Not giving up the fight: a review of the Law Commission's scoping report on non-fatal offences against the person

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**Not Giving up the Fight: A Review of the Law Commission's Scoping Report on the
Non-Fatal Offences Against the Person**

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Abstract

This article reviews the Commission's 2015 recommendations on the non-fatal offences against the person. Its analysis focuses on three main pillars: (i) it examines whether the current law in this area is in need of modernisation; (ii) whether the 'ladder' of non-fatal offences should be reformed in the manner recommended by the Commission; and (iii) identifies and elaborates on issues which have not been adequately addressed by the Commission in this project, albeit they constitute integral parts of the offences against the person. This paper suggests that the Commission's recommendations provide a good starting point, but a more comprehensive review of this area is still required. It is submitted that the reluctance of the Commission to deal in more depth with some fundamental issues, such as the codification of the fault requirements, detracts from the overall strength of this project.

Keywords

Non-fatal offences against the person, constructive and corresponding liability, recklessness, consent, transmission of disease

Introduction

The non-fatal offences against the person encompass a wide variety of conduct, with offences ranging from the most serious assaults causing grievous bodily harm (GBH) to everyday common law assaults. The shared characteristic of these offences is the use and/or threat of use of violence by the defendant (D) to the victim (V). Last year more than 1 million offences of this kind were committed in England and Wales.¹ However, despite the prevalence of these offences, and despite the breadth of their application, the law is still governed by a statute that is over 150 years old. Reform is certainly overdue.

¹ Office for National Statistics, Crime in England and Wales: Year Ending June 2015 (2015) 22 available at <http://www.ons.gov.uk/ons/dcp171778_419450.pdf> last accessed 07 February 2016.

In November 2015, the Law Commission published its latest recommendations on this area of law within a Scoping Report.² These recommendations were part of the Commission's project initiated in 2014 through a Scoping Consultation paper which attracted a great deal of interest from both practitioners and academics,³ but the full story of reform proposals started much earlier. Most importantly for our purposes, the Commission's Scoping Consultation, and indeed their Scoping Report, are explicitly based on a Home Office draft bill (the draft bill) published in 1998.⁴ This draft bill (itself based on the Commission's 1993 recommendations) sought to bring major reforms in this area of law by replacing the Offences Against the Person Act 1861 (OAPA) with a new Act of Parliament.⁵ Although the draft bill recommendations were never taken forward by government, the Commission are not giving up the fight.⁶

This article provides comment on the Commission's latest recommendations over three parts. In part I, I will start my analysis by assessing the Commission's claim that the OAPA is an outdated statute in need of reform and modernisation. This appears to be the least controversial of the Commission's arguments, but it is an essential premise to reform and requires some brief discussion. In part II, I will focus on Commission's recommendations relating to reform of the 'ladder' of core non-fatal offences, asking whether the Commission's recommendations can achieve coherence and clarity. In part III, I will reflect on issues which have not adequately been dealt with by the Commission although central to this group of offences. In particular, it will be argued that a number of gray areas have been created through the case law and a project of this nature should have dealt with those gray areas in more detail. I conclude by asking whether the Commission's recommendations should be taken forward, and whether they are likely to be taken forward.⁷ But I also reflect on the opportunities missed, concluding that even if the Commission's recommendations are enacted, further consideration and reform will still be required.

² Law Commission, Reform of Offences Against the Person, Cm 361 (2015).

³ Law Commission, Reform of Offences Against the Person: A Scoping Consultation Paper, Cm 217 (2014).

⁴ Home Office, Violence: Reforming the Offences against the Person Act 1861 (1998).

⁵ Ibid.

Part I. The need for modernisation

The Commission's recommendations start from the premise that the OAPA is an outdated statute and it should be repealed by a modern piece of legislation.⁸ This is illustrated by the fact that a significant number of offences created under the OAPA have already been repealed by subsequent legislation rendering most of its provisions unenforceable.⁹ For the Commission, however, the main cause for concern in this context are the provisions which are still in force. In particular, it has been argued that the current law in this area is obsolete and in need of modernisation.¹⁰ This need for modernisation can be divided over three levels: (i) in terms of the terminology adopted; and (ii) in terms of trimming unnecessary or obsolete offences, and (iii) in terms of reform to the ladder of core offences against the person. I focus on the first two of these in this part, with the last addressed in Part 2.

As far as the former is concerned, it has been argued that the terminology used by the OAPA is archaic and this causes uncertainty as to the true meaning of certain terms.¹¹ For example, the Commission highlight the offences of assault and battery; common assault. Under the current law, an assault consists of a conduct which intentionally or recklessly causes another 'to apprehend immediate and unlawful violence';¹² whilst battery, on the other hand, requires some sort of physical and unlawful contact between the defendant and the victim.¹³ Although at first sight there is a clear distinction between the two common law offences in terms of the *actus reus* required for each of them, the terms assault and common assault are used interchangeably causing uncertainty as to their true nature. This can be partly attributed to the fact that 'battery' is rarely used in modern language and its use in this context appears to be misleading.¹⁴ For the Commission, therefore, these offences are not labelled correctly, with the labels employed failing to provide a clear indication as to the nature of the wrong proscribed by each of them. To address this poor labelling, the Commission suggests that the labels attached to each offence should be amended. For battery, the suggested label is

⁶ Above n.2 at para. 1.3.

⁷ Law Commission, Eleventh Programme of Law Reform, Law Com No 330 (2011) at para. 2.64.

⁸ Above n.2 at para 1.4.

⁹ Ibid. at para 1.4.

¹⁰ Above n.7 at para. 2.63.

¹¹ Above n.2 at para 1.15.

¹² R v Ireland [1998] AC 147 at 150.

¹³ Ibid. at 444-445.

¹⁴ Above n.2 at para 5.13.

‘physical assault’ whereas for ‘assault’ the proposed label is one of ‘threatened assault’ (see Table 1).¹⁵ Both seem entirely sensible recommendations.

The label assigned to an offence provides an indication as to the nature of the perpetrator’s conduct and the degree of blameworthiness that is attached to it.¹⁶ Attaching a ‘fair label’ to each offence is particularly important since it ‘ensure[s] a proportionate response to law-breaking, thereby assisting the [criminal] law’s educative or declaratory function’.¹⁷ Criminal law does not only punish the wrongdoer for his conduct, but it also condemns both the offender and the wrong committed.¹⁸ For condemnation to be effective, however, a sufficient understanding by the public of the nature of the wrong committed is needed. The Commission’s proposed labels seem to be moving on the right direction here since they provide clear guidance as to the nature of the wrong proscribed by each offence.

The second target for reform identifies offences that can be removed. It has been suggested that certain offences which are rarely used and/or are unnecessary, such as the offence of impeding a person escaping from a shipwreck,¹⁹ should be abolished.²⁰ In some cases the conduct at stake is already criminalised by at least one general injury offence whereas in some other instances it is simply a matter of change in social and economic circumstances; such as the failure to provide ‘apprentices or servants with food’.²¹ The Commission’s objective here is twofold. First, it aims at abolishing all the specific injury offences currently in force under the OAPA where the kind of injury proscribed can adequately be addressed by at least one of the general injury offences. In many cases, simply, there is no need for criminalising the same wrong more than once. Secondly, the Commission seeks to abolish offences, such as the offence of impeding a person escaping from a shipwreck discussed above, which are redundant and their preservation appears to serve no meaningful purpose.

Both recommendations made by the Commission here are reasonable and uncontroversial. Their implementation is likely to contribute towards the modernisation of this area and

¹⁵ Ibid. at para 5.29.

¹⁶ J. Chalmers and F. Leverick, ‘Fair Labelling in Criminal Law’ (2008) *Modern Law Review* 71(2) 217-246 at 221.

¹⁷ A. Ashworth and J. Horder, *Principles of Criminal Law*, 7th edn (OUP, 2013) 77.

¹⁸ A. Ashworth and L. Zedner, ‘Preventive Orders: A Problem of Undercriminalisation?’ in A. Duff and others (eds.), *The Boundaries of the Criminal Law* (OUP, 2010) 59.

¹⁹ OAPA 1861 s.17.

²⁰ Above n.2 at para 1.11.

²¹ OAPA 1861 s.26.

enhance public's understanding of the law. The third area of recommended reform, focusing on the ladder of core offences, is more controversial, and discussed below.

Part II. Repairing the ladder of offences

According to the Commission, another cause for concern about this area of law is the lack of a coherent and 'structured hierarchy of offences' within the ladder of core non-fatal offences.²² We are referring here to the hierarchy of offences from common assault (as least serious), through the section 47 actual bodily harm (ABH) offence, to the GBH offences under sections 20 and 18 OAPA. It has been suggested that this deficiency can be attributed to two main problems: (a) lack of a clear distinction between the offences of this group; and (b) the extensive use of constructive liability. Through its recommendations, the Commission aims at formulating a more rational and representative hierarchy of offences which will reflect more accurately the degree of blameworthiness and seriousness of the offence committed.²³ I will examine the problems identified by the Commission in turn, examining first whether there is indeed need for reform and secondly whether the implementation of the proposed changes is warranted.

For the purposes of this paper a table (Table 1) has been drafted which provides an overview of the current law in this area and the changes proposed by the Commission. I will refer to this table later on in my discussion.

²²Above n.2 at para 1.5.

²³ Above n.7 at para 2.63.

Table 1

The current law			The Commission's scheme		
Offence Committed	Actus Reus	Mens Rea	Offence Committed	Actus Reus	Mens Rea
s.18	Cause wounding or GBH to V	Intention to cause GBH	Clause 1	Cause serious injury to V	Intention to cause serious injury
s. 20	Cause wounding or GBH to V	Intention or recklessness as to causing any harm	Clause 2	Cause serious injury to V	Recklessly causing serious injury
s. 47	Common assault causing ABH to V	Intention or recklessness as to the common assault	Clause 3	Cause injury to V	Intentionally or recklessly causing injury
			Aggravated Assault	Cause injury to V	Intentionally or recklessly causing a common assault
Common Assault	D unlawfully touches V or D causes V to apprehend immediate unlawful violence	D intentionally or recklessly touches V, or D intentionally or recklessly causes V to apprehend immediate personal violence	Physical Assault	D unlawfully touches V	Intention or recklessness
			Threatened Assault	D causes V to apprehend immediate unlawful	Intention or recklessness

					violence	
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(a) Establishing a clearer distinction between each offence

The Commission contends that under the current law there is ambiguity as to the true ambit of some of these offences.²⁴ As a result, this has led to a problematic hierarchy of offences. In this context, two main problems have been identified which contribute towards this lack of clarity.

First, particular emphasis has been placed on the maximum sentence available for the offences under sections 20 and 47 OAPA. Currently, both offences carry a maximum penalty of five years imprisonment, albeit a different kind of harm is proscribed under each offence. The former, proscribes the infliction of GBH whereas the latter deals with ABH. Under the current law, GBH is defined as an injury which is ‘really serious’²⁵ and can include, amongst other, the transmission of HIV,²⁶ stabbing,²⁷ and serious broken bones. On the other hand, ABH refers to injuries which are ‘more than merely transient and trifling’²⁸ and ‘interfere with the health and comfort’ of another.²⁹ ABH will include, amongst other, injuries like grazes and bruising.³⁰ Although the degree of harm required by each offence can vary considerably, the maximum sentence available is the same for both. This is not to suggest that someone who has committed the section 47 offence will receive the same sentence as someone who has committed the section 20 offence; maximum available sentences should not be confused with likely or average sentences. And indeed, the courts have generally maintained the hierarchical distinction between these offences despite the lack of statutory

²⁴ Above n.2 at para 1.8-1.9.

²⁵ DPP v Smith [1961] AC 290 at 334.

²⁶ Dica [2004] QB 1257 at 1257.

²⁷ Taylor [2009] EWCA Crim 544.

²⁸ Donovan [1934] 2 KB 298 at 509.

²⁹ Miller [1954] 2 QB 282 at 285.

steer. However, the efforts of the courts cannot remove what is an obvious anomaly, and one that confuses the laddering of these offences.

As the Commission notes, having the same maximum sentence for these offences fails to highlight the difference between the two in terms of blameworthiness.³¹ This, according to the Commission, can cause ambiguities as to the true ambit of those offences and the kind of conduct that should fall within their scope.³² As indicated above, offences should be labelled accurately in order to convey the right message to society about the nature and the blameworthiness of the wrong proscribed. Hence, a clear distinction between the two offences must be drawn highlighting the fact that GBH constitutes a more serious kind of harm than ABH. What is proposed here by the Commission is for the maximum penalty available for the equivalent section 20 offence to increase to seven years imprisonment.³³ At first sight, increasing the maximum penalty available for the equivalent section 20 offence seems warranted since it clearly highlights the difference between the two offences in terms of the severity of the harm proscribed.

Secondly, the Commission contends that there is currently a gap between common assault and the section 47 offence which has to be addressed.³⁴ In particular, it has been argued that when a minor injury is inflicted it is a common practice for the Crown Prosecution Service (CPS) to charge D with common assault notwithstanding the fact that the harm committed could technically fall within the ambit of the section 47.³⁵ The choice of the CPS is entirely logical. There are a large number of offences of this kind (eg, minor bar fights etc) and so the CPS wants to deal with these kind of injuries swiftly through the Magistrates' Court; there is no need to spend more resources than necessary.³⁶ If charged with the ABH offence, the trial becomes triable either way, and thus additional time and expense may be required.

However, although a logical choice under the current law, charging common assault can be problematic. If D is charged with a common assault, then the maximum penalty available is limited to six months imprisonment. Under certain circumstances, such a short sentence

³⁰ Roberts (1971) 56 Cr App R 95.

³¹ Above n.2 at para 1.8.

³² Ibid. at para 1.8-1.9.

³³ Ibid. at para 5.106.

³⁴ Ibid. at para 5.31.

³⁵ Crown Prosecution Service, Legal Guidance: Offences Against the Person, Incorporating Charging Standard. Available at https://www.cps.gov.uk/legal/l_to_o/offences_against_the_person/#a07 last accessed 10 February 2016.

³⁶ Above n.2 at para 5.31.

might not be appropriate to punish D's conduct. The Commission contends that a new intermediary offence should be introduced, the offence of aggravated assault, to deal with minor injuries which fall on the boundaries between the common law offences and section 47 (see Table 1).³⁷ The maximum penalty for this offence would be twelve months imprisonment and be triable only at a Magistrates' Court.³⁸ It has been argued that this new offence would reflect more accurately the nature of the wrong committed and have the advantage of being triable only at a Magistrates' Court.³⁹

From a normative perspective, the introduction of the new intermediary offence might be warranted. It certainly appears the more appropriate charge in response to the most typical bar fights and related harms, appropriate in terms of label, sentence, and trying authority. A new intermediary offence would create a further rung within the ladder of core offences, but one that may facilitate the creation of a more structured hierarchy since the label attached to each offence is likely to be more representative of the harm caused.

Despite the potential benefits of the new offence highlighted by the Commission, however, it is important to recognise the drawbacks as well. For example, from a practical perspective, adding an extra offence to this already complex hierarchy might result to further confusion as to the precise distinction between the offences falling within this group. If we are to adopt the Commission's proposed scheme, then prosecutors and courts will not only have to distinguish ABH from common assault (a distinction that, in most cases, will be relatively straightforward), but instead, we will be required to draw a more detailed distinction between both common assault and aggravated assault, and between aggravated assault and ABH. The latter distinction will (it is contended) prove particularly problematic. The Commission acknowledges that the creation of too many offences might cause unnecessary specificity and 'fragmentation in the criminal law',⁴⁰ but pushes ahead with the recommended offence.

Beyond problems of identification, there is also a concern that the introduction of this intermediary offence could undermine the retained equivalent of section 47. If the aggravated assault offence is to be introduced, and the CPS refrain from charging wrongdoers with the section 47 offence simply to avoid a full hearing at the Crown Court, this would

³⁷ Ibid. at para 5.50.

³⁸ Ibid. at para 5.68.

³⁹ Ibid. at paras 5.32 and 5.48.

⁴⁰ Ibid. at para 6.109.

render section 47 effectively redundant. In practice, this might create a new gap between the intermediary offence and section 20.

(b) Establishing corresponding rather than constructive liability

The second major concern raised by the Commission in regard to the hierarchy of offences relates to the basis upon which liability is established under sections 20 and 47 OAPA in particular. According to the Commission, what is problematic about the abovementioned offences is the fact that they allow for liability to be established constructively rather than on the basis of the principle of correspondence.

The correspondence principle is based on the assumption that a perpetrator should only be liable for what he intended to do or at least foresaw as a possible consequence of his conduct.⁴¹ If we are to respect the autonomy of the defendant, we should only punish him for criminal wrongs he has in some way chosen to commit or risk. In line with this, liability for criminal wrongs should be constructed on the basis that the perpetrator did not just behaved voluntarily in a morally reprehensible manner, but he had also done so with a 'guilty mind'.⁴² In other words, apart from establishing a causal link between D's conduct and the proscribed harm inflicted, it must also be proven that D was at fault at the time of committing the offence at stake.⁴³ The requirement of fault in this context can take various forms; fault might be in the form of an intention to achieve a particular end, being reckless as to this end and so on.⁴⁴ An example of an offence which is constructed on the merits of the correspondence principle is section 18. To establish liability for this offence the prosecution must not only prove that D caused GBH or wounding to V, but also that it was D's intention to cause GBH (or at least D was reckless as to so causing, and intended to evade arrest etc).

The correspondence principle is most commonly evoked to criticise strict liability offences that do not require any mens rea beyond voluntary movement, but it also applies to constructive liability offences as well.

Constructive liability departs from the correspondence principle because, although mens rea is required for liability (ie, these are not strict liability offences), the required mens rea does not correspond with the level of harm required within the actus reus. An example of this is

⁴¹ B. Mitchell, 'In Defence of a Principle of Correspondence' (1999) Criminal Law Review 195 at 197.

⁴² S. Kadish, *Blame and Punishment: Essays in the Criminal Law* (Macmillan, 1987) 65.

⁴³ J. Spencer and A. Pedain, 'Approaches to Strict and Constructive Liability in Criminal Law' in A. Simester (ed.), *Appraising Strict Liability* (OUP, 2005) 327.

section 47 OAPA. In order to establish liability for this offence one must prove that D was at fault (had mens rea) only with regard to the core offence; either assault or battery. There is no need to prove that D was at fault with regard to the infliction of ABH. If D intentionally or recklessly committed a common assault, then this will suffice to establish liability under section 47 if that common assault resulted in ABH. Similarly, for section 20, D must cause GBH to V, but there is no need to prove that D intentionally caused or was reckless as to causing GBH to V. For this offence, one must only establish that D intentionally caused or was reckless as to causing any kind of harm, such as ABH. According to Andrew Ashworth, if we are to justifiably hold D liable for causing X, then we must ‘establish that the defendant’s intention, knowledge, or recklessness’ relates to X rather than to Y, a lesser harm.⁴⁵ Under section 47 and 20 OAPA, D is held liable for X despite his intention to cause Y or being reckless as to the infliction of Y.

According to the Commission, the current approach adopted under sections 20 and 47 OAPA is problematic and should be abandoned. They contend that the current approach fails to provide fair warning to D about the potential implications of his conduct.⁴⁶ For example, D cannot be sure as to the extent of his liability if he commits a battery. If, as a result of that battery, V suffered ABH, D can be held liable for the offence under section 47. What is proposed here by the Commission is for these two general injury offences to be amended in a way in which they will adhere to the principle of correspondence.⁴⁷ The Commission seeks to achieve this by following the scheme advanced under the draft bill,⁴⁸ where section 20 is repealed by the clause 2 offence which proscribes the infliction of ‘serious injury’ in cases where D was ‘reckless about causing serious injury’ (see Table 1).⁴⁹ Similarly, section 47 is to be repealed by the clause 3 offence, which criminalises the intentional or reckless infliction of injury.⁵⁰

For those arguing in favour of the principle of correspondence what is problematic about constructive liability is the extensive reliance of the criminal law on D’s luck rather than on his actual fault. In this view, D is held liable not because of his choices and fault, but due to

⁴⁴ Above n.17 at 137.

⁴⁵ Ibid. 75.

⁴⁶ Above n.2 at para 4.97.

⁴⁷ Ibid. at para 4.97.

⁴⁸ Ibid. at para. 4.50.

⁴⁹ The term ‘serious injury’ is to be given the same meaning as GBH. Ibid. at para. 4.43.

⁵⁰ The term ‘injury’ is to be given the same meaning as ABH. Ibid. at para 4.43.

his bad (or good) luck as to the extent of V's injury.⁵¹ Suppose, for example, that D merely intended to push V, however, due to D's push, V falls on the ground and hits his head on the pavement's edge, causing him GBH. Based on the principle of correspondence, D should only be liable for the minor injury (battery equivalent) intended or foreseen.⁵² To hold otherwise constitutes a violation of the principle of personal autonomy since liability is imposed for consequences which were not D's autonomous choice.⁵³ Furthermore, as Kenneth Simons contends, a departure from the principle of correspondence entails the infliction of a disproportionate punishment.⁵⁴ In this regard, the punishment imposed on D is disproportionate because he is punished for X, albeit intending to cause or being reckless as to Y.

Although the concerns raised by the advocates of the principle of correspondence are reasonable, it must be conceded that this approach can lead to intuitive unfairness in its diminishing of the importance of the actual harm caused to V.⁵⁵ It has been argued, for example, that what distinguishes the criminal law from other legal methods of social control is the imposition of punishment⁵⁶ to culpable wrongdoers.⁵⁷ Although this might be true, it has to be acknowledged that the criminal law is not solely concerned with D's culpability and fault. The criminal law is also concerned with the harm suffered by V. Recent developments, such as the introduction of the Criminal Injuries Compensation Scheme and of the Victim's Impact Statement,⁵⁸ pay particular attention to V's harm and highlight his enhanced role within the criminal justice system (CJS). Allowing D to 'get away' with a lesser crime because he did not foresee the full extent of the injuries that he in fact caused, runs counter to the growing victim focus approach adopted by the CJS.

In addition, it is submitted that imposing liability constructively is not objectionably *per se*, and that under certain circumstances it can be warranted. As noted above, through constructive liability the criminal law punishes D for X notwithstanding the fact that D was only at fault with regard to Y. The main justification provided by constructivists is that

⁵¹ A. Simester and others, *Simester & Sullivan's Criminal Law: Theory and Doctrine*, 5th edn (Hart, 2013) 197.

⁵² Above n.17 at 75-76.

⁵³ Ibid. at 75.

⁵⁴ K. Simons, 'Is Strict Liability in the Grading of Offences Consistent with Retributive Desert?' (2012) OJLS Vol.32(3) 445-466 at 449.

⁵⁵ J. Horder, 'Two Histories and Four Hidden Principles of Mens Rea' (1997) Law Quarterly Review Vol. 113 95-119 at 119.

⁵⁶ D. Husak, *Overcriminalization: The Limits of the Criminal Law* (OUP, 2008) 146.

⁵⁷ A. Duff, 'Perversions and Subversions of Criminal Law' in A. Duff and others (eds.), *The Boundaries of the Criminal Law* (OUP, 2010) 106.

punishing D is justifiable due to the shift of D's 'normative position'.⁵⁹ Let us use section 47 as an illustration. According to the 'normative position' argument, if D intentionally or recklessly committed a battery, then he is regarded as blameworthy and should be liable for any ABH inflicted as a result of his conduct.⁶⁰ D has chosen to break the law and to cause harm to V, and so D's normative position has changed having chosen to criminally attack V, D should be liable for all harms flowing from that attack. Would it be fair, however, to hold D criminally liable for every adverse consequence that might flow from his conduct?

For a constructivist, holding D criminally liable for every adverse consequence caused by his conduct, no matter how remote these consequences are, is justifiable if D 'knowingly embarks on an unlawful enterprise'.⁶¹ In this view, if D decided to commit an offence, then he has already acted beyond the 'threshold of criminality' and for this reason holding him liable for any adverse consequence caused by his conduct is warranted.⁶²

What might be preferred, however, is a form of 'moderate constructivism'. Under this approach we can be more restrictive as to the circumstances under which liability can be established. In particular, moderate constructivism starts from the premise that holding D criminally liable for X is warranted if there is a sufficient degree of proximity between the harm intended or foreseen and the actual harm inflicted on V.⁶³ Hence, the imposition of punishment will be warranted if D has decided to embark on a course of conduct which is already criminal and for which there is a sufficient degree of foreseeability between the outcome originally intended or foreseen and the actual harm caused. Suppose, for example, that D intended to cause ABH to V by cutting him with a knife. However, out of fear V attempts to run away causing the knife to cause a large gash; GBH.⁶⁴

Strict adherence to the principle of correspondence would require us to hold D liable only for ABH, section 47, rather than for GBH, section 20. However, moderate constructivism enables us to hold D criminally liable for the more serious offence, albeit D intended to cause

⁵⁸ See more Ministry of Justice, *Code of Practice for Victims of Crime* (2013).

⁵⁹ J. Gardner, 'Rationality and the Rule of Law in Offences Against the Person' (1994) *Cambridge Law Journal* 53(3) 502-523 at 509.

⁶⁰ *Ibid.* at 509.

⁶¹ A. Ashworth, 'A change of Normative Position: Determining the Contours of Culpability in Criminal Law' (2008) *New Criminal Law Review* Vol.11(2) 232-256 at 233.

⁶² A. Jackson and T. Storey, 'Reforming Offences Against the Person: In Defence of "Moderate" Constructivism' (2015) *Journal of Criminal Law* 437 at 444.

⁶³ J. Horder, 'A Critique of the Correspondence Principle in Criminal Law' (1995) *Criminal Law Review* 759 at 769.

⁶⁴ *Moriarty v Brooks* (1834) 6 C & P 684.

ABH. In the above hypothetical, there is arguably a close degree of proximity between the intended and the actual harm caused. It is due to that close proximity between the intended or foreseen harm and the actual harm caused that the imposition of constructive liability might be justified. In the absence of close proximity the imposition of constructive liability can hardly be warranted.

In view of the above discussion, although the Commission can be commended by their adherence to the correspondence principle, it maybe that they have gone too far with their reformed versions of sections 47 and 20. Rather than removing the constructive elements of these offences entirely, a more moderate form of constructive liability could have been made available.⁶⁵ And in this regard, if the offences are reformed in line with the Commission's recommendations, it will be interesting to see how strictly they are applied by the courts (ie, testing the courts application of subjective recklessness in cases where the risk of greater harm was objectively obvious).

Finally on the issue of correspondence, the Commission's full enforcement of this approach and recommendations as to sections 47 and 20 sits rather strangely with their recommended new offence of aggravated assault. To be liable for aggravated assault, although D must cause injury, D need only intend or be reckless as to the common assault.⁶⁶

Part III. Unexplored territory

Thus far my analysis has focused on the Commission's recommendations with regard to the ladder of offences, as well as the labelling and terminology used. In this final part I will turn my attention to issues which have remained relatively unexplored by the Commission. These issues include, amongst other, the definition of central concepts such as 'consent', 'recklessness' and 'intention', as well as the potential new offences of 'reckless transmission of disease' and 'domestic violence'.⁶⁷

To expect the Commission to deal with every aspect of these offences at this stage would be unreasonable since the main objective of this project is to set the framework for reform of the core offences. It is also accepted that focusing on the modernisation of the core offences only will make the prospect of reform more likely, as controversial issues are jettisoned. However, some issues, such as the definition of consent, form an integral part of this group of offences

⁶⁵ This approach is also favoured by Jackson and Storey. See above n.62 at 446-447.

⁶⁶ Above n.2 at para 5.47.

and they should have been addressed.⁶⁸ The importance of these issues lies in the fact that they determine to a great extent the nature of the offences and the circumstances under which D is to be held liable.

(a) Defining central concepts

As indicated above, the Commission's mandate was to review the non-fatal offences against the person and set the foundations for the modernisation and elucidation of the law in this area. In light of this, it would be reasonable to expect the Commission to thoroughly engage with every constituting element of these offences including the fault requirements; especially 'intention' and 'recklessness' which are the primary fault elements for the purposes of these offences. In the absence of a criminal code most of the general part of the criminal law, such as the fault requirements, is left to the common law which must give content to these principles. Hence, although a definition for these terms has already been provided through the common law, codification is generally advocated by both academics⁶⁹ and the Commission.⁷⁰ As it has already been acknowledged by the Commission, the codification of the criminal law can lead to greater consistency and clarity.⁷¹ Thus, it is rather surprising that the Commission did not seize the opportunity provided through this project to reiterate its position for codification.

What is even more concerning, however, is the reluctance of the Commission to deal with the concept of consent. Consent, is and will remain a central attribute of these offences if the Commission's scheme is adopted, since under certain circumstances liability is contingent upon V's lack of consent. If, for example, D used foul language against V and as a result of this V 'apprehended immediate personal violence', then D has committed an assault. If, however, V consented to the use of inappropriate language in this context, then D is excused from liability. Nevertheless, the current law has struggled to apply issues of consent consistently. Although it is well established that V's consent must be informed and effective in order to provide D with a valid defence,⁷² and that where ABH or greater harm is caused

⁶⁷ Ibid. at para 5.118.

⁶⁸ Ibid. at para 4.162

⁶⁹ For a more comprehensive analysis see: Above n.17 at 45-47.

⁷⁰ In its 1989 report the Commission did not advocate for the codification of certain offences or of parts of the criminal law, but it advocated for the creation of a criminal code for England and Wales. See: Law Commission, *Criminal Law: A Criminal Code for England and Wales*, Law Com. No. 177 (1989).

⁷¹ Ibid. at v.

⁷² Konzani [2005] EWCA Crim 706 at para 41.

then additional hurdles apply,⁷³ there is still uncertainty as to the normative position of consent in the context of the OAPA. In *Barnes*,⁷⁴ for example, consent has been regarded as an element of the offence rather than a defence.⁷⁵ In *Brown*,⁷⁶ however, the House of Lords endorsed a completely different approach which was premised around the argument that V's consent is a defence rather than an element of the offence.⁷⁷

At first sight, the issue as to whether consent should be regarded as an element of the offence or as a defence appears to be merely one of classification. However, the way in which the offence is articulated in this context is crucial for two main reasons. First, as indicated above, consent or the absence of consent is what distinguishes criminal behaviour from otherwise lawful conduct. To regard consent as an internal element of the offence is to acknowledge that the conduct at stake should only be considered as blameworthy if it is non-consensual.⁷⁸ To hold otherwise is to blur the distinction between lawful and unlawful use or threat of violence since our analysis will start from the premise that any infliction of harm is inherently unlawful. In this view, the law will consider everyday conduct among consenting individuals as blameworthy. Secondly, it relates to the onus of proof. Having consent as an element of the offence means that it will be for the prosecution to prove that V lacked consent or his consent was not informed and effective. If, however, consent is to be regarded as a defence, then it will be for the defence to prove that V provided an informed and effective consent to the activity at stake. Hence, it is contended that each of these terms require careful consideration and articulation if the new non-fatal offences are to be applied fairly and consistently.

(b) Potential new offences

The Commission's reluctance to engage with highly controversial issues is not limited to the codification of the main fault requirements and of consent. Although the Commission has thoroughly engaged with the core offences, it is rather disappointing that its analysis for some other offences has not been examined to its full potential. A good illustration of the former is the discussion regarding the introduction of a specific injury offence dealing with domestic violence. The Scoping Report concluded without analysing in depth the merits of this topic

⁷³ *Brown* [1994] 1 AC 212 at 244-245.

⁷⁴ *Barnes* [2005] EWCA Crim 3246.

⁷⁵ *Ibid.* at para 16.

⁷⁶ *Brown* [1994] 1 AC 212.

⁷⁷ S. Shute, 'Something Old, Something New, Something Borrowed: Three Aspects of the Project' (1996) Crim LR 684.

that the introduction of such an offence was unnecessary since there would be an overlap with section 76 of the Serious Crime Act 2015 (SCA) which deals with ‘controlling or coercive behaviour’ in a domestic setting.⁷⁹ At first sight, it is conceded that there is clearly an overlap between the conduct proscribed under the section 76 SCA offence and the kind of behaviour sought to be addressed by the Commission.⁸⁰ However, it is submitted that the Commission’s analysis in this context should have elaborated further on the section 76 offence by examining whether it can adequately address abusive behaviour of this nature. The fact that there is a *prima facie* overlap between two does not automatically mean that the existing offence should not be placed under scrutiny. Unfortunately, the Commission’s analysis was inadequate focusing solely on the potential overlap between the two offences rather on whether section 76 alone can sufficiently deal with abusive behaviour falling short of physical violence.

As to the latter, reference can be made to the Commission’s analysis on the reckless transmission of disease which did not reach to its full potential. As it has been explicitly acknowledged from the outset, this is a very complex and contentious topics and that a more comprehensive review for this area is needed.⁸¹ Still, however, the Commission sought to discuss various aspects of this topic, such as whether the reckless transmission of disease should be decriminalised, but its analysis did not extend to practical considerations. It is submitted that a number of ambiguities have been created through the way in which the courts interpreted and applied section 20 in this context. Hence, one would expect the Commission to discuss these loopholes in more detail and suggest ways through which they can be addressed. Avoiding the discussion of highly complex and controversial issues at this stage might increase the overall appeal of the Commission’s recommendations to the legislature. This is not to suggest that the Commission is oblivious of those loopholes. Rather, this is to suggest that the Commission should have addressed these loopholes at this stage rather than to call for a more comprehensive review in the future.

Two of the main causes for concern in this regard are the requirements of knowledge and unreasonableness. In the leading cases of *Dica*⁸² and *Konzani*,⁸³ Ds were aware of their HIV

⁷⁸ For a more sophisticated analysis see: G. Williams, ‘Consent and Public Policy’ (1962) Crim LR 74.

⁷⁹ Above n.2 at para 5.118.

⁸⁰ The Commission’s intention was for the proposed offence to deal with abusive behaviour which did not reach the threshold of physical violence, such as ‘keeping a person short of money’. See above n.3 at para 5.152.

⁸¹ Above n.2 at para 6.144.

⁸² [2004] EWCA Crim 1103.

⁸³ [2005] EWCA Crim 706.

status and unreasonably decided to run the risk of communicating the disease to their partners. For this reason there was no need for the Court of Appeal to explore the possibility of D not being sure as to his HIV status since in those cases it had already been established that Ds were conscious of the risk of transmitting the virus to the complainants. Thus, we currently lack clear guidance as to whether D will be liable in cases where he had no definite knowledge of his infection, but does foresee a significant risk and does not inform V about this risk.

According to the CPS's guidelines to its prosecutors, if D has decided to ignore an obvious risk, then it should be for the trier of fact to determine whether D had knowledge of the risk at stake.⁸⁴ A similar approach is adopted by the Commission as well which contends that the first limb of the recklessness test must only be satisfied if 'D is aware of specific information about him or herself that indicates a high level of probability of infection'.⁸⁵ At first sight, if the Commission's approach is examined in parallel with the CPS's guidelines, then it could be argued that at least an indication is provided as to the circumstances under which D will be regarded as having knowledge of the risk of transmitting a serious disease to V. However, this approach is open to criticism for granting extensive discretion to the trier of fact. Convictions and acquittals will rely primarily on the jury's moral intuition. Accordingly, this might cause uncertainty as to the degree of information required in order for the threshold of knowledge to be met.

The second cause for concern is the requirement of unreasonableness. In order for D to be held criminally liable for recklessly transmitting a disease, such as HIV, to V, his decision to expose V to the risk of transmission must be an unreasonable one. In other words, if D reasonably decided to jeopardise V's health, then D cannot be held liable if V was infected by the virus. Hence, even in the absence of disclosure D might evade liability by simply establishing that exposing V to the risk of transmission was not an unreasonable decision. V's informed consent to the risk of transmission will only be relevant if it is proven that: (i) D was aware of the fact that he was infected by the HIV; and (ii) his decision to engage in sexual intercourse with V was an unreasonable one. Setting aside the issue of knowledge for the moment, what has to be qualified here is the requirement of unreasonableness. Under what circumstances is D's decision to expose V to the risk of transmission a reasonable one?

It could be argued that, if D knew that his viral load was minimal, almost untraceable, and took every reasonable precaution, such as the use of a condom, to minimise the risk of infecting V even further, then his decision to run the risk of transmitting the disease to V was not an unreasonable one. This was also acknowledged in CPS's guidelines where it was explicitly stated that recklessness can hardly be established under the abovementioned circumstances.⁸⁶ Similarly, according to the Commission's account, if D's viral load is low, then his decision to expose V to the risk of transmission should not be regarded as an unreasonable one.

Although this approach appears to be sensible, it is submitted that we still lack precise guidance by as to the circumstances under which D's decision in this context might be regarded as a reasonable one. The Commission should have seized the opportunity provided through this project and have elaborated further on the concept of recklessness. What if D had a medium viral load, but used a condom? Would D's decision under these circumstances to expose V to the risk of transmission with a potentially fatal disease still be regarded as a reasonable one? Lack of clarity in this context causes uncertainty as to the true ambit of the criminal law. As indicated above, absence of fair warning is problematic since it does not allow the public to make an autonomous decision as to whether they wish to break the law or not.

Conclusion

As the title of this paper suggests, the Commission has been instructed once again to review the non-fatal offences against the person and present its recommendations. This project covered a wide range of issues including, amongst other, the terminology that must be adopted in case of reform and the basis upon which liability shall be established for this group of offences. The main objective of this article was to critically assess some of the Commission's most important recommendations and examine whether they should be implemented in case of reform. In addition, the Commission has been criticised for its reluctance to engage in more depth with a number of core issues, such as with the definitions of consent and recklessness. Although the Commission's recommendations provide a good starting point, it is submitted that a more comprehensive review of the non-fatal offences

⁸⁴ Crime Prosecution Service, Intentional or Reckless Sexual Transmission of Infection, available at http://www.cps.gov.uk/legal/h_to_k/intentional_or_reckless_sexual_transmission_of_infection_guidance/#Reckless last accessed 15 February 2016.

⁸⁵ Above n.2 at para. 6.18.

against the person is needed. In that review attention has to be paid to the practical problems identified in the current law and examine possible ways through which they can be addressed.

I understand and appreciate why the Commission decided to focus their recommendations on core offences only, highlighting issues of efficiency in Magistrates' Courts, and avoiding problem areas that raise too much controversy and complexity. I understand it, but I still think it is disappointing. If the Commission's recommendations are not acted upon then we are left with an important, but incomplete, addition to the scholarship. If it is acted up, and I hope it will be, one can only wonder when (if ever) those complicating factors omitted will gain legislative traction.

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⁸⁶ Above n.84.