**Getting Their “Act” Together? Implementing Statutory Reform of Offences against the Person**

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*In November 2015, the Law Commission published a scoping report on the future of offences against the person. Building on previous reform efforts, the report proposed reworked versions of these offences for inclusion in a new statute. This article critiques those plans. First, it summarises the background to the report. Secondly, it outlines the problems with the existing crimes. Thirdly, it examines the comparative coherence of the recast offences. Fourthly, it offers some concluding thoughts on the revised scheme of liability.*

**1. Introduction**

Law reform is a protracted affair. Nowhere is this more apparent than in attempts to update offences against the person. Following the Criminal Law Revision Committee’s review of these crimes in 1980,[[2]](#footnote-2) the Law Commission for England and Wales (the Commission) released no fewer than five related publications,[[3]](#footnote-3) culminating in a Home Office draft Bill in 1998 (the draft Bill).[[4]](#footnote-4) That Bill recommended a new hierarchy of offences which, to date, remains unimplemented.

Fast-forward to 2011 and, as part of its 11th Programme of Law Reform, the Commission was asked by the Ministry of Justice to carry out a scoping exercise on reform of offences against the person.[[5]](#footnote-5) The Commission issued a scoping consultation paper (SCP) on November 12, 2014 setting out: the present scheme of offences; the problems with those offences; previous attempts at reform; possible approaches to reform; and the unique difficulties of disease transmission.[[6]](#footnote-6) In respect of these last four matters, it posed 38 questions to consultees for response by February 11, 2015.[[7]](#footnote-7) On November 3, 2015 the Commission published its scoping report.[[8]](#footnote-8) In that document, it revealed it had received 53 replies to the SCP,[[9]](#footnote-9) with consultees drawn from, amongst other areas: the judiciary; general public; legal practice; police; Crown Prosecution Service; academia; and medical profession.[[10]](#footnote-10) Of the 32 respondents who commented on the need for reform, a large majority (28) favoured the creation of modernised offences via a new statute.[[11]](#footnote-11) The scoping report supports that idea, albeit with such a statute based on a modified version of the draft Bill.[[12]](#footnote-12) That strategy makes pragmatic sense: the draft Bill represents a ready-made and popular framework[[13]](#footnote-13) which offers the most likely way of achieving reform.[[14]](#footnote-14)

This article critiques the scoping report’s proposed changes to offences against the person. In particular, it concentrates on the three main crimes of violence contained in the Offences against the Person Act 1861 (OAPA). In order of seriousness, these are:

* “maliciously wounding or causing grievous bodily harm [(GBH)] with intent” under s.18;
* “maliciously wounding or inflicting GBH” under s.20; and
* “assault occasioning actual bodily harm [(ABH)]” under s.47.

Outside the OAPA, and lower down the seriousness hierarchy, the article also focusses on two further statutory offences: assault and battery.[[15]](#footnote-15) Beyond these five “core” crimes, it does not consider the remaining offences against the person, although these are addressed in the scoping report.[[16]](#footnote-16) Such offences, as contained in the OAPA, are undeniably problematic. For example, some are obsolete (“impeding a person escaping from a wreck” under s.17 or “not providing servants or apprentices with food” under s.26), whilst many are duplicated (“doing GBH by explosion” under s.28 and “exploding or sending a substance with intent to do GBH” under s.29). However, the article’s focus on the core crimes reflects their greater significance – they are the most prosecuted offences against the person.[[17]](#footnote-17)

With this focus in mind, the article proceeds in three sections. Section two identifies the chief problem with the core offences – incoherence. It evaluates this problem under three separate headings: conduct; fault; and punishment. These headings reflect the extent of that incoherence, the various features of which are documented throughout the SCP, case law and academic literature. Thereafter, section three examines the comparative coherence of the *new* core offences. In doing so, it considers matters of conduct, fault and punishment through *broader* reform controversies, namely: offence definition; disease transmission; and the role of consent. Reference to these longstanding controversies yields yet more insights into the rationality of the recast crimes. Finally, section four offers some concluding thoughts on the scoping report’s recommended offences.

**2. Offences against the person: identifying incoherence**

It is unsurprising that the OAPA is no longer fit for purpose. Even on its enactment it was only ever a consolidating statute, bringing together prohibitions that were already quite old. This explains why the core offences it contains seem ill-conceived. Similar challenges arise in the other core crimes of assault and battery. In this section, the article highlights the incoherence of these five offences according to the three factors outlined above: conduct; fault; and punishment. Significantly, this framework reveals how such incoherence manifests itself both within and across the core offences.

*Framing conduct*

Due to its status as a consolidating Act, the drafters of the OAPA made no effort to place the offences into a hierarchy of seriousness. As a result, the OAPA does not grade harmful conduct in a logical manner. It also does not clearly define that conduct. These are two of its key weaknesses, as emphasised in the SCP.[[18]](#footnote-18) Those weaknesses create confusion in the OAPA’s divisions of harm, an issue which extends to assault and battery.

(a) Sections 18 and 20

Such confusion can be seen at the top of the injury scale. Notably, in ss.18 and 20, the term “grievous” has become outdated. This has generated difficulties in articulating a precise definition of “grievous” bodily harm. In *DPP v Smith*,[[19]](#footnote-19) the House of Lords held that GBH meant “really serious harm”,[[20]](#footnote-20) implying that only *very* serious harm (as opposed to only serious or non-serious harm) satisfied the GBH threshold. However, *Janjua*[[21]](#footnote-21) has since interpreted GBH as meaning merely “serious harm”,[[22]](#footnote-22) thereby potentially broadening its ambit. *Golding*[[23]](#footnote-23)confirms that breadth: what counts as serious harm depends on “contemporary social standards”.[[24]](#footnote-24) Accordingly, the lack of criteria in delimiting GBH now permits a range of injuries to fall within its reach. These harms may be tangible (unconsciousness [[25]](#footnote-25); broken bones[[26]](#footnote-26)) or intangible (transmission of sexual disease[[27]](#footnote-27)).

Other terminological difficulties also appear in ss.18 and 20. In particular, the former speaks of “causing” GBH, whilst the latter refers to “inflicting” GBH. Previously, “inflict” was interpreted as implying *violence* – GBH had to result from a direct and hostile application of force. In contrast, “cause” required no such force – GBH could occur in *any* way. “Inflict” was consequently viewed as narrower than “cause”,[[28]](#footnote-28) *despite* s.18 being more serious than s.20 on grounds of mens rea.[[29]](#footnote-29) Usefully, *Ireland and Burstow*[[30]](#footnote-30) clarifies that “inflict” is synonymous with “cause”,[[31]](#footnote-31) meaning that principles of causation apply consistently across both offences. Further terminological discrepancies include the fact that s.20 may only be committed against “any *other* person”, whilst s.18 may be committed against “*any* person”. S.18 therefore proscribes *self*-harm which in the past might have been committed to escape service in the armed forces.[[32]](#footnote-32) Understandably, the linguistic challenges in ss.18 and 20 detract from their utility.

An additional curiosity in these sections is the fact that wounding sits alongside GBH as an alternative actus reus mode. Wounding is defined as a break in the continuity of the whole skin.[[33]](#footnote-33) Whilst a wound may amount to serious harm so as to feature justifiably in the same offence as GBH (for instance, stabbing with a knife), other wounds may constitute only minor harm so as to be incomparable to GBH (for example, pricking with a drawing pin).[[34]](#footnote-34) The 19th century rationale for equating a minor wound with a major harm was that even a minor wound could become easily infected, resulting in death. Given medical advances, that reasoning is now outdated. Of course, where a wound *is* equivalent to serious harm, it might be argued that wounding is redundant as an actus reus mode in ss.18 and 20: it should simply be subsumed within GBH. Lesser wounds could also be incorporated within lower forms of bodily harm.

(b) Section 47

Moving down the injury scale, it becomes evident that wounding and GBH overlap with the harm prohibited in the next offence: ABH under s.47. ABH is interpreted as any injury perpetrated by the defendant (D), calculated to interfere with the health or comfort of the victim (V).[[35]](#footnote-35) Such harm must be more than “transient or trifling.”[[36]](#footnote-36) This can include minor physical harm like the cutting of hair[[37]](#footnote-37) or temporary unconsciousness.[[38]](#footnote-38) Significantly, a wound “that does not amount to really serious injury” may be charged as ABH,[[39]](#footnote-39) even though it still satisfies the definition of a wound. Similarly, “serious” injuries will be charged as ABH where they do not attain the “exceptional gravity” of GBH. [[40]](#footnote-40) The practice of charging some wounds and serious harms under s.47 (instead of under the actus rei of ss.18 and 20) reflects a pragmatic need to capture the relevant injury under the most appropriate offence.[[41]](#footnote-41) This is a matter of fair labelling – convictions must only stigmatise and condemn in proportion to wrongdoing. Where s.18 or s.20 is charged, it remains open to a jury to convict under s.47,[[42]](#footnote-42) even if this offence is not included on the indictment.[[43]](#footnote-43) Inevitably, whether by selective charging or alternative jury verdicts, the practice of categorising wounds and serious injuries as ABH demonstrates a defect in the OAPA’s ladder of offences: it reveals a blurring of the harms proscribed in ss.18, 20 and 47. This suggests a fair warning problem: arguably, ss.18, 20 and 47 do not clearly convey in advance to citizens *how* their conduct will be censured if they break the law.

Aside from overlap, a further difficulty emergesacross these three offences. This concerns the stipulation in both GBH and ABH for “bodily” harm. That term is now meaningless: *Ireland and Burstow* confirms that injury to the *mind* also falls within GBH and ABH (depending on severity), assuming this amounts to a recognised psychiatric condition.[[44]](#footnote-44) An additional terminological oddity in s.47 is the need for an assault to “occasion” ABH. The word ‘”occasion” is not legally intelligible. Instead, it has been held that the assault must “cause” ABH,[[45]](#footnote-45) again confirming that regular causation rules apply. Moreover, it is not obvious why ABH is contingent upon an initial assault (or battery):[[46]](#footnote-46) why should the offence not be completed simply on proof that D caused ABH to V? The need for either of these two base offences is thought to preclude liability for *less* serious sexual disease transmission under s.47.[[47]](#footnote-47) This is because sexual infection is normally passed on via consensual sex – which is neither an assault nor a battery. Both of these crimes are considered next.

(c) Assault and battery

The provisions in ss.18, 20 and 47 relegate assault and battery to the bottom of the injury framework. These two offences require no harm: merely an invasion of body space. Battery occurs where D makes physical contact with V (however slight) which is not impliedly consented to as part of the interactions of everyday life.[[48]](#footnote-48) Unwanted touching of any form, whether direct or indirect, will suffice. The *mild* threshold for a battery means that, effectively, most minor injuries are *capable* of falling within ABH under s.47. This creates an overlap with s.47, mirroring the interaction between ss. 18/20 and 47. However, the Crown Prosecution Service (CPS) explains that injuries should not be charged as ABH where the harm done is not serious – that is, where the harm is not significant.[[49]](#footnote-49) Battery is more appropriate. Even where ABH is charged, battery constitutes a valid alternative verdict.[[50]](#footnote-50) Once again, these practices are pragmatic endeavours: they ensure that D’s conviction fairly labels the harm D has caused. They also acknowledge the sentencing and mode of trial disparities between battery and ABH.[[51]](#footnote-51) Nonetheless, such endeavours contribute to a further muddying of the harm distinctions in offences against the person which may frustrate fair warning yet more.

In contrast to battery, assault occurs where D does not make physical contact with V – instead, D causes V (by physical actions or mere words) to *apprehend* contact.[[52]](#footnote-52) It is not necessary for V to anticipate that contact will be made by D instantaneously, but the contact should be expected imminently.[[53]](#footnote-53) Examples of assault may include staring at someone through a window[[54]](#footnote-54) or writing threatening letters.[[55]](#footnote-55) Whilst assault and battery target distinct conduct, there remain uncertainties over how the two crimes co-exist. Even though they are independent offences, the term “assault” (or “common assault”) is frequently used as a generic label for assault *or* battery. This practice further impedes fair warning.[[56]](#footnote-56) The courts have attempted to correct that confusion by separating the offences as “common assault” and “assault by beating”.[[57]](#footnote-57) This continues to have implications for prosecutors who must draft the appropriate charge.[[58]](#footnote-58) Notwithstanding this problem, one common feature of assault and battery *is* clear: D may use V’s consent to harm as an answer to a charge under either offence. No liability will ensue. Importantly, such consent will *not* negate D’s liability for any harm caused above a battery, unless D does not intend or foresee that harm.[[59]](#footnote-59) Where such harm falls within a specified exception, D will also not be liable.[[60]](#footnote-60)

*Framing fault*

As with conduct, incoherence similarly features at the level of fault. Much of this concerns the imposition of constructive liability, although it also extends to assessment of culpability in disease transmission cases. Again, these tricky matters are highlighted by the SCP.[[61]](#footnote-61)

(a) Section 18

At the head of the injury hierarchy, the text of s.18 stipulates “malice” as the required mens rea standard. Nowadays, this term is understood as meaning intention or recklessness. However, despite this, s.18 can *only* be committed intentionally; recklessness is insufficient.[[62]](#footnote-62) Significantly, the actus reus of s.18 – wounding or causing GBH – attaches to two mens rea modes: intention as to causing GBH *or* intention as to resisting/preventing the lawful apprehension or detention of any person. This produces four variants of s.18:

1. wounding with intent to do GBH;
2. causing GBH with intent to do GBH;
3. wounding with intent to resist or prevent apprehension or detention; and
4. causing GBH with intent to resist or prevent apprehension or detention.

The mens rea of s.18 operates straightforwardly in variant 2. However, this is not the case in variant 1. Whilst s.18 may be committed by wounding, an intention to wound will *not* complete the crime – s.18 prescribes no such type of intention. Accordingly, the offence is not complete unless D wounds V with the *ulterior* intent to do GBH. Of course, where the wound is serious, an ulterior intent to do GBH will often be present, although s.20 is relied upon where D wounds V and no ulterior intent to do GBH can be established.

Meanwhile, variants 3 and 4 are particularly controversial. Here, there is a mismatch between the harm caused and the wholly different conduct intended. As Jefferson contends, pushing a drawing pin into a police officer’s arm whilst intending to resist arrest is worlds apart from the intentional lopping off of someone’s arm with a chainsaw. To call both scenarios the same crime appears perverse. [[63]](#footnote-63) Again, this raises fair labelling concerns at the point of conviction. Separately, under variants 3 and 4 there is authority that, in addition to intending to resist or prevent apprehension or detention, D must at least be reckless as to the possibility of causing injury.[[64]](#footnote-64) This sanctions *constructive* liability: D need only foresee injury – *not* wounding or GBH.[[65]](#footnote-65) Constructive liability contravenes the correspondence principle which holds that the mens rea of an offence should directly relate (“correspond”) to its actus reus.[[66]](#footnote-66) The correspondence principle ascribes great significance to individual autonomy (with its emphasis on subjective choice and control) and the rule of law (allowing individuals to plan their conduct).[[67]](#footnote-67) Constructive liability neglects these interests by penalising D for a result which was brought about but *not* intended or foreseen.[[68]](#footnote-68)

Some scholars have attempted to defend constructive liability. Gardner argues that it is acceptable because D causes a prohibited result from an initial criminal act. Assuming there was a choice about committing that initial act, such conduct changes D’s normative position with regard to any consequences (serious or otherwise) flowing from it.[[69]](#footnote-69) D thereby becomes criminally liable for those consequences, a prospect of which D has received fair warning “by the fact that the law to that effect was correctly promulgated, publicised, and so on”.[[70]](#footnote-70) Arguably, and as discussed by Ashworth, the “change of normative position” argument requires greater elaboration. More needs to be done to explain *why* D’s original behaviour *should* be accorded such far-reaching moral and legal significance in establishing liability for events outside his or her contemplation.[[71]](#footnote-71) At the very least, adherence to the correspondence principle should perhaps be the *default* approach to framing criminal liability, with departures from this carefully restricted and justified.[[72]](#footnote-72) Elsewhere, the presence of ulterior intent in variant 1 also breaches the correspondence principle, although this is not especially problematic – it does not create constructive liability. Rather, it only penalises individuals for results which they *did* intend but *failed* to bring about.

(b) Sections 20 and 47

Descending the injury scale, mens rea problems continue in ss.20 and 47. The former requires intention or recklessness – or “malice” on the text of the original offence – as to the causing of *some* bodily harm (not necessarily amounting to wounding or GBH).[[73]](#footnote-73) The latter specifies intention or recklessness as to the assault or battery which causes ABH – there is *no* additional mens rea stipulated as to the ABH itself.[[74]](#footnote-74) Both these offences create constructive liability in violation of the correspondence principle. This is especially marked in s.47. Here, the causing of ABH is the distinguishing feature of the crime – indeed, the offence is known as “ABH”. Yet D requires *no* awareness of potential *bodily* harm – the main ingredient of the actus reus.[[75]](#footnote-75) Rather, D’s state of mind need only relate to the initial assault or battery – that is, causing V to apprehend physical contact or making unwanted physical contact with V. In contrast, under s.20 D must at least intend or be reckless as to causing *some bodily* harm and so there is a smaller degree of difference between the actus reus and mens rea.[[76]](#footnote-76) Ultimately, irrespective of any such degree, both crimes unfairly label D on conviction given that the harm proscribed in either offence still lies *beyond* that envisaged by the mens rea. Inevitably, constructive liability in ss.20 and 47 also generates sentencing dilemmas: these are discussed below.[[77]](#footnote-77)

Away from correspondence, the mens rea of s.20 assumes particular importance in one key respect: transmission of sexual disease. Passing on serious sexual infection amounts to GBH, although it is rare that this is done intentionally under variant 2 of s.18. Consequently, in these cases, prosecutors tend to argue that D was at least *reckless* as to causing some bodily harm (of which serious sexual disease is a type) under s.20.[[78]](#footnote-78) Unfortunately, recourse to recklessness poses tricky questions: what degree of knowledge must D possess about his or her infected status before s/he is deemed to have been reckless? More generally under s.20, whilst V can consent to the risk of transmission – so as to absolve D of liability if V gets infected – how must V be “informed” of that risk? Must D disclose the risk or could V discover it from a third party? What state of mind must D hold about V’s informed consent? Is there legal equivalence between D not disclosing his or her infected status to V and D actively deceiving V of that status following enquiries by V? Current law fails to resolve these matters, although they are addressed as part of the scoping report’s reform proposals.[[79]](#footnote-79)

(c) Assault and battery

The mentes reae of assault and battery are intention or recklessness.[[80]](#footnote-80) In assault, these mental states must relate to V’s apprehension of physical contact; in battery they relate to making unwanted physical contact with V. The SCP did not feel there was anything unique to the mens rea tests of assault or battery that was particularly problematic.

*Framing punishment*

A final level of incoherence can be found in the sentences that the core offences contain. Often, these sentences are not consistently scaled across the offences, leading to an illogical framework of punishment.

(a) Sections 18 and 20

Immediately, challenges arise at the top of the injury ladder. In particular, there is a wide difference between the maximum sentences in ss.18 and 20 – life imprisonment and five years’ imprisonment, respectively. The SCP highlights that this is an enormous contrast given how the conduct elements of both offences are identical.[[81]](#footnote-81) Of course, it is true that the mens rea of s.18 (intentional serious harm in its most common forms – variants 1 and 2) marks that crime out as more grave than s.20 (where the mens rea focusses on intention *or* recklessness as to causing *some* bodily harm). This justifies a higher sentence for the former. However, the *jump* in penalty from s.20 to s.18 is huge. Arguably, the distinction in mens rea between ss. 18 and 20 – which are both crimes of violence, often featuring impulsive reactions to events – is not great enough to warrant that jump.[[82]](#footnote-82) Even *within* s.18, it is not clear that life imprisonment is a fair sanction. The SCP questions whether it is proportionate to have such a sentence available under variants 3 and 4, given the lack of parity in these situations between the harm caused and the conduct intended.[[83]](#footnote-83) Accordingly, there is an irony in the possibility that an individual may be guilty under variant 3 or 4 where they intended no physical harm to anyone, whilst another individual may wound under variant 1 but only be convicted under s.20 (and receive a substantially reduced sentence) because they only intended to cause harm in the form of wound – not GBH.[[84]](#footnote-84)

(b) Sections 20 and 47; assault and battery

As with s.20, the maximum penalty for s.47 is five years’ imprisonment. Straight away, this seems odd: why is committing ABH “morally tantamount” to wounding or causing GBH?[[85]](#footnote-85) Harm under the latter is surely not equivalent to harm under the former? Significantly, a contrast does emerge between the maximum sentence for assault and battery (6 months’ imprisonment) and that for s.47. CPS guidelines make it clear that battery (or “common assault”) should be charged where the injury is unlikely to lead to a sentence of more than 6 months’ imprisonment, even though the case could be charged under s.47. [[86]](#footnote-86) Conversely, s.47 should be charged where the sentence is probably going to be longer than 6 months’ imprisonment.[[87]](#footnote-87) The effect of this large gap in maximum sentences (s.47 – 5 years; common assault – 6 months), combined with the flexibility in charging, is to give prosecutors an unenviable task when selecting the appropriate charge. That task is made no easier by the fact that common assault is triable summarily only, whilst s.47 is triable either way. This can result in distorted charging decisions. Notably, there is an inducement to prosecute some serious cases as common assault, so as to dispose of these cases more quickly and efficiently in the magistrates’ courts. Conversely, there may be an inducement to prosecute some minor cases under s.47, so as to increase pressure on D to plead guilty to common assault as an included offence. Given that a significant number of s.47 cases are tried in the Crown Court, this can incur much greater trouble and expense – with the final sentence being one that could have been imposed by a magistrates’ court.[[88]](#footnote-88)

**3. The scoping report: new offences**

The incoherence in the law of offences against the person renders it confused and confusing. As such, and based on an overwhelmingly positive response from consultees,[[89]](#footnote-89) the scoping report recommends modernisation of these crimes via a new statute. It argues that this statute should adopt the crimes contained in the draft Bill, albeit with some amendments. The draft Bill is an appropriate model for change: it represents the culmination of numerous – and widely respected – reform efforts.[[90]](#footnote-90) That appropriateness is echoed by consultees in their responses to the SCP.[[91]](#footnote-91) In relation to the core offences, the scoping report suggests the following rank of crimes starting with the most serious:

1. “intentionally causing serious injury” – a replacement for s.18 and triable on indictment only (maximum sentence: life imprisonment);
2. “recklessly causing serious injury” – a replacement for s.20 and triable either way (maximum sentence: seven years’ imprisonment);
3. “intentionally or recklessly causing injury” – a replacement for s.47 and triable either way (maximum sentence: five year’s imprisonment);
4. “aggravated assault” – a new offence and triable summarily only (maximum sentence: twelve months’ imprisonment);
5. “physical assault” – a replacement for battery and triable summarily only (maximum sentence: six months’ imprisonment); and
6. “threatened assault” – a replacement for assault and triable summarily only (maximum sentence: six months’ imprisonment). [[92]](#footnote-92)

In this section, the article examines the coherence of these offences as compared with their current counterparts. In doing so, it considers issues of conduct, fault and punishment through three *broader* reform controversies: offence definition; disease transmission; and the role of consent. This approach provides an opportunity to assess the potential success of the proposed crimes from a wider perspective. Special emphasis is placed on the first controversy, not least because it permits evaluation of conduct, fault and punishment across all the new crimes. In contrast, the last two controversies concern discrete topics relating to specific offences. Both these controversies invoke matters of conduct and/or fault only.

*Defining offences against the person*

Section two argued that the incoherence of the existing core crimes stems from deficiencies in offence drafting. Consequently, it is vital that the scoping report addresses these challenges. Of course, debates about definition assume that offences against the person should be criminalised in the first place. Whilst legitimate, that assumption warrants explanation. This is because the processes of criminalisation and offence definition are linked: the latter hones our moral and legal grasp of the conduct proscribed by the former.[[93]](#footnote-93) As will be seen, such an explanation also helps clarify the grounds on which the scoping report continues the separate criminalisation of “threatened assault” and “physical assault” (replacing assault and battery, respectively).

In deciding what conduct should be criminalised, the Harm Principle remains a paradigmatic criterion.[[94]](#footnote-94) Whilst its role in this process is contested,[[95]](#footnote-95) it is helpful in delimiting the criminal law’s normative scope. Generally, it sanctions the criminalisation of conduct that is both harmful and wrongful, subject to balancing requirements such as the likely occurrence of the conduct and its gravity.[[96]](#footnote-96) It can be agreed that the Harm Principle permits criminalisation of offences against the person, including the core crimes. Notwithstanding consent,[[97]](#footnote-97) this is because ss.18, 20 and 47 cover behaviour which physically or psychiatrically damages bodily integrity to differing degrees. At a milder level, battery involves touching which interferes with bodily autonomy (if not integrity). These harms are wrong because they set back V’s pre-legal *entitlement* not to be so harmed. In respect of assault, it is true that no physical or psychiatric harm is suffered – only emotional harm. Nevertheless, the conduct which causes this harm is also wrong. That attitude is reflected in the scoping report. In recommending separate offences of “threatened assault” and “physical assault”, it confirms that both crimes target

“fundamentally *different* wrongs, particularly since assault includes *threatening* behaviour such as telephone calls that need not form the opening stage of an intended attack: it is *enough* that V apprehends that an attack will take place in the near future.”[[98]](#footnote-98)

In addition, these replacement offences more accurately label the harm with which each is concerned.

Accepting that offences against the person should be criminalised, attention next shifts to how the revised crimes define the harms and wrongs underpinning them. As part of this assessment, it is critical to evaluate the extent to which the new offences resolve the problems of conduct and fault outlined in section two. Furthermore, definition informs sentencing. The ensuing analysis therefore also assesses the framing of punishment as set out in the scoping report.

(a) Reflecting wrongdoing #1: offences 1, 2 and 3

It is noticeable that the scoping report defines offences 1, 2 and 3 according to *outcomes*. It organises these outcomes via a hierarchy of *general* harms. Offences 1 and 2 prohibit “serious injury” – this replacing “wounding” and “GBH” in ss.18 and 20. The removal of wounding as a specific harm *type* (and the retention of GBH as a *non*-specific outcome – now rephrased as “serious injury”) affirms the focus on general harm. Moreover, it signals that wounding no longer prima facie fits under the two most serious crimes. This formalises the fair labelling practice of charging wounds under the most appropriate offence available. Lower down the scale, offence 3 retains ABH as a general outcome – now reworded as “injury”. This reinforces the focus on general harm yet more. Additionally, offence 3 removes the requirement for an initial assault or battery.

The modernisation of language in the form of “serious injury” and “injury”, along with the removal of words like “inflict”, “bodily” and “occasioning”, represents an important updating of relevant terms. To be sure, “serious injury” and “injury” are readily understandable to the public as descriptions of harm.[[99]](#footnote-99) Like “wounding”, “grievous bodily harm” and “actual bodily harm”, they are condemnatory in tone, conveying the idea that it is wrong – and illegal – to cause such outcomes. This recognition of the actual harm caused is particularly important for the victims of these offences. Nonetheless, some might lament the loss of the current harm descriptions for the *moral* resonance they create in the public imagination. There is no denying that “wounding”, “grievous bodily harm” and “actual bodily harm” (along with the abbreviations “GBH” and “ABH”) are distinctly evocative. As Gardner states, they contain a “moral clarity which makes them accessible to the ordinary people who must be guided by them.”[[100]](#footnote-100) Consequently, it must be wondered whether the pursuit of textual certainty justifies the removal of *all* morally loaded harm-phrasing from offences against the person.[[101]](#footnote-101) These debates also have fair labelling implications on conviction. The descriptions “serious injury” and “injury” may not sufficiently distinguish the harmful outcome caused. For instance, Horder remarks that:

“Someone who deliberately breaks another's nose in punching him hard is lumped together in the same offence category – intentionally causing serious injury – as someone who deliberately saws another's leg off, puts out a victim's eyes, severs his spine or castrates him.”[[102]](#footnote-102)

Has the scoping report missed an opportunity to variegate outcomes in these more detailed ways? Ultimately, there is the concern that particularism in offence outcomes encourages technical arguments over whether D’s conduct falls within the relevant crime. The desire to avoid these strategies by describing more general – if morally sterilised – harms is understandable. Similarly, the absence in offences 1, 2 and 3 of any mention of *how* D has brought about the harmful outcome alludes to the practical difficulties of discerning between different modes of responsibility – for example, stabbing, cutting or piercing.[[103]](#footnote-103) This is a continuation of the status quo: ss.18, 20 and 47 are also silent on this matter.

Despite the focus on *general* outcomes, the scoping report specifies that “injury” means physical *and* mental harm. Once again, the latter must amount to a recognised psychiatric condition.[[104]](#footnote-104) Such conditions may therefore fall within offences 1, 2 and 3, depending on severity. This replicates the position in existing law under ss.18, 20 and 47.[[105]](#footnote-105) Disease transmission also amounts to “injury” so as to fall within offences 1, 2 and 3,[[106]](#footnote-106) although the likelihood of more minor infection being charged under offence 3 appears remote. Where the disease is not serious (thereby falling outside offences 1 or 2), liability for offence 3 will probably be avoided on grounds of mens rea. Assuming an intention to injure is absent, only recklessness will suffice. The latter requires, amongst other things, that the risk must have been an objectively unreasonable one to take *in the circumstances*.[[107]](#footnote-107) Many non-serious infections are transmitted between people all the time – an obvious example being the common cold. Clearly, it is objectively reasonable to run the risk of transmitting such illnesses in daily life.[[108]](#footnote-108) Problematically, this presupposes that distinctions between serious and non-serious diseases can be drawn. As the scoping report identifies, individuals have different susceptibilities and ailments that are regarded as “minor” may do more serious harm to one person than to another.[[109]](#footnote-109) Nonetheless, even in these situations, the possibility of transmission is still likely to be an *objectively* reasonable risk to take. Elsewhere, inclusion of *serious* disease transmission under offences 1 and 2 marks no change from current law: their equivalent crimes (ss.18 and 20) already include this harm within the meaning of GBH.[[110]](#footnote-110)

Overall, in defining conduct, the new hierarchy presents a simple and logical ladder of harms across offences 1, 2 and 3. It is therefore more intelligible to practitioners and the public. However, in some respects, the revised scheme of harms perpetuates existing problems. In particular, the scoping report is vague about the boundary between “serious injury” and “injury”. Of course, some degree of overlap in classifying harms is inevitable. However, the scoping report could have been clearer on this distinction. For example, it notes that the word “serious” remains ambiguous, before debating – without resolving – whether it might be preferable for offences 1 and 2 to require “exceptionally grave injury”.[[111]](#footnote-111) That extra layer of definition would have better delimited the severity of physical or mental suffering that isolates offences 1 and 2 from offence 3. It is therefore regrettable that the scoping report does not provide more precision on how “serious” should be understood, especially given that demand for precision on this issue is longstanding.[[112]](#footnote-112) At the moment, assuming the split between “serious injury” and “injury” mimics the actus rei divide between ss.18/20 and 47, the problems of overlap, fair warning and fair labelling that have long stalked the law may well persist. The uncertainty created by this gap would need addressing by CPS guidance, keeping in mind the point in *Bollom* that assessment of an injury’s seriousness must take into account the effect of the harm on the *particular* individual.[[113]](#footnote-113)

Notwithstanding these criticisms, offences 1 and 2 should be welcomed for containing requirements of fault (intention or recklessness, respectively, as to causing serious injury) which directly track the harm proscribed by those crimes (serious injury). This satisfies the correspondence principle: there is no constructive liability. This is surely good for fair warning.[[114]](#footnote-114) Moreover, fault corresponds with punishment. Offence 1 – which can only be committed intentionally – contains a higher sentence (life imprisonment) than that in offence 2 (seven years) which can only be committed recklessly. Such sentencing features are a vast improvement on those in ss.18 and 20 where neither necessarily accorded with D’s conduct or culpability. Unfortunately, that rule is not adhered to in offence 3. Here, the sentence (five years) is the same irrespective of D’s mens rea (intention *or* recklessness as to causing injury). As Eriera comments:

“This is not obviously rational. The greater seriousness of intentionally caused injury as compared with recklessly caused injury ought to be reflected in a difference in the maximum sentence available.”[[115]](#footnote-115)

Consequently, it might be doubted whether convicting intentional and reckless wrongdoers under the same offence amounts to fair labelling. Offence 3 now *also* houses those individuals who cause serious harm which is neither intended nor foreseen – under the OAPA such situations are governed by s.20 due to the imposition of constructive liability. The scoping report reveals that the CPS argued in its response to the SCP that serious injuries, however caused, ought to be labelled as such under offence 2 – and not offence 3.[[116]](#footnote-116) However, the Commission submits that this view presupposes that offence 3 is the “new” s.47 – effectively, a minor provision which theoretically deals with all injuries, however insignificant. In fact, as explained in the scoping report, offence 3 will only cover the more serious injuries falling within s.47 due to the proposed creation of a new assault-based crime (“aggravated assault”) which will deal with s.47’s less serious injury cases.[[117]](#footnote-117)

b) Reflecting wrongdoing #2: aggravated assault, physical assault and threatened assault

The scoping report maintains assault and battery as separate offences, albeit relabelled as “threatened assault” and “physical assault”, respectively. The actus rei of these crimes reflect their common law roots: applying force to, or causing an impact on, the body or another (physical assault); and causing another to think that any such force or impact is or may be imminent (threatened assault).[[118]](#footnote-118) Interestingly, “assault” conjures up a particular *mode* of responsibility which, when combined with the adjectives “physical” or “threatened”, implies the harmful outcome with which these offences are concerned. This sharpens understanding of the requisite outcomes more clearly than the singular labels “assault” and “battery”. Moreover, continued use of “assault” retains a moral as well as factual sense of the harms involved in these revised crimes. These references to mode of responsibility and moral character stand in stark contrast to their absences in offences 1, 2 and 3. Such observations confirm that the different harms prohibited by assault and battery will now be more accurately conveyed to the public as matters of fair warning. They will also be more fully captured on conviction. Both crimes can be committed intentionally or recklessly,[[119]](#footnote-119) with conviction for either resulting in a maximum sentence of six months’ imprisonment. Whilst these sentencing arrangements are the same as under current law, the fairness of drawing parity of punishment between physical and threatened assault has been questioned.[[120]](#footnote-120)

Meanwhile, above the two assault offences, but below offence 3, the scoping report introduces a brand new crime: aggravated assault. Unlike the continuation of the blurred boundary between “serious injury” and “injury”, this substantially minimises any overlap between “injury” and “physical assault” – a problem which affects the parallel offences of s.47 and battery. The offence requires intention or recklessness as to an initial physical or threatened assault which goes onto cause “some injury”.[[121]](#footnote-121) In existing law, harm amounting to “some injury” – that is, minor injury – is often mis-labelled: it can be under-charged as common assault (which does not recognise that *any* injury has been caused) or over-charged as ABH (which technically includes *all* minor injuries). If minor harms were to be charged under a crime of “aggravated assault”, the offence description would more precisely criminalise D according to the harm caused – there would be no under- or over-charging.[[122]](#footnote-122) One type of harm that will be difficult to fit under aggravated assault is disease transmission.[[123]](#footnote-123) As with s.47, this difficulty arises because of the need for a base offence of physical or threatened assault. Infection is not normally passed on via these forms of conduct.

A particularly noteworthy feature of aggravated assault is its imposition of constructive liability: mens rea is not needed in relation to causing “some injury”. Nonetheless, the scoping report defends this breach of the correspondence principle.[[124]](#footnote-124) Unlike ss.47 and 20, the base offence remains the *central* focus of D’s conduct, with the subsequent injury acting only as an *aggravating* characteristic. That characteristic is labelled on conviction and represented through a *proportionate* rise in maximum sentence – from six months for the base crime to twelve months in its aggravated form. The offence is triable summarily only, a factor which would save inordinate time and money. This is because many of the minor harms currently charged under s.47 would instead be tried in the magistrates’ courts. At present, such cases are often tried in the Crown Court despite the eventual punishment being one which would have come within the powers of the magistrates’ courts.[[125]](#footnote-125) Whilst s.78(1) of the Powers of Criminal Courts (Sentencing) Act 2000 (the 2000 Act) limits the sentencing powers of magistrates to six months’ imprisonment, the scoping report recommends an increase in that limit of up to twelve months – as permitted, but not yet commenced, by s.154 of the Criminal Justice Act 2003. In any event, higher sentencing limits for *individual* offences are allowed under s.78(2) of the 2000 Act. Assuming an extension of magistrates’ sentencing powers for aggravated assault, 73.5% of ABH cases now tried in the Crown Court would be tried in a magistrates’ court. If those powers were not extended, the proportion of ABH proceedings tried in a magistrates’ court would still be 34.5%.[[126]](#footnote-126) Procedurally, aggravated assault would be available as an alternative charge to offences 1, 2 and 3, whilst the two basic assault offences would, in turn, provide alternative charges to aggravated assault itself.[[127]](#footnote-127)

*Disease transmission*

Disease transmission is arguably the most controversial *type* of harm criminalised under the OAPA. Indeed, it gives rise to awkward issues of conduct and fault. As seen above, the scoping report suggests that transmission of serious disease remains a crime under offences 1 and 2, thereby preserving the position under ss.18 and 20. However, given the contentious nature of this liability, it recommends this as an *interim* measure, pending a wider review of the criminal law’s role in regulating this conduct.[[128]](#footnote-128) Under this arrangement, and like s.18, offence 1 will hardly be used given the rarity of *intentional* serious disease transmission. Rather, such transmission will usually be charged as reckless under offence 2. Seven consultees favoured this as an ongoing policy.[[129]](#footnote-129)

Evidently, many occurrences of serious disease transmission will continue to involve sexual illnesses. To date, recklessness has only been found in these situations where there is proof that D had *actual* knowledge of his or her infected status (for example, a full diagnosis).[[130]](#footnote-130) The scoping report leaves open the possibility that *suspicion* may be enough to ground recklessness in future cases. However, the report states that this should only work where D is personally aware of *specific* information that indicates a high probability of infection (for instance, a preliminary diagnosis). D’s membership of a high-risk group should not be sufficient.[[131]](#footnote-131) Usefully, the report also speculates that those who take precautions – such as using a condom or taking treatment which reduces viral load to an undetectable level – might avoid liability should these scenarios come before the courts at a later date.[[132]](#footnote-132) This is because D cannot be reckless where the risk assumed was a *reasonable one* *in the circumstances*.[[133]](#footnote-133) However, this could remove the requirement for D to disclose his or her infected status to V. One reason for having this requirement is that it gives V an opportunity to provide informed consent to the *risk* of transmission. The need for this disclosure – which, if successful in securing that consent, absolves D of liability – is strong in existing law, even if this does place a weighty burden on D. Nonetheless, the scoping report argues that informed consent need not necessarily originate from information disclosed by D to V. It may come from other means, such as V hearing from third parties that D has been positively tested for infection.[[134]](#footnote-134) Given the myriad contexts in which (non-)disclosure can operate, it may be preferable for this issue to be treated as a question of fact in each case, rather than laying down any firm rule that D either disclose in all instances or only some.[[135]](#footnote-135)

Unsurprisingly, numerous consultees objected to the continued criminalisation of disease transmission. In total, nine respondents supported decriminalisation.[[136]](#footnote-136) This recognises that such liability: discourages individuals from choosing to get tested (so as not to have the necessary knowledge for recklessness); and makes V excessively reliant on D’s disclosure (in that where D does not disclose, V will assume D is not infected – consequently, dis-incentivising V from asking D about his or her infected status or from taking precautions). However, the Commission doubted the validity of both these arguments. In relation to the former, it argued that it would take exceptional legal knowledge on D’s part to refrain from getting tested so as to avoid being found reckless, whilst simultaneously showing remarkable indifference to personal health and safety. In any case, if liability were extended to include suspicion, such conduct would be deemed reckless.[[137]](#footnote-137) Concerning the latter, it contended that decriminalisation would not distribute responsibility evenly between the two parties:

“If two people are confronting the same danger, and one of them is aware of it and the other is not, the primary blame for failing to avoid it must be that of the person who was aware. This must be all the more true when the danger is only to the party who was not aware.”[[138]](#footnote-138)

Nevertheless, the Commission did accept other arguments against criminalisation of disease transmission. In particular, it thought there was merit in the views that liability: discourages openness with (and by) medical professionals because they may have to give evidence against their patients; creates evidential difficulties in proving transmission which can be intrusive and disproportionate to the small number of individuals found deserving of prosecution; and exacerbates an atmosphere of (irrational) fear and prejudice against people infected with serious sexual disease.[[139]](#footnote-139) It also noted how criminalisation might thwart attempts to improve public health in this area.[[140]](#footnote-140) As a result, the option to decriminalise remains live in any forthcoming review.

The scoping report did not rule out a final choice – the crafting of a *specific* OAPA offence to deal with disease transmission. This was favoured by nine consultees,[[141]](#footnote-141) a key reason being that the crime would recognise the distinct wrongfulness of causing this special *type* of bodily harm (infection through otherwise consensual sexual intercourse).[[142]](#footnote-142) That wrongfulness may not be accurately conveyed (as either a matter of fair warning or fair labelling) via general offences against the person – which are mainly concerned with acts of violence. Ultimately, whether falling under a bespoke crime or offences 1 and 2, this liability envisages situations of *non*-disclosure: V does not ask and D does not tell. Criminalisation might operate differently where D *actively deceives* V about D’s infected status – and V has expressly made consent to sex conditional on D not being infected. In the wake of other active deception cases concerning conditional consent to sex (conditions including, for example, condom use or ejaculation[[143]](#footnote-143)), it is likely this would be rape: the deception would vitiate V’s freedom in choosing to consent to sex[[144]](#footnote-144) and D would have no reasonable belief in consent.[[145]](#footnote-145) However, difficult questions remain. Is it legitimate to distinguish such liability on grounds of non-disclosure and active deception? Do not both have the effect of vitiating V’s consent to sex once V discovers s/he has been infected by D?[[146]](#footnote-146) Or are these scenarios *differently* wrongful? Perhaps non-disclosure is an OAPA matter because it primarily harms V’s bodily integrity, whereas active deception is a sexual offence (currently rape) because it more clearly contravenes V’s sexual autonomy? Away from these uncertainties, the scoping report noted that a tailored OAPA offence might be problematic in other ways. For example, it contended that: the law ought not to discriminate between different injuries caused by different means; there were practical difficulties in selecting the diseases and modes of transmission to be protected against; and stigmatisation of infected people would increase.[[147]](#footnote-147) In the end, and despite problems with existing law on disease transmission, the Commission felt that these shortcomings militated against recommending a specific offence.

*The role of consent*

The scoping report confirms that consent will remain a factor which negates D’s liability for physical or threatened assault. Moreover, it clarifies that consent in these crimes is an ingredient of the offence – it is not a defence.[[148]](#footnote-148) Thus, it is a condition of the actus rei of physical and threatened assault that V does not consent. This resolves previous judicial uncertainty[[149]](#footnote-149) and is surely correct: in these crimes, V’s non-consent is an essential part of the wrongfulness of D’s conduct. Where V consents to either type of assault, but injury occurs which is neither intended nor foreseen, D will not be guilty of an offence.[[150]](#footnote-150) This replicates the current legal position.[[151]](#footnote-151) In relation to aggravated assault, the scoping report’s provisional view is that consent should always be an answer to that charge, whether or not any injury was intended or foreseen.[[152]](#footnote-152) Meanwhile, in offences 1, 2 and 3, the report announces that consent only exempts D from liability for causing injury to V in the context of certain accepted activities.[[153]](#footnote-153) This preserves the status quo: those activities include ritual male circumcision; tattooing; ear-piercing; violent sports; and surgery.[[154]](#footnote-154) The maintenance of this category-based approach to consent may be unfortunate. In future, instead of relying on ‘accepted activities’, a more progressive and nuanced strategy might be to allow consent to injury on a case-by-case basis, considering factors such as personal autonomy, V’s vulnerability, the act’s social utility and the severity of injury.[[155]](#footnote-155)

In the SCP, the Commission made it clear that it was not examining the definition or implications of consent as a factor affecting liability for offences of violence.[[156]](#footnote-156) Given the scale of its offences against the person reform project, its desire merely to clarify the existing law on consent – rather than embark upon a wholesale review of it – is understandable. Nevertheless, one wider incongruity concerning consent endures. In cases of disease transmission, where V does not ask D about D’s infected status and D omits to disclose that status, informed consent – by definition – is inoperative. D will potentially be liable for reckless transmission under s.20 (or offence 2 under the revised scheme), having not satisfied the burden of disclosure. This approach conflicts with consent and active deception as to infection in sexual offences. Here, the burden is on V to ask whether D is infected. Only if D then proceeds to deceive V about that status will V’s consent to sex be invalidated, resulting in a possible rape charge for D.[[157]](#footnote-157) This imbalance between disclosure and consent across sexual offences and offences against the person requires further attention. It doubtless has its roots in debates about the proper scope of these offences and how best to criminalise deceptions affecting bodily integrity and sexual autonomy.

**4. Conclusion**

The Commission’s reformulated offences against the person are the products of an extensive consultation and reform exercise. That exercise builds on decades of earlier work which laid the foundations for the scheme of crimes which the Commission now proposes. Both the SCP and scoping report provide thorough critiques of the current law, with very detailed consideration given to how the new hierarchy of offences should be framed. In turn, that hierarchy is logically structured. The crimes contained in it are coherent and sufficiently modernised, with the new offence of aggravated assault designed to criminalise minor harm more accurately. In doing so, it should also free the criminal justice system of expensive and time-consuming Crown Court trials in these cases. Inevitably, not all will be satisfied with the final recommendations. Overlaps between the more serious offences continue, whilst supporters and critics of constructive liability will be unhappy about the extent of its role in the new framework of liability. In the meantime, controversial issues like disease transmission and the role of consent await fuller attention at a later date. Aside from all this, the changes – if enacted – will usher in a brand new set of offences, consigning morally evocative and resonant descriptions like “grievous bodily harm” and “actual bodily harm” to legal history. At a practical level, this may be unremarkable. Yet as a feature of law reform it feels significant beyond the sentimental. This is perhaps due to the long-established nature of these expressive labels and the reticence of recent reform efforts elsewhere – notably those in other serious areas, such as homicide and sexual offences – to remove familiar offence names from the criminal law lexicon. However, notwithstanding this, the scoping report’s recast offences meet the demands for a fairer, clearer and more understandable set of offences against the person. On balance, qualities like these should be applauded as the Commission seeks to turn its proposals into law.

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2. 14th Report, Offences against the Person: (1980) Cmnd 7844. [↑](#footnote-ref-2)
3. Law Commission, *Codification of the Criminal Law: A Report to the Law Commission*: (1985) Law Com. No.143; Law Commission, *A Criminal Code for England and Wales* (2 vols): (1989) Law Com. No.177; Law Commission, *Legislating the Criminal Code: Offences against the Person and General Principles*: (1992) Law Com. C.P.122; Law Commission, *Offences against the Person and General Principles*: (1993) Law Com. No.218; Law Commission, *Consent and Offences against the Person*: (1994) Law Com. C.P.134. [↑](#footnote-ref-3)
4. (1998) Home Office, *Violence: Reforming the Offences against the Person Act 1861*. [↑](#footnote-ref-4)
5. *Eleventh Programme of Law Reform*: (2011) Law Com. No.330, paras 2.61–2.64. [↑](#footnote-ref-5)
6. Law Commission, *Reform of Offences against the Person: A Scoping Consultation Paper*: (2014) Law Com. C.P.217. [↑](#footnote-ref-6)
7. (2014) Law Com. C.P.217, Ch.5. [↑](#footnote-ref-7)
8. Law Commission, *Reform of Offences against the Person*: (2015) Law Com. No.361. [↑](#footnote-ref-8)
9. (2015) Law Com. No.361, para.3.9. [↑](#footnote-ref-9)
10. (2015) Law Com. No.361, Appendix A. [↑](#footnote-ref-10)
11. (2015) Law Com. No.361, para.3.10. [↑](#footnote-ref-11)
12. (2015) Law Com. No.361, paras 4.33 and 9.2. See also generally Ch.4. [↑](#footnote-ref-12)
13. Of the 28 respondents in favour of a new statute, 19 explicitly preferred using the 1998 draft Bill as a reform model: (2015) Law Com. No.361, para.4. 5. More generally, see also paras 4.6-4.8. [↑](#footnote-ref-13)
14. See also: A. Jackson and T. Storey, “Reforming Offences against the Person: In Defence of ‘Moderate’ Constructivism” (2015) 79 J. Crim. L. 437, 446. [↑](#footnote-ref-14)
15. Both offences are contained in s.39 of the Criminal Justice Act 1988, although they are still defined at common law: see “Assault and Battery” below. [↑](#footnote-ref-15)
16. See (2015) Law Com. No.361, Ch.5 (paras 5.69-5.118), Ch.7 and Ch.8. [↑](#footnote-ref-16)
17. The offences under ss.18, 20 and 47 generate at least 26,000 prosecutions a year. Assault and battery produce over 100,000 annual prosecutions: (2014) Law Com C.P.217, para.1.3. See also paras 2.133 (s.18); 2.111 (s.20); 2.72 (s.47); and 2.41 (assault and battery). In comparison, the non-core crimes result in only a few prosecutions each year, with some of these offences never encountered in practice: (2014) Law Com. C.P.217, para.1.3. [↑](#footnote-ref-17)
18. See (2014) C.P. 217, paras 3.16–3.21; 3.69-3.78; 3.86-3.90. [↑](#footnote-ref-18)
19. [1961] A.C. 290 HL. [↑](#footnote-ref-19)
20. per Viscount Kilmuir L.C. at 334. [↑](#footnote-ref-20)
21. [1999] 1 Cr. App. R. 91 CA. [↑](#footnote-ref-21)
22. per Curtis J. at 97. [↑](#footnote-ref-22)
23. [2014] EWCA Crim 889. [↑](#footnote-ref-23)
24. See K. Laird, “R v Golding” [2014] Crim L.R. 686, 689. [↑](#footnote-ref-24)
25. *Hicks* [2007] EWCA Crim 1500, per Toulson L.J. at [33]–[34]. [↑](#footnote-ref-25)
26. *Wood* (1830) 168 E.R. 1271. [↑](#footnote-ref-26)
27. This includes transmission of HIV (*Dica* [2004] EWCA Crim 1103, (2004) 2 Cr. App. R 28; *Konzani* [2005] EWCA Crim 706, (2005) 2 Cr. App. R 14) and genital herpes (*Golding*). Such liability is considered in more detail below: see “Reflecting Wrongdoing #1”, “Reflecting Wrongdoing #2” and “Disease Transmission”. [↑](#footnote-ref-27)
28. See *Clarence* (1888) 22 Q.B.D. 23 HC. [↑](#footnote-ref-28)
29. The difference in mens rea between ss.18 and 20 is outlined below. See “Framing Fault” and “Framing Punishment”. [↑](#footnote-ref-29)
30. [1998] A.C. 147 HL. [↑](#footnote-ref-30)
31. per Lord Hope at 164. [↑](#footnote-ref-31)
32. See M. Jefferson, “Offences against the Person: Into the 21st Century” (2012) 76 J. Crim. L. 472, 483. [↑](#footnote-ref-32)
33. *C v Eisenhower* [1984] Q.B. 331 HC, per Robert Goff L.J. at 340. [↑](#footnote-ref-33)
34. This also creates sentencing controversies. See discussion below: “Framing Punishment”. [↑](#footnote-ref-34)
35. *Miller* (1954) 38 Cr. App. R. 1 (Assizes, Winchester), per Lynskey J. at 10. [↑](#footnote-ref-35)
36. *Donovan* (1936) 25 Cr. App. R. 1 CA, per Swift J. at 13. [↑](#footnote-ref-36)
37. *DPP v Smith* [2006] EWHC 94 (Admin); [2006] 2 Cr. App. R. 1, per Sir Igor Judge P. at 4. [↑](#footnote-ref-37)
38. *T v DPP* [2003] EWHC 266 (Admin); [2003] Crim L.R. 622. [↑](#footnote-ref-38)
39. (2014) Law Com. C.P.217, para.2.103. [↑](#footnote-ref-39)
40. The Crown Prosecution Service (CPS) states that s.47 may be used where “injuries are serious”: CPS, *Legal Guidance: Offences against the Person, Incorporating the Charging Standard*: http://www.cps.gov.uk/legal/l\_to\_o/offences\_against\_the\_person/#a15 [accessed March 14, 2016]. However, the Commission makes clear that under s.47 the CPS is using “serious” to mean “significant”, as distinguished from “of exceptional gravity” in the context of GBH: (2014) Law Com C.P.217, para.2.34. [↑](#footnote-ref-40)
41. Admittedly, as between ss.20 and 47, this pragmatism makes no difference at sentencing. See below: “Framing Punishment”. [↑](#footnote-ref-41)
42. The s.18 offence includes both the ss.20 and 47 offences: *Mandair* (1994) 99 Cr. App. R. 55 CA. [↑](#footnote-ref-42)
43. (2014) Law Com C.P.217, para.2.105. The s.20 offence also includes the s.47 offence: *Wilson and Jenkins* [1984] A.C. 242 HL, per Lord Roskill at 261. [↑](#footnote-ref-43)
44. per Lord Steyn at 159. *Dhaliwal* [2006] EWCA Crim 1139; [2006] 2 Cr. App. R. 24 rules that psychological injury, not amounting to a recognised psychiatric condition, cannot amount to “bodily harm”: per Sir Igor Judge P. at [31]. [↑](#footnote-ref-44)
45. *Roberts* (1972) 56 Cr. App. R. 95 CA, per Stephenson L.J. at 99–100. [↑](#footnote-ref-45)
46. In s.47, the word “assault” is taken to include both assault and battery: (2014) Law Com. C.P.217, para.2.50. [↑](#footnote-ref-46)
47. (2014) Law Com. C.P.217, para.2.54. [↑](#footnote-ref-47)
48. *Collins v Wilcock* [1984] 1 W.L.R. 1172 HC, per Robert Goff L.J. at 1177. [↑](#footnote-ref-48)
49. CPS, *Legal Guidance: Offences against the Person, Incorporating Charging Standard*: http://www.cps.gov.uk/legal/l\_to\_o/offences\_against\_the\_person/#a15 [accessed March 17, 2016]. See also (2014) Law Com. C.P.217, paras 2.34 and 2.67. [↑](#footnote-ref-49)
50. Whilst battery (like assault) is a summary only offence, it remains available as an alternative verdict to ss.18, 20 and 47. This is true even though these first two crimes are indictable only and the third may still be tried on indictment as an “either way” offence. See the Commission’s discussion at: (2014) Law Com. C.P.217, paras 2.105 and 5.201. [↑](#footnote-ref-50)
51. This is explored more below: see “Framing Punishment”. [↑](#footnote-ref-51)
52. *Ireland and Burstow*, per Lord Steyn at 161–162. [↑](#footnote-ref-52)
53. *Ireland and Burstow*, per Lord Steyn at 161. [↑](#footnote-ref-53)
54. *Smith v Chief Superintendent of Woking Police Station* (1983) 76 Cr. App. R. 234 HC, per Kerr L.J. at 237–238. [↑](#footnote-ref-54)
55. *Constanza* [1997] 2 Cr. App. R. 492 CA, per Schiemann L.J. at 496. [↑](#footnote-ref-55)
56. Some argue that it is “pedantry” to distinguish between assault and battery. Instead, “assault” should be used to cover both types of harm: A. Simester and G. Sullivan et al, *Simester and Sullivan’s Criminal Law*, 5th edn (Oxford: Hart Publishing, 2013), pp.430–431. However, the Commission maintains that they are different offences: (2014) Law Com. C.P.217, paras 2.8–2.11. See also below: “Defining Offences against the Person”. [↑](#footnote-ref-56)
57. *Nelson* [2013] EWCA Crim 30; [2013] 1 Cr. App. R. 30, per Keith J. at [3]. [↑](#footnote-ref-57)
58. (2014) Law Com. C.P.217, para.5.34. [↑](#footnote-ref-58)
59. *Meachen* [2006] EWCA Crim 2414, per Thomas L.J. at [40]. [↑](#footnote-ref-59)
60. For further discussion, see “The Role of Consent” below. [↑](#footnote-ref-60)
61. See (2014) Law Com. C.P.217, para.3.38-3.58.; 6.24-6.45. [↑](#footnote-ref-61)
62. *Re: Knight’s Appeal* (1968) FLR 81. [↑](#footnote-ref-62)
63. Jefferson, “Offences against the Person: Into the 21st Century” (2012) 76 J. Crim. L. 472, 484. For the sentencing implications of this, see below: “Framing Punishment”. [↑](#footnote-ref-63)
64. *Morrison* (1989) 89 Cr. App. R. 17 CA, per Lord Lane C.J. at 20. [↑](#footnote-ref-64)
65. This point remains unresolved after *Morrison*: see A. Ashworth and J. Horder, *Principles of Criminal Law*, 7th edn (Oxford: Oxford University Press, 2013), p.312. [↑](#footnote-ref-65)
66. Ashworth and Horder, *Principles of Criminal Law* (2013), p.75. [↑](#footnote-ref-66)
67. Ashworth and Horder, *Principles of Criminal Law* (2013), p.75. [↑](#footnote-ref-67)
68. (2014) Law Com. C.P.217, para.3.42. [↑](#footnote-ref-68)
69. J. Gardner, “Rationality and the Rule of Law in Offences against the Person” (1994) 53 C.L.J. 502, 508-509. [↑](#footnote-ref-69)
70. J. Gardner, “On the General Part of the Criminal Law”, in A. Duff (ed), *Philosophy and the Criminal Law: Principle and Critique* (Cambridge: Cambridge University Press, 1998), 244. The presence of fair warning in offences of constructive liability is debatable – see fn. 113 below. [↑](#footnote-ref-70)
71. A. Ashworth, “A Change of Normative Position: Determining the Contours of Culpability in Criminal Law” (2008) 11 New Crim. L. Rev 232, 255-256. For a more recent defence of the “change of normative position” argument, see K. Simons, “Is Strict Liability in the Grading of Offences Consistent with Retributive Desert?” (2012) 32 O.J.L.S. 445. [↑](#footnote-ref-71)
72. (2015) Law Com. No.361, para.4.97. Constructive liability is discussed more in relation to the Commission’s new scheme of offences: see “Reflecting Wrongdoing #1” and “Reflecting Wrongdoing #2”. [↑](#footnote-ref-72)
73. *Mowatt* [1968] 1 Q.B. 421 CA, per Diplock L.J. at 426. [↑](#footnote-ref-73)
74. *Savage and Parmenter* [1992] 1 A.C. 699 HL, per Lord Ackner at 742. [↑](#footnote-ref-74)
75. (2014) Law Com. C.P.217, paras 3.46-3.48. [↑](#footnote-ref-75)
76. (2014) Law Com. C.P.217, para.3.51. However, arguably there is still a leap from ‘some’ harm to GBH. [↑](#footnote-ref-76)
77. See “Framing Punishment”. [↑](#footnote-ref-77)
78. In *Dica*, *Konzani*, *Golding* – the main appellate decisions on sexual disease transmission (see fn. 26 above) – the courts had no trouble in basing liability for s.20 GBH on recklessness. [↑](#footnote-ref-78)
79. For discussion, see “Reflecting Wrongdoing #1” and “Disease Transmission”. [↑](#footnote-ref-79)
80. *Venna* [1976] QB 421 CA, per James L.J. at 429. [↑](#footnote-ref-80)
81. (2014) Law Com C.P.217, para.3.26. [↑](#footnote-ref-81)
82. Ashworth and Horder, *Principles of Criminal Law* (2013), p.313. [↑](#footnote-ref-82)
83. (2014) Law Com C.P.217, para.3.26. [↑](#footnote-ref-83)
84. A. Eriera, “Offences against the Person: Offending Rationality” (2007) Cambridge Student L.R. 22, 24. [↑](#footnote-ref-84)
85. Eriera, “Offences against the Person: Offending Rationality” (2007) Cambridge Student L.R. 22, 26. For a defence of the sentences in ss.20 and 47 based on an alternative account of these offences, see Gardner, “Rationality and the Rule of Law in Offences against the Person” (1994) 53 C.L.J. 502, 507-511. [↑](#footnote-ref-85)
86. CPS, *Legal Guidance: Offences against the Person, Incorporating Charging Standard*: http://www.cps.gov.uk/legal/l\_to\_o/offences\_against\_the\_person/#a15 [accessed March 23, 2016]. See also (2014) Law Com C.P.217, para.2.66. [↑](#footnote-ref-86)
87. CPS, *Legal Guidance: Offences against the Person, Incorporating Charging Standard*: http://www.cps.gov.uk/legal/l\_to\_o/offences\_against\_the\_person/#a15 [accessed March 23, 2016]. See also (2014) Law Com C.P.217, para.2.66. [↑](#footnote-ref-87)
88. (2014) Law Com C.P.217, paras 3.21 and 5.92. [↑](#footnote-ref-88)
89. See fn. 10 above. Not all consultees supported reform. Some argued, amongst other things, that the current offences worked well in practice and that any defects in language and structure were relatively unimportant. Ultimately, they suggested more piecemeal changes to the law. See (2015) Law Com. No.361, para.3.12. [↑](#footnote-ref-89)
90. (2014) Law Com C.P.217, para.4.6 [↑](#footnote-ref-90)
91. See fn. 12 above. [↑](#footnote-ref-91)
92. See the Law Commission’s “Table of Existing and New Offences” for the full list of current and replacement crimes: http://www.lawcom.gov.uk/wp-content/uploads/2015/11/lc361\_offences\_against\_the\_person\_table.pdf [accessed March 25, 2016]. [↑](#footnote-ref-92)
93. For further insight, see J. Horder, “The Classification of Crimes and the Special Part of Criminal Law”, in A. Duff and S. Green (eds), *Defining Crimes: Essays on the Special Part of the Criminal Law* (New York: Oxford University Press, 2005), p.23. [↑](#footnote-ref-93)
94. Notably, see J. Feinberg, *The Moral Limits of the Criminal* Law (Vols 1 – 4) (New York: Oxford University Press, 1984 – 1988). For more recent studies, see A Simester and A. von Hirsch, *Crimes, Harms and Wrongs* (Oxford, Oxford University Press, 2011), along with the contributions in A. Duff, L. Farmer, S. Marshall, M. Renz and V. Tadros (eds), *The Boundaries of the Criminal Law* (Oxford, Oxford University Press, 2010). [↑](#footnote-ref-94)
95. For example, see A. Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford, Hart Publishing, 2009), Ch.6. [↑](#footnote-ref-95)
96. Feinberg, *The Moral Limits of the Criminal Law Volume 1: Harm to Others* (1984), p.216. [↑](#footnote-ref-96)
97. Discussed further below: see “The Role of Consent”. [↑](#footnote-ref-97)
98. (2015) Law Com. No.361, para.5.17 (emphases added). [↑](#footnote-ref-98)
99. (2015) Law Com. No.361, paras 4.20 and 4.26. [↑](#footnote-ref-99)
100. Gardner, “Rationality and the Rule of Law in Offences against the Person” (1994) 53 C.L.J. 502, 516. [↑](#footnote-ref-100)
101. Gardner, “Rationality and the Rule of Law in Offences against the Person” (1994) 53 C.L.J. 502, 517-518. See also consultee responses: (2015) Law Com. No.361, para.4.21. [↑](#footnote-ref-101)
102. J. Horder, “Rethinking Non-Fatal Offences against the Person” (1994) 14 O.J.L.S. 335, 342; 344. [↑](#footnote-ref-102)
103. Horder, “Rethinking Non-Fatal Offences against the Person” (1994) 14 O.J.L.S. 335, 341. [↑](#footnote-ref-103)
104. (2015) Law Com. No.361, para.4.126. [↑](#footnote-ref-104)
105. See fn. 43 above. [↑](#footnote-ref-105)
106. (2015) Law Com. No.361, para.6.143. The implications of this are discussed below: see “Disease Transmission”. [↑](#footnote-ref-106)
107. *G* [2003] UKHL 50; [2004] 1 A.C. 1034, per Lord Bingham at [41]. [↑](#footnote-ref-107)
108. (2015) Law Com. No.361, paras 6.130 and 6.146. Although see G. Mawhinney, “To Be Ill or to Kill: The Criminality of Contagion” (2013) 77 J. Crim. L. 202. [↑](#footnote-ref-108)
109. (2015) Law Com. No.361, para.6.124. [↑](#footnote-ref-109)
110. See fn. 26 above. [↑](#footnote-ref-110)
111. (2015) Law Com. No.361, para.4.44. [↑](#footnote-ref-111)
112. See Simester and Sullivan et al, *Simester and Sullivan’s Criminal Law* (2013), p.460; A. Ashworth, *Principles of Criminal Law*, 6th edn (Oxford: Oxford University Press, 2009), p.323. [↑](#footnote-ref-112)
113. [2003] EWCA Crim 2846; [2004] 2 Cr. App. R. 6, per Fulford J. at [52] (emphasis added). [↑](#footnote-ref-113)
114. (2015) Law Com. No.361, para.4.97. [↑](#footnote-ref-114)
115. Eriera, “Offences against the Person: Offending Rationality” (2007) Cambridge Student L.R. 22, 29. [↑](#footnote-ref-115)
116. (2015) Law Com. No.361, para.4.82. [↑](#footnote-ref-116)
117. (2015) Law Com. No.361, para.4.86. For analysis of “aggravated assault”, see directly below: “Reflecting Wrongdoing #2”. [↑](#footnote-ref-117)
118. (2015) Law Com. No.361, para.5.29. [↑](#footnote-ref-118)
119. (2015) Law Com. No.361, para.5.29. [↑](#footnote-ref-119)
120. Eriera, “Offences against the Person: Offending Rationality” (2007) Cambridge Student L.R. 22, 29. [↑](#footnote-ref-120)
121. (2015) Law Com. No.361, para.5.68. [↑](#footnote-ref-121)
122. (2015) Law Com. No.361, paras 5.43-5.44. See also V. Scully, “Reforming Offences against the Person – Seventh Time Lucky?” (2015) 10 Arch. Rev. 4, 5. [↑](#footnote-ref-122)
123. (2015) Law Com. No.361, para.6.131. [↑](#footnote-ref-123)
124. (2015) Law Com. No.361, para.5.52. [↑](#footnote-ref-124)
125. See above fn. 87. [↑](#footnote-ref-125)
126. (2015) Law Com. No.361, para.5.55. [↑](#footnote-ref-126)
127. (2015) Law Com. No.361, para.5.67. [↑](#footnote-ref-127)
128. (2015) Law Com. No.361, paras 6.140-6.142. [↑](#footnote-ref-128)
129. (2015) Law Com. No.361, paras 6.41 and 6.44. [↑](#footnote-ref-129)
130. See *Dica*, *Konzani* and *Golding*: fn. 26 above. [↑](#footnote-ref-130)
131. (2015) Law Com. No.361, paras 6.17-6.18. [↑](#footnote-ref-131)
132. See also J. Chalmers, *Legal Responses to HIV and AIDS* (Oxford: Hart Publishing, 2008), D. Hughes, “Condom Use, Viral Load and the Type of Sexual Activity as Defences to the Sexual Transmission of HIV” (2013) 77 J. Crim. L. 136 and K. Harker and E. Wright, “The HIV Stigma: Duty or Defence?” (2015) UCL J. L. and J. 55. [↑](#footnote-ref-132)
133. (2015) Law Com. No.361, para.6.19. [↑](#footnote-ref-133)
134. (2015) Law Com. No.361, paras 6.21-6.23. Similar comments are also made in *Konzani*, per Judge L.J. at [44]. [↑](#footnote-ref-134)
135. For further discussion, see S. Ryan, “Disclosure and HIV Transmission” (2015) 79 J. Crim. L. 395. [↑](#footnote-ref-135)
136. (2015) Law Com. No.361, para.6.41. [↑](#footnote-ref-136)
137. (2015) Law Com. No.361, paras 6.70-6.75. [↑](#footnote-ref-137)
138. (2015) Law Com. No.361, para.6.78. [↑](#footnote-ref-138)
139. (2015) Law Com. No.361, paras 6.68-6.69. [↑](#footnote-ref-139)
140. (2015) Law Com. No.361, paras 6.80-6.88. [↑](#footnote-ref-140)
141. (2015) Law Com. No.361, para.6.41. [↑](#footnote-ref-141)
142. For instance, see respondent comments at (2015) Law Com. No.361, para.6.46. Other proposals for a specific offence of disease transmission include those outlined by Cherkassky and Slater: see L. Cherkassky, “Being Informed: The Complexities of Knowledge, Deception and Consent When Transmitting HIV” (2010) 74 J. Crim. L. 242 and J. Slater, “HIV, Trust and Criminal Law” (2011) J. Crim. L. 309. [↑](#footnote-ref-142)
143. See *Assange v Sweden* [2011] EWHC 2849 (Admin) and *F v DPP* [2013] 2 Cr App R 21, respectively. [↑](#footnote-ref-143)
144. S.74 of the Sexual Offences Act 2003. [↑](#footnote-ref-144)
145. S.1(1)(a) of the Sexual Offences Act 2003. [↑](#footnote-ref-145)
146. On this point, see Slater, “HIV, Trust and Criminal Law” (2011) J. Crim. L. 309, 317. Sharpe also discusses this distinction: see A. Sharpe, “Expanding Liability for Sexual Fraud Through the Concept of ‘Active Deception’: A Flawed Approach” (2016) 80 J. Crim. L. 28. [↑](#footnote-ref-146)
147. (2015) Law Com. No.361, para.6.108-6.114. [↑](#footnote-ref-147)
148. (2015) Law Com. No.361, para.5.25. [↑](#footnote-ref-148)
149. In *Brown* [1994] 1 A.C. 212 HL, the majority interpreted consent as a defence whilst the minority believed it to be part of the offence. In *Barnes* [2004] EWCA Crim 3246; (2005) 1 Cr. App. R. 30, Lord Woolf submitted at [17] that “it is a requirement of the offence that the conduct itself should be unlawful.” [↑](#footnote-ref-149)
150. (2015) Law Com. No.361, para.5.25. [↑](#footnote-ref-150)
151. See fn 58 above. [↑](#footnote-ref-151)
152. (2015) Law Com. No.361, para.5.63. [↑](#footnote-ref-152)
153. (2015) Law Com. No.361, para.4.167. [↑](#footnote-ref-153)
154. per Lord Templeman in Brown at 231. [↑](#footnote-ref-154)
155. See generally: J. Tolmie, “Consent to Harmful Assaults: The Case for Moving Away from Category Based Decision Making” [2012] Crim. L.R. 656. [↑](#footnote-ref-155)
156. (2014) Law Com C.P.217, para.2.55. [↑](#footnote-ref-156)
157. This point is made by K. Laird: “Rapist or Rogue? Deception, Consent and the Sexual Offences Act 2003” [2014] Crim. L.R. 492, 501. See also (2015) Law Com. No.361, para.6.123. [↑](#footnote-ref-157)