Law Commission

REFORM OF OFFENCES AGAINST THE PERSON

A SCOPING CONSULTATION PAPER

Summary for non-specialists

Consultation Paper No 217 (Summary)
12 November 2014
PART 1
INTRODUCTION

1.1 This is a summary of our scoping consultation paper on crimes of violence ("offences against the person"). It gives an overview of the paper and the issues raised in it. It is designed for readers without specialised legal knowledge, and is therefore simplified in some respects. For full details, readers are referred to the scoping consultation paper: if there is any inconsistency between this summary and the full paper, the full paper represents our position.

THE PROJECT

1.2 The law about crimes of violence is complicated and confusing. Most of it is contained in the Offences Against the Person Act 1861. There are also offences of assault, battery and assaulting police officers that are not contained in that Act.

1.3 As part of our Eleventh Programme, we were asked by the Ministry of Justice to examine the case for a reform project on this area of the law. We published our scoping consultation paper in answer to that request. In it, we:

(1) describe the present law;
(2) set out the problems with it;
(3) give the history of previous attempts to reform it;
(4) discuss how the law could be reformed in the future.

We ask consultees for their views both on whether reform is needed and on the form such reform might take.

1.4 This is not the first attempt to reform the law about crimes of violence. Previous attempts include:

(1) Criminal Law Revision Committee, Fourteenth Report, Offences against the Person, in 1980;\(^1\)
(2) Codification of the Criminal Law (report with draft code submitted to the Law Commission by a group of academics chaired by Professor Sir John Smith QC), in 1985;\(^2\)
(3) Law Commission, Draft Criminal Code with commentary, in 1989;\(^3\)
(4) Law Commission, Legislating the Criminal Code: Offences against the Person and General Principles (consultation paper with draft Bill), in 1992;\(^4\)

\(^1\) (1980) Cmnd 7844.
\(^2\) (1985) Law Com No 143.
\(^3\) (1989) Law Com No 177 (2 vols).
(5) Law Commission, Legislating the Criminal Code: Offences against the Person and General Principles (report with draft Bill), in 1993.\(^5\)


The proposals in all these documents were broadly similar.

1.5 The scoping paper bases its discussion on the 1998 Home Office proposals. However, as this is a scoping paper we are not asking for consultees’ views on draft proposals that we are advancing but for their views on the structure a future law reform project in this area might take.

GENERAL PROBLEMS

1.6 In the next few paragraphs we give a general account of some of the problems we have found in the 1861 Act. Some of these are considered in more detail in Parts 2 to 4, where we discuss individual offences.

1.7 The offences are not classified in a coherent way.

(1) Some of them relate to narrowly specialised situations, or include complex lists of situations, rather than setting out a clear principle. For example, there are four quite different ways of committing the offence under section 18 (wounding or grievous bodily harm with intent).

(2) Also, the offences are not clearly classified in order of seriousness. For example, the offence under section 20 (malicious wounding or grievous bodily harm) is meant to be more serious than that under section 47 (assault occasioning actual bodily harm), but they have the same maximum sentence: 5 years.

1.8 One result of this is that the offences are now often used in a different way from what the definitions suggest. Charging practice is now generally in accordance with charging standards issued by the Crown Prosecution Service, which give guidance about which offence should be charged when there is legally more than one choice. Some examples are as follows.

(1) A wound that is not major can legally be charged under section 20 (malicious wounding). In practice it is generally charged under section 47 (actual bodily harm).

(2) Attacks causing minor injuries legally fall within section 47. In practice they are usually charged as common assault.

The current practice is not actually inconsistent with the law, but does represent systematic under-charging compared with what is legally possible. The dividing lines between the offences have in effect been moved to a different place from where they are in the Act.

\(^4\) (1992) CP 122.

1.9 There are several problems with the mental elements of the offences: that is, what the offender must mean to do, or what he or she knows or believes.

(1) Sometimes this is not clearly explained: for example, in section 20 it just says “maliciously” without explaining what this means.

(2) At other times the definition of the offence produces mental elements that are redundant. For example, in section 18 the offender must intend grievous bodily harm, but there is also the word “maliciously”, which adds nothing in most cases.

(3) Most importantly, there is often a mismatch between what the offender must intend or believe, and what he or she must actually bring about. It is generally desirable, in creating criminal offences, that a person should only be held responsible for bringing about a given result if he intended that result, or knowingly took the risk of it. Otherwise, the person will be blamed for what may be only bad luck.

Example. A husband shouts threats to his wife in another room. Unknown to him, she is pouring boiling water from a kettle, is startled and scalds herself. In existing law, he is guilty of assault occasioning actual bodily harm. Since he could not possibly know that this harm would happen, this is unfair. He should only be guilty of common assault.

1.10 The language is often archaic and obscure. Words like “grievous” and “detainer”, used more than once in the Act, are not in common use today. In some cases it is actually inaccurate. The Act often mentions “felony”, “misdemeanour” and “penal servitude”, none of which now exist. Also, the Act does not state the sentence for several important offences.

THE CONSULTATION

1.11 The scoping consultation paper is being published on 12 November 2014. We would like replies by 12 February 2015.

1.12 When we have all the replies we shall analyse them and publish a “scoping report” with more definite suggestions for reform of the law.
PART 2
THE MAIN OFFENCES

2.1 The most commonly committed crimes of violence are described in the next few paragraphs.

2.2 There are three main offences in the Offences Against the Person Act 1861.

(1) The section 18 offence (“wounding with intent” or “GBH with intent”). This can consist of:
   (a) wounding with intent to do grievous bodily harm;
   (b) causing grievous bodily harm with intent to do grievous bodily harm;
   (c) wounding with intent to resist or prevent the apprehension or detention of any person; or
   (d) causing grievous bodily harm with intent to resist or prevent apprehension or detention.

(2) The section 20 offence (“GBH”). This can consist of:
   (a) malicious wounding; or
   (b) maliciously inflicting grievous bodily harm.

   “Maliciously” means that the offender either intended to cause some physical harm or knowingly took the risk of it.

(3) The section 47 offence (“ABH”). This consists of an assault or battery (see next paragraph) which causes actual bodily harm.

2.3 In all these offences, “wounding” means that both the outer and inner layers of skin are broken or penetrated. “Bodily harm” includes illness, and certain psychiatric conditions, as well as physical injuries. “Grievous” means that the harm is really serious.

2.4 Outside the 1861 Act, there are two further offences.

(1) Assault means any act which causes the victim to apprehend immediate unlawful violence, provided that the offender either intends the victim to apprehend violence or is reckless about it.

(2) Battery means any intentional or reckless act of actual violence: this includes any unwanted touching, except what is inevitable in normal social life.

Confusingly, the word “assault” (or “common assault”) is sometimes used generically for both offences.
THE PROBLEMS

2.5 The section 18 and section 20 offences are complicated, and set out several different ways of committing each offence. In particular:

(1) It seems unnecessary to distinguish “wounding” as a special category. A wound either amounts to a serious injury or it does not.

(2) Section 18 awkwardly bundles causing grievous bodily harm with intent to resist arrest with the main offence. If the “resisting arrest” form is needed at all it should be a separate offence.

2.6 In both offences, there is a mismatch between what the offender must intend to do and what the offender must actually do. As explained in Part 1, this means that the offender is often unfairly held to blame for results that he or she did not intend or foresee.

(1) Both offences can take the form of wounding. But there is no mention of intention to wound, or risking causing a wound.

(2) In the section 20 offence, the offender must either wound the victim or cause grievous bodily harm (which means really serious injury). But the offender need not intend or foresee a risk of serious injury: it is enough to foresee a risk of any injury.

Two people, D and V, are having a scuffle in the street. D punches V, and foresees that V may get a black eye. In fact V accidentally trips over a low wall and breaks his leg. D is guilty of inflicting “grievous bodily harm” (the broken leg).

2.7 The mismatch in the section 47 offence, assault occasioning actual bodily harm, is even more marked. The offender must intend or foresee the assault or battery. But he or she need not foresee any risk of physical harm at all. This means that a person can commit the offence of “actual bodily harm”, while remaining in ignorance of the most important fact about it, namely actual bodily harm!

2.8 The language used is archaic and can be confusing.

(1) “Grievous bodily harm” is not a phrase in common use, except when describing these offences.

(2) One section speaks of “causing” harm, another of “inflicting” it and a third of “occasioning” it. It is not clear why there has to be this difference.

(3) Both section 18 and section 20 use the word “maliciously”. This word needs a great deal of explanation to a jury.

(a) In section 20 it is now taken to mean “intending to cause some harm, or foreseeing the risk of harm but unjustifiably taking that risk”. This is not obvious to the reader. Even to a trained lawyer, it is not certain whether the mention of “unjustifiably” is right.
(b) In section 18 it also has this meaning; but there it is quite
unnecessary, as the section already (in most cases) requires the
offender to intend to cause grievous bodily harm.

2.9 In some respects, the drafting of all three offences is now inaccurate.¹

   (1) They refer to “felony”, “misdemeanour” and “penal servitude”. None of
   these are now concepts known to the law.

   (2) Neither section 20 nor section 47 tells us what the maximum sentence is.
   In both cases, it is 5 years' imprisonment, but this is not obvious to the
   reader and is the result of a string of other statutes.

2.10 It is also odd that the section 20 offence (GBH) and the section 47 offence (ABH)
have the same maximum sentence, though the section 20 offence is clearly far
more serious.

2.11 Finally, it would be good to resolve the ambiguity in the word “assault”. There
should either be one offence with one name, covering the present scope of
assault and battery, or two separate offences with different names.

THE 1998 DRAFT BILL

2.12 The Home Office's draft Bill in 1998 contains the following offences.

   (1) Intentionally causing serious injury.

   (2) Recklessly causing serious injury.

   (3) Intentionally or recklessly causing injury.

   (4) Intentionally or recklessly applying force or causing impact, or causing a
       person to believe that such force or impact is imminent.

2.13 This is different from the present law in the following ways.

   (1) In the first offence, the offender must both cause, and intend to cause,
       serious injury. It does not matter whether the injury takes the form of a
       wound.

   (2) In the second offence, the offender must foresee the possibility of serious
       injury. Foreseeing the risk of some harm is not sufficient.

   (3) The third offence need not take the form of an assault: any means of
       causing injury is sufficient. But the offender must intend or foresee the
       risk of injury.

   (4) The Bill preserves the present distinction between assault and battery,
       but makes it clear that they are two forms of the same offence. The
       offence is not given a name, but in some other places in the Bill the word
       “assault” is used as shorthand for it.

¹ That is, sometimes the law has been changed, but the wording of the 1861 Act has not
been updated to reflect the new law.
2.14 There is one other difference from the present law. At present, a person who infects another with HIV or a sexually transmitted infection can be convicted of inflicting grievous bodily harm. In the draft Bill, this can only happen if the offender intended to infect the victim. This topic is so complex and controversial that we discuss it in a separate chapter of the scoping consultation paper: we give a brief summary in Part 5 of this document.

OUR DISCUSSION

2.15 In our Scoping Paper we welcome the scheme of the draft Bill as a great improvement on the present law, and suggest adopting the first three offences almost without change.

2.16 We do suggest two modifications at the lower end of the scale.

1. We suggest creating an offence of causing minor injuries; this would come between the offence of intentionally or recklessly causing injury and the assault offence.

2. We also suggest that assault and battery should be two completely separate offences.

There is also one technical point about whether the offences can be committed by omitting to do something one is under a duty to perform or only by a positive act; we do not discuss this here.

Minor injuries

2.17 The reason for suggesting an offence of causing minor injuries is to ensure that defendants are tried in the court that is appropriate for the gravity and complexity of the case. In particular, minor injuries, which are likely to receive short sentences, are generally more suitable for magistrates’ court trial.

2.18 At present the section 47 offence, assault occasioning actual bodily harm, can be tried either in the Crown Court or in a magistrates’ court. The choice is made by a two-step process. (That is, if the defendant has not said that he or she intends to plead guilty.)

1. First, there is an “allocation hearing” in the magistrates’ court. The magistrates hear what both the prosecution and the defence have to say about which court would be more suitable, and then decide whether the case would be more suitable for them or for the Crown Court.

2. However, even if the magistrates decide the case should be tried in the magistrates’ court, the defendant can opt for Crown Court trial instead.

2.19 Assault and battery, by contrast, can be tried only in a magistrates’ court.

2.20 An important difference between the two courts is what sentence they can pass. A magistrates’ court can only imprison a person for up to 6 months (or in some cases a year). The Crown Court can imprison a person convicted of the section 47 offence for anything up to 5 years.
2.21 Crown Court trials typically involve more delay and expense than trials in a magistrates’ court. This is partly because the Crown Court hears the more serious and complicated cases, but that is not the only reason. Cases in the Crown Court usually have a longer waiting time before they can be heard, and the hearings usually last longer, even if the facts are the same. The costs of running the court, and the legal costs for both prosecution and defence, are also greater in the Crown Court.

2.22 In choosing which court should try a case, the magistrates should follow the Sentencing Council’s Allocation Guidelines. These require the magistrates to consider (among other things) whether the punishment which a magistrates’ court would have the power to inflict for the offence would be adequate. In general, either way offences\(^2\) should be tried summarily unless it is likely that the court’s sentencing powers will be insufficient. In other words, if the likely sentence for an offence under section 47 is 6 months or less, the case should not go to the Crown Court.

2.23 Nevertheless, in a significant number of cases,\(^3\) prosecutions for the section 47 offence are tried in the Crown Court but the sentence actually passed is 6 months or less. We do not know whether this is because the magistrates have overestimated the likely sentence\(^4\) or because defendants have chosen Crown Court trial.

2.24 To avoid this situation, prosecutors frequently charge assault or battery instead of the section 47 offence. Instead of two levels of seriousness there are now in practice three:

(1) “really serious” injuries, prosecuted under section 18 or 20;

(2) moderately serious injuries, prosecuted under section 47;

(3) minor injuries (black eye, split lip, loosened tooth, minor cuts), prosecuted as assault or battery.

Minor injuries are defined as injuries unlikely to attract a sentence of more than 6 months. This practice is now clearly set out in the Crown Prosecution Service’s charging standards.

2.25 This practice helps to avoid cases of minor injury ending up in the wrong court. However, victims and the public may understandably feel that the offender has been under-charged and that the offence is wrongly labelled. This may be one reason why some cases are still charged under section 47 although they eventually receive a sentence of 6 months or less.

2.26 We therefore ask for consultees’ views about whether future reform should include consideration of a separate offence of causing minor injuries. This would

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\(^2\) That is, cases which can be tried either by magistrates or in the Crown Court.

\(^3\) Over the last ten years or so, between 7% and 12% of all Crown Court section 47 cases.

\(^4\) At an allocation hearing, the magistrates only receive a brief account of the facts. They may know roughly what injury was caused, but the full circumstances, which may mitigate the seriousness of the crime, may not emerge till the trial.
be tried only in the magistrates’ court, and the offender would not be able to choose Crown Court trial. However, the offender’s behaviour would be correctly labelled, and the fact of causing injury would appear on the offender’s criminal record.

Assault and battery

2.27 In strict law assault and battery are two separate offences. They are often referred to collectively as “assault”, or “common assault”, and treated for some purposes as one offence that can be committed in two ways. However, problems can arise when the wrong form of the offence is charged.

2.28 “Assault” properly means any behaviour which causes a person to apprehend immediate unlawful violence (provided that the offender intends or foresees that it may have this effect). This is now much wider than a physical attack that fails to connect. Threats uttered from another room, or by telephone or letter, have been held to be an assault.

2.29 We therefore think that it is unrealistic to treat assault and battery as variations on a theme. Whatever the labels used, the offences now cover two quite different kinds of behaviour. There should be two separate offences, with different names.
INTRODUCTION

3.1 In this Part we discuss:

(1) particular assaults, such as assaults on police officers and racially or religiously aggravated assaults;

(2) threats to kill;

(3) solicitation to murder;

(4) poisoning offences;

(5) offences relating to explosives and dangerous substances;

(6) railway offences.

PARTICULAR ASSAULTS

3.2 The main offence of this kind is that of assaulting a constable in the execution of his duty. This is not in the Offences Against the Person Act 1861, but in the Police Act 1996. There are similar offences of assaulting court staff, Revenue officials, immigration officers, prison officers and some other officials. The 1998 draft Bill reproduces the offence in the Police Act more or less as it stands.

3.3 One noticeable point about these offences is that there is no need for the offender to know that the victim is a police officer (or other official). It is sufficient that the victim was a police officer in fact.

Example. V, a plain clothes police officer, enters a restaurant to search for drugs. D, the restaurant owner, not knowing that V is a police officer, shouts at him to leave and finally hits him. D is guilty of assaulting a constable in the execution of his duty.

3.4 This does not make much practical difference, as the maximum sentence for this offence is 6 months, the same as for common assault. Nevertheless it might be fairer if this offence was worded as “knowing that, or being reckless whether, the person assaulted or the person being assisted is a constable”, as suggested by us in our report published in 1993.

3.5 There are also offences in the 1861 Act of assaulting or obstructing a clergyman and assaulting a magistrate or other person in the exercise of his duty preserving a wreck. We question whether these are still necessary.

3.6 Finally there are some offences of violence aggravated by racial or religious hostility. These are based on the offences of assault and battery, assault occasioning actual bodily harm and malicious wounding/GBH: the offence is “aggravated” if it is motivated by hostility to a racial or religious group, or if the
offender demonstrates hostility at or shortly before or after the time of the
offence. The aggravated offences will need updating if the basic offences (of
assault etc) are replaced. We have recently considered the aggravated offences
in our report on “Hate crime: should the current offences be extended?”¹

THREATS TO KILL
3.7 There is an offence of threatening to kill, either the person addressed or a third
person. The 1998 draft Bill proposes widening this to threatening to kill or cause
serious injury, and we ask for consultees’ views about whether future reform
should include consideration of a new offence on these lines.

3.8 A number of questions arise about how the new offence should be drafted.

   (1) One is whether it is necessary that the threat be believed.

   (2) Another is whether the threat must be certain, or can be conditional (“if
   you don’t do so and so I will kill you”).

   (3) A third is whether the offence should include cases where the threat is
   made abroad, or is a threat to kill or injure a person abroad, or both.

SOLICITATION TO MURDER
3.9 There is also an offence of soliciting or endeavouring to persuade one person to
murder another. The 1998 draft Bill did not include any offence of this kind, as it
was thought that the crime of incitement already included this kind of behaviour.
Incitement is now replaced by an offence of assisting and encouraging crime.

3.10 We are not sure that all examples of solicitation to murder are covered by
assisting and encouraging crime. For example, solicitation includes general
encouragement to kill people within a group, such as “unbelievers”. For reasons
explained in our scoping consultation paper, this may not always count as
assisting and encouraging crime. We also discuss the position where the
encouragement, or the proposed murder, takes place abroad.

3.11 We therefore ask for consultees’ views about whether future reform should
include consideration of an offence on the lines of the current offence of soliciting
to murder.

POISONING OFFENCES
3.12 There are three separate poisoning offences:

   (1) administering stupefying substances with intent to commit an offence;

   (2) administering a poison or noxious thing so as to endanger life or inflict
grievous bodily harm;

   (3) administering a poison or noxious thing with intent to injure or annoy.

¹ (2014) Law Com No 348, paras 2.2 to 2.32.
3.13 The 1998 draft Bill replaces all these with a single offence of administering a substance knowing that it is capable of causing injury.

3.14 The rationale for this is that there is no need for any offence of causing actual harm by poison. This is covered by the three main injury offences in the draft Bill, which include causing injury by any means whatever. The offence in the Bill is one of creating danger rather than actual harm. The justification for including such an offence is that poisons and drugs are intrinsically dangerous things, and that there is a legitimate public interest in discouraging their irresponsible use. To prosecute only when the harm is done is to intervene too late.

3.15 In our scoping consultation paper we ask for consultees’ views about whether future reform should include consideration of an offence as set out in the 1998 draft Bill.

EXPLOSIONS AND DANGEROUS SUBSTANCES

3.16 There are four offences to do with explosives and dangerous substances in the 1861 Act:

(1) causing grievous bodily harm by gunpowder or explosives;
(2) using, sending or throwing explosive or corrosive substances with intent to cause grievous bodily harm;
(3) placing explosives near a building or vessel with intent to do bodily injury;
(4) making or having explosives with intent to commit other offences in the Act.

There are three more explosives offences in the Explosive Substances Act 1883, but these are not offences against the person and we do not review them in our paper.

3.17 The 1998 draft Bill replaces the four offences in the 1861 Act with two offences:

(1) exploding, placing, delivering, throwing or applying a dangerous or explosive substance intending to cause, or reckless about causing, serious injury;
(2) exploding, placing, delivering, throwing or applying a dangerous or explosive substance intending to cause, or reckless about causing, injury.

3.18 As with the poisoning offences, these are offences of creating danger, rather than of causing actual harm: actual harm is covered by the three main injury offences. The justification is also the same as in the case of poisons: the substances in question are intrinsically dangerous and there is a public interest in discouraging their irresponsible use.

3.19 Again, our scoping consultation paper asks for consultees’ views about whether future reform should include consideration of offences as drafted in the 1998 Bill.
RAILWAY OFFENCES

3.20 There are three offences to do with railways:

(1) interfering with railway lines with intent to endanger the safety of any person travelling or being on the railway;

(2) throwing things at a train with intent to endanger the safety of a person on the train;

(3) endangering the safety of a person on a railway by any unlawful act or wilful omission.

3.21 The 1998 draft Bill replaces these with a single offence of causing danger on railways. (Some of the previous reports proposed widening this to include other means of transport.) We have not studied this area in detail and make no suggestions about it in our scoping consultation paper.
PART 4
THE REMAINING OFFENCES

4.1 Our paper does not discuss the following offences under the 1861 Act within this project:

(1) bigamy;
(2) attempted abortion;
(3) concealing birth.

They are not included in the 1998 draft Bill or in previous Law Commission projects on offences against the person, as they raise issues going beyond crimes of violence.

4.2 The remaining offences under the 1861 Act are as follows:

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

Of these, attempting to choke and causing harm by furious driving are occasionally encountered in practice; exposing children to danger and setting spring guns etc less often; the rest seldom or never.

4.3 In our scoping consultation paper we ask whether we should consider the abolition of these offences or some of them. (Other offences considered for abolition are those of assaulting clergy and assaulting magistrates and others preserving a wreck: paragraph 3.5 above.)
PART 5
TRANSMITTING DISEASE

INTRODUCTION

5.1 The cases we are considering here are those where:

(1) two people have consensual sexual intercourse,

(2) one of them (whom we shall call “D”) knows or has strong reason to believe that he or she is infected with HIV or a sexually transmissible infection, and

(3) the infection is in fact transmitted to the other partner (“V”).

Most of the cases, and most of the discussion, concerns HIV. However, the argument applies equally to other sexual infections; for example, in the recent case of Golding\(^1\) the defendant pleaded guilty to the section 20 offence after passing on genital herpes. The principle could indeed apply to the non-sexual passing of infection, for example by sharing an infected needle.

5.2 If D transmitted the infection intentionally, it amounts to the section 18 offence, of causing grievous bodily harm with intent. This however is a very rare situation and we know of no case that has ever been prosecuted on this basis.

5.3 More normally, the view is taken that D was “reckless”: that is, he or she knew that there was a risk of infecting V, and unjustifiably took that risk. This is prosecuted as the offence under section 20 (maliciously inflicting grievous bodily harm; we shall call this offence “GBH”).

THE PRESENT LAW

5.4 It used to be thought that cases of this kind did not amount to any crime, because the intercourse was by consent. However, since the case of Dica in 2004, the courts have taken the view that, though V consented to intercourse (so D is not guilty of rape), V did not consent to the risk of infection. D is therefore guilty of GBH.

Dica, knowing that he was HIV positive, had unprotected sex with two women, both of whom contracted the infection. He was charged with malicious infliction of grievous bodily harm under section 20 and convicted. The Court of Appeal held that, if the prosecution case was true, the women had no reason to think there was any risk of infection and had not consented to it, so it would amount to the offence of GBH. The case was sent back for re-trial (for different reasons), and Dica was again convicted.

5.5 No offence is committed if V knew about the risk of infection from D and decided to run that risk. However, this must be an “informed consent”. That is, V must know the particular facts about D: it is not enough to know that, in general,

\(^1\) [2014] EWCA Crim 889.
unprotected sex is a risky activity. V may know these facts about D because D has disclosed them, or (for example) by knowing that D has been receiving treatment or noticing sores on D’s genitals.

5.6 There is one uncertainty. People diagnosed with HIV can and often do undergo anti-retroviral treatment, and one effect of this is to reduce the viral load to a point where the risk of infecting a sexual partner is minimal. In these circumstances, is it justified for D to take this minimal risk, without informing V? Or is V entitled to be informed of any risk, however minimal?

THE 1998 DRAFT BILL

5.7 The 1998 draft Bill was published well before Dica was decided; so at that time the reckless transmission of disease was not criminal. Those responsible for the draft Bill decided to preserve this position. There is therefore a clause in the draft Bill saying that “injury” does not include anything caused by disease, except for the purposes of the offence of intentionally causing serious injury.

5.8 This was a departure from the Law Commission’s draft Bill of 1993. There, the view taken was that, since the three injury offences were designed to include all means of causing physical harm, the transmission of disease should not be an exception.

POLICY QUESTIONS

5.9 Many people, particularly in the public health sector, argue that the unintentional transmission of disease should never be criminal, and that making it criminal has an adverse effect on public health. The arguments are as follows.

(1) At present, people can only be liable for transmitting disease if they knew (or, possibly, had strong reason to believe) that they were infected. This increases people’s general reluctance to be tested: they will not want to know their status if knowledge can contribute to criminal liability.

(2) It discourages openness with (and by) medical professionals, in case they may have to give evidence against their patients.

(3) It encourages people to think that disclosure of HIV status is always a duty, and that if a potential partner has not mentioned his or her status then he or she is not infected.

(4) Because of the difficulty of proving transmission, the existence of the offence leads to very wide-ranging and intrusive investigations affecting a great many people, out of all proportion to the small number who will be found deserving of prosecution.

(5) The whole topic of HIV/AIDS is affected by an atmosphere of fear which is often irrational, and there is still an undesirable stigma against sufferers. The existence of an offence reinforces both these phenomena.

5.10 The arguments against decriminalisation are:
(1) if one partner knows there is a risk of transmitting infection, and the other partner does not know, it is only reasonable that the partner who knows should have the major share of responsibility for avoiding the risk;

(2) if there is no offence of reckless transmission, and no duty to disclose one’s condition, that in practice puts the entire responsibility on the uninfected partner, that is, the partner who does not know;

(3) in general, there is no valid reason to distinguish people who irresponsibly run a known risk of infecting others, and do infect others, from people who recklessly cause injury in any other way.

5.11 Many other countries have stricter laws than England and Wales. For example, in Scotland there is an offence of “reckless endangerment”, where it is criminal to put the other person at risk, even if the infection does not actually pass. In Canada it is an offence to fail to disclose one’s HIV status to a prospective sexual partner.

OUR PAPER

5.12 As this is a scoping consultation paper we are not trying to advance concrete proposals based on either side of the decriminalisation argument. That would require a full scale review. We do not recommend creating new offences of the kind found in other countries, such as reckless endangerment or non-disclosure.

5.13 We do not recommend the scheme in the 1998 draft Bill. Following Dica, it is now out of date; and, for reasons explained in the scoping consultation paper, it would not be the best way of giving effect to the decriminalisation argument.

5.14 We invite consultees to offer views on a broader range of questions.

(1) One possibility is to follow the scheme of the draft Bill in our 1993 Report. There would be general offences of intentionally causing serious injury, recklessly causing serious injury and intentionally or recklessly causing injury. Injury would in principle include disease. (We might need to consider excluding non-serious infections.) The position would be similar to the existing law.

(2) The other possible scheme would be similar, but with a special exemption, to the effect that unintentional transmission of disease through consensual sexual intercourse is not included in the offences.

The second scheme would give effect to the decriminalisation argument of the health professionals and others. As mentioned above, this would require a full scale review.
PART 6
SUMMARY OF THE ISSUES

6.1 In our scoping consultation paper, we describe the existing law in detail and explain what we think the problems are. We ask the readers whether they agree that these problems exist, and whether they have encountered them in practice.

6.2 We then describe the previous attempts at reform, up to and including the 1998 draft Bill. We ask readers whether they agree that the draft Bill should be taken as the basis for reform, while keeping open the possibility of changes on points of detail.

6.3 We then go through the proposals in the 1998 draft Bill in detail. We first consider general points about the meaning of injury and the defendant’s intention or foresight of risk. We then go through the different offences. We finally consider one point of procedure, about when a defendant charged with one offence can be convicted of another offence included within it.

6.4 In a separate chapter we discuss the transmission of disease, and finally we put a series of questions for consultees.

6.5 In general, we ask consultees about the merits of a future reform project following the scheme of the 1998 draft Bill. In some instances we ask consultees for views on alternative approaches to reform in particular:

   (1) a separate offence of causing minor injury;
   (2) keeping assault and battery as two separate offences;
   (3) possible approaches to reform of criminal transmission of disease.

6.6 We ask for comments by 11 February 2015. When we have received these, we intend to prepare a scoping report with more definite proposals, to be published in the spring or summer of 2015.