

## The Law Commission's Criminal Law Bill: No Way to Draft a Code

by Francis Bennion

It is nearly thirty years since I helped the late Sir Noël Hutton to draft the Act setting up the Law Commission. We were both keen to ensure that codification was among the functions conferred on the new body, and this was done.<sup>1</sup> In the Commission's early days strenuous efforts were duly made to codify large areas of our law, but without avail.<sup>2</sup> The intention to codify the criminal law was announced as long ago as 1968.<sup>3</sup> Now we have the first draft Bill, set out in *Legislating the Criminal Code: Offences against the Person and General Principles*, presented to Parliament in November 1993.<sup>4</sup> It is demurely named 'the Criminal Law Bill', though I would have preferred a more emphatic title such as 'the Criminal Code (No. 1) Bill'. This would better reflect the Law Commission's long-term intention.

Our objective now is to produce a series of Bills, each of which will be complete in itself and will contain proposals for the immediate reform and rationalisation of a major, discrete area of the criminal law. Each of those Bills will, like the Criminal Law Bill that accompanies this Report, be suitable for immediate enactment, and when enacted it will place the part of the law with which it deals on an accessible statutory basis. The Bills will, however, all employ the method and approach of the Draft Code, so that in the longer term it ought to be possible with comparative simplicity to combine all the different parts of the new, statutory, criminal law into the single, unified criminal code that the law of England and Wales so badly needs.<sup>5</sup>

So we have due notice. This Bill sets the scene. This is the way the entire Criminal Code we have so long desired will be constructed and drafted. Is it the right way? I would say emphatically not, with all respect to those who have laboured on the project. This is no way to draft a code. The Bill is over-technical, poor on exposition, and a sore puzzle from beginning to end.

I infer that the reason for this disaster is that those responsible have concentrated on the difficulties of the substantive criminal law, which are many, while neglecting the principles of code-making. In an article in 1986 I invited the Law Commission to investigate these, and offered some advice.<sup>6</sup> It has mostly been ignored.

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<sup>1</sup>Law Commissions Act 1965 s. 3(1).

<sup>2</sup>See my account in G. Zellick (ed.), *The Law Commission and Law Reform* (Sweet & Maxwell 1988) pp. 60-66).

<sup>3</sup>The Law Commission: Second Programme of Law Reform (LAW COM. No. 14), p. 6.

<sup>4</sup>Cm 2370; LAW COM. No. 218. I shall refer to the body of this document as the 'Report' and the draft Bill, set out in Appendix A, as the 'Bill'.

<sup>5</sup>Report, paragraph 1.3. The 'Draft Code' is the draft Bill contained in Law Com No 177 (1989): Report, footnote 3.

<sup>6</sup>'Codification Technique' [1986] Crim LR 295.

The Bill goes wrong from its highly complex opening sentence. This technical provision consists of 115 words containing two internal paragraphs each broken down into two subparagraphs. Yet it governs provisions which are all about everyday offences against the person, triable by lay magistrates or lay jurors. It breaks the principle that a code should start by dealing simply and comprehensively with the common, usual cases. Only later should it add frills needed to deal with the rare incident. The provision that brings in unusual complications should be set out separately. Most users never have to go beyond the first statement, which stands as a simple formulation of the paradigm case.

I am anxious to be constructive, for it is not too late to save the project. So the remainder of this article consists of a detailed examination of key provisions of the Bill, coupled with concrete suggestions for improvement.

### **Fault terms**

It is, say the Law Commission, one of the principal aims of the Bill to provide clear and workable definitions of fault terms.<sup>7</sup> By this expression they mean the terms 'intentionally' and 'recklessly', defined in clause 1. This is incomplete in itself, and has to be read with offence-creating provisions set out in clauses 2 to 11. Here is the text of clause 1-

1. For the purposes of this Part a person acts-
  - 'intentionally' with respect to a result when-
    - (i) it is his purpose to cause it, or
    - (ii) although it is not his purpose to cause it, he knows that it would occur in the ordinary course of events if he were to succeed in his purpose of causing some other result; and
  - 'recklessly' with respect to-
    - (i) a circumstance, when he is aware of a risk that it exists or will exist, and
    - (ii) a result, when he is aware of a risk that it will occur,and it is unreasonable, having regard to the circumstances known to him, to take that risk;  
and related expressions shall be construed accordingly.

I will have something to say about the substance of this definition in a moment, but first let me point out that it is a superb example of the drafting vice of compression, about which I have written extensively.<sup>8</sup> An enormous amount of information is skilfully condensed into a tiny space. But what does space matter when comprehensibility is lost?

A rule of legislative drafting designed to reduce the evils of compression is that a paragraphed provision, if you take away the added letters, brackets, dashes, etc., and let it run on, must read as an ordinary sentence. The purpose of the spatial and typographical aids is solely to make the sentence read easily. That rule is broken here.

On the substance, let us test the position by looking now at one of the offence-creating provisions, clause 4, with which this definition is intended to be read.

4. A person is guilty of an offence if he intentionally or recklessly causes injury to another.

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<sup>7</sup>Report, paragraph 14.1.

<sup>8</sup>For the main treatment see *Statute Law* (3rd edn, 1990), chapter 14.

We are now at the other extreme. This is absurdly over-simple, being almost entirely drained of content by definitions and other provisions placed elsewhere. Yet if we add back the content it has the potential for being unnecessarily complex, by introducing both intentional and reckless wounding in the same provision.

To add back the content, we first want to know what 'injury' means. We find the answer in clause 18.

18. In this Part 'injury' means-
- (a) physical injury, including pain, unconsciousness, or any other impairment of a person's physical condition, or
  - (b) impairment of a person's mental health.

There are problems with this definition, but let's leave them till later. We need first to deal with an obvious question. What about the person who inflicts pain while clearly not a criminal, such as the fast bowler or the dentist? Hunting about, we find the answer in clause 20.

20. The provisions of this Part have effect subject to any enactment or rule of law providing a defence, or providing lawful authority, justification or excuse for an act or omission.

The usual way, disliked by some, of alerting the reader to a provision of this sort would be to start clause 4 with 'Subject to the provisions of this Act. . .' In our splendid new code, a better way might be to devise a formula which tells the reader exactly what is meant. We might introduce each offence-creating provision with the words 'Subject to any defence available to him' and include the following in the definition clause-

'References in this Act to a defence available to a person are to any enactment or rule of law providing lawful authority, justification or excuse, or otherwise providing a defence, for the act or omission in question.'<sup>9</sup>

Another question raised by clause 1 is this. Why does not the definition of 'intentionally' deal with the case where a person intends to injure A but mistakenly injures B instead? I don't know the answer (perhaps I haven't scoured the Report with sufficient concentration), but clearly this needs to be included.

I will now look more closely at the substance of clause 1, beginning with 'intentionally'. The first thing to say is that a code should allow the word 'intend' to operate by itself where it safely can. It is a plain English word, which meets most situations without raising any difficulty. Why needlessly puzzle magistrates, juries and others in every case by linking intention to 'purpose'? Is that anyway the best word? Might 'desire' be better? Another recent official report helpfully said-

Intention concerns the outcome desired as a result of an action. Motive concerns the reason for which that outcome is desired.<sup>10</sup>

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<sup>9</sup>The change in the order of words is of course deliberate.

<sup>10</sup>Report of the Select Committee on Medical Ethics, Session 1993-94 (HL Paper 21-I) para. 79.

As for paragraph (ii) of the definition, one can only say that it is a cruel puzzle to inflict every time anyone is concerned with the nature of intention. I don't know what it means, even after studying the Report's laborious explanations of it.<sup>11</sup>

The part of clause 1 that defines 'recklessly' also presents problems, with its reference to 'a circumstance' and 'a result'. Most serious is the reliance on reasonableness, a notoriously slippery concept. The Law Commission say use of this test will ensure that only 'seriously irresponsible' conduct will be caught.<sup>12</sup> It seems to me unlikely that a lay magistrate or jury will invariably find that conduct is unreasonable only where it is seriously irresponsible.

I want now to show how a paradigm offence of causing bodily injury could be set out fully, using the ingredients we have discussed. Let it be the common case where D intentionally injures V. It could be drafted as follows-

Subject to any defence available to him, a person is guilty of an offence if he injures another person intending to injure him or intending to injure some other person.

Where D is being tried on such a common charge, why should the jury be troubled with anything more than this simple formulation, coupled with the definition of 'injury'? I accept that frills will be needed elsewhere to deal with the rare difficult case.

Now let's go back to that definition of 'injury'. The two paragraphs respectively cover physical and mental injury. Isn't it a bit strange to find pain and unconsciousness treated as physical rather than mental? There are more difficulties. As we have seen, clause 4 says 'if he . . . causes injury'. This is wider than 'if he injures', and is objectionable as possibly including, when it should not, secondary offences such as aiding and abetting or counselling and procuring. There is no mention of the duration of the 'injury'. Pain, which can be fleeting, is questionably designated an impairment of V's physical condition. An 'impairment' of V's mental condition looks as if intended to be something permanent, but is this really so? I tentatively offer the following instead-

For the purposes of this Act 'injure' means injure physically or mentally, and includes-

- (a) infecting with any disease, or
- (b) inflicting pain or unconsciousness, otherwise than fleetingly, or
- (c) otherwise impairing a person's physical or mental health.

Paragraph (a) is included to meet the discussion in paragraphs 15.15 to 15.19 of the Report, which seems to call for a mention in the Bill of deliberately causing infection.

### **Reasons for provisions**

The Report gives detailed reasons for each provision of the Bill, but are they an adequate substitute for reasons expressed or implied in the clauses of the Bill itself? This is vital a question, that recurs throughout the Bill. I shall test it by reference to just one further provision. It is clause 25, which sets out the defence of duress by threats. The text of the opening provisions of the clause is as follows.<sup>13</sup>

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<sup>11</sup>Report, paragraphs 7.6 to 7.14.

<sup>12</sup>Report, paragraph 15.18.

<sup>13</sup>The remainder of the clause raises separate issues which do not impinge on the provisions cited here.

25.-(1) No act of a person constitutes an offence if the act is done under duress by threats.

(2) A person does an act under duress by threats if he does it because he knows or believes-

(a) that a threat has been made to cause death or serious injury to himself or another if the act is not done, and

(b) that the threat will be carried out immediately if he does not do the act or, if not immediately, before he or that other can obtain effective official protection, and

(c) that there is no other way of preventing the threat being carried out, and the threat is one that in all the circumstances (including any of his personal characteristics that affect its gravity) he cannot reasonably be expected to resist.

This immediately raises a host of questions. I leave for the moment those that are attempted to be answered in the body of the Report. Others include the following.

Why in subsection (1) is 'threats' in the plural? If it were in the singular the user ought to have no difficulty in applying the Interpretation Act 1978 s 6(c), which says that words in the singular include the plural. Admittedly s 6(c) goes on to say that words in the plural include the singular, but a doubt has been raised whether in clause 25 this is disapplied by a contrary intention. The fact is that a single threat will be used as often as multiple threats, if not more often, so the reference in subsection (1) should be to 'duress by a threat'.

Subsection (2) shows that the only threats relevant here are life-threatening ones. Why is this not made clear right away in subsection (1) (and in the sidenote, which simply says 'Duress by threats')? I suggest that the reference should be to a 'threat to life', and that subsection (2) should be reworded accordingly.

The Report does attempt to answer other obvious questions. What does the reference to 'effective official protection' mean? All we are told is that it means 'police or other official protection'.<sup>14</sup> There is no mention of why unofficial protection is to be disregarded even though 'effective'. What is intended by the last two lines set out above? We are told, although this is far from obvious, that they bring in the closeness of the relationship between the defendant and the person threatened,<sup>15</sup> or the latter's 'timidity'.<sup>16</sup>

Although the explanations about this clause given in the Report are scarcely adequate, it would be impossible to understand the clause without them. The same applies to many other provisions of the Bill. It raises two questions. First, should not a lot of this explanation be somehow written into the clauses of the Bill? Second, should not the official commentary be much more detailed, whether or not the text of the Bill is expanded in this way? On the first point M. L. Friedland's observation concerning the Canadian Criminal Code is applicable-

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<sup>14</sup>Report, paragraph 28.2.

<sup>15</sup>Report, paragraph 29.2.

<sup>16</sup>Report, paragraph 29.12.

. . . simplicity, clarification, and accessibility of the law do not necessarily mean fewer legislative provisions. Indeed, if anything, they require much greater detail than we presently have. You do not simplify by oversimplifying.<sup>17</sup>

I included that wise observation in the 1986 article referred to above. I also said in that article-

Should not a thorough preliminary enquiry be conducted as to the nature of the various codification techniques used by other countries, and the degree of success or failure they have encountered? Is there not a need, in the light of that examination, for a careful working out of the desirable ambit of our own code? This would determine, for example, whether it should confine itself, as might well be wise, merely to the statement of the various offences. It would enquire what degree of detail is desirable, and what methods should be used for keeping the new code updated.

It is not too late for the Law Commission to act on that suggestion. If they did so we might succeed in obtaining a criminal code that really would do what the Commission say they want this one to do, namely play 'a vital role in making the existing law clear, accessible and easy for citizens, prosecutors, lawyers, professional judges, lay magistrates and jurors to understand and use'.<sup>18</sup>

By no stretch of the imagination have they achieved that in the Bill now before us.

Postscript As a matter of courtesy, I sent the above before publication to the secretary of the Law Commission, Mr M. H. Collon. He has asked me to include the following points, which I am glad to do-

The Bill presented in Law Com No 218 is in largely the same terms, and certainly follows exactly the same approach, as the Bill presented for consultation in Consultation Paper No 122. That Bill was greeted with very widespread approval, as is made entirely clear in Law Com No 218. That approval was by no means limited to lawyers: for instance, footnotes 22-24 of Law Com No 218 indicate the police's view of the clarity and ease of use of the Bill ... A number of the criticisms you raise are not simply drafting points, but touch on issues of substance. Examples are the explanation of intention in terms of purpose, and the extent of matters covered by the offences of causing injury. These policy questions were considered with great care, by a very wide range of commentators, in the debate that was evoked by Consultation Paper No 122: a debate in which . . . you unfortunately chose not to take part. The Commission's recommendations on these and other points follow the weight of opinion expressed to it.

I acknowledge that it was unfortunate that through pressure of other work I was unable to take part in the debate at the stage Mr Collon mentions. However, as the above article mentions, most of the views expressed in it have been available for some years in the published sources specified. The salient point is that in nearly thirty years the Law Commission have never thought fit to carry out an investigation, such as it seems obvious needed to be done at an early stage, into the best method of carrying out their statutory duty of codification. I am not

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<sup>17</sup>M.L. Friedland, 'The Process of Criminal Law Reform' 12 *The Criminal Law Quarterly* (1969-70) 148, 150 (emphasis added). The Canadian Criminal code was enacted as long ago as 1892: see 1892 (Can.), c. 29.

<sup>18</sup>Report, paragraph 2.4.

aware that any experts on techniques of codification entered into the debate Mr Colom mentions.

[Published in 15 *Stat LR* (1994) 108.

See the riposte by [Professor Sir John Smith QC in 16 \*Stat LR\* 105.](#)

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