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Should We Reform the Offences Against the Person Act 1861?

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Abstract

In this article, I consider the non-fatal offences central to our criminal justice system and why the proposed reform would increase much needed efficiency and clarity. The legislation governing these offences is over 150 years old and Modern society has evolved since the Victorian era. Many offences have been time restricted, with only judicial interpretation available to tackle this outdated legislation. Another issue is the flawed hierarchy of offences, with an increasing number of litigants-in-person compounded with economic inefficiencies within the system, urgent reform is necessary. Practitioners and academics from various strata have clamoured for reform, one complaint being that the archaic language has created unnecessary procedural complexity. There are also economic arguments for reform, making elements of an offence more clear and succinct could bring many cases in the Crown Court down to the cheaper Magistrates' Court. Reform would increase cost and time efficiency.

The Law Commission and the Home Office have attempted to discuss OAPA reform for over a decade. However, there has been relative silence on this issue from the Ministry of Justice. There is political difficulty which inevitably surrounds any reform of the Criminal Law and others less enthused by reform are discussed. However, it is in the public interest that the piece of legislation affecting the lives of many is efficient and does not alienate anyone to whom it is applicable. The transmission of disease in the context of non-fatal offences is another topic that is discussed within the article.

Keywords

Offences Against the Person Act, non-fatal offences reform, sentencing, assault, criminal legislation

Background

The controversial and much-debated issue of the Offences Against the Person Act 1861 (OAPA) will be re-examined as an example of outdated legislation in need of reform. Since the 1980s there have been six

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attempts at reform through governmental documents, including a Law Commission consultation paper in 1992. The overwhelming judicial and academic backing led to the Home Office Draft Bill 1998, a basis for the current proposed reforms. At different levels of our criminal justice system there has been a consensus. The police, judiciary and practitioners all believe that urgent reform would increase much-needed efficiency. The Law Commission consulted with a variety of individuals involved in the criminal justice system to assess the general support for change. Eighty-eight per cent agreed that the OAPA is in urgent need of reform. Their Scoping Consultation Paper (SCP) was released in 2015; still the Ministry of Justice has remained silent on the issue. The law on violent and non-fatal offences should be modernised for a logical, coherent and comprehensible process, both for practitioners and the public.

The language of the OAPA is 'embarrassingly' archaic and the Law Commission should have been more forceful in their call for reform. This could be down to the 'political fuss' that surrounds issues of updating the criminal law.[1] This perhaps explains the reluctance in investing the costs to repeal and replace the OAPA in favour of new legislation. This article will outline the problems with the OAPA, discussing the current law with proposed amendments and repeal options and ending with a consideration of the topics purposely left out of the SCP, such as legislating the transmission of disease. Whilst exploring available options, a new and efficient statutory instrument is the best chance at reform.

Problems Identified With the OAPA

Lord Thomas CJ writes:

> I recognise the problems identified in . . . relation to the 1861 . . . Act. The legislation is out of date and in some areas obsolete; new ways of offending are not satisfactorily captured . . . Work to reform this area would also provide an opportunity to modernise our criminal law . . . I think it is sensible that you have based your discussion on the 1998 proposals for a draft Bill, . . . a good model and a firm foundation on which to take forward long overdue reform in this area.[2]

The language is outdated and the approach of archaically listing offences with individual factual scenarios is disconnected from today's society. For example, s. 17 involves preventing the escape from a shipwreck, be it unlawful or malicious impediment. It also criminalises preventing another from rescuing those who have been distressed, wrecked or stranded. Section 17 holds the maximum sentence of life, but has never been prosecuted.

The most important issue with the OAPA is the unclear and distorted hierarchy of offences. This is apparent when ss 20 and 47 are considered. A s. 20 is a more severe crime; however, both ss 20 and 47 hold the same maximum custodial sentence of five years. HHJ Goymer for the Council of HM Circuit Judges concurred that 'judges and juries have frequently to grapple with the problems of the current law contained in a statute that is now 154 years old.'[3]

There are widening gaps between low-level offences, such as assault, which carries a six-month custodial sentence, and occasioning actual bodily harm (ABH), which carries a five-year custodial sentence. This has caused confusion particularly among prosecutors who must decide based on the level of injury to charge for a lesser offence, ensuring a cheaper and quicker magistrates' court trial. If, however, the offence has caused actual injury, this may be inappropriate, and therefore the prosecution should charge for an offence that reflects the harm, risking a more expensive Crown Court trial. In an age where the criminal justice system has struggled with lacking of resources due to budgetary cuts. Hence, the proposed reform would improve efficiency and could deter unnecessary spending.

1. Nicola Padfield, *Reform of Offences Against the Person* [2015] 3 CLR 175, p. 175
2. Law Commission, *Reform of Offences Against the Person: A Scoping Consultation Paper*, Law Com. No. 217 (2014) 5–7.
3. Ibid.

There have been piecemeal amendments over the years to the OAPA; however, this has made the law more incoherent and confusing, with more sections repealed than in force. The OAPA has underpinned our system, with over 26,000 prosecutions of non-fatal offences on average every year. Perhaps an incremental approach is not enough. Even though retaining modernist constructivist approaches have been favourably argued,[4] we could opt for a fresh start.[5] Therefore, considering the problems the criminal justice system is facing, it is vital that we reform to clear inconsistencies, ensuring a smooth process and a just, cost-effective system.

The Current Law on Assault and Proposed Amendments

The main areas of reform proposed by the Draft Bill and the SCP will affect ss 18, 20 and 47, which have caused serious procedural issues.[6] The Law Commission also propose amending the common law offences of assault and battery. These offences have caused perplexity and proposals have been made for statutory clarity. Battery is any act of unlawful personal violence which is triable in magistrates' court, with a six-month maximum sentence. To commit the offence there must be unlawful physical touching, however slight. Yet assault (despite misleading usage) means the threat of immediate use of unlawful violence, which carries the same maximum sentence as battery. The conduct can be intentional or reckless and has procedural overlap with aspects in s. 39 of the Criminal Justice Act 1988. Reforming these common law offences for clarity seems sensible in the wake of increasing litigants-in-person. Case law has also highlighted the absurdity of the structure of the offences.

In *Ireland*,[7] the defendant had made malicious telephone calls to women and had initially been convicted of a s. 47 offence: assault occasioning ABH. The defendant appealed but the conviction was upheld; a recognisable psychiatric illness *did* constitute bodily harm within the meaning of the Act. Despite this not being part of the original intention of the OAPA, scientific knowledge has progressed and on public policy grounds, women should have sufficient legal protection against harassing phone calls. This has been established through judicial interpretation, but clear statutory boundaries and definitions are beneficial. Any new legislation must be plain and clear enough that it would not be restricted to the time in which it was written and can evolve with society. This responsibility should not rest with the judiciary, but Parliament should modernise our laws to reflect society.

Section 47 would fall under Clause 3 of the Draft Bill, depending on the seriousness of the injury, or under 'aggravated assault', coined in the SCP. Currently, there need be no proof that the defendant intended or foresaw the harm caused. Clause 3 is the offence of intentionally or recklessly causing injury, triable either way with a maximum custodial sentence of five years. The offence of recklessly causing injury is only committed if the defendant is aware of the risk that their conduct will cause injury. This subtle change could positively affect procedural issues within the OAPA.

The 'aggravated assault' charge is applicable for less serious injuries and would be triable in the magistrates' court with a maximum custodial sentence of 12 months. Still there must be an injury to charge with aggravated assault. This change would bring 34.5% of ABH cases into the magistrates' court, and pending the introduction of increasing sentencing powers this figure could increase to 73.5%, substantially cutting costs.

There have generally been issues of consent in the case law surrounding these low-level offences. The victim must have the capacity to consent, with a consideration of contextual circumstances. In *Brown*[8] the offence was carried out during a game of rugby, where the victim will have consented to a risk of

4. A. Jackson and T. Storey, 'Reforming the Offences Against the Person: In Defence of "Moderate" Constructivism' (2015) 79(6) J Crim L 437.
5. Law Commission, above n. 2 at 38, 49.
6. Elaine Genders, *Reform of the Offences Against the Person Act: Lessons from the Law in Action* [1999] 9 CLR 689 at 689.
7. *R* v *Ireland* [1988] AC 147.
8. *R* v *Brown* [2011] EWCA Crim 786.

violence not unreasonable or malicious. The Draft Bill would legislate cases explicitly where the risk taken is acceptable in ordinary daily life. The recklessness requirement of the defendant being aware that their conduct will cause serious injury will ensure clarity of the new offences. Other factors such as the degree of harm and the victim's vulnerability should be further heeded to avoid an arbitrary and inflexible system.

Section 20 would be replaced by Clauses 2 or 3, depending on the severity of the injury. The current law requires *some* foresight as to the harm, but is not clearly worded in the OAPA. An injury under s. 20 involves a break through the layers of the skin, which need not be substantial, but more than a scratch. Furthermore, the *mens rea* for a conviction under s. 20 is proof of malice, intentional or reckless. The maximum custodial sentence of Clause 2 (recklessly causing serious injury) is seven years, which distinguishes clearly from the Clause 3 offence. The Law Society state, 'there is no apparent logic to the grading of offences in the 1861 Act. This lack of structure means that it is difficult for lay people to readily understand.'[9] There is certainly a problem with the system if the public, to whom this statute is applicable, cannot understand the hierarchy of offences and the consequences each offence carries in terms of imprisonment.

Section 18 contains four modes of factual scenario complicating this non-fatal offence. The principle of oblique intention is that the defendant is aware that the consequence of their conduct is *virtually certain*. The ultimate outcome may not be desired, but is a consequence of their actions. Clause 1 would replace this offence with intentionally causing serious injury, with all the principles of intent already established. Therefore, the intention can involve an act or omission, including the transfer of disease. This offence would still be triable only in the Crown Court with life as the maximum custodial sentence.

Specified Offences and Proposed Amendments in the Draft Bill

The Law Commission state that ss 36–37 be removed from new legislation as they are unnecessary considering the new layout of offences in the Draft Bill. Section 38 would be replaced by Clause 7, which covers the assault intending to resist the arrest, prevent or terminate the lawful arrest of the defendant or third person. The offences in Clauses 5–7 would contain a requirement that the defendant knew or was reckless as to whether the victim was a constable. The Law Commission believe that Clause 6 should hold a maximum custodial sentence of more than seven years, but less than life imprisonment.

The s. 16 offence of threat to kill would be amended by Clause 10, which changes the wording to threatening death or serious injury. The current law does not impose a requirement that the threat is believed, intended or carried out. The *mens rea* is that the victim must fear that it *would* be carried out. The reform should include conditional threats and the threat of rape, which was unclear in the OAPA.

The Law Commission also wanted to amend the s. 4 offence of soliciting murder to encouraging murder (not included in the draft bill). The *mens rea* is unclear; does the defendant require intention or a belief that the advice will be followed? However, Professor John Spencer is cautious of 'well-intentioned' attempts at reform, which can cause more problems than they try to solve.[10]

Sections 22–24 would be replaced by Clause 11 of the Draft Bill, modernising the legislation. This offence should be unrestricted by advancing science and evolving methods of crime. The *actus reus* would be the administering of a substance capable of causing injury, with a maximum custodial sentence of five years. Due to the Criminal Attempts Act 1981, the s. 22 offence of attempting to administer is unnecessary as it is already covered in legislation. Consent to the use of the substance is only valid if the courts accept the context of the consent. The *mens rea* currently involves malice or *Cunningham* recklessness.[11] Furthermore, s. 61 of the Sexual Offences Act 2003 covers the administering of a

9. Law Commission, above n. 2 at 54.
10. Ibid. at 39.
11. *R* v *Cunningham* [1957] 2 QB 396.

substance in the context of sexual assaults. The Law Commission would not attempt to reform the established principles relating to the distribution of drugs (per Lord Bingham in *Kennedy*).[12] These offences take up only a small number of prosecutions annually; only 20–45 cases reach first hearing, but to avoid confusing overlap, reform is necessary.

Sections 28–29 would be replaced by Clause 8 of the Draft Bill, covering the use of dangerous or explosive substances intending or risking serious injury; a maximum custodial sentence of life. The malice requirements have made intention almost superfluous; therefore, the draft bill makes their *actus reus* and *mens rea* requirements more specific. Section 30 is replaced by Clause 9, the use of dangerous or explosive substances intending or risking injury, with a maximum custodial sentence of 14 years. Section 64 can be repealed without replacement as the conduct is already covered in ss 3–4 of the Explosive Substances Act 1883. Annually, only between 3 and 13 cases reach a hearing and the sentences are severe. The Explosive Substances Act 1883 provides for some of these offences and any reforms would be made where there are apparent gaps in the law. Moreover, considering the severity of the sentences, the wording should be succinct and required intention clear.

The key changes are reflected in the classification of an offence by the type of injury that would make the system simpler. This includes the type of injury, how it is caused and the gravity of the injury. This means that the level of injury that in fact occurs, even if that means the defendant is rewarded with undeserved luck, would limit the defendant's guilt. Yet circumstances would also be statutorily relevant, which would ensure safer convictions.

Miscellaneous Offences and Proposed Reform

The railway offences under ss 32–34 would be replaced by Clause 13 of the Draft Bill. However, the law commission would want the maximum custodial sentence of two years to be reconsidered for any new piece of legislation. Section 26 can safely be abolished as the Modern Slavery Act 2015 deals with these issues. The Law Commission disagree with Clause 14 that defines intention and recklessness; they believe that a statutory definition is unnecessary. Clause 15 defines injury, which includes physical injury and recognised psychiatric injury. Unfortunately, they do not include anything caused by disease. Clauses 18–22 uphold the principles of defences and combining charges with alternative verdicts, with Clause 23 abolishing certain common law offences.

Other Contentious Issues

Criminal liability for the transmission of disease was not included as part of the SCP. This is a major issue within the context of OAPA reform and deserves to be examined separately. There is concern with the reckless transmission of STDs through consensual intercourse and the law desperately needs clarification. However, the Law Commission excluded this from the report as they felt it would hinder the process of implementing a new statute of offences, which they deemed to be of urgent necessity. It was held in *Dica*[13] that transmitting an infection can amount to inflicting harm and that consent to intercourse does not imply consent to the harm itself or the risk of the harm; the defendant was charged with a s. 20 offence.

The case law is far from established. Medical experts and HIV charities are troubled by the potential of criminal liability. In public health terms this is counterproductive, as the defendant may have recklessly or unintentionally transferred the disease through consensual intercourse. UNAIDS have recommended that liability be solely confined to cases of intentional transmission. This is an understandable recommendation as criminalising transmission could further stigmatise affected members of society.

12. *R* v *Kennedy* [2007] UKHL 38.
13. *R* v *Dica* [2004] EWCA Crim 1103.

Also, imposing a disclosure memorandum seems excessive. The law needs to be resolved and clear without further stigmatisation.

This raises many questions. Must the defendant know they are infected, or is a belief that they *may* be infected sufficient for recklessness? If the defendant is undergoing treatment and the risk of infecting another is low, is there still a requirement of disclosure? Will mandatory testing be the next requirement? Will we create a system where medical professionals must give evidence against their patients? Do we criminalise the act, even if there is no injury (i.e. transmission)? How much of these issues should be left to the jury? These are the matters that must be considered if there is to be reform of non-fatal offences.

Consent is another issue covered only briefly in the SCP. In the context of disease transmission, the victim must give 'informed' consent; the knowledge that unprotected sex imposes risk is insufficient.[14] A belief in consent is sufficient to acquit the defendant, but the common law is inconsistent with s. 74 of the Sexual Offences Act 2003. However, more generally, it is unclear whether lack of consent is an aggravating ingredient of assault or whether consent is a defence. When is consent enough to negate liability? And how reasonable must this belief be? There should be statutory requirements explicitly stating that matters of age and mental capacity should effectively impede consent.

Those that Disagree with Reform

There have been a minority of bodies and individuals that have disagreed with reforming the OAPA. The Bar Council and Criminal Bar Association think the defects in the Act are merely theoretical and legal meaning has already been successfully established in case law. They believe further repeals of unnecessary offences and piecemeal changes would be sufficient. Yet, others have argued that entire replacement of the current law is necessary to limit further confusion and redundant complexities. Yet, as previously mentioned, the responsibility of modernising legislation lies with Parliament.

Conclusion

There are three possibilities available in terms of OAPA reform. First, allow the Act to stand as it is and allow judicial interpretation to continue as it has done over the past 150 years. Secondly, piecemeal reform, amending individual sections and repealing. Finally, the most convincing argument, repeal and replace the OAPA with new legislation. Some academics and practitioners are wary of complete repeal; they worry that with new law comes new problems. However, as we have discussed, the current law is in urgent need of change.

The major problem with the OAPA are the flawed hierarchy and the outdated criteria within the offences. The seriousness of a crime should be reflected in the available maximum sentence, considering the harm caused or the extent the defendant intended the harm. This relates particularly to the procedural issues of ss 18, 20 and 47. Prosecutors should choose a charge that they think is proportionate and accurate; however, between 2003 and 2013, 7–12% of defendants charged with ABH in the Crown Court received a custodial sentence of six months or less. This could have been dealt with more cost-effectively in the magistrates' court. The CPS even advises prosecutors to charge for lesser offences of assault and battery even if ABH is technically available. These issues that need immediate attention and reform should ensure that the charge and sentence is proportionate to the defendant's conduct. It should narrow culpability based on specifics of intent and the degree of harm.

New legislation should avoid overlap with more recent legislation, make better use of the magistrates' court and avoid unnecessary degrees of complexity and specificity of offences to ensure that the law is unrestricted by modern and evolving methods of crime. It is a paramount objective that we make the law more accessible and strive for a transparent and effective process. Archaic language, such as 'penal

14. *R* v *Konzani* [2005] EWCA Crim 706.

servitude', harms the accessibility of the law. Even practitioners have felt disengaged with the OAPA. Furthermore, an increasing number of defendants are self-represented and inappropriate technical and obsolete language only further alienates the public from our system. which damages the profession. Therefore, we can conclude that reform of the OAPA is essential and urgent.

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