

PLEASE NOTE THAT DUE TO THE TEMPLATE USED FOR THIS DOCUMENT THE LAYOUT OF THE WEBSITE VERSION MAY DIFFER SLIGHTLY FROM THE PRINTED VERSION

A DRAFT

CRIMINAL CODE FOR SCOTLAND

WITH COMMENTARY

Prepared by

Eric Clive, Pamela Ferguson, Christopher Gane,
and Alexander McCall Smith

Published under the auspices of the Scottish Law Commission
140 Causewayside, Edinburgh EH9 1PR

© Eric Clive, Pamela Ferguson, Christopher Gane, Alexander McCall Smith

Permission is given by the copyright owners for unlimited reproduction for non-commercial and educational purposes. Applications for permission to copy for other purposes should be made to one of the authors, each of whom is authorised to act on behalf of the group.

Addresses are given at the end of the paper.

The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

The Honourable Lord Eassie, *Chairman*
Professor Gerard Maher
Professor Kenneth G C Reid
Professor Joseph M Thomson.

The Commission would be grateful if comments on the draft code were submitted by 15 December 2003. All correspondence should be addressed to:

Miss Jane L McLeod
Secretary
Scottish Law Commission
140 Causewayside
Edinburgh
EH9 1PR

Telephone: 0131 668 2131
Fax: 0131 662 4900
Email: info@scotlawcom.gov.uk
Online comments: www.scotlawcom.gov.uk - select "Submit Comments"

NOTES

1. Consultees should be aware that copies of comments received (i) will be passed to the authors of the draft code and, in relation to the principle of codification, also to the Scottish Executive; and (ii) may be made available to any interested party, unless consultees indicate that all or part of their response is confidential. Such confidentiality will, of course, be strictly respected.
2. Where possible, we would prefer electronic submission of comments to the email or online comments address above.
3. The draft code is available on our website at www.scotlawcom.gov.uk or can be purchased from TSO Scotland Bookshop.

A DRAFT CRIMINAL CODE FOR SCOTLAND

WITH COMMENTARY

Contents

Foreword by the Chairman of the Scottish Law Commission	viii
About the draft code	
How it began	1
Method of working	1
Consultation and conferences	2
What is meant by a code in this context?	2
The case for codification	3
Legitimacy of the project	4
Underlying values	4
Form, size and style	5
Structure and contents	5
Coverage	6
Attitudes to codification of the criminal law	7
Submission to Minister for Justice	8
The draft code and commentary	
Notes on the Commentary	9
Long title of draft Bill	11
Part 1	14
General	14
General effect and method of interpretation	14
1 Statutory basis of the criminal law	14
2 Relationship of this Act to existing law	16
3 Method of interpretation	17
Presumption of innocence and burden of proof	18
4 Presumption of innocence	18
5 Proof in criminal proceedings	19
6 Overlapping offences	22
7 Aggravated offences	25
8 General rules on state of mind required	27
9 Intention	29
10 Recklessness	32
11 Knowledge	34

12	Culpably self-induced state of mind	35
	Causation.....	37
13	General rules on causation	37
14	Liability for result caused by omitting to act	40
15	Children.....	42
16	Legal persons	43
17	Persons involved as accomplices or art and part.....	47
	Attempt, incitement and conspiracy.....	52
18	Attempt	52
19	Incitement	54
20	Conspiracy	56
21	Impossibility of committing principal offence.....	58
	Defences.....	59
22	Lawful authority.....	59
23	Self defence.....	64
24	Necessity	66
25	Involuntary conduct	68
26	Impossibility	70
27	Mental disorder	71
28	Error	73
29	Coercion.....	75
30	Saving for diplomatic and other immunities.....	77
	Penalties	78
31	General.....	78
32	Penalty for aggravated offence	80
33	Penalty for attempt, incitement or conspiracy	81
34	Savings for other powers and duties	82
	Territorial application of Scottish criminal law	83
35	Application of Scottish criminal law to acts within Scotland.....	83
36	Application of Scottish criminal law to acts outside Scotland.....	84
Part 2	.....	86
	Non-sexual offences against life, bodily integrity, liberty and other personal interests	86
	Causing death.....	86
37	Murder.....	86
38	Culpable homicide	88
39	Torture.....	92
40	Inhuman or degrading treatment	95
41	Assault.....	96
42	Causing unlawful injury.....	98
43	Causing an unlawful risk of injury.....	99
	Interference with freedom of action or volition	100
44	Slavery	100
45	Abduction.....	102
46	Deprivation of liberty.....	103
47	Drugging	104
	Causing fear, alarm or distress.....	106
48	Making unlawful threats	106
49	Violent and alarming behaviour.....	107
50	Intrusive and alarming behaviour	108
	Offences relating to children.....	109
51	Child abuse.....	109
52	Exposing child to harm	111

53	Exposing child to obscenity or pornography	113
54	Child abduction	114
55	Unlawfully removing child from jurisdiction	115
	Abortion	116
56	Abortion	116
	Offences relating to marriage.....	117
57	Bigamy	117
58	Entering into forced marriage	119
59	Entering into unlawful marriage	120
Part 3	.....	121
	Sexual offences	121
	Terminology.....	121
60	Meaning of terms used in this Part.....	121
	Offences relating directly to sexual activity	123
61	Rape	123
62	Sexual penetration.....	126
63	Sexual molestation	127
64	Sexual intercourse by an adult with a minor.....	128
65	Unlawful sexual activity with a young person.....	129
66	Sexual intercourse between minors.....	130
67	Incestuous conduct.....	131
	Offences involving procuring or exploitation	133
68	Procuring child for sexual activity	133
69	Sexual exploitation of person with a mental disorder.....	134
70	Pimping	136
71	Brothel keeping	137
72	Child pornography	138
	General.....	140
73	Knowledge of age not required.....	140
74	Exception for spouses	141
Part 4	.....	142
	Offences against property and economic interests.....	142
75	Piracy	142
76	Robbery	144
77	Theft.....	145
78	Breaking into a building.....	147
79	Breaking open a locked place	149
80	Fire-raising	150
81	Criminal damage to property	151
82	Causing an unlawful risk of damage to property	152
83	Criminal interference with property.....	153
84	Squatting	154
Part 5	.....	155
	Offences involving extortion, deception or dishonesty	155
85	Extortion	155
86	Fraud	156
87	Embezzlement.....	157
88	Forgery.....	158
89	Reset.....	159
90	Making off without payment.....	160
Part 6	.....	161
	Offences against public order, safety and security	161

91	Carrying weapon	161
92	Breach of the peace	164
93	Wasting the time of emergency services.....	165
94	Presence with intent to commit an offence	166
95	Possession of tools with intent to commit an offence	167
Part 7	.....	168
	Offences against public interests in lawful government	168
	and the administration of justice	168
96	Unlawfully attempting to overthrow government.....	168
97	Perverting the course of justice.....	169
98	Escaping and harbouring.....	170
99	Corruption and abuse of office.....	171
100	Perjury and subornation of perjury	172
101	False oaths or statements.....	173
102	Contempt of court	175
103	False accusation of crime.....	176
Part 8	.....	177
	Offensive conduct	177
104	Unlawful interference with human remains.....	177
105	Soliciting	178
106	Dealing with obscene material.....	179
107	Indecent conduct	180
Part 9	.....	182
	Offences involving animals	182
108	Wanton cruelty to animals	182
109	Sexual activity with an animal	184
110	Interpretation for purposes of this Part	185
Part 10	.....	186
	Rules on consent, interpretation and final provisions.....	186
111	Rules on consent	186
112	Interpretation.....	188
113	Repeals, amendments and transitional provisions	191
114	Short title and commencement.....	192
Schedule 1		
Penalties		189
Schedule 2		
Minor and consequential amendments		192
Schedule 3		
Repeals		200
About the authors		201

Foreword

This publication contains the text, with commentary, of a draft Criminal Code for Scotland, which has been prepared by a group of distinguished Scottish academic lawyers.¹ The interest of the Scottish Law Commission in codification arises from the provisions of section 3(1) of the Law Commissions Act 1965 which state that:

"It shall be the duty of each of the Commissions to take and keep under review all the law with which they are respectively concerned with a view to its systematic development and reform, including in particular the codification of the law"

In our Fifth Programme of Law Reform,² we set out our current approach to codification. We identified as a worthwhile aim codification by means of consolidation of statutes which embodied incremental reforms of a particular area of law. At the same time we continued to believe that there may be a place for codification in the wider traditional sense, that is a comprehensive legislative re-statement of the general principles underlying some unified area of the common law.

In our Sixth Programme of Law Reform,³ we noted that, on his leaving the Commission, one of our then Commissioners, Dr Eric Clive, was to become involved in the preparation of a draft Scottish criminal code as part of a group of academic lawyers. Whilst we could not commit any resources to this project, it was one to which we gave our support.⁴ The group has now produced a final version of the draft Code. The Code is set out by way of a draft Bill, each section of which is followed by the group's own commentary. In addition the group has prepared an introductory part, which explains the history of the project, the method of working used and the case for codification of the criminal law. The group also makes clear what it means by 'codification' in the context of this project. It has sought to put into statutory form the core parts of Scottish criminal law, the bulk of which is currently to be found in the common law. In addition the group has sought not simply to re-state the existing law in a statutory form but has also suggested reform where the group considers the law to be manifestly unsatisfactory.

¹ Professor Eric Clive CBE (Edinburgh), Professor Pamela Ferguson (Dundee), Professor Christopher Gane (Aberdeen), Professor Alexander McCall Smith (Edinburgh).

² (1997) Scot Law Com No 159, para 2.14.

³ (2000) Scot Law Com No 176, paras 1.30-133.

⁴ We continued to note the progress of this project in subsequent Annual Reports. See *Thirty-Fourth Annual Report 1998-1999* (Scot Law Com No 179), paras 2.9-2.11; *Thirty-Fifth Annual Report 2000* (Scot Law Com No 182), para 2.3; *Thirty-Sixth Annual Report 2001* (Scot Law Com No 186), para 2.3; *Thirty-Seventh Annual Report 2002* (Scot Law Com No 189), paras 2.3-2.4.

At this stage we have not formed any view on whether the group's work should be used as the basis for enacting a criminal code for Scotland. However we believe that the group has made a significant and substantial contribution to the literature on Scots criminal law and that a wide-ranging public debate on the issues arising from the draft code in its existing form would be useful. Accordingly we welcome comments both on the general question whether the criminal law in Scotland should be put into a code, as well as on the merits of the group's own approach to codification. We would also invite comments on the particular provisions of the draft code.

We would add that in England and Wales the reform and codification of the criminal law has been identified by the Government as one of its key objectives and that the Law Commission is currently active in preparing a report on the codification of English criminal law.⁵ Codification is also a topic of interest and importance in Scotland and we believe that with the completion of this draft criminal code it is now particularly opportune to give further consideration to the issues involved.

RONALD D MACKAY, *Chairman*
Scottish Law Commission

⁵ Law Commission, *Thirty-Sixth Annual Report 2001* (Law Com No 275), para 5.1. The Government's support for codification of the criminal law is contained in the White Paper on *Criminal Justice: The Way Ahead* (Cm 5074 (2001), paras 3.57-3.59).

About the draft code

How it began

The project began with a conversation between Chris Gane and Sandy McCall Smith after a criminal law examiners' meeting in Edinburgh. There seemed to be a need for a Scottish criminal code. Would it be possible to codify the common law parts of Scottish criminal law? What might a Scottish criminal code look like? Why not try it and see? They decided to ask Eric Clive, then a member of the Scottish Law Commission and known to have an interest in codification, if he would be interested in taking part in a project for the production of a draft criminal code for Scotland. After checking with Lord Davidson, the then Chairman of the Commission, he enthusiastically agreed.

Work began in 1995. It was a great benefit to the group that Frazer McCallum, then a research fellow in the Law Faculty at Aberdeen University, was able to devote some time to helping the group as a researcher and assistant. He combined the early disjointed texts prepared by the members of the group into a first partial draft of a code.

Pamela Ferguson joined the group in 1999. Sir Gerald Gordon took part in the discussions in the later stages of preparation of the draft and made many helpful comments and suggestions. The group would like to take this opportunity to thank him for his most helpful contribution.

Method of working

The major difficulty in the project has always been in finding time for meetings. The members of the group had other commitments which took priority over unofficial voluntary work on the draft code. In the initial stages, meetings took place alternately in Aberdeen and Edinburgh. After Pamela Ferguson joined the group, Dundee proved a convenient meeting place and most meetings took place there. From the beginning, topics were distributed among the participants who each undertook to prepare a draft provision and a short comment. These drafts were discussed and amended at the meetings and then discussed again, often many times. The process of discussion often revealed new problems and possibilities. Gradually a text began to take shape and, indeed, to assume a life of its own. What had been done could be used to make it easier to do something else. The whole thing began to fit together. The need for coherence in itself led to refinements and improvements.

The group did not consciously follow any particular model. The intention was to put into statutory form the existing law of Scotland. Members of the group were, however, well aware of various European and Commonwealth codes, and code projects, and of the American Model Penal Code. They were also aware of the draft criminal code for England and Wales produced by the English Law Commission¹ and of the draft criminal code for South Africa produced by Professor Snyman.² From time to time the solutions adopted or under consideration elsewhere would be mentioned in discussions but the primary concern was to reproduce the existing Scottish law with such minor changes as seemed desirable.

Once most of the provisions were in place it was decided that it would be advantageous to split the primary responsibility for finalising the text and the commentary. Eric Clive revised the drafting of the code itself and Chris Gane and Pamela Ferguson completed and revised the commentary at this stage. All the revised work was fully discussed at meetings of the group. The process of completing and revising both text and commentary produced new questions and, often, new and improved solutions.

Consultation and conferences

A consultation conference was held in Edinburgh University on 20 November 2000 to obtain views on the draft code from interested and knowledgeable people, including in particular those involved in the actual operation of the criminal justice system.³ The draft was revised in the light of comments received and the new draft was sent out to interested persons by email for further comments. It was then revised again. The draft was also discussed at the Scottish Universities Law Faculties' Conference at Pitlochry on 25 March 2002,⁴ at a special conference in the University of Glasgow School of Law on 10 and 11 May 2002⁵ and at the annual conference of the Society of Legal Scholars in September 2002. Further important changes were made in the light of these discussions. The codification of criminal law in Scotland and elsewhere was the subject of a talk by Professor Stuart Green of Louisiana State University at the Scottish Universities Law Faculties' Conference at Pitlochry on 17 April 2003. Professor Green noted the enormous success of the Model Penal Code in the USA and expressed the view that codification was "the right way to go".

What is meant by a code in this context?

¹ *A Criminal Code for England and Wales* (1989) Law Com No 177.

² C R Snyman, *Draft Criminal Code for South Africa with a Commentary* (Juta and Co Ltd, Cape Town, 1995).

³ The conference was attended by an invited audience including sheriffs and representatives of the Association of Scottish Police Superintendents, the Crown Office, the Faculty of Advocates, the Justice Department, the Law Society of Scotland, SACRO, SCOLAG, the Scottish Association for the Study of Delinquency, the Scottish Consortium on Crime and Criminal Justice, the Scottish Criminal Cases Review Commission, the Scottish Law Commission, the Scottish Parliament Information Centre, the Scottish Police College, the Scottish Society for Computers and Law, the Universities of Aberdeen, Dundee, Edinburgh, Glasgow, Stirling and Strathclyde, and Victim Support Scotland. The High Court Judges who had been invited were unfortunately unable to attend due to court commitments.

⁴ This was attended by representatives of the law faculties in the Scottish universities, by the Minister for Justice (Mr Jim Wallace QC, MSP) and by representatives of the Scottish Law Commission, the Faculty of Advocates, the Law Society of Scotland and the leading Scottish law publishers.

⁵ This was attended by, among others, participants from England, Germany and the US.

The word “code” is used in various senses. Sometimes, as in expressions such as “The Highway Code” or “The Countryside Code” it means a set of rules which are not enacted law but just rules of good conduct or good practice. Sometimes it is used in an even wider sense to mean any organised body of knowledge in written form.⁶ The word is not used in those ways here. By “code” is here meant a legislated code - a statute containing a coherent, more or less comprehensive, treatment of a particular branch of the law.

Within that description there are at least two types of code. One type involves codification without any attempt to change the law. The other involves some reform, so that the new law is a restatement with the elimination of perceived defects and anomalies.

The draft criminal code is of this second type. It does not purport simply to restate the law as it is. On the other hand it is not a fresh start. It is not a sort of idealised code or a copy of some foreign model. It is based firmly on laws which have stood the test of time. The group started with the idea of restating the law as it was and making only a few minimal changes where this seemed absolutely necessary to avoid internal inconsistencies or rules which would manifestly be unacceptable to the Scottish Parliament. For example, we were clear from the beginning that we could not reproduce the old definition of rape as it was before it was recently reformed. The draft therefore anticipated by some years the decision in the *Lord Advocate’s Reference (No 1 of 2001)*⁷ that rape did not require the will of the victim to have been overcome by force. As the work progressed it became more and more clear that there were in fact many areas where the existing law was manifestly unsatisfactory. So the draft became more and more a modernising draft, and less and less a simple restatement. The result is a code⁸ suitable for the present times, which would avoid the need for a number of specific Acts to amend the law in necessary ways. The code is, however, still firmly based on the existing law and is recognisably the traditional criminal law of Scotland, updated and set out in modern form.

The case for codification

⁶ Even a textbook might, on this view, be regarded as a code. See Farmer, “Enigma: Decoding the Draft Criminal Code” 7 *Scottish Law and Practice Quarterly* (2002) 68-80 at p. 70.

⁷ 2002 SLT 466.

⁸ In the interests of brevity the draft code will sometimes be referred to simply as the “code”.

The arguments in favour of a criminal code are familiar,⁹ and in most countries and jurisdictions throughout the world have been found convincing.¹⁰ It is generally considered to be better to have the core of a country's criminal law in an organised form rather than a disorganised form. It is generally considered to be better to have it democratically determined and written down in one Act than to have to derive much of it from cases piled upon cases over a hundred years or more. A criminal code helps to prevent gaps in the statute law caused by drafters of new statutory offences forgetting to deal with some points which would be automatically covered by the general part of a code. It also helps to avoid a good deal of repetition caused by drafters of new statutory offences having to repeat such points in every piece of legislation. Legislation on the criminal law is inevitable. It is better to have it in a coherent form rather than in a whole series of isolated, *ad hoc* statutory provisions.

A criminal code would make the law more accessible, more coherent, easier to use, easier to explain and easier to amend by legislation. It would not take away from the courts the task of applying and interpreting the law but would provide them with a firm new basis for the principled and coherent development of the criminal law in the years ahead.

The constant fight against crime is a prime concern of any civilised society which aims to provide a basic level of security and peace of mind for its citizens. A modern and efficient substantive criminal law can reasonably be regarded as an important weapon in that fight. If the basic substantive law is difficult, obscure or uncertain – and in some areas the existing law is all three – it is difficult for those who have to apply the law to do so effectively and well. The training of personnel at all levels of the system is more difficult and expensive. Mistakes are more likely to occur.

Legitimacy of the project

In a thoughtful talk on the draft code¹¹ Professor Lindsay Farmer raised a number of general questions about the code project, including the question of legitimacy.¹²

There can be no question about the legitimacy of a criminal code enacted by the Scottish Parliament after the normal legislative processes, which would include detailed consideration and, no doubt, the hearing of witnesses by a committee.¹³ There would be ample opportunity for individuals and groups of all kinds to submit their views. A recently enacted code of this nature would be as legitimate as a law can possibly be under the present constitutional system. It would be part of the democratically determined framework of laws and institutions which is needed by a modern, forward-looking country.

⁹ See Farmer, "Enigma: Decoding the Draft Criminal Code" 7 *Scottish Law and Practice Quarterly* (2002) 68-80 at p. 69.

¹⁰ It should not be supposed that all jurisdictions with a criminal code are so-called civil law jurisdictions. Many so-called common law jurisdictions in Australia, Canada and the USA also have criminal codes. The case for a core criminal code in England and Wales has been accepted by the government and the English Law Commission is currently working on it. See below.

¹¹ To the Scottish Universities Law Faculties' Conference at Pitlochry in March 2002.

¹² See the article cited above and, for a reply, Clive and Ferguson, "Unravelling the Enigma: A Reply to Professor Farmer" 7 *Scottish Law and Practice Quarterly* (2002) 81-86.

¹³ Presumably one of the Justice Committees.

The question may, however, relate to the legitimacy of an unofficial project of this kind at the pre-legislation stage. What gives a small, self-selected group of professors the right even to submit something for consideration? The answer is that everybody has the right to make responsible and constructive suggestions for legislation. One of the expectations behind the Scotland Act 1998 was that creative energies would be liberated for the public benefit. The criminal code group certainly received a boost from the establishment of the Scottish Parliament. Suddenly it seemed as if what we were doing might have a real chance of enactment. We continued the work with renewed vigour. We would be disappointed if unofficial projects of this kind, which ask only to be considered on their merits, were to be regarded as in some way illegitimate. The draft code is not presented as something which must be accepted or rejected as a package. Its content is for the Scottish Parliament to determine.

Underlying values

Professor Farmer also raised a question about the “political” values which might possibly lie behind the “procedural” values of accessibility, comprehensibility, consistency and certainty.¹⁴ This was not something that we consciously addressed in our work. We wanted the law to be coherent, well-organised and accessible. We had a legislated code in mind and we rather assumed that the Scottish Parliament would want to see the existing body of offences reproduced, with a few additions to fill gaps and with the elimination of obvious archaisms, defects and anomalies. We hoped, and still hope, that the code would obtain all-party support as an important non-political law reform measure.

Nonetheless, Professor Farmer’s question deserves a response based on some honest recollection and introspection. There was never any doubt within the group that the code had to provide at least as much protection against anti-social conduct as the existing law, and preferably more, that it had to comply with human rights requirements and that it had to be workable and efficient. There was complete agreement on those points. On some more marginal issues there were different points of view within the group, usually fairly evenly balanced between the moderately liberal and the moderately tough. A member who was liberal on one issue might turn out to be tough on another. This led to some fascinating discussions, always conducted in a spirit of reasonableness and good humour. It could not be said that there was a group bias either way. The group also, of course, took into account the views expressed on consultation and at conferences.

The draft is just a draft. It is designed to show that a criminal code for Scotland would be not only possible but also desirable. The group hopes that the structure and style and much of the content might be found acceptable and useful. It recognises, however, that this may not be so. The whole question is for the Parliament to decide. Many provisions raise questions of policy. Such provisions could easily be changed, or in some cases simply omitted, without destroying the structure or remaining content. The case for codification does not rest on the values underlying specific provisions.

Form, size and style

¹⁴ See the article cited above, p. 74 - “The question that should be asked of the draft code, then, is whether there are any clear political values lying behind the procedural ones ...”.

The draft code is in the form of an ordinary Bill for the Scottish Parliament, tentatively called the “Criminal Law (Scotland) Bill”. It consists of 114 sections and 3 schedules. It is therefore comparable in size to a number of law reform Bills which have already been introduced in the Scottish Parliament and smaller than some.¹⁵ Every attempt has been made to draft the code in a simple, readable and consistent style and to conform to the rules and conventions of the Scottish Parliament on legislative drafting. It is drafted in a gender neutral way but, we hope, without this being obtrusive or even noticeable.

Preparing Acts on large blocks of the law is, in our view, more likely to promote legislation which is in plain understandable English than preparing a lot of separate Bills dealing with isolated topics in an uncoordinated and sometimes repetitive and overlapping way. We would see a criminal code as a substantial contribution to the objective of having legislation in plain English.¹⁶

The provisions creating offences are all in the style “A person who does X is guilty of the offence of Y”. The word “person” in the code includes a legal person unless the context otherwise requires.¹⁷ No distinction is drawn in the code between crimes and offences but a later section makes it clear that any reference to an offence is to a criminal offence.¹⁸ One incidental advantage of this style is that the code offences are all named. This is not always the case under the existing law which sometimes tolerates innominate offences. The appropriate labelling of offences is important. It makes the law more transparent to the public and also facilitates references to previous convictions and the recording of statistics.

Structure and contents

The draft code is divided into 10 Parts.

Part 1 is a general part. The provisions in it apply not only to code offences but also to other statutory offences, unless the legislation on them provides otherwise. It covers such things as the method of interpretation of the code and other offence-creating provisions; the presumption of innocence and burden of proof; the state of mind required for criminal liability; causation; the special rules on the criminal liability of children, companies and accomplices; attempt, incitement and conspiracy; defences; penalties and the territorial application of Scottish criminal law.

¹⁵ For example, the Land Reform (Scotland) Bill consisted of 97 sections (many of them much longer sections than those of the draft code) and 2 schedules. The Mental Health (Scotland) Bill consisted of 231 sections and 4 schedules.

¹⁶ In *A Partnership for a Better Scotland* (May 2003) the leaders of the Scottish Labour Party and the Scottish Liberal Democrats undertake to ask the Scottish Law Commission to investigate ways by which legislation can be published in plain English.

¹⁷ S.112(g). A legal person is a corporate body, such as a company, or a partnership. It can enter into legal transactions, own property, sue and be sued etc. A legal person in this sense falls to be distinguished from a human being or natural person.

¹⁸ S.112(e).

Parts 2 to 9 deal with particular offences. Part 2 deals with non-sexual offences against interests in the person; Part 3 with sexual offences; Part 4 with offences against property and economic interests; Part 5 with offences involving extortion, deception or dishonesty; Part 6 with offences against public order, safety and security; Part 7 with offences against public interests in lawful government and the administration of justice; Part 8 with offensive conduct; and Part 9 with offences involving animals.

Part 10 deals with rules on consent,¹⁹ interpretation, and final provisions.²⁰

There is nothing immutable about this structure. Indeed it has undergone a good deal of change in the process of preparing the draft. In earlier drafts, for example, defences appeared later in the text on the ground that the ordinary reader would expect to find offences dealt with before defences. The order in which the provisions appear is partly a matter of logical classification and partly a matter of presentation and taste. The material could easily be re-arranged without in any way diminishing the utility of the code.

Coverage

It will be noted from the above that the code does not include some offences which are common and important in practice. In particular, it does not deal with motor vehicle offences such as dangerous and careless driving, drunk driving, speeding, unlawful use of a vehicle or vehicle defect offences.²¹ There are two reasons for this. One is that these offences are already in statutory form. They are already covered by what is, in effect, a code. It is not necessary to codify them afresh. The second reason is more legalistic. The subject matter of the road traffic legislation is a reserved matter under the Scotland Act 1998.²² The Scottish Parliament cannot modify the law on reserved matters.²³

The same considerations apply to offences relating to the misuse of drugs,²⁴ firearms²⁵ and a number of other matters.²⁶ It is true that the Scotland Act 1998 permits the Scottish Parliament to restate the law on a reserved matter.²⁷ That would, in theory, leave the way open for a comprehensive Scottish criminal code containing all offences for which a person could be prosecuted in Scotland. However, there is enough work to be done in producing and enacting what might be termed a core criminal code dealing with non-reserved matters.

If the powers of the Scottish Parliament were to be extended in the future other topics could be added to the code, if so desired.

¹⁹ These state when consent to something is to be disregarded or assumed for purposes of the Act. As these rules apply only for the purposes of the Act and not for the purposes of other statutory provisions they would be inappropriate in Part 1.

²⁰ These deal with repeals, amendments, transitional rules, short title and commencement.

²¹ There were 47,892 motor vehicle offences prosecuted in the Scottish courts in 2001. This can be compared with 25,613 crimes of dishonesty, 6,716 drugs offences and 2,677 non-sexual crimes of violence. *Statistical Bulletin Cr J /2002/9: Criminal Proceedings in the Scottish Courts, 2001*, p. 12 Table 2(a).

²² See sch. 5, Part II, Head E -Transport, s.E1 (Road transport) referring to the Road Traffic Act 1988, the Road Traffic Offenders Act 1988, the Vehicle Excise and Registration Act 1994 and a number of other statutes in this area.

²³ See the Scotland Act 1998, sch. 4, para. 2.

²⁴ See the Scotland Act 1998, sch. 5, Part II, Head B -Home Affairs, s.B1 (Misuse of drugs).

²⁵ See the Scotland Act 1998, sch. 5, Part II, Head B -Home Affairs, s.B4 (Firearms).

²⁶ E.g. immigration; official secrets and terrorism; betting, gaming and lotteries; consumer protection; telecommunications; postal services; air transport; social security; health and safety at work and medicines and poisons. See the Scotland Act 1998, sch. 5, Part II.

²⁷ See the Scotland Act 1998, sch. 4, Part II, para. 7.

There is little in the Act on criminal procedure. It is mainly confined to the substantive law. Criminal procedure is effectively codified already by the Criminal Procedure (Scotland) Act 1995.

Attitudes to codification of the criminal law

For a long time there was considerable opposition, at least in legal circles, to the idea of codification of the criminal law in Scotland. It was sometimes said that the judges were opposed but it seems doubtful whether there was, or is now, a single point of view among judges on this question. There will, however, no doubt still be opposition in some quarters. It is never easy to change the *status quo*. However, there is reason to believe that attitudes to codification are gradually becoming more favourable. Partly this may be due to the new emphasis on human rights. This has made the idea of a rather obscure and inconsistent, and therefore flexible, criminal law, characterised by a judicial power to manipulate the law and even declare new crimes, seem untenable. Partly it may be due to the fact that the Scottish Parliament has shown itself not only to be capable of handling large, technical law reform Bills but also to be accessible and responsive to input from organisations with an interest in a particular area. Partly it may be due to a slight feeling of unease about some recent attempts at judicial modernisation of aspects of the criminal law where, although the results were good within the narrow limits possible, there was room for disquiet about the nature of the process.²⁸ The process is haphazard, depending on what cases come before the courts and proceed to a higher level within the system. Judicial modernisation cannot be comprehensive. It is not the function of a court to deal with problems beyond the point of law raised by the case before it. Judicial reform is therefore likely to deal only with a specific part of a problem. Judicial modernisation cannot be openly and substantially innovative. In practice a court is confined to choosing between inconsistent existing rules or edging the law forward by reinterpreting existing authorities. It generally has to move forwards by pretending to move backwards. It cannot be expected to devise entirely new rules, although such new rules may be precisely what is needed. Effective modernisation of the law requires legislation²⁹ and effective modernisation of a whole area of law requires comprehensive legislation.

In order to foster a free exchange of views it was stated at the consultation conference in November 2000 that comments would be unattributed. It can be said, however, without breaching that undertaking, that cautious support or benevolent neutrality characterised the contributions of several of the eminent speakers. There was no outright opposition. More recently the Lord Advocate has indicated that, although formerly a doubter, he is beginning to think that a case may be made for codification of parts of the criminal law.³⁰ It is also worth noting that the introduction of a core criminal code has become official government policy for England and Wales.³¹

Submission to the Minister for Justice

²⁸ The most notable recent example is *The Lord Advocate's Reference (No 1 of 2001)* 2002 SLT 466 where the High Court completely changed the law on rape, retrospectively reversing an understanding which had prevailed for over a hundred years.

²⁹ We note that in *A Partnership for a Better Scotland* (May 2003) the leaders of the Scottish Labour Party and the Scottish Liberal Democrats undertake to "continue to modernise the law and legal system to protect individual rights."

³⁰ Interview published in the *Sunday Times* of 23 March 2003.

³¹ See the White Paper on *Criminal Justice: The Way Ahead* (Cm 5074, February 2001). See also the Thirty-Sixth Annual Report of the Law Commission for England and Wales (2001) p.26.

The group submitted the draft code to the Minister for Justice in July 2003.

The draft code and commentary

Notes on the Commentary

Throughout the Commentary it has been assumed that the Bill will be enacted. References are therefore to “the Act” rather than “the Bill”. This is more convenient than having constantly to qualify statements by some such expression as “if the Bill is enacted it would make it an offence to ...”.

The text of each section of the Bill is in larger, heavier type than the commentary.

The commentary is aimed primarily at those who have an interest in legislating the code. It is meant to give a brief indication of the thinking behind each section and a brief reference to the existing law, if any, on the subject. It is not meant to include an exhaustive analysis of the existing law or an exhaustive comparison between the existing law and the law as it would be if the draft code were enacted. Nor is it meant to be a profound academic or philosophic discussion of the many difficult theoretical questions which underlie the criminal law of any country.

Some users might like to have a complete text of the Bill without any commentary. For reasons of space that cannot be provided here, but such a text is available on the Scottish Law Commission’s website – www.scotlawcom.gov.uk.

The following is a list of common abbreviations used in the Commentary.

Alison: *Principles and Practice of the Criminal Law of Scotland*, A.J. Alison (2 Vols: Vol. i, *Principles* (Edinburgh, 1832); Vol. ii, *Practice* (Edinburgh 1833))

Gane and Stoddart: *A Casebook on the Criminal Law of Scotland*, 3rd ed, C H W Gane, C N Stoddart and J P Chalmers (eds) (Edinburgh 2001)

Gordon: *The Criminal Law of Scotland*, by Sir Gerald Gordon, 3rd ed, M G A Christie, 2 Vols: (Vol 1, 2001, Vol. 2, 2002) (Edinburgh)

Hume: *Commentaries on the Law of Scotland Respecting Crimes*, Baron Hume, 4th ed, B.R. Bell, 2 Vols (Edinburgh 1844)

Macdonald: *A Practical Treatise on the Criminal Law of Scotland*, J H A Macdonald (Lord Kingsburgh), 5th ed, J Walker (later Lord Walker) and D J Stevenson (eds) (Edinburgh 1948)

Draft Criminal Law (Scotland) Bill

An Act of the Scottish Parliament to replace common law offences by statutory offences; to make provision on the presumption of innocence, on proof in criminal proceedings, on overlapping and aggravated offences, on general principles of criminal liability, on the criminal liability of children, legal persons and persons involved as accomplices or art and part, on attempt, incitement and conspiracy, on defences and on penalties; to make provision on non-sexual offences against life, bodily integrity, liberty and other personal interests, on sexual offences, on offences against property and economic interests, on offences involving extortion, deception or dishonesty, on offences against public order, safety and security, on offences against public interests in lawful government and the administration of justice, on offences involving offensive conduct and on offences involving animals; and for connected purposes.

COMMENTARY

To a large extent the criminal law of Scotland is derived from the common law. Most offences against the person,¹ property interests² and the administration of justice³ are governed by the common law, as are the general principles governing criminal responsibility. To a very considerable extent criminal penalties are likewise governed by the common law.⁴

In a democratic state, the legislature is a more appropriate forum for the creation and amendment of law than the courts, and one of the primary purposes of this Act is to enact the criminal common law in statutory form. Reliance on the common law has meant that the courts, responding to criminal charges brought before them by the public prosecutor, have played a central role in the development of the criminal law in Scotland. Existing offences have frequently been adapted to meet new forms of anti-social conduct,⁵ and, more controversially, it has been held that the High Court of Justiciary has an inherent power to create new offences and to apply these retrospectively.⁶

¹ Including murder, culpable homicide, assault, reckless injury and reckless endangerment, rape and indecent assault and indecency with children. Some important sexual offences are to be found in the Criminal Law (Consolidation) (Scotland) Act 1995. These include incest and related offences (ss.1-4), unlawful sexual intercourse with young girls (s.5) and indecency with young girls (s.6).

² Including theft and aggravated thefts, embezzlement, robbery, extortion, fraud, reset, malicious mischief and fire-raising.

³ Including perjury and subornation of perjury, perverting the course of justice, prison-breaking and the harbouring of escaped prisoners.

⁴ The sentencing powers of the courts are exercised within an increasingly complex statutory framework, but maximum penalties for all common law offences (with the exception of murder) are effectively a matter of common law.

⁵ The offences of “breach of the peace” and “shameless indecency” have proved to be particularly flexible. For a brief list of the types of conduct held to constitute breach of the peace, see Gane and Stoddart, para. 16-01.

⁶ See the case of *Bernard Greenhuff* (1838) 2 Swin. 236. This is the only occasion on which this power, known as the “declaratory power” of the Court, has explicitly been relied upon by the High Court. It is,

While reliance on the common law has avoided the need for legislation in some areas, it is open to the objection that it offends against the principle of legality.⁷ The common law is also open to the criticism that certain offences have become so all-embracing that they no longer identify with sufficient clarity what it is that society wishes to condemn. One attribute of a fair system of criminal law is that it clearly labels the offending behaviour, thus making it clear to all members of the community what is forbidden. This Act pursues the principle of fair labelling by avoiding the use of offences which can be used to punish a wide range of offending behaviour.⁸

As a general rule, the criminal law of Scotland is not a matter which is reserved to the United Kingdom Parliament in terms of the Scotland Act 1998⁹ and the enactment of Scots criminal law in statutory form is, therefore, within the legislative competence of the Scottish Parliament. Certain matters which are relevant to the criminal law are, however, expressly reserved to the legislative competence of the United Kingdom Parliament. These include the law relating to treason,¹⁰ insider dealing,¹¹ money laundering,¹² misuse of drugs (including drug-trafficking),¹³ fire-arms,¹⁴ official secrets,¹⁵ terrorism,¹⁶ consumer protection,¹⁷ road traffic law,¹⁸ aviation and maritime security,¹⁹ health and safety at work²⁰ and abortion.²¹ Furthermore, there are criminal law aspects of other reserved matters (such as social security schemes and weights and measures) which are thus placed beyond the legislative competence of the Scottish Parliament.

It should also be noted that a provision which would not otherwise relate to reserved matters but which makes modifications of, *inter alia*, Scots criminal law as it applies to reserved matters, is to be treated as relating to reserved matters.²² If, however, the purpose of the legislation “is to make the law in question apply consistently to reserved matters and otherwise” then it will not be treated as relating to reserved matters.

however, arguable that the power has been used in other cases, albeit not explicitly. See, for example, the decisions of the High Court in *Strathern v Seaforth* 1926 JC 100 (creation of the offence of “clandestine taking and using” of the property of another to deal with the emerging question of “joy-riding”); *Kerr v Hill*, 1936 JC 71 (creation of the offence of “wasting the time of the police”); *Khaliq v H.M. Advocate*, 1984 JC 23; 1984 SLT 137 (criminalisation of the supply of “glue-sniffing kits” to children and young persons under 16).

⁷ This is discussed further, below. See the commentary to s.1.

⁸ The clearest example of this is the re-distribution of offending behaviour currently dealt with as “breach of the peace” to other, more precisely stated, offences. See now ss.48, 49, 50, 92 and 107 of this Act.

⁹ These are referred to in the Scotland Act 1998 as “reserved matters”. See ss.29(1), 29(2)(b) and 30 of, and sch. 5 to, that Act.

¹⁰ Sch. 5, Part I, para. 10.

¹¹ Sch. 5, Part II, s.A4.

¹² Sch. 5, Part II, s.A5.

¹³ Sch. 5, Part II, s.B1.

¹⁴ Sch. 5, Part II, s.B4.

¹⁵ Sch. 5, Part II, s.B8.

¹⁶ Sch. 5, Part II, s.B8.

¹⁷ Sch. 5, Part II, s.C7.

¹⁸ Sch. 5, Part II, s.E1.

¹⁹ Sch. 5, Part II, ss.E3 and E4.

²⁰ Sch. 5, Part II, s.H2.

²¹ Sch. 5, Part II, s.J1.

²² S.29(4) of the Scotland Act 1998.

It is competent for the Scottish Parliament to legislate on a reserved matter if the legislation merely restates the law.²³ This rule has been used in the Act to restate the basic rule regarding abortion²⁴ (which, of course, is now qualified by United Kingdom legislation permitting abortion in limited circumstances). If the common law rule were not restated in this way a gap would arise because section 1 of the Act abolishes all common law offences. Apart from that, none of the provisions in this Act relates to reserved matters.

As is indicated by the long title, this Act covers (i) general principles of criminal responsibility, defences and penalties and (ii) specific offences. The Act seeks to ensure that the terms which it employs in defining crimes (such as “intention” or “recklessness”) are themselves defined, and defined consistently. The general principles are set out in Part 1. The specific offences are set out in Parts 2-9.

²³ Sch. 4, Part II, para. 7.

²⁴ See s.56.

PART 1
GENERAL

General effect and method of interpretation

1 Statutory basis of the criminal law

Nothing done after the commencement of this Act is an offence under the law of Scotland unless so provided by legislation.

COMMENTARY

Section 1 of this Act places responsibility for the content of the criminal law firmly on the legislature. Placing the criminal law on a statutory basis does not, however, mean that the Courts are deprived of the power to develop the criminal law to meet new situations as and when these arise, but rather that the exercise of the power of interpretation is confined within the boundaries of democratically enacted provisions. There is already a considerable body of statutory criminal law in Scotland, and statutory offences make up much of the daily work of the criminal courts.²⁵ A major purpose of this Act is to enact the common law in statutory form, and section 1 reflects this ethos by declaring that conduct cannot be treated as a crime unless it has already been declared to be a crime by legislation. The principle of legality is reflected in various provisions in the European Convention on Human Rights, in particular article 7.²⁶ The principle states, amongst other things, that a person's conduct should not be punished as a crime unless it has been declared *in advance* to be criminal, and declared to be so in terms which are sufficiently clear and precise for that person to know what is forbidden by the criminal law. More specifically, any lingering doubts about the competence of the High Court retrospectively to create new crimes by the exercise of the "declaratory power" are removed by section 1.

The exercise of the power as described by Hume²⁷ and confirmed by the High Court in the case of *Bernard Greenhuff*,²⁸ would in any event be contrary to article 7 of the European Convention on Human Rights and it would therefore be unlawful²⁹ for a court to exercise it. It would also be *ultra vires* the Lord Advocate, in terms of section 57(2) of the Scotland Act 1998, to invite the court to exercise this power.

²⁵ The most recent year for which figures are available at the time of writing is 2001. In that year 6,716 persons were proceeded against for drug offences, 3,591 for handling offensive weapons, 3,525 for dangerous and careless driving, 7,133 for drunk driving and 10,101 for speeding offences (all statutory offences). (These figures do not include the substantial number of motoring offences that are dealt with by way of fixed penalty.) During the same year 25,613 persons were proceeded against for crimes of dishonesty, 781 for crimes of indecency, 13,946 for simple assault and 4,782 for offences of destroying or damaging property. (Source: Scottish Executive, *Statistical Bulletin Cr J/2002/9: Criminal Proceedings in Scottish Courts, 2001*.)

²⁶ For a discussion of the principle of legality as it is interpreted by the European Court of Human Rights, see Gane, "The Substantive Criminal Law" in Lord Reed (ed.) *A Practical Guide to Human Rights Law in Scotland* (2001), pp. 61-85.

²⁷ i, 12

²⁸ (1838) 2 Swin. 236.

²⁹ In terms of s.6 of the Human Rights Act 1998.

For the purposes of section 1, the legislation which is most likely to be the source of criminal law rules will be Acts of the Scottish Parliament (including, in particular, this Act itself) and Acts of the United Kingdom Parliament.³⁰ Section 1 does not, however, confine the legislative content of the criminal law to Acts of either Parliament, since crimes may be created by subordinate legislation emanating from Westminster or Holyrood.³¹

³⁰ Although criminal law is a devolved matter in terms of the Scotland Act 1998, the Westminster Parliament is still entitled to legislate on matters of criminal law for Scotland.

³¹ There is also the remote possibility of directly applicable European legislation creating a criminal offence. There is, however, no such European legislation at present.

2 Relationship of this Act to existing law

- (1) The provisions of this Act replace any rules of the common law on any matter regulated by this Act.
- (2) The provisions of this Part of this Act apply not only to offences under this Act but also to offences under any other enactment unless otherwise provided in that or any other enactment.

COMMENTARY

Subsection (1) substitutes the provisions of this Act for the rules of the common law. It makes it clear, first, that the abolition of common law offences by section 1 will not leave a vacuum: there will be new provisions to replace the common law offences. Secondly, it goes beyond section 1 because, unlike that section, it applies also to such matters as general principles of criminal liability and defences.

Subsection (2) makes it clear that the rules of general application in Part 1 of the Act apply to all offences and not just to offences under the Act itself, unless otherwise provided in the legislation applicable to the offence. It establishes a default rule which can be displaced by specific legislative provision. So, if some other Act provides its own rules on the mental element required for an offence under it then those rules will prevail but if it is silent on the mental element required then the rules in this Act will apply as default rules. One useful result of this provision is that it will be unnecessary in future Acts creating criminal offences to keep repeating rules on such matters as art and part liability or the liability of bodies corporate. This in itself would be a contribution to a simplification and improvement of the statute book.

The combined effect of sections 1 and 2 is to abolish all common law offences and defences and other common law rules on such matters as the mental state required for criminal liability. It would clearly be unsatisfactory to leave the common law on these topics to run in tandem with the provisions of the code. Although the draft Bill is in the form of an ordinary Bill, and is tentatively called the Criminal Law (Scotland) Bill, the effect of sections 1 and 2 is that it is in substance a codifying measure which would replace the common law in this area.

3 Method of interpretation

- (1) Each provision in this Act is to be interpreted in the light of other relevant provisions in the Act.
- (2) Any provision (whether of this Act or of any other enactment) creating an offence, or to the effect that a person is to be guilty of an offence, is to be interpreted, unless it provides otherwise, as being subject to any provision of this Act laying down a general requirement for criminal liability or providing for an applicable defence.

COMMENTARY

This section sets out two rules for the interpretation of the Act as a whole. These rules should not, however, be viewed in isolation, but should be read along with other general rules governing the interpretation of Acts of the Scottish Parliament.³² Subsection (2) also applies to the interpretation of other offence-creating statutory provisions.

Subsection (1) reflects an existing principle of statutory interpretation but emphasises that the code is to be construed as a whole.

Subsection (2) ensures that offence creating provisions (and also provisions such as those on accomplices and art and part guilt, which do not create separate offences but simply make certain people guilty of existing offences) are read in the light of the provisions of the Act which set out general requirements for criminal liability and applicable defences.

This looks forward to the way in which the offence sections are drafted. As noted above, they are in the form “A person who does X is guilty of offence Y”. That, read on its own, is untrue. A person who does X may, for example, be so mentally ill as not to be responsible for the action or may be only 2 years old or may have the defence of lawful authority. So the offence sections are not to be read on their own but are to be read along with, and subject to, the provisions on the requirements for liability and on defences.

Subject to these rules the Act is to be interpreted like any other Act of the Scottish Parliament.

³² See e.g. the Scotland Act ss.29 and 127, the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999 (SI 1999 No 1379) and the Human Rights Act s.3.

Presumption of innocence and burden of proof

4 Presumption of innocence

A person is presumed innocent of any offence until guilt is established according to law.

COMMENTARY

Sections 4 and 5 deal with the presumption of innocence and the burden of proof. It might be thought that these matters are out of place in a code dealing primarily with the substantive law³³ but, without them, there might be doubt as to how the code is to be read and applied. There might be doubt as to whether, for example, the prosecution had to prove the absence of a defence.

The language of section 4 follows closely that of Article 6(2) of the European Convention on Human Rights, although in terms that provision applies the presumption of innocence only to those “charged with a criminal offence”. In principle it seems right for the Act to state that *everyone*, and not only those charged with an offence, enjoys the protection of this presumption.

The presumption of innocence is, of course, a fundamental tenet of the common law³⁴ and in this sense the provision makes no change.

³³ It should be noted, however, that the Scotland Act 1998 defines Scots criminal law widely so as to include, among other things, evidence, procedure and penalties. S.126(5). See also s.127 read with the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999 (SI 1999 No 1379) sch. 2.

³⁴ See *McKenzie v H.M. Advocate* 1959 JC 32, *per* Lord Justice-Clerk Thomson at 36 and *Slater v H.M. Advocate* 1928 JC 94.

5 Proof in criminal proceedings

- (1) In any criminal proceedings it is for the prosecution to prove guilt in accordance with the rules on evidence, including any rules on corroboration, in force at the time.
- (2) The standard of proof of guilt in criminal proceedings is proof beyond reasonable doubt.
- (3) The prosecution need not prove the absence of any defence or exception unless there is evidence relating to the defence or exception which is sufficient to raise a reasonable doubt as to guilt.
- (4) Where there is such evidence it is for the prosecution, unless legislation provides otherwise in relation to a particular matter, to prove the absence of the defence or exception beyond reasonable doubt.
- (5) The existence of any fact, including any state of mind, may be inferred from other facts proved.

COMMENTARY

This section deals with the burden and standard of proof.

Subsection (1) states the general principle governing the proof of criminal offences in Scotland. It is a corollary of the presumption of innocence set out in section 4. It is qualified by the provisions of section 5(3). Although the burden of proof is not expressly referred to in the European Convention on Human Rights, it is accepted that the presumption of innocence set out in article 6(2) of the Convention implicitly places upon the state the responsibility of proving guilt. That said, there is nothing in the Convention which absolutely prohibits the shifting of the burden of proof to the accused, or modifying the burden placed on the prosecutor, for example, by the use of presumptions.³⁵ However, the modification of the presumption of innocence which this entails must be reasonable and proportionate. Departures from the presumption of innocence must be confined “within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.”³⁶

Subsection (2) deals with the standard of proof. The standard of proof which must be achieved in order to establish guilt is proof “beyond reasonable doubt”.

³⁵ See *Salabiaku v France* (1991) 13 EHRR 779; *Pham Hoang v France* (1995) 16 EHRR 53.

³⁶ *Salabiaku v France*, *ibid*, para. 28. Cf *R v Lambert* [2001] 3 WLR 206; [2001] 3 All ER 577.

Subsections (3) and (4) contain further clarifications as to the burden of proof. There is no burden of proof on the prosecutor to exclude in advance defences or exceptions to liability. Thus, for example, in a case of murder, it is not necessary for the Crown to exclude such defences as self-defence or provocation, unless there is evidence of circumstances relating to one of those defences which is capable of raising a reasonable doubt as to the accused's guilt. Where such evidence exists, then the Crown must exclude the defence beyond reasonable doubt, unless legislation provides otherwise in relation to a particular matter. For example, where the accused seeks to rely on the defence of mental disorder or the defence of diminished responsibility, then the accused must prove that defence on a balance of probabilities.³⁷

There are other exceptional cases where, for particularly strong policy reasons, the burden of establishing a defence or exception is placed on the accused.³⁸

One should also note the effects of the Criminal Procedure (Scotland) Act 1995 Schedule 3 paragraph 16, in relation to the Act's provisions. This is as follows.

“Where, in relation to an offence created by or under an enactment any exception, proviso, excuse, or qualification, is expressed to have effect whether by the same or any other enactment, the exception, exemption, proviso, excuse or qualification need not be specified or negatived in the indictment or complaint, and the prosecution is not required to prove it, but the accused may do so.”

Subsection (5) is a permissive provision which allows appropriate inferences to be drawn from facts which have been proved. It does not *require* any particular inference to be drawn in any given case. This point is further clarified by section 9 (Intention) where subsection (2) makes it clear that there is no rule or presumption that a person intends the natural and probable results of his or her actions.

Sections 5(1) to (4) reflect the current law. Section 5(5) in part reflects the common law, but may also in part modify it. It is clearly the case at present that a judge or jury when determining whether or not a fact has been established is entitled to draw inferences about that fact from others which have been established directly by evidence. In many instances it will not be possible to do otherwise.

³⁷ This is provided for by ss.27(2) and 38(6) of this Act.

³⁸ See e.g. s.91(3) of this Act (reasonable excuse for carrying weapon).

So, for example, where it is proved in a case of rape that the accused had sexual intercourse with a woman who did not consent, and who, by struggling and resisting the accused's advances made it clear that she did not consent, and where violence has been used to overcome that resistance, the jury may infer that the accused knew that she did not consent, even if the accused maintains that he thought that she was consenting. In such a case the jury is drawing a legitimate inference as to the accused's state of mind, based on the objective facts.³⁹ In some cases, however, the courts have tended to suggest that establishing certain objective facts leads to a necessary conclusion, rather than a simple inference. This is especially so in certain categories of murder where the courts have tended to say that where the accused has killed in the course of committing robbery, or where there has been the use of lethal weapons, or where extreme violence has been used, the inference of at least "wicked recklessness" is a necessary inference.⁴⁰ In some instances the courts appear to have adopted a more general proposition that an accused is presumed to intend the natural and probable consequences of his or her actions.⁴¹

³⁹ Cf the discussion of proof of criminal intent by Lord McCluskey in *Ross v H.M. Advocate* 1991 JC 210; 1991 SCCR 823.

⁴⁰ See, for example of this approach *H.M. Advocate v McGuinness* 1937 JC 37 (Lord Justice-Clerk Aitchison); *H.M. Advocate v Fraser and Rollins* 1920 JC 60 (Lord Sands); *Miller and Denovan v H.M. Advocate* (Unreported) Noted, 1991 SLT 211; *Parr v H.M. Advocate* 1991 JC 39; 1991 SCCR 180; 1991 SLT 208 (Lord Hope); *Broadley v H.M. Advocate* 1991 JC 108; 1991 SCCR 416; 1991 SLT 216; and *Brown v H. M. Advocate* 1993 SCCR 382.

⁴¹ See, e.g. Lord Hope in *Ross v H.M. Advocate* 1991 JC 210 at 214; 1991 SCCR 823 at 829 (where the absence of *mens rea* is self-induced "the accused must be assumed to have intended the natural consequences of his act"). See also *Brown v H.M. Advocate* 1993 SCCR 382 (Lord Marnoch) and *Blane v H.M. Advocate* 1991 SCCR 576.

Overlapping and aggravated offences

6 Overlapping offences

- (1) Where a person's acts constitute an offence and some or all of those acts also constitute another offence the person is guilty of both offences.
- (2) A person who is charged with an offence based on acts some or all of which could also constitute another offence may be convicted of the other offence if the first offence is not proved and if the elements required for the other offence are proved.
- (3) In particular, if the requirements of subsection (2) are satisfied—
 - (a) a person charged with an offence may be convicted of an attempt to commit that offence;
 - (b) a person charged with an aggravated offence may be convicted of the offence without the aggravation;
 - (c) a person charged with murder may be convicted of culpable homicide, assault or causing unlawful injury;
 - (d) a person charged with rape may be convicted of assault or sexual molestation;
 - (e) a person charged with robbery may be convicted of theft; and
 - (f) a person charged with theft may be convicted of embezzlement, fraud or reset.
- (4) Nothing in this section enables a person—
 - (a) to be convicted of an offence if not given fair notice of the possibility of being convicted of that offence; or
 - (b) to be convicted or punished twice in respect of the same acts.

COMMENTARY

There are many situations where the acts which an accused person is alleged to have done constitute more than one offence. For example, a course of conduct culminating in rape may also have involved assault, sexual molestation, threats and abduction as well as minor offences. Acts constituting murder may also involve culpable homicide, assault, or child abuse. Acts constituting robbery may also constitute theft. A course of conduct amounting to fraud may also have involved forgery or the making of a false oath or statutory statement. Acts constituting the offence of criminal damage to property may also have involved criminal interference with property or fire-raising. Section 6 attempts to combine flexibility and practicability for the prosecuting authorities with fairness and respect for human rights.

Subsection (1) lays down the general rule of cumulative liability. A person is guilty of any offence constituted by some or all of the acts done and could be separately charged with each, either in one complaint or indictment or in different ones.

Subsection (2) deals with the situation where a person is charged with only one offence and this is not proved, although enough of the facts labelled are proved to justify a conviction of another offence.

The list in subsection (3) of examples of this type of situation is not intended to be exhaustive. Considerations of fairness⁴² require the general rule of cumulative liability to be qualified in two ways. This is done by subsection (4). First, an accused must be given fair notice of any offence of which he or she may be convicted in the proceedings. In the absence of this protection there would be a danger of unfair prejudice to the accused.

Suppose for example that a man is accused of theft and is given no warning that he may be convicted of reset. He has a complete defence to the charge of theft, having an alibi. Knowing that he has a complete defence to the theft charge he does not bother to contest any of the evidence. To his surprise, although acquitted of theft, he is convicted of reset.⁴³ Similar dangers of prejudice could arise in any case where the accused has a complete defence to the major charge.

The requirement of fair notice does not mean that there must be multiple charges. The accused may be charged only with the most serious offence but, if given advance warning of the danger, may be convicted of anything covered by what is alleged in the indictment or complaint and proved to the required standard. In practice the warning may be given by means of a note on the indictment or complaint drawing attention to any offence, other than the main offence charged, for which a conviction may be sought.⁴⁴

⁴² The consideration of fairness referred to here is not recognised by the European Convention on Human Rights (ECHR) nor by the International Covenant on Civil and Political Rights, (ICCPR). Although the principle of *ne bis in idem* is recognised in article 4 of the 7th Protocol to the former, and in article 14(7) of the latter, that principle has no application to the point in issue.

⁴³ That is, receiving or retaining possession of goods which have been stolen by someone else - see s.89.

⁴⁴ See the amendment to sch. 3, para. 8 of the Criminal Procedure (Scotland) Act 1995 made by sch. 2 to the Act.

Secondly, the accused cannot be convicted or punished more than once in respect of the same conduct. In practice this means that the accused will be convicted and punished only in respect of the most serious of the offences covered by the facts libelled.

The principle of cumulative liability is recognised in the existing law. Paragraph 9(2) of Schedule 3 to the Criminal Procedure (Scotland) Act 1995 says that “Any part of the charge in an indictment or complaint which itself constitutes an indictable offence or, as the case may be, an offence punishable on complaint, shall be separable and it shall be lawful to convict the accused of that offence.” Notwithstanding that general rule there are various statutory provisions which deal, non-exhaustively, with particular types of cumulative offences.⁴⁵ Section 4 generalises the rules, makes them more obvious and accessible and introduces basic human rights protections. It does not change the underlying philosophy.

⁴⁵ See para. 8(2) to (4) of sch. 3 to the Criminal Procedure (Scotland) Act 1995, s.14 of the Criminal Law (Consolidation) (Scotland) Act 1995 and s.12 of the Children and Young Persons (Scotland) Act 1937.

7 **Aggravated offences**

- (1) An offence may be aggravated by the intent or motivation with which it is committed, by the manner or circumstances in which it is committed, by the serious nature of the effects produced, by the special vulnerability of the victim; or by the abuse of a special relationship between the perpetrator and the victim, and may be charged and tried accordingly.
- (2) An offence under this Act may, in particular, be aggravated—
 - (a) if committed with intent to commit another offence;
 - (b) if motivated by hatred or contempt for, or malice or ill-will towards, a group of persons defined by reference to race, colour, religion, gender, sexual orientation, nationality, citizenship or ethnic or national origins;
 - (c) if accompanied by expressions of abuse or ill-will based on the victim's membership or supposed membership of any such group;
 - (d) if committed in circumstances involving an invasion of the victim's home or privacy;
 - (e) if committed against an officer of the law carrying out official duties by a person who knows, or could reasonably be expected to know, those circumstances;
 - (f) if committed against a child under the age of 16 years;
 - (g) if committed by a person who has, to that person's knowledge, a position of trust or authority in relation to the victim; or
 - (h) if it results in danger to life or serious personal injury or impairment.
- (3) An offence is not aggravated by a factor if that factor is already specified as an ingredient of the offence.
- (4) For the purposes of this section a group of persons is defined by reference to religion if it is defined by reference to their—
 - (a) religious belief or lack of it;
 - (b) membership of, or adherence to, a church or religious organisation;

- (c) support for the culture and traditions of a church or religious organisation; or
- (d) participation in activities associated with such a culture or such traditions.

COMMENTARY

This section makes it clear that an offence can be aggravated by intent, motivation, circumstances, relationship or effect. Such an aggravated offence may attract a more severe penalty.⁴⁶ Certain aggravated offences may also have other consequences. For example assault with intent to rape and abduction with intent to rape count as sexual offences for the purposes of the Sex Offenders Act 1997 and conviction may thus result in the accused's particulars being entered on the register of sex offenders. The list in section 7(2) is for purposes of illustration and is not intended to be exhaustive.

The current law recognises various nominate aggravated offences such as assault with intent to ravish, assault with intent to rob, racially aggravated harassment,⁴⁷ hamesucken⁴⁸ and deforcement.⁴⁹ More generally, an assault or other offence might be labelled as aggravated by a particular intent or circumstances.⁵⁰ The general rule in section 7 replaces the aggravated common law offences and section 74 of the Criminal Justice (Scotland) Act 2003 which deals with offences aggravated by religious prejudice. That section can accordingly be repealed.⁵¹

⁴⁶ See s.32.

⁴⁷ This was introduced by s.33 of the Crime and Disorder Act 1998 and inserted into the Criminal Law (Consolidation) (Scotland) Act 1995 as s.50A.

⁴⁸ Hamesucken is constituted by invading a person's home and assaulting him or her there.

⁴⁹ This is constituted by assaulting or resisting a messenger-at-arms or other officer of the law in the exercise of his or her duties.

⁵⁰ See the Criminal Procedure (Scotland) Act 1995, sch. 3 paras. 7 and 9(3).

⁵¹ See s.113 and sch. 3 of this Act.

State of mind required

8 General rules on state of mind required

- (1) The general rule is that a person is criminally liable—
 - (a) for an act, only if the person intended to perform that act;
 - (b) for causing a result, only if the person intended to cause that result.
- (2) The enactment defining an offence may, however, provide in relation to the offence or any element of it that recklessness or some other state of mind suffices or that no particular state of mind is required.
- (3) Unless otherwise provided, knowledge of any circumstance forming part of the definition of an offence is required for guilt of that offence.

COMMENTARY

As a general rule, crimes comprise at least two elements: (1) some prohibited conduct, and (2) a legally blameworthy state of mind. In other words, it is not sufficient, in order to establish criminal responsibility, that an accused person has engaged in conduct prohibited by the criminal law. It is necessary also to show that that conduct was accompanied by a state of mind which the law regards as being appropriate for the attribution of criminal responsibility. So, for example, while it is an offence to destroy or damage property belonging to another person without that person's consent,⁵² it is only an offence where that damage is done "intentionally" or "recklessly". If, in a given situation, property is damaged accidentally,⁵³ or even negligently⁵⁴, that is not an offence.

This section introduces three concepts used in the Act to describe a person's state of mind for various purposes – namely "intention", "recklessness" and "knowledge". These terms are further defined in the following sections. Section 8 provides that, as a general rule, *intention* will be required. It also provides, however, that in certain cases *recklessness* may, by statute, be a sufficient state of mind for criminal responsibility. It also introduces the possibility of offences of *strict liability* by providing that an enactment defining an offence may provide that "no particular state of mind is required" in order to establish criminal responsibility. Section 8 recognises the legality of existing statutory offences which impose strict liability, and recognises the right of the legislature to create such offences in future.

⁵² See below, s.81 (Criminal damage to property).

⁵³ That is, without fault on anyone's part.

⁵⁴ That is, by failure to exercise reasonable care.

The imposition of strict liability is controversial, since it involves imposing criminal responsibility on a person who did not intend to cause harm, and was not reckless or even aware that there was any risk of harm in what he or she was doing. It may, indeed, result in imposing liability on those who have in good faith sought to avoid committing an offence. For reasons such as these, the courts have, in general, insisted that there is a presumption against strict liability,⁵⁵ and the onus is on the Crown to show that the statute creating the offence is intended to impose this form of criminal liability.⁵⁶

Strict liability may at first sight appear to be inconsistent with the presumption of innocence.⁵⁷ This matter has been discussed on a number of occasions by the European Court of Human rights which takes the view that it is not, in general terms, incompatible with the presumption of innocence set out in article 6(2) of the Convention.⁵⁸ However, the imposition of strict liability does represent a departure from the basic principle set out in article 6(2), and as such should be confined “within reasonable limits which take into account the importance of what is at stake”.⁵⁹ In other words, strict liability is subject to an over-riding rule of proportionality.

Section 8(3) makes it clear that, unless otherwise provided, knowledge of any circumstance forming part of the definition of an offence is required for guilt of that offence. This is one approach to the question of knowledge. Another approach, not generally favoured in modern statutes, is to make liability strict in this respect, subject to the availability of the defence of error. For strong policy reasons, this stricter approach is followed in this Act in relation to knowledge of the age of the victim in certain sexual offences.⁶⁰ It should also be noted that in several offences (such as rape)⁶¹ recklessness as to the existence or non-existence of a circumstance, such as the victim’s consent, suffices.

⁵⁵ *Sweet v Parsley* [1970] AC 132; *Warner v MPC* [1969] 2 AC 256; [1968] 2 WLR 1303; [1968] 2 All ER 356; *Gammon v A-G of Hong Kong* [1985] AC 1; [1984] 3 WLR 437; [1984] 2 All ER 503; *B (a minor) v DPP* [2000] 2 AC 428; [2000] 2 WLR 452; [2000] 1 All ER 833.

⁵⁶ *Mitchell v Morrison* 1938 JC 64; 1938 SLT 201; *Duguid v Fraser* 1942 JC 1.

⁵⁷ See s.4, above.

⁵⁸ *Salabiaku v France* (1991) 13 EHRR 379, para. 27.

⁵⁹ *Salabiaku v France* (1991) 13 EHRR 379, para. 28.

⁶⁰ See s.73 (Knowledge of age not required).

⁶¹ S.61.

9 Intention

- (1) For the purposes of criminal liability, and without restricting the ordinary meaning of intention—
 - (a) a person is treated as intending a result of his or her act if, at the time of the act, the person foresees that the result is certain or almost certain to occur;
 - (b) a person who intends to harm a person and harms another person instead is treated as intending to harm the other person; and
 - (c) a person who intends to damage property and damages other property instead is treated as intending to damage the other property.
- (2) Subject to subsection (1), there is no rule or presumption that a person intends the natural and probable results of that person's acts.

COMMENTARY

This section provides a slightly extended definition of intention for the purposes of criminal liability. It does this by building upon, rather than replacing, the ordinary meaning of the word “intention”.

Providing a generally accepted definition of intention has proved to be problematic in other jurisdictions.⁶² It has also been a fruitful source of academic dispute. Generally speaking, however, the Scottish courts have avoided detailed discussion of this term. Somewhat exceptionally, in *Sayer and Others v H.M. Advocate*⁶³ Lord Ross adopted the definition of intention offered by Asquith LJ in *Cunliffe v Goodman*.⁶⁴ The definition was in the following terms:

“An ‘intention’ to my mind connotes a state of affairs which the party ‘intending’ ... does more than merely contemplate, it connotes a state of affairs which, on the contrary, he has a reasonable prospect of being able to bring about, by his own act of volition.”

As a definition of intention this is not very satisfactory, partly because intention is a state of mind rather than a state of affairs. It has not been adopted by other judges in the Scottish courts.

⁶² See, for example, the difficulties encountered by the English Courts in *R v Hancock and Shankland* [1986] AC 455; *R v Moloney* [1985] AC 905; [1985] 2 WLR 648; [1985] 1 All ER 1025; and *R v Nedrick* [1986] 3 All ER.

⁶³ 1981 JC 98; 1981 SCCR 312; 1982 SLT 220.

⁶⁴ [1950] 2 KB 237.

The opening words of subsection (1) make it clear that intention should, in general, be given its ordinary meaning.⁶⁵ Attempts to define the ordinary word “intention” by reference to other ordinary words such as “aim”, “purpose”, “foresight coupled with desire”, or “wanting” or “meaning” to do something, generally give rise to more difficulties than they resolve.

Subsection (1)(a) does, however, provide what might be described as an extended definition of intention. It is based on the consideration that there may be cases where it is entirely just to describe the consequences which an accused has brought about as intended, without those being the accused’s aim or purpose in acting. Section 9(1)(a) therefore extends the definition of intention to the case where the accused foresees that his or her conduct is certain or almost certain to give rise to a particular result and nevertheless pursues the course of conduct which leads to that result.

For example, a man attempting to escape pursuit may deliberately drive a car through a fence. He might argue that damaging the fence was not his intention. His intention was to escape and the fence was just in the way. He would have preferred it not to be there. The effect of subsection (1)(a) is that this argument will not work. He is treated as intending to damage the fence.

It is important to note that section 9(1)(a) only applies where the accused foresaw that the result was “certain or almost certain to occur”. Two points arise here.

(i) The first is that the Crown must show that *the actor* was aware of the likely consequences of his or her conduct. It would not be sufficient, in order to prove intention, for the Crown to show that any reasonable person would have realised that this was the case.

(ii) The second is that a high degree of probability is required before this form of intention can be attributed to the accused. It is not enough, for example, for the Crown to show that the accused knew that a particular result was “likely” or “highly likely”. Consider, in this regard, the circumstances of the English case of *Hyam v DPP*.⁶⁶ In that case the accused, wishing to frighten another woman into ending her association with the accused’s former boyfriend, put petrol and paper through her rival’s letterbox, setting fire to the house. In the ensuing conflagration two children, asleep in an upstairs bedroom, were killed. The accused was unaware of the presence of the children. Notwithstanding the highly dangerous nature of A’s actions, it cannot be said that A “intended” the deaths of the children. This was not something that she wished to occur, and it cannot be said that death was “certain or almost certain to occur”.

Subsections (1)(b) and (c) apply the doctrine of transferred intent to offences against the person and property generally. The separate treatment of the two categories of offence makes it clear that the doctrine does not apply between different categories of crime. The doctrine does not, therefore, apply where, for example, A intends to cause harm to another person, but in fact causes damage to property.

⁶⁵ Cf the views of the House of Lords in the English case of *R v Hancock and Shankland* [1986] AC 455; [1986] 2 WLR 357 and those of the Court of Appeal in *Nedrick* [1986] 3 All ER 1.

⁶⁶ [1975] AC 55.

The common law adopts a rather inconsistent approach to the question of transferred intent. It recognises the doctrine in the context of murder⁶⁷ and assault.⁶⁸ The doctrine may apply also to offences of criminal damage, but in *Byrne v H.M. Advocate*⁶⁹ the High Court held that it did not apply to the crime of wilful fire-raising.

Subsection (2) makes it clear that there is no general rule or presumption that a person intends the natural and probable consequences of his or her acts.⁷⁰

⁶⁷ See *Hume*, 1, 22-23.

⁶⁸ See *Roberts v Hamilton* 1989 JC 91; 1989 SCCR 240; 1989 SLT 399 and *Connor v Jessop* 1988 SCCR 624.

⁶⁹ 2000 SCCR 77.

⁷⁰ See the Commentary to s.5(5).

10 Recklessness

For the purposes of criminal liability —

- (a) something is caused recklessly if the person causing the result is, or ought to be, aware of an obvious and serious risk that acting will bring about the result but nonetheless acts where no reasonable person would do so;
- (b) a person is reckless as to a circumstance, or as to a possible result of an act, if the person is, or ought to be, aware of an obvious and serious risk that the circumstance exists, or that the result will follow, but nonetheless acts where no reasonable person would do so;
- (c) a person acts recklessly if the person is, or ought to be, aware of an obvious and serious risk of dangers or of possible harmful results in so acting but nonetheless acts where no reasonable person would do so.

COMMENTARY

Recklessness is accepted as a sufficient state of mind for a number of offences under this Act. As section 10 recognises, a person may be reckless with regard to conduct, the consequences or possible consequences of conduct, and surrounding circumstances. Thus a person might discharge a gun recklessly, in the sense that the action creates an obvious and serious risk of injury to others or damage to property, without actually causing any such injury or damage;⁷¹ a person might, by reckless conduct injure others or damage property;⁷² and a person might have sexual intercourse with another person without that person's consent, being reckless as to whether there is consent or not.

Recklessness connotes risk-taking, and in this sense may take two forms. As a concept it embraces the deliberate risk-taker, the person who knows that his or her conduct presents certain risks, or is aware that certain circumstances may be present. But it also embraces the person who is not aware of the risks, but who, judged by certain objective standards, *ought to be aware*. For that reason, section 10 refers, throughout, not only to the person who is aware of the risks, but also to the person who ought to be aware of the risks.

⁷¹ Cf *David Smith and William McNeil* (1842) 1 Broun 240; *Normand v Robinson* 1994 SLT 558; 1993 SCR 1119 and *Cameron v Maguire* 1999 JC 63; 1999 SLT 883; 1999 SCCR 44.

⁷² Cf *RHW v H.M. Advocate* 1982 SLT 420; 1982 SCCR 152.

There is a danger, however, that punishing those who fail to appreciate risks places the threshold of criminal liability too low. It comes close to holding persons criminally responsible for negligent conduct. For that reason, section 10 refers to a failure to appreciate “an obvious and serious risk”. This is intended to demonstrate that a person is not reckless merely because of a failure to meet the standard of care that can be expected of ordinary reasonable people. The requirement in section 10 that the accused fail to appreciate “an obvious and serious risk”, reflects the common law.⁷³

The precise effect of applying the concept of recklessness in relation to any offence depends on the wording of the provision creating that offence. Often the wording will specify the particular results or circumstances as to which the person must be reckless. Sometimes, however, the wording may refer to doing an act “recklessly” without more.⁷⁴ Paragraph (c) is intended to provide a default rule for interpreting such references. A statute creating an offence involving recklessness could provide its own definition of recklessness.⁷⁵ In the absence of any such special meaning a reference to acting recklessly will be construed under paragraph (c) as including an implied reference to recklessness as to the dangers or possible harmful results of acting in the specified way. This is broadly in line with the existing law. In relation to reckless driving, for example, the High Court has said that driving “recklessly” means “driving which demonstrates a gross degree of carelessness in the face of dangers”.⁷⁶ This, like paragraph (c), includes objective recklessness. The code makes it clear that a person is reckless as to the dangers or possible harmful results of acting if the person is, or ought to be, aware of an obvious and serious risk that those dangers exist or that those results will follow but nonetheless acts where no reasonable person would do so. It tries to introduce a measure of consistency in the use of the concept of recklessness.

⁷³ For examples of the common law approach see *Cameron v Maguire*, above; *Carr v H.M. Advocate* 1994 JC 213; 1994 SCCR 521; *H.M. Advocate v Harris* 1993 JC 150; 1993 SLT 963; *Kimmins v Normand* 1993 SLT 1260; 1993 SCCR 476, *Normand v Robinson*, above.

⁷⁴ There is an example of this in s.51 (Child abuse) of this Act.

⁷⁵ S.2(2) of this Act makes it clear that another statute could provide its own definition of recklessness for its purposes if that were thought desirable. It is to be hoped, however, that future statutes will use the default concept in s.10. This would lead to more coherence in the law.

⁷⁶ *Allan v Patterson* 1980 JC 57; 1980 SLT 77.

11 Knowledge

For the purposes of criminal liability, and without restricting the ordinary meaning of knowledge, a person is treated as knowing of a circumstance if the circumstance exists and—

- (a) the person would have known of it but for a wilful and unreasonable failure to allow that knowledge to be acquired; or
- (b) the person thinks that the circumstance almost certainly exists but nonetheless proceeds where no reasonable person would do so.

COMMENTARY

As with “intention” in section 9, no attempt is made to provide a general definition of “knowledge”. However, section 11 provides an expanded explanation of the term, and extends it to cases where it would, in any event, be difficult to prove “actual” knowledge on the part of the accused.

Paragraph (a) is akin to the notion of “wilful blindness” which has been accepted as a sufficient state of mind with regard to surrounding circumstances where the primary requirement is knowledge. Paragraph (b) deals with the problem that the distinction between knowledge and virtual certainty can be very fine. Very few things can be known with absolute certainty. This could be used by accused persons in a rather pedantic way. For example, an accused may be asked if he knew there were children on the other side of a wall. He may admit that he heard children’s voices. When pressed, he may say that while he thought there were almost certainly children there he did not know this for certain because the voices could have come from a radio or tape recorder. Section 11(b) prevents pedantic quibbles of this type from being put forward as successful defences in any case where the accused has proceeded to act, despite thinking that the relevant circumstance almost certainly exists, where no reasonable person would have done so. This type of situation is not covered by the wilful blindness provision in paragraph (a) because there is no wilful and unreasonable failure to allow the knowledge to be acquired.

The concept of “wilful blindness” is recognised by the common law. For instance, in relation to the crime of reset,⁷⁷ the general rule is that it must be proved that the accused knew that the goods were stolen. In the case of *Latta v Herron*⁷⁸ it was accepted that “wilful blindness” as to the provenance of various items of stolen property was sufficient to sustain a charge of reset.

⁷⁷ That is, receiving or retaining possession of goods which have been stolen by someone else- see s.89.

⁷⁸ (1967) SCCR Supp. 18.

12 Culpably self-induced state of mind

- (1) For the purposes of criminal liability, a person cannot found on a temporary state of mind which is culpably self-induced, and accordingly—
 - (a) where such a state of mind precludes the intention or other mental element required for an offence, the person is to be regarded as having that intention or mental element; and
 - (b) where such a state of mind gives rise to the availability of a defence or exception, that defence or exception is to be regarded as not being available.
- (2) For the purposes of this section, a temporary state of mind is culpably self-induced by a person if it was caused by—
 - (a) a voluntary taking (by swallowing, injecting, inhaling or any other means) by that person of alcohol or any other drug or substance; or
 - (b) a voluntary failure by that person to take any medication or precautionary measures,

when the person knew, or ought to have known, that the taking or failure to take was likely to lead to a loss of self-control.
- (3) Subsection (2) does not apply to anything done in good faith in compliance with the directions of a registered medical or dental practitioner.
- (4) The fact that an offence was committed in the circumstances mentioned in this section is not an aggravation of the offence but may, if there is a serious disproportion between the degree of culpability and the seriousness of the offence, be taken into account in mitigation of sentence.
- (5) This section does not apply to the offences of presence with intent to commit an offence or possession of tools with intent to commit an offence.

COMMENTARY

This section deals with the problem of the person who commits an offence while his or her mental condition is impaired through intoxication brought about by the voluntary consumption of intoxicants, or by the voluntary failure to avoid a condition of intoxication.

While voluntary intoxication is no defence to a criminal charge, involuntary intoxication may be a defence. The latter will occur when the intoxication is not self-induced (that is, the accused is unaware that he or she is consuming the intoxicant), and produces a total alienation of reason amounting to a complete loss of self-control in relation to the offence charged.

Under the common law, voluntary intoxication is no defence to a criminal charge.⁷⁹ The doctrinal basis of this rule is unclear, and it is substantially based on policy considerations: those who commit offences when drunk present a significant social danger, and are deserving of punishment for the harm which they cause notwithstanding the fact that at the time they commit the offence they may be unaware of what they are doing, or unable to control their behaviour. In contrast, the courts have accepted that “involuntary intoxication” may be a defence to a criminal charge, in the circumstances described above.⁸⁰

Section 12 follows the policy of the present law but puts the current rules on a clear statutory basis. Subsection (1) sets out the basic rule that culpably self-induced intoxication is not a defence. Subsection (2) explains what is meant by “culpably self-induced”. Subsection (3) contains an exception for anything done in good faith in compliance with the directions of a registered medical or dental practitioner.⁸¹ Subsection (4) introduces an element of flexibility when it comes to sentencing. The reason for subsection (5) is that the offences there mentioned depend almost entirely on intent and, if the person was to be regarded under section 12(1)(a) as having the intention necessary to commit the offences, their scope would be unacceptably wide.

⁷⁹ *Brennan v H.M. Advocate* 1977 JC 38.

⁸⁰ *Ross v H. M. Advocate* 1991 JC 210; 1991 SCCR 823; 1991 SLT 564; *Cardle v Mulrainey* 1992 SCCR 658; 1992 SLT 1152; *Sorley v H.M. Advocate* 1992 JC 102; 1992 SCCR 396; 1992 SLT 867; and *Ebsworth v H.M. Advocate* 1992 SCCR 671; 1992 SLT 1161.

⁸¹ Here and elsewhere in the Act “registered medical practitioner” means a fully registered person within the meaning of the Medical Act 1983. See the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999 (SI 1999 No 1379) sch. 2.

Causation

13 General rules on causation

- (1) For the purposes of criminal liability, a person's act causes something ("the result") if—
 - (a) the result would not have occurred when it did but for the act; and
 - (b) the connection between the act and the result is sufficiently strong for it to be reasonable to hold the person criminally liable for the result.
- (2) Subsection (1)(a) does not apply in any case where each of two or more acts giving rise to potential criminal liability would have been sufficient for the result to occur when it did.
- (3) For the purposes of subsection (1) the connection between a person's act and the result may, in particular, be sufficiently strong—
 - (a) notwithstanding an intervening event or intervening act by the victim or a third party if the intervening event or act was intended by the person to happen or could reasonably have been expected to happen; and
 - (b) notwithstanding that the result would not have happened but for some unusual susceptibility to injury or damage of the victim or of the property damaged.

COMMENTARY

This section makes general provision for rules on causation. Issues of causation have proved to be problematic most frequently in cases of murder or culpable homicide (where it is necessary for the Crown to establish that the accused caused the death of the victim), although they may also arise in the context of offences of damaging or destroying property,⁸² and in fraud (where the Crown must prove that the accused has caused another person to act to his or her prejudice or to the prejudice of a third party).⁸³

⁸² See, for example, the American case of *State v Jansing* 918 P 2d 1081 (1996) (Arizona).

⁸³ See s.86 (Fraud).

Subsection (1) reflects a distinction between factual and legal causes. Before an accused's act can be regarded as causing a result it must be shown that that act contributed, factually, to that result, in the sense that, in the absence of the accused's act, the result would not have occurred when it did.⁸⁴ However, establishing this factual link is generally not sufficient, since many such factors may have contributed to a given outcome, some of them very remote from the outcome both in time and place. The relative significance of such contributions must also be taken on board. For these reasons section 13(1)(b) provides that there must be a "sufficiently strong" connection between the accused's act and the prohibited result.

Subsection (2) deals with the problem of concurrent causes, a problem which will arise only rarely in practice. The inclusion of the words "when it did" in section 13(1)(a) means that an accused cannot argue that his or her act did not cause the result (e.g. a person's death) because it would have happened at a different time anyway. The only situation which needs to be covered by subsection (2) is the situation where two independent acts cause the result at precisely the same time. If X and Y both shoot Z in the head at the same moment neither should be able to escape criminal liability by arguing that the death would have occurred at the same time anyway because of the other's act. The purpose of subsection (2) is to prevent this type of argument from succeeding.

It should be noted that a person who attempts to produce a result but fails to do so may be guilty of a criminal attempt. So, if the evidence is that X's shot killed Z and Y's shot reached its target a moment after Z was already dead then X would be guilty of murder and Y of attempted murder. See sections 18 and 21 of this Act.

Subsection (3)(a) indicates that an intervening event or intervening act of the victim will not be expected to break the causal link between the accused's act and the result where such act or event was intended by the wrongdoer to happen or could reasonably have been expected to happen. If, for example, an accused were to supply drugs or other substances to third parties, intending that the latter would use them in such a way as to injure themselves, or in circumstances where that could reasonably be expected to happen, it would not normally avail the accused to argue that the injuries were caused by the recipients' own actions.⁸⁵

If, however, the act or event was not intended by the accused to happen and could not reasonably have been expected to happen then the victim's act or the intervening event *may* have the effect of breaking the causal link. In the American case of *People v Lewis*,⁸⁶ for example, the accused shot his brother-in-law, inflicting a wound which would have proved fatal within a relatively short period. However, the victim shortly thereafter cut his own throat, thus further hastening his death. In such a case it would be open to the accused to argue that the act of the victim was not one which he intended or which could reasonably have been expected, and that it therefore broke any causal link between the accused's act and the victim's death.

⁸⁴ The requirements of the criminal law may have to be stricter in this respect than those of the civil law on delict. (See, for example, *Fairchild v Glenhaven Funeral Services Ltd.* [2002] UKHL 22.) The criminal law is about liability to punishment, not allocation of risk. Furthermore, rules of the criminal law can punish directly those who create risks even if no harm results. See, for example, s.43 (Causing an unlawful risk of injury) and s.82 (Causing an unlawful risk of damage to property).

⁸⁵ See, for examples, *Khaliq v H.M. Advocate* 1984 JC 23; 1984 SLT 137; *Ulhaq v H.M. Advocate* 1991 SLT 614; *Lord Advocate's Reference (No 1 of 1994)* 1996 JC 76; 1995 SLT 248.

⁸⁶ 124 Cal. 551; 57 Pac. 470 (1899) (California).

Subsection (3)(b) indicates that an accused person could normally expect no success from arguing that a harmful consequence of his or her actions should be attributed to some inherent weakness in the victim, or (less commonly) in property damaged.⁸⁷ As it is sometimes put, the accused “takes his victim as he finds him”. In applying this rule it does not matter whether the inherent weakness is due to some natural cause, or to conduct on the part of the victim which has weakened his or her health.⁸⁸ The common law rule has generally been applied in relation to inherent physical weaknesses.⁸⁹

In the case of *R v Blaue*⁹⁰ the English Court of Appeal applied the rule to the case of an accused who stabbed a Jehovah’s witness who subsequently refused a blood transfusion. The Court held that the rule that the accused took his victim as he found her applied not only to physical characteristics, but also to her beliefs. Under section 13 a Scottish court could reach this type of result, if it thought it reasonable to do so in the circumstances, by a direct application of the “sufficiently strong” connection test in subsection (1)(b). Subsection (3) is not an exhaustive list of circumstances where a sufficiently strong connection may be found.

The distinction between factual and legal causes is recognised by the common law. The two rules stated in subsection 13(3) reflect the common law position, including what is generally termed the “thin skull rule”, but are framed in a flexible way which leaves room for a court to take account of wholly exceptional situations.

⁸⁷ *Cf State v Jansing* 918 P 2d 1081 (1996) (Arizona).

⁸⁸ *James Williamson* (1866) 5 Irv. 326.

⁸⁹ See, for example *H.M. Advocate v Robertson and Donoghue*, unreported, August 1945 (High Court) (see Gane and Stoddart, p. 114-115); *Bird v H.M. Advocate* 1952 JC 23; 1952 SLT 446.

⁹⁰ [1975] 3 WLR 1411; [1975] 3 All ER 446.

14 Liability for result caused by omitting to act

A person is criminally liable for a result caused by omitting to act only if—

- (a) the legislation on a particular offence expressly so provides;
- (b) the person is under a duty to act (whether by operation of law, or under contract or by an assumption of responsibility) and in breach of that duty omits to act; or
- (c) the person acts (whether lawfully or otherwise) so as to expose another person, or the property of another person, to a risk of injury or damage and then omits to take such steps as are reasonable to avert that risk.

COMMENTARY

This section deals with results caused by omitting to act. An example would be causing the death of a person by failing to rescue them from drowning. In offences which do not involve causing a result the wording of the relevant statutory provision will determine whether acting, omitting to act or either will be sufficient for criminal liability, assuming the other requirements are satisfied. Usually, the wording of the provision will make it clear that a particular offence (e.g. assault, robbery, rape) could not be committed by omitting to act. It should be noted, however, that where the word “act” is used it will, unless the context otherwise requires, include an omission. See section 112 (Interpretation).

Section 14 identifies three types of case where liability for causing a result by failing to act may arise.

Paragraph (a) covers the case where the legislation on a particular offence expressly provides that there will be liability for causing the specified result by omitting to act. A statute may for example expressly make it an offence to cause a child or animal suffering by omitting to provide food or water. There is something similar in section 51(2) of the Act, in relation to the offence of child abuse.

Paragraph (b) states the general principle that there is no general liability for causing a result by failing to act unless there is a duty to do so. Three types of case are identified.

- (i) A duty arises by operation of law. The most widely accepted example of this would be a duty owed by a parent to a child.⁹¹

⁹¹ Cf *R v Gibbins and Proctor* (1918) 13 Cr App R 134.

(ii) A duty arises under a contract.⁹² In such a case, however, mere failure to perform a contractual obligation, even if this does result in personal injury to another or damage to property, would not necessarily involve criminal responsibility. There would have to be the necessary mental element under section 8.

(iii) A duty arises by virtue of an assumption of responsibility. In certain cases it has been held that a person who assumes responsibility for the care of another person who is not capable of looking after himself or herself, may be held criminally responsible for harm suffered by the helpless person resulting from a failure to discharge that responsibility.⁹³ Again there would have to be the necessary mental element.

Paragraph (c) deals with the situation where the accused creates a risk and then omits to take reasonable steps to avert it. Here it is reasonable to hold the accused responsible for the results of the omission.

The common law only exceptionally punishes persons for causing a result by failing to act. There is very little discussion of criminal omissions at common law,⁹⁴ and the courts have recently indicated an unwillingness to extend the law in this area.⁹⁵

There does not appear to be any direct Scottish authority on liability for a result caused by an omission where the accused had assumed responsibility for the care of another person. The provision therefore provides clarification of the law.

Section 14(c) reproduces the rule accepted by the court in the case of *MacPhail v Clark*.⁹⁶ In this case, the accused was a farmer who, quite legitimately, set fire to some stubble in his field. Smoke from this caused vehicles on a nearby road to collide, and the accused was charged with “reckless endangerment”⁹⁷ on the basis that he had culpably failed to rectify a situation of danger which he had created.

⁹² See, for example, *William Hardie* (1847) Ark. 247; *R v Pittwood* (1902) 19 TLR 37.

⁹³ See, for example, the English law cases of *Instan* [1893] 1 QB 450; *Charlotte Smith* (1865) 10 Cox CC 82; *Bonnyman* (1942) 28 Cr App R 131; *Stone and Dobinson* [1977] QB 354; [1977] 2 WLR 169; [1977] 2 All ER 341.

⁹⁴ A rare example is *MacPhail v Clark* 1983 SCCR 395; 1983 SLT (Sh Ct) 37, discussed below.

⁹⁵ *Paterson v Lees* 1999 JC 159; 1999 SCCR 231.

⁹⁶ 1983 SCCR 395.

⁹⁷ See now ss.43 (Causing an unlawful risk of injury) and 82 (Causing an unlawful risk of damage to property) of this Act.

Persons subject to special rules

15 Children

A person is not guilty of an offence by reason of anything done when the person is or was a child under 12 years of age.

COMMENTARY

This section provides that a child under the age of 12 cannot be guilty of a criminal offence. The age is inserted provisionally. The choice of the appropriate age is a policy matter and it would not affect the structure of the Act if the legislature were to insert a different age.⁹⁸

At present section 41 of the Criminal Procedure (Scotland) Act 1995 provides that “It shall be conclusively presumed that no child under the age of eight years can be guilty of any offence.” In *Merrin v S*⁹⁹ the High Court held that the predecessor of this rule (which was in the same terms) meant that a child under the age of eight years could not commit an offence. The rule was one of capacity. Section 15 adopts the same approach but, by avoiding the word “presumed” makes it clearer that the rule is not merely a rule of evidence. In practice very few young children who engage in criminal behaviour are prosecuted, and section 42 of the 1995 Act provides that no child under the age of 16 may be prosecuted except on the instructions, or at the instance, of the Lord Advocate.

In January 2002 the Scottish Law Commission¹⁰⁰ recommended the repeal of section 41, taking the view that there should be no age below which a child could not be capable of committing an offence, while at the same time recommending that there should be a statutory rule that no child below the age of 12 could be prosecuted. The effect of the Commission’s proposals, if enacted, would be that children under the age of 12 could not be prosecuted, but they could be guilty of a criminal offence, however young they might be, and could be referred to a children’s hearing. They could also be prosecuted for the offence later once they had attained the age of 12 if no statutory time limits applied in the particular case.

This Act adopts a different view. It proceeds on the basis that children under 12 years of age are too young to be held guilty of a criminal offence. This is regarded as a matter of criminal responsibility rather than just a matter of temporary protection from prosecution. However, as a result of an amendment to the Children (Scotland) Act 1995 made by Schedule 2 paragraph 3 of this Act, a child could be referred to a children’s hearing by virtue of conduct which would have been an offence if the child had been over the age of 12. The practical results would be similar to those achieved under the Scottish Law Commission’s proposals but the theoretical approach would be different.

⁹⁸ Here and in sch. 2, para. 3.

⁹⁹ 1987 SLT 193.

¹⁰⁰ See *Report on the Age of Criminal Responsibility* (Scot Law Com No 185, 2000).

16 Legal persons

- (1) A legal person is guilty of an offence if an office holder is guilty of the offence and was acting within the scope of the office or on behalf of the legal person in doing the acts constituting the offence or giving rise to liability for the offence.
- (2) A person who, as an office holder of a legal person, is responsible for any action which amounts to, or leads to, the commission of an offence by the legal person or any of its employees or agents is guilty of that offence unless the consequences of the action could not reasonably have been foreseen.
- (3) This section does not limit the effect of any other provision of this Act or of any other enactment which imposes criminal liability on a legal person (whether in terms or by using the word “person” without qualification) or on an office holder of a legal person.
- (4) In this section—
 - (a) “action” includes any decision, policy, practice or course of conduct;
 - (b) “legal person” means any body or entity (such as a company or partnership) which has a separate legal personality, but does not include an individual human being;
 - (c) “office holder” means a person participating in the control of the legal person as a director, manager, partner or holder of a similar office or position; and
 - (d) a person is responsible for an action not only if the person is directly responsible for it but also if the action is attributable to the person’s neglect or if the person connived in or consented to it.

COMMENTARY

When the word “person” is used in this Act it includes a legal person, such as a company or Scottish partnership, unless the context otherwise requires.¹⁰¹ It follows that when a provision of the Act says that a person who does an act is guilty of an offence that provision will apply, unless the context otherwise requires, directly to companies as well as to individuals. Sometimes the context will indicate that a provision is not intended to apply to companies. For example, provisions applying to persons over a certain age are intended to apply directly only to individuals.¹⁰² Similarly, provisions referring to parts of the body are intended to apply directly only to individuals.¹⁰³ It is not only the offence-creating provisions which normally apply to companies. The provisions on art and part guilt and other general provisions of the Act apply to companies as well as to individuals. The purpose of section 16 is not to impose direct liability on companies. That is done by the other provisions of the Act. The purpose is rather to deal with cases where the company may be held criminally liable for the acts of a director or similar person and vice versa.

Subsection (1), read with subsection (4)(c), provides that the company is guilty if a director or other controlling person is guilty and was acting within the scope of the office or employment or on behalf of the legal person at the time. The result may be to make a company indirectly criminally liable even in cases where it could not be directly liable. A company could be indirectly liable for the offence of exposing the sexual organs or buttocks, for example, if the offence was committed (perhaps as a tasteless publicity stunt) by a director or manager on behalf of the company or in the scope of his or her office. It should be noted that the director or other controlling person might be guilty as an accomplice or art and part - e.g. by procuring, advising, inciting or assisting a more humble employee to commit the offence.¹⁰⁴

Subsection (2) makes directors, and similar persons, liable for an offence committed by the company or any employee or agent of the company if the director or similar person was responsible for a decision, policy, practice or course of conduct which led to the commission of the offence and if it could reasonably have been foreseen that the adoption of that decision, policy, practice or course of conduct would give rise to an obvious and serious risk that the offence would be committed. This goes beyond what would ordinarily be covered by the law on accomplices and those liable art and part. Not only does it impose personal criminal liability on the director or other controlling person but it also extends the liability of the company because, as we have seen, the company is itself guilty if the director or similar person is guilty and was acting within the scope of the office or employment, as would clearly be the case in this type of situation. The effect, by a two stage process, is to make the company liable for offences resulting from company policies or practices or other systemic failures to ensure compliance with the criminal law, provided that these failures can be ascribed to a director or similar person.

¹⁰¹ See s.112(g). In other statutes too the word “person” will normally include a legal person unless the context otherwise requires. See the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999 (SI 1999 No 1379) sch. .2

¹⁰² See e.g. s.64 (Sexual intercourse by an adult with a minor).

¹⁰³ See e.g. s.107(1) on exposing the sexual organs or buttocks.

¹⁰⁴ See s.17.

Subsection (3) makes it clear that the provisions of section 16 are without prejudice to other statutory provisions (including the provisions of this Act) imposing criminal liability on a legal person, whether that is done by express reference to companies or legal persons or simply by using the word “person” without qualification. The effect of this provision is that in appropriate cases a company could be found guilty of an offence even if a relevant act, decision or policy could not be ascribed to a named individual director or employee.

Subsection (4) contains definitions for the purposes of the section. It will be noted that the effect of paragraphs (a) and (d) is that a person, such as a director, is regarded as responsible for a decision, policy, practice or course of action not only if he or she is directly responsible for it but also if the action is attributable to his or her neglect or if he or she connived in or consented to it. Many statutes provide that where an offence under the statute (for example, failing to appear for the purposes of an investigation conducted under the statute) has been committed by a body corporate and where it has been committed with the consent or connivance of, or is attributable to neglect on the part of, a director, manager or similar officer, then that person as well as the body corporate is guilty of the offence.¹⁰⁵ One beneficial effect of section 16 would be that it would no longer be necessary to keep repeating this sort of provision in statute after statute.

The existing law on corporate liability is not satisfactory and there is pressure for legislation on the subject. It was at one time believed that companies could not commit criminal offences. Various reasons were given for this. It was argued that a company had no mind, and could not therefore have a “guilty mind”. A corporation, not being a physical entity, could not be subjected to certain forms of punishment. Such arguments are now generally rejected, and it has long been accepted that corporations can be convicted of statutory offences, whether they are offences of strict liability or offences involving proof of a legally blameworthy state of mind. What is less clear under the existing law is the extent to which corporations can be guilty of common law offences. In *Dean v John Menzies (Holdings) Ltd*¹⁰⁶ the High Court held that while a corporation could be guilty of certain common law offences, it could not be guilty of the offence of conducting itself in a shamelessly indecent manner, a sense of shamelessness being essentially a human characteristic. In *Purcell Meats (Scotland) Ltd*¹⁰⁷ it was held that a company could be guilty of the common law offence of attempted fraud. The “controlling mind” theory governing criminal responsibility of corporations appears to be the approach adopted in both *Dean v John Menzies (Holdings) Ltd* and *Purcell Meats*.

¹⁰⁵ For a recent example, see the Commissioner for Children and Young People (Scotland) Act 2003 (asp 17) sch. 2, para. 6.

¹⁰⁶ 1981 JC 23.

¹⁰⁷ 1986 SCCR 672.

In February 2003 the Lord Advocate announced that an indictment had been served on Transco plc, following the deaths of four members of a family in a gas explosion. The indictment charged the company with offences under the Health and Safety at Work Act 1974 but also charged the company with culpable homicide in respect of each of the four deaths. This was the first occasion on which a company had been charged with culpable homicide in Scotland. The indictment in this case did not name any officer of the company or seek to identify any individual human agency to whose culpable acts or omissions the criminal responsibility of the company might be attached. Rather it identified a sequence of alleged corporate failures resulting in the deaths of the victims. Objections to the competency and relevancy of this indictment were repelled by Lord Carloway but on appeal the High Court held the indictment was irrelevant in relation to the culpable homicide charge. At the time of going to press the opinions are not yet available.

The question of liability for common law offences will cease to be relevant once the code is enacted. All offences will be statutory. Subsection (3) makes it clear that a company as such can be guilty of an offence under this or any other enactment. There is nothing in the sections on culpable homicide¹⁰⁸ or recklessness¹⁰⁹ to indicate that the word “person” in those sections is limited to a natural person. It appears, therefore, subject to the caveats that the opinions have not yet been read and that much would depend on the assessment of the evidence, that the result in the *Transco* case could have been different under the code.

¹⁰⁸ S.38.

¹⁰⁹ S.10.

17 Persons involved as accomplices or art and part

- (1) A person who—
 - (a) procures, advises or incites another person to commit an offence; or
 - (b) knowing that another person is committing or intending to commit an offence, assists in the commission of that offence whether by the provision of materials or otherwise,is, if the offence is committed by that other person, also guilty of the offence committed.
- (2) Where two or more persons agree to commit an offence and each of them takes some part in the preparation for or commission of the offence each is guilty—
 - (a) of that offence if it is committed by any of them; and
 - (b) of any other offence committed in the course of committing that offence provided that it was reasonably foreseeable that the other offence would be so committed.
- (3) Where, in the absence of any prior agreement, a person knowingly takes part in the commission of an offence that person is guilty —
 - (a) of that offence; and
 - (b) of any other offence committed in the course of committing that offence provided that it was reasonably foreseeable that the other offence would be so committed.
- (4) The agreement referred to in subsections (2) and (3) may be express or implied from the circumstances.
- (5) Subsection (3) does not impose liability on a person in relation to anything done before that person takes part in the commission of the offence.
- (6) A person is not guilty of an offence under this section by reason only of anything done—

- (a) to avoid or limit any harmful consequences of the offence but without the purpose of furthering its commission;
 - (b) as an unwilling victim of the offence; or
 - (c) as a member of a class of persons for whose protection the offence was enacted.
- (7) For the purposes of this section references to an offence committed by another person include references to anything which would be an offence but for—
- (a) the lack of criminal capacity by the other person;
 - (b) the lack of some mental element on the part of the other person; or
 - (c) the existence of a defence (other than lawful authority, self defence or necessity) which is personal to the other person,
- and a person may accordingly be guilty of the offence under this section as if the offence had actually been committed by the other person.

COMMENTARY

Section 17 deals both (1) with cases where a distinction can properly be drawn between principal offender and those who played a more subordinate or accessory role and (2) with case where all the accused acted as principal offenders. This is reflected in the heading, which refers to persons involved as accomplices or art and part.

Subsection (1) deals with the case of pure “accessorial” liability. The accused is not the actual perpetrator: the offence is committed by the “other” person. The accused is guilty as an accomplice.

Subsection (2) deals with the situation where two or more persons agree to commit an offence and each takes some part in its preparation or commission. The existence of the common purpose and the element of taking part mean that the accused is more directly involved. The accused in this case is more accurately described as being art and part in the commission of the offence.

Subsection (3) applies to the case where, without any prior agreement, the accused takes part in the commission of an offence. Again the element of taking part means that the accused is more accurately described as being involved art and part than as an accomplice.

Subsection (4) makes it clear that the agreement referred to in the preceding subsections may be express or implied from the circumstances - for example, if all the accused set out armed and proceed in a deliberate way to a victim's house and there attack him.

Subsection (5) prevents subsection (3) from making a person who joins in the commission of an offence liable in respect of acts already done before he or she joins in.

A person who is accused as an accomplice or as being involved art and part has the benefit of the usual requirements as to the necessary mental element and the benefit of the usual defences.¹¹⁰ It follows that two persons who are both involved in the killing of a third person may be guilty of different offences. One, for example, may have diminished responsibility and may be guilty only of culpable homicide while the other may be guilty of murder.

Subsection (6)(a) protects those who act to avoid or limit the harmful consequences of conduct but without the purpose of furthering that conduct. It could protect, for example, those who provide contraceptive advice or assistance to young people. The mere fact that they provide such advice or assistance would not mean that they were liable as accomplices for any criminal offence committed by such young people if they had under-age sex.¹¹¹

Subsection (6)(b) is designed to protect the unwilling victim of an offence, even if the victim may in a sense have assisted or participated in the commission of the offence. For example, a young woman who is forced to take part in a marriage may in a sense assist or take part in the commission of the offence of entering into a forced marriage¹¹² but should not be held liable as an accomplice or art and part. This should be so even if there might be difficulty in saying that she is a member of any particular class of persons.

Subsection (6)(c) makes it clear that where Parliament has created an offence for the protection of members of a class of persons, a member of that class cannot be guilty art and part of an offence against himself or herself.

Subsection (7) covers situations where an alleged perpetrator may not in the circumstances be liable to conviction for the offence, but the accused may nonetheless be liable as an accomplice or art and part.

Examples of the type of case envisaged by subsection (7)(a) include cases where the perpetrator is a person under the age of criminal responsibility, or is suffering from mental disorder. It is clear that a person should not be able to avoid responsibility for crimes by getting a young child or mentally disordered person to commit them.

¹¹⁰ See s.3(2).

¹¹¹ Cf the arguments aired in the English case of *Gillick v West Norfolk and Wisbech AHA* [1986] AC 112 (HL); [1984] QB 581 (QBD).

¹¹² See s.58 (Entering into forced marriage).

The circumstances envisaged by paragraph (b) might be illustrated by the following example.¹¹³ A husband (A) incites another man (B) to have sexual intercourse with A's wife. A knows that his wife does not consent. B does not know this and is not, let us suppose, reckless in this respect. B's conduct is not an offence because he lacks the necessary mental element.¹¹⁴ B's conduct would, however, be an offence but for the lack of the necessary mental element on his part. The effect of section 17(6)(b) is that A is guilty of rape as an accomplice or art and part. A cannot be found on the lack of the necessary mental element on B's part.

Subsection (7)(c) deals with similar situations, involving not any lack of capacity or mental element but some non-justifying defence on the part of the perpetrator. The principle is the same. For example, the perpetrator may be under some error not shared by the person procuring or inciting the commission of the offence. One useful result of this provision is that if A coerces B into doing something which would be an offence but for the coercion A cannot escape art and part liability by arguing that B did not commit any offence because he was coerced. It will be noted that the defences of lawful authority, self-defence or necessity (which not only excuse but also justify the conduct of the perpetrator) are available to the person accused as an accomplice or art and part. For example, a woman who assists another woman to defend herself from a brutal attack by a powerful aggressor would not be guilty art and part of anything which would have been an assault by the victim on the aggressor but for the fact that the victim was acting in self-defence.

The principle that all who participate in the commission of an offence are responsible for the acts of the other participants in that offence is well-established at common law. The traditional Scottish term for this sort of guilt by accession or participation is "art and part". The common law recognises the two types of art and part guilt, described above,¹¹⁵ but the distinction between principal and accessories is in most instances irrelevant, except where the law states, as in the case of *Young v H.M. Advocate*,¹¹⁶ that the offence in question can only be committed by a person who holds a particular office, or who has some other special quality. In such cases a person not coming within the prescribed class cannot be found guilty as a principal offender, nor can she or he be found guilty as an accomplice if the principal offender is acquitted.

Under the common law it has been held that where parties were all engaged in the commission of an offence they were all responsible for the acts of each other, to the extent that these were the reasonably foreseeable consequences of participation in the offence. So, for example, if during a joint attack by A and B on C, A stabbed C, A and B would be held responsible for the use of the weapon, unless its use by A was wholly unforeseeable by B. This rule is reflected in subsections (2) and (3).

¹¹³ The example is suggested by the facts of the English case of *R v Cogan and Leak* [1976] QB 217 although the reasoning of the court in that case was rather convoluted. The appropriate result could be reached much more simply and directly under the Act.

¹¹⁴ See s.61(Rape).

¹¹⁵ See, for example, *Codona v H.M. Advocate* 1996 SCCR 300; 1996 SLT 1100, and *Young and Others v H.M. Advocate* 1932 JC 63; 1932 SLT 465, respectively.

¹¹⁶ *Ibid.*

Subsection (4) reflects the current law¹¹⁷ and the remaining subsections also reproduce what is thought to be the common law.¹¹⁸

¹¹⁷ In these respects the draft code anticipated recent developments in the case law. See *McKinnon v H. M. Advocate* 2003 SLT 281; also reported as *McKinnon, McKay and Norwood v H.M. Advocate* 2003 SCCR 224.

¹¹⁸ See the English decision of *Tyrrell* [1894] 1QB 710.

18 Attempt

- (1) A person who, intending to commit an offence, embarks on, but does not complete, the commission of the offence is guilty of an attempt to commit the offence.
- (2) Subsection (1) does not apply if the attempt was voluntarily abandoned, as a result of repentance, before all the acts necessary for the commission of the offence were done.
- (3) For the purposes of this section, a person intends to commit an offence if the person intends to act in a way which would involve the commission of an offence.

COMMENTARY

An unsuccessful attempt to commit a crime is nevertheless a crime, albeit generally a less serious one than the completed offence. The difficulty lies in determining when a person has done enough to attract criminal responsibility. The line between responsibility and no responsibility may be drawn at different stages. The test in section 18 is whether the accused has moved from preparing to commit a crime to actually embarking on the commission of that crime. Any line in this area is difficult to draw. The reference in section 18 to embarkation on the commission of the offence should allow courts to draw the line as appropriate in particular cases.

Section 18 is intended to cover two types of case. In the first, the accused embarks on the commission of the offence but does not do all the acts necessary for its completion, perhaps because the accused is interrupted or prevented. An example would be the case of the burglar who enters a house intending to steal but is disturbed by a barking dog and leaves without appropriating any property. In the second type of case the accused does all the acts necessary for the commission of the crime but, by good fortune as it were, fails to complete the crime. An example would be where an accused fires a gun at someone, intending to kill, but misses. Another example would be where the accused shoots someone, intending to kill, but where the “victim” is already dead.¹¹⁹ Both types of case are intended to be covered by the expression “does not complete” the offence.

¹¹⁹ See s.21 (Impossibility of committing principal offence).

Subsection (2) contemplates a “defence” of repentance and voluntary abandonment of the offence before all the acts necessary for its commission have been done. The effect of repentance and abandonment on responsibility for attempted crime has not been discussed in Scots law,¹²⁰ although the view in English law is that once the stage of attempt has been reached even voluntary abandonment is irrelevant.¹²¹ The arguments in favour of a plea of repentance are; that the accused who repents and abandons the attempt presents less of a social danger than one who is prepared to carry through the offence to completion; that the law should give recognition to the repentance of the accused; and that potential offenders should be encouraged to depart from the criminal purpose.

Section 18(2) is premised on the abandonment being a voluntary act derived from a change of heart by the accused. The accused who abandons the attempt because he cannot achieve his purpose or because she hears the wail of the police sirens is not entitled to the defence. The reasoning behind subsection (2) means that it is not available in the type of case where the accused has done everything necessary for the commission of the offence but is saved by good fortune from achieving that aim. It is then too late for repentance to have any legal effect.

Section 18(3) makes it clear that it is not necessary that the person should have had an actual intention to break the law. It is sufficient if the person had the intention to do something which in fact amounted to the commission of an offence.

At common law, there are a number of theories as to where the line ought to be drawn between liability and no liability. Some cases point to a “last act” theory, whereby the accused is not guilty of an attempted crime until he or she has performed the last act necessary for the crime to begin. Other cases favour a theory of “beyond recall” which holds that the accused is not guilty of an attempted crime until there is no going back; the accused has set in motion a series of events over which he or she no longer has any control. This is designed to allow for repentance; Lady Macbeth is not guilty of attempting to murder the sleeping Duncan, even after she stands over his bed with a knife in her hand, since she is unable to proceed due to the King’s resemblance to her father. The problem with each of these theories is that they draw the line at a very late stage - it would only be when Lady Macbeth plunges the knife into Duncan that we can say that she has committed the last act or that the situation is now beyond her recall. In the case of *H.M. Advocate v Camerons*¹²² the matter was left to the jury, who were instructed to determine whether the accused had gone from preparing to commit a crime, to actual perpetration of that crime. The test in section 18 (whether the accused has moved from preparing to commit a crime to actually embarking on the commission of that crime) is similar to the common law distinction between preparing and starting to perpetrate.

¹²⁰ Cf *MacNeill v H.M. Advocate* 1986 SCCR 288 for a discussion of the analogous issue of voluntary withdrawal from a common criminal purpose.

¹²¹ See Smith and Hogan, *Criminal Law* (10th ed, by Sir J C Smith) (Butterworths), at p. 342; A Ashworth, *Principles of Criminal Law* (4th ed, Oxford UP) argues in favour of recognising a plea of voluntary abandonment (at pp. 467-468).

¹²² 1911 SC (J) 110; 1911 2 SLT 108.

19 Incitement

- (1) A person who—
 - (a) incites another person to act in a way which would involve the commission of an offence by that other person; and
 - (b) intends that the offence will be committed by that other person or is reckless as to whether the incitement will have that result,is guilty of incitement to commit the offence.
- (2) A person is not guilty of incitement to commit an offence by reason only of anything done as a member of a class of persons for whose protection the law creating the offence was enacted.
- (3) A person is guilty of incitement to commit an offence although the person incited—
 - (a) could not commit that offence because of—
 - (i) the lack of criminal capacity by that person;
 - (ii) the lack of some mental element on the part of that person; or
 - (b) would have a defence (other than lawful authority, self defence or necessity) which is personal to that person.
- (4) For the purposes of this section “an offence” means an offence under the law of Scotland or, where there is incitement in Scotland to act in a country or territory outside Scotland, anything which would be an offence under the law in force in that country or territory and which would also be an offence if the act were done in Scotland.
- (5) Where subsection (4) applies a person found guilty of the incitement may be regarded as having been found guilty of incitement to commit the corresponding offence under the law of Scotland.

COMMENTARY

It is an offence to incite another person to commit an offence.¹²³ In *Baxter v H.M. Advocate*¹²⁴ the High Court held that a person can incite another to commit a crime without “actually instructing him to do so... Depending on the circumstances, it may be enough if, for example, he encourages or requests him to do so”. The offer of a reward for the commission of the offence may likewise be a factor for the jury to be taken into account.

The mental element (whether of the inciter or the person incited) required for incitement has not been discussed by the Scottish courts, but subsection (1) makes it clear that the inciter must intend that the incitee commit the offence or be reckless as to that possibility.

Subsection (2) deals with the case where a member of a protected class incites the commission of an offence, created for the protection of that class, against himself (or, more commonly, herself). So, for example, if a fifteen year old girl incites her eighteen year old boyfriend to have sexual intercourse with her, although he commits an offence under section 65 of this Act, she cannot be guilty of inciting the commission of that offence.

Subsection (3) deals with the case where, for example, the accused incites a person who is below the age of criminal responsibility to engage in conduct that would be criminal if carried out by a person above that age. The person inciting the conduct cannot avoid liability by arguing that commission of the offence incited is not possible because of the lack of capacity on the part of the person incited.

Subsection (4) relates to the meaning of “an offence”. This differs according to whether the result of the incitement is to take place in Scotland, or in another country. In the former case, the result must constitute an offence under Scot law. In the latter, the accused must be inciting the commission of something which would be an offence in that other country *and* in Scotland. Subsection (5) supplements this by providing that where the accused is found guilty of having incited another person to commit a crime in another country, the accused is treated as having been found guilty of incitement to commit the corresponding Scottish offence. For example, a person who is found to have incited a third party to commit burglary in England may be found guilty of incitement to commit the Scottish offence of breaking into a building.¹²⁵

Section 19 reflects the common law on instigation.

¹²³ *H.M. Advocate v Tannahill and Neilson* 1943 JC 150; *Baxter v H.M. Advocate* 1998 JC 219; 1997 SCCR 437; 1998 SLT 414.

¹²⁴ 1997 SCCR 437.

¹²⁵ On this offence, which replaces the inaccurately named “housebreaking” of the common law, see s.78.

20 Conspiracy

- (1) A person who agrees with another or others to act in a way which would involve the commission of an offence by any party to the agreement is guilty of conspiracy to commit the offence.
- (2) A person is not guilty of conspiracy to commit an offence by reason only of anything done as a member of a class of persons for whose protection the law creating the offence was enacted.
- (3) A person may be guilty of conspiracy to commit an offence although the only other party to the agreement
 - (a) could not commit that offence because of —
 - (i) the lack of criminal capacity by that person;
 - (ii) the lack of some mental element on the part of that person; or
 - (b) would have a defence (other than lawful authority, self defence or necessity) which is personal to that person.
- (4) For the purposes of this section “an offence” means an offence under the law of Scotland or, where there is an agreement in Scotland to act in a country or territory outside Scotland, anything which would be an offence under the law in force in that country or territory and which would also be an offence if the act were done in Scotland.
- (5) Where subsection (4) applies, a person found guilty of the conspiracy may be regarded as having been found guilty of a conspiracy to commit the corresponding offence under the law of Scotland.

COMMENTARY

It is an offence for two or more persons to agree to engage in conduct which would be an offence if engaged in by a person acting alone.

In *Maxwell and Others v H.M. Advocate*¹²⁶ the court put forward the following general description of the offence of conspiracy at common law:

¹²⁶ 1980 JC 40.

“That crime is constituted by an agreement of two or more person to further or achieve a criminal purpose. A criminal purpose is one which if attempted or achieved by action on the part of an individual would itself constitute a crime by the law of Scotland. It is the criminality of the purpose and not the result which may or may not follow from the execution of the purpose which makes the crime a criminal conspiracy.”

For subsections (2) to (5) see the Commentary on section 19.

This section reflects the common law position.

21 Impossibility of committing principal offence

- (1) A person may be guilty of an offence of attempt, incitement or conspiracy, although the commission of the principal offence is impossible, if commission of the principal offence would have been possible in the circumstances which the person believed or hoped existed.
- (2) In this section “principal offence” means the offence which is the object of the attempt, incitement or conspiracy.

COMMENTARY

An accused who attempts to commit a crime which is, in fact, incapable of success, is nonetheless guilty of attempting to commit that crime. The impossibility may be due to factors beyond the control of the accused, but this does not make such a person any less blameworthy or deserving of punishment. Attempting to bribe someone who does not, in fact, hold the relevant position of authority, is an example of an impossible attempt. Similarly, the accused who believes that his or her suitcase contains heroin may be guilty of attempting to possess drugs contrary to the Misuse of Drugs Act 1971, even if the powder in the case turns out to be flour, or some other harmless substance.

Similar policy justifications apply in relation to the other preparatory offences.

There had been some uncertainty in the common law as to whether it was an offence to attempt to commit a crime, if the attempt was in fact incapable of success. This was settled by the case of *Docherty v Brown*.¹²⁷ This section reiterates the common law position.

¹²⁷ 1996 JC 48; 1996 SLT 325; 1996 SCCR 136.

Defences

22 Lawful authority

- (1) A person is not guilty of an offence if the acts in question are justified by lawful authority.
- (2) An act is justified by lawful authority if—
 - (a) it is required by an enactment or rule of law;
 - (b) an enactment or rule of law confers a right to do it or authorises it; or
 - (c) it is done in the proper exercise of a responsibility or authority conferred by an enactment or rule of law.
- (3) The following are, in particular, regarded as having lawful authority to act in the proper exercise of their role or functions—
 - (a) judges, officers of court, members of the armed forces, police officers and prison officers;
 - (b) members of the public assisting police officers in the exercise of their functions or exercising any lawful power of arrest or responsibility to prevent crime;
 - (c) parents or guardians having parental responsibility;
 - (d) teachers and others having the lawful care or control of a child or young person; and
 - (e) guardians, relatives and others having the care of, or a legitimate role in relation to the welfare of, an adult with incapacity within the meaning of the Adults with Incapacity (Scotland) Act 2000 (asp 4).
- (4) Nothing in this section justifies—
 - (a) the use of force which is excessive in the circumstances;
 - (b) the infliction of torture, inhuman or degrading treatment or corporal punishment; or

(c) any violence, abuse, or maltreatment by those exercising the responsibilities or roles mentioned in subsection (3)(c)(d) or (e).

(5) In deciding whether an act is done in the proper exercise of a responsibility, authority, role or function, account can be taken of superior orders which are not manifestly unlawful.

COMMENTARY

The purposes of this section are to save repetition in the offence-creating sections of words such as “without lawful authority” and to specify what is meant by lawful authority. Subsections (1) and (2) state the general rule that conduct which is required or authorised by an enactment or rule of law, or done in the proper exercise of a lawful responsibility or authority, is not a criminal offence.

Subsection (3) gives particular instances of lawful authority.

One important application of the section will be in relation to the conduct of police officers in the exercise of their functions as such.¹²⁸ This is covered by subsection (3)(a). Without this section police officers would be exposed to the risk of committing a criminal offence every time they arrested someone. Similar considerations apply to judges lawfully ordering people to be deprived of their liberty and to sheriff officers lawfully seizing people’s property for the purposes of civil diligence.

Subsection (3)(b) extends the protection afforded to police officers to members of the public assisting such officers in the exercise of their functions or exercising any lawful power of arrest or responsibility to prevent crime.

Subsection (3)(c) deals with the special position of parents or guardians exercising parental responsibility. A parent, for example may, in the exercise of his or her parental responsibility, have to restrain a child by means of a safety harness or seat belt or may have to prevent the child from playing with a toy. Forcibly restraining another person, or interfering with another person’s use of their property in this way, would normally involve the commission of a criminal offence. Subsection (3)(c) prevents the parent from being criminally liable.

¹²⁸ “Functions” includes powers and duties. See the Scotland Act 1998 s.127 read with the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999 (SI 1999 No 1379) sch. 2.

The special position of teachers and others with the care of young people, and of carers and those with a legitimate interest in the welfare of adults with incapacity, is dealt with by subsection (3)(d) and (e). Teachers and carers often have, for example, to take those in their care from one place to another. Even if the child or adult with incapacity is unable to give effective consent,¹²⁹ taking him or her from one place to another in the proper exercise of the teacher's or carer's role should not be a criminal offence. The matter can be illustrated by the following examples. A stranger persuades a young child or an adult with incapacity to accompany him to a piece of woodland for dubious purposes. That would be abduction.¹³⁰ A teacher persuades a child, as part of a properly organised school excursion, to go with her and the other children in the class to a piece of woodland for a nature study lesson. That would not be abduction. Similarly it would not be abduction if the wife of an elderly demented man, who is looking after him on a daily basis, persuades him to go to a day centre or to go into hospital or to visit his daughter.

It is clear that limitations have to be placed on the defence of lawful authority. Some limits are imposed by the words "proper exercise" in subsection (2)(c). Further important limits are imposed by subsection (4). It makes it clear that the defence does not justify the use of excessive force (e.g. by a police officer in making an arrest, or by a parent or a teacher in restraining a child). Of course, what is excessive will depend on the circumstances. Considerable force may have to be used in some cases. Subsection (4) also makes it clear that the defence does not justify the infliction of torture, inhuman or degrading treatment or corporal punishment. The infliction of corporal punishment would often, in any event, amount to inhuman or degrading treatment¹³¹ but it is specifically mentioned so as to cover all cases and avoid any doubt. These are general provisions applying to all those using the defence of lawful authority. In relation to parents, teachers, guardians and others having the care of, or responsibility for, children or adults with incapacity it is also specifically provided that the defence of lawful authority does not justify any violence, abuse or maltreatment. The words are derived from Article 19 of the United Nations Convention on the Rights of the Child and recognise the special vulnerability of children and people with mental incapacity who are subject to the authority or control of others.

¹²⁹ See s.111 (Rules on consent).

¹³⁰ See s.45, read with s.111 (Rules on consent).

¹³¹ See e.g. *Tyrer v United Kingdom* (1978) 2 EHRR 1 (birching of a seventeen year old youth held to be degrading); *Costello-Roberts v United Kingdom* (1993) 19 EHRR 622 ("slipper" of a seven year old schoolboy held not to be degrading); *A v United Kingdom* (1997) 27 EHRR 611 (repeated caning of a nine year old boy held to be inhuman and degrading).

Section 51 of the Criminal Justice (Scotland) Act 2003 already severely restricts, but does not abolish, the defence of reasonable chastisement which allows a parent or person having charge or care of a child to inflict corporal punishment on a child without being guilty of assault. It outlaws any physical punishment of children which includes or consists of a blow to the head, shaking or the use of an implement but continues to allow physical punishment by other means, including hitting or smacking, to come within the category of “justifiable assault”.¹³² In deciding whether what was done was a justifiable assault a court must have regard to (1) the nature of what was done (2) the reason for it (3) the circumstances in which it took place (4) its duration (5) its frequency (6) any effect (whether physical or mental) which it has been shown to have had on the child (7) the child’s age (8) the child’s sex (9) the child’s state of health and (10) the child’s other personal characteristics. The court may also have regard to other factors. It may be doubted whether this instruction to have regard to at least ten factors gives the clearest of guidance to parents wondering whether or not something would be a criminal offence.

The code goes beyond section 51 of the Criminal Justice (Scotland) Act 2003, and provides a clearer rule, in not allowing any physical punishment of children. It gives children the same protection from physical punishment as is given to other people, such as prisoners or adults with incapacity, over whom others may have some lawful authority. This is in line with the recommendations of the United Nations Committee on the Rights of the Child which monitors compliance by States with the United Nations Convention on the Rights of the Child and which observed in 2002, with regard to the United Kingdom:

“The Committee is of the opinion that governmental proposals to limit rather than to remove the ‘reasonable chastisement’ defence do not comply with the principles and provisions of the Convention ... particularly since they constitute a serious violation of the dignity of the child.”¹³³

The Committee further recommended to the United Kingdom that it should:

“with urgency adopt legislation throughout the State party to remove the ‘reasonable chastisement’ defence and prohibit all corporal punishment in the family and in any other contexts not covered by existing legislation...”¹³⁴

A similar view has recently been taken by the Joint Parliamentary Committee on Human Rights. It observed:

“There is little ambiguity in Article 19 of the CRC ... On the face of it the retention of the defence of reasonable chastisement is a breach of Article 19...”¹³⁵

It is worth noting, also, that the House of Commons Health Committee has very recently recommended abolition of the lawful chastisement defence.¹³⁶

¹³² S.51(1).

¹³³ UN Committee on the Rights of the Child, 4 October 2002 CRC/C/15/Add.188, para. 35.

¹³⁴ UN Committee on the Rights of the Child, 4 October 2002 CRC/C/15/Add.188, para. 36.

¹³⁵ Joint Committee on Human Rights, 10th Report of Session 2002-2003, *The UN Convention on the Rights of the Child*, HL Paper 117, HC 81, para. 109. The Committee noted, however, that Article 19 only obliged States to take “appropriate” measures to protect children from violence, abuse or maltreatment and conceded that this gave rise to some room for doubt.

In the light of these recommendations, and as a matter of policy and principle, it seems difficult to justify the retention of a special exception which would allow parents to hit children. However, this is a controversial and politically sensitive matter. Whatever is put in the draft code could be regarded only as a marker. The question is for the Parliament to decide.

¹³⁶ House of Commons, Health Committee, 6th Report, *The Victoria Climbié Inquiry*, 5 June 2003, para. 55: “Physical punishment of children is no longer permitted in schools, and the Government recently announced that new standards from September 2003 will outlaw childminders smacking children in their care. We urge the Government to use the opportunity of its forthcoming Green Paper on children at risk to remove the increasingly anomalous reasonable chastisement defence from parents and carers in order fully to protect children from injury and death.”

23 Self defence

- (1) A person is not guilty of an offence against an aggressor, or any property of the aggressor, if the person acts in self defence.
- (2) A person acts in self defence only if the acts in question are immediately necessary and reasonable—
 - (a) to defend that person or another person against unlawful force or unlawful personal harm from an aggressor;
 - (b) to prevent or end the unlawful detention of that person or another person by an aggressor;
 - (c) to protect property (whether belonging to that person or another person) from being unlawfully taken, damaged or destroyed by an aggressor; or
 - (d) to prevent or end an unlawful intrusion or presence by an aggressor on property of which that person, or a person under whose authority that person acts, is lawfully in possession.
- (3) For the purposes of this section—
 - (a) any acts likely to kill a person are not to be treated as reasonable except where they are immediately necessary for the purpose of saving the life of, or protecting from serious injury, the person doing the acts or some other person;
 - (b) anything justified by the defences of lawful authority, self defence, or necessity is not unlawful; and
 - (c) a person's presence on property is to be treated as lawful, notwithstanding the fact that that person does not have a legal title to occupy as owner, tenant or otherwise, if that person's occupancy is at the relevant time protected by law.

COMMENTARY

This section reflects the policy that accused persons are entitled to an acquittal where they use reasonable force to repel unlawful violence or certain other types of unlawful conduct by others.

Subsection (1) contains the general rule that a person is not guilty of an offence against the aggressor, or any property of the aggressor, if the person acts in self defence. The most usual application of the defence is in relation to self defence against assault but it also applies to other situations. A person who is unlawfully locked up by an assailant in the assailant's shed, for example, is entitled to break down the door to escape and would not be committing the offence of criminal damage to property.¹³⁷

The fact that the section refers to "an aggressor" does not mean that there is no available defence where the threat to a person comes from a non-aggressive act or from another source. The defence of necessity provided by section 24 would often be available in such cases. For example, if a climber has to cut a rope and cause the death of a fellow climber in order to prevent himself from being dragged along with the other climber to a certain death that would not be self-defence against an aggressor but may be justified by the necessity defence. Similarly, if a person is locked up in a shed belonging to someone other than the aggressor the breaking of the door in order to escape may be justified by the defence of necessity.

Subsection (2) provides that the conduct of the accused must be immediately necessary and reasonable and must be for one of the purposes set out in this subsection. The only one which requires explanation is paragraph (d). This covers self help which is immediately necessary and reasonable to prevent or end an unlawful intrusion on property but is subject to, for example, the laws that are designed to protect overstaying tenants or spouses against eviction without the use of the appropriate legal procedures. See subsection (3)(c).

Subsection (3)(a) makes it clear that where deadly force is used, the accused must have been acting to repel a threat to his or her own life, or that of a third party. This is in line with Article 2 of the European Convention on Human Rights. A great deal of media attention has focussed recently on the meaning of reasonable force where the accused uses violence against a housebreaker. The English case of *Tony Martin* serves to illustrate this. The Scottish courts have tended to hold that force may be classed as reasonable so long as it does not, in the circumstances, amount to a cruel excess of violence.¹³⁸

This section largely reflects the common law position, but makes it clear that reasonable force can also be used in defence of property. Subsection (3) (on acts likely to kill) is somewhat narrower than the common law, which allows a woman to kill to prevent rape but does not permit a man to kill to prevent non-consensual sodomy.¹³⁹

¹³⁷ This is defined in s.81.

¹³⁸ See *Fenning v H.M. Advocate* 1985 JC 76; 1985 SCCR 219; 1985 SLT 540.

¹³⁹ *McCluskey v H.M. Advocate* 1959 JC 39, followed in *Elliot v H.M. Advocate* 1987 JC 47; 1987 SCCR 278.

24 Necessity

- (1) A person is not guilty of an offence if the acts in question are justified by necessity.
- (2) A person's acts are justified by necessity if, in circumstances not amounting to self defence or coercion—
 - (a) they are immediately necessary and reasonable in order to prevent a greater harm; and
 - (b) the commission of what would otherwise be an offence could reasonably be regarded as justifiable in the circumstances.
- (3) This section justifies the taking of human life only if that is done to save human life.

COMMENTARY

Necessity applies where circumstances other than threats by a third party put the accused in the situation of having to choose between, on the one hand, obeying the law and causing serious ill consequences and, on the other hand, breaking the law. Where the latter course of action is the lesser of two evils, the accused may have a complete defence. There is an obvious public interest in keeping the defence within reasonable bounds. The situation must be such that any reasonable person would believe the commission of the offence to be justified.

Where life has been taken, necessity can only form a defence if the action was taken to save life.

In respect of the common law, the defences of necessity and coercion were conflated by the High Court, in the case of *Moss v Howdle*.¹⁴⁰ They are, however, better treated as two distinct defences. The former involves the accused having to make a decision whether or not to break the law in order to prevent a greater harm, not necessarily a harm to himself or herself. The accused has, as it were, a free choice. In the latter, the accused is under pressure from threats by a third party who is attempting to deny the accused a free choice. Although the person who is coerced into committing a criminal offence is often deserving of as much sympathy as the person who acts to prevent a greater harm, the policy considerations applying to the two offences are not necessarily the same. There is perhaps a stronger public policy argument for keeping coercion within narrow bounds because of the risk of abuse by criminal coercers.

The roles of necessity and coercion are also different in relation to art and part liability,¹⁴¹ incitement,¹⁴² conspiracy¹⁴³ and self-defence.¹⁴⁴

¹⁴⁰ 1997 JC 123; 1997 SCCR 215; 1997 SLT 782.

¹⁴¹ See s.17(7)(c).

¹⁴² See s.19(3)(b).

¹⁴³ See s.20(3)(b).

As with coercion, it is unclear whether, at common law, necessity is available to a charge of murder or culpable homicide. In the case of *R v Dudley and Stevens*¹⁴⁵ the House of Lords ruled out this possibility for English law. In principle, however, even the taking of life may be justified by necessity. For example, a driver whose brakes have failed may opt to steer the car towards a pavement with only one or two pedestrians, rather than steer towards a large crowd of people. A person may throw a bomb out of a window, averting the deaths of hundreds, but causing the death of someone outside the building.

¹⁴⁴ See s.23(3)(b).

¹⁴⁵ (1884) 14 QBD 273.

25 Involuntary conduct

- (1) A person is not guilty of an offence if any act or apparent act forming an essential ingredient of the offence was, without fault on that person's part, beyond that person's physical control.
- (2) An act or apparent act beyond a person's physical control may include—
 - (a) a reflex movement, spasm or convulsion;
 - (b) a bodily movement during unconsciousness or sleep;
 - (c) a bodily movement resulting from the person's body or part of it being merely an instrument in the hands of another;
 - (d) a bodily movement resulting from the person being subjected to the operation of natural forces;
 - (e) an act or movement resulting from hypnosis.
- (3) Where a person is acquitted because of this section and it is proved on a balance of probabilities that the involuntary conduct was due to a disorder which is likely to continue or recur, the person may, where this is necessary for the protection of others, be treated as if acquitted on the ground of mental disorder.

COMMENTARY

This section contains one of the fundamental principles of criminal responsibility, namely that a person should not be held responsible for conduct forming part of an offence which is beyond his or her control.

The circumstances in which this may occur are various. In *H.M. Advocate v Ritchie*¹⁴⁶ the accused was charged with the culpable homicide of a pedestrian by reckless driving. His defence that he had become overcome by “toxic exhaustive factors” so that he was no longer conscious and in control of the vehicle at the time of the accident was accepted by the court. In *Simon Fraser*¹⁴⁷ an accused was charged with the murder of his infant son. It appeared that the acts resulting in the child’s death were carried out by the accused while in a state of somnambulism. The accused was discharged upon giving an undertaking to the court that he would thereafter sleep alone. The basis of the disposal in that case is obscure, but section 25(2)(b) makes it clear that the accused would be entitled to an acquittal on the ground that the killing was not within his physical control. In cases such as *Fraser*, however, where the conduct was due to a disorder which is likely to continue or recur, the court may decide that the public need to be protected from such a recurrence, and treat the accused as if he or she had been acquitted on the ground of mental disorder. In such cases, the accused may be dealt with according to the procedures described in section 58 of the Criminal Procedure (Scotland) Act 1995. In short, such a person may be made the subject of a hospital order, or other measures involving compulsory medical care.

It is important to note that section 25 applies only where the lack of control was “without fault” on the part of the accused. So, for example, where an accused person committed a number of driving offences while in a somnambulistic state, the court held that he could be found guilty since he had contributed to his condition by consuming alcohol, knowing (from past experience) that this could provoke his somnambulism.¹⁴⁸

Persons who unknowingly consume intoxicants and as a result are unable to control their actions are entitled to be acquitted under the existing law.¹⁴⁹ The section makes no change in that respect.

The current law also draws the distinction made in section 25(3) between the involuntary conduct which results from an external factor (such as a blow on the head or a spiked drink) which is not likely to recur, and a medical condition which is likely to lead to similar loss of control in the future.

¹⁴⁶ 1926 JC 45; 1926 SLT 308.

¹⁴⁷ (1878) 4 Couper 70.

¹⁴⁸ See *Finegan v Heywood* 2000 JC 444; 2000 SCCR 234; 2000 SLT 905. Cf the treatment of somnambulism by the Supreme Court of Canada in *R v Parkes* [1992] 2 SCR 871. See also s.12 on the question of a culpably self-induced state of mind.

¹⁴⁹ *Ross v H.M. Advocate* 1991 JC 210; 1991 SCCR 823; 1991 SLT 564.

26 Impossibility

A person is not guilty of an offence for failing to do something which was, in the circumstances and without fault on that person's part, impossible for that person to do.

COMMENTARY

Section 26 provides that a person is not guilty of an offence for failing to do something which was, in the circumstances and without fault on that person's part, impossible for that person to do. For example, a statute may require a person to remove fishing nets on a Sunday and may make it a criminal offence to fail to do so. Yet, because of a sudden tempest, it may be impossible to remove the nets.¹⁵⁰ This section would provide an excusing defence.

This provision reflects the widely held belief that persons should only be held criminally responsible for behaviour for which they themselves are in some way responsible.

¹⁵⁰ See e.g. *Middleton v Tough* (1908) 5 Adam 416.

27 Mental disorder

- (1) A person is not guilty of an offence if the acts in question were done as a result of a mental disorder which rendered the person incapable of conforming to the relevant requirements of the criminal law or of appreciating the true nature or significance of the acts.
- (2) An accused cannot be acquitted on the ground of mental disorder unless the requirements of subsection (1) are proved on a balance of probabilities.

COMMENTARY

An accused who was suffering from a mental disorder at the time of the offence may be entitled to an acquittal. “Mental disorder” is defined later.¹⁵¹

Subsection (1) makes it clear that an accused would be entitled to the defence of mental disorder not only if the disorder rendered him or her incapable of understanding the true nature or significance of his or her acts but also if it rendered him or her incapable of conforming to the relevant requirements of the criminal law.

Subsection (2) provides rules with regard to the proof of this defence. An accused cannot be acquitted unless the requirements of subsection (1) are proved on a balance of probabilities. This reflects the existing law and the policy consideration that it should not be made too easy for people to use a plea of mental disorder in order to escape criminal responsibility. The existing law has, however, been criticised as an unjustifiable exception to the normal rule that the burden of proof is on the prosecution.¹⁵² If it were to be decided that the law should be changed it would be very easy simply to delete subsection (2) and allow the normal rules to apply.

Under the existing law an accused is entitled to an acquittal on the ground that she or he was “insane” at the time of the offence.¹⁵³ Section 27 re-formulates the insanity defence by updating the terminology.

¹⁵¹ See s.112(d) and the commentary on that provision.

¹⁵² See the Scottish Law Commission’s Discussion Paper on *Insanity and Diminished Responsibility* (DP No. 122, 2003) Part 5.

¹⁵³ Hume, i, 37; *Brennan v H.M. Advocate* 1977 JC 38; 1977 SLT 151.

The precise formulation of the plea of insanity in the existing law is uncertain, although it is accepted that the accused, in order to benefit from this plea, must prove (on a balance of probabilities) that he or she was suffering from a “total alienation of reason in relation to the act charged as a result of mental illness.”¹⁵⁴ Various objections can be raised to this formulation of the plea, most notably that the term “insanity” has no place in modern medical understanding of mental disorder. It also places much greater emphasis on the accused’s ability to reason than might be supported by modern understanding of the nature of mental disorder.

The topic of insanity has recently been considered by the Scottish Law Commission in its discussion paper on Insanity and Diminished Responsibility (DP No. 122, 2003).¹⁵⁵ The manifest defects in the existing law are, we believe, met by section 27 although, as noted above, there could be debate about subsection (2).

¹⁵⁴ *Brennan v H.M. Advocate* 1977 JC 38; 1977 SLT 151.

¹⁵⁵ See Chalmers, “Reforming the Pleas of Insanity and Diminished Responsibility: Some Aspects of the Scottish Law Commission’s Discussion Paper” (2003) 8 *Scottish Law and Practice Quarterly*, 79.

28 Error

- (1) A person who acts under a mistaken but reasonable belief in a state of affairs is not guilty of an offence if there would have been no criminal liability had the facts been as they were believed to be.
- (2) A person who acts under a mistaken belief induced by reliance on official advice as to the lawfulness of the act is not guilty of an offence if—
 - (a) it was reasonable in the circumstances for the person to rely on the official advice; and
 - (b) there would have been no criminal liability had the official advice been correct.
- (3) In this section—
 - (a) an error as to a state of affairs includes an error as to the age of a person, a quality or characteristic possessed by a person, the presence of consent, the existence of a relationship, and the ownership of property but does not include an error as to the requirements of the criminal law; and
 - (b) “official advice” means advice from a national or local government official charged with some responsibility for the area of activity in question.

COMMENTARY

The accused who acts under a mistaken belief which is reasonable in the circumstances may have the defence of error. The error must be such that there would have been no offence had the state of affairs been such as the accused supposed it to be. For example, the accused who takes someone else’s property would have a defence if this was done in the reasonable belief that the property was in fact his or her own. The accused has made an error as to the ownership of the property and, in the words of the section, the error is such that “there would have been no criminal liability had the facts been as they were believed to be”. In contrast, if the accused takes someone’s else’s property, believing that the property belongs to A, when in fact it belongs to B, there is no defence of error available under this section since there would still have been an offence if the property had belonged to B.

An error as to the applicability of the criminal law is not a defence. An example of this is the case of *Clark v Syme*¹⁵⁶ in which the accused shot a neighbour’s sheep in the belief that he was under a legal entitlement to do so. He was found guilty of malicious mischief.¹⁵⁷

¹⁵⁶ 1957 JC 1.

Subsection (2) provides for a defence where the error was induced by reliance on official advice. The case of *Roberts v Local Authority for Inverness*¹⁵⁸ may be an example of this. Here the accused had applied for a licence to move cattle from one local authority area to another but was told by the responsible official that no licence was necessary. The responsible official was himself in good faith as he thought, wrongly, that the amalgamation of two local authority areas had affected the position. The accused was convicted at first instance of moving cattle without a licence but his conviction was quashed on appeal. The statute in that case provided a defence of lawful authority or excuse, and the court held that the accused had a lawful excuse.

Subsection (3) provides, for the avoidance of doubt, that an error as to the ownership of property, as to a person's age or as to the existence or non-existence of a relationship counts as an error as to a state of affairs. Ownership or the existence of a relationship might possibly have been regarded as matters of law.

Ignorance of the law is no defence at common law and errors of fact generally can exculpate only if both honest and reasonable. The exception to this is the crime of rape. Section 28 applies to all crimes, including rape. See the commentary to section 61.

¹⁵⁷ See now s.81 (Criminal damage to property) of this Act.

¹⁵⁸ (1889) 2 White 385.

29 Coercion

- (1) A person is not guilty of an offence if the acts constituting the offence were done only under the immediate effect of coercion.
- (2) Coercion, for the purposes of this section, requires—
 - (a) a threat by the coercing person to cause immediate fatal or serious injury to the coerced person or another person if the acts constituting the offence are not done;
 - (b) that the coerced person had not intentionally gone into a situation where it was foreseeable that such a threat might be made;
 - (c) that the threat was not one which the person could reasonably be expected otherwise to have avoided; and
 - (d) that the threat was one which would have induced a person of normal fortitude having the characteristics of the coerced person to commit the offence.
- (3) This section applies to the taking of human life only if that is done in order to save human life.

COMMENTARY

The rationale for allowing the defence of coercion is that threats of violence addressed to an accused or a third party (perhaps towards a family member) put the accused in the invidious position of having either to obey the law and suffer the consequences, or break the law. Justice requires that an individual ought to have a fair opportunity to conform to the law, and the behaviour of the coercer prevents this. On the other hand there is an obvious public interest in not making the defence of coercion too readily available.

Subsection (1) confers the defence of coercion, but subject to strict limitations. The most general is that what was done must have been done only under the immediate effect of the coercion.

Subsection (2) sets out further requirements. The first, covered in paragraph (a), is that there must have been a threat of immediate serious injury to, or the death of, the coerced person or another person. If the threats are not immediate the threatened person is expected to seek recourse to the police, where appropriate, rather than to succumb to the threats.¹⁵⁹ Paragraph (b) requires that the accused must not have intentionally gone into the situation where it was foreseeable that such a threat would be made. This covers the situation in which the accused has been in some sense responsible for being in the situation e.g.- the accused who joins a terrorist organisation and then later complains that other members of the organisation coerced him or her into breaking the law. This is also the position in other jurisdictions.¹⁶⁰ Subsection (2)(c) requires that the accused must be faced with no other alternatives but breaking the law or suffering the violence offered by the coercer. Subsection (2)(d) requires that the threats must be such as to have had a similar impact on a reasonable person. People can be expected to show a reasonable degree of fortitude.

Subsection (3) addresses the issue of whether coercion can be a defence to murder or culpable homicide. The Act does allow coercion to be a defence when life has been taken, but only if this had been done to save life.

Coercion is a recognised defence under the common law, but its limits have not been clearly established. The issue of coercion in cases of murder or culpable homicide has not been authoritatively decided. Its applicability to the case of murder was touched on briefly by the court in *Thomson v H. M. Advocate*¹⁶¹ but the court expressly declined to express a view on that point. In *Collins v H.M. Advocate*¹⁶² Lord Allanbridge, in his charge to the jury, stated that the defence of coercion was not available in a case of murder. That statement must, however, be regarded as entirely *obiter* since neither of the accused in *Collins* had relied upon the defence of coercion. The House of Lords has held that in English law coercion is not available as a defence to a charge of murder¹⁶³ or attempted murder.¹⁶⁴ In principle, however, there is no reason for not allowing coercion to provide a defence, where the taking of life by the accused was the lesser of two evils in the circumstances.

¹⁵⁹ See *Thomson v H.M. Advocate* 1983 JC 69; 1983 SCCR 368.

¹⁶⁰ See the cases of *R v Fitzpatrick* [1977] NI 20 and *R v Sharp* [1987] 1 QB 853.

¹⁶¹ 1983 JC 69; 1983 SCCR 368.

¹⁶² 1993 SLT 101; 1991 SCCR 898.

¹⁶³ *R v Howe* [1987] AC 417.

¹⁶⁴ *Gotts* [1992] 2 AC 412.

30 Saving for diplomatic and other immunities

Nothing in this Act affects the law on any diplomatic or other immunity.

COMMENTARY

This section makes it clear that the Act has no effect on the rules regarding the immunity from criminal prosecution of diplomatic envoys (which immunity may extend to members of their families or households). Such immunity remains governed by international law, principally the Vienna Convention on Diplomatic Relations of 1961, and various Acts of the United Kingdom Parliament.¹⁶⁵ The immunity of heads of state or government, or former heads of state or government and foreign ministers is likewise unaffected.¹⁶⁶

¹⁶⁵ See, in particular, the International Organisations (Immunities and Privileges) Act 1950, the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act 1952, the Diplomatic Immunities (Conferences with Commonwealth Countries and Republic of Ireland) Act 1961, the Diplomatic Privileges Act 1964 (giving effect to the 1961 Vienna Convention) and the Diplomatic and Other Privileges Act 1971.

¹⁶⁶ State Immunity Act 1978, ss.1, 14(1). See also: *R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No 3)*, 2000 1 AC 147 and *Case Concerning the Arrest Warrant of 11 April (Democratic republic of the Congo v Belgium)* International Court of Justice, 14 February 2002.

Penalties

31 General

- (1) Schedule 1 has effect for the purpose of prescribing the maximum penalties for offences under this Act.
- (2) In the case of any offence in category A of Part 1 of schedule 1—
 - (a) the offence is triable only in the High Court of Justiciary; and
 - (b) a fine is not available as an alternative penalty if the accused is a natural person.
- (3) An offence in category F of Part 1 of schedule 1 is triable only in summary proceedings.
- (4) Any reference in schedule 1 to the “standard scale” is to the standard scale referred to in section 225(2) of the Criminal Procedure (Scotland) Act 1995.

COMMENTARY

This part of the Act attempts, for the first time, to introduce into the law of Scotland some general indication of the relative gravity of offences (albeit only in relation to the Act’s own offences). This is justified on the basis that the Act should not only determine the content of the substantive criminal law, but should also indicate, even if only in general terms, which offences society considers to be more serious, and those which it considers to be less serious.

The scheme adopted here is general in its terms. It allocates all offences to one of six categories, and identifies the maximum penalty for each of those categories. The sentencing provisions are not intended to be closely prescriptive, or to interfere to a significant degree with judicial discretion in sentencing. The suggested offence bands, while setting appropriate upper limits, provide broad parameters within which, it is believed, the courts can properly reflect the relative gravity of particular examples of each offence.

It must of course be recognised that the allocation of an offence to a particular penalty category, and the determination of the maximum penalty within that category are essentially matters of public policy. The Act does, however, demonstrate that the method by which an appropriate level of differentiation in sentencing could be achieved need not be conceptually complex. It would be a very easy matter to alter the category in which any particular offence appears in schedule 2.

Since the maximum penalty for all common law offences (if tried on indictment in the High Court) is life imprisonment, the sentencing structure of the common law gives no guidance as to the relative seriousness of offences. Even if this can be deduced from the sentencing policy of the courts (such as there is) it is nevertheless the case that the law does not embody any clear principled approach to this issue.

An important consequence of there being no minimum or fixed penalties in this Act is that while the maximum penalty for murder is life imprisonment, this is no longer the mandatory penalty. It is therefore open to the court to impose a determinate period of imprisonment which it considers reflects the gravity of the particular case of murder. Although this may be regarded as controversial, it must be recognised that as a result of the passing of the Convention Rights (Compliance) (Scotland) Act 2000, it is now possible for a court when imposing the mandatory life sentence for murder to set the “punishment” part of that sentence at whatever point in the sentencing scale it thinks fit, and the Parole Board could, at the end of that period instruct the release of the offender. It is, therefore, already possible for the courts effectively to curtail the effect of a mandatory sentence of life imprisonment by stating a relatively short punishment period.

32 Penalty for aggravated offence

Where a person is convicted of an offence (the principal offence) aggravated under section 7 of this Act the maximum penalty which may be imposed is the same as the maximum penalty for the principal offence but, subject to that, the court must take into account, in imposing sentence, the fact that the offence was aggravated and the nature of the aggravation.

COMMENTARY

It would be possible, in relation to code offences, to provide that the maximum penalty for an aggravated offence should be one notch up from the normal maximum for the offence without the aggravation and indeed this solution was adopted in earlier versions of the code. However, that would involve distinguishing between code offences and non-code defences in a rather arbitrary way and it would also have the effect, given the flexibility of the rules on aggravation, that a slight aggravation could have a disproportionate effect on the maximum penalty. The solution in the section controls the effect of pleading an aggravation, which might otherwise make maximum penalties meaningless, but otherwise leaves matters to judicial discretion. The effect is that the aggravation will increase sentence only if the court would have imposed less than the maximum sentence in respect of the offence without the aggravation. As it is rare in practice for maximum penalties to be imposed for non-aggravated offences this solution does not substantially diminish the potential practical importance of aggravation of an offence.

33 Penalty for attempt, incitement or conspiracy

Where a person is convicted of an attempt, incitement or conspiracy to commit an offence (the principal offence), the maximum penalty which may be imposed is the same as the maximum penalty for the principal offence but, subject to that, the court must take into account, in imposing sentence, the fact that the principal offence has not been committed.

COMMENTARY

It would be possible, in relation to code offences, to take the view that the maximum penalty for an incomplete offence should be one notch lower than the maximum penalty which would have been available under schedule 2 had the offence been fully carried out.¹⁶⁷ However, this would have involved distinguishing, in a rather unsatisfactory way, between code offences and non-code offences. Accordingly section 33 simply provides that the maximum penalty for an attempt, incitement or conspiracy is the same as the maximum penalty for the completed offence but requires the court, in imposing sentence, to take into account the fact that the offence was incomplete.

¹⁶⁷ This was the solution adopted in earlier drafts of the code.

34 Savings for other powers and duties

Nothing in this Part of this Act affects—

- (a) any powers of sentencing or disposal other than powers to impose a fine or imprisonment;
- (b) any powers to increase sentence in the light of previous convictions or other extraneous factors; or
- (c) any sentencing duties (consistent with the maximum penalties provided for in this Part) laid down by legislation in relation to particular offences or particular categories of offenders.

COMMENTARY

This section preserves necessary discretion in relation to sentencing. It makes it clear that the rules in the Act on penalties are not intended to interfere with such matters as the power of a court to take previous convictions into account or with sentencing powers other than powers to impose a fine or imprisonment.

Territorial application of Scottish criminal law

35 Application of Scottish criminal law to acts within Scotland

- (1) Unless otherwise provided, the criminal law of Scotland applies only to acts done in Scotland.
- (2) Where an act forming part of an offence, or any event necessary for the completion of an offence, occurs in Scotland, the offence is deemed to be committed in Scotland, whether or not every such act or event occurs in Scotland.

COMMENTARY

Section 35 contains the normal rules on the territorial application of the criminal law. Generally speaking the criminal law of Scotland applies only to what is done in Scotland. Subsection (2) expands or clarifies this by making it clear that it is sufficient if an act forming part of the offence or any event necessary for the completion of an offence occurs in Scotland.

36 Application of Scottish criminal law to acts outside Scotland

- (1) Any British citizen or British subject who does any act outside the United Kingdom which if done in Scotland would constitute the offence of murder, culpable homicide, torture, slavery, or piracy is guilty of the same offence and subject to the same punishment as if the act had been done in Scotland.
- (2) Any British citizen or British subject employed in the service of the Crown who, when acting or purporting to act in the course of such employment, does any act outside the United Kingdom which if done in Scotland would constitute an offence punishable on indictment is guilty of the same offence and subject to the same punishment as if the act had been done in Scotland.
- (3) A person is guilty of incitement, conspiracy or attempt to commit an offence, although the incitement, conspiracy or attempt occurs outside Scotland, if the act or result incited, agreed upon or attempted occurs in Scotland or is intended to occur in Scotland and constitutes or would constitute the offence or an element in the offence.
- (4) Subsection (3) applies also to subornation of perjury and subornation of a false oath or statement.
- (5) Where acts outside Scotland constitute an offence under the law of Scotland those acts may be taken, for all purposes relating to the prosecution, trial and punishment of the accused, as having occurred at any place in Scotland where the accused was apprehended or is in custody or at such other place within Scotland as may be determined by the Lord Advocate.

COMMENTARY

This section deals with exceptional cases where acts or omissions wholly outside Scotland constitute an offence under the law of Scotland.

The section is derived from existing statutory provisions. Subsections (1) and (2) are derived from section 11(1) and (2) of the Criminal Procedure (Scotland) Act 1995. So far as incitement is concerned, subsection (3) is derived from section 16A of the Criminal Law (Consolidation) (Scotland) Act 1995 but is wider than that section. Section 16A applies only to certain listed sexual offences but section 36 is of general application. So far as conspiracy is concerned subsection (3) is derived from section 11A of the Criminal Procedure (Scotland) Act 1995. Subsection (4) applies the same rules to subornation of perjury and subornation of a false oath or statement. This is for the avoidance of any doubt which might be caused by the fact that the word incitement does not appear in the name of these offences. Subsection (4) is derived from section 11(3) of the Criminal Procedure (Scotland) Act 1995. There is a similar rule in section 46 of the Criminal Law (Consolidation) (Scotland) Act 1995 (which deals with false statements and declarations).

PART 2
NON-SEXUAL OFFENCES AGAINST LIFE, BODILY INTEGRITY, LIBERTY
AND OTHER PERSONAL INTERESTS

Causing death

37 Murder

- (1) A person who causes the death of another person with the intention of causing such a death, or with callous recklessness as to whether such a death is caused, is guilty of the offence of murder.
- (2) Notwithstanding anything in section 9 (Intention), a registered medical practitioner, or a person acting under the direction of such a practitioner, who, acting with the consent of a patient or with lawful authority, does anything reasonably and in good faith with the primary purpose of relieving the patient's pain or discomfort is not regarded as intending to cause the death of the patient merely because the practitioner or other person foresees that the death is certain or almost certain to occur earlier than it otherwise would.

COMMENTARY

The definition in subsection (1) treats the *mental element* in the crime as its defining characteristic.¹⁶⁸ Murder embraces not only intentional killing, but also reckless killing. As the subsection makes clear, however, murder requires a particular kind of recklessness. It is not sufficient that the accused is shown to have acted recklessly with regard to death. The Crown must show that the accused acted with “callous” recklessness, suggesting extreme disregard for human life.

The offence is confined to the killing of another person, so that it continues to exclude the possibility of a charge of murder in cases where the death in question is that of an unborn child¹⁶⁹, and in cases of “self murder” or suicide.¹⁷⁰

¹⁶⁸ This may be contrasted with the provisions of some United States codes which define murder by reference to other criteria, such as the characteristics of the victim or the surrounding circumstances of the killing. See, for example Code of Alabama, s.13A-6-2 (a) (3) (killing while committing first degree arson, burglary, kidnapping, rape or robbery); Indiana Code, 35-42-1-1, s.1(3) (killing while dealing in certain types of drugs).

¹⁶⁹ If, however, a child *born alive* dies as a result of ante-natal injuries inflicted upon it, or upon the mother, this could be murder. *Cf McCluskey v H.M. Advocate* 1989 SLT 175.

¹⁷⁰ “Self-murder” may at one time have been regarded as a crime: Mackenzie, I, title XIII.

Subsection (2) makes provision for an exception to the general rule set out in subsection 9(1)(a) (intention). It addresses the situation where a doctor treating a patient may, in good faith, act so as to relieve the patient's suffering, foreseeing that the treatment may hasten death. Given the extended definition of intention provided in section 9(1)(a) it would be difficult to avoid the conclusion that the doctor intended death. A similar conclusion has already been reached by the Court of Appeal in England.¹⁷¹ The purpose of subsection (2) is to ensure that, subject to the safeguards set out in the provision, doctors are not put at risk of prosecution for treatments having a "double effect" - that is treatments which have the primary effect of relieving pain or discomfort but which also have the effect of hastening death.

Until relatively recently the accepted common law definition of murder was that contained in Macdonald's Criminal Law:¹⁷²

"Murder is constituted by any wilful act causing the destruction of life, whether intended to kill, or displaying such wicked recklessness as to imply a disposition depraved enough to be regardless of consequences."

In *Drury v H.M. Advocate*¹⁷³ the then Lord Justice-General, Lord Rodger, expressed the view that murder required a "wicked" intention to kill. This view is unsupported by any of the earlier authorities on the definition of murder, and does not appear to have been referred to by the High Court in the subsequent case of *Galbraith v H.M. Advocate (No. 2)*.¹⁷⁴ The distinction drawn between an "ordinary" intention to kill and a "wicked" intention to kill may, in any event, be rather limited since in *Drury* the Lord Justice-General qualifies his statement by a reference to Hume which suggests that all cases of intention to kill are "wicked" unless the killing is justified or excused.¹⁷⁵ Section 37 follows the interpretation of the law as it was before *Drury*, but uses "callous" rather than "wicked" to describe the special type of recklessness required. "Callous" describes well the type of recklessness required. It must be more than ordinary recklessness. It must involve a callous acceptance of the risk of death created by the acts or a callous indifference to the possible fatal consequences of the acts. The terrorist who plants a bomb and gives the police a short advance warning may argue that he did not intend to kill anyone but, if somebody is killed, could be convicted of murder on the ground that he was callously reckless as to whether death was caused. Callous has the advantage of not carrying with it some of the more artificial baggage which accompanies the term "wickedly reckless" such as the question whether there can be wicked recklessness in the absence of an intention to do some bodily harm.¹⁷⁶

¹⁷¹ *Re A (Children) (conjoined twins: surgical separation)* [2000] 2 WLR 480.

¹⁷² At p. 89.

¹⁷³ 2001 SCCR 583; 2001 SLT 1013.

¹⁷⁴ 2002 JC 1; 2001 SCCR 551; 2001 SLT 953.

¹⁷⁵ 2001 SCCR 583; 2001 SLT 1013, para. 11.

¹⁷⁶ On this question, see Gane and Stoddart, pp. 402-403.

38 Culpable homicide

- (1) A person who causes the death of another person—
 - (a) recklessly;
 - (b) by an assault; or
 - (c) by another unlawful act likely to cause significant physical harm, provided that the person intended the act to cause such harm or was reckless as to whether it would cause such harm,is guilty of the offence of culpable homicide.
- (2) Neither an intention to cause death nor recklessness as to whether death is caused is necessary for guilt under subsection (1)(b) or (c).
- (3) A person who, but for this subsection, would be guilty of murder is not guilty of murder, but is guilty of culpable homicide, if—
 - (a) the person, at the time of the killing, had lost self-control as a result of provocation; and
 - (b) an ordinary person, thus provoked, would have been likely to react in the same way.
- (4) For the purposes of subsection (3)—
 - (a) the provocation may be by acts or words or both (whether by the deceased or another person); and
 - (b) the ordinary person is assumed—
 - (i) to have any personal characteristics of the accused that affect the provocative quality of the acts or words giving rise to the loss of self-control; and
 - (ii) to have a normal ability to exercise a reasonable measure of self-control.
- (5) A person who, but for this subsection, would be guilty of murder is not guilty of murder, but is guilty of culpable homicide, if at the time of the act leading to the death the person, although not entitled to a complete acquittal under section 27 (Mental disorder), was suffering from an abnormality of mind of such a nature as to diminish substantially the degree of responsibility.

- (6) A person cannot take advantage of subsection (5) unless the abnormality of mind giving rise to the diminished responsibility is admitted by the prosecution or proved on a balance of probabilities.

COMMENTARY

Culpable homicide can be divided into two broad categories. The first embraces (a) all unlawful deaths which result from assault,¹⁷⁷ or other acts which, although not involving an assault, involve conduct which might reasonably involve personal injury (such as fire-raising)¹⁷⁸ and (b) reckless acts which are not in themselves unlawful, but which cause death (for example, recklessly installing a gas supply).¹⁷⁹ The second comprises cases of unlawful killing which would be murder, but for the presence of the mitigating factors of provocation or diminished responsibility.

Subsections (1) and (2) deal with the first category of culpable homicide - the category which is self-standing rather than the result of mitigation of murder. The common law concept of reckless culpable homicide is retained in subsection (1)(a), although the Act is more precise than the common law about what is meant by recklessness.¹⁸⁰ Although the common law assault rule has been criticised as being harsh, it is retained in subsection (1)(b). The justification is that, as assault is an intentional invasion of another's bodily integrity, anyone who commits assault can reasonably be held liable for the consequences, however unexpectedly severe they may be. The rule in subsection (1)(c) on deaths caused by other unlawful acts likely to cause significant physical harm is more qualified, because of the potential range of such acts. The accused must have intended the act to cause the harm or have been reckless as to whether it would cause the harm.

Subsections (3) and (4) allow for a partial defence of provocation, the effect of which is to reduce what would otherwise be murder to culpable homicide. The law recognises that a person who has lost self-control due to another person's behaviour is less blameworthy than the person who acts similarly, but in cold blood. Subsection (3) makes it clear that there is both a subjective and an objective dimension to the plea of provocation. The subjective aspect (set out in paragraph (a)) requires that at the time of the killing *the accused* had lost self-control as a result of the provocation. The objective aspect in paragraph (b) requires that "an ordinary person" faced with such provocation, would have been liable to react in the same way. Subsection (4) makes it clear that the provocation may be by acts or words or both. It also makes clear what qualities the ordinary person is assumed to have for this purpose.

¹⁷⁷ *Bird v H.M. Advocate* 1952 JC 23; *Burns v H.M. Advocate* 1998 SCCR 281.

¹⁷⁸ *Mathieson v H.M. Advocate* 1981 SCCR 196; *Sutherland v H.M. Advocate* 1994 JC 62; 1994 SCCR 80; 1994 SLT 634.

¹⁷⁹ *Paton v H.M. Advocate* 1935 JC 19. Cf *Angus McPherson and John Stewart* (1861) 4 Irvine 85.

¹⁸⁰ See s.10.

Subsection (3) marks two significant developments on the common law. In the first place it recognises a wider range of provocative behaviour. The common law has insisted that, with one exception, only violence or the threat of violence could provide a foundation for a plea of provocation.¹⁸¹ Verbal abuse and insults, however extreme, could not provide a foundation for a plea of provocation. The only exception to the rule requiring violence arose in the case of sexual infidelity. Here, an accused could base a plea of provocation on the sudden discovery (or confirmation) of sexual infidelity on the part of a person with whom he or she had a relationship upon which an expectation of fidelity could be based.¹⁸² Subsection (3)(a) recognises that provocation may arise not only from violence, but from “acts or words or both”.¹⁸³ Subsection (3)(b) reflects the existing law as explained in *Drury v H.M. Advocate*.¹⁸⁴ It requires that “an ordinary person” would have been liable to react as the accused did.

Subsection (4)(b) expands upon the reference to the “ordinary person”. It would be possible to approach the “ordinary person” requirement in a wholly objective or a wholly subjective manner. If the former approach were to be adopted, then there would be a risk that the “ordinary person” test would rule out the defence where, for example, certain characteristics of the accused made him or her more susceptible to the kind of provocation offered. (Taunting a person about particular physical or other characteristics not shared by other members of the community would be one example.) If, on the other hand, a wholly subjective approach were to be adopted, then this would run the risk of allowing the defence, for example, to a person who was peculiarly ill-tempered.

Subsection (4)(b) therefore attempts a compromise, by permitting the personal characteristics of the accused to be taken into account to the extent that they are relevant to the provocative quality of the acts or words giving rise to the loss of self-control, while at the same time disregarding them when considering the accused’s ability to exercise self-control. Subsection (4) therefore rejects the approach recently adopted in English law by the House of Lords in which the accused’s personal characteristics were held to be relevant not only to the quality of the provocation offered, but also to his ability to exercise self-control.¹⁸⁵

Subsection (5) provides for a plea of diminished responsibility. The mental abnormality resulting in diminished responsibility must normally be proved by the defence on a balance of probabilities. That will be appropriate if the accused is being tried for murder. However, if the prosecution decides to prosecute only for culpable homicide, accepting that the accused suffers from such a mental abnormality as to give rise to a clear case of diminished responsibility, it should be sufficient that the prosecution admits that the requirements are satisfied. The accused, in other words, should be able to take advantage of the prosecution’s decision to prosecute only for the lesser offence.

¹⁸¹ See generally, *Thomson v H.M. Advocate* 1985 SCCR 448; *Cosgrove v H.M. Advocate* 1990 JC 333; 1990 SCCR 358; 1991 SLT 25; *Drury v H.M. Advocate* 2001 SCCR 583; 2001 SLT 1013.

¹⁸² See, generally, *Drury v H.M. Advocate* 2001 SCCR 583; 2001 SLT 1013; *H.M. Advocate v Gilmour* 1938 JC 1; *H.M. Advocate v Hill* 1941 JC 59; *McDermott v H.M. Advocate* 1973 JC 8; 1974 SLT 206; *H.M. Advocate v McKean* 1996 JC 32; 1996 SLT 1983; 1996 SCCR 402.

¹⁸³ Cf the Homicide Act 1957, s.3, in respect of English law.

¹⁸⁴ 2001 SCCR 583; 2001 SLT 1013.

¹⁸⁵ See *Smith (Morgan)* [2000] 3 WLR 654.

The defence of diminished responsibility has been recognised at common law since the case of *Alexander Dingwall*¹⁸⁶ in 1867, and was recently reviewed by the High Court in the case of *Galbraith v H.M. Advocate (No. 2)*.¹⁸⁷ In that case the High Court recognised that an accused person's ability to determine and control his or her actions could be impaired by mental abnormality to such a degree as would reduce responsibility for killing from murder to culpable homicide. The mental abnormality could be medical, psychiatric or psychological in origin, and could be based in external causes such as sexual or other abuse. There must, however, be some recognised mental abnormality. That abnormality could take various forms. It may mean that the accused perceives matters differently from a normal person, or it might affect the ability to form a rational judgement as to whether a particular act was right or wrong, or it might affect the accused's ability to decide whether to perform that act.¹⁸⁸ Subsection (5) thus reflects the common law as it appears to be developing in cases such as *Galbraith*.

The plea of diminished responsibility has traditionally been confined to murder cases because of the fixed penalty for murder. It enabled account to be taken of factors which, in the case of other offences, could be taken into account in mitigation of sentence. Under this Act the fixed penalty for murder is abolished.¹⁸⁹ There is, therefore, an argument that the plea of diminished responsibility is no longer necessary. We have retained it for the time being for labelling reasons. For a person to be labelled a murderer when that person was suffering from diminished responsibility may be considered harsh and unfair.

The law on diminished responsibility has recently been considered by the Scottish Law Commission in a very thorough discussion paper.¹⁹⁰ It may be that in the light of the responses to that discussion paper changes will be recommended. It would be a simple matter to amend this Bill to incorporate such changes, including the deletion altogether of the provision on diminished responsibility if that were to be thought appropriate.

Mental abnormality resulting in diminished responsibility must normally be proved by the defence on a balance of probabilities. That will be appropriate if the accused is being tried for murder. However, if the prosecution decides to prosecute only for culpable homicide, accepting that the accused suffers from such a mental abnormality as to give rise to a clear case of diminished responsibility, it should be sufficient that the prosecution admits that the requirements are satisfied. The accused, in other words, should be able to take advantage of the prosecution's decision to prosecute only for the lesser offence. This is provided for by subsection (6). This also reflects the common law.

¹⁸⁶ (1867) 5 Irvine 466.

¹⁸⁷ 2002 JC 1; 2001 SCCR 551; 2001 SLT 953.

¹⁸⁸ 2002 JC 1; 2001 SLT 953, at para. 51.

¹⁸⁹ See sch. 2.

¹⁹⁰ Discussion Paper No 122 on *Insanity and Diminished Responsibility* (2003).

39 Torture

- (1) A person who inflicts severe pain or suffering (whether physical or mental) on another person (“the victim”) solely or primarily—
 - (a) to derive pleasure from the victim’s pain or suffering;
 - (b) because of the victim’s membership or supposed membership of a group of persons defined by reference to race, colour, religion, gender, sexual orientation, nationality, citizenship or ethnic or national origins;
 - (c) to obtain information or a confession from the victim or another person;
 - (d) to intimidate or coerce the victim or another person; or
 - (e) to punish the victim or another person,is guilty of the offence of torture.
- (2) Section 7(4) applies also for the purposes of this section.
- (3) Subsection (1)(e) of this section does not apply to the infliction of normal and reasonable punishment on convicted persons in a way which is compatible with their human rights.

COMMENTARY

Torture is prohibited by all general human rights treaties,¹⁹¹ and by a number of specific anti-torture measures.¹⁹² Such international treaties absolutely forbid torture, and permit no exceptions or qualification to that prohibition. However, to the extent that torture may provide the basis for certain charges of crimes against international law¹⁹³ and certain defences to such crimes are recognised,¹⁹⁴ it would appear that *as a crime* torture is not absolutely forbidden (in the sense that it may be excused under certain conditions).

The term “torture” in international law is reserved for conduct which produces an especially severe level of suffering. In *Ireland v United Kingdom*¹⁹⁵ the European Court of Human Rights described “torture” as requiring “deliberate inhuman treatment causing very serious and cruel suffering”,¹⁹⁶ and it would seem appropriate that the offence under section 40 would be construed in the light of current international human rights standards. It would not be sufficient to leave torture to be dealt with under other crimes (such as assault). First, torture is a particularly odious crime, and the principle of fair labelling justifies distinguishing it from assault. Secondly, there can be forms of torture, such as psychological torture, which would not easily be covered by assault because there is no use of force or invasion of bodily integrity. Thirdly, absence of consent on the part of the victim is not required for there to be the offence of torture.

Torture is an offence under section 134 of the Criminal Justice Act 1988. That offence is based on the definition of torture contained in the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. As such, it is directed at officials.

The crime of torture under section 39 reflects elements of the definition of torture in article 1 of the United Nations Convention, but differs from it in certain important respects. Thus while the United Nations Convention (and thus section 134 of the Criminal Justice Act 1988) is confined to “official” torture (that is, torture carried out by public officials or persons acting in an official capacity, or torture carried out by other persons at the instigation or with the connivance of public officials) section 39 draws no distinction between “official” and “private” torture. It would, therefore be an offence under section 39 for a member of a criminal organisation to torture a suspected informer, while such action would not be an offence under section 134 of the 1988 Act.

¹⁹¹ See, in particular, the European Convention on Human Rights, article 3, the International Covenant on Civil and Political Rights, article 7, the American Convention on Human Rights, article 5 and the African Charter on Human and Peoples’ Rights, article 5.

¹⁹² United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Inter-American Convention to Prevent and Punish Torture. See also the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. This does not define torture, but sets out mechanisms whereby persons deprived of their liberty may be protected from torture or inhuman and degrading treatment or punishment.

¹⁹³ For example, torture is a crime against humanity in terms of article 7(1) of the Rome Statute of the International Criminal Court, a war crime in terms of article 8, and may also be included within the crime of Genocide under article 6 of that statute.

¹⁹⁴ For example, intoxication, mental disorder and duress are all defences to crimes against international law in terms of article 31 of the Rome Statute.

¹⁹⁵ (1978) 2 EHRR 25.

¹⁹⁶ (1978) 2 EHRR 25, at para. 167.

Under section 134(4) it is (controversially) a defence to a charge of torture that the accused “had lawful authority for that conduct”. This defence is excluded in the case of the offence under section 39 of this Act. See section 22 (Lawful authority). That makes subsection (3) of section 39 necessary.

40 Inhuman or degrading treatment

- (1) A person who treats another person in an inhuman or degrading manner is guilty of the offence of inhuman or degrading treatment.
- (2) Subsection (1) of this section does not apply to the infliction of normal and reasonable punishment on convicted persons in a way which is compatible with their human rights.

COMMENTARY

In common with many international human rights treaties, the Act recognises a distinction between torture and inhuman or degrading treatment. The distinction is a matter of degree, reflecting different levels of suffering. In *Ireland v United Kingdom*¹⁹⁷ the European Court of Human Rights described conduct as amounting to “inhuman” treatment where it caused “if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbance.”¹⁹⁸ Conduct was described as “degrading” where it was “such as to arouse in [the victims] feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.”¹⁹⁹ What is required for torture, inhuman or degrading treatment is not an absolute but a relative matter: “it depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim”.²⁰⁰ What might be regarded as inhuman or degrading treatment of a young and vulnerable person might not be regarded as such in the case of a stronger or more robust adult.²⁰¹

The reasons for including this as a specific offence in the Act are similar to those for including torture – (1) international recognition that treating individuals in an inhuman or degrading fashion is a serious violation of human rights; (2) fair labelling; (3) the fact that assault would not cover all cases of inhuman or degrading treatment; (4) the fact that consent of the victim is irrelevant. Like torture, this is not a specific offence under the existing law of Scotland. The Act therefore innovates on the common law and statute.

Again, the defence of lawful authority does not apply to this offence. (See section 22 (4).) That makes subsection (2) necessary.

¹⁹⁷ (1978) 2 EHRR 25.

¹⁹⁸ (1978) 2 EHRR 25, at para. 167.

¹⁹⁹ (1978) 2 EHRR 25, at para. 167.

²⁰⁰ See *Costello-Roberts v United Kingdom* (1993) 19 EHRR 622, at para. 30.

²⁰¹ See, generally, *Tyrer v United Kingdom* (1978) 2 EHRR 1 (birching of a seventeen year old youth held to be degrading); *Costello-Roberts v United Kingdom* (1993) 19 EHRR 622 (“slipper” of a seven year old schoolboy held not to be degrading); *A v United Kingdom* (1997) 27 EHRR 611 (repeated caning of a nine year old boy held to be inhuman and degrading).

41 Assault

- (1) A person who attacks another person, presents a weapon at another person in a menacing manner or uses force against another person, without that person's consent, is guilty of the offence of assault.
- (2) For the purposes of this section, attacking a person includes punching, kicking, hitting, biting, grabbing or pushing that person; striking, stabbing or cutting that person with a weapon or implement; causing that person to be struck by any projectile; causing that person to come into contact with any object or structure to that person's injury; and otherwise infringing that person's interest in bodily integrity.

COMMENTARY

The primary meaning of an assault is any attack on the person of another. "Attack" is given an inclusive definition in subsection (2) of this section. It covers a range of behaviour from spitting to stabbing or shooting. The attack must be intentional.²⁰² The section also expressly covers conduct consisting in presenting a weapon at another person in a menacing manner, such as leaping out at someone with a knife in one's hand in an obviously aggressive manner. This could constitute an assault even if there were no physical contact. Other menacing conduct of a similar type²⁰³ would constitute the offence of violent and alarming behaviour under section 49 of the Act but the case where a weapon is presented is retained within assault because of the seriousness of that type of conduct.

Finally the section also covers the unlawful use of force against another person.

The attack or use of force must generally be done without the victim's consent, but the section must be read in the light of section 111 which imposes limitations on the extent to which consent can exclude criminal liability for assault. In particular, section 111(2) provides that consent to an attack or the use of force will be disregarded if the consent was to a socially unacceptable activity likely to cause serious injury or a risk of serious injury.

²⁰² This is the result of the general provision in s.8(1) that a person is normally criminally liable for an act only if the person intended to perform that act.

²⁰³ See e.g. *Atkinson v H.M. Advocate* 1987 SCCR 534.

With one important exception, this section substantially reproduces the common law, which defines assault as any attack on the person of another.²⁰⁴ The presentation of weapons²⁰⁵ and the use of force are accepted as forms of assault at common law.²⁰⁶ The important difference between this provision and the common law is that the common law does not recognise the consent of the victim as a defence. In *Smart v H.M. Advocate*²⁰⁷ the High Court held that the consent of the victim did not, as a general rule, exclude criminal liability for assault. That decision seems to have been largely driven by the circumstances of the case under consideration (which involved an agreement between the parties to settle their differences by a “square go” - a fight without weapons). In the circumstances of the case it was probably unnecessary for the court to adopt such a radical position. The injuries inflicted on the victim were such as would be outside the scope of any reasonable doctrine of consent to assault which would confine the operation of consent to relative minor injuries.²⁰⁸ The actual result reached in *Smart* (that consent to such a fight did not prevent assault) would still be reached under section 42 when read with section 111(2).

²⁰⁴ Macdonald, 115; *Smart v H.M. Advocate* 1975 JC 30; 1975 SLT 65.

²⁰⁵ *Gilmour v McGlennan* 1993 SCCR 837.

²⁰⁶ *Cf David Keay* (1837) 1 Swin. 543.

²⁰⁷ 1975 JC 30; 1975 SLT 65.

²⁰⁸ The indictment in *Smart* alleged that the accused “. . . did [in a public park], assault [the complainer], and did kick him on the private parts, punch and kick him about the head and body, pull out his hair and bite him on the left arm to his injury.”

42 Causing unlawful injury

A person who intentionally or recklessly causes injury to another person, without that person's consent, is guilty of the offence of causing unlawful injury.

COMMENTARY

An assault involves an intentional attack or an intentional use of force, not necessarily causing injury. Section 42 covers cases where injury is caused but there is not necessarily an attack or a use of force. Examples of such cases would be poisoning or administering drugs or other noxious substances to a person, or supplying to a person the means whereby they cause injury to themselves.²⁰⁹

Section 42 is not confined to intentional injury, but includes reckless injury.²¹⁰

The offence is not committed if the victim consents, but again regard must be had to the limitations placed upon consent by section 111. It is necessary to have a defence of consent, to cover cases such as medical interventions and certain legitimate sporting or leisure activities which involve a risk of injury.

This offence is similar to the common law offence, described by Hume as "causing real injury".²¹¹

²⁰⁹ See *Khaliq v H.M. Advocate* 1984 JC 23; 1983 SCCR 671; 1984 SLT 137; 1983 SCCR 483; *Ulhaq v H.M. Advocate* 1991 SLT 614; 1990 SCCR 593.

²¹⁰ Recklessness is defined in s.10 of this Act.

²¹¹ See *Khaliq v H.M. Advocate* and *Ulhaq v H.M. Advocate*, above.

43 Causing an unlawful risk of injury

- (1) A person who intentionally or recklessly causes a risk of injury to another person is guilty of the offence of causing an unlawful risk of injury.
- (2) It is not necessary for the purposes of this section that another person should be within the area of risk provided that there is a risk of such a person being within that area.
- (3) It is a defence under this section that the only person or persons who might have been injured consented to the risk.

COMMENTARY

Section 43 applies even if there is no general danger to the public from the accused's conduct. There need not be an actual injury. It is enough if there was a risk of injury, recklessly caused. The ways in which a risk of injury might be caused are many and various. This offence would be committed, for example, where a person who is about to be searched is asked by police whether she has any sharp objects on her person and falsely denies that she has any such objects whereas in fact she has an unsheathed needle in her pocket.²¹² The crime would also be committed by a person who organises a rave in dangerous premises;²¹³ recklessly discharges a firearm;²¹⁴ recklessly throws an object from a high building;²¹⁵ or places objects on a railway line.²¹⁶ Subsection (2) is designed to make it clear that an offence may be committed by, for example, firing a high velocity gun near an area where people might be, even if in fact, unknown to the accused, nobody was there at the time. Subsection (3) provides the defence of consent which, as in section 43, is necessary to cover such things as accepted medical or sporting risks or the risks associated with certain legitimate activities like rock climbing.

This offence replaces the common law offence of recklessly endangering other persons. The common law offence generally involves an allegation of endangering the public (as opposed to a single individual.)

²¹² This is similar to the facts in the case of *Normand v Morrison* 1993 SCCR 207. See also *Mallin v Clark* 2002 SCCR 901; 2002 SLT 1202.

²¹³ See *Normand v Robinson* 1993 SCCR 1119; 1994 SLT 558.

²¹⁴ *David Smith and William McNeil* (1842) 1 Broun 240; *Normand v Robinson* 1993 SCCR 1119; 1994 SLT 558; *Cameron v Maguire* 1999 JC 63; 1999 SCCR 44.

²¹⁵ *Cf RHW v H.M. Advocate* 1982 SCCR 152.

²¹⁶ *Cf Robson v Spiers* 1999 SLT 1141, in which the accused was convicted of culpably and recklessly chasing cattle so that they escaped first on to a railway line and then on to a road, to the danger of persons using the railway line and the road.

Interference with freedom of action or volition

44 Slavery

- (1) A person who brings about or exploits the slavery of another person or who engages in the slave trade is guilty of the offence of slavery.
- (2) In this section—
 - (a) “slavery” includes—
 - (i) the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised; and
 - (ii) a servile status or condition resulting from any of the institutions or practices mentioned in Article 1 of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery signed at Geneva on 7 September 1956; and
 - (b) “the slave trade” includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce that person to slavery; all acts involved in the acquisition of a slave with a view to sale or exchange; all acts of disposal by sale or exchange of a person acquired with a view to being sold or exchanged; and in general, every act of trade or transport in slaves by whatever means of communication.

COMMENTARY

Slavery is prohibited by a number of specific international treaties²¹⁷ as well as general human rights treaties²¹⁸ and instruments²¹⁹ and enslavement is also recognised as a crime against humanity.²²⁰ Engaging in the slave trade is a crime under the Slave Trade Act 1824.²²¹

²¹⁷ See the Slavery Convention, signed at Geneva on 25 September 1926 (60 LNTS 253 – in force 9 March 1927 – functions transferred to the UN by Protocol approved by UN General Assembly resolution 794 (VIII) of 23 October 1953) and the Supplementary Convention on the Abolition of Slavery and the Slave Trade, and Institutions and Practices Similar to Slavery, 226 UNTS 3 (in force 30 April 1957).

²¹⁸ See, for example, the European Convention on Human Rights, article 4(1), the International Covenant on Civil and Political Rights, article 8(1), the American Convention on Human rights, article 6(1) and the African Charter on Human and Peoples’ Rights, article 5.

²¹⁹ See, for example, the Universal Declaration of Human rights, 1948.

²²⁰ See, for example, the Rome Statute of the International Criminal Court, article 7(1)(c).

²²¹ S.9.

The reason for including slavery as a specific crime in the present Act is that it is an odious offence, internationally condemned, which on the principle of fair labelling ought to be distinguished from deprivation of liberty.²²² The latter might cover merely locking somebody up for an hour or so. It is also important to make it clear that the victim's acquiescence in the situation would not prevent there being slavery. The offence of deprivation of liberty would not be committed if the victim consented.²²³ "Slavery" and the "slave trade" are defined in the Act in the same way as in the leading international conventions on the subject.²²⁴

Acts outside Scotland may amount to an offence under this section.²²⁵ So the mere fact that slavery is not recognised as a status in Scotland²²⁶ is not a reason for omitting this offence from Scottish criminal law.

There is no specific offence of slavery in the common law. Participating in the slave trade is currently an offence under the Slave Trade Act 1824, but its inclusion in the present Act allows for the complete repeal of the older Act, which is expressed in dated terms.

²²² See s.46.

²²³ See s.46.

²²⁴ See the Slavery Convention of 1926 (article 1) and the Supplementary Convention of 1957 (article 7).

²²⁵ See s.36.

²²⁶ *Knight v Wederburn*, 1778 M. 14545.

45 Abduction

A person who carries off or takes away another person, without that person's consent, intending such abduction or being reckless as to whether there is such abduction, is guilty of the offence of abduction.

COMMENTARY

The offence of abduction involves carrying a person off or taking them away, without their consent.²²⁷ It is likely to be a more serious offence in most cases than deprivation of liberty without the element of taking away and this is reflected in the maximum sentence available for this crime. It may be aggravated by the further intent with which it is committed - for example, abduction with intent to rape, rob, murder or extort money.

Normally, abduction will be an intentional crime. An example of reckless abduction might be where someone drives off a van, knowing that there is an obvious and serious risk that there are children in the back, but not caring.

Not all cases where a person is taken from one place to another without consent will be abduction. There may, for example, be the defence of lawful authority.²²⁸

Abduction is an offence at common law.²²⁹

²²⁷ See also s.54 of the Act (Child abduction).

²²⁸ See s.22.

²²⁹ *Elliott v Tudhope* 1987 SCCR 85; 1987 SLT 721.

46 Deprivation of liberty

A person who deprives another person of liberty, without that person's consent, intending such deprivation or being reckless as to whether there is such deprivation, is guilty of the offence of deprivation of liberty.

COMMENTARY

This provision makes it clear that it is a crime to deprive a person of liberty without consent even without the element of carrying off or taking away. It would, for example, be an offence under this section to lock a person in a room where he or she already was when found by the offender.

Intention or recklessness is required for this offence. Accidentally to lock a person in a room would not be an offence under the section. It may, however, be possible to commit the offence if the accused, having been made aware of the fact that she or he has accidentally deprived a person of liberty intentionally or recklessly fails to take reasonable steps to restore that person to liberty.²³⁰

The defence of lawful authority may be particularly relevant to this offence.²³¹ It would not be an offence, for example, for a police officer to exercise a lawful power of arrest or for a parent to confine a small child in a cot in the proper exercise of parental responsibility.

Gordon²³² suggests that "unlawful detention without any element of carrying off" would amount to abduction at common law. For the purposes of the code, however, it seems preferable to regard this as a distinct offence.

²³⁰ This would be an example of liability for a result caused by omitting to act. See s.14(c).

²³¹ See s.22.

²³² Para. 29.52.

47 Drugging

- (1) A person who administers any drug or other substance to another person—
 - (a) with intent to stupefy that person or being reckless as to whether that person is stupefied;
 - (b) with intent to facilitate the commission of an offence against that person or being reckless as to whether such an offence is committed; or
 - (c) with intent that that person commits an offence, or being reckless as to whether that person commits an offence,is guilty of the offence of drugging.
- (2) Subsection (1)(a) does not apply—
 - (a) if the drug or substance is administered in the course of lawful medical or dental treatment; or
 - (b) if the other person, knowing the likely effects of the drug or substance, requested or consented to its administration.
- (3) For the purpose of this section administering a drug or substance includes causing it to be taken.

COMMENTARY

This section embraces three related, but different, forms of wrongful act. All involve the administration of a drug or other substance.

The offence in subsection (1)(a) does not require an intent to do anything, or recklessness as to anything, beyond stupefying the victim. The essence of the offence is a violation of the victim's interest in freedom of action and volition.

The offence in subsection (1)(b) covers the situation where someone drugs another person with intent to facilitate the commission of an offence (such as rape or theft) against that person or being reckless as to whether such an offence is committed.

The offence in subsection (1)(c) deals with the situation where the accused intends the *victim* to, or is reckless as to whether the victim does, commit an offence while drugged, and would cover the situation where the accused has spiked the victim's drink, knowing that the victim is likely to drive a motor vehicle, or even knowing that the victim might assault another, or damage property, while under the influence of the drug.

Subsection (2) is for the protection of people who might be unfairly or inappropriately caught by the earlier provisions. Paragraph (a) protects proper medical and dental practices. Paragraph (b) is included for the avoidance of doubt to protect people, such as bar-keepers, who supply intoxicants to people who request them. It will be noted that these protections are relevant only in relation to the offence in section 47(1)(a). They do not apply to the cases where the person administering the drug intends a crime to be committed by or against the drugged person and they do not provide protection from any other crime which might be committed.

Subsection (3) contemplates the case where the drug is not directly administered by the accused, but is supplied to the victim for self-administration.

At common law “drugging” would generally be treated as a form of causing real injury. There is, according to Gordon,²³³ no reported instance of a charge of drugging without an ulterior intent such as theft, but various older texts, including Alison,²³⁴ Macdonald²³⁵ and Anderson²³⁶ are all of the view that stupefaction without an ulterior intent would be unlawful.

²³³ Para. 29.48.

²³⁴ Alison, i, 629.

²³⁵ Macdonald, p. 126.

²³⁶ Anderson, *Criminal Law of Scotland* (3rd ed) p. 172.

Causing fear, alarm or distress

48 Making unlawful threats

A person who makes to another person a threat—

(a) to cause the death of, or injury to, that other person or a third person; or

(b) to cause, by criminal means, substantial harm to the property or patrimonial interests of that other person or a third person,

intending that other person to believe that the threat will be carried out, is guilty of the offence of making unlawful threats.

COMMENTARY

This section protects the individual against whom threats are made. It includes any threat of injury. Some types of threats for specific purposes are covered by other sections of this Act.²³⁷

In certain circumstances it is unlawful at common law for one person to make threats against another. Written and verbal threats of death or serious bodily harm, or even serious damage to a person's property, are in themselves criminal.²³⁸ Less serious threats are not criminal, unless they are done for a criminal purpose (such as perverting the course of justice²³⁹, or extortion).

²³⁷ See e.g. ss. 85 (Extortion) and 97 (Perverting the course of justice - a threat to harm a witness if he or she gave evidence would be caught by this section because it would be an act calculated to pervert the course of justice).

²³⁸ See *Kenny v H.M. Advocate* 1951 J.C. 104; and *James Miller* (1862) 4 Irvine 238.

²³⁹ *Kenny v H.M. Advocate* 1951 J.C. 104.

49 Violent and alarming behaviour

A person who by violent behaviour intentionally or recklessly causes another person fear, alarm or significant distress is guilty of the offence of violent and alarming behaviour.

COMMENTARY

This section provides that it is an offence to engage in violent behaviour which causes fear, alarm or significant distress to others. The section does not require that the violent behaviour be directed towards the victim. So, for example, for A to attack B in the presence of C could involve an offence against either B or C, provided that the requisite fear, alarm or significant distress is proved. *Actual* fear, alarm or distress is required. It is not sufficient to show that the conduct was such as would be likely to frighten, alarm or distress ordinary people. If no one is actually frightened, alarmed or distressed by the violence, then no offence is committed.

One type of conduct which would be clearly caught by the section is domestic violence falling short of assault.

Conduct such as this would under the present law amount to breach of the peace. Under this Act, “breach of the peace” is limited to what its name suggests - causing a disturbance.²⁴⁰ It is in the section of the Act dealing with offences against public order, safety and security. The current common law definition is regarded as being too all-embracing.²⁴¹ Principles of fair labelling require that more precise notice be given of the harmful behaviour struck at by the criminal law. The requirement in section 49 that actual fear, alarm or significant distress be caused is a substantial narrowing of this aspect of the common law.

²⁴⁰ See s.92.

²⁴¹ See P.R. Ferguson, “Breach of the Peace and the European Convention on Human Rights” (2001) *Edinburgh Law Review* 5:2, 1-24.

50 Intrusive and alarming behaviour

- (1) A person who by intrusive behaviour intentionally or recklessly causes another person fear, alarm or significant distress is guilty of the offence of intrusive and alarming behaviour.
- (2) For the purposes of this section—
 - (a) intrusive behaviour includes stalking, following, watching and spying upon a person; and
 - (b) behaviour includes an isolated act and a course of conduct.

COMMENTARY

This section protects the interest of people in being free from excessive intrusion or harassment. As with section 49, actual fear, alarm or distress must be caused. It is not sufficient to show that the conduct was such as was likely to cause such fear, alarm or distress to an ordinary person.

The definition in subsection 50(2) is not exhaustive. Intrusive behaviour could include the making of unwanted telephone calls²⁴² or other unwanted communications, or even the giving of unsolicited gifts,²⁴³ provided that the necessary impact on the victim was established. Similarly, aggressive begging could amount to intrusive and alarming behaviour as could aggressively pestering someone to buy something.

Again, conduct of this nature could, under the existing law, be charged as breach of the peace. This section preserves the protection afforded by the common law, but in a more specific and manageable manner, again in accordance with principles of fair labelling.

²⁴² See *The Herald*, 7 December 1998 and P. R. Ferguson, above. Making threatening phone calls has been held to be a breach of the peace at common law: *Robertson v Vannet* 1999 SLT 1081.

²⁴³ See *Elliott v PF Glasgow* (High Court, 12 May, 1999, unreported.)

Offences relating to children

51 Child abuse

- (1) A person with parental responsibilities in relation to a child under the age of 16, or with the charge or care of such a child, who intentionally or recklessly—
 - (a) subjects the child to violence, maltreatment or abuse;
 - (b) causes the child physical or mental injury;
 - (c) abandons or neglects the child in a manner likely to cause the child suffering or injury to health; or
 - (d) allows the child to be used or exploited for sexual or pornographic purposes,is guilty of the offence of child abuse.

- (2) A person neglects a child in a manner likely to cause injury to health if, for example, the person has failed to provide, or to take reasonable steps to arrange for the provision of, adequate food, drink, clothing, medical or dental treatment or accommodation for the child.

COMMENTARY

This section deals with child abuse by parents or others having the charge or care of a child under the age of 16. It therefore covers not only parents but also those whose responsibility for the care of a child is on a temporary basis, such as a teacher, child-minder, nanny or baby-sitter. Children in the care of others are particularly vulnerable and are exposed to types of maltreatment which would not necessarily be covered by the general law on assault and related offences. The section is in line with the United Nations Convention on the Rights of the Child.²⁴⁴

It strikes at positive acts as well as failures to act where the latter are likely to cause the child suffering or injury to health.

²⁴⁴ See article 19(1): “States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardians or any other person who has the care of the child.”

This section is based on section 12 of the Children and Young Persons (Scotland) Act 1937, with some changes in the language to clarify it, to reflect the United Nations Convention on the Rights of the Child and to adapt the section better to the structure of the code.²⁴⁵

In practice most of the difficulty in the existing law has been in relation to the word “neglect”. The list in subsection (2) of section 51 is only illustrative. There can be cases of neglect which do not come within this list. The present law is the same and cases on section 12 of the 1937 Act may therefore usefully be referred to for guidance on the generic concept of neglect.²⁴⁶ The appropriate standard against which the accused’s behaviour is to be measured in deciding whether there has been neglect has been held to be “what a reasonable parent, in all the circumstances, would regard as necessary to provide proper care and attention to the child.”²⁴⁷ Leaving a child alone in a house or being so drunk while in charge of a child as to be incapable of looking after the child may amount to neglect and hence, if the child is likely to be caused suffering or injury to health, to an offence under section 51.²⁴⁸

²⁴⁵ For example, s.51, unlike s.12 of the 1937 Act, does not require the parent or other person to have acted or failed to act “wilfully”. This word has been a source of difficulty.

²⁴⁶ See e.g. *Clark v H.M. Advocate* 1968 JC 53; *R. v Sheppard* [1981] AC 394, [1980] 3 All ER 899; *H v Lees*; *D v Orr* 1994 SLT 908, 1993 SCCR 900; *McF. v Normand* 1995 SCCR 380.

²⁴⁷ By Lord Justice General Hope in *H v Lees*; *D v Orr* 1994 SLT 908; 1993 SCCR 900.

²⁴⁸ *Ibid.*

52 Exposing child to harm

- (1) A person who—
 - (a) supplies or administers an article or substance to a child under the age of sixteen when that person knows or ought to know that the article or substance is likely to pose a serious risk of harm to the child; or
 - (b) causes or permits a child under the age of sixteen to engage in an activity when that person knows or ought to know that engaging in the activity is likely to pose a serious risk of harm to the child,is guilty of the offence of exposing a child to harm.
- (2) This section does not apply—
 - (a) to anything done by, or on the instructions of, a registered medical or dental practitioner in the interests of the child's health or welfare;
 - (b) to causing or permitting a child to participate in, or supplying a child with equipment for, an educational, sporting or recreational activity which does not, in the circumstances, involve exceptional or unacceptable risks.
- (3) It is a defence under this section that the person had exercised all due diligence to avoid committing an offence under it.

COMMENTARY

The offences introduced by this section are designed to protect children from exposure to dangerous articles, substances or activities and to supplement specific statutory offences relating to particular articles (such as crossbows), substances (such as alcohol or tobacco) or activities (such as child labour) and to provide flexibility and room for development, in a principled way, in the future. The section would cover such conduct as using children as chimney sweeps; using children in dangerous or unhealthy work in factories or shops or on farms; supplying glue-sniffing kits to children; supplying children with explosive materials or dangerous weapons which they are unlikely to be able to control properly; giving young children alcohol or drugs likely to cause them harm; allowing children to take part in dangerous performances such as knife throwing or lion taming; allowing children to engage in severe athletic or gymnastic training before their bodies are ready for it, or encouraging them to participate in sporting or other recreational activities which present abnormal risks.

Subsection (2) contains exceptions for medical or dental treatment and educational, sporting or recreational activities which do not involve exceptional or unacceptable risks. Thus it would not be an offence for a school or youth organisation to encourage children to engage in rock climbing or canoeing or skiing, provided that these activities did not, in the circumstances, present exceptional or unacceptable risks.

There are currently many statutes for the protection of children from specific dangers (including tobacco and alcohol) but the common law has no general offence of exposing children to dangerous substances or activities. Most of the specific statutory provisions will remain but some provisions of the Children and Young Persons (Scotland) Act 1937 (on giving alcohol to children under 5, and on causing or permitting children under 16 to take part in dangerous performances) are repealed because they are adequately covered by the new general offence.

53 Exposing child to obscenity or pornography

A person of or over the age of 16 years who, without reasonable excuse, causes or permits a child under the age of 16 years to see or hear obscene or pornographic material or activities is guilty of the offence of exposing a child to obscenity or pornography.

COMMENTARY

This section is confined to the protection of persons under the age of sixteen. Note that aural obscenities are included. Another section²⁴⁹ of this Act covers displaying or dealing with obscene material regardless of the age of the persons exposed or potentially exposed to it. The reasonable excuse exception in section 53 is included to cover such situations as biology lessons or asking a child witness to view an exhibit in a court case.

It is an offence at common law for any person to display obscene or pornographic material to any other person, whether in public or in private.²⁵⁰ It is not, however, an offence to permit another person to view pornographic material, even if that person is a young child.²⁵¹ Nor is it an offence at common law to cause or permit a person to hear obscene or pornographic material.

²⁴⁹ S.106 (Dealing with obscene material).

²⁵⁰ *Watt v Annan* 1978 JC 84, 1978 SLT 198.

²⁵¹ *Paterson v Lees* 1999 JC 159, 1999 SCCR 231.

54 Child abduction

A person who, without reasonable excuse, takes, entices or detains a child under the age of sixteen so as to remove the child from the control of any person having lawful control of the child or so as to keep the child out of the control of any such person, is guilty of the offence of child abduction.

COMMENTARY

This offence depends upon interference with a right to have control of a child. Since a natural parent may be excluded from exercising such rights, it follows that the crime can be committed by the child's parent or parents, and, indeed, the removal of a child from one parent by the other is probably the most commonly encountered form of this crime in modern practice.²⁵² The consent of the child to go with the abducting parent is no defence, since the child is deemed to be incapable of giving a valid consent in the case of this offence.

The defence of lawful authority²⁵³ would be available in the case where both parents have full parental rights and one parent removes the child from the control of the other.

At common law it is an offence for any person to remove a child under the age of puberty²⁵⁴ "from the custody of a parent or other person who has for the time being the parental right of custody in terms of [an enactment] or under any order made by the court".²⁵⁵ The crime is known technically as *plagium* which is a form of theft – child-stealing. This provision broadly follows the current law, except that it applies to any child under the age of 16. It also gets rid of the outdated and objectionable notion that a child is a form of property and can be stolen.

²⁵² See, for examples, *Downie v H.M. Advocate* 1984 SCCR 365; *Hamilton v Mooney* 1990 SLT (Sh Ct) 105; *Hamilton v Wilson* 1994 SLT 431.

²⁵³ See s.22.

²⁵⁴ That is, 12 for a girl and 14 for a boy.

²⁵⁵ See *Hamilton v Wilson* 1994 SLT 431. The Children (Scotland) Act 1995 does not now use the concept of "custody". This is why s.55 refers to "control".

55 Unlawfully removing child from jurisdiction

- (1) A person who takes or sends a child under the age of sixteen out of Scotland, contrary to an order by a Scottish court prohibiting the removal of the child from Scotland, is guilty of the offence of unlawfully removing a child from the jurisdiction.
- (2) It is a defence under this section that the person, at the time of the taking or sending, did not know, and could not reasonably have been expected to know, that the court order was in existence.

COMMENTARY

This section makes it an offence to remove a child under the age of sixteen from Scotland contrary to an order by a Scottish court prohibiting such removal.

It is currently an offence under section 6(1) the Child Abduction Act 1984 for “a person connected with a child under the age of sixteen”²⁵⁶ to take or send the child out of the United Kingdom without “the appropriate consent” (which includes the consent of each person who is a parent or guardian, or the consent of the court where the child is subject to a residence order). The present law is unsatisfactory in a number of respects and has been heavily criticised.²⁵⁷ It is in some respects too narrow. Why should it apply only to a “person connected with the child”? Why should it apply only to removal from the United Kingdom and not also to removal from Scotland to another part of the United Kingdom? It is in other respects too wide. Removal from the control of a parent or guardian, without that person’s consent, is adequately covered by section 54. The new provision in section 55 is more focussed.

²⁵⁶ A “person connected with” the child includes a parent or guardian of the child, or a person who has custody of the child or, in the case of an “illegitimate child” a person in respect of whom there are reasonable grounds for believing that he is the father of the child: Child Abduction Act 1984, s.6(2).

²⁵⁷ See the Scottish Law Commission’s *Report on Child Abduction* (Scot Law Com No 102, 1984).

Abortion

56 Abortion

- (1) A person who terminates a woman's pregnancy, or does anything to procure the termination of a woman's pregnancy, either entirely or in relation to one of two or more fetuses, is guilty of the offence of abortion.
- (2) This section does not apply to any abortion lawfully carried out under any Act of Parliament.

COMMENTARY

Abortion is lawful if carried out in terms of the Abortion Act 1967.²⁵⁸ Section 56 merely restates the underlying principle of the law that if the terms of the Abortion Act are not complied with it is an offence to terminate a woman's pregnancy. Subsection (2) specifically provides that any abortion lawfully carried out under any Act of Parliament would not be an offence under this section.²⁵⁹ It would be possible to refer specifically to the 1967 Act in section 56 but specific references are best avoided in an Act such as this, which is designed to last for some time without the need for frequent amendment. Section 56 would cover any replacement for the Abortion Act 1967 which might be enacted by the United Kingdom Parliament.

It is an offence at common law to terminate a woman's pregnancy. This section does not alter the current legal position. Under section 29(1)(b) of the Scotland Act 1998, the Scottish Parliament may not act outside its legislative competency, and a provision is outside its competency if it relates to a "reserved matter".²⁶⁰ Abortion is a reserved matter²⁶¹, but since section 56 of this Act is merely a restating provision which is not designed to alter the substance of the common law in any way, the inclusion of this section is within the competence of the Scottish Parliament.²⁶²

²⁵⁸ As amended by s.37 of the Human Fertilisation and Embryology Act 1990.

²⁵⁹ See also the general provision on lawful authority in s.22 of this Act.

²⁶⁰ See the Introduction to this Act, above.

²⁶¹ Under sch. 5, Part II, Head J1 of the Scotland Act 1998.

²⁶² By virtue of sch. 4, para. 7(1) of the Scotland Act 1998.

Offences relating to marriage

57 Bigamy

- (1) A person who—
- (a) enters into a formally valid marriage with a person while already married to another; or
 - (b) enters into a formally valid marriage with a person who is already married to another,
- and who knows of, or is reckless as to, the existence of the prior marriage, is guilty of the offence of bigamy.
- (2) In assessing whether a person is reckless as to the existence of a prior marriage, a mistaken belief that the other spouse of that marriage is dead is taken to be reasonable if the accused had, during the preceding seven years, no reason to suppose that that spouse was alive.

COMMENTARY

Bigamy is an offence against the security of the marriage relationship and against the seriousness with which that relationship is regarded by society.

An example of reckless bigamy would be the case where the accused had been separated from his wife for a few years and had lost contact with her. The accused might not know that he was still married. He might have been divorced or his wife might have died. But there would be an obvious and serious risk that he was still married and a reasonable person would not remarry without making further enquiries.

Subsection (2) makes provision for the case where a person accused of bigamy has entered into the subsequent marriage in the belief that his or her previous spouse is dead. A belief that the previous spouse is dead would negate an intention to enter into a bigamous marriage, although it would not necessarily negate recklessness if that belief was not reasonable. The reasonableness or otherwise of other beliefs, such as a belief that the first marriage has been dissolved by divorce, is left to be assessed in the circumstances of each case.

Bigamy is an offence at common law. Under the present law, bigamy appears to be confined to the case where a person already validly married contracts a formally valid second marriage (as in section 57(1)(a)). The case envisaged by section 57(1)(b) would be dealt with at common law on the basis of the general principles of accessorial liability. However, if the necessary knowledge or recklessness is present, an offence involving contempt for the marriage laws is committed equally by the married partner and the unmarried partner. In some cases indeed the unmarried partner may be the only one to know that the other party is still married. The section therefore makes both parties liable on the same basis.

Subsection (2) repeats, in words more appropriate to the new formulation of the offence, the substance of a provision in section 13 of the Presumption of Death (Scotland) Act 1977. Section 13 is repealed in Schedule 3.

58 Entering into forced marriage

A person who voluntarily enters into a formally valid marriage with a person whose consent or apparent consent to the marriage has been induced by force or fear and who knows that, or is reckless as to whether, the consent or apparent consent has been so induced, is guilty of the offence of entering into a forced marriage.

COMMENTARY

This section strikes only at forced marriages - marriages which can only be celebrated because one of the parties has been induced by force or fear to consent to marriage. An unwilling party to a marriage who is not coerced to this degree is outwith the scope of this section. It is not aimed at arranged marriages.

The section protects not only the public interest in marriages based on free consent but also the more immediate interest of the coerced person. The word “voluntarily” is designed to prevent the section applying in a case where both parties have been forced to go through with the marriage.

It may be asked why the section strikes at the person who enters into the marriage but not at the persons who do the forcing. The reason is that the section is in a part of the code dealing with offences relating to marriage and is designed to protect the interests mentioned above. People who force other people to do acts of any kind (including going through a marriage ceremony) which may have a lasting effect on their lives will be caught by other provisions of the Act if they overstep certain limits. Such conduct may, depending upon the circumstances, involve extortion, threats or even physical assault.

There is no specific offence under the present law of entering into a coerced marriage. Even where other offences may be available, these may not have been committed by the other party to the marriage who may be taking advantage of threats or force applied by others. Section 58 fills an apparent gap in the present law.

59 Entering into unlawful marriage

A person who enters into a formally valid marriage when the parties are not legally permitted to marry each other for a reason other than one mentioned in either of the last two sections and who knows of, or is reckless as to the existence of, the impediment, is guilty of the offence of entering into an unlawful marriage.

COMMENTARY

This section supplements the law on bigamy and forced marriages by applying a similar rule to cases where a person entering into a marriage knows that it is invalid for some other reason, such as that the other party is under the age of 16 or that the parties are within the prohibited degrees of relationship, or that the other party is not freely consenting to marriage.

This is a new offence. It is designed to fill a gap in the law. If entering into a marriage which is void on the ground of a prior subsisting marriage is an offence it is difficult to see why entering into a marriage which is void on some other ground, such as close relationship or lack of sufficient age, should not also be an offence. There are various marriage-related offences in the Marriage (Scotland) Act 1977, section 24, but they are of a more minor and regulatory nature and are directed primarily at marriage celebrants who do not observe the prescribed rules. It seems more appropriate, and more convenient for the users of the legislation, to leave them where they are rather than to bring them into this Act.

PART 3
SEXUAL OFFENCES

Terminology

60 **Meaning of terms used in this Part**

- (1) In this Part of this Act, unless the context otherwise requires—
- (a) “minor” means a person aged 12 years or more but under the age of 16 years;
 - (b) “procuring” a person for an activity includes persuading that person to take part in the activity or making arrangements for that person to take part in the activity whether with the procurer or another person and whether or not the activity takes place;
 - (c) “sexual activity” includes sexual intercourse, sexual penetration and sexual contact;
 - (d) “sexual contact” includes masturbation, any other sexual stimulation of either party by contact, and any touching in a sexual manner, but does not include sexual intercourse or sexual penetration;
 - (e) “sexual intercourse” means penetration of the genitalia, anus or mouth by the penis;
 - (f) “sexual penetration” means penetration of the genitalia or anus by anything other than a penis; and
 - (g) “touching in a sexual manner” means touching which is intended by the person doing the touching to be sexual or which is perceived, on reasonable grounds, by the person touched as being sexual.
- (2) Nothing other than sexual intercourse is within subsection (1) if it was done reasonably and in good faith for medical reasons.

COMMENTARY

The offences contained in sections 61-72 employ terms such as “sexual activity”, “sexual conduct” and “sexual intercourse”, and section 60 provides definitions of these terms.

It will be noted that “touching in a sexual manner” means touching which is intended by the person doing the touching to be sexual or which is perceived, on reasonable grounds, by the person touched as being sexual.

Since “sexual penetration” is defined to mean penetration of the genitalia or anus by things other than a penis, and “sexual contact” includes any touching in a sexual manner, it is important that these terms are defined to exclude things (for example, conducting a gynaecological examination or taking a person’s temperature rectally) which are done reasonably and in good faith for medical reasons. This is provided for in section 60(2).

“Sexual intercourse” at present is generally restricted to penetration of the genitalia by the penis. Section 60(e) substantially expands this definition to include penetration of the anus or mouth by the penis. This has important implications for the crime of rape under section 61.

Offences relating directly to sexual activity

61 Rape

A person who—

- (a) has sexual intercourse with another person without the consent of that person; and
- (b) knows that, or is reckless as to whether, the other person does not consent,

is guilty of the offence of rape.

COMMENTARY

This section defines the crime of rape. In a number of important respects it departs from the definition provided by the common law.

The prohibited conduct in rape: (a) sexual intercourse

The prohibited conduct in the crime of rape is defined under section 61 in terms of sexual intercourse without the consent of the other person. Since sexual intercourse is defined in section 60 to include penetration of the genitalia, anus or mouth by the penis, the offence of rape thus includes heterosexual and homosexual acts. Section 61 also makes it clear that both men and women can be guilty of rape. (It is worth comparing this with clause 1 of the (English) Sexual Offences Bill 2003 which by its wording makes it clear that rape is to remain a gender-specific offence which can only be committed by a man. Thus while clause 1 makes it an offence for “a person” to intentionally penetrate the vagina, anus or mouth of another person, the offence can only be committed when that “person” commits the prohibited act “with his penis”.)

Penetration by things other than the penis is not defined as rape in this section. It is felt that while modern understanding of the idea of rape extends beyond ordinary sexual intercourse, there is merit, not least in terms of labelling the offence, to confine it to a relatively limited range of sexually aggressive behaviour. The Act does not, however, ignore the very real harm involved in other forms of such behaviour, but prefers to separate these out from the crime of rape. Thus section 62 provides for an offence of “sexual penetration”. This deals with sexual penetration by any instrument other than the penis.

This section, read along with the definition of “sexual intercourse” in section 60(1)(e) substantially expands upon the common law definition of rape. Under the existing law in Scotland, (unlike in many other jurisdictions, including England), rape may only be committed by a man against a woman. A man who penetrates another man without the latter’s consent may commit a number of offences, but he does not commit rape. Rape is at present confined to heterosexual intercourse – penetration of the vagina by the penis. A woman who forces a man to have sexual intercourse with her is not guilty of rape.

The prohibited conduct in rape: (b) lack of consent

Prior to the decision of the High Court in *Lord Advocate's Reference (No 1 of 2001)*²⁶³ the accepted definition of rape required proof of sexual intercourse by force or the threat of force, and by overcoming the will of the woman. In that case, however, the High Court held that the "forbidden situation" of rape should be understood as requiring only that the sexual penetration took place without the woman's consent.

Section 61 makes it clear that in order to prove rape the Crown need only show that sexual intercourse took place without the consent of the victim. Read along with section 111, section 61 makes it clear that an apparent consent to intercourse is to be disregarded when it is affected by the factors set out in section 111. So, for example, whereas the present law requires the Crown to show that the effect of force or fear was such as to exclude consent, section 111 provides that even if consent is given it is to be disregarded if induced by force or fear.

At present the law assumes that, provided a party understands that the act engaged in is one of sexual intercourse, the fact that they are prepared to engage in the act only on the understanding that the other party is someone with whom they would be prepared to have intercourse, may be insufficient to negate consent. The current law provides that a woman is not to be taken to consent to intercourse with another person if she has been induced to believe that the other person is her husband. Section 61 extends the present law (a) by applying that to both parties, i.e. it includes the situation where a man has been induced to believe that the woman with whom he is having intercourse is his wife, and (b) by extending this rule to cases other than spouses (for example, to co-habitees and boyfriend/girlfriend relationships).²⁶⁴

The legally blameworthy state of mind

The legally blameworthy state of mind required by section 61 is that the accused knows that the other party ("the complainer") is not consenting, or is reckless as to consent. A person accused of rape may wish to argue that he or she made a mistake about the other party's consent. That would be of no avail if there was objective recklessness, that is, if the accused ought to have been aware of an obvious and serious risk that there was no consent and nonetheless proceeded where no reasonable person would have done so.²⁶⁵

²⁶³ 2002 SLT 466.

²⁶⁴ Cf the English case of *Elbekkay* [1995] Crim LR 163 in which the Court of Appeal held that it was rape for a man to have intercourse with a woman by impersonating her boyfriend with whom she had been living for 18 months.

²⁶⁵ See s.10(a).

In the case of *Jamieson v H.M. Advocate*²⁶⁶ the High Court held that this element of the offence requires proof of knowledge on the part of the accused that the woman was not consenting, or, alternatively, an absence of an honest belief on the part of the accused that the woman was consenting. This construction of the mental element has been criticised, as have similar formulations in other jurisdictions.²⁶⁷ In particular, it permits the accused who has sexual intercourse with a victim who clearly does not consent to escape conviction on the basis of a wholly unreasonable belief in consent. This rule (which is not in accord with the general approach of Scots law to the question of error of fact) has the potential to diminish the protection afforded by the criminal law to victims of sexual aggression.

Even in England, support for the “honest” mistake approach appears to be waning. The English Law Commission has recommended substantial modifications to the rule,²⁶⁸ and the Home Office Sex Offences Review has recommended that the “defence of honest belief” in consent “should not be available where there was self-induced intoxication, recklessness as to consent, or if the accused did not take all reasonable steps in the circumstances to ascertain free agreement at the time”.²⁶⁹ This is now reflected in clauses 1 (rape) and 3 (assault involving sexual penetration) of the Sexual Offences Bill which both provide that if an accused claims that he or she believed that the complainer consented, that belief will not exclude liability if (a) a reasonable person would, in all the circumstances, doubt whether the complainer consented, and (b) the accused did not act in a way that a reasonable person would consider sufficient in all the circumstances to resolve such doubt.

Section 61 effects a return to the law as it was believed to be prior to the decision of the High Court in *Jamieson v H.M. Advocate*.

²⁶⁶ 1994 JC 88; 1994 SLT 537; 1994 SCCR 181, confirming *Meek v H.M. Advocate* 1983 SLT 280; 1982 SCCR 613.

²⁶⁷ See C. Gane, *Sexual Offences*, (Butterworths, 1992) pp. 40-42; C. Wells, “Swatting the Subjectivist Bug” [1982] Crim LR 209; P.R. Ferguson, “Controversial Aspects of the Law of Rape: An Anglo-Scottish Comparison” in R. F. Hunter (ed), *Justice and Crime: Essays in Honour of the Rt Hon. The Lord Emslie*, (T & T Clark, 1993). As Wilson has observed: “The lack of a substantive requirement of reasonableness of belief has been widely criticized on the ground that it tends to favour those whose quest for sexual fulfilment is so single-minded that they are oblivious to the obvious, or those who entertain groundless ideas about what women say and do when they ‘really mean no’.” (*Criminal Law* (Longman, 1998) at p. 354).

²⁶⁸ The Law Commission, “Consent in Sex Offences: A Report to the Home Office Sex Offences Review” (2000), pp 62-70.

²⁶⁹ Home Office, “Setting the Boundaries: Reforming the Law on Sex Offences” (2000), Recommendation 9. See also the discussion at paras. 2.13-2.14.

62 Sexual penetration

A person who—

- (a) causes the sexual penetration of another person without the consent of that person; and
- (b) knows that, or is reckless as to whether, the other person does not consent,

is guilty of the offence of sexual penetration.

COMMENTARY

“Sexual penetration” is defined in section 60(1)(f) as meaning penetration of the genitalia or anus by anything other than a penis. This section therefore includes “object rape” as well as digital penetration, in contrast to rape under section 61, which is limited to certain forms of sexual penetration by the penis.

At common law penetration of the body with an object, or with a part of the body other than the penis, is not rape but indecent assault.

The Home Office Review of sexual offences has concluded that the definition of rape in English law should continue to be confined to “penile penetration”, to include penetration of the anus, mouth or genitalia.²⁷⁰ The same Review also recommends that there should be a separate offence of “sexual assault by penetration” to cover all other penetration of the anus or genitalia without consent.²⁷¹ The Sexual Offences Bill currently before the United Kingdom Parliament gives effect to this recommendation for England and Wales.²⁷²

²⁷⁰ Home Office, “Setting the Boundaries: Reforming the Law on Sex Offences” (2000), Recommendation 1. See also para. 2.8.1–2.8.8.

²⁷¹ Home Office, “Setting the Boundaries: Reforming the Law on Sex Offences” (2000), Recommendation 3. See also paras. 2.9.1–2.9.2.

²⁷² Sexual Offences Bill 2003 (HL Bill 26) clause 3 (Assault by penetration).

63 Sexual molestation

A person who—

- (a) has sexual contact with another person, without the consent of that person; and
- (b) knows that, or is reckless as to whether, the other person does not consent,

is guilty of the offence of sexual molestation.

COMMENTARY

“Sexual contact” is defined by section 60(1)(d) to include a wide range of sexual behaviour, but does not include sexual intercourse or sexual penetration.

Most examples of “sexual molestation” would be covered by the common law crime of indecent assault. That term is not used in the code for the following reasons. As a term, “indecent assault” embraces a wide range of offending behaviour, some examples of which are very grave, others less so. One difficulty with the term is that it does not give an adequate indication of what behaviour is prohibited.²⁷³ This section makes it clear that what is prohibited is non-consensual sexual contact. Another reason for avoiding the term “indecent assault” here is that it would be too similar to the separate offence of indecent conduct in section 107 of the Act. The essence of the offence in section 63 is not so much that the conduct is indecent but that it is an invasion of the victim’s interest in not being sexually molested.

²⁷³ See, for example, the English case of *Court* [1988] AC 28; [1988] 2 WLR 1071; [1988] 2 All ER 221 in which the House of Lords had to determine whether or not a man spanking the bottom of a twelve year old girl, over her clothes and ostensibly to punish her, but in fact for his own private sexual gratification was guilty of indecent assault.

64 Sexual intercourse by an adult with a minor

A person aged 16 years or more who has consensual sexual intercourse with a minor is guilty of the offence of sexual intercourse by an adult with a minor.

COMMENTARY

Sections 64, 65 and 66 all deal with sexual relations with minors or young people. Minors are defined by section 60(1)(a) as persons aged 12 years or more but under the age of 16. These sections set out different offences, distinguished by the age of the parties and the nature of the activity. Thus section 64 deals with *sexual intercourse* between a person aged 16 or more and a minor. Section 65(a) deals with sexual activity with a minor where the other person is two or more years older than the minor. Section 65(b) deals with sexual activity with a young person under the age of 18 years where the other person is in a position of trust or authority in relation to the young person. Section 66 deals with sexual intercourse between persons who are both minors. The section 64 offence (sexual intercourse by an adult with a minor) is regarded as a more serious offence than the others and is treated for sentencing purposes as a category C crime, whereas the offences under sections 65 and 66 fall into category D.

Section 64 deals with consensual sexual intercourse between a person aged sixteen or over with a person aged over 12 but below sixteen. Non-consensual sexual intercourse would amount to rape. Even consensual sexual intercourse with a person aged under 12 would be rape, because in terms of section 111(3) the consent of a person who has not reached the age of 12 is to be disregarded.

Section 73 of this Act provides a defence to a charge under this section that the accused believed, on reasonable grounds, that the minor was aged over 16. It is important to note, in this regard, that there must be an actual belief. Since knowledge of age need not be proved by the Crown²⁷⁴ it would not be a defence for the accused merely to say that she or he did not appreciate that her or his sexual partner was under 16.

The present law on sexual intercourse with girls under the age of 16 is set out in section 5 of the Criminal Law (Consolidation) (Scotland) Act 1995, but section 64 is significantly broader in its effect than section 5 of the 1995 Act. In the first place, the offence under section 5 can only be committed by a man who has sexual intercourse with a girl below the statutory age-limits. It is not an offence (either under statute or at common law) for a woman to have sexual intercourse with a boy who has reached the common law age of puberty (14). Under section 64 the offence is committed by the older person, whether a man or a woman. Where a person is charged under section 5(3) of the 1995 Act with having sexual intercourse with a girl aged over 13 but under 16, section 5(5) of the 1995 Act provides for the defence of reasonable error as to age where the accused is under the age of 24 and had not previously been charged with a similar offence. The defence provided under section 73 of this Act is less qualified (as described above).

²⁷⁴ See s.73 (Knowledge of age not required).

65 Unlawful sexual activity with a young person

A person who engages in consensual sexual activity—

- (a) with a minor when the person is 2 or more years older than the minor; or
- (b) with a young person under the age of 18 years when the person is in a position of trust or authority in relation to that young person,

is guilty of the offence of unlawful sexual activity with a young person.

COMMENTARY

This section deals with consensual sexual activity with a minor or young person. Such activity would include sexual touching or petting. It would go too far to criminalise all such consensual conduct between adolescents of the same or a similar age. Section 65 therefore is confined to cases where one of the participants is a minor and there is at least a two year age difference or one of the participants is under the age of 18 and the other is in a position of trust or authority in relation to him or her. While paragraph (a) includes sexual activity between a minor and a person who is not a minor, it also includes persons who are themselves minors. So, for example, a 16 year old boy who engages in consensual sexual activity with his 13 year old girlfriend would be guilty of an offence under this section, as, indeed, would a 17 year old who engages in such relations with a 14 year old.

This section marks a departure from the existing law in a number of respects. In the first place, it covers some conduct which is not presently criminal, as, for example, the case of the 17 year old girl who engages in consensual sexual activity with a 14 year old boy. Secondly, it does not cover some conduct which is presently criminal, as, for example, in the case of two fifteen year old boys who engage in consensual sexual activity with each other.

Section 65(b) would replace the rather lengthy provisions in sections 3 and 4 of the Sexual Offences (Amendment) Act 2000 on sexual activity with a person under the age of 18 by a person in a position of trust in relation to that person.²⁷⁵ The term “a position of trust or authority” is used in other sections²⁷⁶ and is given an inclusive definition later in the Act.²⁷⁷

²⁷⁵ Ss.3 and 4 of the 2000 Act are repealed by sch. 3.

²⁷⁶ See ss.7(2)(g) (Aggravated offences) and 69 (Sexual exploitation of person with a mental disorder).

²⁷⁷ See s.112(2).

66 Sexual intercourse between minors

A minor who has consensual sexual intercourse with another minor is guilty of the offence of sexual intercourse between minors.

COMMENTARY

This section deals with sexual intercourse between minors.

Legislation in this area is notoriously difficult. It is well-known that there is a great deal of sexual activity between young people under the age of 16 and, from one point of view, it is unrealistic and potentially harmful to criminalise such conduct where there is no element of disparity of age or power. On the other hand young people generally may be said to be entitled to some protection from the criminal law against conduct which, even if quite widespread, has still great potential dangers for the immature. This Act errs on the side of tradition and caution in this area and maintains a criminal offence. The advantage is that a clear line is drawn at the age of 16. Below that age young people are protected, even from themselves. In assessing the actual impact of the law, however, it should be borne in mind that children under 12 will not be guilty of any criminal offence²⁷⁸ and children between 12 and 16 will not be prosecuted except with the consent of the Lord Advocate.²⁷⁹ In practice, therefore, offences against section 66 will generally involve at most a referral to a children's hearing which could take into account all the circumstances and would be well placed to distinguish between degrees of harmfulness.

The common law provides that sexual intercourse with a girl under the age of 12 is always rape. In addition, section 5(1) of the Criminal Law (Consolidation) (Scotland) Act 1995 makes it an offence to have intercourse with a girl aged under 13 years²⁸⁰ and section 5(3) of that Act makes it an offence to have unlawful sexual intercourse with a girl of or over the age of 13 years and under the age of 16 years. Note, however, that sexual intercourse is currently defined as penile penetration of the genitalia. The expanded definition of this term in section 60 of this Act means that an offence under section 66 may be committed by two boys.

²⁷⁸ See s.15 of this Act.

²⁷⁹ This is the current position under s.42(1) of the Criminal Procedure (Scotland) Act 1995. It is unchanged by this Act.

²⁸⁰ The maximum penalty is imprisonment for life.

67 Incestuous conduct

- (1) A person who—
 - (a) engages in sexual activity with another person who is a close relative; and
 - (b) knows that, or is reckless as to whether, the other person is a close relative,is guilty of the offence of incestuous conduct.
- (2) In this section “close relative” means—
 - (a) an ascendant or descendant by blood;
 - (b) a brother, sister, uncle, aunt, nephew or niece, whether of the whole or the half blood;
 - (c) an adoptive parent or adopted child, or former adoptive parent or adopted child;
 - (d) a step-child or former step-child where the step-child or former step-child is under the age of 21 years.
- (3) No offence under this section is committed by a person who is the non-consenting victim of the sexual activity in question.

COMMENTARY

Incest is regarded as an offence in most societies. As it involves consensual conduct between adults there is an argument for saying that it should be decriminalised. The reasons commonly given for making it a criminal offence – to protect the vulnerable from sexual exploitation within a family situation, to prevent inbreeding, to maintain the purity of close family relationships, to reflect a widespread social taboo – do not always apply to some of the situations caught by the offence. Nonetheless the protective arguments do apply to many cases which would come within the offence and there would, we believe, be a public expectation that incest and similar sexual conduct within close family relationships ought to be an offence. For this reason the offence in section 67 is included in the code.

Incestuous conduct under section 67 includes all types of sexual activity. The offence therefore includes acts other than sexual intercourse, and includes homosexual as well as heterosexual acts. The relationships which are included in “incestuous conduct” are described. It should be noted that sexual acts between step-child or former step-child and step-parent or former step-parent are included, but only where the step-child or former step-child is under 21. This offence extends the present concept of incest (hence the name “incestuous conduct” to differentiate this offence from the traditional notion of incest which is limited to sexual intercourse.)

The relationships which are included in “incestuous conduct” are broadly the same as those presently covered by the crime of incest. At present, however, sexual intercourse between step child or former step child and step-parent or former step-parent is not incest but a separate offence. That is understandable, given the traditional meaning of “incest”, but the broadening of the offence to “incestuous conduct” makes it more rational to include these offences in this section rather than put them in a separate category.

Incest is presently covered by section 1 of the Criminal Law (Consolidation) (Scotland) Act, but has been a statutory offence in Scotland since the Incest Act of 1567.²⁸¹

²⁸¹ This was only repealed in 1986, by the Incest and Related Offences (Scotland) Act of that year.

68 Procuring child for sexual activity

A person aged 16 years or more who procures a child under the age of 16 years for any unlawful sexual activity is guilty of the offence of procuring a child for sexual activity.

COMMENTARY

This provision is designed to protect young persons under 16; boys as well as girls. The definition of “sexual activity” in section 60 is very wide and is an inclusive definition. It includes sexual penetration and sexual contact, as well as sexual intercourse. It follows that section 68 would cover many of the types of activity currently dealt with by charges of lewd practices whether at common law or under section 6 of the Criminal Law (Consolidation) (Scotland) Act 1995. Other offences in the code²⁸² may also be relevant to cases involving children.

The present law contains various offences of procuring, mainly designed to protect females.²⁸³ It is an offence to procure any female under 21,²⁸⁴ to procure any woman or girl by threats or intimidation;²⁸⁵ or to procure a mentally handicapped woman.²⁸⁶ In each of these provisions the accused must be procuring the victim for “unlawful sexual intercourse”.²⁸⁷ Section 68 applies only to minors but applies to both sexes. The following section deals with the sexual exploitation of a person with a mental disorder.

The definition of “procuring” in section 60 includes both the case where the procurer procures for the activity with himself or herself and the case where he or she procures for somebody else. It also makes it clear that there can be procuring for sexual activity whether or not the activity takes place. “Procuring” includes persuading the person to take part in the activity or making arrangements for the person to take part in the activity.²⁸⁸ Procuring a young person to engage in sexual activity would be an offence under section 68 whether or not the young person is willing to do this, since the clear purpose of this offence is to protect the young person from sexual exploitation.

²⁸² See e.g. ss.53 (Exposing child to obscenity or pornography), 64 (Sexual intercourse by an adult with a minor) and 107 (Indecent conduct).

²⁸³ Note however, s.13(5) of the Criminal Law (Consolidation)(Scotland) Act 1995, which provides that it is an offence to procure the commission of a homosexual act.

²⁸⁴ S.7(1) of the Criminal Law (Consolidation)(Scotland) Act 1995.

²⁸⁵ S.7(2) of the Criminal Law (Consolidation)(Scotland) Act 1995.

²⁸⁶ S.106(1)(b) of the Mental Health (Scotland) Act 1984.

²⁸⁷ The term “unlawful” means outwith marriage.

²⁸⁸ S.61. *Cf.*, in a slightly different context, *Attorney-General’s Reference (No 1 of 1975)* [1975] QB 773. In the English case of *Christian* (1913) 23 Cox CC 541 it was suggested that procuring a girl to become a prostitute required an element of fraud or persuasion but that is not the approach adopted under s.61.

69 Sexual exploitation of person with a mental disorder

- (1) A person who engages in sexual activity with, or procures for sexual activity, a person with such mental disorder as to be unable to guard against sexual exploitation and who—
 - (a) is in a position of trust or authority in relation to that person; or
 - (b) takes advantage of that person's disorder in order to engage in, or procure that person for, the activity,is guilty of the offence of sexual exploitation of a person with a mental disorder.
- (2) A person is guilty of an offence under subsection (1) only if the person knows that, or is reckless as to whether, the other person has such a mental disorder as is mentioned in that subsection.
- (3) No offence is committed under subsection (1)(a) by the mere continuation of a consensual sexual relationship which existed immediately before the requirements of that provision were satisfied.

COMMENTARY

This provision identifies the issue of sexual exploitation of a person with a mental disorder as a key concern of the criminal law.

There are recently enacted provisions in sections 311 to 314 of the Mental Health (Care and Treatment) (Scotland) Act 2003 relating to the protection of persons suffering from mental disorder from sexual exploitation (whether by their carers or by others). The new provisions are a considerable improvement on the earlier provisions in the Mental Health (Scotland) Act 1984²⁸⁹ but serve to illustrate the disadvantages of *ad hoc* legislation rather than codification. The new offences to some extent duplicate offences in this Act which apply generally to non-consensual sexual activity. Because they have to deal with many questions which are covered by general provisions of this Act they are also more lengthy than necessary.

It might be tempting to retain these recently enacted provisions and to tolerate a degree of overlap with the code provisions. However, the more principled course would be to repeal sections 311 to 314 of the 2003 Act. We have tried to incorporate in section 69 the desirable and progressive features of the new provisions and to ensure that no protection for mentally disordered people would be lost.

²⁸⁹ Ss.106 and 107. These went too far and were inconsistent with the privacy rights of the mentally disordered person. They outlawed sexual activity even where this involved no exploitation and was a normal and beneficial part of the person's life.

“Mental disorder” is defined in section 112 by reference to the definition in section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003. Persons with mental disorder therefore include persons with a learning disability. “A position of trust or authority” is also defined in section 112.

70 Pimping

A person who—

(a) causes or induces another person to become a prostitute; or

(b) exploits the prostitution of another person,

is guilty of the offence of pimping.

COMMENTARY

This section provides a general offence of causing or inducing another person (male or female) to become a prostitute or exploiting the prostitution of another. The section does not define “prostitute” or “prostitution”. The currently accepted definition of a prostitute is a person who commonly offers her (or his) body for lewdness, in return for payment.²⁹⁰

The Criminal Law (Consolidation) (Scotland) Act 1995 contains a number of offences relating to prostitution. These include the offence of a male person living on the earnings of prostitution,²⁹¹ living on the earnings of another from male prostitution²⁹² and exercising control over prostitutes.²⁹³ There is a separate offence where a female person exercises control over a prostitute for the purpose of gain.²⁹⁴ Section 7(1) of the 1995 Act deals with procuring for prostitution. The distinctions between those offences which can be committed by men, and those by women, as well as the distinction between male and female prostitution are historical accidents and have no foundation in principle. These provisions of the 1995 Act are repealed by schedule 3 to this Act.

The Criminal Justice (Scotland) Act 2003 contains provisions in section 22 on traffic in prostitution etc. It would be possible to incorporate these provisions in the code if so wished but for the moment they are left as they are, subject to one minor consequential amendment.²⁹⁵

²⁹⁰ *De Munck* [1981] 1 KB 635; *Webb* [1964] 1 QB 357, approved and relied upon by the court in *Smith v Sellers* 1978 JC 79; 1978 SLT (Notes) 44. The definition of a prostitute applies in terms only to a female prostitute, although there is no reason why it should not apply to a male prostitute.

²⁹¹ S.11(1)(a).

²⁹² S.13(9).

²⁹³ S.11(3).

²⁹⁴ S.11(4).

²⁹⁵ See sch. 2, para. 8.

71 Brothel keeping

A person who knowingly permits premises, or any part of premises, or any vehicle or vessel, over which that person has control to be used as a brothel or for the purposes of habitual prostitution is guilty of the offence of brothel keeping.

COMMENTARY

This section provides for the offence of brothel keeping. A “brothel” is not confined to a building but may include a vehicle or vessel. It may seem odd to include vehicles and vessels, but in *Calvert v Mayes*²⁹⁶ it was suggested that a car which was habitually used for the purpose of prostitution could be a “brothel”. In *Winter v Woolfe*²⁹⁷ it was held that a “brothel” was a place resorted to by persons of the opposite sex for the purpose of “illicit intercourse”.

Brothel keeping is an offence under section 11(5) of the Criminal Law (Consolidation) (Scotland) Act 1995. Under that section any person who (a) keeps or manages or acts or assists in the management of a brothel; or (b) being the tenant, lessee, occupier or person in charge of any premises, knowingly permits such premises or any part thereof to be used as a brothel or for the purposes of habitual prostitution; or (c) being the lessor or landlord of any premises, or the agent of such lessor or landlord, lets the same or any part thereof with the knowledge that such premises or some part thereof are or is to be used as a brothel, or is wilfully a party to the continued use of such premises or any part thereof as a brothel, is guilty of an offence.²⁹⁸

²⁹⁶ [1954] 1 All ER 41.

²⁹⁷ [1931] 1 QB 549.

²⁹⁸ Premises are to be treated for the purposes of s.11 of the Act as a brothel if people resort to them for the purposes of homosexual acts (as defined by s.13(4) of the Criminal Law (Consolidation) (Scotland) Act 1995) in circumstances in which resort thereto for heterosexual practices would have led to the premises being treated as a brothel for the purposes of those sections: Criminal Law (Consolidation) (Scotland) Act 1995, s.13(10).

72 **Child pornography**

- (1) A person who makes, reproduces, advertises, distributes, shows, or possesses any pornographic or indecent representation of a child under the age of 16 years is guilty of the offence of child pornography.
- (2) In this section a pornographic or indecent representation of a child means any representation, in any form or medium—
 - (a) which shows a child engaged in any sexual activity; or
 - (b) which shows a child and is otherwise indecent.
- (3) It is a defence under this section that the person—
 - (a) had a legitimate reason for doing the acts complained of; or
 - (b) had not seen the representation and did not know or have any reason to suspect that it was pornographic or indecent.
- (4) In this section—
 - (a) references to a child under the age of 16 years include a person who appears from the evidence as a whole, or from the representation, to be under the age of 16 years; and
 - (b) references to distributing a representation include exposing or offering it for acquisition by another person.

COMMENTARY

Subsection (1) makes it an offence to make, reproduce, advertise, distribute, show or possess pornographic or indecent images of children under the age of 16.

This section is largely derived from section 52 and 52A of the Civic Government (Scotland) Act 1982, and the most frequently encountered examples of offences under that legislation relate to “internet pornography”. In both Scotland²⁹⁹ and England³⁰⁰ the courts have held that when a person accesses an indecent image and downloads it on to a computer that act, of itself, constitutes the “making” of an indecent image for the purpose of this offence. In *Longmuir v H.M. Advocate* the High Court, following the decision of the English Court of Appeal in *R v Bowden* held that the word “make” in section 52(1)(a) of the Civic Government (Scotland) Act 1982 “is apt to cover the activity by which a person using a computer brings into existence the data stored on a computer disk”.

Section 72(3) provides for certain defences, including the defence of having a “legitimate reason” for making, possessing etc. the prohibited material. Although section 72 is substantially derived from sections 52 and 52A of the Civic Government (Scotland) Act 1982, the “legitimate reason” defence in those provisions is not applicable to those who “make” the images – only those who possess or otherwise deal with them. Section 72(3) extends the “legitimate reason” defence to those who make such images. Forensic photographers may, for example, have to make images which show a child and would normally be considered indecent.

Although this defence has not been discussed in any Scottish case, indications from the English authorities are that it is likely to be narrowly construed. In *Atkins v DPP*³⁰¹ the accused was a lecturer in the English Department at Bristol University. He was charged with making and possessing indecent images of children. In relation to the charge of possession he claimed that he had a “legitimate reason” for having the images, namely “legitimate academic research” (although the case does not set out in any detail what the nature of his research might have been). In considering the scope of the “legitimate reason” defence the Divisional Court observed:

“The question of what constitutes ‘a legitimate reason’ ... is a pure question of fact ... in each case. The central question where the defence is legitimate research will be whether the defendant is essentially a person of unhealthy interests in possession of indecent photographs in the pretence of undertaking research, or by contrast a genuine researcher with no alternative but to have this sort of unpleasant material in his possession. ... Courts are plainly entitled to bring a measure of scepticism to bear upon such an enquiry: they should not too readily conclude that the defence has been made out.”

²⁹⁹ *Longmuir v H.M. Advocate* 2000 JC 378; 2000 SCCR 447. See also *Ogilvie v H.M. Advocate* 2002 JC 74; 2001 SCCR 792; 2001 SLT 1391.

³⁰⁰ *R v Bowden* [2001] QB 88.

³⁰¹ Above.

73 Knowledge of age not required

Knowledge of the age of a child or young person is not required for there to be an offence under any provision of this Part of this Act which depends on such age but it is a defence under any such provision that the accused believed on reasonable grounds that the child or young person was above the relevant age or, in the case of section 65(a), was less than 2 years younger than himself or herself.

COMMENTARY

Sexual offences involving children and young persons which are defined by reference to the age of the child or young person are at present generally regarded as offences of strict liability with regard to the age of the child, that is to say, it is not necessary for the prosecutor to prove that the accused was aware that the child or young person was below the specified age limit.³⁰² This section continues that policy. It is an exception to the normal rule in section 8(3).

³⁰² This at least is true with regard to statutory offences. The position with regard to common law offences (such as rape or indecent assault) is unclear. The imposition of strict liability in a number of statutory sexual offences has been challenged recently in England and Wales (see, for example, *B v DPP* [2000] 1 All ER 833). No such challenge has as yet been mounted in Scotland.

74 Exception for spouses

No offence under this Part of this Act is committed if the two persons involved in any consensual sexual activity which would otherwise constitute the offence or an element of the offence were married to each other at the time and were both aged 13 years or more.

COMMENTARY

This section is intended to exclude the possibility of spouses being prosecuted for consensual sexual activity with each other. In Scotland a person cannot lawfully contract a marriage until she or he has reached the age of 16 and a person domiciled in Scotland could not contract a marriage outside Scotland below that age, even if the law of the place where the marriage is contracted permits marriage of a person below that age.³⁰³ However, Scots law will recognise foreign marriages lawfully entered into by persons not domiciled in Scotland even though the parties are below the age of 16, and this section ensures that such persons are not exposed to the risk of criminal proceedings. However, this Act adopts the position that the protection of very young persons from the possibility of sexual exploitation or abuse is a significant concern of the criminal law, overriding respect for foreign marriage laws, and does not permit the defence of marriage in the case of young children below the age of 13.

A number of existing statutory sexual offences require that the sexual intercourse be “unlawful”,³⁰⁴ a term which in this context is generally interpreted to mean “extra-marital”,³⁰⁵ or otherwise provide an exception for spouses.³⁰⁶

³⁰³ Marriage (Scotland) Act 1977, s.1.

³⁰⁴ See, for example, s.5(1) of the Criminal Law (Consolidation) (Scotland) Act 1995.

³⁰⁵ *Henry Watson* (1885) 5 Couper 696.

³⁰⁶ See e.g. s.313(3) of the Mental Health (Care and Treatment) (Scotland) Act 2003.

PART 4
OFFENCES AGAINST PROPERTY AND ECONOMIC INTERESTS

75 Piracy

A person who—

- (a) by violence or the threat of immediate violence takes a ship or aircraft from the possession or control of those lawfully in charge of it; or
- (b) being a member of the crew of, or a passenger on, a ship or aircraft, directs any act of violence, detention or depredation against another ship or aircraft or against persons or property on board such other ship or aircraft,

is guilty of the offence of piracy.

COMMENTARY

This section adopts the approach taken by the High Court in the case of *Cameron v H.M. Advocate*.³⁰⁷ Piracy was defined in that case as “robbery of a ship”. The definition in this section includes “air piracy”. Certain forms of “air piracy” are offences under legislation such as the Aviation Security Act 1982. These remain unaffected by the offence in section 75.

As a matter of international law piracy is generally regarded as a “private” act, so that “piratical” acts carried out for political ends would not generally be regarded as piracy, nor would attacks carried out by a warship or government ship or aircraft. There is nothing in section 75 which would exclude such acts from the municipal definition of piracy (and in relation to aircraft piracy there are good policy reasons for not doing so). Members of the crew of a government ship or aircraft which engaged in attacks on other ships or aircraft as a matter of state policy would have to fall back upon defences such as lawful authority (as set out in section 22 of this Act.) It should also be noted that the definition of piracy in section 75(a) embraces mutiny by the crew or passengers on board a ship, whereas piracy in international law terms is confined to acts directed at other ships.

³⁰⁷ 1971 JC 50.

Piracy is defined by the common law of Scotland,³⁰⁸ as well as by international law.³⁰⁹ There is no requirement that the common law definition should conform to the international law definition, as states are free to define this offence according to their municipal law, at least so far as concerns acts of piracy within their territorial waters.³¹⁰ “Air piracy” is not within the current common law definition.

³⁰⁸ *Cameron v H.M. Advocate* 1971 JC 50.

³⁰⁹ See *In Re Piracy Jure Gentium* [1934] AC 856 (customary international law) and the United Nations Convention on the Law of the Sea, article 101.

³¹⁰ See, generally, Bantekas, Nash and Mackarel, *International Criminal Law* (Cavendish Publishing, 2001), pp. 48-53.

76 Robbery

- (1) A person who by violence directed against the person of another, or by the immediate threat of such violence, takes property from the possession or control of another person is guilty of the offence of robbery.
- (2) For the purpose of this section taking includes forcing a person to hand over.

COMMENTARY

This section defines the crime of robbery in terms of “taking” property from another person. It is intended to protect a person’s interest in peaceful possession or control of property. Under section 76 it would be robbery for a person to take by violence his or her own property from a person in possession of it.

“Appropriating” (a term used in relation to theft) is a wider term than “taking”, so that certain forms of dealing with another person’s property which would constitute theft would not be sufficient for robbery.

This offence follows to some extent the definition of robbery at common law but focuses on the violent nature of the taking rather than on whether the taking involves theft. Although robbery was generally regarded as an aggravated form of theft it was recognised at common law that the two offences were separate and distinct.³¹¹ However, as a matter of law there could not be a robbery without a theft,³¹² and “theft” in robbery was the same as theft as an offence in its own right. The main difference between section 76 and the common law is that the interest protected under section 76 is the interest in peaceful possession or control rather than the interest in ownership. Were a person to take by violence his or her own property, that would not be theft and would not be robbery under the common law.

³¹¹ *Peter Wallace* (1821) Shaw 30; *Ellen Falconer and Others* (1852) J Shaw 546; *Isabella Cowan and Others* (1845) 2 Broun 398.

³¹² Although this is not explicitly stated by Hume, it is implicit in his discussion of the elements of robbery (Hume, i, 104-11). The same assumption is made by Alison (i, 227-249) and Macdonald (pp. 39 *et seq.*). According to Gordon (para. 16-02), “There can ... be no robbery unless there is a theft, and the law regarding appropriation, things capable of being stolen, and the *mens rea* of theft, apply equally in robbery”.

77 Theft

- (1) A person who steals another person's property is guilty of the offence of theft.
- (2) Stealing is appropriating property, without the owner's consent, with the intention of depriving the owner permanently of it or being reckless as to whether or not the owner is deprived permanently of it.
- (3) For the purposes of this section—
 - (a) “appropriating” property includes taking, keeping or disposing of the property, or dealing with it as if it were one's own;
 - (b) depriving a person of property includes depriving that person of its value;
 - (c) a person is treated as intending to deprive the owner permanently of property if (but not only if) the person appropriates the property with the intention of retaining it only if it turns out to be worth retaining;
 - (d) a person is treated as being reckless as to whether the owner is deprived permanently of property if (but not only if) the person—
 - (i) abandons the property in circumstances where the owner will not necessarily recover it; or
 - (ii) takes the property with the intention of using its return, or an offer of its return, to the owner as a means of causing the owner to pay a reward or price or yield to a demand.

COMMENTARY

The crime of theft is based on “appropriation”, as defined in section 77(3)(a). Theft requires (a) an intention on the part of the accused to deprive someone of their property on a permanent basis, or (b) recklessness as to that consequence. Cases involving an intention to deprive a person of property temporarily are covered under section 83 of this Act (Criminal interference with property).

In relation to theft, and other offences under Part 4, the provision in section 111(4), on when a person may be treated as consenting to an infringement of an interest in property, should be noted. It has the effect of removing from the scope of theft various trivial or minor infringements which no reasonable person would regard as criminal.

At common law theft is defined as the appropriation of property belonging to another, without consent, and with the intention of depriving that person of the property, whether permanently, temporarily or indefinitely.³¹³ The emphasis formerly placed on “taking possession” and “carrying away” property as an element of theft was significantly diminished by decisions in the nineteenth century.³¹⁴ Similarly, the emphasis formerly placed on an intention to deprive the owner permanently of the property was also reduced by a series of cases³¹⁵ in which it was held that a lesser intention would suffice for theft. These trends were confirmed by the decision in *Black v Carmichael*³¹⁶ in which it was held that wheel clamping could amount to theft even though there was clearly no intention on the part of the accused to deprive the owner permanently of the vehicle.

Section 77 restores the definition of theft to what most people would regard as theft. It brings the law more into line with ordinary usage. This does not mean that lesser forms of interference with property would not be covered by the code. They would be covered, more naturally and appropriately, by other offences such as the offence of interference with property in section 83 of the Act.

The situations mentioned in subsection (3) are all particular examples or extensions of concepts used in subsection (2). They do not limit those concepts.

³¹³ See *Milne v Tudhope* 1981 JC 53; 1981 SLT (Notes) 43; *Kivlin v Milne* 1979 SLT (Notes) 2; *Fowler v O'Brien* 1994 SCCR 112; *Carmichael v Black*; *Black v Carmichael* 1992 SCCR 709; 1992 SLT 897.

³¹⁴ *John Smith* (1838) 2 Swinton 28; *George Brown* (1839) 2 Swinton 394.

³¹⁵ See e.g. *Milne v Tudhope* 1981 JC 53; 1981 SLT (Notes) 43.

³¹⁶ 1992 SLT 897.

78 Breaking into a building

- (1) A person who, not having any right of entry, breaks into a building without the consent of a lawful occupier is guilty of the offence of breaking into a building.
- (2) For the purposes of this section breaking in includes obtaining entry—
 - (a) by breaking or forcing open a door, window, hatch or any other part of the building;
 - (b) by overcoming the security of any lock or other security device;
 - (c) by means of any aperture not designed as a normal route for entering the building; or
 - (d) by obtaining entry in such a way or in such circumstances as to cause, or to be likely to cause, fear, alarm or distress to any person lawfully present in the building.
- (3) In this section—
 - (a) “building” includes—
 - (i) a caravan, motor-caravan, tent or houseboat;
 - (ii) a temporary or portable structure serving the purposes of a building; and
 - (iii) any part of a building; and
 - (b) “entry” includes entry of the whole or any part of the body or of an object or any part of an object.

COMMENTARY

The offence of breaking into a building in this section involves overcoming the security of a building. The term “breaking into a building” is used in place of the common law term “housebreaking” since the offence (both under this Act and at common law) is not restricted to breaking into houses.

At common law housebreaking is regarded either as an aggravation of stealing (as in theft by housebreaking) or as part of a preparatory offence (housebreaking with intent to steal). The offence in section 78 is significantly wider than the common law in that it extends simply to housebreaking, and there is no requirement of any ulterior intent or purpose under this section.

At common law housebreaking with no further intent, or with an intent other than to steal, is not an offence as such,³¹⁷ so that, for example, housebreaking with intent to rape a young woman in a house has been held to be indictable only as a form of breach of the peace.³¹⁸ This is a controversial decision. Were a similar case to occur in the future, the accused could be charged with breaking into a building under section 78, with an aggravation that this was with intent to rape.

The detailed provisions in subsections (2) and (3) are broadly derived from the common law.

³¹⁷ *Cochrane v H. M. Advocate* 2002 SCCR 1051; 2002 SLT 1424.

³¹⁸ *H.M. Advocate v Forbes* 1994 JC 71; 1994 SLT 861.

79 Breaking open a locked place

- (1) A person who, not having any right to do so, overcomes the security of a locked place, other than a building, without the consent of a person authorised to give access to that place, is guilty of the offence of breaking open a locked place.
- (2) In this section “place” includes a vehicle or receptacle.

COMMENTARY

This section embraces all instances of overcoming the security of a locked place (other than a building) without the consent of the person authorised to give access to that place.

Opening “lockfast” places, like housebreaking, is recognised by the common law as an aggravation of theft, or as part of a preparatory offence. This offence is a much broader one, since the accused’s intention in opening the locked place may not be in order to steal, but may be something quite different, such as to cause damage to property in it. Indeed, an offence under this section could be committed if the accused had no further intention than to break into the locked place - for example, out of simple malice or a desire to cause distress and alarm or in order to practise or show off unlawful skills.

It will be noted that breaking into cars is covered by this section (subsection (2)) and indeed will probably be the most common type of conduct caught by it in practice.

80 Fire-raising

A person who starts a fire—

- (a) with the intention of causing personal injury or being reckless as to whether such injury is caused;
 - (b) with the intention of damaging or destroying another person's property without that person's consent, or being reckless as to whether such damage or destruction is caused; or
 - (c) with the intention of committing fraud or any other offence,
- is guilty of the offence of fire-raising.

COMMENTARY

While acts of fire-raising could easily be embraced within the general offence of criminal damage to property (see section 82), the types of fire-raising covered by this section are such a serious matter as to merit a separate offence. This offence requires intentional fire-raising, or (in cases covered by paragraphs (a) or (b)) reckless fire-raising, for one of the specified purposes. Where an accused has started a fire with the intention of injuring another person, there is no requirement that any person actually be injured and similarly with the other cases specified in subsection (b) and (c).

Prior to the recent case of *Byrne v H.M. Advocate (No. 2)*³¹⁹ the common law of fire-raising was badly in need of reform. It distinguished between “wilful fire-raising” and “culpable and reckless fire-raising” but each of these was a misnomer. “Wilful fire-raising” was limited to deliberately setting fire to heritage (buildings, trees or crops), while “culpable and reckless fire-raising” was the appropriate charge where any type of property was set on fire recklessly, or (confusingly) where any property other than heritage was set on fire deliberately. The decision of the High Court in *Byrne* substantially clarified the law, by holding that there were two forms of the crime of fire raising – intentional fire-raising and reckless fire-raising. Section 80 builds on this clarification. However, it marks a departure from the common law in that to start a fire with the intention of injuring a person is not an offence as such at common law,³²⁰ although it is clearly conduct which requires to be identified as especially serious. Section 80(c) reflects the common law which has always recognised that while it is not generally an offence to destroy one's own property – even by fire – it is an offence to do so if this is done with the intention to defraud.

³¹⁹ 2000 JC 155; 2000 SCCR 77; 2000 SLT 233.

³²⁰ Although it might in certain circumstances constitute an aggravated assault.

81 Criminal damage to property

A person who intentionally or recklessly causes the destruction of, or damage to, another person's property, without that person's consent, is guilty of the offence of criminal damage to property.

COMMENTARY

This section makes it an offence to destroy or damage property belonging to another person. The damage or destruction must be deliberate or reckless. The High Court has held that an accused is reckless in relation to damage to another person's property where the accused creates an obvious and material risk of causing such damage to the property.³²¹ Section 10 of this Act would produce similar results.

There are many situations where the owner of property consents to damage to the property. For example a person may engage a contractor to knock down an outbuilding. No offence is committed in such cases.

Intentionally or recklessly destroying or damaging the property of another is the most commonly encountered form of the common law crime of malicious mischief (which is sometimes also referred to as "malicious damage"). Such conduct is also embraced by the statutory offence of vandalism. The latter is defined in section 52(1) of the Criminal Law (Consolidation) (Scotland) Act 1995 as the wilful or reckless damage or destruction of property without reasonable excuse. Section 52(2) provides that it is not vandalism where the property had been set on fire – this would be fire-raising instead. This Act contains no such exception. Hence damaging or destroying property by fire will henceforth be a breach of section 81. The actual starting of the fire might also, of course, be fire raising under section 80 if the further requirements of that section were satisfied. Section 52 of the 1995 Act is repealed by section 113 of, and schedule 3 to, this Act.³²²

³²¹ *Black v Allan* 1985 SCCR 11.

³²² It is in Part VI of the 1995 Act which is repealed in total in sch. 3.

82 Causing an unlawful risk of damage to property

A person who intentionally or recklessly causes a risk of the destruction of, or serious damage to, another person's property, without that person's consent, is guilty of the offence of causing an unlawful risk of damage to property.

COMMENTARY

An example of an offence under section 82 might be cutting another person's boat loose from its moorings in stormy weather. Even if, by good fortune, no damage ensued there could still be an intentional or reckless causing of a risk of destruction or serious damage.

This is a new offence. Causing an unlawful risk of damage to another person's property is not an offence as such at common law, and there is no statutory provision to this effect. It seems clear that seriously endangering someone else's property is conduct which should attract criminal penalties.

83 Criminal interference with property

- (1) A person who interferes with another person's property or lawful possession or use of property, without that person's consent, so as to cause loss, harm or serious inconvenience to that person or to any other person is guilty of the offence of criminal interference with property.
- (2) A person is guilty of an offence under this section only if the person intended to cause such loss, harm or serious inconvenience, or was reckless as to whether any such result would follow.

COMMENTARY

This section covers situations not covered by theft or criminal damage to property. The accused must interfere with property in a manner which causes loss, harm or serious inconvenience to the owner or user of the property, and must have done so intending such a result, or recklessly.

In *H.M. Advocate v Wilson*³²³ it was held that deliberately to interfere with the property of another in such a way as to cause patrimonial (i.e. financial) loss was a form of malicious mischief at common law. This section preserves that general idea, and extends it to cases where no financial loss is suffered, but other harm or serious inconvenience is caused. This would, therefore, cover the wheel-clamping situation revealed in *Black v Carmichael*³²⁴ which would not amount to theft under section 77 of this Act (because of the absence of an intention permanently to deprive), and where the core of the offence was the inconvenience to the owner of the car rather than any financial loss. It would also cover the case where the accused "borrows" a person's property, without consent, and causes inconvenience to the owner, but does not intend to keep the property, and does not damage it as such.³²⁵

Section 83 would also cover the type of case in which a person interferes with another person's lawful use of his or her property by denying that person access to it or preventing him or her from leaving it in a normal way, to that person's serious inconvenience.³²⁶

³²³ 1984 SLT 117, 1983 SCCR 420.

³²⁴ See the commentary to s.77 (Theft), above.

³²⁵ This was recognised at common law as the offence of "clandestine taking and using" of property: *Strathern v Seaforth* 1926 JC 100.

³²⁶ See e.g. *McMillan v Higson* 2003 SCCR 125; 2003 SLT 573, where a case of this nature was unsuccessfully prosecuted as breach of the peace at common law. The accused had deliberately parked his car across a private road so as to prevent the victim, who lived in a house further down the road, from driving out in a normal way.

84 Squatting

A person who lodges in any premises, or occupies or encamps on any land, without the consent of the owner or lawful occupier, is guilty of the offence of squatting.

COMMENTARY

The section strikes at squatting on another person's property.

The provisions of the Criminal Justice and Public Order Act 1994 relating to trespassory assemblies etc. are not affected by this section, nor are any civil law remedies against unauthorised squatters or campers.

It is important to remember the defence of lawful authority in relation to this section.³²⁷ No offence would be committed by a person who had a statutory or common law right to do the acts in question. A person would not, for example, be guilty of an offence under the section merely by exercising the statutory access rights conferred by the Land Reform (Scotland) Act 2003.

The current law is contained in section 3 of the Trespass (Scotland) Act 1865, which, in lengthy and convoluted language, makes it an offence to camp on another person's land or to squat in someone's house, without permission. Section 3 is the only live section in the 1865 Act and its replacement enables the whole Act to be repealed.³²⁸

³²⁷ See s.22.

³²⁸ See s.113 and sch. 3.

PART 5
OFFENCES INVOLVING EXTORTION, DECEPTION OR DISHONESTY

85 Extortion

- (1) A person who makes a demand of another, calculated to cause that other to act to the prejudice of that other or of a third party, supported by a threat which the person knows or believes may cause the other to accede to the demand, is guilty of the offence of extortion.
- (2) For the purposes of this section—
 - (a) either the demand or the threat must be illegitimate;
 - (b) a demand is legitimate if what is demanded is legally due; and
 - (c) a threat is legitimate if—
 - (i) it is a threat to report an offence to the criminal authorities or to use an available legal process or legal remedy; and
 - (ii) the offence, legal process or legal remedy relates to the subject matter of the demand.

COMMENTARY

The lay term for this offence is blackmail. The classic example is where the accused threatens to expose a person's misconduct unless the latter pays the accused a sum of money which is not due. Either the demand or the threat must be illegitimate. Where money is in fact owed by the victim to the accused, it is not extortion for the accused to ask for payment, or even to threaten to take court action to enforce the debt. In such cases, the demand is legitimate and so is the threat. However, where the accused encourages repayment by any illegitimate threat, a demand for payment backed by such a threat would be extortion. Conversely, if no money is due, but the accused nevertheless threatens court action, then this is also extortion, since the demand is an illegitimate one. It does not matter that what is demanded is action (or inaction) by the victim or a third party. The offence requires some prejudice to the victim or a third party, but this need not be economic loss.

This provision substantially reflects the common law but leaves it open to the courts to develop the notion of what constitutes an illegitimate threat or demand.

86 Fraud

A person who, by deception, causes another person to act to the prejudice of that person or a third person is guilty of the offence of fraud.

COMMENTARY

This offence requires the accused's deception to induce some element of prejudice to the victim or a third party. Prejudice in this respect is not, however, limited to financial or economic matters. In *William Fraser*³²⁹ the accused was charged with raping a woman by having sexual intercourse with her by inducing her to believe that he was her husband. It was held that this was not rape, but that it was a species of fraud. This would be fraud under section 86 (although it would be generally be more appropriately prosecuted under section 61 (Rape) read with section 111 (Rules on consent).)

The accused must know that the statement or implication being made is in fact a false one. The crime covers express fraud (whether in documents or oral statements), and fraud by implication. It is a "result" crime in that the Crown must establish that the deception caused the victim to act to his or her prejudice or to the prejudice of a third party.

At common law fraud occurs where the accused brings about any practical result by means of a false pretence.³³⁰ The common law offence is so widely defined that it need not involve any prejudice to the dupe or to any other person. Indeed to induce a person to attend a surprise birthday party would, technically, be a criminal offence at common law. The offence in section 86 is therefore narrower in this respect than the common law, since it requires an element of prejudice.

³²⁹ (1847) Ark. 280.

³³⁰ *Adcock v Archibald* 1925 JC 58.

87 Embezzlement

A person who—

- (a) holds property under an obligation to use it for a specified purpose or in relation to which the person is under an obligation to account to another person; and
- (b) dishonestly uses the property for another purpose or dishonestly fails to account,

is guilty of the offence of embezzlement.

COMMENTARY

Embezzlement emerged as a common law crime at a time when theft was limited to cases where the accused took possession of property belonging to another person and carried it away. Persons who misappropriated the property of another which had been entrusted to them and of which they were in possession could not be guilty of theft. Similarly, persons who held property as trustees, being in legal terms owners of the property (although under an obligation to account for their dealings with the property) could not be guilty of theft.

Most cases of the former type could now be dealt with as cases of theft. Cases of the latter type would still not constitute theft, since this requires appropriation of property belonging to another. This Act retains the separate offence of embezzlement since it involves a form of dishonest dealing with property, distinguished by the element of breach of trust in embezzlement which is not necessarily present in theft. The property, such as money, may belong to the embezzler, there being only an obligation to account for a similar amount. This also distinguishes embezzlement from theft under section 77. A person cannot steal his or her own property.

This provision reflects the common law.

88 Forgery

- (1) A person who creates a false document or object, knowing it to be false, with the intention that it be used to deceive another person, to the prejudice of that person or any other person, or being reckless as to whether it is so used, is guilty of the offence of forgery.
- (2) For the purposes of this section, a document or object is false if it purports to be something it is not.

COMMENTARY

Fabricating something so that it appears to be what it is not is the crime of forgery. The fabricated item may range from a painting to a false signature on a cheque, or the alteration of a credit card. Once the item is created the crime of forgery has been committed. The section applies whether the item is tendered to another or not. There must, however, be the intention that the fabricated document or object be used to deceive another person, to the prejudice of that person or another person, or recklessness as to whether it is so used. The recklessness provision ensures that the section will cover the forger who produces masses of forged notes for sale, for example, without any specific intention of using them personally or even that they be used, but knowing full well that they will be used to deceive people to their prejudice.

This section extends the common law, which concentrated on “uttering” (that is, the tendering aspect) - forgery by itself not generally being criminal.

89 **Reset**

- (1) A person who receives or retains property which has been acquired by another person by robbery, theft, extortion, fraud or embezzlement and who—
 - (a) knows that the property has been so acquired; and
 - (b) does not have the intention of securing the return of the property to its owner or other lawful custodian,is guilty of the offence of reset.
- (2) Property ceases to be within subsection (1) once it has been returned to its owner or other lawful custodian.

COMMENTARY

A person who receives property that has been dishonestly appropriated by another person is guilty of reset. The accused must know the origin of the property. However, section 11 of the Act defines “knowledge” so as to include wilful blindness or virtual certainty. In the context of reset, wilful blindness is used to describe the person who suspects that the property may have been stolen, but turns a blind eye to these suspicions and decides to refrain from asking about the origins of the property.

A thief is guilty of theft, but not also of reset.³³¹ While it is common to refer to reset of theft, the section makes clear that the property may have been obtained as a result of other offences of dishonesty.³³² The reference to not having the “intention of securing the return” is to cover the person who finds items, perhaps in the street, and takes possession of them in order to return them to the owner, or to the police. Subsection (2) makes it clear that property ceases to be within the section once it has been returned to its owner or lawful custodian. Without this provision it might in theory still have been regarded as once having been acquired by theft.³³³

This provision substantially reflects the existing law but expands it in relation to property obtained by extortion.

³³¹ See *Blackhurst v McNaughten* 1981 SCCR 195 and, in s.89, note the words “by another person”.

³³² This is also the current law so far as concerns property obtained by theft, fraud, robbery or embezzlement. See the Criminal Procedure (Scotland) Act 1995, Sch. 3, para. 8.

³³³ S.67(1) of the Civic Government (Scotland) Act 1982 requires a person who takes possession of found property to take reasonable care of it, and to deliver it or report the finding of the property, to a police constable, or to its owner.

90 Making off without payment

A person who—

- (a) has received goods or services;
 - (b) has expressly or impliedly undertaken to make payment before leaving the place where they have been received; and
 - (c) makes off without payment and with intent to avoid payment,
- is guilty of the offence of making off without payment.

COMMENTARY

Making off without payment where payment is expected “on the spot” is a form of dishonest conduct not easily fitted within the definition of crimes such as theft or fraud. If, for example, a woman goes to a self-service filling station, fills up her petrol tank and then drives off without paying, it is not easy to determine the nature of her offending without an enquiry into her intentions when she introduces the petrol into her tank. If at the time she does this she intends to pay then she is not guilty of any crime. If, subsequent to filling the tank she then decides not to pay and drives off, she is not guilty of stealing the petrol which (unless there is an agreement to the contrary) became her property as soon as it went into the tank of her car.³³⁴ Similarly, she is not guilty of fraud, since there was no fraudulent intent when the property was acquired. If, all along, she never intended to pay, then charges of theft of the petrol or fraud are a possibility, but this would depend on the Crown establishing the prior guilty intent. The offence in section 90 of this Act (which is based upon section 3 of the English Theft Act 1978) identifies clearly the wrongdoing struck at by the criminal law.

This is a new offence.

³³⁴ See Sale of Goods Act 1979, s.18, Rule 5(1).

PART 6
OFFENCES AGAINST PUBLIC ORDER, SAFETY AND SECURITY

91 Carrying weapon

- (1) A person who, without reasonable excuse, has a weapon in a public place or on school premises or medical premises is guilty of the offence of carrying a weapon.
- (2) In this section—
 - (a) a “weapon” means—
 - (i) any article made or adapted for use for causing personal injury;
 - (ii) any article intended by the person having it for use for causing personal injury, whether by that person or another person;
 - (iii) any article with a blade or which is sharply pointed (other than a folding pocket knife with a blade not exceeding 3 inches or 7.62 centimetres in length when measured along the cutting edge);
 - (b) “reasonable excuse” includes having the weapon only for use at work, for educational purposes, for religious reasons or as part of any national costume;
 - (c) “school premises” includes any land occupied for the purposes of a school other than land occupied solely as a dwelling by a person employed at the school; and
 - (d) “medical premises” includes a doctor’s surgery and a hospital.
- (3) It is for the accused to prove on a balance of probabilities that there was reasonable excuse for the purposes of this section.

COMMENTARY

This section is aimed at the dangerous and socially objectionable practice of carrying a weapon, knife, blade or sharply pointed article (collectively a “weapon” as specially defined in the section) in a public place or on school or medical premises. It is not necessary for the weapon to be used. Merely having it is an offence unless there is a reasonable excuse for having it.

Subsection (1) sets out the offence in general terms. The term “reasonable excuse” is given a non-exhaustive definition in subsection (2). There is most likely to be a reasonable excuse in relation to the category of articles in subsection (2)(a)(iii) - that is articles which are not made, adapted or intended for use for causing personal injury. For example, a joiner might have a chisel or awl for genuine work purposes. A chef might have knives on school premises for cooking purposes. There could, however, be a reasonable excuse in relation to articles of other types as well. For example, a museum employee may be transporting a collection of rare martial arts weapons from one museum building to another.

Subsection (2) defines a weapon widely for the purposes of the section. The term covers three types of article - those which are made or adapted for causing personal injury, those which are intended by the person having them for causing personal injury and those which are not so designed or intended but which have a blade or a sharp point and which could therefore be used for that purpose. In relation to this third type, there is an exception for small folding pocket knives.

Subsection (2) also contains non-exhaustive definitions of “reasonable excuse”, “school premises” and “medical premises”. “Public place” is defined in section 112 (Interpretation) because it is also used elsewhere in the Act. “Land” in paragraph (c) includes buildings and other structures.³³⁵ Section 22 of this Act (which provides the defence of lawful authority) must also be kept in mind in relation to this section. It would cover for example a police officer who was lawfully armed with a gun in the proper exercise of his or her responsibilities as a police officer.

Subsection (3) is an exception to the normal rule, in line with the existing law and justified by strong public policy considerations.

³³⁵ See the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999 (SI 1999 No 1379) sch. 2.

The section is an amalgam of sections 47, 49 and 49A of the Criminal Law (Consolidation) (Scotland) Act 1995.³³⁶ There are some drafting changes but the section does not change the substance of the current law. Illustrative cases include *Grieve v McLeod*³³⁷ (whether anticipated need for self-defence a reasonable excuse); *McLaughlin v Tudhope*³³⁸ (whether article had been adapted for causing personal injury); *Woods v Heywood*³³⁹ (whether an article with a dual purpose, here a machete, was made for causing personal injury); *Owens v Crowe*³⁴⁰ (whether inference could be drawn that lock-knife carried in a disco was intended for use for causing personal injury); and *McAuley v Brown*³⁴¹ (meaning of “folding pocketknife”).

³³⁶ S.49A of the 1995 Act was inserted by the Offensive Weapons Act 1996.

³³⁷ 1967 JC 32.

³³⁸ 1987 SCCR 456.

³³⁹ 1988 SCCR 434; 1988 SLT 849.

³⁴⁰ 1994 SCCR 310.

³⁴¹ 2003 SLT 736.

92 Breach of the peace

A person who intentionally or recklessly causes a disturbance by acting in a way which a reasonable observer would regard as violent, aggressive, or disorderly is guilty of the offence of breach of the peace.

COMMENTARY

This section makes it clear that breach of the peace is violent, aggressive or disorderly behaviour which actually causes a disturbance. The offence may be committed in private.³⁴²

Breach of the peace is one of the most notoriously elastic offences in the common law.³⁴³ The offence, which at one time required some degree of disturbance of the public peace, was extended by the courts to embrace anything done “in breach of public order or decorum which might reasonably be expected to lead to the lieges being alarmed or upset or tempted to make reprisals at their own hand”.³⁴⁴ The question whether conduct was likely to produce such a result was an objective one.³⁴⁵ The High Court has, in more recent decisions, insisted that breach of the peace charges must reveal “conduct which does present as genuinely alarming and disturbing, in its context, to any reasonable person.”³⁴⁶

Other aspects of what is currently breach of the peace are covered in this Act by sections 49 (Violent and alarming behaviour) and 50 (Intrusive and alarming behaviour).

³⁴² This reflects the common law. See *Young v Heatly* 1959 JC 60.

³⁴³ A detailed description of the current crime is to be found in M. Christie, *Breach of the Peace* (Butterworths, 1990).

³⁴⁴ *Raffaeli v Heatly* 1949 JC 104.

³⁴⁵ *Donaldson v Vannett* 1998 SLT 957.

³⁴⁶ *Smith v Donnelly* 2002 JC 65; 2001 SCCR 800; 2001 SLT 1007.

93 Wasting the time of emergency services

- (1) A person who makes, or causes to be made, any false representation, knowing it to be false, to any emergency service and thereby causes a diversion of resources is guilty of the offence of wasting the time of the emergency services.
- (2) In this section “emergency service” means the police, fire brigade and ambulance services and any other service operated for the emergency protection of life.

COMMENTARY

It is an offence under this section to waste the time of any of the emergency services by making false reports which cause them to expend time and resources on fruitless investigations. There are good policy reasons for this offence; wasting the time of the emergency services can have extremely serious results.

It is an offence at common law to waste the time of the police, by making false reports which cause the police to expend time and resources on fruitless investigations. It does not have to involve false accusation of crime – a false report of an accident would suffice.³⁴⁷ This offence extends that idea to other emergency services.

³⁴⁷ See *Kerr v Hill* 1936 JC 71; *Gray v Morrison* 1954 JC 31 and *Bowers v Tudhope* 1987 JC 26; 1987 SCCR 77; 1987 SLT 748.

94 Presence with intent to commit an offence

A person who is in any premises, vehicle or vessel, or who is in the immediate vicinity of any of these, with intent to commit an offence in or on the premises, vehicle or vessel is guilty of the offence of presence with intent to commit an offence.

COMMENTARY

This section is in the nature of a preventative offence, designed to allow for the arrest and prosecution of persons before they commit more serious offences. The section makes it an offence for a person to be in or near premises (including vehicles and vessels), intending to commit any offence there.

The current provision which is most similar to this is contained in section 57(1) of the Civic Government (Scotland) Act 1982. This applies to a person who is found in or on a building or other premises, where it may reasonably be inferred that the person intended to commit theft³⁴⁸ there. Section 94 of this Act is broader than the current position in that it covers a person who intends to commit “an offence”, and not merely the offence of theft. It leaves the question of reasonable inference to be covered by the general provision in section 5(5) which provides that the “existence of any fact, including any state of mind, may be inferred from other facts proved”.

³⁴⁸ Which for these purposes includes “any aggravation of theft, including robbery”: Civic Government (Scotland) Act 1982, s.57(2).

95 Possession of tools with intent to commit an offence

A person who has, in a public place or in the place of the intended offence, any tool or other object with intent to commit an offence with it is guilty of the offence of possession of tools with intent to commit an offence.

COMMENTARY

This section is also in the nature of a preventative offence, designed to allow for the arrest and prosecution of persons before they commit more serious offences. It proscribes the possession of a tool or other object, with intent to commit an offence using these tools. The accused may either be in a public place, or in the premises or place in which the offence is to take place.

This is most similar to section 58(1) of the Civic Government (Scotland) Act 1982. The 1982 Act provisions apply, however, only to a person who intends to commit theft, or had committed theft, with the tools. Section 95 is broader than the current position in that it again applies to any offence. Hence possession of tools with intent to commit assault, or criminal damage to property (sections 41 and 81 of this Act) would be covered by this provision. Section 58 of the 1982 Act applies only to a person who has two or more convictions for theft. Section 95 is broader in that it applies to any person.

PART 7
OFFENCES AGAINST PUBLIC INTERESTS IN LAWFUL GOVERNMENT
AND THE ADMINISTRATION OF JUSTICE

96 Unlawfully attempting to overthrow government

- (1) A person who attempts to overthrow the constitutionally appointed government of the United Kingdom of Great Britain and Northern Ireland, or of any constituent part of it, by the use of force is guilty of the offence of unlawfully attempting to overthrow the government.
- (2) This section does not affect the law on treason.

COMMENTARY

Treason as a reserved matter is outwith the legislative competence of the Scottish Parliament.³⁴⁹ This Act therefore makes no provision in relation to treason other than to indicate, for the avoidance of doubt, that the offence created by section 96 does not affect the law of treason. The offence created by section 96 would apply to attempts to overthrow the United Kingdom government, and the devolved organs of government in Scotland, Wales and Northern Ireland, but would not embrace conduct of a kind contemplated by the various forms of treason.

The common law recognises the offence of sedition where the accused is guilty of

“wilfully, unlawfully and mischievously, and in violation of the party’s allegiance, and in breach of the peace, and to the public danger, uttering language calculated to cause disaffection, disloyalty, resistance to lawful authority, or in more aggravated cases, violence and insurrection.”³⁵⁰

In the case from which that quotation is taken it was recognised that there is a fine line between sedition and freedom of expression. The offence in section 96 is narrower than the common law position in that the accused must be attempting to overthrow the government by force. The offence of incitement in section 19 could catch those who incite others to make such an attempt.

³⁴⁹ Scotland Act 1998, sh. 5, para. 10, and s.29(1) and 29(2)(c).

³⁵⁰ *John Grant and Ors* (1848) J Shaw 51, at 103, per Lord Moncrieff.

97 Perverting the course of justice

A person who obstructs or perverts the investigation or prosecution of any offence, or does any act calculated to pervert the course of justice, is guilty of the offence of perverting the course of justice.

COMMENTARY

The offence of perverting the course of justice covers a wide range of conduct, which typically includes giving false information to the police to avoid detection and prosecution,³⁵¹ intimidating or attempting to intimidate witnesses,³⁵² and knowingly bringing false criminal charges against an individual.³⁵³ Charges of perverting the course of justice are not restricted to interference with the course of criminal investigations and proceedings, but include interference with the course of civil and other proceedings.³⁵⁴ It is even an offence for a person charged with an offence dishonestly to assert that he has no knowledge of the offence.³⁵⁵

It is an offence at common law to pervert (or to attempt to pervert) the course of justice. Section 97 reflects the current law.

³⁵¹ See, for example, *Dean v Stewart* 1980 SLT 85; *H.M. Advocate v Davies* 1993 SLT 296; *H.M. Advocate v Keegan* 1980 SLT 35.

³⁵² See, for example, *Kenny v H.M. Advocate* 1951 JC 104; 1951 SLT 363; *Fyfe v H.M. Advocate* 1989 SLT 50; *Darroch v H.M. Advocate* 1980 SLT 33.

³⁵³ See, for example, *McFarlane v Jessop* 1988 SCCR 186; 1988 SLT 596.

³⁵⁴ *McGregor v D* 1977 SLT 182 (intimidation of witness in relation to children's hearing).

³⁵⁵ *Johnstone v Lees* 1999 SCCR 687; 1995 SLT 1174.

98 Escaping and harbouring

- (1) A person who escapes from the lawful custody of the police or prison authorities is guilty of the offence of escaping from lawful custody.
- (2) A person who harbours a person who has escaped from the lawful custody of the police or prison authorities, with the intention of assisting that person to avoid recapture, is guilty of the offence of harbouring.
- (3) For the purposes of this section, escaping from lawful custody includes failing to return from leave from such custody.

COMMENTARY

It is an offence for a person to escape from lawful custody. This is committed if the accused escapes when detained or arrested, as well as if he or she escapes from prison. The essence of the crime is the escape - it is not essential that the accused breaks out using violence to other persons, or damaging property.³⁵⁶

Subsection (2) makes it an offence to harbour a person who has escaped from custody, with the intention of assisting them to avoid arrest, and subsection (3) makes it clear that failing to return to custody at the end of a period of leave of absence counts as escaping.

This section amalgamates the current common law offences of prison breaking and escape from lawful custody e.g. detention or arrest by the police. There was no general common law crime of harbouring. This term was used only in relation to those who had absconded from a limited number of environments, including the armed forces, merchant navy and mental hospitals. Such harbouring would have been tried as an attempt to defeat the course of justice. Hume suggested that a wife could not be guilty of harbouring her husband³⁵⁷ and in the case of *Miln v Stirton*³⁵⁸ a charge against a wife of attempting to defeat the ends of justice by harbouring her husband, who had an extract conviction warrant outstanding against him, was held by a sheriff to be incompetent. The notion of a special defence confined to wives, and based on some idea of a wifely duty of obedience, now seems unacceptable. This section provides no such defence.

³⁵⁶ See *William Hutton* (1837) 1 Swin 497.

³⁵⁷ Hume, i, 49.

³⁵⁸ 1982 SLT (Sh Ct) 11.

99 Corruption and abuse of office

- (1) A person who—
 - (a) makes or offers to any public official; or
 - (b) being a public official, accepts or solicits,

any payment, gift or advantage with the intention or understanding, express or implied, that it will improperly influence the performance of public duties by that public official, or improperly reward the performance of those duties, is guilty of the offence of corruption.
- (2) Subsection (1) applies whether the payment, gift or advantage is for the benefit of the public official or for the benefit of another person.
- (3) A public official who abuses an office or position in such a way as to bring the administration of justice, the public service or a public body into disrepute is guilty of the offence of abuse of office.
- (4) In this section—
 - (a) “public official” means any holder of a public office whether in the United Kingdom or elsewhere, or any person employed by the Crown or by a foreign State or government, or by a public body or institution whether national or international; and
 - (b) “public office” includes any judicial or quasi-judicial office.

COMMENTARY

It is an offence to offer a bribe to a person who holds a public office, is employed by the Crown or works for a public body. This includes civil servants, police, court staff, judges, and local authority employees such as teachers, social workers, lecturers and traffic wardens. The offence is committed both by the person who offers the bribe and the person who accepts it. Abuse of office is covered by section 99(3). This would cover, for example, a failure to act in an unbiased manner on the part of anyone holding judicial office. This section makes no change to the common law crime of corruption. There are numerous statutory offences dealing with the holders of particular offices. The most relevant for present purposes is the Public Bodies Corrupt Practices Act 1889 (c.69) which is rendered unnecessary by the new provision in section 99 and is repealed in schedule 3.

100 Perjury and subornation of perjury

- (1) A person who, while on oath in any judicial proceedings —
 - (a) gives evidence knowing it to be false; or
 - (b) with intent to mislead, gives evidence without knowing it to be true,is guilty of the offence of perjury.
- (2) A person who incites or attempts to procure or suborn another person to commit perjury is guilty of the offence of subornation of perjury.
- (3) For the purposes of this section—
 - (a) a person is taken to be on oath notwithstanding any irregularity in the forms or ceremonies used in administering the oath if the person administering the oath had power to do so and if the person taking the oath accepted those forms or ceremonies without objection or declared them to be binding; and
 - (b) “oath” includes any affirmation or declaration made in lieu of oath.

COMMENTARY

Perjury under this section consists in knowingly giving false evidence (or in giving, with intent to mislead, evidence not known to be true) in judicial proceedings. The evidence must be given on oath (or on affirmation or declaration). It need not, however, be material to the issues in the proceedings in which it is given.³⁵⁹ A person who incites another person to commit perjury, or who seeks to procure the commission of perjury by someone else, is guilty of the offence of subornation of perjury. Subsection (3)(b) is not strictly necessary because, under the normal rules of interpretation, “oath” includes affirmation and declaration³⁶⁰ but is included in the interests of greater transparency. Section 100 reflects the common law but does not preserve any requirement that the evidence must have been competent and relevant at the time it was given.³⁶¹

³⁵⁹ *Lord Advocate’s Reference (No 1 of 1985)* 1986 JC 137; 1986 SCCR 329; 1987 SLT 187.

³⁶⁰ See the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999 (SI 1999 No 1379) sch. 2.

³⁶¹ See Hume, i, 369; *H.M. Advocate v Smith* 1934 SLT 485; *Angus v H.M. Advocate* 1935 JC 1; 1934 SLT 501.

101 False oaths or statements

- (1) A person who—
 - (a) is required or authorised by law to make a statement on oath for any purpose; or
 - (b) is required or authorised to make a statement otherwise than on oath for any purpose by, under or in pursuance of any public general Act of Parliament, Act of the Scottish Parliament or order that evidence be given for the purposes of proceedings in another jurisdiction,and who, otherwise than in judicial proceedings, knowingly makes for that purpose a statement which is false in a material particular is guilty of the offence of making a false oath or statement.
- (2) A person who by means of a knowingly false oath or statement obtains—
 - (a) registration on any register or roll kept under or in pursuance of any Act of Parliament or Act of the Scottish Parliament of persons qualified by law to practise any vocation or calling; or
 - (b) a certificate of any such registration,is guilty of the offence of using a false oath or statement.
- (3) A person who incites or attempts to procure or suborn another person to commit an offence against this section is guilty of the offence of subornation of a false oath or statement.
- (4) For the purposes of this section—
 - (a) a person is taken to be on oath notwithstanding any irregularity in the forms or ceremonies used in administering the oath if the person administering the oath had power to do so and if the person taking the oath accepted those forms or ceremonies expressly or without objection; and
 - (b) “oath” includes any affirmation or declaration made in lieu of oath.
- (5) This section applies to acts done outside Scotland as it applies to acts done within Scotland provided that the acts have, or are intended to have, effects in Scotland.

COMMENTARY

The law relies on the accuracy of oaths and formal statements in various non-judicial contexts and it is therefore important to have some sanction directed against false oaths and statements for those cases, outwith the context of judicial proceedings, which are not covered by the law on perjury.

Section 101(1)(a) makes it an offence to make a false statement on oath where the person is required or authorised by law to make a statement on oath. The person must know that the statement is false in a material particular. Paragraph (b) of the same subsection extends the same rule to those who are required or authorised by statute to make a statement otherwise than on oath for any purpose, or who are ordered by a court to give evidence for the purposes of proceedings in another jurisdiction.

Subsection (2) deals with the particular problem of knowingly making false oaths or statements for the purposes of obtaining registration on any statutory register or roll, or a certificate of any such registration. Even if the person is not specifically required or authorised by statute to make the statement an offence will still be committed if the statement brings about the obtaining of registration or certification.

Subsection (3) prevents criminal liability being avoided by simply making the oath or statement outside Scotland provided that it produces, or is intended to produce, effects in Scotland.

This section is derived from sections 44 to 46 of the Criminal Law (Consolidation) (Scotland) Act 1995. There is no substantial change in the law although the drafting has been consolidated and some matters expressly mentioned in the 1995 Act are not repeated because they are covered by this Act's provisions on overlapping offences³⁶² and art and part guilt.³⁶³

³⁶² S.6.

³⁶³ S.17.

102 Contempt of court

- (1) A person who—
 - (a) prevaricates in giving evidence before a Scottish court; or
 - (b) acts in such a way as to show gross disrespect for the authority of a Scottish court, whether or not the person intended to show such disrespect,is guilty of the offence of contempt of court.
- (2) This section does not affect—
 - (a) any legislation dealing with contempt of court by publishing matter tending to interfere with the course of justice;
 - (b) the law on breach of interdict or failure to obey an order for specific implement; or
 - (c) any powers of any court to deal with contempt in proceedings before it.

COMMENTARY

This section deals only with contempt in the face of the court (and expressly excludes contempt which takes the form of prejudicing legal proceedings by the publication of material which has the potential to prejudice the course of justice.)³⁶⁴ Contempt in the face of the court may be committed by misconduct in court (by an accused,³⁶⁵ a witness, lawyer, juror³⁶⁶ or member of the public). One commonly encountered form of contempt is wilful failure by a witness, or a party or legal representatives, to appear timeously before the court.³⁶⁷ Prevarication by a witness is another common form of contempt.³⁶⁸ The present position is that contempt of court is regarded as *sui generis* – that is, it is dealt with as neither a criminal nor a civil matter.³⁶⁹

³⁶⁴ See the Contempt of Court Act 1981, as amended by the Broadcasting Act 1990.

³⁶⁵ See, for example, *Dawes v Cardle* 1987 SCCR 135.

³⁶⁶ See *Wilson v John Angus & Sons* 1921 SLT 139 (where a person summoned for jury duty arrived drunk and allowed himself to be empanelled); and *H.M. Advocate v Yates* (1847) Arkley 238.

³⁶⁷ See, for example, *Pirie v Hawthorn* 1962 JC 69; 1962 SLT 291; *Muirhead v Douglas* 1979 SLT (Notes) 17.

³⁶⁸ See, for example, *McLeod v Speirs* (1884) 5 Couper 387; *Childs v McLeod* 1980 SLT 27. S.155(1) of the Criminal Procedure (Scotland) Act 1995 provides that a witness in a summary prosecution who fails to attend after being duly cited, or unlawfully refuses to be sworn, or after the oath refuses to answer questions which the court may allow, or prevaricates in his or her evidence, shall be deemed guilty of contempt of court and be liable to be “summarily punished forthwith for such contempt of court”.

³⁶⁹ See *H.M. Advocate v Aird* 1975 JC 64.

103 False accusation of crime

A person who makes any false statement, knowing it to be false, to the police or prosecuting authorities that another person is guilty of an offence is guilty of the offence of making a false accusation of crime.

COMMENTARY

Where a person makes a false accusation concerning criminal conduct by someone else, this may be a crime. The person making the accusation must know that there is no substance to it. While this could be classed as wasting the time of the emergency services (in this case, the police)³⁷⁰ making false accusations against an innocent person is generally regarded as a more serious crime.

This section reflects the common law.

³⁷⁰ See s.93 (Wasting the time of emergency services).

PART 8
OFFENSIVE CONDUCT

104 Unlawful interference with human remains

A person who, without reasonable excuse, interferes with human remains in such a way as to be likely to cause offence to a reasonable person is guilty of the offence of unlawful interference with human remains.

COMMENTARY

It is an offence under this section to interfere, without reasonable excuse, with human remains in such a way as to be likely to cause offence to a reasonable person. The justification for criminalising this conduct is the great offence which it causes to almost everybody and the anguish it causes to those who had a close relationship to the deceased person. The words “without reasonable excuse” mean that the provision will not interfere with the normal and necessary activities of people like undertakers and pathologists.

This new statutory offence replaces, but is not nearly so limited as, the common law offence of violation of sepulchres.³⁷¹ “Remains” would include not only the whole body of a deceased person but also any part or organ of that body.

³⁷¹ See e.g. *Coutts* (1899) 3 Adam 50.

105 Soliciting

A person who, for the purposes of prostitution or of obtaining the services of a prostitute—

- (a) loiters in a public place;
- (b) solicits in a public place or in any other place so as to be seen from a public place; or
- (c) importunes any person who is in a public place,

in such circumstances as to be likely to cause fear, alarm or offence to others is guilty of the offence of soliciting.

COMMENTARY

This offence appears in Part 8 (Offensive conduct) rather than along with sexual offences in Part 3 because the essence of it is the nuisance – that is, the fear, alarm or offence - caused by the conduct to the individuals importuned and to members of the public. There need not be any infringement of anyone’s interest in his or her person.

The section is derived from section 46 of the Civic Government (Scotland) Act 1982.

106 Dealing with obscene material

- (1) A person who, without reasonable excuse—
 - (a) displays, or causes or permits to be displayed, any obscene material in a public place or so as to be visible from any public place; or
 - (b) publishes, sells or distributes or, with a view to its eventual sale or distribution, makes, prints, has or keeps any obscene material,is guilty of the offence of dealing in obscene material.
- (2) It is a defence under this section that the person used all due diligence to avoid committing the offence.
- (3) This section does not apply to anything authorised under the laws specifically regulating television or sound broadcasting, cinematographic exhibitions or theatrical performances.
- (4) In this section “obscene material” means material so grossly indecent or revolting that its public display or ready availability would be likely to cause serious offence to most adult people in Scotland.

COMMENTARY

This section proscribes various ways of dealing with obscene material, including its publication, sale, or distribution. It also covers the person who displays such material in a public place, or in a manner which causes the material to be seen from a public place. Subsection (3) provides an exception for television, radio, cinema and theatre performances where these have been regulated by the provisions of other legislation, such as the Theatres Act 1968 and the Broadcasting Act 1990. The test of obscene material is that, in the circumstances, it would be likely to cause serious offence to most adults in Scotland.

There is at present a common law offence of publishing an obscene work with the intention of corrupting the morals of the public, but it is rarely prosecuted.³⁷² The common law offence of shameless indecency tends to be prosecuted by the Crown in preference to that of publishing an obscene work. Section 106 is derived in part from section 51 of the Civic Government (Scotland) Act 1982 and section 1 of the Indecent Displays (Control) Act 1981.

³⁷² According to Gordon (para. 41.15), the last reported prosecution was the case of *Henry Robinson* in 1843 (1 Broun 643).

107 Indecent conduct

(1) A person who—

- (a) engages in sexual activity;
- (b) exposes the sexual organs or buttocks; or
- (c) urinates or defecates,

in such a way or in such circumstances as to cause, or to be likely to cause, offence to a reasonable person is guilty of the offence of indecent conduct.

(2) In this section “sexual activity” has the same meaning as in Part 3 (Sexual offences) of this Act.

COMMENTARY

This offence covers certain types of conduct which are unobjectionable in most circumstances but which in certain circumstances are likely to cause offence or annoyance to reasonable persons. No offence will be committed under this section unless the conduct is done in such circumstances as to cause, or to be likely to cause, offence or annoyance to a reasonable person.

Subsection (1)(a) deals with sexual activity, as defined in Part 3 of the Act. A separate paragraph on this is necessary because not all sexual acts, even if they were in a public place, would be caught by the provision on indecent exposure (subsection (1)(b).) The sexual acts may, for example, take place under a blanket or in some other way which prevents there being indecent exposure. Subsection (1)(a) would cover, for example, sexual intercourse on a plane or train to the annoyance of other passengers. It is not limited to what is done in a public place. A couple who invade a person’s garden or house and have sexual intercourse there to the person’s reasonable annoyance would be guilty of an offence under this provision.

Subsection (1)(b) would catch “flashing” and “mooning”. The term “sexual organ” may include female breasts, but only when exposed in a sexual fashion. The offence does not strike at exposure by itself but only at such exposure as is likely to cause offence or annoyance to a reasonable person. It may be supposed that a reasonable person would not be annoyed or offended by, for example, a nursing mother, nudity on a beach reserved for nudists or by a topless dancer in a pub or club where this sort of conduct is to be expected.

Subsection (1)(c) is not limited to urinating or defecating in a public place or so as to be seen from a public place. It would therefore cover the person who urinates or defecates in another person’s garden in such circumstances as to cause or be likely to cause offence or annoyance to a reasonable person.

Section 107(1)(a) is a new offence although many cases covered by it would have been caught by the common law on shameless indecency. Subsection (1)(b) is derived from the common law on indecent exposure. Subsection (1)(c) is derived from section 47 of the Civic Government (Scotland) Act 1982.

PART 9
OFFENCES INVOLVING ANIMALS

108 Wanton cruelty to animals

- (1) A person who causes an animal suffering solely or primarily to derive pleasure from its suffering is guilty of the offence of wanton cruelty to animals.
- (2) This section does not affect any offence under any other legislation relating to cruelty to animals.

COMMENTARY

This section creates a basic and general offence of wanton cruelty to animals. It applies where a person causes an animal to suffer solely or primarily to take pleasure in its suffering. The reason for criminalising such conduct is partly sympathy for the animal, partly revulsion at the conduct and the attitude of mind revealed by it and partly the consideration that a person who behaves in this way without being liable to any sanction may be encouraged to behave cruelly in other ways.

“Animal” is defined in section 110(a) of the Act so as to exclude human beings. Apart from that, the term has its ordinary dictionary meaning. However, only an animal capable of suffering could come within the section.

What constitutes a reason which would prevent the conduct from being solely or primarily to derive pleasure from the animal’s suffering is not limited by the section. The section is intended to lay down a basic, minimal offence which can be supplemented by more specific provisions on particular types of activity, such as hunting wild mammals in certain ways with dogs. For the basic offence in section 108, any reason other than the wanton infliction of suffering for its own sake suffices. The reason might, for example, be pest control; public safety; the treatment or killing of a diseased or injured animal; the gathering, production or preparation of food; the conduct of normal agricultural, horticultural or forestry operations; the management of the environment or the lawful pursuit of a traditional sport or pastime such as angling or shooting.

Cruelty to animals is not an offence at common law. This is, therefore, a new offence designed to underpin the various statutory offences in the way a common law offence would have done if there had been one. Killing or injuring an animal belonging to another person might be malicious mischief at common law³⁷³ but the essence of that crime is the damage to another person’s property, not the cruelty to the animal as such.

³⁷³ *Patchett v MacDougall* 1983 JC 63; 1983 SCCR 361; 1984 SLT 152.

The section supplements but does not replace other statutory provisions on cruelty to animals, most of which apply to a wider range of conduct but to a narrower range of animals. The Protection of Animals (Scotland) Act 1912, for example, penalises the causing of unnecessary suffering to animals (which covers a much wider range of conduct than that caught by section 108) but applies only to domestic or captive animals and has various exceptions. The Protection of Wild Mammals (Scotland) Act 2002 applies only to wild mammals and only to certain forms of hunting with dogs.

109 Sexual activity with an animal

A person who engages in sexual activity with an animal is guilty of the offence of sexual activity with an animal.

COMMENTARY

The justification for criminalising sexual activity with animals is partly the revulsion caused to most members of the public and partly the element of abuse of power over the animal. As human beings are animals it is necessary to define “animal” in such a way as to exclude them. (See section 110(a).) The definition of sexual activity for this purpose is to be found in section 110(b). It is essentially the same as in Part 3 with certain necessary adjustments.

“Unnatural connection with a beast” is, according to the Institutional writer, Alison, a crime at common law.³⁷⁴ There seems, however, to be some doubt as to whether a woman is capable of the offence of bestiality.³⁷⁵ Section 109 proscribes “sexual activity”, a term which is defined to include sexual penetration by things other than a penis, as well as “sexual contact”. Hence a woman may be capable of breaching this provision.

³⁷⁴ Alison, i, 566.

³⁷⁵ Gordon, para. 34.04.

110 Interpretation for purposes of this Part

In this Part of this Act—

- (a) “animal” does not include a human being; and
- (b) “sexual activity” has the same meaning as in Part 3 (Sexual offences) of this Act, with any necessary adaptations, but does not include any act done in good faith for purposes of animal husbandry, animal breeding or veterinary medicine.

COMMENTARY

This section defines the terms “animal” and “sexual activity” for the purposes of the two preceding sections. “Sexual activity” has essentially the same wide meaning as in the sexual offences sections of this Act, but an exception is introduced for those involved in legitimate practices in animal husbandry or breeding, as well as for veterinarians. Without this exception, artificial insemination procedures, for example, might have been caught by the section.

PART 10
RULES ON CONSENT, INTERPRETATION AND FINAL PROVISIONS

111 Rules on consent

- (1) For the purposes of any Part of this Act any consent given by a person is to be disregarded if at the time when the consent was given—
 - (a) the person giving the consent was, by reason of his or her young age or mental disorder, unable to understand what was being consented to or to withhold consent;
 - (b) the consent was induced by force or fear or was otherwise not freely given; or
 - (c) the consent was induced by fraud as to the nature of what was being consented to or the identity of the person doing what was consented to.
- (2) For the purposes of Part 2 of this Act (Non-sexual offences against life, bodily integrity, liberty and other personal interests) any consent given by a person is to be disregarded if the consent was to a socially unacceptable activity likely to cause serious injury or a risk of serious injury.
- (3) For the purposes of Part 3 of this Act (Sexual offences) any consent given by a person is to be disregarded if at the time when the consent was given the person was under 12 years of age.
- (4) For the purposes of Part 4 of this Act (Offences against property and economic interests) a person is treated as consenting to an infringement of an interest in property if the circumstances at the time of the infringement were such that it would have been reasonable to assume that the person would have had no objection to the infringement.

COMMENTARY

Various offences throughout this Act are committed only if the victim does not consent to what is done. This applies, for example, to assault, causing injury or the risk of injury, abduction, deprivation of liberty, and certain sexual offences such as rape. It is important, however, that these provisions ensure that those who lack the capacity to consent, or whose ability to consent freely may be impaired, are properly protected.

Subsection (1) contains general rules on disregarding consent. These rules apply across the whole Act. Paragraph (a) provides that the victim's consent is to be disregarded if he or she was unable, because of age or mental disorder, properly to consent. Paragraph (b) provides that consent is to be disregarded if it has been induced by force or fear or if for any reason it was not freely given. The provision attempts to address the problem which arises where consent, or the lack of consent, is part of the definition of a crime. In such cases it may be difficult to determine whether consent was given, or withheld, or given reluctantly. Paragraph (b) indicates that even if consent is given, it is to be disregarded if it is given in circumstances which impair the freedom of the victim to consent or not to consent. It makes it clear that it is not only physical force or the threat of such force which may impair consent and render it ineffectual. So, for example, if the accused demands sexual relations with the victim under threat of dismissal from her job, or eviction from his home, it could now be held that if the victim does consent, that consent was not "freely given" and therefore falls to be disregarded. Paragraph (c) deals with the case of fraud but, in order to prevent any small deception from negating consent, provides that the fraud must be as to the nature of what was being consented to or the identity of the person doing what was consented to.

Subsection (2) applies only for the purposes of Part 2 of the Act (Non-sexual offences against life, bodily integrity, liberty and other personal interests). It recognises that in some circumstances public policy requires that even those of full age and capacity should not be permitted to consent to the causing of serious injury (or the risk of serious injury) by socially unacceptable means. This formulation is designed to allow consent to be given to minor injuries. A person can consent, for example, to having his or her hair cut or ears pierced and there would be no assault in such cases. It is also designed to allow consent to major injuries such as might be incurred in surgery or in lawful sports (such as boxing matches), provided that the serious injury is not caused by socially unacceptable means, such as sado-masochistic practices,³⁷⁶ or through an unregulated brawl.

Subsection (3) applies only for the purposes of Part 3 of the Act (Sexual offences). In certain circumstances a young person may have sufficient understanding to give consent, but for policy reasons that consent is considered irrelevant. This is true, for example, in relation to sexual activity, where, even though there may be factual consent, as a matter of policy the Act determines that that consent should not exclude criminal responsibility. This subsection therefore provides that the consent of a person under 12 to any sexual act is to be disregarded.

Subsection (4) applies only for the purposes of Part 4 of the code (Offences against property and economic interests). It is the converse of the provisions just discussed. They provide that consent is to be disregarded in certain cases. Section 111(4) provides that it is to be assumed. A person is treated as consenting to an infringement of an interest in property if the circumstances at the time of the infringement were such that it would have been reasonable to assume that the person would have had no objection to the infringement. The point of this provision is to take out of the law on theft (and related offences) trivial acts like picking a wild raspberry, blackberry or mushroom or appropriating an ordinary elastic band lying abandoned on the street.

³⁷⁶ See e.g. *R v Brown* [1994] 1 AC 212; [1993] 2 All ER 75.

112 Interpretation

- (1) In this Act, unless the context otherwise requires—
- (a) “act” includes omission, and any reference to acting or doing is to be construed accordingly;
 - (b) “damage”, in relation to animals owned by a person, includes the killing or injuring of those animals;
 - (c) “document” includes a document in electronic form;
 - (d) “mental disorder” has the same meaning as in section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13);
 - (e) “offence” means criminal offence;
 - (f) “owner” in relation to property includes the owner of a part share in the property and cognate expressions are to be construed accordingly;
 - (g) “person” includes legal person;
 - (h) “property” means property of every description, whether moveable or not and whether corporeal or not, and includes money and electricity; and
 - (i) “public place” includes any place to which at the material time the public have, or are permitted to have, access, whether on payment or otherwise; the doorways or entrances of premises abutting on any such place; and any common passage, close, stair, garden or yard pertinent to any tenement or group of separately owned houses.
- (2) For the purposes of this Act, cases where a person is in a position of trust or authority in relation to another include those cases where—
- (a) the person is the teacher, instructor or religious adviser of that other;
 - (b) the person provides care services to that other professionally or on behalf of a voluntary organisation;

- (c) the person is actively engaged in the management of, works in, or is contracted to provide services to—
 - (i) a hospital where that other is being given treatment; or
 - (ii) an establishment where that other lives.

COMMENTARY

Section 112 contains some definitions which apply throughout the Act. Some have already been mentioned in relation to earlier sections. Others are fairly self-explanatory. The only points calling for notice here are the following.

The normal definition of “document” for the purposes of an Act of the Scottish Parliament is “anything in which information is recorded in any form”.³⁷⁷ That is useful so far as it goes but in the case of electronic “documents” might be read as applying to the “thing” in which the information is recorded rather than the information itself - the computer disc rather than the computer file. For this reason “document” is defined here as including a document in electronic form. The definition is important in relation to fraud.³⁷⁸

“Mental disorder” is defined by reference to the definition in section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003. This was drawn up after extensive consideration and consultation and it may be supposed that it will now be regarded as the standard definition. It means any mental illness, personality disorder or learning disability, however caused or manifested.³⁷⁹ However, a person is not considered mentally disordered by reason only of sexual orientation; sexual deviancy; transexualism; transvestism; dependence on, or the use of, alcohol or drugs; behaviour that causes, or is likely to cause harassment, alarm or distress to any other person; or acting as no prudent person would act.³⁸⁰

The Scottish Executive’s Policy Memorandum on the Bill which led to the Mental Health (Care and Treatment) (Scotland) Act 2003 explained the three terms – mental illness, personality disorder and learning disability - as follows.³⁸¹

Mental illness “encompasses functional conditions such as schizophrenia and manic depressive psychoses and non-psychotic conditions such as anorexia nervosa, obsessive compulsive disorders and disorders of mood. It also encompasses organic conditions – irreversible such as dementia (including Alzheimer’s syndrome) and temporary, such as acute or delirious reactions to physical illness, or toxic confusional states induced by drugs or alcohol (but not simply intoxication). It also covers acquired brain injury with associated mental symptoms.”

³⁷⁷ See the Scotland Act 1998 ss.126 and 127, read with the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999 (SI 1999 No 1379) para. 6(3).

³⁷⁸ See s.86 (Fraud).

³⁷⁹ S.328(1).

³⁸⁰ S.328(2).

³⁸¹ The Scottish Executive’s Policy Memorandum on the Bill that led to the Mental Health (Care and Treatment) (Scotland) Act 2003, para 293.

Personality disorder “is used to describe a wide range of situations where a person manifests behaviour, and responses to personal and social situations, which represent extreme or significant deviations from the way the average individual in a given culture perceives, thinks, feels and particularly relates to others.”

Learning disability “is generally accepted as incorporating the following facets: a significant lifelong condition: involving reduced ability to understand new or complex information or to learn new skills: reduced ability to cope independently: and a condition which started before adulthood with a lasting effect on the individual’s development.”

The definition of mental disorder is therefore a very wide definition. It is important to note, however, that the defence of mental disorder in section 27 of this Act depends on much more than the mere presence of mental disorder. The acts in question must have been done as a result of a mental disorder which rendered the person incapable of conforming to the relevant requirements of the criminal law or of appreciating the true nature or significance of the acts. It is clear that many minor mental disorders would not have this effect. Similarly, the other references to “mental disorder” in this Act are all accompanied by a functional test.

The definition of “person” as including a legal person is slightly narrower than that used in many other statutes where “person” includes a body of persons corporate or unincorporate.³⁸² The definition in section 112 is meant to indicate that that broader definition does not apply. It is difficult and could be dangerous to apply the rules of the criminal law to an unincorporated body of persons. The crowd at a football match is, for example, an unincorporated body of persons, as is the audience in a cinema.

“Property”, in this Act, means property of every description, whether moveable or not and whether corporeal or not, and includes money, animals owned by a person, and electricity. This is a wide definition but in tune with existing trends in the law.³⁸³ One important effect is that there could be theft of land or electricity under this Act. See section 77.

The definition of “public place” is important in relation to, for example, the offences of carrying a weapon (s.91) and soliciting (s.105). The definitions in existing statutory provisions vary from one provision to another. The definition in the Act is similar to that in section 51 and some other sections in Part IV of the Civic Government (Scotland) Act 1982 (c.45).

The definition of “a position of trust or authority” in subsection (2) is relevant in relation to section 7 (Aggravated offences), section 65 (Unlawful sexual activity with a young person) and section 69 (Sexual exploitation of person with a mental disorder). The definition is an inclusive one. It would remain open to the courts to apply it to other cases of an obviously abusive nature. “Residential establishment” in the definition is intended to include places like boarding schools, children’s’ homes, nursing homes and old peoples’ homes

³⁸² See the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999 (SI 1999 No 1379) sch. 2.

³⁸³ The Scotland Act 1998 s.126(1), for example, defines property as including “rights and interests of any description”.

113 Repeals, amendments and transitional provisions

- (1) Schedule 2 to this Act, which contains minor amendments and amendments consequential upon the provisions of this Act, has effect.
- (2) The enactments mentioned in schedule 3 to this Act are hereby repealed to the extent specified in the second column of that schedule.
- (3) The repeal of any enactment by this Act does not prevent any person from being prosecuted, tried, convicted and punished for an offence committed under that enactment at a time when it was in force.
- (4) The abolition or replacement of any common law rule by this Act does not prevent any person from being prosecuted, tried, convicted and punished for an offence committed under that rule at a time when it was in force.

COMMENTARY

Subsections (1) and (2) are routine provisions introducing the schedules of amendments and repeals.

Subsections (3) and (4) deal with the application of the Act in time. They are designed to prevent criminals from slipping into a gap between the old and the new laws.

114 Short title and commencement

- (1) This Act may be cited as The Criminal Law (Scotland) Act 200...
- (2) This Act comes into force at the end of the period of three months beginning with the date of Royal Assent.

COMMENTARY

Section 114 is also a routine provision. The reason for choosing the Criminal Law (Scotland) Act, rather than the Criminal Code (Scotland) Act, as the short title is to make it clear that the normal rules of interpretation apply to this Act as to any other Act. It was feared that the use of the word “code” in the title might have led to arguments that the Act was in some significant respect different from other Acts of the Scottish Parliament.

SCHEDULE 1
(introduced by section 31)

PENALTIES

PART 1

MAXIMUM PENALTIES BY CATEGORY OF OFFENCE

<i>Category</i>	<i>Maximum penalty following conviction on indictment</i>	<i>Maximum penalty following conviction in summary proceedings</i>
A	Life imprisonment or a fine or both	Not applicable (category A offences being triable only on indictment)
B	Twenty years imprisonment or a fine or both	Six months imprisonment or a fine not exceeding level 5 on the standard scale or both
C	Ten years imprisonment or a fine or both	Six months imprisonment or a fine not exceeding level 5 on the standard scale or both
D	Five years imprisonment or a fine or both	Six months imprisonment or a fine not exceeding level 4 on the standard scale or both
E	Two years imprisonment or a fine not exceeding level 5 on the standard scale or both	Six months imprisonment or a fine not exceeding level 4 on the standard scale or both
F	Not applicable (category F offences being triable only in summary proceedings)	Three months imprisonment or a fine not exceeding level 3 on the standard scale or both

PART 2

ALLOCATION OF OFFENCES TO CATEGORIES
FOR THE PURPOSES OF PART 1

<i>Provision creating offence</i>	<i>Names of offences</i>	<i>Category</i>
	<i>Non-sexual offences against life, bodily integrity, liberty and other personal interests</i>	
Section 37	Murder	A
Section 38	Culpable homicide	B
Section 39	Torture	A
Section 40	Inhuman or degrading treatment	B
Section 41	Assault	C

Section 42	Causing unlawful injury	C
Section 43	Causing an unlawful risk of injury	D
Section 44	Slavery	A
Section 45	Abduction	B
Section 46	Deprivation of liberty	C
Section 47	Drugging	C
Section 48	Making unlawful threats	C
Section 49	Violent and alarming behaviour	D
Section 50	Intrusive and alarming behaviour	D
Section 51	Child abuse	C
Section 52	Exposing child to harm	D
Section 53	Exposing child to obscenity or pornography	E
Section 54	Child abduction	C
Section 55	Unlawfully removing child from jurisdiction	C
Section 56	Abortion	E
Section 57	Bigamy	E
Section 58	Entering into forced marriage	D
Section 59	Entering into unlawful marriage	E
	<i>Sexual offences</i>	
Section 61	Rape	A
Section 62	Sexual penetration	A
Section 63	Sexual molestation	C
Section 64	Sexual intercourse by an adult with a minor	C
Section 65	Unlawful sexual activity with a young person	D
Section 66	Sexual intercourse between minors	D
Section 67	Incestuous conduct	B
Section 68	Procuring child for sexual activity	B
Section 69	Sexual exploitation of person with a mental disorder	C
Section 70	Pimping	D
Section 71	Brothel keeping	D
Section 72	Child pornography	C
	<i>Offences against property and economic interests</i>	
Section 75	Piracy	A
Section 76	Robbery	B
Section 77	Theft	C
Section 78	Breaking into a building	C
Section 79	Breaking open a locked place	D
Section 80	Fire-raising	B
Section 81	Criminal damage to property	B
Section 82	Causing an unlawful risk of damage to property	D
Section 83	Criminal interference with property	C
Section 84	Squatting	E
	<i>Offences involving extortion, deception or dishonesty</i>	
Section 85	Extortion	C
Section 86	Fraud	C

Section 87	Embezzlement	C
Section 88	Forgery	C
Section 89	Reset	C
Section 90	Making off without payment	E
	<i>Offences against public order, safety and security</i>	
Section 91	Carrying weapon	D
Section 92	Breach of the peace	E
Section 93	Wasting the time of emergency services	E
Section 94	Presence with intent to commit an offence	F
Section 95	Possession of tools with intent to commit an offence	F
	<i>Offences against public interests in lawful government</i>	
Section 96	Unlawfully attempting to overthrow government	A
Section 97	Perverting the course of justice	C
Section 98(1)	Escaping from lawful custody	D
Section 98(2)	Harbouring	E
Section 99(1)	Corruption	C
Section 99(3)	Abuse of office	E
Section 100(1)	Perjury	C
Section 100(2)	Subornation of perjury	C
Section 101(1)	Making a false oath or statement	E
Section 101(2)	Using a false oath or statement	E
Section 101(3)	Subornation of a false oath or statement	E
Section 102	Contempt of court	E
Section 103	False accusation of crime	D
	<i>Offensive conduct</i>	
Section 104	Unlawful interference with human remains	E
Section 105	Soliciting	E
Section 106	Dealing in obscene material	E
Section 107	Indecent conduct	F
	<i>Offences involving animals</i>	
Section 108	Wanton cruelty to animals	D
Section 109	Sexual activity with an animal	E

SCHEDULE 2
(introduced by section 113)

MINOR AND CONSEQUENTIAL AMENDMENTS

Indecent Displays (Control) Act 1981

- 1 (1) The Indecent Displays (Control) Act is amended as follows.
- (2) For section 5(4)(b) (saving) there is substituted—
“Section 106 (Dealing with obscene material) of the Criminal Law (Scotland) Act 200....”

Civic Government (Scotland) Act 1982 (c.45)

- 2 (1) The Civic Government (Scotland) Act 1982 is amended as follows.
- (2) In section 59(4) for “sections 50, 57 and 58 of this Act” there is substituted “section 50 of this Act and sections 94 (Presence with intent to commit an offence) and 95 (Possession of tools with intent to commit an offence) of the Criminal Law (Scotland) Act 200...”.

Children (Scotland) Act 1995 (c.36)

- 3 (1) The Children (Scotland) Act 1995 is amended as follows.
- (2) In section 52(2)(i), after “offence” there is inserted “or has done something which would have been an offence but for the fact that the child was under the age of 12 years at the time”.

Proceeds of Crime (Scotland) Act 1995 (c.43)

- 4 (1) The Proceeds of Crime (Scotland) Act 1995 is amended as follows.
- (2) In section 21(6) (when property to be regarded as used for the purpose of committing an offence), after the words “the use” there is inserted “or possession”.

Criminal Procedure (Scotland) Act 1995 (c.46)

- 5 (1) The Criminal Procedure (Scotland) Act 1995 is amended as follows.
- (2) In section 5(2) for the words “without prejudice to any other or wider powers conferred by statute” there is substituted “unless the enactment creating the offence provides otherwise” and for the words “a common law offence” there is substituted “an offence”.
- (3) In section 5(3) for the words “without prejudice to any wider powers conferred by statute” there is substituted “unless the enactment creating the offence provides otherwise”.
- (4) In section 7(4), for the words from “(a) theft” to “embezzlement” there is substituted—
“(a) theft
(b) reset;

- (c) fraud;
 - (d) embezzlement,”
- (5) In section 7(6) for the words “without prejudice to any wider powers conferred by statute” there is substituted “unless the enactment creating the offence provides otherwise” and for the words “a common law offence” there is substituted “an offence”.
- (6) In section 7(8)(b) for the words from “robbery” to “coinage” there is substituted—
- “or rape;
 - (ii) robbery, breaking into a building or fire-raising;
 - (iii) theft, reset, fraud or embezzlement, where the value of the property is an amount exceeding level 4 on the standard scale;
 - (iv) assault, where the assault was by stabbing or was aggravated by being committed with intent to rape, or by the fact that it caused serious personal injury or danger to life;
 - (v) forgery or an offence under the Acts relating to coinage.”
- (7) For section 11A, there is substituted—
- “Incitement or conspiracy to commit offences outside Scotland**
- 11A.—**(1) Where a person is charged with incitement or conspiracy to commit an offence in a country or territory outside Scotland any requirement that an act or omission, which would be an offence under the law of Scotland if done or made in Scotland, be punishable under the law of that other country or territory is taken to be satisfied unless, not later than such time as the High Court may, by Act of Adjournal, prescribe, the accused serves on the prosecutor a notice—
- (a) stating that, on the facts as alleged, the requirement is not, in the opinion of the accused, satisfied;
 - (b) setting out the grounds for that opinion; and
 - (c) requiring the prosecutor to prove that the condition is satisfied.
- (2) The court may permit the accused to require the prosecutor to prove that the requirement is satisfied without the prior service of a notice by the accused.
- (3) In proceedings on indictment the question whether the requirement is satisfied is to be determined by the judge alone.”
- (8) After section 16 there is added the following section—
- “Special police powers in relation to weapons**
- 16A.—**(1) Where a constable has reasonable grounds for suspecting that any person is carrying a weapon and has committed or is committing an offence under section 91 (Carrying weapon) of the Criminal Law (Scotland) Act 200..., the constable may search that person without a warrant, and detain that person for such time as is reasonably required to permit the search to be carried out; and shall inform the person of the reason for such detention.
- (2) Where a constable has reasonable cause to believe that a person has committed or is committing an offence under section 91 of the Criminal Law (Scotland) Act 200... and the constable -

(a) having requested that person to give his name or address or both -
(i) is not given the information requested; or
(ii) is not satisfied that such information as is given is correct; or
(b) has reasonable cause to believe that it is necessary to arrest him in order to prevent the commission by him of any other offence in the course of committing which a weapon might be used,
he may arrest that person without a warrant.

(3) Any person who—
(a) intentionally obstructs a constable in the exercise of the constable's powers under subsection (1); or
(b) conceals a weapon from a constable acting in the exercise of those powers,
shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 4 on the standard scale.

(4) A constable may arrest without warrant any person who he has reason to believe has committed an offence under subsection (3).

(5) A constable may enter school premises or medical premises and search those premises and any person on those premises for any weapon if he has reasonable grounds for suspecting that an offence under section 91 (Carrying weapon) of the Criminal Law (Scotland) Act 200... has been or is being committed on those premises.

(6) If in the course of a search under subsection (5) the constable discovers an article which he has reasonable grounds for believing to be a weapon he may seize it.

(7) The constable may use reasonable force, if necessary, in the exercise of the power of entry conferred by subsection (5).

(8) In this section, “weapon”, “school premises” and “medical premises” have the same meanings as in section 91 (Carrying weapon) of the Criminal Law (Scotland) Act 200....”

(9) In section 19A(6) (inserted by section 48 of the Crime and Punishment (Scotland) Act 1997 (c.48)—

(a) in the definition of “relevant sexual offence” for the words from “of the following offences” to “(homosexual offences)” there is substituted—
“offence under Part 3 (Sexual offences) of the Criminal Law (Scotland) Act 200...”;

(b) in the definition of “relevant violent offence” for the words from “(a) murder” to “United Kingdom” there is substituted—

“(a) any offence under sections 37 (Murder), 38 (Culpable homicide), 39 (Torture), 40 (Inhuman or degrading treatment), 41 (Assault), 42 (Causing unlawful injury), 43 (Causing an unlawful risk of injury), 45 (Abduction), 46 (Deprivation of liberty), 51 (Child abuse), 54 (Child abduction) or 80 (Fire-raising) of the Criminal Law (Scotland) Act 200...;

- (b) any offence under sections 2 (Causing explosion likely to endanger life) or 3 (Attempting to cause such an explosion) of the Explosive Substances Act 1883; and
- (c) any offence under sections 16 (Possession of firearm with intent to endanger life or cause serious injury), 17 (Use of firearm to resist arrest) or 18 (Having a firearm for purpose of committing an offence listed in Schedule 2) of the Firearms Act 1968”;
- (c) in the definition of “specified relevant offence”—
 - (i) for paragraph (a) there is substituted—
 - “(a) any offence under sections 61 (Rape), 62 (Sexual penetration) or 63 (Sexual molestation) of the Criminal Law (Scotland) Act 200...; and”
 - (ii) for paragraph (b) there is substituted—
 - “(b) any offence under sections 37 (Murder) or 38 (Culpable homicide) of the Criminal Law (Scotland) Act 200...; any offence under section 41 (Assault) of that Act where the assault is aggravated by the fact that it caused serious personal injury or danger to life; and any offence under section 45 (Abduction) or section 54 (Child abduction) of that Act”.
- (10) In section 46—
 - (a) in subsection (1), for “Children and Young Persons (Scotland) Act 1937” there is substituted “the legislation creating the offence”;
 - (b) for subsection (3) there is substituted—
 - “(3) Without prejudice to section 255A of this Act, where in an indictment or complaint for an offence which can be committed only by or in respect of a child or a person within a certain age range it is alleged that the person by or in respect of whom the offence was committed was a child or was within that age range, and he appears to the court to have been at the date of the commission of the alleged offence a child (within the meaning of the Act creating the offence), or to have been within that age range, he shall for the purposes of this Act and of the legislation creating the offence be presumed at that date to have been a child (within the meaning of the Act creating the offence) or to have been within that age range, unless the contrary is proved.”;
 - (c) in subsection (4), for the words from “under” to “this Act” there is substituted “which can be committed in respect of a child or young person”;
 - (d) subsection (7) is deleted.
- (11) In section 54(6) for the word “insane” where it first occurs there is substituted “suffering from mental disorder”; for the word “insane” where it second occurs there is substituted “suffering from mental disorder”; and for the word “insanity” there is substituted “mental disorder”.
- (12) In section 55(4) for the word “insane” where it first occurs there is substituted “suffering from mental disorder”, and for the word “insane” where it second occurs there is substituted “mental disorder”.

- (13) In section 57(1) for the word “insanity” there is substituted “mental disorder”.
- (14) In section 62(2)(b)(iii) for the word “insanity” there is substituted “mental disorder”.
- (15) In section 63(1)(b) and (c) for the word “insanity” there is substituted “mental disorder”.
- (16) In section 64(2) for the words from “in the forms” to the end of the subsection there is substituted “in such form as may be specified by Act of Adjournal”.
- (17) In section 78(2) for the word “automatism” there is substituted “involuntary conduct”.
- (18) In section 138(2) for the words from “shall be” to the end of the subsection there is substituted “may be in such form as may be specified by Act of Adjournal”.
- (19) In section 190(1) for the word “insane” where it first occurs there is substituted “as a result of mental disorder incapable of conforming to the relevant requirements of the criminal law or of appreciating the true nature or significance of the act”, and for the word “insanity” there is substituted “mental disorder”.
- (20) In section 205—
 in subsection (1), for “shall” there is substituted “may”;
 in subsection (2), after “but” there is inserted “may be sentenced” and after “and shall” there is inserted “then”;
 in subsection (3), after “but” there is inserted “may be sentenced”, after “detained” (where it first occurs) there is inserted “without limit of time” and after “and shall” there is inserted “then”.
- (21) In section 205D (inserted by the Convention Rights Compliance (Scotland) Act 201 (asp 7) the words “must impose or” are deleted.
- (22) In section 210A(10), for the definition of “sexual offence” there is substituted—
 ““sexual offence” means—
 (i) an offence under Part 3 (Sexual offences) of the Criminal Law (Scotland) Act 200...;
 (ii) an offence under section 41 (Assault) or 45 (Abduction) of that Act aggravated by an intent to commit an offence under Part 3 (Sexual offences) of that Act; and
 (iii) an offence under section 170 of the Customs and Excise Management Act 1979 in relation to goods prohibited to be imported under section 42 of the Customs Consolidation Act 1876, but only where the prohibited goods include indecent photographs of persons.”.

- (23) In section 274(2), for the words from “any of the following offences” to the end of the subsection there is substituted “an offence under Part 3 (Sexual offences) of the Criminal Law (Scotland) Act 200...”.
- (24) In section 307, in the definition of “child” the words from “except” to “this Act” are deleted.
- (25) In Schedule 1, for the list of offences there is substituted—
- “1. Any offence under sections 51 to 55 (“Offences relating to children”) of the Criminal Law (Scotland) Act 200....
 2. Any offence under sections 64, 65(a), 66, 68, or 72 (being sexual offences which necessarily involve a child under the age of 16 years) of the Criminal Law (Scotland) Act 200....
 3. Any other offence involving violence or injury to, abuse, maltreatment, neglect, or exposure to danger of, or sexual acts or conduct towards, a child under the age of 17 years.”
- (26) In Schedule 3—
- (a) in paragraph 2, at the end, there is added—
“and specifies the enactment or other legislative provision alleged to have been contravened”;
 - (b) in paragraph 3, for the words from “wilfully” to “allegation” there is substituted “with any particular state of mind, but a reference to the state of mind required for the commission of the offence”;
 - (c) paragraph 8 is replaced by the following paragraph—

“ 8.—(1) For the purpose of section 6 (Overlapping offences) of the Criminal Law (Scotland) Act 200..., notice that an accused charged with an offence may be convicted of another offence may be given by means of a note on the indictment or complaint specifying any other offence or offences in respect of which a conviction may be sought in the proceedings.

(2) The power conferred by section 6 (Overlapping offences) of the Criminal Law (Scotland) Act 200... to convict a person of an offence other than that with which he is charged shall be exercisable by the sheriff court before which he is tried notwithstanding that the other offence was committed outside the jurisdiction of that sheriff court.”
- (27) In Schedule 5, the words from “You did assault” to “to O.R., and steal it” are deleted.
- (28) In Schedule 5A (inserted by section 1 of the Crime and Punishment (Scotland) Act 1997 (c.48)—
- (a) paragraphs 4 and 5 are deleted;

- (b) for paragraph 6 there is substituted—
 - “(6) Assault, where the assault was aggravated
 - (a) by being committed with intent to rape; or
 - (b) by the fact that it caused serious personal injury or danger to life.”;
- (c) paragraphs 9 and 10 are deleted.

Sex Offenders Act 1997 (c.51)

6 (1) The Sex Offenders Act 1997 is amended as follows.

- (2) In Schedule 1, paragraph 2 (Offences in Scotland)—
 - (a) in sub-paragraph (1)—
 - (i) for sub-sub-paragraph (a) there is substituted—
 - “(a) an offence under Part 3 (Sexual offences) of the Criminal Law (Scotland) Act 200...”;
 - (ii) sub-sub-paragraphs (c) and (d) are deleted;
 - (b) in sub-paragraph (2), sub-sub-paragraphs (a) (b) (d) (e) and (f) are deleted; and
 - (c) sub-paragraph (3) is deleted.

International Criminal Court (Scotland) Act 2001 (asp 13)

7 (1) The International Criminal Court (Scotland) Act 2001 is amended as follows.

- (2) In subsection (1), at the end, there is inserted “including those set out in Part 1 of the Criminal Law (Scotland) Act 200...”

Protection of Children (Scotland) Act 2003 (asp 5)

8 (1) The Protection of Children (Scotland) Act 2003 is amended as follows.

- (2) In section 10(1) for “insanity” there is substituted “mental disorder”.
- (3) In schedule 1, for paragraphs 1 and 2 there is substituted—
 - “1. The offences referred to in sub-paragraph (i) of section 10(9)(a) above are offences under sections 51, 52, 53, 64, 65, 66 or 68 of the Criminal Law (Scotland) Act 200...
 - 2. An individual falls within this paragraph if the individual—
 - (a) commits an offence under any other provision of Part 3 of the Criminal Law (Scotland) Act 200... where the victim was a child; or
 - (b) commits any other offence which caused, or was intended to cause, bodily injury to a child.”

Criminal Justice (Scotland) Act 2003 (asp 7)

9 (1) The Criminal Justice (Scotland) Act 2003 is amended as follows.

- (2) In section 22(7), for the words from “section 51 of the Civic Government (Scotland) Act 1982 (c.45)” there is substituted ““material” includes any representation in any form or medium”.

SCHEDULE 3
(introduced by section 113)

REPEALS

Enactment	Extent of Repeal
The Slave Trade Act 1824 (c.113)	The whole Act
Trespass (Scotland) Act 1865 (c.56)	The whole Act.
Public Bodies Corrupt Practices Act 1889 (c.69)	The whole Act.
False Oaths (Scotland) Act 1933 (c.20)	The whole Act.
Children and Young Persons (Scotland) Act 1937 (c.37)	Sections 12, 16, 22 and 33.
Presumption of Death (Scotland) Act 1977 (c.27)	Section 13.
Civic Government (Scotland) Act 1982 (c.45)	Sections 46, 51, 52, 57 and 58.
Incest and Related Offences (Scotland) Act 1986 (c.36)	The whole Act.
Criminal Law (Consolidation) (Scotland) Act 1995 (c.39)	Parts I and VI (except section 53).
Criminal Procedure (Scotland) Act 1995 (c.46)	Sections 5(4), 11, 11A, 19A(7)(b), 41, 210(11)(b), 293. Schedule 2. Schedule 3, paragraphs 7, 9 10, 14 and 17.
Sexual Offences (Amendment) Act 2000 (c.44)	Sections 3 and 4.
Criminal Justice (Scotland) Act 2003 (asp 7)	Sections 51 and 74.
Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13)	Sections 311 to 314.

COMMENTARY

The Act permits the repeal of a number of statutory provisions. The Incest and Related Offences (Scotland) Act 1986 should have been repealed by the Criminal Law (Consolidation) (Scotland) Act 1995 (sections 1-4 of which reproduce the provisions of section 1 of the 1986 Act).

About the authors

Eric Clive was Professor of Scots Law in the University of Edinburgh, then for 19 years a full-time member of the Scottish Law Commission and is now back in the University of Edinburgh as a visiting professor. He has a long-standing interest in law reform, codification and legislative drafting. He is a member of the Law Reform Committee of the Law Society of Scotland. He is on the panel of legislative drafters for the Non-Executive Bills Unit for the Scottish Parliament and has recently drafted Bills for the Parliament and for the Scottish Law Commission. He is on the Drafting Committee for the Study Group on a European Civil Code. Address: School of Law, University of Edinburgh, Old College, South Bridge, Edinburgh EH8 9YL, Scotland. Email address: eric.clive@ed.ac.uk

Pamela Ferguson is Professor of Scots Law at the University of Dundee and the author of articles on criminal law. She teaches criminal law and is convenor of the Scottish Criminal Law Forum. Prior to becoming an academic she was a member of the Procurator Fiscal service. Professor Ferguson was appointed as senior adviser to the Scottish Parliament's Justice 2 Committee during its inquiry into the Crown Office and Procurator Fiscal Service. Address: Department of Law, University of Dundee, Scrymgeour Building, Dundee DD1 4HN, Scotland. Email address: p.r.ferguson@dundee.ac.uk

Christopher Gane is Professor of Scots Law at Aberdeen University and is the author or co-author of several text books on Scottish criminal law. He is a member of the Criminal Law Committee of the Law Society of Scotland and has also acted as an adviser to the Scottish Parliament's Justice Committee. Address: School of Law, University of Aberdeen, Taylor Building, Aberdeen AB24 3UB, Scotland. Email address: c.gane@abdn.ac.uk

Alexander McCall Smith is a professor in the Law School at Edinburgh University and teaches criminal law at honours and postgraduate level. He is co-author of a major textbook on law and medicine and the author of several books on criminal law. Address: School of Law, University of Edinburgh, Old College, South Bridge, Edinburgh EH8 9YL, Scotland. Email address: Sandy.McCall.Smith@ed.ac.uk