclude such persons from the range of agents whose acts may give rise to vicarious liability. As this proposal would change the law[66] without a clear case being made for doing so, clause 29 does not adopt it. The clause does not distinguish between the person who "uses" the defendant's vehicle as his employee and the person who "uses" the defendant's vehicle on a single occasion because the defendant has asked him to do so, whether or not for payment.[67] This does not mean that a person will necessarily be liable for the act of his independent contractor even where the offence employs a verb like "uses". The matter remains one for judicial interpretation. It is one thing to hold that a person carrying on a business of supplying milk[68] or heavy building materials[69] "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 engages to carry his furniture to a new residence. Paragraph (b) 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.

9.50 *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*[70] and our Working Party proposed its abolition.[71] Subsection (2) gives effect to this proposal so far as concerns offences created by the Code itself or by subsequent legislation. Parliament will have to provide clearly for the attribution to one person of the fault of another if it wishes this to occur. There can be no question, however, of proposing the abolition of the delegation principle as it has been held to apply to existing legislation. Some legislation is so drafted that abolition would seriously affect its enforceability. Subsection (3) therefore expressly preserves the application of the principle to pre-Code offences.

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[64]See Appendix B, Example 29(i).

[65]See, e.g., *Coppen* v. *Moore (No. 2)* [1898] 2 Q.B. 306; Appendix B, Example 29(ii), which anticipates that the same result will be reached under the Code.

[66]See, e.g., *Quality Dairies (York) Ltd.* v. *Pedley* [1952] 1 K.B. 275 and *F.E. Charman Ltd.* v. *Clow* [1974] 1 W.L.R. 1384, [1974] 3 All E.R. 371.

[67]We accept the Code team's view (Law Com No. 143, para. 10.27) that a member of the defendant's family or a friend who performs the relevant act gratuitously for the defendant at his request should be covered by the reference to persons acting with the defendant's "authority" rather than being artificially treated "as if he were...employed by him", as was proposed in Working Paper No. 43 (Proposition 4).

[68]As in *Quality Dairies (York) Ltd.* v. *Pedley*, above, n.[66].

[69]As in *F.E. Charman Ltd.* v. *Clow*, above, n.[66].

[70][1965] A.C. 486.

[71]Working Paper No. 43, pp. 29-31.

PART 10

PARTIES TO OFFENCES (2): CORPORATIONS, UNINCORPORATED ASSOCIATIONS AND CHILDREN

Clause 30: Corporations

10.1 *Working Paper No. 44.* The Code team, in considering how the criminal liability of corporations should be provided for in the Code, took as their point of departure a Working Paper on the subject prepared by our Working Party.[1] As that Working Paper was not followed by a Report, the team had no Law Commission recommendations to follow and were bound to attempt a restatement of the existing law as they understood it. Our following them in this is, of course, in keeping with the general policy of this codification project; but the point is worth stressing here for two reasons.

10.2 *A controversial subject.* One reason is the controversial character of corporate criminal liability. The subject is a relatively recent judicial development[2] and was not fully discussed in authoritative judgments before the House of Lords' decision in *Tesco Supermarkets Ltd.* v. *Nattrass* in 1971.[3] We are conscious that we are here proposing the restatement of principles whose underlying theory and rationale remain strangely uncertain. It is comforting to note, however, that, although the Working Party did review other possible approaches to the subject (including that of abolishing corporate liability altogether), its discussion plainly tended towards the preservation of a slightly modified version of the status quo. Clause 30 incorporates some of those modifications.

10.3 *An undeveloped subject.* The second observation to be made upon the application to corporate criminal liability of our general restatement policy concerns the relatively undeveloped state of the subject. Although its essentials are reasonably clear, the Code team expressed surprise at the number of points at which, in drafting their suggested clause, they had to fill in gaps in the law for want of authority.[4] It has therefore been encouraging that the team's clause largely escaped criticism on consultation, and in particular that their proposals for the filling of gaps were not questioned. We have been able to adopt that clause with very minor amendments.

10.4 *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.[5] These propositions are confirmed by subsection (1).[6] Since the rest of the law relating to corporate liability certainly needs to be stated, subsection (1) is included for the avoidance of any doubt that might arise if it were not.

10.5 *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.[7] 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,[8] is that "one of its controlling officers, acting within the scope of his office and with the fault required, is concerned in the offence".[9] There are several phrases here which require elaboration.

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[1]Working Paper No. 44 (1972), Criminal Liability of Corporations.

[2]The modern law on the subject is usually regarded as dating from a group of cases in 1944, especially *D.P.P.* v. *Kent and Sussex Contractors Ltd.* [1944] K.B. 146; *I.C.R. Haulage Ltd.* [1944] K.B. 551.

[3][1972] A.C. 153.

[4]Law Com. No. 143, para. 11.2 (referring by way of example to the subject-matter of paras. 10.12, 10.17 and 10.18 below). [5]See, respectively, Clean Air Act 1956, s. 1; Control of Pollution Act 1974, s. 31(1)(a).

[6]See Appendix B, Examples 30(i) and (ii).

[7]*Tesco Supermarkets Ltd.* v. *Nattrass* [1972] A.C. 153.

[8]This includes any case of liability as an accessory, since all such liability is fault-based.

[9]See Appendix B, Examples 30(iii) and (iv). A case apparently inconsistent with this requirement is *Yugotours Ltd.* v. *Wadsley* [1988] Crim. L.R. 623 (Trade Descriptions Act 1968, s. 14 (1)(b): "recklessly" making a false statement).

10.6 *"Controlling officer"*. This key phrase is defined in subsection (3):

> "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, or was validly, appointed to any such office)."

This (subject to what is said in the following paragraph) is intended to capture 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]

10.7 *Invalid appointment or no appointment.* The Code team followed a hint in Working Paper No. 44 in not requiring the controlling officer to be validly appointed.[13] They took the view, with which we agree, that 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 their definition, and now of our own, rebels against some dicta in *Tesco*.[14] The definition treats as a controlling officer any person who in fact participates in the control of a corporation by exercising the functions of a relevant office, whether as the result of appointment (valid or not) or *de facto*. It will, for example, include a kind of case about which the Northern Circuit Scrutiny Group was concerned: that of the bankrupt who runs a company of which members of his family are the nominal directors and shareholders.

10.8 *"Shadow directors"*. We considered going further. It was suggested to us that the category of "controlling officer" should be declared to include a "shadow director" within the meaning of section 741(2) of the Companies Act 1985: "a person in accordance with whose instructions the directors of a company are accustomed to act".[15] This would be a more radical extension of the notion of the "directing mind and will" as it has been judicially explained, for it would not be limited to persons involved in the control of a corporation through the exercise of the functions of officers. Although we have some sympathy for the suggestion, the case for it seems to us to depend upon the existence of a clearer rationale for corporate criminal liability than English law has yet developed. It is a law reform suggestion and we ought not to adopt it in advance of detailed consideration and appropriate consultation.[16]

10.9 *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.[17] For it is "a question of law whether...a person in doing particular things is to be regarded as the company.... "[18] Subsection(3)(c) declares accordingly.

10.10 *"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 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."[19]

10.11 *"...is concerned in the offence."* This shorthand expression in subsection (2) is explained in subsection (4), as elaborated in subsection (5). A controlling officer may render a corporation guilty of an offence by doing the acts specified for the offence; by being a party to the acts of others — procuring, assisting or encouraging those acts; or by failing to prevent

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[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.
[15] This might include a controlling company, as it does for some purposes of the Companies Act but not for others: Companies Act 1985, s. 741(3).
[16] The Companies Act use of the concept of "shadow director", which concerns the position of individuals rather than the liability of the company, does not in itself provide a compelling reason to augment the definition of "controlling officer" in clause 30(3).
[17] *Andrews Weatherfoil Ltd.* [1972] 1 W.L.R. 118; applying a dictum of Lord Reid in *Tesco Supermarkets Ltd.* v. *Nattrass* [1972] A.C. 153 at 173.
[18] [1972] A.C. 153 at 170, *per* Lord Reid.
[19] Working Paper No. 44, para. 39d.

relevant acts (of other controlling officers or of subordinates) or relevant events. Only the last of these possibilities needs elaboration.

10.12 *"Fails to prevent."* It seems clear that a company must be guilty of a fraud offence if its managing director knows that company personnel are defrauding customers and turns a blind eye to what is going on. The perpetrators are not "encouraged" by his inactivity unless they know of his knowledge. An additional expression is needed. "Fails to prevent" 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) explains that the failure required is a failure "to take steps that he might take" to ensure (in effect) that the offence is not committed. The subsection must of course be read together with the reference to "the fault required" in subsection (2).

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

(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.[20]

(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.[21]

(iii) *Subsection (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"[22] decision of *Moore* v. *I. Bresler Ltd.*[23]

10.14 *Offences that a corporation cannot commit.* Subsection (7) reflects the traditional view that there can be no question of criminal liability if there can be no punishment. It declares that a corporation cannot be guilty of an offence that is not punishable with a fine or other pecuniary penalty.[24]

10.15 *Defences.* The leading case of *Tesco Supermarkets Ltd.* v. *Nattrass*[25] 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 commission of such an offence by himself or any person under his control.[26] 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 is not capable of direct application to all of them. It appears to be necessary to distinguish, as subsection (8) does, between three classes of defence.

10.16 *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

[20]Cf. Working Paper No. 44, para. 39b.
[21]*Ibid.*
[22]*Ibid.*, para. 39c.
[23][1944] 2 All E.R. 515.
[24]For discussion of some other offences (those requiring natural persons as principals; perjury; conspiracy) see the Code team's Report, para. 11.12 (ii)-(iv). We accept the team's view that no provision relating specially to corporate liability is required in respect of any of these.
[25][1972] A.C. 153.
[26]Trade Descriptions Act 1968, s. 24(1).

officers, and it cannot matter that other persons concerned in the transaction do not have the belief or intention required for the defence.[27] Such a rule derives readily enough from the *Tesco* case by analogy.

(ii) *No controlling officer involved.* But that case is not 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.[28]

10.17 *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.[29] On a charge of possessing a controlled drug, it is a defence that the possessor neither knew nor suspected nor had reason to 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.

10.18 *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.[30] 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 require 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.[31]

Clause 31: Liability of officer of corporation

10.19 *The case for a general provision.* Parliament often provides, by so-called "directors' liability clauses", for the criminal liability of an officer of a corporation[32] with whose "consent or connivance" an offence by the corporation has been committed. There are good reasons for including in Part I of the Code a provision of this kind of general application. This will avoid the need for repeated provision in the different Chapters of Part II, including Chapters that may come to be included in the future, and indeed in other subsequent legislation. It also enables the liability in question to be stated in Code language and to be understood in its proper relationship to other Code principles.

10.20 *The basis of liability.* The liability of a corporate officer for "consent or connivance" must in many cases duplicate his liability at common law for aiding, abetting or counselling the offence. The Code should avoid such duplication. Subsection (1)(a) therefore merely provides for the liability, as an accessory, of a controlling officer who intentionally fails to take steps that he might take to prevent the commission of an offence by the corporation where he knows that, or is reckless whether, the offence is being or will be committed.[33] This appears to cover all situations of consent and connivance that are not already caught by clause 27, the main provision on accessories.[34] But many statutes also provide for the liability

[27]See Appendix B, Example 30(v).
[28]Example 30(vi).
[29]Example 30(vii).
[30]See, e.g., Road Traffic Act 1988, s. 42(2)(a): defence that the driver of an overweight vehicle was proceeding to the nearest available drawbridge.
[31]See Appendix B, Example 30(viii).
[32]Or of a member of a corporation managed by its members: see clause 31 (2).
[33]See Appendix B, Example 31.
[34]Cf. Law Com. No. 143, para. 11.18.

of a corporate officer to whose neglect an offence is attributable. Subsection (1)(b) imposes such liability in relation to strict liability offences only. It is something of a departure from principle to provide for a kind of accessory liability in the absence of fault; and it would be wrong to do so where the offence itself requires fault in the case of the principal.

10.21 *Application of the clause.* We do not think that it is appropriate to apply the clause to existing ("pre-Code") offences to which directors' liability clauses do not already apply. To do so would change the law affecting many offences without consultation with the government departments having responsibility for that law.

10.22 A very different question is whether to apply the clause to all offences contained in Part II of the Code or created by subsequent legislation. In modern times directors' liability has commonly been declared in relation to offences in regulatory legislation and sometimes, but not consistently, in relation to more general offences. Section 18 of the Theft Act 1968, for example, applies only to certain offences of deception[35] and to false accounting, apparently on the ground that these offences are "of a kind to be committed by bodies corporate".[36] Almost any offence might be so committed, however. We are not able to find any clear basis for distinguishing in this respect between different classes of offence. We therefore recommend that clause 31(1) should be of general application (subject, of course, to the power of Parliament, if it thinks fit, to provide that it does not apply in the case of any particular offence).

Unincorporated bodies

10.23 *Criminal liability.* Clause 30 concerns incorporated bodies only; the Code has no provision relating to the criminal liability of unincorporated bodies. This is not because an unincorporated body cannot commit criminal offences. Unless the contrary appears, "person" in an Act includes a body of persons corporate or unincorporate.[37] This includes an Act, including of course the Code itself, providing for the criminal liability of a "person". Some modern Acts expressly create offences that may be committed by unincorporated bodies.[38] Others assume the liability of unincorporated bodies or associations as "persons" for offences under the Acts and include procedural and other provisions to cater for offences alleged to have been committed by them.[39]

10.24 *Principles of liability.* The reason for the silence of the Code is that neither case law nor legislative practice justifies the framing of provisions, equivalent to clause 30, on the principles of liability. If the offence requires a fault element,[40] who must be proved to have been at fault in the way specified if the body or association is to be liable? What is the equivalent of the "directing mind and will" doctrine of corporate liability?[41] What principles govern the availability of defences?[42] There is no English judicial authority on these questions and there are no adequate statutory models. It would be wrong for us, without prior consultation, to attempt to devise a regime to suit the wide variety of types of unincorporated body. We recommend that this matter be left for the time being to the common law.[43]

10.25 *Liability of officers and members.* Nor have we felt justified in including in our draft Bill an equivalent of clause 31 (liability of officer of corporation). Some statutes provide for the liability of partners, officers or committee members for offences committed by associations or bodies to which they belong;[44] but the inclusion of such provisions is much less general than in the case of corporations and the provisions vary greatly in their effects.

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[35]Offences under ss. 15, 16 and 17 of that Act and ss. 1 and 2 of the Theft Act 1978 (but not s. 20(2) of the 1968 Act). Cf. Forgery and Counterfeiting Act 1981, s. 25, relating to offences under ss. 18 and 19 only of that Act.

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

[37]Interpretation Act 1978, s. 5, Sched. 1.

[38]See, e.g., Representation of the People Act 1983, s. 202 (1) (express provision that "person" includes "an association...unincorporate"); Surrogacy Arrangements Act 1985, s. 2(5).

[39]See, e.g., Insurance Companies Act 1982, s. 92; Companies Act 1985, s. 734; Banking Act 1987, s. 98.

[40]See, e.g., Insurance Companies Act 1982, s. 73; Representation of the People Act 1983, ss. 60(1), 61(5), 75(5).

[41]Cf. clause 30(2) and para. 10.5 above.

[42]Cf. clause 30(8).

[43]See clause 4 (4).

[44]See, e.g., Representation of the People Act 1983, s. 75(6); Banking Act 1987, s. 98(6),(7).

Clause 32: Children

10.26 *Child under ten.* Subsection (1) restates the present law[45] — without expressing the matter, as the present law does, in terms of a conclusive presumption of incapacity.

10.27 *Child over ten but under fourteen.* Subsection (2) specifies an additional fact to be proved in any prosecution of a child under fourteen — namely, that he knew that what he was doing was "an offence or...seriously wrong." The phrase "seriously wrong" reflects the most recent judicial statement of what must be proved in order to rebut the traditional presumption that the child was *doli incapax*, that he lacked the "mischievous discretion" necessary for criminal liability.[46] A requirement of knowledge that the act is seriously wrong seems inapt, however, in the case of very minor offences; yet it has never been suggested that a child over ten cannot commit such offences. Knowledge that the act is an offence would seem to suffice.[47]

10.28 *Should the present rule be preserved?* As the Code team pointed out, the *doli incapax* presumption has been said to "[reflect] an outworn mode of thought" and to be "steeped in absurdity"[48] and it has long been recognised as operating capriciously. Its abolition was proposed in 1960 by the Ingleby Committee on Children and Young Persons.[49] For these reasons the team recommended that it should not survive in the Code.[50] We do not feel able to adopt this suggestion. Parliament did not take the opportunity to implement the Ingleby Committee's proposal in the Children and Young Persons Act 1969 but chose rather to reduce the incidence of criminal proceedings against children and young persons. The recommendation made in 1960 is no longer adequate warrant for a reform on which there has been no recent consultation and which is bound to be controversial. We would add that, while we are alive to the criticisms of the present law, we should in any case be loth to recommend an isolated change in the law that might be interpreted as encouraging greater use of the criminal process as a means of dealing with children.

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

[46]*McC.* v. *Runeckles* [1984] Crim. L.R. 499. In *J.B.H. and J.H. (minors)* v. *O'Connell* [1981] Crim. L.R. 632 it was said that it must be proved that the child knew his act to be "morally wrong"; but the court in the later case regarded "seriously wrong" as embracing "morally wrong" and preferred the wider expression. Cf. *Gorrie* (1919) 83 J.P. 136.

[47]Cf. Glanville Williams, *Textbook of Criminal Law* 2nd ed., (1983), 639.

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

[49](1960), Cmnd. 1911, para. 94.

[50]Law Com. No. 143, para. 11.22.

PART 11

INCAPACITY AND MENTAL DISORDER

Incapacity

Clause 33: Automatism and physical incapacity

11.1 "*Automatism*" has been referred to as "a modern catch-phrase" to describe "an involuntary movement of the body or limbs of a person."[1] In general a person is not criminally liable for such a movement or its consequences. On one analysis an "involuntary movement" is not an "act". In Code terms, however, even an unconscious movement of a person is an "act", but one done "in a state of automatism". This permits flexible use of the word "act" as a key term in the Code and makes "a state of automatism" also available as a Code expression. The word "involuntary" is not needed — happily, in view of the variable use to which it tends to be put.[2]

11.2 *Limited function of subsection (1).* The main function of clause 33 (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 failure to comply with a standard of conduct may also have to rely on the clause.[3] On the other hand, a state of automatism will negative a fault requirement of intention or knowledge or (normally) recklessness; so 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.

11.3 *Conditions within the subsection.* Subsection (1)(a) refers to acts of two kinds:

(i) an act over which the person concerned, although conscious, has no control: the "reflex, spasm or convulsion". Such an act would rarely, if ever, be the subject of a prosecution.

(ii) an act over which the person concerned does not have effective control because of a "condition" of "sleep, unconsciousness, impaired consciousness or otherwise". We believe that the references to "impaired consciousness"[4] and to deprivation of "effective" control are justified both on principle and by some of the leading cases. The governing principle should be that a person is not guilty of an offence if, without relevant fault on his part, he cannot choose to act otherwise than as he does. The acts of the defendants in several cases have been treated as automatous although it is far from clear, and even unlikely, that they were entirely unconscious when they did the acts and although it cannot confidently be said that they exercised no control, in any sense of that phrase, over their relevant movements.[5]

11.4 The case law, however, is not consistent. In *Broome* v. *Perkins*[6] D drove five miles home, very erratically, in a hypoglycaemic state. The evidence was that he may well not have been conscious of what he was doing. The Divisional Court directed a conviction of driving without due care and attention, on the ground that D's mind must have reacted to stimuli, made decisions (to swerve, brake, restart after stopping) and given directions to his limbs. His actions were regarded as not "involuntary" or "automatic". Yet it seems clear that D's condition was such that he could not choose to behave otherwise than as he did. Cases such as those we have mentioned above appear not to have been referred to. Finding it necessary to choose between the authorities, we propose a formula under which we expect (and indeed hope) that a person in the condition of the defendant in *Broome* v. *Perkins* would be acquitted (subject to the question of prior fault).

11.5 *Prior fault.* Subsection (1)(b) excepts from the protection of the subsection cases in which the state of automatism itself is the result of relevant fault on the part of the person

[1] *Watmore* v. *Jenkins* [1962] 2 Q.B. 572 at 586, *per* Winn L.J.
[2] See, e.g., the discussion of *Broome* v. *Perkins* (1987) 85 Cr.App.R. 321 in para. 11.4 below.
[3] See Appendix B, Example 33(i).
[4] *Pace* Neill J. in *Roberts* v. *Ramsbottom* [1980] 1 W.L.R. 823, [1980] 1 All E.R. 7 (a civil case).
[5] See *Charlson* [1955] 1 W.L.R. 317, [1955] 1 All E.R. 859; *Kemp* [1957] 1 Q.B. 399; *Quick* [1973] Q.B. 910 (acts of violence when consciousness and effective control impaired by, respectively, cerebral tumour, arteriosclerosis, hypoglycaemia).
[6] (1987) 85 Cr.App.R. 321.

affected or of voluntary intoxication.[7] A person charged with an offence that may be committed by negligence can be convicted if his state of automatism was the result of his own negligent conduct. Under clause 22 (1)(a) a person who was unaware of a risk by reason of voluntary intoxication is credited, when charged with an offence of recklessness, with the awareness that he would have had if sober; and clause 33 (1)(b) ensures that he cannot escape liability for the offence by a plea of automatism. Paragraph (b) is intended to produce the same results as the common law.[8]

11.6 *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.[9] 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.

Mental disorder

Disability in relation to the trial

11.7 *Reform proposals*. The defendant's mental disorder (or his being a deaf-mute) may operate as a bar to his trial on indictment or to the progress of his trial beyond the end of the prosecution case.[10] 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.[11] The Committee on Mentally Abnormal Offenders (chairman: Lord Butler; hereafter called "the Butler Committee") gave elaborate consideration to the law and procedure relating to disability and made important recommendations for reform.[12] 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. But some of the Committee's procedural proposals were controversial. A consultative document issued by the Home Office in April 1978 referred in particular to serious doubts 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.

11.8 *Location in the Code*. We hope that the important matter of disability will be further considered as soon as possible with a view to reform. We do not, however, share the Code team's preference for including provisions on disability in Part I of the Code.[13] It is true that the Butler Committee proposed that a finding of disability and an acquittal based on a mental disorder verdict should give rise to similar disposal powers. But compatibility between the two disposal regimes can be achieved without enacting the relevant provisions side by side. Those relating to disability are procedural in nature and in due course their proper place will be in the projected Part III of the Code.

Code provisions on mental disorder

11.9 *Butler Committee*. The Butler Committee proposed substantial reform of the law and procedure relating to the effect of mental disorder on criminal liability and the disposal of persons acquitted because of mental disorder.[14] 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 its review of the subject. We ourselves are persuaded that implementation of the Committee's proposals would greatly improve this area of the law. We have, however, found it necessary to suggest some important modifications of those proposals. Clauses 34 to 40 therefore aim to give effect to the policy of the Butler Committee as modified by us in ways that will be explained in the following paragraphs.

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[7] See Appendix B, Examples 33(ii) and (iii).

[8] There may be one trivial departure 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: *Kay* v. *Butterworth* [1945] L.T. 191. 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 33 (1), read as a whole, implies that he continues "driving" until his vehicle comes to rest.

[9] See Appendix B, Examples 33(iv) and (v).

[10] Criminal Procedure (Insanity) Act 1964, s. 4.

[11] *Ibid.*, s. 5 (1).

[12] Report (1975), Cmnd. 6244 (hereafter referred to as "the Butler Report"), Chapter 10.

[13] See Law Com. No. 143, para. 12.2.

[14] Butler Report, Chapter 18.

11.10 *The present "insanity defence".* Before considering the structure of the proposed law, it will be convenient to refer to that of the present law. The *M'Naghten Rules*,[15] together with statutory provisions, produce a "special verdict" ("not guilty by reason of insanity")[16] and the automatic committal of the acquitted person to a hospital to be specified by the Secretary of State,[17] in two kinds of case.

(i) The first case is that where it is proved (rebutting the so-called "presumption of sanity") that, because of "a defect of reason, from disease of the mind", the defendant did not "know the nature and quality of the act he was doing". If the defendant "did not know what he was doing",[18] he must have lacked any fault required for the offence charged; so, in modern terms at least, this first element in the *M'Naghten Rules* has the appearance of a rule, not about guilt, but about burden of proof and disposal. The defendant should in any case be acquitted, but he must prove that he should be; and his acquittal is to be treated as the occasion for his detention as a matter of social defence.

(ii) The second case is that where, because of "a defect of reason, from disease of the mind", the defendant "did not know he was doing what was wrong."[19] This is a case, then, in which the Rules afford a defence properly so called: a person who would otherwise be guilty is not guilty "by reason of insanity". But, once again, social defence requires his detention in hospital.

11.11 *Structure of the proposed provisions.* Clauses 35 and 36, following the structure proposed by the Butler Committee, are similarly concerned with two kinds of case, in each of which there is to be a verdict of acquittal in special form ("not guilty on evidence of mental disorder"). On the return of a mental disorder verdict the court would have flexible disposal powers,[20] the availability of which would undoubtedly give clauses 35 and 36 greater practical importance than the insanity defence now has.

(a) *Clause 35 (1).* In one case all the elements of the offence are proved but severe mental disorder operates as a true defence. This is equivalent to case (ii) above.

(b) *Clause 36.* In the other case an acquittal is inevitable because the prosecution has failed to prove that the defendant acted with the required fault (or to disprove his defence of automatism or mistake); but the reason for that failure is evidence of mental disorder, and it is proved that the defendant was indeed suffering from mental disorder at the time of the act. This differs from case (i) above in casting no burden on the defendant of proving his innocence.

11.12 *Summary trial.* The Butler Committee recommended that a magistrates' court should acquit on evidence of mental disorder in the same circumstances as a jury.[21] Our clauses so provide. The general principles of the substantive criminal law applicable to offences triable either way must be the same whatever the mode of trial in the particular case. A defendant who lacked the fault required for the offence charged will of course be entitled to an acquittal wherever he is tried.[22] And if severe mental illness or severe mental handicap at the time of the offence entails an acquittal on trial on indictment, it must do so also on summary trial. A defence of severe mental illness may, of course, make summary trial inappropriate. That is a consideration that could be taken care of by procedural provisions. But, assuming that mental disorder is capable of arising as an issue on summary trial, the Code must clearly provide for the same substantive consequences as on trial on indictment.

Clause 34: Mental disorder: definitions

11.13 *"Mental disorder"; "severe mental illness"; "severe mental handicap".* These terms are considered below, in the context of the provisions in which they are crucial.[23] The Butler scheme renounces the outdated terms "insanity" and "disease of the mind".

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[15](1843) 10 Cl. & F. 200; 8 E.R. 718.
[16]Trial of Lunatics Act 1883, s. 2 (as amended by Criminal Procedure (Insanity) Act 1964, s. 1).
[17]Criminal Procedure (Insanity) Act 1964, s. 5 and Sched. 1 (as amended by the Mental Health Act 1983).
[18]Lord Diplock's modern translation in *Sullivan* [1984] A.C. 156 at 173.
[19]Interpreted in *Windle* [1952] 2 Q.B. 826 to mean legally wrong.
[20]See para. 11.34 below.
[21]Butler Report, para. 18.19.
[22]Subject at present, it may be, to the possibility in the magistrates' court of a hospital order made on the basis simply that he did the act charged and is now suffering from mental illness or severe mental impairment that would justify the making of the order if he were convicted: Mental Health Act 1983, s. 37 (3).
[23]See paras. 11.26, 11.17 and 11.19, respectively.

11.14 *"Return a mental disorder verdict"*. Each of the situations defined in clauses 35 (1) and 36 calls for the return of "a mental disorder verdict".[24] 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 the definition section: a jury will declare that the defendant "is not guilty on evidence of mental disorder"; the magistrates will "dismiss the information on evidence of mental disorder."

Clause 35: Case for mental disorder verdict: defence of severe disorder

11.15 Subsection (1) provides that even though he has done the act specified for the offence with the fault required, a defendant is entitled to an acquittal, in the form of a mental disorder verdict, if he was suffering from severe mental illness or severe mental handicap at the time. This implements the Butler Committee's conception[25] with some modifications.

11.16 *Attributability of offence to disorder: a rebuttable presumption.* One aspect of the Committee's recommendation has proved controversial. The 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".[26] They therefore proposed, in effect, an irrebuttable presumption that there was a sufficient connection between the severe disorder and the offence. This proposal is understandable in view of the limitation of the defence to a narrow range of very serious disorders; and its adoption would certainly simplify 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 was not attributable to the disorder.[27] We agree. Subsection (2) provides accordingly. We believe that it must improve the acceptability of the Butler Committee's generally admirable scheme as the basis of legislation.

11.17 *"Severe mental illness"* is defined in clause 34 in the terms proposed by the Butler Committee. Severe mental illness, for the purpose of this exemption from criminal liability, ought, in the 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".[28] We believe that this symptomatic mode of definition has much to commend it. The psychiatric expert will give evidence in terms of strict "factual tests",[29] rather than of abstractions (such as "disease of the mind" or "severe mental illness" itself) or diagnostic labels. The method allocates appropriate functions to the law itself (in laying down the test of criminal responsibility), to the expert (in advising whether the test is satisfied) and to the tribunal of fact (in judging, by reference to the whole of the case, whether that advice is soundly given).

11.18 *Content of the definition.* We are grateful to the Section for Forensic Psychiatry of the Royal College of Psychiatrists for responding to our request for advice on the content of the definition of "severe mental illness". We are told that there was a suggestion, at the time of the Butler Committee's Report, that the list of symptoms in the definition might not be sufficiently comprehensive, but that this suggestion had had little support. Our advisers expressed their own satisfaction with the proposed criteria of severe mental illness and with the way in which they are expressed.

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[24]The Butler Committee, following tradition, used the phrase "special verdict"; but we share the Code team's preference for "mental disorder verdict" as more informative and unambiguous: see Law Com. No. 143, para. 12.20 (ii).

[25]Butler Report, paras. 18.26 *et seq.*

[26]*Ibid.*, para. 18.29.

[27]If such a person were to remain ill at the time of his conviction (of any offence other than murder), he could of course be made the subject of a hospital order.

[28]*Ibid.*, paras. 18.30-18.36.

[29]*Ibid.*, para. 18.36 (where the Committee fully explained the virtues of the definition).

11.19 *"Severe mental handicap"* is defined in clause 34. The expression used by the Butler Committee was "severe subnormality", which was defined in the Mental Health Act 1959, section 4, in terms 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 aggressive or seriously irresponsible conduct on the part of the person concerned".[30]

This 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. We therefore propose that the expression "severe mental handicap" be used, with the same definition as "severe mental impairment" down to the word "functioning" [31] This will give effect to the Butler Committee's intentions and has the approval of our Royal College advisers.

11.20 *Burden of proof.* Subsection (1) permits proof of severe disorder by either prosecution or defendant. Normally it will be for the defendant to prove it, as his defence to the charge. This is as proposed by the Butler Committee.[32] But there may be a case in which the defendant adduces evidence of mental disorder on an issue of fault or automatism and the prosecution responds with evidence of severe disorder[33] and in such a case it may be the prosecution evidence (or a combination of prosecution and defence evidence) which results in a mental disorder verdict under clause 35 (1).

11.21 *Evidence of severe disorder.* Subsection (3) provides that such evidence must be given by two appropriately qualified doctors, as recommended by the Butler Committee.[34]

11.22 *Exception.* A severely mentally handicapped person cannot commit an offence under clause 106(1), 107 or 108 involving sexual relations with another such person. Subsection (4) ensures that such a person, if charged with one of those offences, receives an unqualified acquittal.

Clause 36: Case for mental disorder verdict: evidence of disorder

11.23 *Broad effect of the clause.* 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.[35] Clause 36 gives effect to this recommendation, significantly modified by the adoption of a narrower meaning of "mental disorder" than that proposed by the Committee.

11.24 *Cases covered by the clause.* The clause 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 33). (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.

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[30]Mental Health Act 1983, s. 1 (1).

[31]Cf. the definition of "mental handicap", referring to "significant" rather than to "severe" impairment, in Police and Criminal Evidence Act 1984, s. 77 (confessions by mentally handicapped persons); and the definition of "defective" in Sexual Offences Act 1956, s. 45, as amended.

[32]Butler Report, paras. 18.39, 18.40.

[33]See clause 38 (2); and cf. Criminal Procedure (Insanity) Act 1964, s. 6.

[34]Butler Report, para. 18.37. We note that only one of the medical practitioners giving evidence or making reports for various purposes under Part III of the Mental Health Act 1983 need be a practitioner approved under section 12 of that Act: s.54 (1).

[35]Butler Report, para. 47 of Summary of Recommendations.

11.25 The clause deals also with the case where the defendant lacked the required fault because of the combined effects of mental disorder and intoxication. We have discussed this case in our comments on clause 22 (intoxication).[36]

11.26 *"Mental disorder": the Butler Committee's proposal.* The Butler Committee proposed to adopt in principle the Mental Health Act definition of "mental disorder" — namely, "mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability of mind"[37] — subject only to the exclusion of "transient states not related to other forms of mental disorder and arising solely as a consequence of (a) the administration, maladministration or non-administration of alcohol, drugs or other substances or (b) physical injury."

11.27 We are surprised that such an extremely wide definition, designed for the very different purposes of the Mental Health Act, should have been thought suitable as the basis of a qualified acquittal, subject only to the exclusion of certain "transient states not related to other forms of mental disorder". If this proposal were followed, the result might be to subject too many acquitted persons to a possibly stigmatising or distressing verdict and to inappropriate control through the courts' disposal powers.[38] The cases attracting a mental disorder verdict under this clause should, we think, be strictly limited. We therefore exclude "mental illness" (not being "severe") and "any other disorder or disability of mind" from our definition. We also exclude "psychopathic disorder" as being, we believe, irrelevant to the existence of "fault" in the technical sense.

11.28 *"Mental disorder": the proposed definition.* We define "mental disorder" in clause 34 to include (only):

(a) "severe mental illness" (as defined in the same section): the defendant who lacked fault, or believed in the existence of an exempting circumstance, because of a psychotic distortion of perception or understanding, will receive a mental disorder verdict and be amenable to the court's powers of restraint.

(b) "arrested or incomplete development of mind": this category from the Mental Health Act definition of "mental disorder" survives our amendment of the Butler Committee's proposal. We must, however, express a doubt as to whether it should do so. Some persons against whom fault cannot be proved might receive mental disorder verdicts, and become subject to the protective powers of the criminal courts, although under the present law they would receive unqualified acquittals. It may be thought more appropriate to leave any acquitted persons within this category who represent a danger to themselves or others to be dealt with under Part II of the Mental Health Act 1983.

(c) (in effect) pathological automatism that is liable to recur:[39] it would not, we think, be acceptable to propose that the courts should lose all control over a person acquitted because of what is now termed "insane automatism". Paragraph (c) of our definition requires the "state of automatism" (see clause 33 (1)) to be "a feature of a disorder...that may cause a similar state on another occasion". This qualification confines the mental disorder verdict to those possibly warranting some form of control that the court can impose. It may nevertheless be felt by some that the paragraph includes too much. The Butler Committee wished, in particular, 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 do not think, however, that there is a satisfactory way of distinguishing 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[40] on the one hand and

[36]See para. 8.45 above.

[37]Mental Health Act 1959, s. 4 (1); re-enacted in Mental Health Act 1983, s. 1 (2).

[38]For example: D's defence to a charge of shoplifting is that she took the goods in a state of absent-mindedness caused by depression; she denies the intention required for theft. The depression may be a "mental illness" or some "other disorder...of mind" within the Mental Health Act definition; but D, if the court thinks that she may be telling the truth, should enjoy a plain acquittal rather than an acquittal "on evidence of mental disorder". Cf. *Clarke* [1972] 1 All E.R. 219, where the Court of Appeal took the same view under the present law.

[39]See cl. 34 for the definition of this category. "Intoxication" is expressly excluded; a mental disorder verdict is not intended to be available in a case of automatism caused by the taking of drugs for an illness: cf. *Quick* [1973] Q.B. 910. See Appendix B, Example 36(iii).

[40]Cf. *Kemp* [1957] 1 Q.B. 399.

diabetes or epilepsy [41] on the other. If any of these conditions causes a state of automatism in which the sufferer commits what would otherwise be an offence of violence, his acquittal 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. What is objectionable in the present law is the offensive label of "insanity" and the fact that the court is obliged to order the hospitalisation of the acquitted person, in effect as a restricted patient. With the elimination of these features under the Butler Committee's scheme, the verdict should not seem preposterous in the way that its present counterpart does.

11.29 *Burden of proof.* A mental disorder verdict under clause 36 will not be appropriate unless the court or jury is satisfied 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 is not so satisfied, there will be an ordinary acquittal.[42] As in the case of clause 35 (1), proof may derive from prosecution or defence evidence, or indeed from a combination of the two.[43] Clause 36 follows the Butler Committee in requiring the mental disorder to be proved on the balance of probabilities: but, since the defendant is *ex hypothesi* entitled to an acquittal, there is an obvious argument for requiring proof beyond reasonable doubt of the case for exposing him, through a mental disorder verdict, to the disposal powers of the court.

Clause 37: Plea of "not guilty by reason of mental disorder"

11.30 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". [44]

Clause 38: Evidence of mental disorder and automatism

11.31 *Question of law.* Subsection (1) puts it beyond doubt that it is the function of the court (and not, in particular, of medical witnesses) to interpret the definitions of "automatism" and "mental disorder" in clauses 33 (1) and 34 respectively. The allocation of this function to the court is important for the purposes of clauses 33 (1) and 36 as well as of subsection (2) of the present clause.

11.32 *Prosecution evidence.* The Butler Committee proposed that the prosecution should, as at present, be restrained from adducing evidence of mental disorder until the defendant raises an issue that justifies its doing so; but the Committee thought that, "[i]f the defendant admits doing the act and contests the case solely on his state of mind, it is right that all the evidence as to his state of mind can be given, and if the evidence is that he was mentally disordered when he did the act there should be a [mental disorder] verdict rather than an ordinary acquittal."[45] Subsections (2) and (3) give effect to these views.[46]

11.33 *Notice of defence.* 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 automatism"; and the Code team included in their Bill a provision to give effect to this proposal in a modified form.[47] Since then the Crown Court (Advance Notice of Expert

[41]Cf. *Sullivan* [1984] A.C. 156.

[42]Compare Appendix B, Examples 36(i) and (ii).

[43]Cf. para. 11.20 above. The Code team (Law Com. No. 143, para. 12.18) postulated two cases: "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" (see cl. 38 (2)) "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."

[44]Butler Report, para. 18.50. The Committee referred to circumstances in which the court would not accept, or would hesitate before accepting, such a plea.

[45]Butler Report, para. 18.48.

[46]Subsection (2), in its reference to murder cases, partially replaces the Criminal Procedure (Insanity) Act 1964, s. 6 (see also cl. 57 (2)); and subsection (3) is based on that section.

[47]*Ibid.*, para. 18.50; Law Com. No. 143, para. 12.27 and draft Bill, cl. 40 (2) and (3).

Evidence) Rules 1987[48] have been made. The Code team's provision, in its application to trial on indictment, would substantially duplicate those Rules. In any case, we have elsewhere in our Bill forborne to offer rules requiring advance notice of defences.[49] The subject merits further consideration in the present context, as does the Code team's further suggestion[50] that the prosecution should (subject to judicial direction) be able to give evidence of mental disorder as part of its case in chief if a relevant defence has been notified.

Clause 39: Disposal after mental disorder verdict

11.34 *Proposal for flexible powers.* By far the most important aspect of the Butler Committee's scheme of reform was the proposal as to the consequences of a mental disorder verdict. The Committee recommended that the court be given quite flexible powers, 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.[51]

11.35 The details of this proposal no doubt still require consideration by the government departments concerned and it would not be realistic for us, without the benefit of necessary consultation, to offer a complete set of relevant provisions. We can only express the hope that this important reform will be undertaken without further delay. It should be clear that enactment of our clauses 35 and 36, providing for mental disorder verdicts, depends upon abolition of the mandatory consequences of the present equivalent verdict.

11.36 Clause 39 provides for a Schedule of provisions concerning the disposal of persons found not guilty on evidence of mental disorder.

Clause 40: Further effect of mental disorder verdict

11.37 This clause gives effect to a subsidiary recommendation of the Butler Committee.[52]

[48]Under the Police and Criminal Evidence Act 1984, s. 81: see S.I. 1987, No. 716 (L.2).
[49]Cf. para. 12.19 below.
[50]Law Com. No. 143, para. 12.28; draft Bill, cl. 40 (4)(a) and (5).
[51]Butler Report, paras. 18.42-18.45. We ought to express a doubt as to whether the Committee's proposals include orders appropriate for cases in which physical rather than mental conditions give rise to mental disorder verdicts under clause 36. In particular, the Committee's only proposal for supervision in the community is based on the model of conditional discharge under a Mental Health Act hospital order: para. 18.45.
[52]*Ibid.* para., 18.38. The clause is in general terms although the Committee referred to indictments only.

PART 12

DEFENCES

Introduction

12.1 *Clauses 41 to 46* bring together a disparate collection of matters under the heading "Defences". These matters by no means exhaust the topic of defences as that word is understood in the Code.[1] Many defences are, of course, stated in relation to particular offences or groups of offences by the enactments creating them and they require no mention in Part I of the Code, except for the proposition (clause 41) that a mistaken belief in the existence of circumstances which would afford any defence is in general itself a defence.[2] Code defences specially available to accessories are conveniently stated in the clause dealing with that subject.[3] Where mental disorder is not simply the reason why a person does not have the fault required for an offence, but excludes liability even though all the elements of the offence are present (clause 35), it is, in Code terms, properly speaking a defence; and similarly with automatism and physical incapacity (clause 33). These topics are presented in their own group of clauses, immediately preceding those headed "Defences."

12.2 *Defences not specified in the Code.* As the Code team explained in their Report,[4] it is impossible to specify in the Code all those circumstances which amount to defences because they justify or excuse the doing of acts that would otherwise be offences. For, first, the full statement of some defences would involve reducing doctrines of the civil law to statutory form for the purpose of their application in criminal cases, a task which it would not be appropriate for us to undertake even if it were in principle desirable that it should be done. Secondly, the exact specification or application, or even the existence, of some defences cannot be stated with confidence in the present state of the law. Such defences, of which necessity is the most obvious example, must be left to develop at common law. The Code can state a limited number of general defences that are well-developed (see clauses 41, 42 and 44) or capable of being closely defined (see clause 43). Having done so, it cannot do more than make clear that that is not an exhaustive statement of defences and that other circumstances of justification and excuse continue to apply. We are persuaded by the team's arguments and, with the exception of the clause mentioned in the following paragraph, we have in general adopted their proposals as to the appropriate contents of this part of the Code.

12.3 *Acts authorised by law.* The Code team's Bill employed two clauses for the purpose of preserving defences. The first was their clause 48, which was based on a provision in the American Law Institute's Model Penal Code. This would have provided, in effect, that a person does not commit an offence by doing an act that is sanctioned by certain kinds of legal authority or by the existence of a public duty. The team acknowledged that this clause contained nothing that would not be covered by their more general clause 49. They included it out of a desire that the Code should be informative. We do not think that the case for including clause 48 was made out and we have not reproduced it.

12.4 *Acts justified or excused by law.* The Code team's clause 49 forms the basis of our own clause 45(c). The paragraph may be said to have two functions. On the one hand, as already said, it preserves known defences not specified in the Code. Examples are given in the commentary on clause 45, below.[5] On the other hand, it will permit the development of existing defences and even the emergence of defences not at present known to the law. Common law principles of justification and excuse are not static. They are developed by the judges as occasion arises and attitudes change. The history of duress by threats in recent years is a striking example of the development of a known defence. Our comment on clause 43[6] refers to recent cases revealing the existence of an analogous defence of duress of circumstances. Clause 45(c), or rather clause 4 (4) to which it refers, preserves the power of

[1]For the Code distinction between offences and defences, see para. 7.2 above.
[2]And see clause 22 (1)(b) and (3) as to intoxicated beliefs of this kind.
[3]See clause 27(6) and (8).
[4]See Law Com. No. 143, paras. 13.8 *et seq.*
[5]Para. 12.41.
[6]Para. 12.21 below.

the courts to determine the existence, extent and application of any justification or excuse provided by the common law.[7]

12.5 *"Unlawfully" and "without lawful excuse" not employed in the Code.* Parliament has sometimes qualified the statement of offences with the words "unlawfully" or "without lawful excuse". There has been no consistency in this usage, however, and the use of such words does not seem to have been necessary for the purpose of importing general defences. The Code provisions on general defences, including clause 45(c), ensure that they are unnecessary in the statement of offences in Part II.[8]

Clause 41: Belief in circumstance affording a defence

12.6 *A statutory presumption.* 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.[9] Subsection (1) provides a presumption in favour of a corresponding rule for defences, namely, that a person who acts in the belief that a circumstance exists has any defence that he would have if it existed.[10] The Code thus gives general effect to the *prima facie* principle that a person is to be judged, for purposes of criminal liability, on the facts as he believed them to be. This is the tendency, though not the universal effect,[11] of recent judicial developments in the field of defences. It is desirable that the Code should provide consistently for offences and defences, leaving it to Parliament in particular contexts, if it thinks fit, to exclude the application of this subsection or to limit a defence of belief in the existence of an "exempting circumstance"[12] to a case of a belief based on reasonable grounds. Where a defendant relies on this subsection, the absence of reasonable grounds for the belief he claims to have held is, of course, relevant in determining whether he did hold it.[13]

12.7 *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",[14] and a person's mistaken belief may be as to the existence of one such circumstance. Subsection (1) 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 55(a) and 58). If he mistakenly believes that just such a thing has been done or said, the supposed provocation is treated as actual provocation, and other elements of this 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.

12.8 *Voluntary intoxication.* Subsection (1) has to be read subject to clause 22 (1)(b) and (3). A person who was voluntarily intoxicated is credited, in the case of an offence requiring a fault element of recklessness, with the understanding of the relevant matter that he would have had if he had been sober. Similarly, in the case of an offence requiring a fault element of failure to comply with a standard of care, or requiring no fault, a person who was voluntarily intoxicated is treated as not having believed that an exempting circumstance existed if a reasonable sober person would not have done so.

12.9 *Application of the clause.* Subsection (2) ensures that subsection (1) does not affect the law relating to "pre-Code offences"—those created by or under pre-Code legislation.

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[7]Similar provisions are to be found in s. 7(3) of the Canadian Criminal Code and s. 20 of the New Zealand Crimes Act 1961. The power to determine the existence of a defence was used by the New Zealand Court of Appeal in *Finau* v. *Department of Labour* [1984] N.Z.L.R. 596, holding that a defence of impossibility was available to an immigrant who had overstayed her leave if no airline would carry her because of the advanced state of her pregnancy. Stephen J.'s defence of the corresponding provision in the Draft Code of 1879 was cited by Professor Glanville Williams in a comment on our Report on Defences of General Application (Law Com. No. 83): [1978] Crim. L.R. 128 at 129.

[8]For a fuller statement see Law Com. No. 143, paras. 13.13, 13.14.

[9]This truism is discussed in n. 48 to para. 8.32 above.

[10]See Appendix B, Example 41. Compare clause 6 of the draft Criminal Liability (Mental Element) Bill appended to our Report on the Mental Element in Crime (1978), Law Com. No. 89. That clause (and the Code team's clause 44) proposed to specify the ways in which the presumption might be displaced. For our reason for not now adopting this proposal, see para. 8.27 above, relating to the presumption of a requirement of fault established by clause 20 (1); that paragraph, appropriately modified, applies here.

[11]See, e.g., para. 12.15 below.

[12]Defined in clause 6 as "any circumstance amounting to a defence or any element of a defence".

[13]See clause 14.

[14] See n. 12 above.

Whether a principle equivalent to that stated by subsection (1) applies in relation to a defence specially provided for a pre-Code offence will depend on the application and interpretation of the relevant legislation as though the Code had not been enacted (clause 2 (3)) or on any relevant rule of the common law (clauses 4 (4), 45(c)).[15]

12.10 *Burden of proof.* Subsection (3) puts the burden of proof in relation to a belief in a defence where it lies in relation to the defence itself.[16]

Clause 42: Duress by threats

12.11 This clause provides a defence of duress by threats similar to that available at common law. We draw attention below to certain proposed departures from the common law position. The subject is one upon which we made recommendations, with a draft Bill, in 1977.[17] The present clause benefits, in its content, from the further consideration which we have been able to give to the subject in the light of the Code team's work and of recent consultation, and, in method, from clause 1 of our earlier draft Bill as modified in clause 47 of the Code team's Bill.

12.12 *Nomenclature.* We call the defence "duress by threats" to distinguish it from the related defence of duress of circumstances which we propose in clause 43. Subsection (1) makes available the phrase "acting under duress by threats" for use elsewhere.[18]

12.13 *Availability of the defence.* In our earlier Report we recommended that duress should be a defence to all crimes.[19] This was noticed by members of the House of Lords in *Howe*,[20] where, however, it was held that duress is not a defence to murder. Lord Bridge of Harwich expressed the view that if duress is to be made a defence to murder "the proper means to effect such a reform is by legislation such as that proposed by the Law Commission." It is only by legislation, Lord Bridge observed, "that the scope of the defence of duress can be defined with the degree of precision which, if it is to be available in murder at all,[21] must surely be of critical importance."[22] The topic is, of course, a controversial one; and the decision in *Howe* has itself proved controversial.[23] In the circumstances we have thought it right that our draft clause should reflect that decision by providing (in subsection (2)) that the defence does not apply to murder or attempt to murder.[24] Exceptionally, we place this aspect of the clause within square brackets, as an indication that our recommendation on the point has not been abandoned.

12.14 *Elements of the defence: (a) what the actor must know or believe.* Subsection (3) sets out the circumstances in which a person does an act under duress by threats.[25] The first requirement is that he must know of, or believe in the existence of, a threat to himself or another if he does not do the act. Paragraph (a) lays down three conditions:

(i) The threat, following the prevailing judicial view and that of most modern codes,[26] must be one of death or serious personal harm to himself or another.[27]

(ii) The threat must be, or he must believe that it is, one that will be carried out immediately or before he or the other can obtain official protection. In this connection subsection (4) provides that it is immaterial that, in fact or as he believes, any available official protection will or may be ineffective.[28] This gives effect to our earlier proposal which, although questioned by the Code team,[29] was

[15]Cf. clauses 18 and 20 (2): paras. 8.8 and 8.26 above.
[16]Cf. Criminal Liability (Mental Element) Bill (n. 10 above), cl. 6 (5).
[17]Report on Defences of General Application (1977), Law Com. No. 83.
[18]See clause 44 (3)(d).
[19]Law Com. No. 83, paras. 2.39-2.45.
[20][1987] A.C. 417.
[21]The words "at all" refer to the fact that, before the decision in *Howe*, duress had been held to be available to an accessory to murder (House of Lords in *Director of Public Prosecutions for Northern Ireland* v. *Lynch* [1975] A.C. 653) but not to a principal (Judicial Committee of the Privy Council in *Abbott* v. *The Queen* [1977] A.C. 755).
[22][1987] A.C. 417 at 437-438.
[23]See J.C. Smith, [1987] Crim. L.R. 481; I.H. Dennis, (1987) 51 J. Cr. L. 463 at 464-474; H.P. Milgate, [1988] C.L.J. 61; L. Walters, (1988) 8 L.S. 61.
[24] As to attempt, see [1987] A.C. 417 at 445, *per* Lord Griffiths, *obiter*.
[25]See Appendix B, Examples 42(i) and (ii).
[26]See Law Com. No. 83, para. 2.25.
[27]For "personal harm", see clause 6.
[28]See Appendix B. Example 42(iii).
[29]Law Com. No. 143, para. 13.18.

strongly supported on consultation by the South-Eastern Circuit (Southwark) Scrutiny Group.

(iii) There must be, or he must believe that there is, no other way of preventing the threat being carried out.

12.15 *"Knows or believes"*. The emphasis in subsection (3)(a) on the actor's knowledge or belief reflects the fact that a defence of duress depends essentially upon a state of mind. In this respect the clause somewhat departs from the prevailing judicial view, according to which a person's belief in the existence of a threat must be "reasonably" held if it is to found the defence.[30] This requirement would, we believe, be inconsistent with the tendency of judical developments in other contexts.[31] It would also be at odds with the general policy of the Code, in keeping with those developments, of assigning the reasonableness of a person's asserted belief to the domain of evidence.[32]

12.16 *Elements of the defence: (b) actor cannot be expected to resist threat.* The threat must be one which the actor cannot reasonably be expected to resist; and the circumstances to be considered for this purpose include his personal circumstances as they affect the gravity of the threat. This follows our earlier recommendation of a test of what can reasonably be expected "of the defendant in question ...Threats directed against a weak, immature or disabled person may well be much more compelling than the same threats directed against a normal healthy person"[33]. This was quoted by the Court of Appeal in *Graham*,[34] where the resistance to be expected was held to be that of "a sober person of reasonable firmness", though one "sharing the characteristics of the defendant". A person's "firmness", however, is itself one of his characteristics that may affect the gravity of the threat to him; and we are not convinced that personal characteristics can be separated in the way that the *Graham* test appears to contemplate. The test stated in subsection (3)(b) therefore departs in one respect from that of the Court of Appeal.

12.17 *Voluntary exposure to duress*. Subsection (5) provides that the defence is not available to a person who has voluntarily and without reasonable excuse exposed himself to the risk of a relevant threat[35] — as, for example, by joining a criminal group which he knows may threaten with violence a member who is reluctant to commit offences in its service. This is the effect of recent case law[36] and is consistent with our own earlier recommendation on the point.[37]

12.18 *Marital coercion*. Subsection (6) abolishes this common law defence.[38]

12.19 *Notice of defence*. The Code team included in their Bill a provision requiring notice of an intention to advance a duress defence. This was in accordance with a recommendation of our own,[39] but that recommendation was not made in the context of the preparation of a Code Bill. We do not seek to implement it in the present clause. The subject of notice of defences requires general consideration and ought not to develop in a piecemeal fashion.[40]

Clause 43: Duress of circumstances

12.20 *Analogy with duress by threats*. Clause 43 adopts with minor amendments a clause which the Code team included in their Bill under the title "defence of necessity". It provides a defence to one who acts in order to avoid an imminent danger of death or serious personal harm to himself or another if in the circumstances he cannot reasonably be expected to act otherwise.[41] The defence is modelled, so far as appropriate, on the defence of duress by

[30]*Graham* [1982] 1 W.L.R. 294, [1982] 1 All E.R. 801; approved, but *obiter* and without argument on the point, in *Howe* [1987] A.C. 417.

[31]See especially, in the context of defences, *Gladstone Williams* (1983) 78 Cr. App. R. 276; *Beckford* v. *The Queen* [1988] A.C. 130.

[32]See para. 12.6 above.

[33]Law Com. No. 83, para. 2.28.

[34][1982] 1 W.L.R. 294 at 300, [1982] 1 All E.R. 801 at 805-806.

[35]See Appendix B, Examples 42(iv) and (v).

[36]*Sharp* [1987] Q.B. 853; *Shepherd* (1988) 86 Cr. App. R. 47; and see *Fitzpatrick* [1977] N.I. 20.

[37]Law Com. No. 83, paras. 2.35-2.38; the principle was more elaborately stated in clause 1 (5) of the draft Criminal Liability (Duress) Bill.

[38]As previously recommended: Law Com. No. 83, para. 3.9.

[39]Law Com. No. 83, para. 2.33; draft Criminal Liability (Duress) Bill, cl. 2 (1).

[40]Cf. Law Com. No. 143, para. 13.21.

[41]See Appendix B, Examples 43(i) and (ii).

threats. The Code team, who observed that the kind of situation covered by their clause is sometimes called "duress of circumstances", were critical of our failure, in the Report on Defences of General Application,[42] to recognise the force of the analogy with duress by threats. We are now persuaded that, as the team put it, "[t]he 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";[43] and we are satisfied that the proposed defence should be provided by the Code.

12.21 *Authority*. We are fortified in this conclusion by the fact the Court of Appeal has twice recently, in the context of the offence of reckless driving, recognised a defence of this kind—though without having occasion to consider all its details or to give it general application.[44] In *Conway*, the later of the two cases, the defence was said to be conveniently called "duress of circumstances". We agree. It is appropriate thus to emphasise the analogy with the case of threats.

12.22 *Elements of defence*. Subsection (2) states the elements of the defence. Like duress by threats, it is limited to cases where death or serious personal harm is threatened. The danger must be imminent. Like duress by threats, the defence is limited "by means of an objective criterion formulated in terms of reasonableness";[45] but 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.

12.23 *Application of defence*. Subsection (3) excludes murder and attempt to murder from the scope of the defence (but in square brackets, as with clause 42 (2))[46] (para. (a)); avoids any inconvenient overlap between this and certain other defences (para. (b)(i) and (ii)); and sustains the analogy with duress by threats by excluding the case where the actor has knowingly and without reasonable excuse exposed himself to the danger (para. (b)(iii)).

Clause 44: Use of force in public or private defence

12.24 *Function of the clause*. This clause, together with clause 185 (protection of person or property by acts causing destruction of or damage to property), would replace existing statutory and common law principles defining the circumstances in which a person has a defence to a charge of committing a crime involving the use of force. The clause could be invoked, for example, on a charge of murder or any violent offence against the person or an offence of criminal damage to property. But the clause states principles of the criminal law only. 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.

12.25 *Eliminating inconsistency*. The clause seeks in principle to restate existing law and does so in as much detail as the authorities reasonably permit. But the law should also be consistent and the present law relating to the use of force varies according to the circumstances in indefensible ways. For example, if a person is charged with damaging property belonging to another and his defence is that he was defending his own property, section 5 (2) of 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 result 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 44 (together with clause 185) will eliminate such insupportable distinctions.

12.26 *The form of subsection (1)*. Subsection (1) is stated in slightly more complex terms than might be expected. It provides that 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 to (in brief) prevent crime, effect a lawful arrest, prevent or terminate a breach of the peace, or protect person or property from unlawful acts. The reference to circumstances which the person using force *believes to exist* would ideally be

[42](1977), Law Com. No. 83.
[43]Law Com. No. 143, para. 13.25.
[44]*Willer* (1986) 83 Cr.App.R. 225; *Conway* [1988] 3 W.L.R. 1238. See also *Martin* [1989] 1 All E.R. 652, C.A. (driving while disqualified).
[45]*Graham* [1982] 1 W.L.R. 294 at 300, [1982] 1 All E.R. 801 at 806.
[46]See para. 12.13 above.

omitted, leaving the case of mistaken belief to be catered for by clause 41 (belief in circumstance affording a defence). It is included, however, in order to bring out the force of the words "circumstances *which exist*" (meaning, which actually exist, whether or not the person using force is aware of the fact). These words are themselves included because the powers of arrest without a warrant granted by the Police and Criminal Evidence Act 1984 apply where a person "is in the act of committing", or "is guilty of", or "is about to commit", an arrestable offence, as well as when the arrester has reasonable grounds for suspecting one of these things to be the case.[47] It has seemed necessary, for the sake of consistency, to apply clause 44 for all purposes, and not only that of arrest, to the case where as a matter of fact justifying circumstances exist. For an arrester may also be preventing crime and, in doing so, protecting himself or another person from attack or some property from damage. It would be unacceptable to apply different principles to the same use of force in relation to its different purposes.[48]

12.27 *Permitted purposes of use of force.* The several paragraphs of subsection (1) require little comment:

(a) *Prevention of crime; arrest.* This paragraph reproduces the effect in criminal law of section 3(1) of the Criminal Law Act 1967.

(b) *Prevention of breach of peace.* In *Howell*[49] it was said that a breach of the peace occurs

> "whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, an unlawful assembly or other disturbance."

It is clear from this that prevention of a breach of the peace, which is a common occasion for the use of force, is a wider concept than prevention of crime and requires separate protection. 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 fear of the kind mentioned in the *Howell* dictum or to remove the cause of such fear where it already exists.[50]

(c) *Defence of person.* This paragraph states the law as proposed by the Criminal Law Revision Committee.[51] The Committee's recommendation that the defence should be available to anyone who mistakenly believes in the existence of facts justifying the use of force in defence of himself or another anticipated a spate of decisions to the same effect.[52]

(d), (e) and (f) *Prevention of unlawful detention; defence of property; prevention of trespass.* These paragraphs restate existing law.

12.28 *"Force".* Subsection (2), by giving an extended meaning to the word "force", ensures that subsection (1) permits the use of force against property, a threat of force against person or property and the detention of a person without the use of force (as well, of course, as force against a person).

12.29 *"Unlawful".* Paragraphs (c), (d) and (e) of subsection (1) permit the use of force against "unlawful" acts. An act (for example, a trespass) may be unlawful under the civil law although not criminal. Subsection (3), a somewhat technical provision, is concerned with cases in which, to avoid any uncertainty, the Code needs to declare that for the purposes of the section the behaviour of a person against whom force is used is "unlawful" although, if it were the subject of a criminal charge, that person would be acquitted. For example, it ought to be clear, without the need to resort to what may be uncertain principles of the law of tort, that one who is attacked with a dagger by a nine-year-old or by a person suffering from severe mental illness may use reasonable and necessary force in self-defence although his attacker is immune from criminal liability (clauses 32 (1) and 35 (1)).[53]

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[47]Police and Criminal Evidence Act 1984, s. 24 (4)-(6); cf., formerly, Criminal Law Act 1967, s. 2 (2), (3) and (5).

[48]For fuller treatment of this matter, see Law Com. No. 143, paras. 13.34-13.36.

[49][1982] Q.B. 416, *per* Watkins L.J. at 427.

[50]*Pace* the Code team (see Law Com. No. 143, para. 13.39), we do not think it necessary to include in the Code a definition of "breach of the peace".

[51]Fourteenth Report: Offences against the Person (1980), Cmnd. 7844, paras. 119-121.

[52]Especially the landmark decision in *Gladstone Williams* (1983) 78 Cr. App.R. 276 and *Beckford* v. *The Queen* [1988] A.C. 130 P.C.

[53]See also Appendix B, Examples 44(iv)-(vi).

12.30 Where a person properly using force for a purpose mentioned in subsection (1) (c), (d) or (e) is unaware of the facts that would ground the acquittal of the person against whom he uses it, he will be protected by subsection (1) (without resort to subsection (3)) because of his belief in circumstances rendering the other's conduct "unlawful" in the sense of criminal. Resort to subsection (3) is therefore necessary only when the person using force is aware of the special facts.

12.31 It is sometimes lawful to arrest and to use reasonable force against a person because he is reasonably, though perhaps quite wrongly, suspected of some wrongdoing. For example, under the Police and Criminal Evidence Act 1984, any person may arrest without a warrant anyone whom he has reasonable grounds for suspecting to be committing an arrestable offence; and, under the Criminal Law Act 1967, the arrester may use reasonable force to make the arrest. Subsection (3)(c) relates to the position in the criminal law of the wrongly (though reasonably) suspected person who resists arrest or uses force to defend himself against force reasonably used by the arrester. The effect of subsection (3)(c) is that, with one important qualification, he does not commit an offence by using reasonable force to resist that arrest. Whatever the position in the civil law (which is unaffected by the subsection) a person should not, in our opinion, be guilty of an offence merely because he resists, and uses reasonable force to resist, an arrest which is not justified by the actual facts.[54] For the purposes of the subsection, the arrester's conduct is "unlawful"; but neither the arrester nor the resister is guilty of any offence. The same principle applies to an innocent person's defence of his property and for the other purposes of the section.

12.32 *Exception for lawful act of constable.* Subsection (4) states the important qualification referred to in the preceding paragraph. Where the person making the arrest is a constable acting in the execution of his duty, the suspected person must submit to arrest even if he is perfectly innocent and the constable's suspicion, though reasonable, is in fact mistaken. The suspect will commit an offence if he resists arrest and further offences if he uses force, whether against the constable or a person assisting him to carry out his duty. This is so even if he believes the arrest to be unlawful, unless he also believes there is "imminent danger of injury."[55] It is one thing to require the wrongly suspected person to submit to arrest. It is quite another to say that he must submit to the infliction of personal harm or even death. The effect of the subsection is that he does not commit an offence by using force which he believes to be immediately necessary to prevent such harm to himself or another innocent person. This is so even in the case where he is aware of the circumstances giving rise to the policeman's reasonable suspicion, that is to say, he knows that he is resisting the lawful, though mistaken, use of force.[56] The subsection in no way limits the present right to resist an unlawful arrest, whether by a constable or not.

12.33 *Preparatory acts.* Subsection (5) ensures that criminal liability (most obviously, under legislation prohibiting the possession of firearms or offensive weapons) will not attach to an act immediately preparatory to a use of force permitted by subsection (1).[57]

12.34 *Self-induced occasions for the use of force.* The effect of the first part of subsection (6) is that subsection (1) provides no defence to a person who deliberately provokes the very attack against which he then defends himself.[58] On the other hand, it is important to preserve the liberty of the citizen to go about his lawful business even if he knows that he is likely to be met by unlawful violence from others.[59] If he does so and is attacked he may defend himself.[60] The second part of subsection (6) so provides.

12.35 *Opportunity to retreat.* Subsection (7) restates the law, only recently clarified by the Court of Appeal in *Bird*,[61] on the significance of the defendant's having had an opportunity to retreat before using force. Although the fact that he had such an opportunity is relevant to the court's or jury's consideration of whether his use of force was immediately necessary and reasonable, it is not conclusive of the question and is simply to be taken into account together with other relevant evidence.

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[54]For example: P, a police officer, reasonably but wrongly suspecting 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. If D believes that he is in danger of personal harm his act should not be an offence, although P's act is lawful in every sense. (See, however, a dictum to the contrary of Lowry L.C.J. in *Browne* [1973] N.I. 96 at 107.)

[55] *Fennell* [1971] 1 Q.B. 428.

[56]See Appendix B, Examples 44(vi), (vii) and (viii).

[57]See Appendix B, Example 44(ix). The subsection is convincingly defended in Law Com. No. 143, para. 13.44.

[58]See Appendix B, Example 44(x). Cf. *Browne* [1973] N.I. 96, *per* Lowry L.C.J. at 107.

[59]See *Beatty* v. *Gillbanks* (1882) 9 Q.B.D. 308.

[60]*Field* [1972] Crim. L.R 435. See Appendix B, Example 44(xi).

[61] [1985] 1 W.L.R. 816, [1985] 2 All E.R. 513.

12.36 *Reasonable threats.* Subsection (8), which provides that a threat of force may be reasonable although the use of the force would not be, states the effect of *Cousins.*[62]

12.37 *Saving for other defences.* Subsection (9) preserves the full effect of other defences (particularly that provided by clause 185 (protection of person or property by damage to property)) which overlap the general defence provided by clause 44.

Clause 45: Acts justified or excused by law

12.38 *Defence provided by an enactment.* The self-evident proposition that, if a statutory provision justifies or excuses the doing of any act, that act does not amount to an offence is stated by paragraph (a) for the sake of completeness.[63]

12.39 *Defence provided by an "enforceable Community right".* We were advised on consultation that this clause should expressly protect from criminal liability any act justified or excused by an "enforceable Community right" as defined in the European Communities Act 1972, section 2 (1); and paragraph (b) does so. As s. 2(1) is an "enactment" and requires courts in the United Kingdom to give effect to Community law, this paragraph may not strictly be necessary; but, in view of the advice we received, we include it from abundance of caution.

12.40 *Defence provided by common law.* Clause 4 (4) preserves common law rules that are not replaced by corresponding rules of the Code or inconsistent with the Code; and it expressly ensures that the Code does not limit "any power of the courts to determine the existence, extent or application" of any rule so preserved. We have referred above[64] to the application of this principle to defences. Its importance is so great in this context that, to avoid its being missed, it receives a cross-reference in paragraph (c) of clause 45.

12.41 *Application of paragraph (c) (defences preserved by cl. 4(4)).* We referred above to two broad functions of clause 4(4) as applied by paragraph (c):

(i) *Preserving known defences not specified by the Code.* This is perhaps sufficiently illustrated by a reference to offences against the person. It is to the common law that a person will resort for his defence on a charge under Chapter I of Part II if he claims that his act was done in the exercise of his right as a parent to chastise a child; or his right as a doctor to render medical aid to, or to practise surgery on, an unconscious patient; or his right to use force against another person within the rules of a lawful game.[65] These rights are not stated in Chapter I; but the offences in that Chapter must be understood to be subject to common law defences just as they are subject to the defences stated in clauses 41 to 43.[66]

(ii) *Developing defences.* Clause 4(4) permits the judicial development of defences. We have already pointed to recent activity of the courts in "determin[ing] the...extent or application" of the defence of duress by threats. Another obvious topic amenable to judicial development is the defence of necessity, if it is indeed to be regarded as a general defence of uncertain scope. The role of necessity as a defence to criminal charges is a much disputed matter. We examined the subject in our Report on Defences of General Application,[67] where we concluded that any common law defence of necessity should be abolished and that there should be no general defence of necessity in the Criminal Code. This recommendation was not well received by commentators and we accept the Code team's recommendation that the defence should be "left open-ended, to be developed or not as the courts may decide".[68] If necessity is properly to be regarded not as a general defence but as the common basis for the recognition of a variety of circumstances of justification or excuse, clause 4(4) will equally enable the courts to declare that the common law accords that recognition to appropriate circumstances coming before them.[69]

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[62][1982] Q.B. 526.
[63]See Appendix B, Example 45(i).
[64]Paras. 12.2, 12.4.
[65]See Appendix B, Example 45(ii).
[66]See also para. 9.37 above, as to common law defences of accessories.
[67](1977), Law. Com. No. 83, Part IV.
[68]Law Com. No. 143, para. 13.11.
[69]Cf. the recognition of "duress of circumstances" in cases of reckless driving: above, para. 12.21.

Clause 46: Non-publication of statutory instrument

12.42 *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 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 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.

12.43 *Burden of proof.* The 1946 Act lays on the defendant the burden of proving that the instrument had not been issued by H.M.S.O. This is restated by subsection (2). 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.[70]

[70]Clause 13 (1)(a).

PART 13

PRELIMINARY OFFENCES

Introduction

13.1 *Clauses 47 to 52* are concerned with the offences of incitement, conspiracy and attempt. These are referred to in the Code as preliminary offences; "inchoate" offences is an alternative description. All three were originally common law offences. Proposals for their codification were published by our Working Party in 1973 in Working Paper No. 50. The Working Paper was followed by two Reports. The first,[1] published in 1976, dealt only with conspiracy. The recommendations in the Report formed the basis for the statutory restatement of conspiracy in Part I of the Criminal Law Act 1977. The second,[2] 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 our recommendations. We have not reported on the offence of incitement, which remains a common law offence.

13.2 The Code team noted in their Report[3] that the preliminary offences are traditionally regarded as part of the general principles of criminal liability. They apply in respect of all substantive offences (except that attempt is restricted to attempts to commit indictable offences[4]) and have close links with the law of complicity. The team recommended that the offences be included in Part I of the Code. This attracted no adverse comment on consultation. The Justices' Clerks' Society stated that in their view these offences should appear in Part I. We agree.

13.3 *Consistency between the offences.* The recent statutory restatements of conspiracy and attempt form the basis of most of the provisions relating to these offences in our draft Bill. We are, however, recommending certain changes to the specification of conspiracy and attempt in the light of developments since those statutes were passed and in the light of certain comments made to us in the consultation on the Code team's draft Bill. Apart from these changes, the existing statutory language has had to be modified in some respects in the interest of maintaining consistency of expression in the draft Bill. Several of the issues arising in respect of conspiracy and attempt arise also in the context of incitement. We believe that as far as possible there should be consistency between these offences. They share a common rationale concerned with the prevention of substantive offences[5] and they frequently overlap. When two or more persons engage in conduct preliminary to a substantive offence more than one of these offences may well be involved. It would be illogical and confusing to a court or jury if similar problems were provided with significantly different solutions. Therefore we have regarded the policy concerning those issues in the offence of incitement which arise also in conspiracy and attempt as generally having been settled in the way recently provided by Parliament for conspiracy and attempt. On issues peculiar to incitement we have followed the general principle of restatement of the existing law, having regard also to the comments made to us on consultation on the Code team's draft Bill.

Clause 47: Incitement to commit an offence

13.4 *Form of the offence.* The clause deals only with incitement of a person to commit an offence. It does not deal with statutory offences of incitement to certain conduct which may not itself be an offence.[6] We share the view of our Working Party that such offences should be considered under the class of specific offences to which they relate.[7]

13.5 *Incitement and facilitation.* From time to time it has been suggested that the offence of incitement should be enlarged so as to embrace those who facilitate the commission of offences (for example, by providing assistance for their commission), but who do not seek to persuade ("incite") others to commit offences. The enlarged offence would follow the existing law in not requiring proof that a substantive offence was committed; the offence would be complete on performance of the act of facilitation. This suggestion is similar to a

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[1]Conspiracy and Criminal Law Reform (1976), Law Com. No. 76.
[2]Attempt, and Impossibility in relation to Attempt, Conspiracy and Incitement (1980), Law Com. No. 102.
[3]Law Com. No. 143, para. 14.2.
[4]Criminal Attempts Act 1981, s. 1(4).
[5]See Law Com. No. 76, paras. 1.1-1.5.
[6]See, e.g., Incitement to Mutiny Act 1797, s.1.
[7]Working Paper No. 50, para. 92.

proposal to enlarge the law of complicity to which we have already referred.[8] As we said in that other context, such a radical approach, involving complex issues and an extension of criminal liability, cannot be pursued in the present project.

13.6 *"Encourage" or "incite"?* The Code team proposed the verb "encourage" to describe the act necessary to make a person guilty of incitement.[9] This was criticised by the South-Eastern Circuit (Maidstone) Scrutiny Group dealing with preliminary offences. They acknowledged that "incite" is one of the dictionary meanings of "encourage", but were concerned that the latter word might suggest a need for proof of actual encouragement. They pointed out that a person may be liable for incitement even though the person incited is not in fact encouraged. The incitee may have no intention of acceding to the incitement, or, conversely, may have made up his mind to commit the offence and have no use for encouragement from another. These comments persuade us that "encourage" is not the best word to use in this context. The familiar term "incite" is in our view preferable. This sufficiently conveys, without the need for an explanatory provision, that the person incited need not be influenced by whatever it is that constitutes the incitement.

13.7 *Other external elements.* The remaining part of paragraph (a) of subsection (1) restates the nature of the conduct that the other is incited to perform. He may be incited to do acts personally which will involve the commission of an offence by him as a principal, or he may be incited to procure their performance by an innocent agent. In the latter case the incitee would still commit the offence as a principal by virtue of clause 26(1)(c). It follows that if the person incited could not as a matter of law commit the substantive offence there can be no liability for incitement to commit it. This restates the common law rule that there is no liability for the incitement of a child under the age of criminal responsibility or of a victim in relation to an offence created for his or her protection.[10] Incitement of children may, as both the Working Party[11] and the Code team[12] envisaged, be dealt with as attempts to commit offences by means of innocent agents.[13] Incitement of victims has occasionally presented problems in relation to sexual offences. One gap in the law, revealed in the case of *Whitehouse*,[14] was filled by section 54 of the Criminal Law Act 1977, whereby it is an offence for a man to incite to have sexual intercouse with him a girl under sixteen whom he knows to be his granddaughter, daughter or sister. This offence now appears in clause 103(3) of our draft Bill. Other gaps, concerning the incitement of children under sixteen to acts of gross indecency, are covered by clauses 114 and 115, which give effect to recommendations of the Criminal Law Revision Committee.[15]

13.8 Subsection (1) provides that an incitement may be to commit more than one offence. This restates existing law.[16]

13.9 *The fault requirement.* This is a matter of some complexity. The ordinary meaning of the verb "incite" connotes an element of intention; the notion of "inciting" recklessly would be odd. But this is referring only to intention as to the act which constitutes the act of inciting. The ordinary meaning of "incite" does not yield a clear answer to the question of what further fault, if any, is required. The Code team proposed that the incitor should be guilty if "he intends that the other person shall commit the offence or offences".[17] We agree that in the interests of consistency with conspiracy and attempt, for which the policy has been settled recently by Parliament,[18] intention should be the principal fault requirement. But the team's form of words seems to us to be unduly compressed and, in one respect, too limited. The essence of incitement, and the point which helps to distinguish it from attempt, is the incitor's state of mind in relation to the state of mind of the incitee. It is undoubtedly sufficient if the incitor intends that the incitee shall act with the fault required for the substantive offence. This is helpfully spelt out in terms in subsection (1)(b). It should also be sufficient if the incitor believes that the person incited, if he acts at all, will do so with the fault required. For example, if D seeks to persuade E to have sexual intercourse with Mrs.

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[8]See para. 9.4 above.
[9]Law Com. No. 143, para. 14.5.
[10]*Whitehouse* [1977] Q.B. 868; Glanville Williams, *Textbook of Criminal Law* 2nd ed., (1983), 444.
[11]Working Paper No. 50, para. 102.
[12]Law Com. No. 143, para. 14.6.
[13]See Appendix B, Example 47(i).
[14][1977] Q.B. 868.
[15]Fifteenth Report: Sexual Offences (1984), Cmnd. 9213, paras. 7.12 and 7.23.
[16]*Most* (1881) 7 Q.B.D. 244 (article in newspaper inciting readers to commit murders).
[17]Law Com. No. 143, para. 14.6.
[18]Criminal Law Act 1977, s. 1(1); Criminal Attempts Act 1981, s. 1(1).

D, D believing that E knows that Mrs. D does not consent to it, there seems to be a clear case of incitement to rape. It should not be necessary to prove that it was D's intention that E should have such knowledge.[19] Whenever the fault required for a substantive offence includes knowledge of or recklessness as to circumstances (such as the absence of consent), it is likely to be more appropriate for the purposes of incitement to refer to the incitor's belief that such knowledge or recklessness exists rather than to his intention that it should.

13.10 *Incitement and attempt.* If the incitor does not intend or believe that the person incited shall or will act with the fault required, but nonetheless intends that the external elements of the substantive offence shall occur, he may be guilty not of incitement but of an attempt to commit the substantive offence by means of an innocent agent. An example given by the Working Party was of a person who incites a child under ten to steal.[20] Such an incitement will usually amount to a more than merely preparatory act for the purposes of attempt because there will usually be no further acts which it is necessary for the incitor to do to procure the agent to commit the offence.[21] Assuming that the requisite intent for an attempt is present, the attempt will be complete.

13.11 In *Curr*[22] 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 Working Party[23] and the Code team that the decision stated the wrong test. As the Code team put it, "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." We propose to depart from the decision in *Curr* in favour of the rule stated in subsection (1)(b).

13.12 *Offences which can be incited.* At common law incitement to commit an indictable or a summary offence is itself an offence.[24] Subsection (2) restates the general principle. However, it should be noted that in this respect the draft Bill departs from the principle of consistency among the preliminary offences. There is no liability for attempting to commit a summary offence (Criminal Attempts Act 1981, section 1(4)) but there is liability for conspiracy to commit a summary offence (Criminal Law Act 1977, section 1). Parliament, in enacting the rule for attempt, rejected our recommendation that an attempt to commit a summary offence should itself be an offence.[25] The view was taken that there was no need to extend the ambit of attempt to summary offences. Any such extension might, it was felt, result in more time being taken up in magistrates' courts with complicated questions of attempts to commit minor offences than would be justified by any advantage of the extra reach of the law. In the absence of evidence of any need to extend the criminal law on this point we accept the decision. We maintain, nevertheless, that a different rule can be justified for conspiracy and incitement. These offences, which *ex hypothesi* concern more than one person, enable the promoters and organisers of large-scale minor offences to be brought within the reach of the law. Admittedly prosecutions may be appropriate in practice only on rare occasions.[26] It was for this reason that we recommended in our Report on conspiracy that prosecutions for conspiracy to commit summary offences should only be brought with the consent of the Director of Public Prosecutions. We now make a similar recommendation in respect of incitement to commit a summary offence. The requirement of the Director's consent will ensure that the offence is not misused while keeping open the possibility of using such a charge to deal with cases where an element of social danger is involved in the deliberate promotion of offences on a widespread scale.[27]

13.13 *Incitement to incite and incitement to conspire.* A number of problems arise concerning the use of preliminary offences in combination. In relation to incitement the present law has reached the point of absurdity. Incitement to conspire was abolished as an offence known to the law by section 5(7) of the Criminal Law Act 1977. Recently the Court of Appeal has twice held that incitement to incite is an offence known to the law.[28] It seems,

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[19]See also Appendix B, Example 47(ii).
[20]Working Paper No. 50, para. 102.
[21]Criminal Attempts Act 1981, s. 1(1), discussed by Smith and Hogan, *Criminal Law* 6th ed., (1988), pp.291 *et seq.*
[22][1968] 2 Q.B. 944.
[23]Working Paper No. 50 para. 93; Law Com. No. 143, para. 14.6.
[24]Smith and Hogan, *op. cit.*, p.254.
[25]Law Com. No. 102, para. 2.105.
[26]Law Com. No. 76, para. 1.85.
[27]*Ibid.*
[28]*Sirat* (1985) 83 Cr. App. R. 41; *Evans* [1986] Crim. L.R. 470.

however, that this is so only when the first person incited is to incite, but not to agree with, a second person to commit an offence. If the evidence shows that D incited E to agree with F to wound G, section 5(7) of the Criminal Law Act 1977 apparently prevents a charge against D of incitement to conspire or of incitement to incite. But if D incites E to incite F (perhaps by a command, or a letter not requiring an answer) to wound G, D can be charged with incitement to incite. Such an absurd distinction cannot be restated in the Code.

13.14 Unlike other provisions of Part I of the Criminal Law Act 1977, section 5(7) was not based on a recommendation in our Report, which did not deal with the point. Abolition of incitement to conspire had, however, been recommended by the Working Party. They had argued that to allow an offence of incitement to conspire would be to take the law "further back in the course of conduct to be penalised than is necessary or justifiable".[29] The Working Party did not make any express reference to possible charges of incitement to incite, although it may be presumed that logically they would have wished to exclude this possibility also. The Code team's draft Bill followed the Criminal Law Act 1977 in excluding conspiracy from the scope of incitement, but did not exclude incitement itself thereby allowing for the possibility of charges of incitement to incite. The Scrutiny Group on preliminary offences invited us to look again at this problem, indicating that in their view it should be possible to indict for inciting to conspire.

13.15 The recent Court of Appeal decisions that incitement to incite is an offence known to the law have produced a clear anomaly. It would be illogical, and would bring the law into disrepute, to restate both the effect of these cases and section 5(7) of the Criminal Law Act 1977. It would not be right, within the scope of this project, to attempt to overturn the recent decisions. Such a course would require much fuller discussion and consultation. We therefore recommend that neither incitement nor conspiracy should be excluded from the scope of incitement. In this way the anomaly will be eliminated without, we believe, a significant increase in the scope of criminal liability.[30]

13.16 *Incitement to attempt.* It is unclear whether an offence of incitement to attempt is known to the law. Virtually all possible instances of incitement are incitements to commit substantive offences, and it is difficult to conceive of a case where a charge of incitement to attempt (to commit an indictable offence) would not be inept. Smith and Hogan, however, suggest one possibility, namely where in the circumstances known to the incitor, but not to the person incited, the completed act will amount only to an attempt.[31] The existence of this, admittedly, rare case, together with the general principle we referred to above of consistency of approach to the preliminary offences, persuade us that it would be preferable not to exclude attempt from the scope of incitement. Accordingly, our draft Bill makes no special provision with regard to incitement to attempt.

13.17 *Victims. Subsection (3)* exempts from liability for incitement a victim of an offence who is a member of a class of persons whom it is the purpose of the enactment creating the offence to protect. The terms of the rule correspond closely to that in clause 27(7) which exempts such a victim from liability as an accessory. We have already set out the arguments supporting the rule.[32] It only remains to add at this point that it would be illogical to exempt the victim from liability as an accessory (arising perhaps from acts of incitement) but to retain liability for the offence of incitement. In the leading case of *Tyrrell*[33] a girl under sixteen could not be convicted of aiding and abetting unlawful sexual intercourse with herself or of inciting the commission of that offence. As we explained earlier the draft Bill applies the rule to liability as an accessory and to liability for incitement and conspiracy.

13.18 *Identity of person incited. Subsection (4)* complements subsection (1) by providing, in effect, that the identity of the person incited is immaterial. This will further the successful prosecution of those who insert incitements into newspapers, periodicals etc. addressed to the public or a section of the public at large.[34]

13.19 *Incitement and accessories.* 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,[35] and

[29]Working Paper No. 50, paras. 44, 45.
[30]See Appendix B, Example 47(iii).
[31]*Op. cit.*, p.254.
[32]Para. 9.38 above.
[33][1894] 1 Q.B. 710; Appendix B, Example 47(iv).
[34]See, e.g., *Most* (1881) 7 Q.B.D. 244; Appendix B, Example 47(v).
[35]J.C. Smith, *Crime, Proof and Punishment* (ed. Tapper, 1981), 21 at p. 27.

subsection (5)(a) restates this position for the Code. However, it appears that the incitement of another to aid, abet, counsel or procure (in other words, to make himself an accessory to) the commission of an offence by a third person is not an offence known to the law.[36] The reason for this is that aiding and abetting is not in itself an offence. It attracts liability only on the commission of the substantive offence. Until that offence is committed the incitement is only to do acts which may or may not turn out to be criminal. The logic of this rule, which is restated in the opening three lines of subsection (5),[37] has been undercut to some extent by the decisions that incitement to incite is an offence known to the law. As explained above, we support those decisions for the purpose of the Code, but they lead to the saving made by paragraph (b) of subsection (5) which embodies a distinction that might be thought by some to be purely technical.

Clause 48: Conspiracy to commit an offence

13.20 *Codification of conspiracy*. The clause restates relevant provisions of Part I of the Criminal Law Act 1977 with some modifications and additions. It does not, however, deal with the offences at common law, preserved by section 5(2) and (3) of the Criminal Law Act 1977, of conspiracy to defraud, conspiracy to corrupt public morals and conspiracy to outrage public decency. We recently issued a Working Paper on conspiracy to defraud setting out a range of options regarding the future of this offence and inviting views thereon.[38] A Report containing the results of the consultation and our conclusions is in the course of preparation. No work is being undertaken at the present time on conspiracy to corrupt public morals and conspiracy to outrage public decency.[39] Nevertheless we remain committed to the principle that all common law offences should eventually be abolished in accordance with the general aims of codification and replaced by appropriate offences in statutory form. For the present these types of conspiracy will continue to exist as common law offences.

13.21 *The external elements of conspiracy*. Subsection (1)(a) sets out the external elements of conspiracy in line with section 1(1) of the Criminal Law Act 1977. The wording of the paragraph draws on but does not exactly reproduce the language of section 1(1) for the reasons given by the Code team in their Report.[40] The Code team's draft escaped criticism on scrutiny and appears here virtually unchanged.

13.22 *The fault element*. Subsection (1)(b) restates the effect of section 1(1) of the Criminal Law Act 1977, which provided:

> "If a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out *in accordance with their intentions*, will necessarily amount to or involve the commission of any offence by one or more of the parties to the agreement, he is guilty of conspiracy to commit the offence or offences in question."

13.23 It appears from the emphasised words that the section seeks to express a conception of conspiracy as involving agreement between two or more people both or all of whom intend that the offence shall be committed. That is what we intended when we recommended the creation of the statutory offence.[41]

13.24 In *Anderson*[42] the accused agreed to assist in the escape of a prisoner from prison. The House of Lords held that he was guilty of conspiracy to effect the escape because he intended to play some part in the agreed course of conduct, even if he neither intended the escape plan to succeed nor believed that it could do so. He was treated by the House of Lords as a principal offender, not simply as an accessory to a conspiracy between the others involved. Their Lordships did not require by way of mens rea for any conspirator more than an intention to play some part in the agreed course of conduct. The implication of this is that there may be a conspiracy although no conspirator actually intends that the offence agreed upon shall be committed. This implication is, in our view, at odds with the plain meaning of the section. We think, with respect, that the conviction in *Anderson* is better supported on

[36] *Bodin and Bodin* [1979] Crim. L.R. 176 (Judge Geoffrey Jones); Smith and Hogan, *op. cit.*, p.255.
[37] See Appendix B, Example 47(v).
[38] Working Paper No. 104 (1987).
[39] Our recommendations concerning these offences, set out in Part III of Law Com. No. 76, were not enacted in the Criminal Law Act 1977 or subsequently.
[40] Law Com. No. 143, para. 14.18.
[41] Law Com. No. 76, para. 1.39.
[42] [1986] A.C. 27.

the ground that the accused was an accessory to a conspiracy between others. He clearly assisted and encouraged the plan, knowing of the circumstances (that the plan was to effect an escape from prison) and of the conspirators' intention to commit that offence. A similar analysis can be applied to the hypothetical case put by Lord Bridge in *Anderson*.[43] The proprietor of a car hire firm who agrees to supply a car to a gang for a robbery is equally an accessory to the gang's conspiracy even though he may have no interest in whether the robbery is in fact committed.

13.25 A further point arises concerning a dictum in *Anderson* that each conspirator should intend to play some part in furtherance of the agreed course of conduct.[44] This contradicts the traditional view of conspiracy that it is necessary, and also sufficient, that each conspirator should intend that the agreed course of conduct be carried out whether by himself or other members of the conspiracy. If A and B agree that B shall murder C, A taking no part in the killing, the law has always taken the view that that is a conspiracy to murder. But, following this dictum, A would not be guilty of conspiracy and therefore B could not be guilty of conspiracy either since no other parties are involved. This seems to us to be contrary to public policy. Our clause does not therefore give effect to the dictum.[45]

13.26 *Recklessness as to circumstances*. Subsection (2) states for conspiracy a rule in similar terms to that stated in clause 49(2) for attempt. The effect is that where an offence includes as one of its elements a circumstance in respect of which recklessness is sufficient fault, recklessness as to that circumstance will suffice also for a charge of conspiracy to commit the offence. Thus if A and B agree to have sexual intercourse with C being aware that she may not consent they are guilty of conspiracy to rape. Because their awareness of the risk of her non-consent is sufficient fault in respect of that element of rape it is also sufficient for conspiracy to rape. The rule qualifies the general principle that intention is the characteristic fault requirement of the preliminary offences. We deal in detail with its justification in the context of attempt, where the point is most likely to arise in practice.[46] If the justification for the rule as it applies to attempt is accepted it would be inconsistent in principle not to apply it to conspiracy also.

13.27 *Scope of conspiracy*. Subsection (3) 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.

13.28 *Victims*. Subsection (4) states for conspiracy the equivalent rule to those stated in clauses 27(7) and 47(3) which protect from ancillary criminal liability victims of offences designed for their protection.[47]

13.29 *Exemptions*. 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. Clause 48 does not provide for the continuation of these exemptions. We deal separately with the three types of case.

13.30 (a) *Agreements with spouses*. At common law the offence of conspiracy did not extend to agreements between spouses. The origins of this rule lay in the ancient notion of the unity of husband and wife. Because husband and wife were deemed to be one person they could not form the agreement which is the essence of the offence. It hardly needs to be said that in view of changed attitudes to marriage in modern society this "antique fiction"[48] cannot sustain the rule. In our earlier Report on conspiracy, we recommended[49] retention of the exemption for alternative reasons, principally the importance of maintaining the stability of marriage by non-interference with the confidential relationship of husband and wife. We are now persuaded, particularly having regard to subsequent developments in the law, that this argument is insufficient to sustain the rule. First, the exemption is an anomaly. Husbands and wives are capable in law of being accessories to each other's offences. Where, say, a wife agrees that her husband shall commit an offence, that agreement cannot ground

[43] *Ibid.*, at 38.
[44] *Ibid.*, at 39.
[45] See Appendix B, Example 48(i).
[46] See para. 13.44 below.
[47] See paras. 9.38 and 13.17 above.
[48] The phrase is that of Oliver J. in *Midland Bank Trust Co. Ltd.* v. *Green (No. 3)* [1979] 2 All E.R. 193 at p. 215. In that case Oliver J. held that the exemption from criminal conspiracy of agreements between spouses did not extend to tortious conspiracy. His decision was affirmed on appeal: [1981] 3 All E.R. 744 (C.A.).
[49] Law Com. No. 76, para. 1.49.

liability for conspiracy by either party, but it will ground liability in the wife for aiding and abetting if the husband actually commits the offence. The distinction makes no sense. Secondly, as a result of section 80 of the Police and Criminal Evidence Act 1984, husbands and wives are now competent witnesses for the prosecution against each other in all cases and the privilege against disclosure of marital communications has been abolished. Thirdly, the exemption was criticised on consultation. The Scrutiny Group on preliminary offences said that they saw no reasons of social policy for maintaining the rule relating to spouses. In the light of these considerations we recommend that the exemption for agreements with spouses should not be retained.

13.31 (b) *Agreements with children.* In our conspiracy Report we proposed that a person agreeing with a child under the age of criminal responsibility to commit an offence should not be liable for conspiracy.[50] This reflected the majority view on consultation on our Working Paper No. 50 which had expressed the opinion that the law did permit a conviction for conspiracy in such a case.[51] We are inclined to think now that the exemption is unjustified. The justification of conspiracy as a means of enabling early intervention to prevent crime applies as much to this case as to any other. We would now prefer to leave such cases to be dealt with according to general principles of conspiracy in the same way as cases of agreements with mentally disordered persons. That is, if the child understands the nature of the agreement and intends that the offence be committed, his own immunity from prosecution should not affect the liability for conspiracy of the person who is over the age of criminal responsibility. Accordingly, we recommend that the exemption for agreements with children should not be retained.

13.32 (c) *Agreements with intended victims.* In our conspiracy Report, we recommended that neither the protected person nor the non-exempt party should be liable for conspiracy in respect of an agreement to commit the offence of which the protected person would be the victim.[52] This recommendation again reflected a majority view on consultation on Working Paper No. 50. But we think now that this exemption also is unjustified. It would be preferable, as in the cases of agreements with spouses and agreements with children, to allow the general principles of conspiracy to apply. We recommend accordingly.

13.33 *Conspiracy as a continuing offence.* In *Director of Public Prosecutions* v. *Doot*[53] 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."[54] Subsection (5) restates this principle. Subsection (6) spells out the corollary that a person may become a party to a subsisting conspiracy by joining the agreement which constitutes the offence.[55]

13.34 *Conspiracy and complicity.* Subsection (7) sets out for conspiracy a provision corresponding to clauses 47(5) (incitement and accessories) and 49(6) (attempt and accessories). The opening four lines resolve a point on which the law is not at present clear. Smith and Hogan have argued that an agreement to aid and abet the commission of an offence by a person who is not a party to the agreement is not a conspiracy under section 1(1) of the Criminal Law Act 1977.[56] That argument was accepted by the Court of Appeal in *Hollinshead*,[57] a case in which the accused agreed to sell to X "black boxes", devices for attaching to electricity meters to show that less electricity had been consumed than was the fact. The accused expected X to re-sell the devices to consumers of electricity for use in defrauding electricity boards. Thus the accused had clearly agreed to aid and abet such consumers to commit offences under the Theft Act 1978, section 2, against the electricity boards. If such an agreement were capable of amounting to a conspiracy under section 1(1) of the Criminal Law Act 1977, it would have followed under the doctrine enunciated in *Ayres*[58] that that agreement could not have been a conspiracy to defraud at common law. The upholding by the House of Lords of convictions for conspiracy to defraud would appear

[50] *Ibid.*, paras. 1.51 and 1.58.
[51] Working Paper No. 50, para. 43.
[52] Law Com. No. 76, paras. 1.55 and 1.58.
[53] [1973] A.C. 807.
[54] At p. 827.
[55] See Appendix B, Example 48(iv).
[56] *Op. cit.*, p.265.
[57] [1985] A.C. 975 at 985-6 (C.A.). The decision of the House of Lords is reported *ibid.* beginning at 987.
[58] [1984] A.C. 447. Since reversed by the Criminal Justice Act 1987, s. 12.

to imply[59] that there was no statutory conspiracy on the facts, and therefore that an agreement to aid and abet the consumers to commit offences against the electricity boards was not a statutory conspiracy. In our recent Working Paper on conspiracy to defraud we drew attention to the possibility of creating a new offence of conspiracy to aid and abet and invited views thereon.[60] Pending the outcome of this consultation, clause 48 restates the position we believe to have been established by *Hollinshead*.[61] This position is consistent with the corresponding rules for incitement and attempt, the latter having been settled by Parliament in section 1(4)(b) of the Criminal Attempts Act 1981.

13.35 Subsection (7)(a) makes clear that a person may be an accessory to a conspiracy by others. He may, like the defendant in *Anderson*,[62] intentionally assist or encourage the conspirators' plan even though he does not himself intend the offence to be committed and is thus not a principal in the conspiracy.

13.36 Subsection (7)(b) confirms that an agreement to incite a person not a party to the agreement to commit an offence as a principal is a conspiracy under clause 48(1) and (3). This reproduces existing law under section 1(1) of the Criminal Law Act 1977. We commented in our conspiracy Report that conspiracy to incite was a potentially useful offence,[63] and a reminder of its existence was recently given by the Court of Appeal in *Hollinshead*.[64] We do not find it necessary to make any express provision concerning charges of conspiracy to conspire and conspiracy to attempt. We cannot envisage any circumstances in which it would be necessary to bring such charges in preference to charges of conspiracy to commit a substantive offence.

13.37 *Conviction*. Subsection (8) makes provision for a number of matters relating to the conviction of a person for conspiracy.

13.38 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 28(2)(a), which states an equivalent rule for an accessory. Because a conspirator will invariably be an accessory to the substantive offence when committed, consistency is highly desirable.

13.39 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.

13.40 Paragraph (c) restates in simpler language section 5(8) of the Criminal Law Act 1977.[65]

13.41 Paragraph (d) provides for the avoidance of doubt that it is immaterial that the only other party to the agreement cannot be convicted of conspiracy. The latter may, for example, have a defence or be immune from prosecution. As long as the other party made the agreement with the requisite intention the existence of his defence or immunity does not preclude proof of the elements of conspiracy against the defendant.[66]

Clause 49: Attempt to commit an offence

13.42 The Criminal Attempts Act 1981 provided for the abolition of the common law of attempt and its replacement by a statutory offence of attempt created by section 1. The specification of the statutory offence was largely based on the recommendations contained in our Report on attempt.[67] With the exception of two matters on which we now recommend a change of policy our draft Bill restates the law set out in the Act.

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[59]Although it was said that the point was being left open.
[60]Working Paper No. 104, Appendix C.
[61]See Appendix B, Example 48(v).
[62][1986] A.C. 27. See Appendix B, Example 48(vi).
[63]Law Com. No. 76, para. 1.44.
[64][1985] A.C. 975 at 987 (C.A.).
[65]See Appendix B, Example 48(vii).
[66]Example 48(viii).
[67]Law Com. No. 102.

13.43 *The elements of attempt.* Subsection (1) is closely modelled on section 1(1) of the Criminal Attempts Act 1981. The only change of substance is the use of the word "indictable" to indicate directly the type of offence to which the section applies. Other changes of wording have been made only in the interest of consistency of style in the draft Bill.

13.44 *Recklessness as to circumstances.* Subsection (2) states for attempt a rule corresponding to that stated in clause 48(2) for conspiracy.[68] The rule represents a change from the policy we formerly recommended of requiring for attempt an intention to bring about each of the constituent elements of the offence attempted.[69] That recommendation was at least partly based on the belief that the decision of the Court of Appeal in *Mohan*,[70] to the effect that attempt is a crime of specific intent, applied equally in respect of consequences and circumstances specified in the definition of the offence attempted. However, in *Pigg*,[71] a case on the common law decided after the Criminal Attempts Act 1981 had come into force, the Court of Appeal upheld a conviction for attempted rape on the basis that the accused was reckless whether the woman consented to intercourse. It was subsequently argued that the principle involved — that where recklessness as to a circumstance suffices for the substantive offence it should suffice for the attempt — should apply to the statutory offence of attempt also.[72] In their Report the Code team expressed 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".[73] Accordingly they sought to clarify the point by providing expressly that the intention required for an attempt was an intention in respect of all the elements of the offence attempted. An illustration was included of the application of the requirement to a case of attempted rape. On consultation the requirement and the illustration were strongly attacked by the Scrutiny Group on preliminary offences. The Group argued with force that the policy involved was undesirably narrow in relation to circumstantial elements of substantive offences, particularly in cases where intoxication was involved. They recommended that the Code should make clear that the principle of *Pigg* applied to the statutory offence of attempt.

13.45 In view of the decision in *Pigg* it is plain that some clarification is required. Section 1(1) of the Criminal Attempts Act 1981 leaves the matter in doubt.[74] We ourselves have no doubt that the criticisms expressed by the Scrutiny Group reflect widely-held social judgments about the need to protect potential victims against certain types of drunken and violent offender. We find the Group's criticisms persuasive and take the view that we should depart from our previous recommendation to the extent provided for in the subsection. A minor complication of the proposed rule is that it erects a distinction between "circumstances" and other elements of the substantive offence attempted. This distinction may occasionally be difficult to apply. We are prepared to tolerate the difficulty because in the mainstream cases where the rule is likely to operate, namely, rape and obtaining property by deception, the rule appears to work well. The distinction between act (sexual intercourse) and circumstance (non-consent) or between result (obtaining) and circumstance (the falsity of the representation) is plain on the face of the definitions of the offences.

13.46 *Attempt by omission.* The extended meaning given to the word "act" by clause 16 allows for the possibility of an attempt being committed by an omission. It is generally believed that the interpretation of "act" in section 1(1) of the Criminal Attempts Act 1981 does not extend to omission, although it was the intention of the Government that in certain cases an attempt by omission could be charged under the Act.[75] Where a substantive offence, such as murder or manslaughter, can be committed by omission, it seems right to provide for the possibility of an attempt to commit such an offence by omission. Subsection (3) so provides.[76]

13.47 *Issues of law and fact.* Subsection (4) restates section 4(3) of the Criminal Attempts Act 1981 with some simplification of wording but no change of substance.

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[68]See Appendix B, Example 49(i); cf. Example 48(iii).
[69]Law Com. No. 102, para. 2.14.
[70][1976] Q.B. 1.
[71][1982] 1 W.L.R. 762, [1982] 2 All E.R. 591.
[72]Glanville Williams, *op. cit.*, 409 and in [1983] Crim. L.R. 365. *Contra*, Buxton, [1984] Crim. L.R. 25.
[73]Law Com. No. 143, para. 14.30.
[74]The point was raised but not decided in *Millard and Vernon* [1987] Crim. L.R. 393.
[75]See Dennis, [1982] Crim. L.R. 5 at pp. 7-8.
[76]See Appendix B, Example 49(ii).

13.48 *Offences which may be attempted.* Subsection (5) restates paragraph (c) of section 1(4) of the Criminal Attempts Act 1981. Paragraph (b) of that section has been taken over to subsection (6). Paragraph (a) is not restated. This is because we have recommended that incitement to conspire should be restored as an offence,[77] and in the interest of consistency we now make a similar recommendation for attempted conspiracy. An example of a case appropriately covered by such a charge would be where D agrees with E to commit an offence, but E is a police informer who intends to frustrate the commission of the offence. There is no completed conspiracy because E lacks the required intention. But D has done everything he can to conspire and does intend the offence to be committed. There seems no reason why he should not be guilty of attempted conspiracy.

13.49 *Attempts and complicity.* Section 1(4)(b) of the Criminal Attempts Act 1981 provided that it is not an offence to attempt to aid, abet, etc., the commission of an offence. This wording was unhappy in its context because aiding, abetting, etc., is not as such an offence in the same sense as the offences referred to in paragraphs (a) and (c). In *Dunnington*[78] 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. It was held 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 accessory to an attempt. The opening lines of subsection (6) restate more aptly the intended effect of section 1(4)(b) while paragraph (a) confirms the decision in *Dunnington*.[79] Paragraph (b) makes it clear that nothing in the subsection precludes the use of charges of attempt to commit the other preliminary offences of incitement and conspiracy. A charge of attempt to attempt would of course be inept.

Clause 50: Impossibility and preliminary offences

13.50 *A single, consistent provision.* We reviewed the law on this matter in our Report on Attempt, and Impossibility in relation to Attempt, Conspiracy and Incitement. We concluded 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.[80] In the cases of conspiracy and attempt legislation was necessary to achieve this objective. Effect was given to our proposals in the Criminal Attempts Act 1981. Impossibility was ruled out as a defence to attempt by subsections (2) and (3) of section 1, and as a defence to conspiracy by section 5(1), inserting a paragraph (b) into the definition of conspiracy in section 1(1) of the Criminal Law Act 1977. In *Shivpuri*[81] the House of Lords confirmed that under the Act the impossibility of committing the offence intended did not preclude a conviction for an attempt to commit the offence. In relation to incitement we had taken the view that legislation was unnecessary. It appeared that the common law, as stated in *McDonough*[82] and *D.P.P.* v. *Nock*[83] was already in accordance with the position recommended for conspiracy and attempt. Subsequently, however, the Court of Appeal held in *Fitzmaurice*[84] that the common law principles relating to impossibility, which it had been our concern to reverse as regards conspiracy and attempt, 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.

13.51 We agree with the Code team that it would be absurd to perpetuate this distinction.[85] The same principle should apply to all the preliminary offences. This means that the position for incitement must be brought into line with that for conspiracy and attempt. We accept the Code team's view that it is unnecessary to make separate provision for each offence. Only one provision is needed to rule out impossibility as a defence to any of the preliminary offences. Subsection (1) has been drafted accordingly. Its effect is that for the purposes of all the offences 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

[77]See para. 13.15 above.
[78][1984] Q.B. 472.
[79]See Appendix B, Example 49(iii).
[80]Law Com. No. 102, paras. 2.100, 3.8 and 4.1.
[81][1987] A.C. 1, reversing the previous decision of the House of Lords in *Anderton* v. *Ryan* [1985] A.C. 560.
[82](1962) 47 Cr. App. R. 37.
[83][1978] A.C. 979 at p. 999.
[84][1983] Q.B. 1083.
[85]Law Com. No. 143, para. 14.40.

time). If in those supposed circumstances he would be guilty of the preliminary offence charged, the impossibility of achieving his intention is immaterial.[86]

13.52 *Application.* Subsection (2) provides that subsection (1) applies both to the offences created by clauses 47 to 49 and to any other statutory offence of incitement, conspiracy or attempt to commit a specified offence.

13.53 *Acts justified or excused.* Subsection (3) provides a necessary qualification to the generality of the principle embodied in subsection (1). If, as a matter of interpretation, a defendant can take advantage of a statutory defence to a substantive offence although he was unaware of the circumstances of justification or excuse, it would not be right to convict him of a preliminary offence on the basis that he intended to commit or believed that he was committing an offence. An example of such a defence appears in clause 44(1).[87]

Clause 51: Preliminary offences under other enactments

13.54 A number of statutes create specific offences of incitement, conspiracy or attempt to commit other offences. Most of these offences are already unnecessary because the conduct referred to is covered by the existing general law. These can safely be repealed when the relevant statutes are revised after the Code comes into force. Nonetheless it is clearly essential to state the rules which govern liability for such offences. Subsection (1) provides that clauses 47 to 50 shall apply for this purpose. Similar provisions already exist as regards conspiracy and attempt in section 5(6) of the Criminal Law Act 1977 and section 3 of the Criminal Attempts Act 1981 respectively.

13.55 *No rule of exclusivity.* Subsection (2) makes clear that the offences under clauses 47, 48 and 49 and the offences created by other enactments are not mutually exclusive. If conduct constitutes a preliminary offence both under the Code and under another enactment, there may be a conviction of either offence. This is a departure from the rule of exclusivity set out in section 5(6) of the Criminal Law Act 1977 and section 3 of the Criminal Attempts Act 1981. That rule was challenged on consultation by the Society of Public Teachers of Law, who argued that it was without merit and could cause a good deal of trouble. We agree; the present rule for conspiracy and attempt opens the way for unmeritorious technical submissions that the indictment charges or the evidence discloses a preliminary offence under another enactment and therefore that the defendant cannot be convicted of the relevant Code offence. The only virtue of exclusivity that we can discern is that it ensures that the penalties prescribed by Parliament for the offence under the other enactment are not exceeded by those for the equivalent Code offence. This matter can be specifically addressed by provisions concerning the penalties for the preliminary offences under the Code. Thus Schedule 1, col. 4 provides in respect of incitement, conspiracy and attempt that where the offence amounts also to an offence referred to in clause 51 the penalty is the same as that provided for the latter offence.

Clause 52: Jurisdiction and preliminary offences

13.56 The first three subsections of this clause give effect to recommendations of the Criminal Law Revision Committee in their Fourteenth Report.[88] Subsection (1) deals with incitement, conspiracy or attempt in this country to commit an offence abroad, subsection (2) with the converse case of incitement, conspiracy or attempt abroad to commit an offence in this country.[89] Subsection (3) sets out the offences to which these provisions, which have the effect of extending the jurisdiction of the English courts, apply.

13.57 *Conspiracy entered into abroad.* Subsection (4), which applies only to conspiracy, states a principle of the common law laid down by the House of Lords in *D.P.P.* v. *Doot.*[90] 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 but left it unclear whether this was only so if any act was done in England in pursuance of the agreement. Entering the jurisdiction for any purpose connected with the agreement should

[86]See Appendix B, Examples 50(i)-(iii).
[87]See paras. 12.24 *et seq.* above: and Appendix B, Example 50(iv).
[88]Offences against the Person (1980), Cmnd. 7844, para. 303.
[89]See Appendix B, Examples 52(i) and (ii).
[90][1973] A.C. 807; Appendix B, Example 52(iii).

be regarded as such an act, and the subsection so provides.[91] If an act in pursuance of the agreement is done in England, all the conspirators, including those who remain abroad, will under this provision be triable in England. If, however, the only conspirators to enter the jurisdiction do so for purposes unconnected with the agreement, subsection (4) will not apply. The conspirators will not then be triable in England unless the case falls within subsections (2) or (3).

Prosecution and punishment

13.58 Provisions relating to prosecution and punishment of the preliminary offences appear in Schedule 1. This is one respect in which we have found it helpful to treat these offences in the same way as the offences in Part II of the Bill. The nature and scope of Schedule 1 has already been explained in Part 5 of this Report. The provisions of the Schedule relating to the preliminary offences were explained fully by the Code team in their Report.[92] They attracted no adverse comment on consultation and are reproduced with no substantial change.

Withdrawal

13.59 We have previously recommended that there should be no defence of withdrawal in relation to the preliminary offences of attempt and conspiracy.[93] The Code team accepted this view and made no provision for such a defence for any of the preliminary offences. The Society of Public Teachers of Law urged that such a defence should be included in the Code. They argued that there is no justification for making any distinction between what the defendant must do to be guilty of incitement and what he must do to be guilty as an accessory. In respect of liability as an accessory a kind of defence of withdrawal is provided by clause 27(8), which restates the common law concerning a person who countermands his encouragement of the commission of an offence. We are not persuaded by this argument which, among other things, seems to us to overlook the important distinction that *ex hypothesi* the preliminary offence has already been committed but the substantive offence has not. Interests of crime prevention justify the defence in the second case but not the first. In any event the proposal is intimately connected with the larger issue of facilitation and reform of the law of complicity. As we have indicated, it has not been possible to address that issue in the present exercise.

[91] In *Jurisdiction over Fraud Offences with a Foreign Element* (December 1987), we provisionally proposed that every party to a conspiracy formed abroad to commit certain offences of fraud, or to defraud, in England and Wales should be triable here, *whether or not anything is done in this country to further the conspiracy:* see para. 3.4. Our final Report on this subject will be published shortly.

[92] Law Com. No. 143, paras. 14.13-14.16 (incitement); 14.27 (conspiracy); 14.36-14.39 (attempt).

[93] Law Com. No. 102, para. 2.133.

Report relating to Part II of the Draft Bill

The following pages (Parts 14 to 18) concern Part II of the draft Bill. The material in this section of our Report is of two rather different kinds.

The commentary on *Chapters I and II* (Offences against the Person: Sexual Offences) explains the source of most of the offences stated by these Chapters in recommendations of the Criminal Law Revision Committee. This is new law and requires relatively full explanation. The part of the Report dealing with Offences against the Person also explains the omission of some offences that might have been looked for in this Chapter.

The commentary on *Chapters III, IV and V* on the other hand, is relatively brief. These Chapters (Theft, Fraud and Related Offences: Other Offences relating to Property: Offences against Public Peace and Safety) restate existing offences. The Report identifies the sources from which the offences are taken, refers to any amendments of substance found necessary in the process of incorporating the offences in the Code and explains the omission of some offences and other provisions that might be looked for in these Chapters.

PART 14

PART II, CHAPTER I

OFFENCES AGAINST THE PERSON

Introduction

14.1 Chapter I of Part II incorporates, with a few modifications, the recommendations of the Criminal Law Revision Committee (in this Part of this Report called "the Committee") in their Fourteenth Report.[1] The corresponding clauses of the Code team's Bill were scrutinised by a special group chaired by Lord Justice Lawton and including Sir George Waller, Lord Justice Lloyd, Mr. Justice McCullough, Judge Hazan (all members of the Committee) and Mr. Timothy Lawrence. We have been greatly assisted by their comments. The Committee's recommendations concerning false imprisonment, kidnapping and child stealing were not included in the Code team's Bill because the Child Abduction Bill was then being considered by Parliament. Those recommendations, with the modifications required by the Child Abduction Act 1984, are included in the present draft Bill, as is the new offence of torture created by the Criminal Justice Act 1988, section 134.

Clause 53: Interpretation

14.2 *The person against whom the offences may be committed.* The definition of "another" in clause 53(a) effectively defines "the person" against whom the offences in this Chapter may be committed. Though, following Coke,[2] the definition of a person "in being" is traditionally discussed only in relation to homicide, it is clear that, in principle, the same definition must apply to offences against the person generally. This is achieved by paragraph (a). That paragraph also makes it clear that a person who intends to cause the death of, or serious personal harm to, an unborn child does not intend to commit murder and is not, by reason of that intention, guilty of murder if the child is born alive and then dies of the injury. This settles a matter of doubt in the present law[3] in accordance with, as we think, sound principle. A person who intended to kill the mother would be guilty of murder of the child if the injuries he inflicted with that intent caused the child to die after it had been born alive: see clause 24(1) (transferred fault).

14.3 The requirement that the child should have "an existence independent of its mother" has been criticised; but it is used in the Infant Life (Preservation) Act 1929, section 1(1), the Committee recommended that it be preserved (Report, para. 35) and a proposal to eliminate or modify it would require consultation, particularly with medical opinion, that we have not been able to undertake.

14.4 *Causing death.* Clause 53(b) preserves the common law "year and a day" rule as recommended by the Committee. The rule will apply to murder, manslaughter, suicide pact killing, complicity in suicide and infanticide.[4]

Clause 54: Murder

14.5 Subsection (1) implements recommendation 1 of the Committee's Report. It does not include the third variety of fault ("intending to cause fear of death or serious injury and being aware that he may kill") which was included in square brackets in the draft clause in the Code team's Bill. The Committee did not recommend its inclusion. They said only that, "if Parliament favours a provision" of this type, it should be on these lines. We do not regard it as a satisfactory provision. Moreover, we note that the House of Lords has appointed a Select Committee to consider, inter alia, "the scope and definition of the crime of murder in England and Wales and in Scotland."[5] The proposals of the Criminal Law Revision Committee will undoubtedly require reconsideration in the light of the Select Committee's recommendations. In the meantime, we think it right to retain the proposals to which the Criminal Law Revision Committee gave such lengthy and careful consideration.

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[1]Offences against the Person (1980), Cmnd 7844.
[2]3 Inst. 47.
[3]See Jennifer Temkin, "Pre-natal Injury, Homicide and the Draft Criminal Code", [1986] C.L.J. 414.
[4]*R.* v. *Coroner for Inner West London, ex parte De Luca* [1988] Crim. L.R. 541.
[5]*Hansard* (H.L.), 21 July 1988, Vol. 499, col. 1491.

14.6 The proposals modify the present law in two respects. (i) An intention to cause serious personal harm is at present a sufficient fault for murder. Under the clause, this will not be so unless the defendant is also aware that he may cause death. (ii) At present, the defendant's awareness that it is "virtually certain" that his conduct will cause death or serious personal harm is only evidence that he intended such a result. Under the Code, that state of mind will be intention.[6] The judge will direct the jury that, if the defendant was aware that, in the ordinary course of events, his act would cause death or serious personal harm, he intended death or serious personal harm.

14.7 The clause uses the phrase, "causes death", instead of "kills", which was used in the Code team's Bill. This change of language has been explained earlier in this Report.[7]

14.8 A person who causes death with one of the two specified states of mind will be guilty of murder unless one of the defences provided by clauses 56, 58, 59, 62 and 64 applies, reducing the offence to manslaughter or infanticide.

14.9 Because of the exceptional nature of the mandatory penalty for murder, provision is made for it in subsection (2), with a cross-reference in Schedule 1.

Clause 55: Manslaughter

14.10 *"Voluntary manslaughter"*. As at common law, manslaughter under the clause is a complex crime. It may take any one of five forms. Three of these, designated by the Criminal Law Revision Committee "voluntary manslaughter" (the traditional phrase) would be murder but for the existence of a defence — diminished responsibility, provocation or that the force which caused death, though excessive, was used in public or private defence. The clause makes it clear that clauses 56, 58 and 59 provide defences to murder, thus attracting the operation of other Code provisions relating to defences. Since, by clause 25(b), "defences apply to both principals and accessories", clauses 56, 58 and 59, though expressed only in terms of the principal, apply equally to accessories.

14.11 *"Involuntary manslaughter"* takes two forms. The first is where the defendant lacks the fault required for murder because he is voluntarily intoxicated. At common law, he is not guilty of murder but guilty of manslaughter. The Committee proposed the retention of this rule. It is desirable to state it expressly rather than leave the matter to the general provisions of clause 22 because of the danger that "being aware that he may cause death" might be construed as a form of recklessness, leaving the defendant who was unaware through voluntary intoxication liable by virtue of clause 22(1) to conviction for murder. Subsection (1)(b) makes it clear that he is guilty only of manslaughter.

14.12 The second form of involuntary manslaughter covers the defendant who intends to cause serious personal harm — who is guilty of murder under the present law — and he who is reckless whether death or serious personal harm be caused.

14.13 *Manslaughter a single offence*. Whatever the form of manslaughter, the defendant will be convicted simply of manslaughter, contrary to clause 55. This is so even if four jurors think that a defendant, charged with murder, 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 intended only to cause serious personal harm. There is a disagreement on the murder charge but, if the jury are discharged in respect of that charge, they may return a verdict of guilty of manslaughter because they are unanimous that he intended to cause at least serious personal harm.[8]

14.14 The Code team's Bill provided that a jury which found a defendant guilty of manslaughter by reason of diminished responsibility should return a verdict to that effect. We think that such a provision is unnecessary and might cause difficulties in a case of the kind envisaged above, where the jurors are agreed on a verdict of manslaughter but on different grounds. The matter is adequately dealt with by the present practice of the judges 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.

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[6]Clause 18(b); see para. 8.14 above.
[7]Para. 7.13 above.
[8]See J.C. Smith, "Satisfying the Jury", [1988] Crim. L.R. 335 at 341.

Clause 56: Diminished responsibility

14.15 As in the corresponding clause in the Code team's Bill, 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). The phrase, "at the time of his act" — which may be the act of causing death or of procuring, assisting or encouraging that act — has been included to make it clear beyond doubt that the jury must look to that time and not to the time of trial.

14.16 The definition of "mental abnormality" in subsection (2) is the definition of "mental disorder" in section 4 of the Mental Health Act 1959 (now section 1(2) of the Act of 1983) which the Committee, after some hesitation, was persuaded was appropriate for this purpose.[9] Intoxication (the state of being disordered or stupefied by alcohol or other drugs) is excluded. We note that in *Tandy*[10] the Court of Appeal held that intoxication may found diminished responsibility if the defendant is suffering from alcoholism which renders the taking of "the first drink" involuntary. As we are implementing the recommendations of the Committee rather than codifying the present law, we have not thought it right to attempt to include this rather difficult concept in the clause.

Clause 57: Evidence of mental abnormality

14.17 Subsection (1) corresponds to clause 38(1). Subsection (2) corresponds to clause 38(2), together with which it replaces section 6 of the Criminal Procedure (Insanity) Act 1964. Subsections (3) and (4) give effect to recommendations of the Committee.[11]

Clause 58: Provocation

14.18 This clause gives effect to recommendations 9 to 13 of the Committee's Report. The defendant will be judged on the facts as he believed them to be (clause 41) and, as the Committee recommended, "with due regard to all the circumstances, including any disability, physical or mental, from which he suffered...". We believe that this is adequately summed up in the phrase, "any of his personal characteristics that affect its [sc. the provocation's] gravity." The same words are used in clauses 42 (duress by threats) and 43 (duress of circumstances). A characteristic which is relevant for the purpose of one defence will not necessarily be relevant for the purpose of another. If the alleged provocation consisted in an assault with intent to rob, the fact that the defendant was sexually impotent would not affect its gravity; but, if it consisted in taunts of sexual impotence, that personal characteristic would be highly relevant.

Clause 59: Use of excessive force

14.19 This clause implements the Committee's recommendation 73 which adopted a principle then accepted in some parts of the Commonwealth, particularly Australia.[12] Recently, however, the High Court of Australia, in *D.P.P.* v. *Zekevic*,[13] has overruled its previous decisions on the use of excessive force and followed *Palmer* v. *R.*,[14] bringing Australian law into line with the present law of England: the intentional use of deadly force in self-defence or the prevention of crime is either justified, in which case no crime is committed, or it is not, in which case the killer is guilty of murder. The Australian High Court overruled its previous decisions, not because they thought the principle applied was unsound but because of the complexity which had arisen from the courts' attempts to state the law in a form which took account of the burden of proof. The Australian law was changed not because it was thought to be wrong in principle, but because it was too difficult for juries to understand and apply. We do not believe that these difficulties will arise under the Code. Applying clauses 13 (proof) and 44 (use of force in public or private defence), the judge should be able to direct the jury in readily comprehensible terms. *D.P.P.* v. *Zekevic* does not, in our opinion, affect the soundness of the Committee's recommendation.

Clause 60: Jurisdiction over murder and manslaughter

14.20 This clause implements the Committee's recommendations 76 to 78. The question was raised on scrutiny whether "British citizen" is the appropriate term in this context. We

[9]Fourteenth Report, para. 92. The term "mental disorder" is not used here, because it is used with a narrower meaning elsewhere in the Code: see clauses 34 and 36.
[10][1989] 1 AII E.R. 267.
[11]Fourteenth Report, paras. 95 and 96.
[12]See particularly *Howe* (1958) 100 C.L.R. 448.
[13](1987) 61 A.L.J.R. 375.
[14][1971] A.C. 814.

are satisfied, after consultation with the Home Office, that it is. The operation of the clause is fully explained and illustrated in the Code team's Report.[15]

14.21 The Committee's recommendations 80 and 81, concerning jurisdiction over preliminary offences, are dealt with in relation to those offences in clause 52.

Clause 61: Attempted manslaughter

14.22 This clause, creating a new offence of attempted manslaughter, implements the Committee's recommendation 79, extended, as consistency requires, to include the case of a person who attempts to cause death when using excessive force in public or private defence. The clause will operate as a defence to a charge of attempted murder and, by virtue of clause 25(b), will apply to accessories to the killing.

Clause 62: Suicide pact killing

14.23 This clause implements the Committee's recommendation 29 that killing in pursuance of a suicide pact should not be manslaughter but a particular offence, which we have designated "suicide pact killing", punishable with a maximum of seven years' imprisonment. It applies to the case of a party to a suicide pact who kills another party to the pact or who procures, assists or encourages a third person to kill a party to the pact. It does not apply to the case of a person who procures the other to take his own life. He is not a person "who, but for this section, would be guilty of murder", because suicide is no longer self-murder, or any offence. He will, however, be guilty of an offence under the next clause.

14.24 Subsection (3), implementing the Committee's recommendation 30, provides that it is a defence to a 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.

Clause 63: Complicity in suicide

14.25 This clause reproduces the effect of section 2 of the Suicide Act 1961 but with the reduced maximum penalty of seven years' imprisonment recommended by the Committee.[16] 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 49(1): clause 49(6) does not apply because this is not a case of an attempt to procure the commission of an offence.

Clause 64: Infanticide

14.26 This clause implements the Committee's recommendations 18 to 24. It provides a defence to a charge of murder or manslaughter or an attempt to commit either offence. The defence applies also to a woman who is charged as an accessory to murder or manslaughter committed by others: see clause 25(b).

14.27 Subsection (3) provides for the case where the jury is satisfied that the defendant is guilty of either infanticide or child destruction but not satisfied that it was the one rather than the other. If the jury was uncertain, either whether the child had been born, or whether he had an existence independent of the defendant when his death occurred, it would be bound to acquit of murder or manslaughter and it would be impossible to say whether the defendant was guilty of infanticide or of child destruction. Though satisfied that it was either the one offence or the other, the jury would be bound, at least in theory, to acquit of both offences. The Committee thought that there should be provision for cases of this kind.[17] The subsection enables the jury to convict of infanticide. Infanticide is chosen rather than child destruction because, under the Code, infanticide is the less serious offence. We have followed the recommendation of the Committee to reduce the maximum penalty for infanticide to five years but, like the Committee, propose no change in the penalty for child destruction. To do so would inevitably involve reconsideration of the penalty for abortion which would be controversial and could not be undertaken without consultation. If the penalties for the three offences were rationalised,[18] this subsection might require reconsideration.

[15]Law Com. No. 143, para. 15.24, and Illustration 62, p. 234.
[16]Fourteenth Report, para. 136.
[17]*Ibid.*, para. 36.
[18]If the life penalty for infanticide were retained, the Committee wished child destruction to be regarded as the more serious offence.

14.28 The subsection provides only for the case where the jury is uncertain. If the jury is satisfied, either that the child had not been born at the material time, or that he did not then have an existence independent of his mother, it would have to acquit of murder, manslaughter and infanticide. 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 only with a maximum of five years.

Clause 65: Threats to kill or cause serious personal harm

14.29 This clause implements the Committee's recommendation 63, extending the scope of the present section 16 of the Offences against the Person Act 1861. The word "believe" is substituted for "fear" as more appropriate and consistent with other Code provisions.

Clause 66: Abortion

14.30 The Committee made no recommendations regarding offences of abortion and child destruction and we have to assume the continuance of the present law. Clause 66 replaces 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. This is dealt with separately in clause 67.

14.31 The offences in the 1861 Act are framed in terms of doing certain acts with intent to procure miscarriage. This is an inappropriate method in the Code and clause 66 simply makes it an offence to procure the miscarriage of a woman otherwise than in accordance with the provisions of the Abortion Act 1967. It then becomes an offence under clause 49 to attempt to procure such a miscarriage, whether or not the woman is in fact pregnant (clause 50). The corresponding clause in the Code team's Bill used the phrase "terminate the pregnancy", the language of the Abortion Act 1967. It was pointed out to us that this was inappropriate for the definition of the offence because an obstetrician who induces birth "terminates the pregnancy". We have therefore reverted to the language of the 1861 Act. The word "intentionally" has been introduced so as to exclude the application of clause 20 which would change the law by making it an offence recklessly to cause a miscarriage.

Clause 67: Self-abortion

14.32 This clause codifies the present law.

Clause 68: Supplying article for abortion

14.33 This clause reproduces the effect of section 59 of the Offences against the Person Act 1861 in Code style.

Clause 69: Child destruction

14.34 Subsections (1) and (2) reproduce the effect of section 1 of the Infant Life (Preservation) Act 1929 in Code style. Subsection (3) makes further provision for the situation discussed above in relation to clause 64(3).[19]

Clause 70: Intentional serious personal harm

14.35 This clause implements the Committee's recommendation 39(1) and replaces section 18 of the Offences against the Person Act 1861. The Committee proposed no definition of "injury" or "serious injury". We prefer the terms "personal harm" and "serious personal harm". Clause 6 states that "'personal harm' means harm to body or mind and includes pain and unconsciousness"; but no definition of "serious" personal harm is proposed. This will be as at present a matter for the judgment of the court or jury on the facts of the particular case.

14.36 *Jurisdiction*. Subsection (2) provides for an extension of the ordinary limits of criminal jurisdiction in respect of this crime which is logically required by the implementation of the Committee's recommendation 80 by clause 52.[20]

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[19]Para. 14.27.

[20]See para. 13.56 above. Illustrations of the operation of the clause, derived from Law Com. No. 143, p. 236, are as follows:

(i) D, in England, despatches a letter bomb to France. When P opens the letter in France, two of his fingers are blown off. If this is serious personal harm and D intended to cause such harm, he is guilty of an offence under clause 70 and may be tried in England.

(ii) 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 serious personal harm and D intended to cause such harm, D is guilty of an offence under clause 70 and may be tried in England.

Clause 71: Reckless serious personal harm

14.37 This clause implements the Committee's recommendation 39(2).

Clause 72: Intentional or reckless personal harm

14.38 This clause implements the Committee's recommendation 39(3). As the offence will carry a maximum penalty of three years' imprisonment, a special provision will be required to make it an arrestable offence (as the Committee recommended). This could be done by the addition of a subsection to the present clause or by amendment of section 24(2) of the Police and Criminal Evidence Act 1984, which lists offences that are arrestable although the maximum term of imprisonment available is less than five years.

Clause 73: Administering a substance without consent

14.39 This clause implements the Committee's recommendations 53 and 54.

Clause 74: Torture

14.40 The offence of torture was created by section 134 of the Criminal Justice Act 1988 and, as a serious offence against the person, it is appropriately included in this Chapter of the Code. The drafting of the clause is exceptional in two respects. First, express reference to justification or excuse is retained. These matters cannot here be left to the operation of clause 4(4), which is confined to justification or excuse under the law of England and Wales whereas section 134 refers to justification or excuse under the law of the United Kingdom or any other place where the alleged torture was inflicted. Second, express reference to liability for omissions is also retained. The word "inflict" which is used in the definition of the offence has been held[21] to have a narrower meaning than "cause" and to imply the direct application of force. If, in accordance with the general principle of the Code, the matter were left as a question of construction for the courts, there would be a serious risk that omissions might be excluded and the scope of the offence narrowed so as not to satisfy the United Kingdom's international obligations in the matter.

Clause 75: Assault

14.41 *A single offence.* We note that common assault and battery are treated as distinct offences by the Criminal Justice Act 1988, section 38; but the clause implements the recommendation of the Committee that "there should be a single offence of assault, whether or not there is a battery". For this reason we felt unable to adopt a suggestion made on consultation, that the clause be redrafted as two subsections.

14.42 *Consent* will be a defence to some other offences in this Chapter where its absence is not stated to be an element of the offence. A boxer who tries to knock out his opponent clearly intends to cause at least personal harm and, possibly, even serious personal harm. If, as is generally thought, this is not an offence, it is because of a rule of the common law that justifies or excuses blows struck in the course of properly conducted boxing. The other boxer's consent that such blows should be aimed at him is effective. Such rules are preserved under the Code by clause 4(4) (and see clause 45(c)). Consent as a defence to an assault could have been left to clause 4(4). It seems, however, desirable to state it expressly as an element of the offence because the whole essence of the assault is that the act is done without the consent of the victim. The definition would look very odd without it.

14.43 Some applications of force are, prima facie, assaults even if the victim consents. This is recognised by the concluding words of the clause — "where the act is likely or intended to cause personal harm". This however, is subject to important and well-known exceptions, of which the case of the boxer mentioned above is an example. The corresponding clause in the Code team's Bill stated some of the recognised justifications for acts intended or likely to cause personal harm; but it is impossible to produce a comprehensive and closed list, so that clause referred to acts otherwise justified or excused by the clause corresponding to the present clause 4(4). Some, at least, of the specified justifications would be equally applicable to charges under clauses 70, 71 and 72, where they were not mentioned. That seemed inconsistent and unsatisfactory and we considered whether the justifications should be specified in the case of these offences also. On balance, however, we concluded that the preferable course is to leave the whole matter to the operation of clause 4(4) in respect of all these offences. The Code, in this respect, is less informative but it has the merit of consistency.

[21] *Wilson* [1984] A.C. 242 at 260, construing "inflict any grievous bodily harm".

Clause 76: Assault on a constable.

14.44 This clause implements the Committee's recommendations 46 and 47. It 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 acting in the execution of his duty.

Clause 77: Assault to resist arrest

14.45 This clause implements the Committee's recommendation 51.

Clause 78: Assault to rob

14.46 The offence of assault with intent to rob under section 8 of the Theft Act 1968 is reproduced here rather than in Chapter III because it is essentially an offence against the person.

Offences of detention and abduction

14.47 *Introduction.* The Committee recommended (recommendation 65) the creation of two offences of detention and two offences of abduction to replace the common law crimes of kidnapping and false imprisonment and the statutory offence of child stealing (Offences against the Person Act 1861, section 56) and the abduction of an unmarried girl under the age of sixteen (Sexual Offences Act 1956, section 20). The Child Abduction Act 1984, in substance, enacted the first of the two proposed abduction offences and created a second offence, going beyond the recommendations of the Committee, which may be committed by a person exempted from liability under the first child abduction offence who takes or sends a child under the age of sixteen out of the United Kingdom without the "appropriate consent".

14.48 The codification of the Child Abduction Act and the implementation of the Committee's proposals thus require the enactment of five offences, the two offences under the 1984 Act and the three recommended offences. In addition, the Taking of Hostages Act 1982 requires codification and finds its proper place in this group of offences. We have not taken into account in our draft Bill any changes to the Child Abduction Act 1984 which will be required in consequence of the enactment of the Children Bill currently before Parliament. Consideration will need to be given to up-dating and amending the relevant provisions of the draft Criminal Code Bill (in particular clauses 83 and 84), once the Children Bill becomes law.

14.49 *Children.* For the purposes of offences involving children, the Committee proposed fourteen as the relevant age. Parliament, however, when considering the Child Abduction Bill, decided that the more appropriate age was sixteen and that is the age adopted in the Act. As consistency requires, sixteen is specified as the relevant age throughout this group of offences.

14.50 *Omissions.* The Committee recommended that each of its proposed four offences should be capable of commission by omission. The Child Abduction Act, however, makes no express provision for liability for omissions and, following the general principle of the Code,[22] in this group of clauses as in others, the matter is left as a question of construction for the courts.

Clause 79: Interpretation

14.51 This clause provides for the interpretation of "takes", "detains", "sends" and acting "without the consent" of another, for the purposes of this group of offences.

Clause 80: Unlawful detention

14.52 This clause substantially replaces the common law offence of false imprisonment. The definition follows the Committee's recommendations closely.

Clause 81: Kidnapping

14.53 This clause replaces the common law offence of the same name and again follows the recommendations of the Committee closely.

[22]See para. 7.11 above.

Clause 82: Hostage-taking

14.54 This clause replaces the offence under section 1 of the Taking of Hostages Act 1982. The offence is given the name of "hostage-taking". The words, "intentionally or recklessly" are introduced for the sake of consistency with the definitions of other offences in this group.

Clause 83: Abduction of child by parent

14.55 This clause re-enacts, in Code style, the offence in section 1 of the Child Abduction Act 1984 which is additional to the Committee's recommendations.

Clause 84: Abduction of child by other persons

14.56 This clause re-enacts, in Code style, the offence in section 2 of the Child Abduction Act 1984. It is, in substance, the third offence recommended by the Committee.

Clause 85: Aggravated abduction

14.57 This is the fourth offence recommended by the Committee and follows their recommendations closely.

Clause 86: Endangering traffic

14.58 This clause implements the Committee's recommendation 56 and extends it to include waterways.[23] The provision has been criticised as being too limited and particular for a Code. It is argued that the Code should include a general offence of deliberate endangerment. We acknowledge the force of this argument but the creation of a general offence would be a substantial measure of law reform, requiring discussion and consultation which we have not been able to undertake.

Offences in the Offences against the Person Act 1861 not included

14.59 There are provisions in the 1861 Act that the Committee did not propose for repeal. The Committee appears to have intended that they should all remain in the 1861 Act rather than to be transferred to the modern statute contemplated. We agree with this view in every case except one: the abortion offences in sections 58 and 59 have been included.[24] The provisions in question, with a summary of the Committee's observations on them, are as follows:

(a) *Section 26*: Neglecting to provide food etc. for, or doing bodily harm to, apprentice or servant. A similar summary offence is contained in section 6 of the Conspiracy and Protection of Property Act 1875. The Committee suggested that consideration should be given in consultation with the responsible government departments to their repeal.[25] We have not been able to undertake this consultation in the present exercise.

(b) *Sections 28-30, 64 and 65*: Explosive substances offences: making or having gunpowder etc. with intent; power to issue search warrant. The Committee thought that these offences should survive pending a general review of explosive substances offences.[26]

(c) *Section 31*: Setting spring guns etc. with intent to inflict grievous bodily harm. The Committee thought that this offence required re-examination as to its substance (but not by a committee of lawyers) as well as modernisation; and that it should be considered by the appropriate government departments.[27] Again, we have not been able to take this forward here.

(d) *Section 34*: Doing or omitting anything to endanger railway passengers. This offence would not be required if the Committee's proposed endangering offence were enacted (see clause 86). The Committee accepted that it should be left

[23]We note that the Government has accepted the need to create a new offence of intentionally obstructing a road or interfering with devices for the regulation of traffic, and intends to include a "modified version" of the offence recommended by the Criminal Law Revision Committee in forthcoming legislation: see the Report of the Road Traffic Law Review (the North Report) (1988), paras. 7.5 and 7.6 and *The Road User and the Law: The Government's Proposals for Reform of Road Traffic Law* (1989), Cm. 576, paras. 3.2 – 3.3.

[24]See clauses 66-68.

[25]Fourteenth Report, para. 210, Recommendation 61.

[26]Fourteenth Report, para. 205, n.1. See further para. 18.11 below.

[27]Fourteenth Report, paras. 211 – 213, Recommendation 62.

unrepealed at the request of the British Railways Board and the British Transport Police.[28] This provision belongs, if anywhere, in railway legislation.

(e) *Section 57*: Bigamy. The Committee said that this offence was outside their terms of reference.[29] Eventually this offence might go into the Chapter of Part II (which we have not drafted) concerned with offences against public morals and decency.[30]

(f) *Section 60*: Concealment of birth. The Committee thought that this should be retained, pending its review by the departments responsible for the law relating to burials and the registration of births and deaths, on the ground that it does not belong in a statute on offences against the person.[31]

Other offences not included

14.60 We also omit from this Chapter the following offences, which, but for the considerations which we mention against each, would have been candidates for inclusion:

(a) Cruelty to children and the tattooing of minors. Section 1 of the Children and Young Persons Act 1933 (cruelty to persons under 16) is plainly an important offence against the person. Although for criminal law purposes it would be useful to have this offence (suitably re-expressed) in the Code, it stands alongside many other offences in the 1933 Act, some of which are not offences against the person. The offence under the Tattooing of Minors Act 1969 stands or falls with the cruelty offence so far as its inclusion in the Code is concerned.

(b) Causing death by reckless driving. This offence is to be replaced by an offence of causing death by dangerous driving following the recommendations of the Road Traffic Law Review.[32] We recognise that it is a very serious offence, but we have already explained that we do not think any of the offences in road traffic legislation should be incorporated, even in a complete Code.[33]

(c) Causing bodily harm by wanton or furious driving. The C.L.R.C. proposed that this offence should be abolished.[34]

(d) Offences against the personal security of the Sovereign. Section 2 of the Treason Act 1842 (attempts to injure or alarm the Sovereign) was considered by us in our earlier Working Paper on Treason.[35] However, work on that project has been suspended for the time being.[36]

(e) Criminal defamation. This offence was recommended by us in place of the common law offence of criminal libel.[37] When implemented, this offence could be placed in this Chapter of the Code, but we did not think that the principles governing our selection of offences for the present draft Bill required its inclusion now.

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[28]Fourteenth Report, para. 197.
[29]Fourteenth Report, para. 1.
[30]See Report, Vol. 1, Appendix C.
[31]Fourteenth Report, para. 33, n.3.
[32]See the North Report (1988), Chapter 6 and *The Road User and the Law: The Government's Proposals for Reform of Road Traffic Law* (1989), Cm. 576, paras. 2.2-2.13.
[33]See para. 3.5 above.
[34]Fourteenth Report, para. 144. See also the North Report (1988), para. 8.16.
[35](1977) Working Paper No. 72, Treason, Sedition and Allied Offences.
[36]See Seventeenth Annual Report 1981-1982 (1983), Law Com. No. 119, para. 2.25.
[37](1985) Law Com. No. 149, Cmnd. 9618, Report on Criminal Libel.

PART 15

PART II, CHAPTER II

SEXUAL OFFENCES

Introduction

15.1 This Chapter incorporates the recommendations of the Criminal Law Revision Committee (in this Part of this Report called the "Committee") in their Fifteenth,[1] Sixteenth[2] and Seventeenth[3] reports, with the exceptions mentioned, and otherwise restates the present law.

15.2 We have sought to draft clauses to give effect to the recommendations of the Committee. We have done so in pursuance of our policy stated earlier.[4] We recognise that in the area of sexual offences opinions as to what conduct should be criminal are likely to differ. Some of us do not agree with the Committee's recommendations in every respect. We point out in the following paragraphs some of the respects in which some of us have the strongest reservations. We have, however, followed our policy and the fact that we have drafted offences as recommended by the Committee is not to be taken as an expression of our agreement or disagreement with their recommendations.

Clause 87: Interpretation

15.3 It is convenient to define a number of terms some of which are, and some of which are not, defined in existing legislation.

15.4 *"Buggery"* is not at present defined in any statute but it is desirable to include a definition because, following the Committee, buggery will not, in the Code, include intercourse with an animal.[5] The definition incorporates the effect of section 44 of the Sexual Offences Act 1956 as interpreted by the Privy Council in *Kaitamaki*[6] and the ruling in that case that heterosexual intercourse continues until the man withdraws. It seems legitimate to assume that the same principles apply to buggery. By implication, the definition makes it clear that buggery is confined to penile intercourse and does not include the insertion of an instrument.

15.5 *"Man" and "woman"*. These definitions are taken from section 46 of the Sexual Offences Act 1956 with the addition of the bracketed words which eliminate the presumption that a boy under the age of fourteen is incapable of sexual intercourse, following the Committee's recommendation 7.[7]

15.6 *"Premises."* The Committee recommended,[8] for the purpose of offences relating to prostitution, that "premises" should include other accommodation, "for instance, a boat or caravan", and, in the interests of consistency, the extended definition is applicable to other offences consisting in the use of premises for sexual purposes.

15.7 *"Sexual intercourse."* Section 44 of the Sexual Offences Act 1956 uses this term to include "unnatural" as well as natural intercourse. As unnatural intercourse is defined in the Code as buggery, it is convenient to define sexual intercourse as intercourse between a man and a woman. The Committee recommended[9] that rape should be limited to penile-vaginal intercourse. If this recommendation is accepted for rape, as to which some of us have reservations, we think the same definition should be applied to offences involving sexual intercourse generally. The first part of the definition in the clause (referring to the physical act of intercourse) provides accordingly.

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[1]Sexual Offences (1984), Cmnd. 9213 (hereafter called the "Fifteenth Report").
[2]Prostitution in the Street (1984), Cmnd. 9329 (hereafter called the "Sixteenth Report").
[3]Prostitution: Off-Street Activities (1985), Cmnd. 9688 (hereafter called the "Seventeenth Report").
[4]Report, Vol. 1, para. 3.34.
[5]Fifteenth Report, para. 12.7, Recommendation 63.
[6][1985] A.C. 147.
[7]Fifteenth Report, para. 2.48.
[8]Sixteenth Report, para. 3.13.
[9]Fifteenth Report, para. 2.47, Recommendation 6.

15.8 The second part of the definition of "sexual intercourse" is broadly intended to provide a definition of what is currently termed "unlawful sexual intercourse". We have dropped the word "unlawful", because to have included it might have given an appearance to the definition at odds with reality. Paragraph (a) states the accepted meaning of the expression in current legislation while paragraph (b), (i) (ii) and (v) states the circumstances in which sexual intercourse between husband and wife is at present "unlawful" for the purposes of the law of rape. Sub-paragraphs (iii) and (iv) may also represent the present law. Sub-paragraph (vi), however, goes farther than the present law. The Committee, though much divided on the question of marital rape,[10] were unanimous that rape should be extended to the case of a husband and wife who are not cohabiting.[11] They considered various formulae including that in section 2(6) of the Matrimonial Causes Act 1973 — "a husband and wife shall be treated as living apart unless they are living with each other in the same household." The Committee found difficulties with every formula and it is, of course, true that no form of words will provide a clear-cut answer to the question in all circumstances. This, however, is not uncommon in the law, even the criminal law, and we believe that the language of section 2(6) provides a workable test. It is accordingly adopted in paragraph (b) (vi).

15.9 The adoption of this meaning of "sexual intercourse" for the purposes of the whole Chapter (other than clause 120 (sexual acts in public) which includes intercourse between husband and wife) makes it clear that a husband may be guilty, in the specified circumstances, of other sexual offences against his wife — procuring her to have sexual intercourse by threats or deception and using an article to overpower for sexual purposes (clauses 90, 91, and 92). There is at present no authority on this question and the Committee made no recommendation about it, but consistency in principle and policy requires the step proposed.

15.10 *"Gross indecency"*. The Code does not provide a definition of this term. The Committee were opposed to providing one.[12] Some of us would have preferred to see either the term defined in the legislation or some other expression used.[13]

Clause 88: Intoxication

15.11 This rather technical clause supplements the general provision in clause 22(1)(a), that a person who was voluntarily intoxicated is to be treated, for the purpose of proof of a fault element of recklessness, "as having been aware of any risk of which he would have been aware had he been sober." Some offences in this Chapter include a fault element of not believing in a particular circumstance (for example, in rape, not believing that the woman is consenting to the sexual intercourse). Such an absence of belief is not necessarily recklessness, as defined in clause 18(c), because absence of a belief that a circumstance exists does not entail awareness of the risk that it may not. So a provision corresponding to clause 22(1)(a) is needed to deal with a defendant's claim to have been so drunk that he believed the woman was consenting. Clause 88 refers not only to the absence of a belief as a fault element, but also to a specified belief as a defence; this is because some provisions in the Chapter may be regarded as providing defences rather than as specifying fault elements when they declare a person to be guilty of an offence *unless* he holds a specified belief (for example, in sexual intercourse with an under-age girl, the belief that she is over sixteen).

Clause 89: Rape

15.12 The definition of rape is based upon the recommendations of the Committee. They recommended[14] that the mental element in rape should cover –

> "(a) the man who knew that the woman was not consenting, and
>
> (b) the man who either was aware that she might not be consenting or did not believe that she was consenting."

[10] We stress that, if we had been charged with formulating the policy for reform of the law on this issue, it is unlikely that our recommendation would have been the same as that of the Committee.
[11] Fifteenth Report, para. 2.85, Recommendation 10.
[12] Fifteenth Report, paras. 7.14 to 7.20.
[13] See, e.g., commentary on clause 115 (para. 15.50) below.
[14] Fifteenth Report, para. 2.41, Recommendation 4.

It is arguable that any man who is aware that a woman might not be consenting does not believe that she is consenting so that all the cases in recommendation (b) could be covered by a provision that a man is guilty of rape if he does not believe that the woman is consenting. Indeed, such a provision covers everything in recommendation (a) as well but it is desirable to state (a) expressly so as to facilitate the useful practice of having two counts,[15] one for "intentional", and one for "reckless", rape in appropriate circumstances. We also think it useful to state expressly that awareness is a sufficient mental element. "Is aware" and "does not believe" are coupled in the same paragraph because they are both appropriate to describe a reckless rape but the clause avoids the use of the word "reckless". There is no requirement that it be unreasonable for a man who is aware that a woman is not consenting, or does not believe that she is consenting, to take the risk that the woman may not be, the premise being that it is never reasonable to take such a risk.[16]

15.13 *Consent and threats.* The Policy Advisory Committee were concerned about "cases where men are acquitted seemingly because some juries do not consider that a woman is raped when she submits to sexual intercourse through fear." Following the Committee,[17] subsection (2) makes it clear that a man is guilty of rape where he obtains the woman's consent by a threat to use force against her or another. The Committee thought that "it should not be rape if, taking a reasonable view, the threats were not capable of being carried out immediately." The Committee made no recommendation to require the woman's belief to be based on reasonable grounds. Detention, in itself, would not negative the effect of consent but the Committee thought that it should be rape where a woman is confined by a man for the purpose of sexual intercourse and there is an express or implied threat to use force against her should she try to escape. But, if the woman knows that she can free herself from the effect of the threat and does not do so, her consent to sexual intercourse will negative rape. The effect of the subsection is that consent obtained by other threats — for example, to break off an engagement or to dismiss from employment — will negative rape but the man will be guilty of an offence under clause 90.

15.14 Although we have given effect to the Committee's majority recommendation in subsection (2)(a), some of us feel strongly that it is wrong to confine the threats which can negative consent in rape not only to those which the woman believes will be carried out "*immediately* or before she can free herself" but also to threats to use *force*. The test appears to be stricter than that applying in the case of the defence of duress by threats (clause 42) and might be stricter than the present law relating to rape. Moreover, it is not difficult to think of examples of equally potent threats which would destroy any real consent (probably under the present law), such as to abduct her baby without the use of force.

15.15 *Consent and deception.* Subsection (2), again following the Committee,[18] specifies the circumstances in which it will be rape if consent is obtained by deception. There is authority at common law[19] that it is rape if the woman is deceived as to the nature of the act and the Sexual Offences Act 1956, section 1(2), provides that a man who induces a woman to have sexual intercourse with him by impersonating her husband commits rape; but it is by no means clear that intercourse obtained by other deceptions as to identity constitutes rape. The subsection provides that it does. The effect is that consent obtained by any other deception — for example, that the man is not married or that he intends to marry the woman — will negative rape, as under the present law, but the man will be guilty of an offence under clause 91.

15.16 *Proceedings for "rape offence".* Subsection (3) gives effect to Schedule 4, which reproduces, with the minimum of modification, the relevant provisions of the Sexual Offences (Amendment) Act 1976, as amended by section 158 of the Criminal Justice Act 1988. The Schedule includes an offence of publishing or broadcasting any matter in contravention of paragraph 3 of the Schedule, which provides for the anonymity of complainants.

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[15] *Mohammed Bashir* (1983) 77 Cr. App. R. 59 where the judge "very wisely" (*per* Watkins L.J. at 62) amended the indictment by introducing a second count for "reckless" rape; *Satnam S, Kewal S* (1983) 78 Cr. App. R. 149.

[16] Notwithstanding the recommendation of the Committee and the points raised in this paragraph, some of us think it would be simpler and clearer to state that a man is guilty of rape "if he does not believe that the woman is consenting".

[17] Fifteenth Report, paras. 2.26–2.29.

[18] Fifteenth Report, paras. 2.20 to 2.25, Recommendation 2.

[19] E.g. *Flattery* (1877) 2 Q.B.D. 410; *Williams* [1923] 1 K.B. 340.

Clause 90: Procurement of woman by threats

15.17 This clause restates section 2(1) of the 1956 Act in Code style. Threats and intimidation are left undefined as in the present law.

Clause 91: Procurement of woman by deception

15.18 This clause restates section 3(1) of the 1956 Act, substituting "deception" for "false pretences or false representations" as recommended by the Committee.[20]

Clause 92: Use of article to overpower for sexual purposes

15.19 This clause replaces section 4 of the 1956 Act. That section is limited to obtaining sexual intercourse. The Committee recommended its extension to buggery and gross indecency.[21] "Drug, matter or thing" is replaced by "article or substance". The clause clarifies two issues on which the section is unclear: (i) that the defendant must act in order to cause the result, whether he in fact causes it or not; and (ii) that he is guilty if he intends the sexual intercourse, etc., to be with himself. In a sense the clause is unnecessary in that anything within it is covered by clause 73 (administering a substance without consent) but the Committee recommended its continuance. Its function is to provide a specifically sexual offence. The sexual nature of the crime will appear on the offender's record, as it would not if the conviction were a conviction under clause 73.

Clause 93: Intercourse with girl under thirteen

15.20 Subsection (1) of this clause replaces section 5 of the 1956 Act. It introduces new defences — that the defendant believed the girl to be his wife or to be over sixteen — as recommended by the Committee.[22] As with the Committee's recommendations generally, the onus of proof would be on the prosecution once the defendant had satisfied the evidential burden.[23] Provision of the defence of belief that the girl was over sixteen appears to be a significant departure from the existing law. Although the Committee thought that there would be very few cases where such a defence would be available on a charge of this offence, we are nonetheless concerned that the effect of the provision may diminish the protection to under-age girls because of the ease with which the defence could be claimed. We therefore doubt whether this defence should be available under clause 93. The same criticism applies to the availability of this defence elsewhere in this Chapter.[24]

15.21 *Permitting girl to use premises for intercourse.* Surprisingly, the Committee made no recommendation relating to the provisions of the 1956 Act concerning the permitting of the use of premises for sexual intercourse with a girl under 13 (section 25) or a girl under 16 (section 26) or a woman who is a defective (section 27). There is no suggestion that these offences should cease to exist. The first of these offences is located here because of its close connection with the offence in subsection (1). There is some doubt whether the three offences require fault, or admit of a defence of mistake, with respect to the age of the girl or (in the case of the offence in section 27) the condition of the woman.[25] Consistency suggests that the principle applicable should be the same as that in subsection (1). Subsection (2) provides accordingly.

Clause 94: Intercourse with girl under sixteen

15.22 Subsection (1) replaces section 6 of the 1956 Act and subsection (2), section 26 of the Act. As with clause 93, subsection (1) follows the recommendations of the Committee[26]; and subsection (2) is drafted on the same principles as clause 93(2).

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[20]Fifteenth Report, para. 2.108, Recommendation 15.
[21]Fifteenth Report, para. 2.109, Recommendation 16.
[22]Fifteenth Report, paras. 5.17 and 5.18, Recommendations 24 and 25.
[23]Fifteenth Report, para. 5.18, Recommendation 26.
[24]See, e.g., clauses 93 (2) and 96.
[25]See Smith and Hogan, *Criminal Law* 6th ed.,(1988) pp.444-445.
[26]Fifteenth Report, paras. 5.6, 5.11 to 5.14 and 5.16, Recommendations 23 and 24.

Clause 95: Non-consensual buggery

15.23 This follows the recommendation of the Committee that there should be a distinct offence of non-consensual buggery with a man or a woman, with the same mental element as for rape.[27] The Committee made no recommendation as to the nature of consent but it seems obviously right that the same principles should apply as in the case of rape and the clause provides accordingly. However, the reservations which some of us have expressed in relation to rape apply equally to the offence under this clause.[28]

Clause 96: Buggery with child under thirteen

15.24 The Committee recommended that there should be a single offence of buggery with a child under thirteen and that the defence recommended in relation to unlawful sexual intercourse with girls under 13 and under 16 should apply.[29] In the case of a boy, however, the minimum age for homosexual intercourse is to be eighteen so it follows that the belief must be that the boy is 18 or above. In the case of buggery with a boy, the offence will be committed whether the man is the agent or the patient.[30]

Clause 97: Buggery with girl under sixteen

15.25 This follows the form of the offence of unlawful sexual intercourse with a girl under sixteen as recommended.[31]

Clause 98: Buggery by man with boy under eighteen

15.26 This is the first of a series of new offences which are required because of the combination of (i) a recommendation of the Committee that an offence should carry a higher penalty in particular circumstances[32] and (ii) the decision of the House of Lords in *Courtie*[33] that the provision for a higher penalty makes the offence in those circumstances a distinct offence. The effect is to produce pairs of offences, the one of which in the case of each pair includes the other. The model is the existing pair of offences of sexual intercourse with girls under thirteen and under sixteen respectively. These offences were formerly mutually exclusive and were redrafted in their present form by the Criminal Law Act 1967 because of the difficulties that this created. In this clause the circumstance which aggravates the offence under clause 99 is that the defendant is eighteen or over. The effect is that, if a person charged with the graver offence is acquitted because the prosecution fail to prove the aggravating fact, the defendant may be convicted of the lesser "included offence" under clause (8)(1)(b)(i).

Clause 99: Buggery with boy under eighteen

15.27 This implements the recommendation that it should be a separate offence of buggery for two males to engage in an act of anal intercourse where either is or both are under 18; and that a male aged 18 or over should have a defence if he believed his partner was aged 18 or over.[34]

15.28 *Buggery between males aged over 18.* It is at present an offence for men over the age of twenty-one to commit buggery unless it is done "in private" as narrowly defined is section 1(2) of the Sexual Offences Act 1967. In future such acts will be an offence only if done in public as defined in clause 120.

15.29 Following the Committee's recommendations, there is a discrepancy between the age at which a man or a woman may lawfully consent to anal intercourse: while the minimum age would be 16 for females, it would be 18 for males. Our own preference would have been a policy which did not discriminate between the sexes in this way.

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[27]Fifteenth Report, paras. 3.6 to 3.7, Recommendation 18.
[28]See paras. 15.12, 15.14 above.
[29]Fifteenth Report, paras. 6.7, 6.10, 6.11, 6.15 and 6.16. Cf. our criticism at para. 15.20.
[30]See clause 87.
[31]Fifteenth Report, paras. 6.7 and 6.11, Recommendation 31.
[32]Fifteenth Report, para. 6.15.
[33][1984] A.C. 463.
[34]Fifteenth Report, paras. 6.13 to 6.14, Recommendation 33.

Clause 100: Indecency by man with boy under eighteen

15.30 See the note on clause 98. This is an aggravated form of the offence under clause 101.

Clause 101: Indecency with boy under eighteen

15.31 This replaces the offence under section 13 of the 1956 Act, but limits it to the case where at least one of the parties is under 18, as recommended.[35] Gross indecency between males aged over 18, at present an offence unless done "in private" as defined in section 1(2) of the Sexual Offences Act 1967, will be an offence only if done in public as defined in clause 120.

15.32 In our view, one unsatisfactory result of the Committee's recommendations is that in relation to clauses 100 and 101, and also clauses 98 and 99, a man of 18 would not be guilty of an offence if he believed the boy to be over 18 whereas a boy of 17 would be guilty of an offence notwithstanding this belief. This seems to us be unjust. Although the draft clauses reflect the policy of the Committee, we would not wish to lend our support to implementation of them in their present form.

Clause 102: Homosexual acts on merchant ships

15.33 This provision replaces section 2 of the Sexual Offences Act 1967, which preserves the offence of buggery at common law and under section 12 of the Sexual Offences Act 1956 for certain acts on merchant ships. The offence would be an offence under the Code but no change of substance is involved.

Clauses 103 and 104: Incest

15.34 These clauses replace sections 10 and 11 of the 1956 Act with the modifications recommended by the Committee, that is to say, (i) that the offence should extend to adoptive as well as blood relationships between father and daughter and mother and son; (ii) that it should cease to be an offence for brother and sister to have intercourse where they have both reached the age of 21; and (iii) that daughters, granddaughters and sons under the age of 21 should be exempted from liability.[36] Some of us are uneasy about the rationale for extending the offence of incest beyond blood relationships. If it is felt necessary to impose special penalties for those who abuse a *de jure* or *de facto* parental relationship with another person, then it might be better to consider them altogether under the new offence in clause 105.

15.35 *Defence.* The Committee made no recommendation as to whether there should be a defence for a person who believes his partner to be of such an age that the intercourse would be lawful. Where, ex hypothesi, the parties are in a close relationship, such cases are likely to be rare but they could occur and it would be inconsistent with the general principle applied by the Committee in the other parts of the Report if the defence were not available. It is accordingly provided by the draft clauses.

15.36 *Aggravated incest.* The recommendation that incest by a man with a girl under the age of thirteen should carry a higher penalty[37] requires the creation of a separate offence and this seems to be conveniently designated "aggravated incest" by clause 103(2).

15.37 *Incitement of incestuous intercourse.* Clause 103(3) replaces section 54 of the Criminal Law Act 1977.

Clause 105: Intercourse with step-child under twenty-one

15.38 The Committee recommended that this should be a separate offence analogous to incest.[38] Consistently with clauses 103 and 104, provision is made for a defence of belief that the step-child is over twenty-one. We think it would be more consistent to extend this

[35]Fifteenth Report, para. 6.18, Recommendation 35.
[36]Fifteenth Report, paras. 8.28, 8.22, 8.37, Recommendations 42, 44 and 46.
[37]Fifteenth Report, para. 8.41, Recommendation 47.
[38]Fifteenth Report, para. 8.31, Recommendation 45.

offence to children treated as children of the family, rather than simply to step-children who may or may not have been so treated.[39]

Clause 106: Intercourse with severely mentally handicapped woman

15.39 Subsection (1) replaces section 7 of the 1956 Act, but exempts from liability a man who is himself severely mentally handicapped and one who believes that the woman is not suffering from any mental handicap, as recommended by the Committee.[40] The definition of "severe mental handicap" in clause 6, which will apply to offences in this Chapter, is the same as that of "defective" in the 1956 Act, as amended. It is not thought necessary to provide any definition of "any mental handicap." For our part, however, we think it would be more rational to exempt from liability a person who believes that the woman is not suffering from *severe* mental handicap (which is in effect the existing law).[41]

15.40 *Defence.* A man charged with an offence under clauses 106(1), 107, or 108 may raise the defence that he is severely mentally handicapped. Clause 35(4) makes it clear that this is not a defence of mental disorder and that, when successfully raised, it should result in an acquittal. No offence has been committed; so others, particularly medical staff, will not be in peril of conviction as accessories.

15.41 *Permitting mentally handicapped woman to use premises for intercourse.* Subsection (2) replaces section 27 of the 1956 Act.[42]

Clauses 107 and 108: Buggery and indecency with severely mentally handicapped person

15.42 These clauses follow the Committee in creating specific offences of buggery and gross indecency with a male or female person suffering from severe mental handicap and provide the same exemptions as clause 106.[43]

Clause 109: Abduction of severely mentally handicapped person

15.43 This clause replaces section 21 of the 1956 Act, with the defence recommended by the Committee.[44] We have used the term "care" in our clause in place of "possession" in the present legislation; the former seems more appropriate, but it is not meant to effect a change of substance. It is convenient to place the offence here because the other abduction offences in the 1956 Act will disappear with the recommendations of the Committee and the Child Abduction Act 1984, which is to be incorporated in the Chapter on offences against the person.[45]

Clause 110: Sexual relations with mentally disordered patient

15.44 The Committee considered that the offences under section 128 of the Mental Health Act 1959 were outside their terms of reference but thought they should continue to be law and that the Committee's recommendations in relation to section 7 of the 1956 Act (see clause 106 above) as to defences, penalties and mode of trial "could well have relevance" to these offences.[46] The fact that section 128 provides (in subsection (5)) that it is to be construed as one with the Sexual Offences Act 1956 and the omission of section 128 from the consolidation of mental health law in the Mental Health Act 1983 strongly suggest that the proper place for these offences is in the Code. Clause 110 accordingly restates the offences in Code style. The provisions of section 128 were extended by the Sexual Offences Act 1967 to include buggery or acts of gross indecency with a man. No provision was made in the 1967 Act for such acts with a woman, no doubt because buggery with a woman continued, and continues, to be unlawful at common law. It will cease to be unlawful under the recommendations of the Committee incorporated in the Code, except where specific

[39]See para. 15.34 above.
[40]Fifteenth Report, para. 9.11, Recommendation 53.
[41]Consistency would require a similar change in relation to the defences provided in clauses 107, 108 and 109.
[42]See para. 15.21 above.
[43]Fifteenth Report, paras. 9.6 and 9.11, Recommendations 50-53.
[44]Fifteenth Report, paras. 13.11 and 13.12, Recommendations 67, 68.
[45]See clauses 82-85.
[46]Fifteenth Report, para 9.4.

provision is made. The offences in clause 110 therefore extend to buggery or gross indecency with a man or woman.

15.45 *Defence.* Subsection (4), in accordance with the general policy of this Chapter, provides a defence where the defendant believes that the woman with whom he has sexual intercourse, or the man or woman with whom he commits buggery or gross indecency, is not a mentally disordered patient.

Clause 111: Indecent assault

15.46 This clause implements the recommendation of the Committee that indecent assault should be the same offence whether committed against a male or female.[47] It also incorporates the effect of the decision of the House of Lords in *Court.*[48] The rule that children under 16 cannot consent to indecent assault disappears; but if the indecency is gross there will be an offence under clause 115 or (if the child is under thirteen) both clauses 114 and 115.

Clause 112: Procurement of gross indecency by threats

15.47 The Committee recommended the creation of this new offence.[49]

Clause 113: Indecent exposure

15.48 This clause is intended to reproduce the effect of the offence under section 4 of the Vagrancy Act 1824[50] using modern and plain language. No attempt is made to codify the common law offence of indecent exposure which is an aspect of the common law offence of outraging public decency and which may be repealed in due course.[51] However, we think there is a case for widening the offence in clause 113 to cover indecent exposure to another male, since cases involving exposure to a boy could be equally alarming and undesirable.

Clause 114: Indecency with child under thirteen

15.49 This aggravated offence is required by the recommendation of the Committee that a higher penalty should be available where the act is done with a child under thirteen.[52]

Clause 115: Indecency with child under sixteen

15.50 This replaces the offence under section 1 of the Indecency with Children Act 1960 but raises the age of the child protected by the provision from 14 to 16. Children below the age of sixteen will be able to give effective consent to indecency but not to gross indecency. It is for this reason that some of us think that clauses 114 and 115 are good examples of instances where a statutory definition of "gross indecency" would have been helpful.[53] The defences, recommended by the Committee, are new.[54]

Clauses 116 and 117: Indecent photographs of children

15.51 Clause 116 derives from section 1 of the Protection of Children Act 1978 and clause 117 from the Criminal Justice Act 1988, section 160. We have removed some inconsistencies in the 1978 Act (which refers to a single "photograph" in one offence and to "photographs" in others) and as between that Act and the 1988 provision ("photograph" throughout). Unlike other offences in this Chapter, it is not a defence that the defendant believes the child to be aged sixteen or above.

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[47]Fifteenth Report, para. 4.8, Recommendation 19.
[48][1988] 2 All E.R. 221.
[49]Fifteenth Report, paras. 4.29 to 4.30, Recommendation 22.
[50]Cf. Smith and Hogan, *Criminal Law* 6th ed., (1988) p.470.
[51]See our Report on Conspiracy and Criminal Law Reform (1976), Law Com. No. 76, para. 3.143.
[52]Fifteenth Report, paras 7.21 to 7.23, Recommendation 38.
[53]See para. 15.10 above.
[54]Fifteenth Report, paras. 7.12, 7.21 to 7.23, 7.27, Recommendations 37-39.

15.52 *Ancillary provisions*. Subsection (5) gives effect to Schedule 5, which reproduces, with the minimum of modification, sections 4 and 5 of the Protection of Children Act 1978 which relate to powers of entry and search, seizure and forfeiture of indecent photographs of children.

Clauses 118 and 119: Bestiality

15.53 Following the recommendations of the Committee, buggery with an animal is in future to be known as bestiality and to be only a summary offence.[55] But procuring an act of bestiality by another person is to be a much more serious offence, triable either way and punishable with 5 years imprisonment.[56] Some of us disagree with the Committee (although not as to the criminality of procuring) and think that an offence of bestiality is outdated and should not be retained: conduct harming an animal is punishable under the law of criminal damage and cruelty to animals.

Clause 120: Sexual acts in public

15.54 This clause replaces the present law under which it is an offence for men to commit buggery or gross indecency otherwise than "in private". The offence extends to heterosexual intercourse and acts of gross indecency by two or more persons. The Committee's recommendation[57] that the offence should require the participation of two persons is clear. That is the reason why our clause does not apply to a single person committing an act of gross indecency in public or to one person committing an act of bestiality with an animal. It may be that the latter case was an oversight and should be included, although this would open the way to argument that other acts of gross indecency by a single person with an inanimate instrument, or without, should also be included.

15.55 "*In public*". "Public place" is intended to be more narrowly defined than a place which is not "in private". The Committee did not propose any definition of "public place" but it is desirable that there should be one and that provided by clause 6 is the definition commonly used in legislation. The Committee recommended that the offence should be extended to "clubs and places of common resort" by broadening the definition of "members of the public"[58] but this would not seem to be effective unless such a place is a place in which the offence can be committed. Subsection (2)(c) makes it clear that it is. The act committed on the club premises in view of the members will thus be an offence even though, but for these provisions, the club would not be a public place nor its members "members of the public." The Committee did not offer any definition of "place of common resort", presumably taking the view that this is a phrase with a generally known meaning. It appears to be intended to cover a place which is something like a club, but the *ejusdem generis* rule of construction would not apply. The phrase, "club *or other* place of common resort," is intended to achieve the same effect.

Clause 121: Acts in public lavatories

15.56 This clause preserves the effect of section 1(2)(b) of the Sexual Offences Act 1967, as recommended by the Committee.[59]

Clause 122: Meaning of "prostitute"

15.57 The Committee recommended that the epithet "common" be no longer used in respect of prostitutes.[60] But, as *Morris-Lowe*[61] decides, the performance of a single act of "lewdness" for reward on one occasion does not make a person a common prostitute for the purposes of the present law. A prostitute is one who offers her or himself commonly for lewdness. On the other hand, the Committee stated that they did "not believe that, even theoretically, it should be open to a defendant in the offences we propose below to attempt

[55]Fifteenth Report, para. 12.7, Recommendation 63.
[56]Fifteenth Report, para. 12.9, Recommendation 64.
[57]Fifteenth Report, para. 10.5, Recommendation 58.
[58]Fifteenth Report, para. 10.21, Recommendation 59.
[59]Fifteenth Report, para. 10.26, Recommendation 60.
[60]Sixteenth Report, para. 17, Recommendation 1.
[61][1985] 1 W.L.R. 29, [1985] 1 All E.R. 400.

to escape liability by arguing that the prostitutes working for him are in fact discriminating in their choice of clients."[62] The definition deals expressly with this point while the element of commonality is dealt with by requiring that the prostitute offers himself "to others." The definition applies to both male and female prostitutes. "Lewdness" is an old-fashioned term and is replaced by "sexual purposes." The clause makes clear the present law that prostitution extends to the case in which the prostitute is paid to do sexual acts, such as masturbation, to the body of his client.

Clause 123: Organising prostitution

15.58 The Committee recommended[63] the replacement by three new offences of the offences under section 30 (man living on earnings of prostitution) and 31 (woman exercising control over prostitute) of the 1956 Act and section 5(1) (living on earnings of male prostitution) of the Sexual Offences Act 1967. Clauses 123 to 125 give effect to the recommendations. Like the other clauses, clause 123 applies equally to males and females and to male and female prostitution.

Clause 124: Controlling a prostitute

15.59 The Committee recommended[64] that it should be an offence to "control or direct" the activities of a prostitute, but it does not appear that "direct" adds anything to "control" and the inclusion of both words might create a needless problem of construction for a court which would feel obliged to give each word some effect.

Clause 125: Facilitating prostitution

15.60 This definition is intended to achieve the effect described by the Committee.[65] It makes clear that the offence is complete when the act intended to facilitate prostitution is done, even though the meeting never in fact takes place; but the act must be more than a merely preparatory act because it must be intended "thereby" to facilitate the meeting.

Clause 126: Meaning of "premises"

15.61 The Committee,[66] for the purposes of offences relating to the use of premises for prostitution, wanted "premises" to include a boat or caravan and this is effected by the provision for the purposes of the whole Chapter in clause 87. Clause 126 implements the recommendation of the Committee[67] that the legislation should apply to a "nest of prostitutes", each in separate occupation of part of a single building but under direct or indirect common control — as at common law. "A landlord should not be free to install and directly or indirectly control a number of prostitutes in one building and the word 'premises' should be defined so as to cover this situation." The definition would not therefore cover a "co-operative" of prostitutes, each in occupation of a separate flat in a building but not "under common direction or control".

Clause 127: Managing premises used for prostitution

15.62 This replaces the offence of brothel-keeping under section 33 of the 1956 Act.[68] The requirement that there be two or more prostitutes reflects the common law definition of a brothel. In one respect the offence is narrower than brothel-keeping, which applied whether the women required payment for their services or not.

Clause 128: Letting premises for prostitution

15.63 This replaces section 34 of the 1956 Act (landlord letting premises for use as a brothel) in accordance with the Committee's recommendation.[69]

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[62]Seventeenth Report, para. 1.4.
[63]Seventeenth Report, paras. 2.9 to 2.11, Recommendation 2.
[64]Seventeenth Report, para. 2.12 to 2.15, Recommendation 2(b).
[65]Seventeenth Report, para. 2.18, Recommendation 2(c).
[66]Seventeenth Report, para. 3.13.
[67]Seventeenth Report, para. 3.14.
[68]Seventeenth Report, para. 3.13, Recommendation 5(a).
[69]Recommendation 5(b).

Clause 129: Permitting use of premises for prostitution

15.64 This replaces section 35 of the 1956 Act (tenant permitting premises to be used as brothel) in accordance with the Committee's recommendations.[70]

Clause 130: Use of premises for prostitution involving personal harm

15.65 This is the offence proposed by the Committee[71] to replace the aspect of the law concerning disorderly houses applied in *Tan*[72] on the assumption that the offence of keeping a disorderly house will be abolished as recommended by us.[73] The Committee were concerned with "pain or injury". The Code term "personal harm" includes pain (clause 6).

Clause 131: Procurement of woman to become prostitute

15.66 This replaces section 22 of the 1956 Act.[74]

Clause 132: Procurement of woman under twenty-one

15.67 This replaces section 23 of the 1956 Act. The Committee thought that the age limit should be reduced to 18 but that this would have to await revision of our international obligations in this respect.[75]

Clause 133: Procurement of homosexual acts

15.68 The offence under section 4 of the Sexual Offences Act 1967 can be committed only by a man. This clause extends it so that it may be committed by a woman, as recommended by the Committee.[76]

15.69 We agree with the Committee that there is a continuing need to penalise procurement for the purposes of prostitution. However, we are concerned that the effect of clauses 131 to 133 is to perpetuate a number of anomalies which exist in the present law. For example, we wonder whether there is any valid reason for limiting the offence in clause 131 to the procurement of a *woman* to become a prostitute. Why should the offence not apply to both women and men? A similar question arises in relation to clause 132. We note also that, while it is an offence to procure a woman to become, *in any part of the world*, a prostitute, there is no comparable extension of jurisdiction in the case of the conduct penalised by clause 133. Moreover, some of us question, in relation to the last clause, whether it should remain an offence, where there is no question of prostitution, and where two persons committing the homosexual act are not themselves guilty of any criminal offence.

Clauses 134 to 137: Soliciting for prostitution or sexual purposes

15.70 This part of the Chapter incorporates the Street Offences Act 1959 and the Sexual Offences Act 1985.

15.71 Following these Acts, we have retained in the draft clauses specific references to both the singular and plural: for example, clause 136(1) refers to the soliciting of "a woman (or different women) for the purpose of obtaining her, or their, services as a prostitute, or prostitutes". By including the plural, it is possible that this may lead to wrong inferences being drawn in relation to other clauses where only the singular form is used. It is not our intention that the normal presumption that, unless the context otherwise requires, the singular includes the plural should be displaced elsewhere.

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[70]Recommendation 5(c). The Committee made the further recommendation (para. 3.21, Recommendation 9) that section 35(2) and (3) of, and Schedule 1 to, the 1956 Act should be replaced with a new statutory provision for a covenant against use of the premises for the purposes of prostitution by two or more prostitutes to be implied in all leases. We think that such a provision falls outside the scope of the present exercise and we have not included it in the Criminal Code Bill.

[71]Seventeenth Report, para. 3.10, Recommendation 6.

[72][1983] Q.B. 1053.

[73]Report on Conspiracy and Criminal Law Reform (1976), Law Com. No. 76, para. 3.143.

[74]Seventeenth Report, para. 4.4, Recommendation 10.

[75]*Ibid.*, para. 4.5.

[76]Seventeenth Report, paras. 4.14 and 4.15, Recommendations 12 and 13.

15.72 The recommendation of the Committee for the creation of an offence of soliciting by a man of a woman for sexual purposes in a manner likely to cause her fear has not been implemented.[77] A clause incorporating that proposal was included in the Bill which became the Sexual Offences Act 1985 but was rejected by Parliament. Mr. David Mellor said[78] that a number of members at all stages of the Bill had expressed reservations as to whether the mischief met by the clause sufficiently outweighed the doubts about the way that it was drafted and its underlying thinking. Recommending the deletion of the clause, he said that he and those whom he had consulted were not saying that there was not a problem of women being placed in fear but they were not satisfied that the clause in the Bill was the right way to deal with it.

Clause 138: Soliciting by man for homosexual purposes

15.73 This replaces section 32 of the 1956 Act as recommended by the Committee.[79]

Proof of sexual offences

15.74 The Sexual Offences Act 1956 includes an express requirement of corroboration in respect of several offences.[80] The Committee in their Eleventh Report recommended that these provisions should be replaced by a clause in their draft Bill requiring the judge to warn the jury of the special need for caution before convicting the defendant on the uncorroborated evidence of the victim of any sexual offence.[81] The Committee reiterated this recommendation in their Seventeenth Report.[82] In the light of recent developments in the common law relating to corroboration, we do not think it appropriate to adopt the Committee's draft clause in this part of the Code. We have followed them in eliminating the statutory requirements of corroboration.[83] The effect is that the common law principles (at present applicable to rape and other sexual offences where there is no statutory requirement) will apply to all sexual offences in the Code.[84]

[77]Sixteenth Report, para. 46, Recommendation 8.
[78]*Hansard* (H.C.), 10 May 1985, Vol. 78, cols. 1038-1039.
[79]Sixteenth Report, para. 55, Recommendation 10.
[80]Sexual Offences Act 1956, ss. 2(2), 3(2), 4(2), 22(2) and 23(2).
[81]Eleventh Report: Evidence (General) (1972), Cmnd. 4991, paras 186-188 and draft Criminal Evidence Bill, cl. 17(1).
[82]Para. 2.110.
[83]Eleventh Report, para. 188 and clause 19(4).
[84]We have the law concerning the corroboration of evidence in criminal proceedings under review following a reference to that effect made by the Lord Chancellor in November 1988: see Twenty-Third Annual Report 1987-1988, (1989) Law Com. No. 176, para. 2.13.

PART 16

PART II, CHAPTER III

THEFT, FRAUD AND RELATED OFFENCES

Subject-matter and method

16.1 *Subject-matter.* Chapter III of Part II of the Code contains the offences currently to be found in the Theft Act 1968, the Theft Act 1978, Part I of the Forgery and Counterfeiting Act 1981 and section 9 of the Criminal Attempts Act 1981 (vehicle interference). It brings together, that is to say, those statutory offences which share (in broad terms) an element of dishonest conduct or intention and which will be conveniently located in the Code.[1] The two Theft Acts obviously belong in this Chapter. Vehicle interference (cl. 151) is defined, in effect, as conduct preliminary to an offence of theft (cl. 140) or taking a conveyance without authority (cl. 150). Forgery and kindred offences (cll. 164 to 171) supplement the law of fraud and are placed immediately after the group of fraud offences from the Theft Acts (cll. 155 to 163).

16.2 *Conspiracy to defraud.* One important offence of dishonesty is missing from the Chapter. Conspiracy to defraud, although recently given a maximum penalty by statute,[2] remains in substance a common law offence. We cannot in the present project either propose its abolition without replacement, or replace it (whether by a new general offence of fraud, or by supplementation and amendment of existing offences, or by a combination of those methods), or attempt a statutory restatement of it. The last of these courses might be thought to be in keeping with the general aim of reducing existing law to consistent statutory form. But (even if it had merit) it would be premature in view of the consultation on conspiracy to defraud on which we have been currently engaged. In December 1987 we published a Working Paper on the subject in which we canvassed all of the above courses as options for consideration.[3]

16.3 *Method.* Unlike Chapters I and II, which for the most part implement modern law reform proposals, Chapter III offers no new law. It consists of a restatement of the existing offences, with (in general) only such changes as are required for consistency with the general content and style of the Code. The result, we believe, is that some of the offences are stated a good deal more simply and clearly. Very few amendments with more than merely stylistic significance — and these only minor ones — have been thought to be justifiable. They have been made in order to eliminate manifest error or inconsistency in the existing statutes or to improve clarity without risk of substantive change.

16.4 *Theft Acts unreformed.* Some will be disappointed by such restraint in the treatment of the Theft Acts. The law penalising dishonest conduct is of central importance and offences under these Acts account for a very large proportion of all the indictable offences with which the courts have to deal. It is a matter for some concern that both the Acts themselves (especially that of 1968) and the substantial case law that they have generated are regarded by some critics as seriously defective. This is not, however, a matter that it would be appropriate to pursue here. Our task at this point is to include in the draft Code the law of criminal dishonesty in its existing statutory condition.

Notes on draft clauses

16.5 *Introduction.* As said above, the offences collected in this Chapter of Part II are in general reproduced without reform. The aim has been to achieve consistency with Code style and method in point of language, presentation and clarity of statement, without affecting substance. The following paragraphs draw attention only to marked departures from the method or language of the enactments replaced.

16.6 *Clause 139: interpretation.* In keeping with the method of the Code, this clause gathers together definitions of terms used at various points in the Chapter.[4] Any term used only in one section or group of sections is defined where it is used.

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[1] For the applicable principle of convenience, see Report, Vol. 1, para. 3.3.
[2] Ten years' imprisonment: Criminal Justice Act 1987, s. 12(3).
[3] Working Paper No. 104, Conspiracy to Defraud (1987). We hope to complete our final Report during 1989.
[4] The general definition of property is to be found in clause 6 (general interpretation).

16.7 *Clause 146: robbery.* We propose that the offence of assault with intent to rob, currently contained in section 8(2) of the Theft Act 1968, should appear with other assaults in the Chapter on offences against the person, where it will be found at clause 78.

16.8 *Clause 147: burglary.* This clause takes the opportunity to correct a plain and unintended error in section 9 of the Theft Act 1968. Section 9 (1)(a) expressly requires entry as a trespasser with intent to commit an "offence". But section 9 (1)(b) does not expressly require the infliction of grievous bodily harm, which may convert a trespassory entry into burglary, to be an offence; if paragraph (b) were taken literally, burglary could be committed accidentally by someone in a building as a trespasser. This anomaly is an accident of the parliamentary proceedings on the Theft Bill.[5] Our draft eliminates the error, consistently with known parliamentary intention and, we believe, uncontroversially.

16.9 *Clause 150: taking a conveyance or pedal cycle without consent.* This restatement of section 12 of the Theft Act 1968 takes pedal cycles out of the category of "conveyances", for the sake of simplification and without alteration of the law.[6]

16.10 The words "or other lawful authority" in subsections (1) and (2) and the reference to belief in lawful authority in subsection (4) might be thought not to be strictly necessary in view of the general Code provisions in clauses 41 (belief in circumstance affording a defence) and 45 (acts justified or excused by law). But to omit them would, we think, put comprehensive grasp of the Code at an unwarrantable premium. In any case, "without lawful authority"[7] may differ from "unlawfully" and "without lawful excuse" (expressions generally renounced for the purpose of stating Code offences[8]) in indicating to the courts that they may recognise types of authority and excuse that are special to the offence in question and do not constitute general defences. For these reasons it seems clear that this aspect of the language of section 12 of the Theft Act should be preserved.[9]

16.11 *Clause 154: blackmail.* In the Theft Act 1968 this offence appears (in section 21) immediately after the offences of fraud, with which it shares the cross-heading "Fraud and blackmail". It is here removed from that position, so that a group of offences headed "Fraud" can begin with a definition of "deception"[10] (irrelevant to blackmail) and be immediately followed by the related group of clauses dealing with forgery and kindred offences.

16.12 *Clause 159: obtaining pecuniary advantage by deception.* We propose in subsection (2) a minor amendment of section 16(2) of the Theft Act 1968 for the sake of clarification only. Section 16(2) begins:

> "The cases in which a pecuniary advantage within the meaning of this section is to be regarded as obtained for a person are cases where —...."

Our equivalent passage (in the style of the Code) is:

> "For the purposes of this section a pecuniary advantage is obtained for a person if, and only if, —...."

We draw attention to the words "and only if". The supposition that "pecuniary advantage" means anything that can be regarded as such an advantage and that subsection (2) merely gives examples is quite common. That this is erroneous might be thought to be quite plain but experience shows that it needs to be made plainer.

16.13 *Clauses 162 and 163: suppression, etc. of documents; procuring execution of valuable security.* Section 20 of the Theft Act 1968 is here divided into two sections because the section contains two quite different offences, one involving deception and one not. What they have in common is the technical term "valuable security", which is defined in clause 162(2).

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[5]The matter is explained by Professor J.C. Smith in a comment on *Jenkins* at [1983] Crim. L.R. 386.

[6]Compare cl. 150 (1) and (2) with Theft Act 1968, s. 12 (1) and (5).

[7]And, in other contexts, "without reasonable excuse".

[8]See above, para. 12.5.

[9]Cf. clause 149, where the phrase "without lawful authority" also includes a reference to the absence of the consent of the owner.

[10]See clause 155 reproducing Theft Act 1968 s. 15(4). In our Working Paper No. 104, Conspiracy to Defraud (1987), para. 10.9 and our Working Paper No. 110, Computer Misuse (1988), para. 5.3 we have proposed an extension of the existing definition of "deception" to cover the deception of a machine (including a computer).

16.14 *Clause 172: handling stolen goods.* It might be argued that the Code definition of "knowledge" as in effect embracing "wilful blindness"[11] renders otiose the words "or believing" in section 22 (1) of the Theft Act 1968. But the courts do not in this context equate belief with wilful blindness, which they treat only as evidence of belief[12]; "believing" may cover some cases that "knowing", as defined in clause 18(a), will not cover; and no harm seems to be done by its inclusion.

16.15 Our restatement of this offence proposes one piece of clarification. As the offence is currently drafted, a person may commit handling "if he...dishonestly undertakes or assists in [the] retention, removal, disposal or realisation [of stolen goods] by or for the benefit of another" or "if he arranges to do so" (where "do so" also refers to receiving them). This clumsy expression has caused much unnecessary trouble. It seems clear that what is meant is that one may either (i) *undertake* a relevant act *for the benefit of* another or (ii) *assist in* the doing of a relevant act *by another.*[13] Clause 172 is drafted accordingly.

16.16 *Clause 173: advertising rewards for return of goods stolen or lost.* It has been held that this offence in section 23 of the Theft Act 1968 is an offence of strict liability; it may be committed by a printer or publisher who is unaware of the offending advertisement.[14] Hence clause 173(2), excluding the application of clause 20, which, if it applied, would reverse that interpretation.

16.17 *Clause 175: going equipped.* This restatement of section 25 of the Theft Act 1968 omits section 25 (3), which provides:

> "(3) Where a person is charged with an offence under this section, proof that he had with him any article made or adapted for use in committing a burglary, theft or cheat shall be evidence that he had it with him for such use."

Such a provision seems to us to be inappropriate in a Code. It is merely an example of a wider general proposition that the tribunal of fact may draw a reasonable inference in the absence of evidence raising a doubt about the safety of the inference. Compare, for instance, the inference, to which the Theft Act 1968 (and, accordingly, Chapter III) does not refer, that may be drawn from possession of recently stolen goods.

16.18 *Clause 177 and Schedule 6: ancillary provisions.* Schedule 6 reproduces sections 26 (except as already repealed), 27 and 31 (1) of the Theft Act 1968, which are concerned with law enforcement, evidence and procedure.[15]

16.19 *Provisions not reproduced.* The following provisions of the Theft Act 1968[16] are not reproduced:

(i) Section 28: orders for restitution. This concerns the powers of criminal courts on conviction. It belongs in a Powers of Criminal Courts Act (or in a future Part IV of the Code). We recommend that it remain in the Theft Act for the time being.

(ii) Section 30(1): application of Act between spouses. The criminal law generally applies to spouses. So, for example, the Criminal Damage Act 1971 found no need for a provision to the effect that one spouse can be guilty of damaging the other's property. The Theft Act provision was from abundance of caution or for the avoidance of doubt, in view of the contrary rule at common law in the case of larceny.[17] There is no need for section 30(1) to be repeated.

(iii) Section 30(2): spouses as prosecutors and witnesses. This subsection provides that one spouse can[18] bring proceedings against the other "for any offence (whether under this Act or otherwise)" and can give evidence for the prosecution at any stage of such proceedings. As this relates to all offences, it has no place in a particular Chapter of Part II. It might perhaps be repealed, for it seems that repeal would not revive any pre-existing rule to the contrary.[19] Or it could stay where it is (pending preparation of Part III of the Code).

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[11]See clause 18(a); above, para. 8.10.
[12]See especially *Griffiths* (1974) 60 Cr.App.R. 14; *Moys* (1984) 79 Cr.App.R. 72.
[13]Cf. *per* Lord Bridge in *Bloxham* [1983] 1 A.C. 109 at 113.
[14]*Denham and Scott* (1983) 77 Cr.App.R. 210.
[15]See Report, Vol. 1, para. 3.27.
[16]Other than provisions which are spent, already repealed or replaced by more general provisions in Part I.
[17]Preserved in part by the Larceny Act 1916, s. 36.
[18]Subject to s. 30(4), which is reproduced in column 5 of Schedule 1, in the entries relating to clauses 140 and 180.
[19]Interpretation Act 1978, s. 16(1)(a); Bennion, *Statutory Interpretation* (1984), p. 436.

(iv) Section 31(2): this provision is concerned exclusively with title to property "stolen or obtained by fraud or other wrongful means".

(v) Section 32(1) and Schedule 1: preservation of pre- Theft Act offences. Schedule 1 of the 1968 Act preserved with modifications existing offences of taking or killing deer and taking or destroying fish. Paragraph 1 of the Schedule has been superseded by the Deer Act 1980, section 1, creating some summary offences not appropriate for transfer to the Code. Paragraph 2 contains a summary offence of taking or destroying fish in water which is private property or in which there is a private right of fishery. This offence also we propose should be omitted from the Code.

PART 17

PART II, CHAPTER IV

OTHER OFFENCES RELATING TO PROPERTY

Subject-matter and method

17.1 *Subject-matter.* Chapter IV of Part II of the Code contains offences currently to be found in the Criminal Damage Act 1971 (cll. 178-186: offences of damage to property), in Part II of the Criminal Law Act 1977 and section 39(2) of the Public Order Act 1986 (cll. 187-195: offences relating to entering and remaining on property) and in section 1 of the Protection from Eviction Act 1977 as amended by section 29 of the Housing Act 1988 (cl. 196: unlawful eviction and harassment of residential occupier). These are the offences which, applying the test of user convenience,[1] we judge suitable for transfer to the Code.

17.2 *Method.* In principle, the aim in this Chapter, as in Chapter III, has been to restate the existing offences in Code style and otherwise consistently with the Code as a whole. Achieving this aim in the case of offences of damage to property involves some proposals for change in the law to which we draw attention in the notes that follow.

Notes on draft clauses

17.3 *Introduction.* These notes, like those in the preceding Part on the clauses in Chapter III, are mainly concerned with points of substance rather than of style and presentation.

17.4 *Clauses 178 and 179: interpretation.* The effect of these definitions of terms for the purposes of the offences of damage to property is, except in one respect, the same as that of the corresponding provisions of the Criminal Damage Act 1971. The exception is a small one. Under the 1971 Act the exclusion from the meaning of "property" of certain things growing wild (section 10(1)(b)) applies for all purposes of the Act. This is unsatisfactory; the fruits and flowers of wild shrubs must surely be "property" within the meaning of the rule that reasonable steps can be taken in the protection of property (clause 185). Clause 178(1) slightly limits the meaning of "property" for the purposes only of the definition of offences, leaving the full definition in clause 6 to apply for the purposes of the clause 183 defence.

17.5 *Clause 180: destroying or damaging property.* Subsection (1) is simpler in form than its original, section 1 (1) of the Criminal Damage Act 1971. The language of section 1 (1) incorporates the effect of the common law rules on "transferred intent", ensuring that D commits the offence created by the subsection if, having the required fault with respect to property belonging to O, he does an act causing damage to property belonging to P. This result is achieved under the Code by the general provision on transferred fault in clause 24 (1), with the gain in simplicity referred to. The substitution of "causes the destruction of or damage to" for "destroys or damages" (in subsections (1) and (2)) has already been explained.[2]

17.6 *The fault required* for any offence under this section 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 *Caldwell.*[3] For recklessness as defined for the purposes of the Code by clause 18(c) is narrower, for reasons we have given above,[4] than recklessness in section 1 as explained in *Caldwell.* To reproduce the effect of section 1 since *Caldwell* it would be necessary to add a third alternative fault element to the offences in clause 180. This could of course be done; the Code team provided the term "heedlessness" for the purpose.[5] We agree with the team, however, in thinking that, if it were done, it would be necessary to make a similar extension of the offence of intentional or reckless personal harm (clause 72), and perhaps of some other offences against the person. Without such a corresponding change a

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[1]See Report, Vol. 1, para. 3.3 above.
[2]See para. 7.13 above.
[3][1982] A.C. 341. See para. 8.18 above.
[4]Para. 8.19.
[5]Defined, in effect, as giving no thought to whether there is a risk (which would be obvious to any reasonable person) that a relevant circumstance exists or will exist, or to whether a relevant result will occur, the risk being one that it is in the circumstances unreasonable to take: cf. cl. 22(a) of the Code team's Bill.

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 than of recklessly causing personal harm. 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.[6] 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;[7] and recklessness here appears to have the narrower sense adopted in clause 22.[8] 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 the offences in Chapter I are based. It is not appropriate for us to propose that course. Nor would we wish to do so. Like the Criminal Law Revision Committee, we have consistently recommended that the fault elements of serious criminal offences be drafted in terms of intention or recklessness (in the clause 18 sense). We are fortified in maintaining that position now by our knowledge that the *Caldwell* interpretation of section 1 of the Criminal Damage Act has been, to say the least, controversial and that the direction to the jury recommended in that case has caused practical difficulties.

17.7 *"Without lawful excuse"*. This phrase occurs in the definitions of the offences in sections 1, 2 and 3 of the 1971 Act (with a partial explanation in section 5) We have already explained why it is not used in the Code.[9] The cases of "lawful excuse" provided by section 5 are reproduced in clauses 184 and 185. An "excuse" that no doubt excludes an offence under section 1 (1) of the 1971 Act (clause 180(1)) is the consent of the owner of property to its destruction or damage.[10] This is worth referring to explicitly and is stated by clause 184. All other matters of defence covered by the phrase "without lawful excuse" in the 1971 Act are taken care of by the provision of general defences in Part I of the Code and by the general saving of any justification or excuse available by statute or at common law (clause 45).

17.8 *The entries in Schedule I* are set out in such a way as to make clear that clause 180, according to the principle stated by the House of Lords in *Courtie*,[11] creates three offences: 1. an offence under subsection (1), committed otherwise than by fire, and punishable with a maximum of ten years' imprisonment on conviction on indictment; 2. an offence under subsection (1), committed by fire (arson), with a maximum of life imprisonment; 3. an offence under subsection (2), whether arson or not, also punishable with life imprisonment.

17.9 *Clause 184: consent or belief in consent*. This clause goes a little further than section 5 (2)(a) of the 1971 Act, for a reason already given.[12] It applies where the actor *knows* that he has the owner's consent as well as where he mistakenly believes that the owner has consented or would consent if he knew of the circumstances. It does not, however, apply where the owner in fact consents (or would consent) if the actor is unaware that this is so.

17.10 *Clause 185: protection of person or property*. This clause replaces section 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 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.

(ii) Property may be protected from appropriation as well as from destruction or damage.

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[6]As to s. 20, see *W. (A Minor)* v. *Dolbey* (1989) 88 Cr. App. R. 1, [1983] Crim. L.R. 681; *Grimshaw* [1984] Crim. L.R. 108; *Morrison, The Times* 12 November 1988.

[7]*Venna* [1976] Q.B. 421.

[8]Smith and Hogan, *Criminal Law* 6th ed., (1988), 379; Glanville Williams, *Textbook of Criminal Law* 2nd ed., (1983), 171.

[9]See para. 12.5 above.

[10]Cf. *Denton* [1981] 1 W.L.R. 1446.

[11][1984] A.C. 463; that is, the principle that, where greater punishment can be imposed if a particular factual ingredient can be established than if it is not, two distinct offences exist.

[12]See para. 17.7 above.

[13]See para. 12.25 above.

(iii) The word "unlawful"[14] qualifies the acts against which protective measures may be taken. This means that the clause does not extend to the defence of property against an attack by an animal (such as an attack by a dog on sheep) that involves no crime or tort on the part of its owner. For this purpose, as for others,[15] the clause has to be eked out by resort to surviving common law defences (clause 45(c)).

(iv) 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.

(v) The test of the immediate necessity for, and the reasonableness of, the action taken is made objective.

17.11 *Relationship to clause 44* (use of force in public or private defence). The result is harmony between clauses 44 and 185 in all the respects just listed. But there is one difference between them. Clause 185 is not limited to the use of force; property might exceptionally be destroyed or damaged by means not involving force.

17.12 *Clauses 187-194: offences relating to entering and remaining on property*. These offences have undergone a good deal of reorganisation and rewriting to make them compatible with the Code but do not in general require comment.

17.13 *Clause 195: obstruction of court officers*. It seems appropriate to transfer this specialised obstruction offence to the present Chapter along with the other offences from Part II of the Criminal Law Act 1977. In due course the Code should contain a Chapter dealing with offences relating to the administration of justice,[16] to which it would then no doubt be appropriate to transfer this offence.

17.14 *Strict liability*. The parenthesis in subsection (1) replaces the words "in fact" in the original. Subsection (3) gives a defence of belief that the person being obstructed is not an officer of the court. For the rest, "in fact" appears to mean the offence is one of strict liability in respect of the status and function of the person being resisted or obstructed. The parenthesis in subsection (1) makes this clear, excluding the fault requirement that would otherwise be implied by clause 20 (1).

[14]Subsection (2) gives this word the same meaning here as it has in clause 44 (use of force in public or private defence).

[15]It is clear that neither s. 5 (2) of the Criminal Damage Act nor clause 185 covers all the circumstances in which protective measures causing damage to property are "justified or excused by law" (to use the language of clause 45). Not all justified acts, for example, protect property "in *immediate* need of protection" (s. 5 (2)) or are "*immediately* necessary" (cl. 185). See Smith and Hogan, *Criminal Law* 6th ed., (1988), 690-692, 695-696.

[16]See our Report on that subject (1979), Law Com. No. 96; and Report, Vol. 1, Appendix C.

PART 18

PART II, CHAPTER V

OFFENCES AGAINST PUBLIC PEACE AND SAFETY

Subject-matter and method

18.1 *Subject-matter.* Chapter V of Part II of the Code contains offences currently to be found in the Public Order Acts 1936 and 1986, the Public Meeting Act 1908, the Prevention of Crime Act 1953, the Criminal Justice Act 1988, the Restriction of Offensive Weapons Act 1959 and section 51 of the Criminal Law Act 1977. The Chapter thus brings together those statutory offences concerned with the preservation of public order and safety which will conveniently be located in the Code.

18.2 *Method.* This Chapter, like Chapters III and IV, restates existing law. In general the only changes proposed are those required for consistency with the style and terminology of the Code as a whole.

Notes on draft clauses

18.3 *Introduction.* These notes, like those relating to the clauses in Chapters III and IV, are largely concerned with points of substance rather than matters of style and presentation. We do, however, draw attention to any marked departures from the method or language of the enactments replaced.

18.4 *Clauses 198 — 202: the fault element.* These clauses restate in Code style the offences contained in sections 1 to 5 of the Public Order Act 1986. The references to a person being "reckless" whether, for example, his conduct is violent or his behaviour threatening, replace the corresponding references to "awareness" in section 6 of the Public Order Act 1986. We had previously recommended the use of awareness as an alternative to recklessness in view of the different meanings of that term in different offences.[1] Now that the Code provides a uniform definition of recklessness in subjective terms it is appropriate to use it here. A minor change in the law is involved in that recklessness requires in addition to awareness of the relevant risk that it be unreasonable to take it. The burden will be on the prosecution to prove this, but in practice the issue will virtually never arise. It is not easy to see how in this context a person could claim that it was reasonable for him to take the risk that his conduct might be violent or his behaviour threatening. The change in wording will have the advantage that where public order offences are charged with offences against the person or offences against property, for which recklessness is frequently the fault element, fewer fault terms will need to be explained to the jury.

18.5 *Involuntary intoxication: burden of proof.* The Code does not restate section 6(5) of the Public Order Act 1986. That provision, which has effect in relation to the offences in sections 1 to 5 of the Public Order Act 1986, places on the defendant the burden of proving that his intoxication was involuntary. The provision is inconsistent with the general principle contained in clause 22(7).[2] Having regard to this general principle, we think that the small group of public order offences corresponding to those in the Public Order Act 1986 should not be treated as anomalous by placing on the defendant such a burden of proof. If the Code were to be enacted, we believe that the law on this point should be changed in order to achieve the necessary consistency and simplicity for use with juries.

18.6 *Clauses 203 - 210: racial hatred.* Clause 203(1) sets out the definitions contained in sections 17 and 29 of the Public Order Act 1986. The definitions of "distribute", "publish" and "recording" have been amended slightly in consequence of our decision to include in clause 203 the interpetation provisions formerly in sections 19(3) and 21(2) of the Public Order Act 1986. We have also taken the opportunity to add entries for "play" and "show" to the list.

18.7 *Clauses 204 — 209* restate in Code style the offences set out in sections 18-23 of the Public Order Act 1986. In clause 207(4) there is substituted an express statement that the burden of proof is on the defendant in place of the words in section 20 (3) of the Act, "the

[1] Offences relating to Public Order (1983), Law Com. No. 123, paras. 3.41-3.52.
[2] See para. 8.51 above.

performance shall, unless the contrary is shown, be taken not to have been given solely or primarily for the purposes mentioned above." It is clearer, and more in keeping with Code style, to use the language of burden of proof rather than that of presumptions.

18.8 *Directors' liability*. Section 28 of the Public Order Act 1986, which contains the standard provisions relating to the liability of directors and members of corporations in respect of offences by the corporations, is not reproduced in this Chapter. The matters covered by the section are dealt with in the Code in clause 31.

18.9 *Clause 214: disturbances at public meetings*. This clause restates in Code style the offences contained in section 1(1) and (3) of the Public Meeting Act 1908. Section 1(2) of that Act (incitement to commit offences under section 1) is not reproduced in this Chapter because its effect is preserved by clause 47 (the general offence of incitement, which includes incitement to commit summary offences).

18.10 *Obstruction of constable*. The Chapter does not include, although it might have done, the offence under section 51(3) of the Police Act 1964 of obstruction of a constable in the execution of his duty. The reason for its exclusion is the requirement that the obstruction be done "wilfully". This is a term used in a number of offences in existing law, but the differing interpretations it has been given in different contexts[3] have caused difficulty and render it unsuitable for use as a fault term in the Code. Moreover its appearance in the Code in the context of obstruction might cause embarrassment in view of the terms of the offence under clause 195(1) of obstruction of court officers executing process for possession. This clause restates section 10 of the Criminal Law Act 1977 which refers to "intentionally" obstructing etc. We prefer the latter term which is of course used throughout the Code. However, we do not feel that we can alter the definition of the offence in the Police Act 1964 without further review and consultation. Pending such a review it would be better to leave this offence out of the Code, although it is to be hoped that it will in due course be included.

18.11 *Other offences not included*. We also omit from this Chapter the following offences, which, but for the considerations which we mention against each, would have been candidates for inclusion:

(a) Offences under the Unlawful Drilling Act 1819. We have not felt it appropriate to undertake, as part of the present exercise, the modernisation of this ancient legislation.

(b) Offences under the Explosive Substances Act 1883. These offences also require, before they can be introduced into the Code, more radical amendment than we have felt it proper to undertake without consultation.[4]

(c) Offences under sections 16-25 of the Firearms Act 1968 (headed "Prevention of crime and preservation of public safety") . The inclusion of clauses 215 and 216 (possession of offensive weapon or article with blade or point) may make the exclusion of these offences, including that of carrying a firearm in a public place, seem hardly logical. But the offences are part of a more general code for the control of firearms from which, we believe, it would be artificial and probably inconvenient to detach them.

(d) Entering a football ground in breach of an exclusion order (Public Order Act 1986, section 32(3)). This belongs rather with the body of law on the control of sporting events.

[3] See Smith and Hogan, *Criminal Law* 6th ed. (1988), 122-124 and 395-396.
[4] See also para. 14.59(b) above.

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