The Law Commission

(LAW COM. No. 89)

CRIMINAL LAW

REPORT ON THE MENTAL ELEMENT IN CRIME

Laid before Parliament by the Lord High Chancellor
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The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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CONTENTS

THE LAW COMMISSION

Item XVIII of the Second Programme

THE MENTAL ELEMENT IN CRIME

To the Right Honourable the Lord Elwyn-Jones, C.H.,
Lord High Chancellor of Great Britain

PART I: INTRODUCTION

1. Under Item XVIII of its *Second Programme of Law Reform*[1] the Law Commission is responsible for examining the general principles of the criminal law with a view to their eventual codification. In carrying out this task we have been assisted by a Working Party[2] who, as part of their examination of these general principles, prepared a working paper[3] on the mental element in crime.

2. Apart from the great assistance given to us by the Working Party, we have had constructive and helpful comments on the working paper from many individuals and organisations[4]. We have also had most valuable discussions with the Criminal Law Revision Committee who are concerned with the mental element in crime as it affects, in particular, the topic of offences against the person. Following the recommendation under Item XVIII of our Second Programme, this topic has been referred by the Home Secretary to that Committee. The Committee published a Working Paper on Offences against the Person in August 1976.

3. Our recommendations are summarised in Part VI and there is attached at Appendix A a draft Bill which would give effect to those which required legislation. Our hope is that, if our recommendations are adopted, the draft Bill will provide a first instalment of legislation setting out all the general principles of a new code of criminal law.

PART II: THE SCOPE OF THIS REPORT

4. The state of mind of a defendant may be relevant to four different aspects of crime. It is only with the fourth of these that we are concerned in this report. The first aspect is the mental capacity in general of the accused. Thus, whereas a child under ten is entirely exempt from criminal responsibility[5], a child between the ages of ten and fourteen may be criminally liable for an offence if he did the prohibited act knowing that the act was against the law or at least that it was morally wrong[6]. Secondly, there is the question of the effect upon the defendant's legal responsibility of any mental disorder or abnormality of mind

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1 (1968) Law Com. No. 14.
2 The membership of the Working Party is set out in Appendix B.
3 (1970) Working Paper No. 31.
4 See Appendix C for a list of those who commented on the working paper.
5 Children and Young Persons Act 1933, s. 50, as amended by the Children and Young Persons Act 1963, s. 16.
6 Smith and Hogan, *Criminal Law*, 3rd ed., 1973, p. 129.

from which he may have been suffering at the time when he did the act specified in the offence with which he is charged. Mental disorder may either relieve a defendant of legal responsibility altogether, when a special verdict is returned, or may result in a reduction in the seriousness of the offence charged as with the defence of diminished responsibility[7] or the provisions as to infanticide[8]. Thirdly, the state of mind of the defendant has to be considered in relation to his muscular movement resulting in the prohibited act. The muscular movement has to be voluntary (in the sense of a conscious exercise of the will) before it can be said that the defendant committed that act, or in other words that it was his act. A muscular movement may be involuntary because that person is in a state which has come to be called "non-insane automatism", which can be brought about by, for example, drink or drugs or physical injury such as concussion, or can happen through a natural phenomenon such as sleep walking. Questions relating to mentally disordered offenders, legal insanity and automatism, whether caused by drink or drugs or otherwise, are dealt with in the Report of the Committee on Mentally Abnormal Offenders under the Chairmanship of the Rt. Hon. Lord Butler[9].

5. The fourth aspect of an offence where the state of mind of the accused may be relevant, and the one which is the primary concern of this report, involves asking the question: what state of mind (if any) is required in the accused with regard to the other requirements of the offence in question? Our purpose is to make recommendations to reduce the uncertainty, which may otherwise arise in respect of any future offence-creating provision [10], in answering this question.

6. We emphasise that we are not in this report expressing a view, or making recommendations, as to the precise mental element (or absence of such a requirement) which as a matter of policy may be appropriate to specific offences. We are recommending in the first place that there should be statutory provisions as to the meaning of intention, knowledge and recklessness, which provisions should apply unless expressly excluded[11]. They will not, however, apply to an enactment unless it employs one of these terms. Much of the value of the provisions would be lost if Parliament, in creating new offences, frequently used terms other than those specified to indicate what mental elements are comprised in them. We think that the specified terms will be sufficient to cover the desired mental element in the great majority of cases. Of course, there may be exceptional circumstances in which the use of other words will be unavoidable. But we are strongly recommending that terms denoting a mental element other than those we specify should wherever possible be avoided[12].

7. Secondly, we are recommending that there should be certain statutory presumptions[13], operating in the absence of express indication to the contrary,

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7 Homicide Act 1957, s. 2.

8 Infanticide Act 1938.

9 (1975) Cmnd. 6244.

10 For the reasons why our recommendations are limited to future offences, see para. 70, below.

11 See paras. 44, 49, 60, 65 and 72, below.

12 See para. 72 (*b*), below. We refer, in particular, to the words "maliciously" and "wilfully": see paras. 10–11, below.

13 See paras. 89 and 91, below.

as to the extent to which offences should be taken to require a mental state on the part of the defendant. However, although we think it necessary to have these presumptions to provide guidance to the courts if the offence in question gives no indication as to this matter, we are strongly recommending that, in future provisions, such indications should be provided[14], and furthermore that, where it is intended to require a mental state in the defendant, the terms[15] "intention", "knowledge" or "recklessness" should be employed[16].

8. In Part V of this report we consider a different kind of question from those which have been mentioned in the preceding paragraphs. Section 8 of the Criminal Justice Act 1967 provides that a court or jury determining whether a person has committed an offence is not bound in law to infer that he intended or foresaw a result of his actions only because that result was a natural and probable consequence of them. That section, which was passed following the decision of the House of Lords in *Director of Public Prosecutions* v. *Smith*[17], does not deal with cases where the mental element under consideration is recklessness as to a result, knowledge of a fact, or recklessness as to whether a circumstance exists. In Part V we recommend the extension of the underlying principle of section 8 of the 1967 Act in such a way as to cover these cases.

PART III: ELEMENTS OF UNCERTAINTY AS TO THE MENTAL STATE

9. Experience with existing and past offences shows that the uncertainty which can arise as to the mental element (if any) in particular offences is of three kinds. In the first place, there is no general agreement as to the precise meaning of the words used in statutes to denote a mental element. It is apposite in this connection to cite Lord Simon of Glaisdale in *D.P.P. for Northern Ireland* v. *Lynch*[18] where, speaking in a wider context than the issue of duress, with which that case was primarily concerned, he said—

> "A principal difficulty in this branch of the law is the chaotic terminology, whether in judgments, academic writings or statutes. Will, volition, motive, purpose, object, view, intention, intent, specific intent or intention, wish, desire; necessity, coercion, compulsion, duress—such terms which do indeed overlap in certain contexts, seem frequently to be used interchangeably, without definition, and regardless that in some cases the legal usage is a term of art differing from the popular usage. As if this were not enough, Latin expressions which are themselves ambiguous, and often overlap more than one of the English terms, have been freely used—especially animus and (most question-begging of all) mens rea".

Where such words are used in an offence-creating provision there is usually no statutory guidance as to their meaning, either in the enactment itself or in any

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[14] See para. 75, below.
[15] See paras. 44, 49, 60 and 65, below.
[16] See para. 72, below.
[17] [1961] A.C. 290.
[18] [1975] A.C. 653, 688.

other enactment by which it can be interpreted, Secondly, there has sometimes been uncertainty as to whether a requirement of a mental state, which is provided for in the enactment, applies to all the requirements of the offence. For example, section 23 of the Larceny Act 1861 (repealed by the Theft Act 1968) created an offence of "unlawfully and wilfully" killing, wounding or taking a house dove or pigeon. In each of *Horton* v. *Gwynne*[19] and *Cotterill* v. *Penn*[20] the defendant, who shot and killed a house pigeon in the belief that it was a wild pigeon, was held to be guilty of this offence, apparently on the ground that the "wilfulness" extended only to the element of killing a pigeon, and not to the additional element that it had to be a pigeon of the domestic variety. Thirdly, there has been uncertainty where the offence under consideration appears on its face to require no mental element on the part of the defendant, and the question arises whether the courts should read a requirement of a mental state into the offence and, if so, what Parliament intended the nature of that requirement to be. It was not until 1975 that it became clear that so ordinary an offence as assault occasioning actual bodily harm could be committed not only intentionally but also recklessly[21].

1. The meaning of terms denoting a mental state

(i) "Maliciously"

10. The word "maliciously" was used extensively in the legislation which was consolidated in the Offences against the Person Act 1861 and the Malicious Damage Act 1861. Perhaps the one thing which can be said with certainty about this word, as used in these Acts, is that it does not bear anything like the meaning which the word "maliciously" would normally be understood to have in ordinary English. In *R.* v. *Cunningham*[22] the defendant ripped a gas meter from the wall of an unoccupied house in order to steal money from it; gas escaped into a neighbouring house and was inhaled by, and endangered the life of, another person. He was charged with an offence under section 23 of the Offences against the Person Act 1861 of "unlawfully and maliciously" administering or causing "to be administered to or taken by any other person any poison or other destructive or noxious thing, so as thereby to endanger the life of such person." The Court of Criminal Appeal, in criticising the judge's direction to the jury that "malicious" meant "wicked", cited with approval [23] the formulation in the then current editions of Kenny's *Outlines of Criminal Law* and of *Russell on Crime* of what constitutes "malice" in a statute. According to this test "malice" in a statute requires—

> "either (1) an actual intention to do the particular kind of harm that was in fact done; or (2) recklessness as to whether such harm should occur or

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19 [1921] 2 K.B. 661.

20 [1936] 1 K.B. 53.

21 *R.* v. *Venna* (1975) 61 Cr. App. R. 310.

22 [1957] 2 Q.B. 396.

23 How complete the Court's approval was is perhaps doubtful: although Kenny's test, with its reference to the necessity in recklessness of foreseeing the risk that the *particular kind of harm* might result, seems to have been unqualifiedly accepted, at p. 401 of the judgment it was said that the question which should have been left to the jury was whether, even if the appellant did not intend the injury, he foresaw that the removal of the gas meter might cause *injury to someone*. This provides a possible way of reconciling *R.* v. *Cunningham* and *R.* v. *Mowatt*, the next case mentioned below.

not (i.e. the accused has foreseen that the particular kind of harm might be done and yet has gone on to take the risk of it). It is neither limited to nor does it indeed require any ill will towards the person injured".

But in *R.* v. *Mowatt* the Court of Appeal held that the word "maliciously" did not, in respect of the "recklessness" mentioned in Kenny's test, require that the accused should have foreseen that his unlawful act might cause a wound or grievous bodily harm, but that any physical harm to some person, even if of a minor character, would suffice[24]. *R.* v. *Mowatt* related to a charge under section 20 of the Offences against the Person Act 1861 of "unlawfully and maliciously" wounding or inflicting "any grievous bodily harm upon any other person". Whatever the precise meaning of "maliciously" in law, it can hardly be regarded as satisfactory to use in an offence-creating enactment a word to which the ingenuity of textbook writers and judges has attributed an effect so far removed from its natural meaning.

(ii) "Wilfully"

11. "Wilfully" is another word which, in different contexts, has raised problems, some of which remain unresolved. In *Eaton* v. *Cobb*[25] a charge was brought under section 72 of the Highways Act 1835 which made it an offence "in any way wilfully" to "obstruct the free passage of any. . . highway". It was held by the Divisional Court that a motorist who opened the offside door of his car, having "acted reasonably in looking in his mirror to see if there was anybody passing the motor car, and through no fault of his failed to see the person who was about the pass the car", was not guilty of wilful obstruction. This decision does not settle the question whether "wilfulness" is equivalent to "malice" and whether, in the same way as the latter term was construed in *R.* v. *Cunningham*[26], it requires either "intention" or "recklessness". In *R.* v. *Holroyd*[27], however, Maule J. held that the defendant was guilty under section 15 of the Railway Regulation Act 1840 (by which a "person who shall wilfully do or cause to be done any thing in such manner as to obstruct any engine or carriage using any railway" committed an offence) if he "designedly placed [on the rails] substances having a tendency to produce an obstruction, not caring whether they actually impeded the carriages or not"[28]. In the different context of an offence under section 40[29] of the Medical Act 1858 of "wilfully and falsely" using one of the titles or descriptions mentioned in that section,

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[24] [1968] 1 Q.B. 421, 426. The decision is criticised in Smith and Hogan, *Criminal Law*, 3rd ed., 1973, pp. 301–302, on the ground that a person who intends some injury less than wounding or grievous bodily harm should only be guilty of the lesser offence of assault occasioning actual bodily harm, although the maximum punishment for that offence is the same as under s. 20.

[25] [1950] 1 All E.R. 1016.

[26] See para. 10, above.

[27] (1841) 2 Moo. and Rob. 339, 341; 174 E.R. 308, 310.

[28] As to whether the mental state of "not caring" amounts to recklessness see para. 64, below.

[29] Re-enacted in substantially the same terms, including the requirement of "wilfully and falsely", by s. 31 of the Medical Act 1956. The hope expressed by Lord Goddard C.J. in *Wilson* v. *Inyang* [1951] 2 K.B. 799, 802 "that some day the General Medical Council will take steps to get another Act of Parliament which will clear up the anomalies and difficulties which the courts have found in applying the relevant statutory provisions to this class of fact" does not therefore appear to have been realised.

"implying that [the defendant] is registered under this Act", Lord Goddard C. J. held[30] that "he does not commit an offence if he honestly believes that he was within his rights in describing himself as he did". Lord Goddard went on to say that the fact that the defendant had no reasonable ground for his belief was only evidence of his lack of an honest belief and that the question whether a person acted honestly was a question of fact for the magistrate[31].

(iii) "With intent"

12. "Intent" and "intention" are words which in relation to offences have given rise to considerable uncertainty. Since section 8 of the Criminal Justice Act 1967 came into effect it has been clear that a person's intention, or foresight of the result of his actions, is not to be conclusively presumed by reason only of that result being a natural and probable result of those actions; but, if the result is a natural and probable result of those actions, that is part of the evidence from which the intention or foresight may be inferred. There is also general agreement among judges and textbook writers as to one other matter bearing on the meaning of "intent", namely that a person can in law intend an event whether or not he desires it for its own sake; in other words it is immaterial, as far as his intent to bring about a particular result is concerned, that he has a further aim or motive[32]; but the latter may of course be relevant to the appropriate punishment for bringing about the particular result. Apart from this largely negative guidance, the precise meaning of "intention" in relation to any given event remains in some doubt.

13. In *Hyam* v. *D.P.P.*[33] the accused went to the house of another woman and poured through her letter-box some petrol which the accused then set alight. According to her defence, she intended only to frighten the other woman, but, although the latter escaped, two of her children lost their lives in the resulting

[30] In *Wilson* v. *Inyang* [1951] 2 K.B. 799, 803–804, where Lord Goddard explained the apparently somewhat inconsistent earlier decision of the Divisional Court in *Younghusband* v. *Luftig* [1949] 2 K.B. 354.

[31] The meaning of "wilful" has also been discussed with reference to the offence of wilfully obstructing a constable in the execution of his duty, under the Police Act 1964, s. 51(3). In *Rice* v. *Connolly* [1966] 2 Q.B. 414, 419, Lord Parker C.J. said " 'wilful' in this context not only in my judgment means 'intentional' but something which is done without lawful excuse"; therefore the defendant, who had refused to answer a constable's questions, or to accompany him to a police box unless arrested, was not guilty of an offence, since, though undoubtedly he had "obstructed" the constable in the execution of his duty, he was lawfully entitled to refuse to comply with the constable's demands. But in *Dibble* v. *Ingleton* [1972] 1 Q.B. 480 (where a motorist, who had been stopped by the police with a view to a breath test under the Road Safety Act 1967, frustrated the test by deliberately taking a drink of whisky) the court had to qualify the "without lawful excuse" test by holding that it did not apply to the doing of a positive act, as opposed to a mere refusal to act. It is however arguable that these cases do not so much elucidate the meaning of "wilful" as define the circumstances in which, in spite of the requirement of "wilfulness" in an offence-creating provision, the courts will read into the provision a qualification of "without lawful excuse". In *Wilmott* v. *Atack* [1976] 3 W.L.R. 753 a conviction under s. 51(3) was quashed because the defendant had tried to help, and not merely to obstruct, the police officer.

[32] As Lord Hailsham of St. Marylebone L.C. pointed out in *Hyam* v. *D.P.P.* [1975] A.C. 55, 73, motive in a legal context has two meanings: first, it can relate to the motive power—jealousy, fear, etc.—which gives rise to an intention; secondly, it means a "kind of intention" (Glanville Williams, *Criminal Law* (*The General Part*), 2nd ed., 1961, p. 48). It is the second meaning to which we here refer.

[33] See n. 32, above.

fire. On these facts the question which the House of Lords had to decide was what was the mental state required in the accused to make her guilty of murder. The majority[34] held that the requirement of "malice aforethought" (the traditional term used to describe the mental element in murder) was satisfied if the accused did the acts resulting in the deaths, not intending to endanger life but knowing that it was probable that grievous, in the sense of really serious, bodily harm would result.

14. With the implications of this decision, in so far as it does not bear on the meaning of intention, we are not directly concerned in this report. However, in the course of his speech[35] Lord Hailsham of St. Marylebone L. C. cited with approval Asquith L. J. in a civil case[36] where the latter said: "An 'intention' to my mind connotes a state of affairs which the party 'intending'—I will call him X—does more than merely contemplate: it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of volition". Lord Hailsham went on to say that he thought it clear that " 'intention' is clearly to be distinguished alike from 'desire' and from *foresight of the probable consequences*"[37]; but he conceded that "no doubt foresight and the degree of likelihood with which consequences are foreseen are essential factors which should be placed before a jury in directing them as to whether the consequences are intended".

15. On the other hand Viscount Dilhorne[38], although he did not think it strictly necessary for the purposes of the case to decide whether Ackner J. was wrong in saying in his direction to the jury in *Hyam's* case that knowledge of the high probability of consequences established an intent in respect of them, "inclined to the view" that the trial judge was correct. "If [a man] does [an act] deliberately and intentionally, knowing when he does it that it is highly probable that grievous bodily harm will result, I think most people would say and be justified in saying that whatever other intentions he may have had as well, he at least intended grievous bodily harm". Lord Diplock[39], while dissenting on another point[40], took "the uncomplicated view that in crimes of this class no distinction is to be drawn in English law between the state of mind of one who does an act because he desires it to produce a particular evil consequence, and the state of mind of one who does the act knowing full well that it is likely to produce that consequence although it may not be the object he was seeking to achieve by doing the act. What is common to both these states of mind is willingness to produce the particular evil consequence."

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34 Lords Diplock and Kilbrandon dissented on the ground that the correct test was "that in order to amount to the crime of murder the offender, if he did not intend to kill, must have intended or foreseen as a likely consequence of his act that human life would be endangered" (Lord Diplock in *Hyam* v. *D.P.P.* [1975] A.C. 55, 93).

35 [1975] A.C. 55, 74.

36 *Cunliffe* v. *Goodman* [1950] 2 K.B. 237.

37 Emphasis added.

38 [1975] A.C. 55, 82.

39 *ibid.*, at p. 86.

40 See n. 34, above.

16. Lord Cross of Chelsea[41], however, was a little more hesitant: on the one hand he thought that "if, for example, someone parks a car in a city street with a time bomb in it which explodes and injures a number of people . . . the ordinary man might well argue as follows: 'The man responsible for this outrage did not injure these people unintentionally; he injured them intentionally. So he can fairly be said to have intentionally injured them—that is to say, to have intended to injure them. The fact that he was not certain that anyone would be injured is quite irrelevant (after all, how could he possibly be certain that anyone would be injured?); and the fact that, although he foresaw that it was likely that some people would be injured, it was a matter of indifference to him whether they were injured or not (his object being simply to call attention to Irish grievances and to demonstrate the power of the I.R.A.) is equally irrelevant' ". On the other hand Lord Cross conceded that "a logician might object that the ordinary man was using the word 'intentionally' with two different shades of meaning", and he was "prepared to assume that as a matter of the correct use of language the man in question did not intend to injure those who were in fact injured by his act".

17. With the varying views expressed by the Law Lords in *Hyam* v. *D.P.P.* regarding the meaning of "intent" may be contrasted the decision of the Court of Appeal in the subsequent case of *R.* v. *Mohan*[42]. In the latter the defendant, in response to a policeman's signal to stop, slowed down his car but then accelerated, driving it at the policeman, who had to jump aside to avoid injury; the defendant thereupon drove on without stopping. He appealed against conviction on a count in the indictment which charged him with an attempt to commit the offence, under section 35[43] of the Offences against the Person Act 1861, of causing bodily harm to a person by wanton driving. The court held in the first place that the offence of attempt required proof of an intent to commit the crime attempted. But it held further that "evidence of knowledge of likely consequences, or from which knowledge of likely consequences can be inferred, is evidence by which intent may be established but it is not, in relation to the offence of attempt, to be equated with intent. If the jury find such knowledge established they may and, using common sense, they probably will find intent proved, but it is not the case that they must do so"[44]. The court therefore allowed the appeal on the ground that the trial judge's direction as to the mental element, namely "[the accused] must have realised . . . that such driving—unless it were to stop . . . — was likely to cause bodily harm if he went on, or he was reckless as to whether bodily harm was caused", inadequately explained the state of mind required of an accused to make him liable for an attempt.

18. There are other decisions where intent has been interpreted to mean a resolution to bring about a certain result, and not to include foresight of a given degree of likelihood that a certain result will ensue. For example, section 18 of the Offences against the Person Act 1861 makes it an offence "unlawfully and

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41 [1975] A.C. 55, 96.

42 [1976] Q.B. 1.

43 "Whosoever, having the charge of any carriage or vehicle, shall by wanton or furious driving or racing, or other wilful misconduct, or by wilful neglect, do or cause to be done any bodily harm to any person whatsoever, shall be guilty of an offence . . .."

44 [1976] Q.B. 1, 10–11.

maliciously by any means whatsoever [to] wound or cause any grievous bodily harm to any person *with intent* to do some grievous bodily harm to any person"[45]. In two cases[46], decided on essentially similar provisions in legislation superseded by the 1861 Act, the facts suggest that the accused may have recognised that their acts might cause grievous bodily harm; nevertheless it was clearly laid down that what the offence required was an intent to inflict grievous bodily harm, with no suggestion that "intent" for this purpose included foresight of a certain degree of likelihood that such harm would result. More recently, in *R.* v. *Belfon*[47] where the relevant offence was under section 18 of the Offences against the Person Act 1861, the Court of Appeal held that the requirement of an intent to do grievous bodily harm could not be met by proof of recklessness and treated the speeches of the House of Lords in *Hyam* v. *D.P.P.*[48] as limited to murder[49].

(iv) "Knowing "or "with knowledge"

19. The concept of "intention" which we have discussed in the preceding paragraphs is normally used[50] in the context of the criminal law in respect of certain results. Some offences, however, involve no results[51], although all offences prescribe certain circumstances to be present before criminal liability can be established. The question which then arises is what mental state, if any, is required of the accused in relation to those circumstances, and further (which is the question particularly relevant to this report) how is such a mental state to be indicated. It would probably be generally agreed that the highest (in the sense of the most demanding) mental requirement in respect of circumstances is that the person concerned should "know" or "have knowledge of" those circumstances. But the meaning of "knowledge" in relation to the prescribed circumstances of an offence has in law given rise to uncertainty, which has encouraged glosses on the meaning of "knowledge" and sometimes the provision of alternatives to the requirement of knowledge involving some lesser degree of cognition. Thus, at common law and under section 33 of the Larceny Act 1916, it was an essential ingredient of the offence of receiving stolen goods that the accused received the goods "knowing" them to have been stolen. In *R.* v. *White*[52] Bramwell B. told the jury that "the knowledge . . . need not be such knowledge as

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45 Emphasis added.

46 See in *R.* v. *Abraham* (1848) 1 Cox C.C. 208 (gamekeeper firing at a person hunting small birds who was 40 or 50 yards away) the direction of Parke B.; and in *R.* v. *Ashman* (1858) 1 F. & F. 88; 175 E.R. 638 (firing through a window at a preacher in church with a gun loaded with powder and blood) the direction of Willes J.

47 (1976) 63 Cr. App. R. 59.

48 [1975] A.C. 55.

49 On the general issue as to the extent to which intent includes or should include foresight of the probability of a result see J. H. Buzzard, "Intent", [1978] Crim. L.R. 5 and J. C. Smith, " 'Intent': A Reply", *ibid.*, 14.

50 It would seem however linguistically permissible to use "intention" instead of "knowledge" in respect of circumstances. In possession offences the nature of the substance possessed is a circumstance but it is possible to speak of "intentionally" possessing explosives or drugs, although it would be more natural to refer to possessing them knowing that they were explosives or drugs.

51 This would appear to be true of offences of merely possessing certain categories of objects, such as controlled drugs under s. 5(1) and (2) of the Misuse of Drugs Act 1971. Contrast s. 5(3) which makes it an offence to have a controlled drug in one's possession, "with intent to supply it to another in contravention of section 4(1) of this Act".

52 (1859) 1 F. & F. 665; 175 E.R. 898.

would be acquired if the prisoner had actually seen the lead stolen; it is sufficient if you think the circumstances were such, accompanying the transaction, as to make the prisoner believe that it had been stolen". The comparable "handling" offence created by section 22(1) of the Theft Act 1968 substituted "knowing or believing" for "knowing". Cases[53] under the 1968 Act have made it clear that "knowing or believing" in effect means actually knowing or being convinced in one's mind that the property has been stolen. But, even if the mental state in respect of section 22(1) of the Theft Act is now relatively clear, the question arises whether other offences, where the requirement is simply one of "knowing"[54] impose a stricter requirement[55] than is demanded in an offence which is framed in terms of "knowing *or believing*"[56].

(v) "Recklessness" as to results

20. We have already referred to *R.* v. *Cunningham*[57] in which the Court of Criminal Appeal said that the meaning of "malice" in an offence under the Offences against the Person Act 1861 was correctly stated in Kenny's *Outlines of Criminal Law* and in *Russell on Crime* as requiring either "an actual intention" or "recklessness" in respect of the particular kind of harm that was in fact done. It will have been noted that the court also approved the explanation given in Kenny's *Outlines* of the meaning of "recklessness"; it is present where "the accused has foreseen that the particular kind of harm might be done and yet has gone on to take the risk of it". It will be observed, however, that the latter formulation of recklessness as to results, although it emphasises that an accused must advert to the risk of the harm—that is that it requires a certain mental state on his part—does not deal with the question of the degree of risk which it is necessary to appreciate.

21. Although judges have frequently referred to "recklessness" as one of the criteria of criminal liability there are very few statutory provisions which make use of this concept in relation to the results of a person's acts. Causing death by reckless driving under section 1 of the Road Traffic Act 1972 and reckless driving under section 2 of that Act are arguably such provisions. But in section 2 the recklessness is not on the face of the provision connected with any result, and the section could only be said to use the concept of "recklessness" in the sense

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[53] In *Atwal* v. *Massey* [1971] 3 All E.R. 881, 882, Lord Widgery C.J., in referring to "knowing or believing" under s. 22(1) of the Theft Act 1968, said: "The question is a subjective one: was the appellant aware of the theft or did he believe the goods to be stolen or did he, suspecting the goods to be stolen, deliberately shut his eyes to the consequences". However, in *R.* v. *Grainge* [1974] 1 All E.R. 928, 931 (C.A.) Eveleigh J. said that Lord Widgery was not to be taken as "seeking to introduce another definition of the offence"; and, in *R.* v. *Griffiths* (1974) 60 Cr. App. R. 14, 18, James L.J., giving the judgment of the Court of Appeal, further explained that "to direct the jury that the offence is committed if the defendant, suspecting that the goods were stolen, deliberately shut his eyes to the circumstances . . . is a misdirection"; but "to direct the jury that, in common sense and in law, they *may* [emphasis added] find that the defendant knew or believed the goods to be stolen because he deliberately closed his eyes to the circumstances is a perfectly proper direction".

[54] *e.g.*, in s. 12(1) of the Theft Act which refers to "knowing" that a conveyance has been taken without lawful authority, or in s. 6(2) of the Forgery Act 1913.

[55] Smith and Hogan, *Criminal Law*, 3rd ed., 1973, p. 498, suggest not.

[56] Emphasis added.

[57] See para. 10, above.

envisaged in *R.* v. *Cunningham* and *R.* v. *Mowatt*[58] if it is taken to require recklessness as to some harm. However, section 1(1) of the Criminal Damage Act 1971 makes it an offence for a person to destroy or damage property belonging to another "intending to destroy or damage any such property *or being reckless* as to whether any such property would be destroyed or damaged"[59]. This does provide a clear statutory example of a requirement of "recklessness" as to results; but recklessness is not defined in the Act, and, even if it is to be assumed that the Criminal Damage Act 1971 and, more doubtfully, the Road Traffic Act 1972 were, in line with *R.* v. *Cunningham*[60], envisaging a "reckless" defendant as one who consciously adverts to a particular risk, the required degree of that risk is a matter of some uncertainty. In *R.* v. *Parker*[61], a case under section 1(1) of the Criminal Damage Act 1971, the Court of Appeal said that a person was reckless in that context if he carried out a deliberate act knowing *or closing his mind to the obvious fact*[62] that there was some risk of damage resulting from that act, and did not specify the degree of risk necessary.

(vi) "Recklessness" as to circumstances

22. We have stated[63] that the most demanding mental requirement in respect of the prescribed circumstances of an offence is that the accused should "know" of those circumstances, and we have considered some of the difficulties which have arisen in deciding what for this purpose "knowledge" means. However, there are offences for which it may be desired to make a person liable, even if, on the most extended construction which can reasonably be given to "knowledge", his mental state falls short of knowledge of the prescribed circumstances of the offence. The questions which then arise are what should be the nature of this lesser cognitive state and in what way can it most appropriately be indicated.

23. Statutory offences, imposing on the prosecution the necessity of proving that an accused has a mental state, in relation to the prescribed circumstances of the offence[64], falling short of knowledge, appear to be largely confined to offences where the relevant circumstance is the falsity of a representation. Section 12(1) of the Prevention of Fraud (Investments) Act 1939[65] provided *inter alia* that

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58 See para. 10, above.

59 Emphasis added. This Act follows (with amendments not here relevant) the draft Bill accompanying our Report on Offences of Damage to Property (1970), Law Com. No. 29.

60 See para. 20, above.

61 (1976) 63 Cr. App. R. 211, 214.

62 The words emphasised by us here were added to the definition of recklessness as previously given by the Court of Appeal in *R.* v. *Briggs* (1976) 63 Cr. App. R. 215. See also *R.* v. *Stone and Another* [1977] Q.B. 354, 363 and *R.* v. *Criminal Injuries Compensation Board, Ex parte Clowes* [1977] 1 W.L.R. 1353, 1360.

63 See para. 19, above.

64 There are of course offences where it is a defence for the accused in effect to prove he was not negligent, as he might be able to do by showing that he neither knew nor ought reasonably to have known of circumstances, the presence of which was essential to the offence. See, *e.g.*, s. 3(2B) of the Consumer Protection Act 1961 (as amended by s. 1 of the Consumer Protection Act 1971) which allows the accused to prove by way of defence "that he took all reasonable precautions and exercised all due diligence to avoid the commission of" the offence—*i.e.*, the offence under s. 2 of selling, or of having in his possession for the purpose of sale, goods not complying with regulations under s. 1 of the Act.

65 Replaced, in respect of the quoted passage, by a similarly worded s. 13(1) of the Prevention of Fraud (Investments) Act 1958. Section 13(1) of the latter Act was amended by s. 21(1) of the Protection of Depositors Act 1963 so that it now includes after "the reckless making" the parenthesis "(dishonestly or otherwise)". See also *R.* v. *Staines* (1974) 60 Cr. App. R. 160.

"any person who . . . by the *reckless* making of any statement, promise or forecast which is misleading, false or deceptive, induces or attempts to induce another person [to invest money]"[66] should be guilty of an offence. In a case on this section, *R.* v. *Bates and Another*[67], Donovan J. said that the ordinary meaning of the word "reckless" was "careless", "heedless", "inattentive to duty" and as he did not consider that there were any sufficient reasons why he should depart from that meaning he concluded that the word "must be left to bear its full meaning, and be construed, therefore, as covering also the case where there is a high degree of negligence without dishonesty". In *R.* v. *Mackinnon and Others*[68], however, Salmon J. said that "ever since *Derry* v. *Peek*[69] the word 'reckless', used in relation to false statements, strongly suggests a statement made not caring whether it be true or false; that is, a dishonest or fraudulent statement as distinct from one which is made with an honest belief in its truth", and so instructed the jury. But Paull J. in *R.* v. *Grunwald and Others*[70], while considering that dishonesty was not essential to recklessness, was not prepared to accept the meaning which Donovan J. had given to the concept; he thought that carelessness was not itself sufficient to constitute recklessness, although it is not entirely clear what additional factors he thought needed to be present[71].

24. Parliament has since made it clear that for the purposes of the particular statutory provision "recklessness" does not require dishonesty[72]. But it may still be questioned whether Donovan J. was correct in equating "recklessness" in the making of false statements with "negligence" (or perhaps, having regard to his reference to "a high degree of negligence" to something in the nature of "gross negligence") or whether, in the absence of a specific statutory direction, "recklessness" requires dishonesty at least in the sense of not caring whether the statement is true or false (in accordance with Salmon J.'s view cited above)[73]. There is further the question whether recklessness as to the making of false statements, even if it does not involve dishonesty, requires that the maker should have adverted to the risk of the statement being untrue and nevertheless persisted in making it (which, according to *R.* v. *Cunningham*[74], is what is involved in recklessness as to the prescribed results of an offence). And, of course, if the last-mentioned view is correct, we have no authoritative guidance on the degree of risk required whether in respect of recklessness as to the results or as to the circumstances of an offence (including the circumstances that a statement is false).

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66 Emphasis added.

67 [1952] 2 All E.R. 842, 845, 846. The decision was approved, in the circumstances of the case obiter, by Lord Goddard C.J. in *R.* v. *Russell* [1953] 1 W.L.R. 77.

68 [1959] 1 Q.B. 150, 153.

69 [1889] 14 App. Cas. 337; T.L.R. 625.

70 [1963] 1 Q.B. 935, 938, 939.

71 Paull J. said at p. 940 that the statement had to be "rash" and that its maker had to have "no real basis of facts on which he could support" it.

72 See n. 65, above.

73 The Divisional Court had some sympathy with this view in *M.F.I. Warehouses Ltd.* v. *Nattrass* [1973] 1 W.L.R. 307. But in the light of the particular statutory provision involved (the Trade Descriptions Act 1968, s. 14) which, in respect of the reckless making of a statement, says that a statement is deemed to have been made recklessly if made "regardless of whether it is true or false . . . whether or not the person making it had reasons for believing that it might be false", the court held that the mere failure to consider whether the statement was true or false constituted "recklessness" under the Act.

74 See paras. 10 and 20, above.

2. The extent of application of terms denoting a mental state

25. It is perfectly possible for an offence to require a certain mental state in respect of one of its elements and to require a different mental state (or only negligence or neither negligence nor any mental state) in respect of another element. A problem therefore can arise where, for example, a term indicative of a mental state is placed in an offence-creating provision in such a position that it is doubtful whether it applies to one requirement only of the offence or also to its other requirements. We have already referred to *Cotterill* v. *Penn*[75] where it was held that a person who killed a house pigeon in the belief that it was a wild pigeon was guilty of the offence of "unlawfully and wilfully" killing a house pigeon. One way of justifying this decision is to make a somewhat artificial division of the requirement in question (namely, the death of a house pigeon) into two requirements, "wilfulness" being required in respect of the death of the bird killed but not in respect of the death of a house pigeon[76]. We do not seek to justify the decision in *Cotterill* v. *Penn*, but it is not difficult to envisage other offences in which there could be reasonable doubt as to which requirements were intended to be covered by a single term indicative of a certain mental state required on the part of an offender.

26. For example, section 51(1) of the Police Act 1964 provides that "any person who assaults a constable in the execution of his duty . . . shall be guilty of an offence". It has been held under an earlier comparable provision[77] that a person may be guilty of the offence even if he did not know that the person he assaulted was a constable[78]. If in the future a provision were enacted which made it an offence "intentionally or recklessly[79] to assault a constable in the execution of his duty", it could at least be argued that Parliament was concerned to emphasise that the assault as such had to be intentional or reckless but that, in view of the importance of giving protection to the police, it meant to put on the assailant the risk of the victim turning out to be a constable in the execution of his duty. The Criminal Law Revision Committee have in their Working Paper on Offences against the Person[80] proposed that, if there continues to be a separate offence of assault on a constable, the prosecution should be required to prove that the defendant knew that the victim was a constable but that the offence should not require the defendant to know that the constable was acting in the execution of his duty.

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75 [1936] 1 K.B. 53: see para. 9, above.

76 This at least appears to be the reasoning underlying Darling J.'s judgment in the similarly decided case of *Horton* v. *Gwynne* [1921] 2 K.B. 661, 662, where he said that the respondent "never denied that he shot at [the bird] meaning to kill that particular bird. . . . It was not as if he had shot at a crow and killed a pigeon unintentionally". Avory J. in *Cotterill* v. *Penn* (n. 75, above) purported to be following *Horton* v. *Gwynne* and cited the passage from Darling J.'s judgment to which we have referred. Lord Hewart C.J. in the same case appears to have decided the case on the somewhat different ground that "wilfully" meant something less than "maliciously"; if the latter term had been used it seems that he would not have held the defendant in *Cotterill* v. *Penn* to be guilty.

77 Section 38 of the Offences against the Person Act 1861.

78 See *R.* v. *Forbes and Another* (1865) 10 Cox C.C. 362.

79 That an assault may be committed recklessly was decided in *R.* v. *Venna* (1975) 61 Cr. App. R. 310.

80 Para. 125.

27. Two recent and not easily reconcilable cases in the Court of Appeal bear on the question whether the effect of words indicating a mental state should be "spread" to cover factors which have to be present in order that the offence can be committed. In *R.* v. *Smith (David)*[81] the defendant was charged under section 1(1) of the Criminal Damage Act 1971 which provides that "a person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence". He was the tenant of a flat and, with the consent of his landlady, had made certain additions to it; he damaged the additions, in the honest but mistaken belief that they were his own property, in order to recover wiring which he had installed for his stereophonic equipment. James L. J., delivering the judgment of the court, said that, in construing section 1(1), they had no doubt that—

> "the actus reus is 'destroying or damaging any property belonging to another.' It is not possible to exclude the words 'belonging to another' which describes the 'property'. Applying the ordinary principles of mens rea, the intention and recklessness and the absence of lawful excuse required to constitute the offence have reference to property belonging to another. It follows that in our judgment no offence is committed under this section if a person destroys or causes damage to property belonging to another if he does so in the honest though mistaken belief that the property is his own, and provided that the belief is honestly held it is irrelevant to consider whether or not it is a justifiable belief"[82].

28. But since *R.* v. *Smith (David)* the Court of Appeal appears to have made an important limitation to the width of application of the principle laid down in that case. In *R.* v. *Cato and Others*[83] the defendant was convicted of manslaughter and of administering a noxious thing contrary to section 23 of the Offences against the Person Act 1861 which is as follows—

> "Whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, so as thereby to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm, shall be guilty of an offence. . . ."

He and the deceased repeatedly injected each other with mixed heroin and water; only the defendant recovered from these injections. The defendant appealed unsuccessfully against his conviction for manslaughter. He also appealed against his conviction under section 23. It was held that "when the act complained of is done directly to the person of the victim . . . the requirement of malice is satisfied if the syringe was deliberately inserted into the body of [the other person]. . . and if [the appellant] at a time when he so inserted the syringe knew that the syringe contained a noxious substance"[84]. As the act was done directly to the victim,

[81] [1974] Q.B. 354: see the decision to the same effect in *R.* v. *Hallam* [1957] 1 Q.B. 569, in which the decision to the contrary in *R.* v. *Dacey* [1939] 2 All E.R. 641 was overruled.

[82] *ibid.*, at p. 360.

[83] (1976) 62 Cr. App. R. 41.

[84] *ibid.*, at p. 49.

malice (that is, intention or recklessness, according to *R.* v. *Cunningham*[85]) did not have to relate to the further requirement of the offence, namely that the administration of the drug had endangered life or inflicted grievous bodily harm. *R.* v. *Cunningham* was distinguished on the ground that the injury there was done indirectly. It is noteworthy that *R.* v. *Smith* (*David*) does not, according to the report, appear to have been cited in argument or in the judgment. We emphasise that we are not discussing whether the result reached in *Cato's* case was desirable as a matter of policy. But, if it is desired to give effect to such a policy, its application should not in our view depend on whether the infliction of harm was direct or indirect: if the policy is correct, then Cato should equally have been guilty under section 23 if in otherwise similar circumstances he had put a glass containing the drug before the other party who proceeded to drink the contents.

3. The absence from statutory offences of terms denoting a mental state

29. The third factor making for uncertainty as to whether a statutory offence requires a particular mental state arises where the offence in question is formulated without specific reference to a mental state and without a requirement of negligence or a provision that the offence in question is "strict"[86]. The courts then have to decide whether Parliament must be taken to have intended that liability for the offence should be strict, should depend on negligence on the part of the defendant, or should depend on a certain mental state on his part; if a mental state is required, the courts have further to ascertain the nature of that mental state (whether, for example, it involves intention, knowledge or recklessness).

30. In the above-mentioned respects the implied intention of Parliament is notoriously difficult to ascertain[87]. Generally speaking the courts approach a statutory offence with an initial presumption in favour of the necessity of a mental element in the offence. They presume that Parliament intended the statutory offence to be subject to the same principle as that which with few exceptions[88] they apply to offences at common law[89]. This presumption may be

[85] See para. 10, above.

[86] As in Working Paper No. 31 (see n. 2 on p. 2 of the paper), we prefer the expression "strict liability" rather than "absolute liability" when used in relation to offences. Even in offences where neither a particular mental state nor negligence on the part of the defendant is required, defences such as duress, self-defence and automatism (see para. 4, above) are always available in appropriate circumstances.

[87] It has indeed been suggested by Lord Devlin (*Samples of Lawmaking*, 1962, p. 71) that to speak of the intention of Parliament in this connection is to resort to fiction. "The fact is that Parliament has no intention whatever of troubling itself about *mens rea*. If it had, the thing could have been settled long ago. All that Parliament would have to do would be to use express words that left no room for implication. One is driven to the conclusion that the reason why Parliament has never done that is that it prefers to leave the point to the judges and does not want to legislate about it".

[88] As to the extent to which the common law crimes of public nuisance, criminal libel and contempt are offences of strict liability see Smith and Hogan, *Criminal Law*, 3rd ed., 1973, pp. 67, 623 and 638.

[89] See, *e.g.*, Wright J. in *Sherras* v. *de Rutzen* [1895] 1 Q.B. 921, which concerned a charge of supplying liquor to a policeman on duty, contrary to s. 16(2) of the Licensing Act 1872, which contained no requirement that the defendant must know that the policeman was on duty: "There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence". See also Lord Reid in *Sweet* v. *Parsley* [1970] A.C. 132, 148: ". . . whenever a section is silent as to mens rea there is a presumption that, in order to give effect to the will of Parliament, we must read in words appropriate to require mens rea".

displaced where the courts find indications pointing in the direction of strict liability in the statutory context of the offence[90], in the object of the statute, having regard to contemporary social conditions[91], or in the nature of the penalty imposed[92]. This process is fraught with uncertainty, because the strength given to the presumption and the readiness with which courts are prepared to find indications which displace it vary at different times and between differently constituted tribunals.

31. The cases relating to bigamy (contravention of section 57 of the Offences against the Person Act 1861) illustrate the difference of view which, in the absence of a specific legislative direction, can be taken by the judiciary as to the mental element involved in an offence. The offence is committed by a person who, "being married, shall marry any other person, during the life of the former husband or wife . . ." but *inter alia* does not extend to any such person "whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time". In *R.* v. *Tolson*[93] the defendant believed wrongly but on reasonable grounds that her husband had been lost at sea. Only five years after being so informed, she married again. The Court for Crown Cases Reserved held, but only by a majority of nine to five, that, although she could not on the facts avail herself of the statutory defence cited above, she was not guilty of bigamy. The view shared by the majority was that she was innocent of the offence not merely because she did not know of one of the prescribed circumstances (namely, that the first husband was alive at the time of the second marriage) but because she believed in good faith *and on reasonable grounds* that

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90 Strict liability may thus be indicated in respect of an offence where other provisions in the same Act create offences with a specific requirement of some mental element; in this event it is possible to infer that the omission in the offence in question is deliberate. But the weight to be attached to such an indication is doubtful. For example, in *Sherras* v. *de Rutzen* (see n. 89, above) the conviction of the defendant was quashed, although another offence in the same section of the Act made it an offence *knowingly* to harbour or suffer to remain on his premises any constable on duty.

91 Thus Donovan J. in *R.* v. *St. Margarets Trust Ltd. and Others* [1958] 1 W.L.R. 522, 527, on holding a hire purchase company liable for disposing of a car on which without their knowledge a deposit of at least 50 per cent. of the purchase price had not been paid contrary to a Hire Purchase Order, said: "The object of the Order was to help to defend the currency. . . . The present generation has witnessed the collapse of the currency in other countries and the consequent chaos, misery and widespread ruin. It would not be at all surprising if Parliament, determined to prevent similar calamities here, enacted measures which it intended to be absolute prohibition of acts which might increase the risk in however small a degree". See similarly, with regard to the dangers of drugs, Lord Parker C.J. in *Yeandel and Another* v. *Fisher* [1966] 1 Q.B. 440, 446, where he held that the offence under s. 9(1)(b) of the Dangerous Drugs Act 1964 of being "concerned in the management of any premises used for [smoking cannabis or cannabis resin or] for dealing in . . . [them] (whether by sale or otherwise)" was strict: "I certainly take judicial notice of the fact that drugs are a great danger today, and legislation has been tightening up the control of drugs in all its aspects". *Yeandel and Another* v. *Fisher* appears to have been disapproved in *Warner's* case (see n. 92, below).

92 *e.g.*, in *Warner* v. *Metropolitan Police Commissioner* ([1969] 2 A.C. 256, 278—see paras. 33–34, below) Lord Reid said of the decision in *Yeandel and Another* v. *Fisher* (see n. 91, above): "The only thing that makes me hesitate about this case is the severity of the penalty [*i.e.*, up to 10 years' imprisonment] and the fact that this would be regarded as a truly criminal and disgraceful offence so that a stigma would attach to a person convicted of it".

93 (1889) 23 Q.B.D. 168.

he was dead[94]. But in *R.* v. *Wheat and Another*[95] the Court of Criminal Appeal held that a man who married a second time, believing in good faith and on reasonable grounds that he was divorced, was, in spite of *R.* v. *Tolson*, guilty of bigamy. In *R.* v. *Gould*[96], where the facts resembled those of *R.* v. *Wheat and Another*, the Court of Appeal did not follow the latter case but applied the broader principle emerging from *R.* v. *Tolson*: the court took the view that a person was innocent of bigamy if he had an honest and reasonable belief either that the first spouse was dead (as in *R.* v. *Tolson*) or that he was no longer married at the time of the second marriage (as in *R.* v. *Wheat and Another* and in *R.* v. *Gould* itself).

32. The problem which has been raised in paragraphs 29 to 31 has in the particular context of drug offences been considered by the House of Lords in *Warner* v. *Metropolitan Police Commissioner*[97] and *Sweet* v. *Parsley*[98]. These cases provide some broad guidance on the required mental state of a defendant in relation to the prescribed circumstances of an enacted offence in the absence of express indication in the enactment itself. But many uncertainties remain, even in the special sphere of drug offences, wherever the mental state of the accused, the circumstances surrounding the commission of the offence, or the statutory formulation of the offence in question, differ in some respect from those in *Warner's* case and *Sweet* v. *Parsley*.

33. In *Warner* v. *Metropolitan Police Commissioner*[99] the appellant was charged with having a scheduled drug (20,000 amphetamine sulphate tablets) in his possession, contrary to section 1(1)[100] of the Drugs (Prevention of Misuse) Act 1964; his case was that he collected two parcels which he assumed both contained scent, whereas in fact only one contained scent and the other tablets. It is some indication of the complexity of this branch of the law that some 47 cases were referred to in the speeches of the Law Lords and 29 further cases were cited by counsel in argument.

(*a*) Lord Guest was "not inclined to place much weight on whether there is or is not a presumption that mens rea is a necessary ingredient in a statutory offence." He thought that "in any event the language of section 1 [was] sufficient to rebut any such presumption." He attached importance to "the mischief aimed at and the object of the prohibition"; these were "the unauthorised possession of the drugs which are injurious to health" and "the social evil of the trafficking of drugs". His conclusion was that liability under section 1(1) was "absolute"[101].

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[94] It was not necessary on the facts in *R.* v. *Tolson* for the court to decide that a person, who unreasonably believes that one of the prescribed circumstances of bigamy is absent, can be guilty of the offence. But in *R.* v. *King* [1964] 1 Q.B. 285, where the evidence showed no reasonable grounds for the defendant's belief that the preceding marriage was void and that he was therefore not married at the time of the second marriage, it was held that he was guilty of bigamy.

[95] [1921] 2 K.B. 119.

[96] [1968] 2 Q.B. 65.

[97] [1969] 2 A.C. 256.

[98] [1970] A.C. 132.

[99] [1969] 2 A.C. 256.

[100] ". . . it shall not be lawful for a person to have in his possession a substance for the time being specified in the Schedule to this Act unless . . .."

[101] The immediately preceding citations from Lord Guest's speech are at [1969] 2 A.C. 300–301.

What in this context Lord Guest meant by "absolute liability" is not entirely clear. He conceded[102] that a person could not be said to possess an article if he did not know that he had anything in his control at all (as when unknown to him the article is slipped into his basket); on the other hand he could "see no half-way house between the offence being absolute in the sense that mere possession of the container constitutes the offence and the offence being only constituted by knowledge in the full sense", which latter alternative Lord Guest clearly rejected.

(*b*) At the other extreme was the speech of Lord Reid. He said the question in the case was whether there were "sufficient grounds for inferring that Parliament intended to exclude *the general rule that mens rea is an essential element in every offence*"[103]. He was however "unable to find sufficient grounds for imputing to Parliament an intention to deprive the accused of all right to show that he had no knowledge or reason to suspect that any prohibited drug was in his premises or in a container which was in his possession". He conceded however that in a particular class of case the courts might properly adopt a test which was "a half-way house between the common law doctrine and absolute liability". The test was "whether a reasonable man in [the defendant's] shoes would have known or have had reason to suspect that there was something wrong". With regard to this special class of case where it might be permissible to imply an "objective" test of liability, it is clear that Lord Reid had in mind "the original type of absolute offence[104]—a person engaging in a business where he does certain things at the peril of a pecuniary penalty"[105].

(*c*) The views of Lords Morris of Borth-y-Gest, Pearce and Wilberforce would appear to occupy intermediate positions between those of Lords Guest and Reid. Lord Morris of Borth-y-Gest proceeded "on the basis that, unless a statute otherwise provides, there should be no conviction if there is no mens rea". Taking into account, however, the "declared purpose of the Act to prevent the misuse of drugs" he reached the conclusion that, except in respect of those persons who were expressly excluded from liability, "Parliament decided to forbid possession absolutely". But "possession" itself involved a certain mental element, although only to the extent that an accused must be

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102 *ibid.*, at p. 300.

103 Emphasis added.

104 Thus, in an earlier part of his speech Lord Reid ([1969] 2 A.C. 272) had referred to *R.* v. *Woodrow* (1846) 15 M. & W. 404; 153 E.R. 907, in which a tobacconist was held guilty of an offence under s. 3 of the Tobacco Act 1842 which provided that every "retailer of tobacco who shall receive or take into or have in his possession" any adulterated tobacco "shall forfeit two hundred pounds", although he believed it to be good tobacco and had no reason to suspect that it was not.

105 The preceding citations from the speech of Lord Reid are at [1969] 2 A.C. 279, 280. Lord Reid also pointed out (*ibid.*, at p. 282) that the narrow grounds of decision put forward in the speeches of Lords Pearce and Wilberforce (see para. 33(*d*) and (*e*), below) were sufficient for justice to be done in the present case, but would work injustice in some other types of case: an example would be where a person in innocent circumstances genuinely and reasonably believes that what he has taken into his possession is ordinary medicine, when it is in fact a prohibited drug.

"knowingly in control of some article or thing or substance or package or container in circumstances which had enabled him to know or to discover (or could have enabled him, had he so wished, to know or to discover) what it was that he had before assuming control of it or continuing to be in control of it"[106].

(*d*) Lord Pearce began by emphasising that "the illicit drug traffic is a very serious evil" and that "Parliament intended by the 1964 Act to prevent it so far as possible by penalising the unauthorised possession of certain drugs". "Reluctantly", he did not think it possible for the courts to presume that Parliament intended that "mere physical possession of drugs would be enough to throw on a defendant the onus of establishing his innocence", so that "unless he did so (on a balance of probabilities) he would be convicted". The choice was therefore between requiring some knowledge of the thing possessed and its quality, on the one hand, and a simple requirement that the accused had to his knowledge physical control of a thing which (whether he knew it or not) contained an unlawful drug, on the other. He decided that the latter was the correct test. But the words " 'have in his possession' admittedly connote knowledge of some sort"[107]. The "knowledge" for this purpose must be of the "existence" of the prohibited article and of its "nature" (that is, whether it is of the same "kind" as the prohibited article, aspirin being for this purpose of the same nature as heroin), but the defendant does not have to know the "qualities" (that is, that it is heroin and not aspirin) of what he possesses[108]. Special considerations would, in Lord Pearce's view[109], apply to things in a container. There is a *prima facie* assumption that a person who is in possession of a container is in possession of its contents. But this assumption "is discharged if he proves (or raises a real doubt in the matter) either (*a*) that he was a servant or bailee who had no right to open it *and* no reason to suspect that its contents were illicit or were drugs or (*b*) that although he was the owner he had no knowledge of (including a genuine mistake as to) its actual contents or of their illicit nature and that he received them innocently and also that he had had no reasonable opportunity since receiving the package of acquainting himself with its actual contents".

(*e*) Lord Wilberforce said that the basic question in the case was "what kind of control with what mental element does the Act intend to prohibit?"[110]. On the facts of the case he took[111] as his "starting point" the fact that "the accused had physical control of something . . . found to contain the substance. This is evidence . . .of possession. It calls for an explanation". In the absence of an explanation the jury are entitled to conclude that the accused had not only physical control of the substance but also such mental element as is required for

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106 The preceding citations from Lord Morris's speech are at [1969] 2 A.C. 294–296.

107 The preceding citations are taken from Lord Pearce's speech at [1969] 2 A.C. 302–303.

108 The preceding sentence is paraphrased from Lord Pearce's speech at [1969] 2 A.C. 305.

109 See [1969] 2 A.C. 305–306.

110 *ibid.*, at p. 309.

111 The immediately following citations from Lord Wilberforce's speech to the end of the paragraph are at [1969] 2 A.C. 312.

possession. If there is an explanation, Lord Wilberforce said it would be for the jury to decide whether there is genuine ignorance of the presence[112] of the substance, or such an acceptance of the package with all that it might contain, or with such opportunity to ascertain what it did contain or such guilty knowledge with regard to it as to make up the statutory possession".

34. The jury had been instructed that "possession" meant control and that if the accused had control of the package which in fact contained the amphetamine sulphate tablets he had control of the tablets. Lords Reid, Pearce and Wilberforce, for the reasons given in their speeches, considered that this summing-up was defective, although they all dismissed the appeal under the proviso to section 4(1) of the Criminal Appeal Act 1907[113]; Lords Morris and Guest dismissed the appeal without referring to the proviso.

35. The second decision of the House of Lords, which is relevant to our consideration of the mental element involved in statutory offences providing no express indication of what that element (if any) should be, is *Sweet* v. *Parsley*[114]. The appellant, the sub-tenant of a farmhouse, let out several rooms, retaining one room for her own use and occasionally visiting the farm to collect the rent and her letters and to see that all was well. Cannabis was found at the farm, but it was conceded that the appellant had no knowledge that her house was being used for the purpose of smoking cannabis. She was charged under section 5(*b*) of the Dangerous Drugs Act 1965 with being concerned in the management of premises used for the purpose of smoking cannabis. The House was unanimous in reversing the decision of the Divisional Court[115] which had affirmed her conviction.

(*a*) Lord Wilberforce relied on a "prosaic interpretation" of the subsection comparable to his view in *Warner's* case[116] that "possession" implied a certain mental element apart from physical control. Being concerned in the management of premises used for smoking cannabis did not mean being concerned in the management of the premises as such, on which cannabis had in fact been smoked. It connoted a "purposeful management activity. . . being concerned in the management of . . . a cannabis smoking den or parlour", and on the facts the appellant had no such purpose[117].

(*b*) The other Law Lords made use of the same argument but some made reference to wider considerations. Lord Reid reiterated what he had

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112 Although at one point (*ibid.*, at p. 311) Lord Wilberforce said he wished to associate himself with the observations of Lord Pearce, it would seem that by the "presence" of a substance he did not mean the same as Lord Pearce meant by the "nature" of that substance. Thus (*ibid.*, at p. 311) he said that, if a person has the intention to possess or knowledge that he does possess what is in fact a prohibited substance, "it is not additionally necessary that he should know the nature of the substance".

113 As amended by s. 4 of the Criminal Appeal Act 1966.

114 [1970] A.C. 132. 18 cases were cited in the speeches of the Law Lords and 45 further cases by counsel in argument.

115 [1968] 2 Q.B. 418.

116 See concluding part of para. 33(*e*), above.

117 The preceding citations from Lord Wilberforce's speech are at [1970] A.C. 161.

said in *Warner's* case[118] to the effect that there is a presumption that *mens rea* is required in a provision which is silent as to the requirement. This presumption is still operative even if on the plain meaning of the language of the provision it appears to impose strict liability. An intention by Parliament to impose strict liability in cases where there is no clear indication in the Act itself should be much less readily assumed in respect of "acts of a truly criminal character" than of "quasi-criminal acts"; in respect of the former the legislator "would have to consider whether . . . the public interest really requires that an innocent person should be prevented from proving his innocence in order that fewer guilty men may escape". To interpret section 5(*b*) as imposing strict liability would put hundreds of thousands of innocent persons who let premises at risk of being convicted of a serious crime and Lord Reid could not believe this was Parliament's intention[119]. Developing what he said in *Warner's* case[120] Lord Reid suggested[121] that a possible alternative to the stark choice between a *mens rea* offence in the full sense and a strict liability offence would be for Parliament to transfer "the onus of proof as regards mens rea to the accused, so that, once the necessary facts are proved, he must convince the jury that on balance of probabilities he is innocent of any criminal intention". Alternatively gross negligence rather than *mens rea* could be imposed by the provision, and it would be easier for the courts to infer the former requirement than to treat a provision as one imposing strict liability. A variant of the latter would be for the courts to adopt the principle that "as a general rule an honest and reasonable belief in a state of facts which, if they existed, would make the defendant's act innocent affords an excuse for doing what would otherwise be an offence"[122]. This has been adopted by the courts in Australia without legislative intervention[123].

(*c*) Lord Diplock also referred[124] with approval to the principle followed by Australian courts, which was on the lines laid down many years before by the majority of the judges in *R.* v. *Tolson*[125], but he pointed out that the approach of Dixon J. in *Proudman* v. *Dayman*[126] did not mean that the accused has to prove the existence of mistaken belief on a balance of probabilities but that he has to raise a reasonable doubt as to its non-existence. He recognised that to require the mistaken belief to be based on reasonable grounds "introduces an objective mental element into mens rea . . . [but] . . . there is nothing unreason-

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118 See para. 33(*b*), above.

119 The preceding passages devoted to Lord Reid's speech are quoted or paraphrased from [1970] A.C. 149–151.

120 See para. 33(*b*), above.

121 [1970] A.C. 150.

122 See *Proudman* v. *Dayman* (1941) 67 C.L.R. 536, 540.

123 *ibid.*

124 [1970] A.C. 163–165.

125 See para. 31, above.

126 (1941) 67 C.L.R. 536.

able in requiring a citizen to take reasonable care to ascertain the facts relevant to his avoiding a prohibited act"[127].

(*d*) Lord Pearce, however, although he referred to the "satisfactory concept" evolved by the Australian courts, appeared to have some doubts whether it could be reconciled with the decision in *Woolmington* v. *D.P.P.*[128] as to the burden of proof in criminal cases.

36. The particular situation which faced the House of Lords in *Warner's* case[129] and *Sweet* v. *Parsley*[130] has been changed by the Misuse of Drugs Act 1971, with regard to offences of the type with which the defendants in those cases were charged[131]. Nevertheless, we have analysed the speeches in *Warner's* case and *Sweet* v. *Parsley* at some length for two main reasons. The first reason is that the speeches strikingly illustrate the difference of view and emphasis which can occur even in the highest judicial tribunal in dealing with the general problem of attributing an intention to Parliament with regard to the mental element (if any) in an offence, when *ex hypothesi* Parliament has given no express indication of that intention. The second reason is that several of the speeches[132] draw attention to the complex character of that problem, which is obscured if it is formulated in terms of a simple choice between a mental element and strict liability. As we have illustrated above[133], a "mental element" in respect of an offence may mean "intention" or "knowledge" but it may also connote a lesser degree of foresight or cognition such as is sometimes indicated by the concept of "recklessness". And, even when there is no "mental element" (in this broader sense) which is indicated in respect of, or can be read into, an offence, this does not necessarily mean that Parliament intended liability for the offence to be strict. Parliament may have intended that liability for the offence should depend not on the accused's state of mind but on his failure to conform to an objective standard of reasonable behaviour, that is to say, on negligence. The task of ascertaining the intention of Parliament is further complicated by questions of the burden of proof. Even if a court has decided that an offence, on its face imposing strict liability, requires of an accused a mental state as to the prescribed results or circumstances or only negligence in these respects, it still has to decide whether Parliament intended: (1) that the prosecution should have to prove beyond reasonable doubt the relevant mental state or negligence; (2) that the accused should be liable unless he

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[127] [1970] A.C. 165. Contrast *R.* v. *Howells* [1977] Q.B. 614 (an honest and reasonable belief that a modern reproduction was an antique firearm is no defence to possessing a firearm, not being an antique, without a certificate).

[128] [1935] A.C. 462. But, as pointed out above, Lord Diplock did not have this difficulty as he regarded the Australian test as imposing only an *evidential* burden on the defendant.

[129] See paras. 33–34, above.

[130] See para. 35, above.

[131] Thus under s. 28 of the 1971 Act it is a defence for a person charged under s. 5(2) of the Act with having a controlled drug in his possession "to prove that he neither knew of nor suspected nor had reason to suspect the existence of some fact alleged by the prosecution which it is necessary for the prosecution to prove if he is to be convicted of the offence charged". And by s. 8 a person who is concerned in the management of premises on which the smoking of cannabis takes place is only guilty of an offence if he "knowingly permits or suffers" that activity so to take place.

[132] See the remarks of Lord Reid referred to in paras. 33(*b*) and 35(*b*), above, and of Lords Diplock and Pearce in para. 35(*c*) and (*d*), above.

[133] See paras. 20–24, above.

can prove on a balance of probabilities that he lacked such mental state or that he was not negligent; or (3) that the accused should be liable unless there is some evidence from which the jury could conclude that he lacked the relevant mental state or negligence, in which event the prosecution would have to prove beyond reasonable doubt that he had the mental state or was negligent.

37. Another comparatively recent decision of the House of Lords, *Alphacell Ltd.* v. *Woodward*[134], was also concerned, although in a different context from that of drugs, with the construction of a statutory offence requiring on its face no particular mental state on the part of the offender. Effluent from the appellants' factory collected in a settling tank but passed by an overflow directly into a nearby river owing to the blockage by vegetation of the pumps installed to prevent such overflow taking place. The House dismissed the appeal against conviction under section 2(1)(*a*) of the Rivers (Prevention of Pollution) Act 1951, which made any person liable who "causes or knowingly permits to enter a stream any poisonous, noxious or polluting matter". The appellants were held guilty of "causing" the effluent to enter the river even though they neither intended nor knew of the overflow and were not negligent in letting it happen[135].

(*a*) Lord Wilberforce saw no reason either for reading back the word "knowingly" into the first limb, or for reading the first limb as, by deliberate contrast, "hitting something which is unaccompanied by knowledge". It was simply a matter of giving "a common sense meaning" to "causing" , and he was satisfied that on the facts the appellants had caused the polluting matter to enter the stream[136].

(*b*) Lord Cross of Chelsea had reasons[137] for dismissing the appeal which were similarly confined to the question whether the appellants had caused the overflow and he did not think that the section required the prosecution to prove that such causing had been negligent.

(*c*) Viscount Dilhorne also thought that the appellants had "caused" the overflow but accepted that "if the language of a penal statute is capable of two interpretations, then that most favourable to the subject is to be applied"[138]. He did not, however, consider there were two possible interpretations of the section (that is one involving liability if the appellants had "caused" the overflow, and the other only making them liable if they had intended the overflow which they in fact caused). In coming to this conclusion he had regard to the nature of the offence, namely pollution, and the fact that it was of a quasi-criminal nature subject to a penalty[139].

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134 [1972] A.C. 824.

135 See the speech of Viscount Dilhorne (*ibid.*, at p. 838): "In view of the attitude taken by the respondent, though it may be that the justices were in fact of the opinion that there had been negligence, one must treat this case as one in which there was no finding of negligence on the part of the appellants".

136 [1972] A.C. 824, 834.

137 *ibid.*, at pp. 846–847.

138 *ibid.*, at p. 841.

139 Viscount Dilhorne in this connection referred (*ibid.*, at p. 839) to Lord Reid's speech in *Sweet* v. *Parsley* ([1970] A.C. 132, 149—see also para. 33(*b*), above) and to that of Lord Diplock in the same case (*ibid.*, at p. 163). The provision in issue in *Alphacell Ltd.* v. *Woodward* was concerned with an offence subject to a maximum fine of £200, although under s. 2(7) of the Rivers (Prevention of Pollution) Act 1951 "a repetition or continuation of an earlier offence" might lead to imprisonment for 6 months.

(*d*) Lord Pearson[140], in holding that it was sufficient for liability that the appellants had "caused" the overflow, also laid weight on the character of the offence ("in the nature of public nuisance"). But, unlike Lord Wilberforce, he drew further support for his view from the fact that in the section in question a distinction was made between the person who "knowingly permits" and one who simply "causes".

(*e*) Lord Salmon agreed[141] that this latter distinction was "if anything, against the appellants". But he devoted the principal part[142] of his speech to answering the contention that, even if the appellants caused the pollution of the stream, they were entitled to the presumption operating in favour of the subject in penal legislation and should not therefore be liable unless they caused the pollution intentionally, knowingly or negligently. With regard to the type of offence in question, concerned with "the risk of pollution particularly from the vast and increasing number of riparian industries", where the pollution was minor and there was no intention or negligence "a comparatively nominal fine"[143] would be appropriate. Parliament must be taken to have recognised as a matter of public policy that no conviction could be obtained and pollution would go unchecked if the prosecution had to discharge "the often impossible onus of proving that the pollution was caused intentionally or negligently".

38. There is a further aspect of the problem which faces the courts when they have to deal with a statutory offence which gives no indication on its face as to whether it requires a particular mental state or negligence on the part of the defendant. In such a case the courts have not simply to decide whether the offence is one of strict liability, requires intention, knowledge or recklessness (as the case may be) or can be committed by a defendant who is only negligent; they have to decide whether one of these mental states or negligence is required in respect of only one or of some or of all of the requirements of the offence. On this question there is a considerable difference between the results reached by the courts. For example, in *R.* v. *Prince*[144] which concerned an offence of taking an unmarried girl under sixteen out of the possession and against the will of her father or mother[145], the fact that she was under sixteen was one of the requirements of the offence; and it was held that the accused was liable even if he believed, and believed on reasonable grounds, that the girl was over sixteen. However, Bramwell B.[146] thought that the accused would not have been liable if he had believed that he had the father's consent (as the absence of such consent was another requirement of the

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140 [1972] A.C. 824, 842.

141 *ibid.*, at p. 849.

142 *ibid.*, at p. 848, from which the succeeding citations from Lord Salmon's speech are taken.

143 The appellants on conviction were fined £20 and ordered to pay £24 costs.

144 (1875) L.R. 2 C.C.R. 154.

145 Section 55 of the Offences against the Person Act 1861, now replaced by s. 20 of the Sexual Offences Act 1956.

146 *ibid.*, at p. 175. Kelly C.B., Cleasby, Pollock and Amphlett BB., and Grove, Quain and Denman JJ. concurred in Bramwell B.'s judgment. Bramwell B. thought that his decision (that the accused was liable even if he believed the girl was over 16) gave "full scope to the doctrine of the mens rea"; and it seems that he thought that knowledge of the lack of parental consent was essential to guilt because "if the taker believed he had the father's consent . . . he would have no mens rea".

offence); and in the earlier case of *R.* v. *Hibbert*[147] the conviction was quashed because there was no finding that the accused knew that the girl in question was in the possession of her parent (as such possession was a third requirement of the offence). In other words, if Parliament fails expressly to indicate its intention, the courts are left not with a single problem but with the multiple problem of deciding in respect of each requirement of the offence whether or not some particular mental state or negligence is necessary.

39. In concluding this part of the report, we wish to repeat with reference to the decisions we have cited what we have earlier said[148] about the report as a whole. We are not arguing, for example, that *Alphacell Ltd.* v. *Woodward*[149], *Sweet* v. *Parsley*[150] and *Warner's* case[151] were from the point of view of social policy right or wrong. We have referred to a necessarily limited number of cases, illustrative of a much larger number of decisions. What we are concerned to show from them is that, where Parliament does not indicate to what extent an offence requires a certain mental element or negligence, the courts are often placed in a position of great difficulty, resulting in protracted and expensive litigation. The courts then have to resort to a number of somewhat loose and flexible principles which are a continuing source of uncertainty in a branch of the law where the maximum degree of certainty is desirable.

PART IV: OUR RECOMMENDATIONS IN THE LIGHT OF PART III AND WORKING PAPER NO. 31

1. The definition of certain terms indicating a mental state

40. The Working Party[152] assisting the Law Commission made proposals in Working Paper No. 31 with regard to the definition of certain terms indicating a mental element in a statutory offence. Those proposals involved the statutory definition of "intention", "knowledge" and "recklessness" and the application, in the absence of a contrary indication in the statute, of these definitions to statutory offences. We consider in paragraphs 41 to 66 below the extent to which we are able for the purposes of our recommendations in this report to adopt those proposals of the Working Party; and in paragraphs 70 to 72 below we consider whether it would be desirable and practicable to adopt the further proposal of the Working Party that the statutory definitions should apply not only to future offences but also to existing offences. We may at this stage say that consultation showed a wide measure of sympathy with the proposal for statutory definition of these terms and, although there was some difference of view as to whether all the particular definitions suggested in the working paper were appropriate, it was generally agreed that some extension of the ordinary meaning of intention and knowledge was needed.

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147 (1869) L.R. 1 C.C.R. 184.
148 See para. 6, above.
149 See para. 37, above.
150 See para. 35, above.
151 See paras. 33–34, above.
152 See para. 1, above, and Appendix B.

(i) "Intention"

41. Working Paper No. 31[153] defined "intention" as follows—

"A person intends an event not only

(*a*) when his purpose is to cause that event but also

First alternative

(*b*) when he has no substantial doubt that that event will result from his conduct.

Second alternative

(*b*) when he foresees that that event will probably result from his conduct."[154]

The majority of the Working Party which prepared Working Paper No. 31 preferred the first and the minority the second alternative.

42. We do not think it necessary to define or paraphrase actual "intention", as distinct from either of the extensions referred to in paragraph 41 above. Proposition (*a*) in that paragraph says that a person intends an event when his purpose is to cause that event. This may be mere tautology, but, if it is not, then its effect must be that "intention" (apart from either of its extensions) is to be construed as having a special meaning, and that this special meaning, whether because it is wider or narrower or different in some other way, is more accurately conveyed by "purpose". We do not believe this to be so; and indeed there is some risk that the word "purpose", used in this way, might be construed as synonymous with "motive", which would be incorrect[155].

43. The comments we received on Working Paper No. 31 indicated that opinion was fairly evenly divided between the alternative versions of the definition. We prefer the first version. Given that it is, and is likely to continue to be, necessary for the purposes of some offences[156] to distinguish between "intention" and "recklessness", the second version seems to us to extend "intention" into the field of "recklessness" and even some way beyond it. If "recklessness" imports a combination of two ingredients, namely awareness of a risk and some ingredient indicating when the taking of that risk is unjustifiable, it would be strange if the area of intention were expanded so widely as to include a state of mind (foreseeing a probability as distinguished from being aware of a

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153 At p. 30.

154 We use the convenient word "conduct" in this report to indicate acts and omissions.

155 See para. 12, above.

156 Compare, *e.g.*, s. 18 of the Offences against the Person Act 1861 (unlawful and malicious wounding or causing of grievous bodily harm *with intent* to do such harm or *with intent* to resist or prevent the lawful apprehension or detainer of any person—maximum penalty, life imprisonment) with s. 20 of that Act (unlawful and malicious wounding or infliction of grievous bodily harm—maximum penalty, 5 years' imprisonment). Under s. 20 recklessness suffices. This distinction between an offence requiring intention and an offence only requiring recklessness is emphasised by the Criminal Law Revision Committee in their Working Paper on Offences against the Person (paras. 100–117). They provisionally recommend the replacement of the offence of assault occasioning actual bodily harm and the offences under ss. 18 and 20 of the Offences against the Person Act by new offences of (*a*) causing serious injury with intent to cause serious injury, (*b*) causing serious injury recklessly, (*c*) causing injury with intent to cause injury, and (*d*) causing injury recklessly.

risk) not far removed from the first ingredient of recklessness but without its limiting second ingredient. Another and very important objection to the second version of the definition of intention is that it would push the legal meaning of "intention" far beyond the ordinary meaning of the word; if a judge in his direction laid down that in law a man intends what he only foresees to be probable, we think there would be a considerable danger that the jury would disregard or at least misunderstand it.

44. *We recommend* that, for the purposes of any enactment to which this provision applies[157], a person should be regarded as intending a particular result of his conduct if, but only if, either he actually intends that result or he has no substantial doubt that the conduct will have that result.

(ii) "Knowledge"

45. Working Paper No. 31[158] defined "knowledge" as follows—

> "A person knows of circumstances not only when he knows that they exist but also when
>
> First alternative
>
> he has no substantial doubt that they exist.
>
> Second alternative
>
> he knows that they probably exist".

The majority of the Working Party which prepared the working paper preferred the first and the minority the second alternative.

46. Consultation on the working paper showed that opinion was divided approximately to the same extent as in the case of the alternative versions of the definition of "intention". There were, however, certain additional elements in the arguments used. In relation to the second version, some thought that there was some contradiction in the idea of "knowing" that something "probably" exists. At the same time there was concern, in relation to both versions, that a person might be relieved from criminal liability if he deliberately shut his eyes to the existence of the relevant facts.

47. On the whole, we have come to the conclusion that knowledge should be treated in a similar way to intention and for substantially similar reasons. With regard to the position of the person who is shown deliberately to have shut his eyes to the existence of the relevant circumstances of an offence, and claims that he did not actually *know* of their existence, we consider that a jury or court would generally infer, and so find as a fact, that he *had no substantial doubt* that those circumstances existed.

48. An extension of "knowledge" on these lines would in our view make it unnecessary in future offences, where knowledge of certain circumstances is required, to repeat the "knowing or believing" formula used in section 22(1) of the Theft Act 1968. The term "belief" is equivocal in respect of the mental

[157] Our recommendation is limited to future legislation: see paras. 70–72, below.
[158] At p. 30.

state which it purports to indicate[159]. Although, as we have pointed out[160], decisions subsequent to the Theft Act 1968 have clarified the meaning of "knowing or believing" in that Act, we think it would make for certainty without sacrificing anything which should be included within the concept of knowledge, if the latter were limited to actual knowledge of, or to having no substantial doubt as to, the existence of the circumstance in question. In the as yet unimplemented draft Bill[161] accompanying our Report on Forgery and Counterfeit Currency we followed the "knowing or believing" precedent provided by the Theft Act. We now think therefore, that it would be better to use there the concept of knowledge in relation to the falsity of an instrument, with "knowledge" being extended in accordance with our recommendation in the next paragraph.

49. *We recommend* that, for the purposes of any enactment to which this provision applies[162], a person should be regarded as knowing that a particular circumstance exists if, but only if, either he actually knows or he has no substantial doubt that that circumstance exists.

(iii) "Recklessness"

50. Working Paper No. 31[163] defined "recklessness" as follows—

"A person is reckless if,

(*a*) knowing that there is a risk that an event may result from his conduct or that a circumstance may exist, he takes that risk, and

(*b*) it is unreasonable for him to take it having regard to the degree and nature of the risk which he knows to be present."

It will be noted that in the above definition "recklessness" as to a result and "recklessness" as to a circumstance are dealt with together. We have reached the conclusion that "recklessness" in either of these respects can be defined in the same way. But we think it is desirable for the purpose of explaining our recommendations to consider them separately, having regard to the somewhat different attitude which the courts have taken to "recklessness" in respect of results and of circumstances[164].

(*a*) "Recklessness" as to results

51. In order that a person should be regarded as "reckless" as to a result of his conduct, it is in our view essential that he should foresee, at the time when he pursues that conduct, that it *may* have that result. We do not think, however, that it should be necessary for him to appreciate any precise degree of risk of that result occurring. But we would emphasise that he must foresee that the result in question may happen. If he does not advert to the risk at all, he cannot in our view be said to be reckless, given that "recklessness" is to be treated as a

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159 Contrast the statements "I believe in the existence of God" (which implies that I have an inner conviction that God exists) and "I believe that X took the 8.30 train to London" (which implies that I think but am not certain that X took that train).

160 See n. 53, above.

161 Appendix A to Law Com. No. 55 (1973). See also paras. 50–51 of that Report.

162 Our recommendation is limited to future legislation: see paras. 70–72, below.

163 At pp. 30–31.

164 See paras. 20–24, above.

mental state, although one falling short of intention. Thus, for the purposes of section 1(1) of the Criminal Damage Act 1971 where the charge is that the defendant without lawful excuse destroyed property belonging to another "being reckless as to whether any such property would be destroyed or damaged", it ought in our view to be regarded as sufficient, so far as the necessary foresight is concerned, to prove that the defendant, at the time when he acted, foresaw that property belonging to another might be destroyed or damaged by his conduct.

52. In the last paragraph we have referred to the defendant "foreseeing" that a result may happen. In the relevant proposition in Working Paper No. 31[165] the corresponding reference was to "knowing" that there is a risk. We prefer to speak of "foresight" in this connection. In the first place we think the latter word is a more appropriate one to use in relation to a future event. Secondly, in paragraphs 46 to 49 we have proposed an extended meaning of "knowing", where the reference is to knowing that a circumstance exists. We do not think it is appropriate to apply the extended meaning to such a concept as knowing that a risk exists.

53. The definition of "recklessness" proposed in Working Paper No. 31[166] had a second limb applying a test of reasonableness in taking the risk. It will be remembered that in describing the elements of uncertainty in the present law we pointed out[167] that, although in *R.* v. *Cunningham*[168] the Court of Appeal cited with approval references in Kenny's *Outlines of Criminal Law* and in *Russell on Crime* to recklessness as involving foresight that a particular kind of harm might occur and a subsequent taking of that risk, there was a lack of authoritative guidance as to when the taking of that risk would amount to "recklessness". It was to deal with the question of when the taking of the risk would not be justifiable that the working paper proposed the second limb of its definition of "recklessness", namely (*b*) in paragraph 50, above.

54. The comments received on the second limb of the definition of "recklessness" in the working paper disclosed a considerable amount of uncertainty as to its interpretation. And, apart from the question of interpretation, there was some difference of view in any event as to what the second limb ought to provide. In particular, did it mean, and ought it to provide, that the taking of the risk must be unreasonable by an objective or by a subjective standard?

55. We agree that liability in criminal law for reckless conduct in relation to a particular result should not solely depend on whether the defendant foresaw that that result might occur. Many human activities involve some risk of injury to the person or of damage to property and most people in undertaking these activities foresee that they might happen. A golfer on Wimbledon Common may foresee that he may hit a bystander, but he would not be liable even civilly for negligence unless in all the circumstances it was unreasonable for him to make the stroke which in fact resulted in injury to the bystander; it would be

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165 See para. 50, above.
166 See para. 50, above.
167 See paras. 10 and 20, above.
168 [1957] 2 Q.B. 396.

strange if he could nevertheless be liable under section 20 of the Offences against the Person Act 1861[169]. We are in broad agreement with the formulation in Working Paper No. 31 of the second limb of the test of criminal recklessness which has been set out in paragraph 50 above; but we do not think it necessary in that second limb to distinguish between the degree and the nature of the risk. What is relevant is the defendant's estimation of the likelihood of the particular result required by the offence. However, we think that the question whether this second limb involves subjective or objective criteria requires some further refinement and explanation.

56. In our view, for the purposes of criminal liability[170], a person should not be regarded as reckless as to a result of his conduct unless at the time of that conduct he foresaw that that result might occur and, in the judgment of a reasonable man with that person's appreciation of the degree of the risk involved, it would have been unreasonable to pursue that conduct. The judgment is to be made by reference to objective criteria in so far as the question to be answered is not what the defendant thought reasonable but what a reasonable man would think reasonable; it may, however, involve a certain subjective element in so far as the judgment of the reasonable person has to be made on the basis of any actual appreciation by the defendant of the degree of the risk involved.

57. A few simple examples may serve to illustrate the practical result of the test of recklessness which we are recommending—

(*a*) A man is kicking a football along a pavement. To avoid some children and without thinking of any risk involved, he kicks the ball to one side. The ball breaks a window. He is not guilty of recklessly damaging property (although of course he could be civilly liable for negligence).

(*b*) An amateur handyman has built a high fence in his garden. He admits that when he built it he foresaw the fence might conceivably blow down and cut his neighbour. In fact, owing to his lack of technical expertise in the construction of high fences, the fence is blown down by the wind and injures his neighbour, cutting him on the face. If it would not be unreasonable for a person, with the defendant's appreciation of the degree of the risk involved, to take that risk, the defendant would not be liable for causing injury recklessly[171].

(*c*) A professional variety artist, with many years of accident-free experience of juggling, is performing before an audience with a dozen Indian clubs. He admits that he foresaw that in such a performance he might misjudge a throw and wound a spectator but, in view of his long experience and skill, he thought there was no more than a very

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169 See n. 156, above.

170 A man may be liable for negligence in civil law (or indeed in criminal law where liability for negligence, as distinct from recklessness, is imposed) if he fails to appreciate the nature and degree of a particular risk provided that he *ought* to have appreciated them—*i.e.*, if a reasonable man would have appreciated them. This is a purely objective test which is qualified only to the extent that a child of tender years is judged by the standards of appreciation appropriate to a child of that age.

171 See n. 156, above.

remote risk of a spectator being so injured. He in fact misjudges a throw, as a result of which a spectator is wounded. He is only reckless for the purposes of criminal liability if it is unreasonable for such a performer, who estimates the risk of injury as very slight, to take it.

(*d*) The case is as in (*b*) above, except that the builder is a professional craftsman, who has built a number of high fences of similar technical construction several of which he has had to repair after they have been blown down by the wind and one of which caused personal injury by its fall. If (as seems on the facts an inevitable inference) he foresaw when building the fence in question that there was a risk it would blow down and cause injury and (as further seems likely) it is found to be unreasonable for him to have taken that risk, he has been reckless for the purposes of criminal liability.

58. It will be apparent that, in some cases, the application of the test of reasonableness which we are recommending may present some complexities. We think, however, that such cases will be rare. Indeed, in many cases, once it has been proved that the defendant foresaw that a result of the specified description might follow from his conduct, it will be so obvious that it was unreasonable to take that risk that the question will hardly be in issue and can safely be left to a jury with a minimum of instruction from the trial judge.

59. There are no doubt circumstances in which it is desirable to impose criminal liability without a requirement that the defendant's conduct must be either intentional or reckless. We do not think, however, that to accommodate these cases, at all events as far as future statutes are concerned[172], the meaning of recklessness should be so extended that its real mental element, as far as the defendant is concerned, becomes almost non-existent. It has to be borne in mind that there are some offences which can be committed by a person who either intends the prohibited result or is reckless as to whether it occurs. Whichever of these mental states is proved, the conviction is for one and the same offence and the maximum penalty does not vary with the mental state proved. It is true that where an offence has these alternative grounds of liability the sentence can be adjusted to meet the particular circumstances, but this will not fully remove the stigma of being convicted of the offence. We think that, if a crime is to require a mental element to be expressed in the alternative of "intention" or "recklessness", the latter should not require any less of a mental element than is involved in the recommendation we are making. If it is desired to cover other cases of risk-taking, it seems better to us that they should be based on liability for negligence or be offences of strict liability.

60. *We recommend* that, for the purposes of any enactment to which this provision applies[173], a person should be regarded as being reckless as to a particular result of his conduct if, but only if,—

(*a*) he foresees at the time of that conduct that it might have that result and,

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172 To which our present recommendation is limited: see paras. 70–72, below.

173 Our recommendation is limited to future legislation: see paras. 70–72, below.

(*b*) on the assumption that any judgment by him of the degree of that risk is correct, it is unreasonable for him to take the risk of that result occurring.

(*b*) "Recklessness" as to circumstances

61. We agree with the proposal in Working Paper No. 31[174] that recklessness as to circumstances which are prescribed in an offence-creating provision should be defined in the same way as recklessness as to a prescribed result. A particular requirement of an offence may be stated in such a way as to make it appear that it is a prescribed *result* of the defendant's conduct. But it is often possible to reframe the offence, retaining the same requirement without any difference in the nature of the offence, in such a way as to make it appear that that requirement is a prescribed *circumstance* of the offence. If recklessness on the part of the defendant is necessary in respect of that requirement, its meaning should be the same in whichever way the offence is framed. We have pointed out[175], for example, that section 1(1) of the Criminal Damage Act 1971 provides that "a person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence"; and we have referred in this connection to *R.* v. *Smith (David)*[176] in which it was in effect held that the intention or recklessness relates to the whole of the *actus reus*, that is not merely that property would be destroyed or damaged but also that the property of another would be so affected. It would, however, have been possible to draft the offence in such a way that the requirement as to the property destroyed or damaged being the property of another would appear as a *circumstance* of that offence; thus it might have run, "a person who without lawful excuse intentionally or recklessly destroys or damages any property, provided that it is in fact the property of another, knowing that, or being reckless as to whether, it is the property of another, shall be guilty of an offence". The requirement that the property destroyed or damaged has to be the property of another is common to both section 1(1) of the Criminal Damage Act 1971 and the alternative draft, and the recklessness which relates to the requirement ought in our view to be the same in either case.

62. It is true, as we have pointed out[177], that in respect of one kind of circumstance required in an offence, namely that a particular statement is false, the courts and Parliament have in the past adopted different views about recklessness from that which we are recommending with regard to circumstances generally. In the civil case of *Derry and Others* v. *Peek*[178] Lord Herschell, after reviewing the authorities, concluded—

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174 See para. 50, above.

175 See para. 27, above.

176 [1974] Q.B. 354: see para. 27, above.

177 See para. 23, above.

178 (1889) 14 App. Cas. 337, 374. The appellants, directors of a tramway company, honestly believed a statement in a prospectus issued by them to the effect that the company had the right to use steam power instead of traction by horses, whereas in fact the special Act incorporating the company provided for traction by animal power or, with the consent (in the event refused) of the Board of Trade, by steam power. The House of Lords, reversing the decision of the Court of Appeal, held the appellants not liable to the respondents who had taken shares in the company in reliance on the statement in the prospectus.

"First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made".

63. *Derry and Others* v. *Peek*, which was only concerned with the meaning of fraud in the civil law, has in our view had a somewhat confusing influence on the meaning of recklessness in relation to offences in which the making of a false statement is an essential element. We have already referred[179] to the difference of judicial view which has arisen as to the meaning of "the reckless making of any statement" in section 13(1) of the Prevention of Fraud (Investments) Act 1958. We have also mentioned in the some connection the addition to the latter Act of the parenthesis "(dishonestly or otherwise)" which was effected by the Protection of Depositors Act 1963. Another example of the employment in an Act of the concept of the reckless making of a false statement, where the meaning given to "reckless" differs from the definition of "recklessness" as to circumstances which we are recommending, is to be found in section 14 of the Trade Descriptions Act 1968. This provides *inter alia* that it is an offence "recklessly to make a statement which is false" in relation to certain matters; and by section 14(2)(*b*) a statement is deemed to be made recklessly, if made "regardless of whether it is true or false . . . whether or not the person making it had reasons for believing that it might be false"[180].

64. At all events as far as future offences are concerned[181], we think that, in the absence of an express contrary intention, recklessness as to circumstances should be defined without reference to the concept of being "careless". As we have pointed out[182], Lord Herschell—for understandable reasons, bearing in mind that he was defining "fraud"—meant by "careless" something in the nature of a calculated indifference to the truth or falsity of a statement, as also appears to

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179 See para. 23, above.

180 A deception for the purposes of ss. 15 and 16 of the Theft Act 1968 may also be "reckless" in respect of words uttered or conduct pursued, but "reckless" is not defined, although an offence under s. 15 or s. 16 must additionally be "dishonest" (see ss. 15(1) and 16(1)). See also n. 73, above.

181 We discuss in paras. 70–72, below, whether the recommendations should apply only to future or also to existing offences.

182 See para. 62, above.

have been the view of Salmon J. in *R.* v. *Mackinnon and Others*[183]. But in our view a person may be "reckless" as to the falsity of a statement although he is far from "careless" or "regardless" as to whether it is true or false; indeed he may well hope that it is true, as he is likely to avoid trouble if it is. Being "careless" in Lord Herschell's sense, moreover, is in danger of being confused with "carelessness" (that is "not employing care"), which is tantamount to negligence, objectively assessed; this seems close to the view of "recklessness" taken by Donovan J. in *R.* v. *Bates and Another*[184]. We do not think "recklessness" should be confused with "negligence". On the other hand, we do not see any reason for making dishonesty an element in recklessness, as to the falsity of a statement or otherwise; of course dishonesty may be an additional requirement of an offence[185], but that is something independent of the definition of "recklessness".

65. *We recommend* that, where an enactment, to which this provision applies[186], makes it an offence for a person to conduct himself in a specified way, being reckless as to whether a particular circumstance exists, he should be regarded as being reckless as to that circumstance if, but only if,—

(*a*) he realises at the time of that conduct that there is a risk of that circumstance existing and,

(*b*) on the assumption that any judgment by him of the degree of that risk is correct, it is unreasonable for him to take it.

66. It will be observed that, for similar reasons to those which have led us to speak of foresight rather than knowledge of a result[187], we prefer to use "realises", rather than "knows", in regard to the risk of a circumstance existing and to refer to the defendant's "judgment", rather than his "knowledge", of the degree of that risk.

(iv) "Negligence"

67. In Working Paper No. 31 not only were intention, knowledge and recklessness provided with definitions which it was proposed should apply to existing and future offences, but also "negligence". The definition[188] of "negligence" was as follows—

> "A person is negligent if he fails to exercise such care, skill or foresight as a reasonable man in his situation would exercise."

68. Whereas, however, there is a considerable measure of uncertainty as to the meaning in law of intention, knowledge, and recklessness both as to results and, more particularly, as to circumstances, there has not been any comparable uncertainty as to the legal meaning of negligence. We therefore make no recommendation for any general statutory definition of negligence. We are not of

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183 [1959] 1 Q.B. 150: see para. 23, above.
184 [1952] 2 All E.R. 842: see para 23, above.
185 As it is in ss. 15 and 16 of the Theft Act; see n. 180, above.
186 Our recommendation is limited to future legislation: see paras. 70–72, below.
187 See para. 52, above.
188 At p. 57, with illustrations and commentary on pp. 57–63.

course here referring to the very different question, as to which there has been uncertainty[189], whether in respect of any particular requirement of an offence it is sufficient to establish liability for that offence that the defendant has been negligent, whether some higher degree of "fault"[190] is necessary or whether in respect of that requirement the offence is one of strict liability. We mention this latter question in later paragraphs of this report[191].

2. Terms indicating a mental state with regard to the requirements of an offence and as to matters relevant to a defence or exception

69. The terms intention, knowledge and recklessness may be used in the statutory formulation of an offence in two different ways. First, they may be used with regard to matters which are requirements of the offence, that is to say matters which have to be proved by the prosecution before the defendant can be held guilty. Secondly, they may be used in relation to matters (*a*) which the defendant, in order to establish a defence, has to prove on a balance of probabilities[192] or (*b*) of which there has to be sufficient evidence to cast the burden of proving the contrary on the prosecution. The distinction between (*a*) and (*b*) is sometimes expressed as one between a "persuasive" and an "evidential" burden. For example, section 29 of the Sexual Offences Act 1956, taken in conjunction with section 47 of that Act, casts a persuasive burden on the defendant, in order to escape liability for causing or encouraging the prostitution of a female defective, to prove that "he does not know[193]. . . her to be a defective". We intend that our recommendations as to the meaning of intention, knowledge and recklessness should be applicable not only to the requirements of an offence but also to their use in the contexts described in (*a*) and (*b*) above.

3. The enactments to which the recommended definitions should apply

70. In the working paper it was proposed[194] that the definitions of intention, knowledge and recklessness there suggested should apply to existing as well as to future offences. We are unable to recommend the adoption of this proposal for the reasons which follow. Existing enacted offences which make use of intention, knowledge or recklessness were not formulated in the light of our recommendations as to the meaning to be given to these concepts. They might well have been differently formulated if those responsible had been aware of the meaning which would be attached to the terms which they used. If our recommended definitions were to apply to existing enacted offences it would first be necessary to review every such offence which referred to intention, knowledge or recklessness, to ascertain whether the application of the recommended definitions would change the character of the offence as enacted and interpreted and then, after

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189 See paras. 29–39, above.

190 We use "fault" here and elsewhere in this report in a broad sense to include the mental states of intention, knowledge and recklessness, as well as negligence (or some other objectively determined standard of conduct).

191 See paras. 73–75 and 78–89, below.

192 *R.* v. *Carr-Briant* [1943] K.B. 607.

193 Irrelevant to the present discussion is the addition here omitted: "and has no reason to suspect".

194 At p. 30.

due consultation with the varying interests involved, to make recommendations in respect of each individual offence as to whether it should be—

(*a*) made subject to the definitions or

(*b*) amended in the light of the definitions or

(*c*) excluded altogether from the application of those definitions.

This would be a very lengthy and formidable undertaking which would detract from what we regard as the more important general task of reviewing and reformulating old offences and of recommending, where necessary, new offences with a view to the eventual construction of a criminal code employing a terminology which is widely accepted and understood. We think it important that all who are engaged in this latter task should employ a common vocabulary in respect of the mental element in offences.

71. Once again we emphasise that we are not expressing a view on the mental state (if any) appropriate to a particular offence; but we think that our recommendations in respect of intention, knowledge and recklessness should apply, unless their effect is expressly excluded, to those terms when used in future offences, that is offences provided in or under statutes passed on or after the day appointed for our recommendations to come into operation. We should also refer to what we have said in paragraph 6 of this report. Although the implementation of our recommendations regarding intention, knowledge and recklessness would not preclude the use of those terms with a different sense from that which we have recommended (provided that this was expressly stated) or, indeed, the employment of completely different terms to denote a mental element, we hope that intention, knowledge and recklessness in the sense in which we have defined them would be sufficient for almost all future offences.

72. *We recommend* that,

(*a*) wherever a provision in or under a statute passed on or after an appointed day refers to intending, knowing or being reckless in relation to an offence, our recommendations as to those terms should apply unless the provision otherwise expressly provides; and

(*b*) in the creation of new offences on or after the appointed day the use of terms, other than those which we have recommended for expressing the required mental element, should wherever possible be avoided.

4. The absence of terms denoting that an offence requires a mental state

73. Earlier in this report[195] we have referred to the uncertainty which can arise in the construction of a statutory offence. This uncertainty arises when it is not indicated what mental state (if any) is needed of a defendant in respect of one or more of the requirements of the offence before he can be guilty of that offence. And we have pointed out[196] that it is an undue simplification of the problem in such a case to regard the choice before the courts as one between on the one hand reading into the offence a requirement of some form of mental element and on the other treating the offence as one imposing strict liability. It may well be that on a proper construction, where all the requirements of the offence (other

[195] See paras. 29–39, above.

[196] See para. 36, above.

than the requirement of "fault") are satisfied, it can only be committed by a defendant who has failed to conform to an objective standard of reasonable behaviour; in other words the offence involves something akin to negligence. We have also pointed out that, whatever requirement as to a mental element or as to negligence a court reads into an offence, there is the further question as to what should be the burden of proof in respect of that requirement.

74. It is necessary to consider the ways that can be devised to resolve the uncertainty which may arise in the circumstances discussed in the last paragraph. But first we emphasise that that uncertainty only arises where it is not clear from the language used to formulate an offence whether in respect of any matters relevant to the commission of that offence a particular mental state, some objective standard of conduct or strict liability is involved.

75. *We therefore recommend* that, in respect of an offence which is created by a provision in or under a statute passed on or after the appointed day, it should be expressly stated to what extent liability depends on intention, knowledge or recklessness (which we hope, as stated in paragraph 72(*b*) above, will be the terms used, wherever possible, to indicate any mental state required), depends on an objective standard of conduct (whether expressed as liability for negligence or in some other way) or is intended to be strict.

(i) Existing offences

76. With regard to existing offences, Proposition 6 in Working Paper No. 31[197] was in the following terms—

> "Subject to any specific exceptions, where the existing law does not require a particular degree of fault[198] in respect of an element of the offence, that offence nevertheless requires negligence in the defendant as to that element. In such cases, unless otherwise expressly provided, negligence may be treated as established in the absence of any evidence to the contrary[199]. Where the fault proved by the evidence is of a higher degree than negligence, negligence shall be taken as established."[200]

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[197] At p. 7.

[198] Note 1 on p. 1 of the Working Paper makes it clear that "fault" was intended to include both a mental state and negligence. We use it in the same way in this report.

[199] It appears from para. (4) of the Commentary on Proposition 6 (see Working Paper No. 31, p. 27) that it was envisaged that it would be for the defendant to adduce evidence that he had not been negligent, but if such evidence were adduced it would still rest with the prosecution to convince the court or jury that he had been negligent.

[200] The working paper gave two illustrations of the effect of this proposition, one of which, relating to s. 235(2) of the Road Traffic Act 1960, is now no longer relevant, owing to the replacement of that offence (which had been held to impose strict liability—see *R.* v. *Cummerson* [1968] 2 Q.B. 534) by an offence of "knowingly" making a false statement (see the Road Traffic Act 1972, s. 170). The other illustration was the offence under s. 157 of the Bankruptcy Act 1914 for a bankrupt to fail to give a satisfactory explanation of the manner in which the loss of a substantial part of his estate was incurred, which in *R.* v. *Salter* [1968] 2 Q.B. 793 (C.A.) was held to impose strict liability, while the defendant's defence that he had done all that could reasonably be expected of him was irrelevant. The intention of the proposition was to give him such a defence.

77. In paragraph 70 above we have explained why we have been unable to accept the proposal that the recommended definitions of intention, knowledge and recklessness should apply to existing offences. We also cannot recommend the adoption of Proposition 6. It is true that the proposition is "subject to any specific exceptions", but the determination of those exceptions over the whole field of the criminal law would involve a similar enquiry to that which, with its attendant difficulties and disadvantages, would be necessary if our recommendations regarding intention, knowledge and recklessness were to be applied to existing offences. With regard to Proposition 6 we are strengthened in our conclusion by the consideration that many of the offences which raise difficulty as to whether they ought as a matter of policy to involve a mental element, negligence or strict liability are found in legislation of a "regulatory"[201] kind, which requires fairly frequent reconsideration and reformulation by Parliament[202]. When such reformulation takes place in future, if the recommendations[203] so far made in this report are accepted, we think the legislator will be assisted in knowing what would be the effect of referring in a future offence to intention, knowledge or recklessness.

(ii) Future offences

78. Working Paper No. 31[204] contained five propositions as to future offences, as follows—

1. "Subject to Proposition 2, in every offence created after [a date to be prescribed] the fault required is a mental element consisting of intention, knowledge or recklessness[205] on the part of the defendant in respect of all the other elements of the offence, unless the requirement is expressly excluded.

2. Where an offence is an offence of omission or is defined so as to include an omission, the fault required is negligence[206] in the defendant as to the omission, unless a mental element is expressly or impliedly required or the offence is expressly stated to be of strict liability or otherwise to be independent of fault in the defendant.

3. Where the requirement of intention, knowledge or recklessness is expressly excluded from some or all of the elements of an offence, the offence requires negligence in the defendant as to such elements, unless the offence is stated to be of strict liability or otherwise to be independent of fault in the defendant in respect of such elements.

4. Unless expressly provided, in all offences where negligence is required

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201 See n. 211, below.

202 See the example of s. 235(2) of the Road Traffic Act 1960 and its replacement by s. 170 of the Road Traffic Act 1972, referred to in n. 200, above.

203 See paras. 44, 49, 60, 65, 72 and 75, above.

204 At pp. 6–7.

205 These terms were intended to be defined in accordance with the definitions cited in paras. 41, 45 and 50, above.

206 Negligence was defined in the Working Paper (at p. 57) in the following way: "A person is negligent if he fails to exercise such care, skill or foresight as a reasonable man in his situation would exercise".

by reason of Proposition 2 or 3 above, negligence may be treated as established in the absence of any evidence to the contrary[207].

5. Where the fault proved by the evidence is of a higher degree than that required for the offence the fault required shall be taken as established."

79. On consultation there was a considerable measure of agreement that there should be presumptions relating to intention, knowledge, recklessness and negligence in future offences. There was similarly agreement that the propositions set out in paragraph 78 above were appropriate for this purpose, although there was some criticism of Proposition 2 on the ground that it is often a technicality of drafting as to whether an offence is framed in terms of omission or commission. We think, however, that the vital question is whether the general scheme underlying the propositions, which is to introduce statutory presumptions relating to "fault" and strict liability in enacted offences, would provide a satisfactory method of reducing, at least as far as future offences are concerned, the uncertainty which has arisen as to those conditions of culpability in existing offences, wherever the offence in question makes no express reference to such fault or strict liability.

80. The argument in favour of having some statutory presumptions applying to future offences (irrespective of the further question as to what those presumptions should be) runs as follows—

(*a*) The question whether any requirement of an offence imports intention, knowledge, recklessness or negligence on the part of the defendant in respect of that requirement is an important issue of legislative policy.

(*b*) Past experience with statutory offences shows[208] that, where Parliament does not expressly indicate its policy in this respect, the courts sometimes have difficulty in ascertaining the legislative intention. The difficulties of the courts result in uncertainty of the law which is not always resolved even at the level of the House of Lords. These results are particularly undesirable in the criminal law.

(*c*) Having regard to the varying circumstances in which, and the pressures under which, legislation is sometimes passed, it is unreasonable to expect that in all future offence-creating statutes Parliament will indicate its intention in regard to the question referred to in (*a*) above.

(*d*) It is therefore appropriate that the courts should be given general guidance by way of statutory presumptions in respect of this question, which would take effect unless Parliament in the relevant offence indicates otherwise.

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[207] On p. 19 of Working Paper No. 31 it was stated: "The intention of Proposition 4 is . . . to place an evidential burden (but only an evidential burden) on the defendant in cases where, by Proposition 2 or 3, negligence is required". It was further explained that "an evidential burden" meant that "once the prosecution have proved the *actus reus*, the triers of fact may infer negligence in the defendant in the absence of any evidence to the contrary which arises whether from the prosecution's case or from any evidence given by or on behalf of the defendant".

[208] See paras. 29–39, above.

(*e*) Statutory presumptions of this kind would by no means trespass on the right of Parliament to require in new offences whatever mental state or negligence (if any) it may think appropriate. Indeed, where the proposers of a Bill intended to create an offence departing from the result which the presumptions would otherwise achieve, the necessity of expressly spelling out that intention would alert Parliament to the fact that it was being asked to approve an offence departing in some respect from the normal pattern set by the presumptions.

81. The argument against introducing such statutory presumptions appears to run as follows—

(*a*) If, in the future, it becomes the general practice of those responsible for presenting to Parliament Bills containing offence-creating provisions to specify the particular mental state which is necessary in respect of each requirement of the offence in question, or to make it clear that in that regard it involves negligence or is an offence of strict liability, then the necessity for any scheme of presumptions would disappear.

(*b*) The general practice envisaged in (*a*) above will become more attractive, and more conducive to certainty as to the implications of offences, if those responsible for framing legislation are able to rely on the statutory guidance as to the effect of referring to intention, knowledge and recklessness, which has been recommended earlier in this report[209].

(*c*) Having regard to (*a*) and (*b*), it is not unreasonable to expect that the problem, which has arisen in the past as to whether an offence is in respect of any particular requirement one necessitating intention, knowledge, recklessness or negligence, or is in this respect strict, will greatly diminish in importance. It would be undesirable to introduce an elaborate scheme of statutory presumptions to deal with a problem of minimal dimension.

(*d*) The question as to whether there should be any statutory presumptions cannot be altogether divorced from the nature of the presumptions which are envisaged. The justification of the presumptions must be that they anticipate for future offences the intention of Parliament with regard to most offences, with Parliament remaining free expressly to exclude the presumption in any particular case. But, to take, by way of example, the presumption that every offence implies intention, knowledge or recklessness on the part of the defendant[210], it cannot be anticipated with any certainty that, regulatory offences apart, typical offences in the future will make intention or knowledge on the one hand or recklessness on the other alternative grounds of liability in particular instances. It may be statutory policy to separate offences requiring intention or knowledge from those which can be committed by a "reckless" person.

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209 See paras. 44, 49, 60 and 65, above.

210 As follows from Proposition 1 in the working paper, as cited in para. 78, above. The qualification of the proposition in respect of offences of negligence is not here regarded in the example, in view of the criticism it received on consultation.

(*e*) There is a stronger case for presumptions in respect of "regulatory offences"[211], which in the past have caused much difficulty. It may be reasonable to anticipate that Parliament will in the future as a general rule not intend such offences to involve strict liability if conviction can give rise to a risk of imprisonment. But it does not follow that a presumption against such an intention is needed. Since *Sweet* v. *Parsley*[212] it is much clearer that the courts themselves are reluctant to assume that Parliament intended strict liability in respect of offences of this kind, unless Parliament expressly makes clear that intention.

(*f*) Where those responsible for presenting Bills to Parliament were content with the effect, as far as any offences in the Bills are concerned, of the operation of the presumptions on those offences, they would naturally be tempted not to go to the trouble of spelling out in the Bill the requirements as to fault or strict liability which would in any event follow by reason of the operation of the presumptions. This would result in a misleading form of legislation (to understand which the reader would have to look elsewhere) in a field, namely the criminal law, which should as far as possible immediately make clear its implications to the citizen.

(*g*) It is necessary to consider what would be the situation if in any future Act containing offence-creating provisions the operation of the legislation imposing the presumptions was expressly excluded. It might be thought that the position would at least not be different from what it is at present when in a statutory offence no express indication is given as to whether the offence requires intention, knowledge, recklessness or negligence. But it is doubtful whether this in fact would be the situation. It is more likely that the courts, looking at the legislation providing for the presumptions and at the particular offence-creating statute which expressly excluded them, would draw the conclusion that Parliament intended the offence to be one of strict liability. Yet the reality might be that Parliament would not have considered the issue of strict liability at all. It would be a paradoxical result of the introduction of statutory presumptions leaning against strict liability if the practical result was that the courts held more offences to involve strict liability.

82. The considerations put forward in paragraph 81(*a*), (*b*) and (*c*) above are interconnected. They are based on the assumption that in future, those responsible for any offence-creating provision will make clear in respect of each of the requirements of the offence whether intention, knowledge, recklessness or negligence is demanded, or whether in respect of that requirement the offence is one of strict liability. It is certainly our strong recommendation that these matters should be made clear in future offences. However, legislation comes into being in varying circumstances. We do not think that it is realistic to assume that in every

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211 "Regulatory offences" are here taken to mean statutory offences which are considered necessary in a highly organised society but conviction of which is not generally regarded as always involving moral turpitude on the part of the individual offender. Examples of such offences may be found in legislation protecting health and safety in employment, or safeguarding the physical environment.

212 See para. 35, above.

future offence-creating provision there will invariably be a clear statement of the requirements of the offence in these respects. In principle, therefore, we think there is a case for having some presumptions with regard to future offences. If the presumptions are only regarded as provision for exceptional situations then the danger referred to in paragraph 81(*f*)—that the presumptions will lead generally to a misleading form of penal legislation—is not likely to arise.

83. As far as the objection to presumptions raised in paragraph 81(*g*) is concerned—namely that their introduction would in practice lead to more offences of strict liability—we think that this objection under-estimates the importance which Parliament would attach to statutory presumptions. If such presumptions were in regard to any particular offence expressly excluded, then we think it reasonable to expect that Parliament would require some explanation of why this course had been taken. This in turn would lead to consideration of the nature of the liability involved in the proposed offence.

84. The considerations mentioned in paragraph 81(*d*) and (*e*) are concerned more with particular presumptions than with the question of whether there should be any presumptions at all. As far as paragraph 81(*d*) is concerned, the suggestion there made is that it would be inconvenient to have a general presumption in favour of intention, knowledge or recklessness with the consequent necessity of making express provision where it was desired to distinguish between offences involving intention or knowledge and those where recklessness would suffice. But if, as we have recommended and anticipate, offences in future will normally be formulated in any event with express provision as to the mental element involved, the extent of this inconvenience will be slight; and it would be still further diminished if the application of the presumption as to intention, knowledge or recklessness were limited to offences involving imprisonment. And paragraph 81(*e*) concedes that a presumption against strict liability in respect of offences punishable by imprisonment is justifiable, and only suggests that it may not be necessary in the light of *Sweet* v. *Parsley*[213]. Our analysis[214] of that decision of the House of Lords, however, and the doubt which must remain as to the applicability of its principles to offence-creating provisions in other statutory contexts, show that it is still somewhat uncertain what the attitude of the courts is to offences which may involve imprisonment but do not expressly require a mental state on the part of the defendant.

85. Our conclusion is therefore that there should be presumptions in respect of future offences. We are strengthened in this conclusion not only by the views of the Working Party responsible for Working Paper No. 31 but also by the almost unanimous approval of the principal of presumptions which emerged from our consultation. Those expressing such approval included those members of the judiciary and of the Society of Public Teachers of Law who commented on the proposals, the Law Reform Committee of the Bar Council, and The Law Society.

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213 See para. 35, above.
214 *ibid.*

(*a*) A presumption as to the requirements of an offence

86. The next questions are when such presumptions are needed and what should be the nature of those presumptions. When in respect of any requirement of an offence no express provision is made for liability which—

(*a*) is strict, or

(*b*) depends on

(i) the presence or absence of a particular state of mind on the part of the defendant or

(ii) compliance with an objective standard of conduct on his part,

we think that intention (or, as the case may be, knowledge) or recklessness should be presumed to be necessary as far as that requirement is concerned. Thus, as an example of where the requirement relates to a particular result, if there were a future statutory offence of assault occasioning actual bodily harm[215], and there were no express provision for fault or for strict liability as to the harm, the defendant would have to intend, or be reckless as to, such harm. The position would be similar in regard to a circumstance of an offence; thus, if there were a new offence of taking a child under fourteen out of the custody, care or control of his parent or guardian without the latter's consent (as is proposed by the Criminal Law Revision Committee in their Working Paper on Offences against the Person[216]) and there were no express provision for fault or for strict liability with regard to the lack of consent, the defendant would have to know that, or be reckless as to whether, there was that lack of consent.

87. We are not, however, saying that offences without any requirement of intention, knowledge or recklessness cannot in appropriate circumstances be justified. Thus we recognise that, where an offence is aimed at checking a major social evil, any apparent hardship to defendants who become liable even though they have only at the most been careless may perhaps be outweighed by the importance of emphasising the seriousness of the evil in question. It may be that liability on the basis of negligence or even of strict liability will induce persons to take much more stringent precautions than they otherwise would take to avoid the particular social evil (such as a danger to public health) at which the offence is aimed. But we think the question whether such liability is imposed is an important issue of policy which should be clearly presented to Parliament. It will be if, where such liability is imposed, there is the necessity expressly to exclude the presumption or to make express provision for liability in the way set out in (*a*) or (*b*) in paragraph 86, above.

(*b*) The extent of application within an offence of intention, knowledge or recklessness

88. We have earlier referred to the uncertainty[217] which may arise as to whether a requirement in an offence of intention, knowledge or recklessness applies to all the other requirements of the offence or only to some of them. In some cases the court will have little difficulty in deciding, for example, that conduct which has to be intentional implies necessarily that the defendant must

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215 *cf.*, s. 47 of the Offences against the Person Act 1861.

216 Para. 151.

217 See paras. 25–28.

know the circumstances against which that intention has to be directed. The offence of intentionally damaging property belonging to another implies a requirement that the defendant knows that the property belongs to another[218]. But if on the language of a provision a court were to hold that no such implication could be made our recommendation in paragraph 89 below would become effective. Thus in a case similar to *R.* v. *Cato and Others*[219], unless there were express contrary provision, the prosecution would have to prove not only that the defendant administered the drug intentionally or recklessly but also either that he intended to endanger the other's life or to inflict grievous bodily harm or that he was reckless in that regard.

89. *We recommend* that, wherever, in respect of any requirement of an offence which is created by a provision in or under a statute passed on or after the appointed day, there is no provision—

(*a*) making liability strict, or

(*b*) making liability depend on

(i) the presence or absence of any particular state of mind or

(ii) compliance with an objective standard of conduct,

then, to the extent that no such provision is made, the offence should involve on the part of the defendant intention or recklessness in relation to any result and knowledge or recklessness in relation to any circumstance.

(*c*) A presumption as to matters relevant to a defence or exception

90. In paragraph 69 above we have referred to the distinction between matters which are requirements of an offence (in the sense that the burden is on the prosecution in any event to prove them to establish the liability of the defendant) and those matters relevant to a defence or exception in respect of which there is a "persuasive" burden on the defendant or an "evidential" burden. We should emphasise that our recommendation in paragraph 89 above is intended to apply only to a requirement of an offence. There might, however, be offences created in the future where the question of the fault element (if any) to be applied might arise not in connection with a requirement of the offence but in regard to its absence in respect of a defence or exception from liability. For example, in *Brooks* v. *Mason*[220], where the offence in question was knowingly selling intoxicating liquor to a child under fourteen "excepting such intoxicating liquors as are sold or delivered in corked and sealed vessels . . ."[221], it was held that the defendant did not escape liability if he did not know that the bottle was uncorked and unsealed. The question which the court had to decide in *Brooks* v. *Mason* was whether a mental state applicable to the commission of an offence implied that its absence in respect of circumstances required to give rise to that exception saved the defendant from liability. We think that, to cover such

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218 See *R.* v. *Smith* (*David*) [1974] Q.B. 354 and para. 27, above.

219 [1976] 62 Cr. App. R. 41: see para. 28, above.

220 [1902] 2 K.B. 743.

221 The Intoxicating Liquors (Sale to Children) Act 1901, s. 2, now repealed. Under s. 169 of the Licensing Act 1964 it is an offence knowingly to sell intoxicating liquor to a person under 18, and there is no such exception.

cases, there should be a presumption as to the mental element, taking account of the particular burden of proof which may be appropriate in the circumstances.

91. *We therefore recommend* that,—

(*a*) wherever, in respect of an offence which is created by a provision in or under a statute passed on or after the appointed day, liability is subject to a defence or exception which does not amount to a provision making liability depend on

(i) the presence or absence of any particular state of mind or

(ii) compliance with an objective standard of conduct,

then the defendant should not be liable if, when the conduct required for the commission of the offence occurred, he believed[222] that any circumstance existed which, had it in fact existed, would have provided him with the defence or the exception from liability; and

(*b*) for the purposes of (*a*) above the requirements as to proof of a belief that a circumstance existed should be the same as those which relate to proof of a circumstance which the offence provides as a defence or an exception from liability.

PART V: THE MENTAL ELEMENT AND THE REASONABLE MAN

92. We now turn to issues which, although concerned with the mental element in offences, are of a different order from those discussed in the previous parts of this report. So far we have been considering the precise meaning to be given to words in the statutory formulation of offences requiring a mental state on the part of the defendant and the extent to which, when there is no express indication in an offence that a mental state is required, the courts should presume it. We are now concerned with the position which arises once it is clear that a particular mental state is required in relation to an offence. What then should be sufficient to establish that a defendant has the particular mental state in question?

93. The House of Lords was widely regarded as having decided in *D.P.P.* v. *Smith*[223] that a jury should be bound to infer an *intent* to kill or to inflict grievous bodily harm (which under the present law is necessary for a killing to amount to murder) if "an ordinary reasonable man"[224] in the position of the alleged murderer would have foreseen death or grievous bodily harm as the natural and probably consequence of his act. In the light of that case we made in

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222 In para. 48 above we have expressed the view that for the purposes of formulating the requirements of an offence "knowing" (with the extended meaning our recommendation in para. 49 above would give to it), rather than "knowing or believing", circumstances to exist is to be preferred. We think, however, that, where the defendant is in relation to a defence or exception to be given the benefit of the presumption in para. 91, it would be inadequate (and, incidentally, cumbersome) to require him merely to show that he did not know that the relevant circumstance did not exist; he should have to show that he believed the relevant circumstance to exist, and "belief" here means his inner conviction as to the existence of that circumstance.

223 [1961] A.C. 290.

224 *ibid.*, at p. 331.

our Report on Imputed Criminal Intent[225] a recommendation which was implemented by section 8 of the Criminal Justice Act 1967. That section provided that—

> A court or jury, in determining whether a person has committed an offence,—
>
> (*a*) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but
>
> (*b*) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.

94. The scope of section 8 was restricted to the circumstances which had given rise to it. It was only concerned with intent and with foresight as a factor in the ascertainment of intent. It did not deal, for example, with proof of such mental state as is involved in knowledge or recklessness.

95. In *D.P.P.* v. *Morgan and Others*[226] the majority of the House of Lords decided, with regard to the offence of rape, which involves sexual intercourse with a woman without her consent, that if the defendant genuinely believed that the woman consented to intercourse he is not guilty even though a reasonable man in his position would have believed that there was no consent. Thus Lord Fraser of Tullybelton in his speech said—

> "If the effect of the evidence as a whole is that the defendant believed, or may have believed, that the woman was consenting, then the Crown has not discharged the onus of proving commission of the offence as fully defined and, it seems to me, no question can arise as to whether the belief was reasonable or not. Of course, the reasonableness or otherwise of the belief will be important as evidence tending to show whether it was really held by the defendant, but that is all"[227].

96. In the light of this case the Report of the Advisory Group on the Law of Rape[228] made recommendations which have been implemented in this respect by the Sexual Offences (Amendment) Act 1976. For our present purpose the relevant provision is section 1 which provides that—

> (1) For the purposes of section 1 of the Sexual Offences Act 1956 (which relates to rape) a man commits rape if—
>
> (*a*) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it; and
>
> (*b*) at that time he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it;
>
> and references to rape in other enactments (including the following provisions of this Act) shall be construed accordingly.

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225 (1967) Law Com. No. 10.
226 [1976] A.C. 182, 192.
227 [1976] A.C. 182, 237.
228 (1975), Cmnd. 6352.

(2) It is hereby declared that if at a trial for a rape offence the jury has to consider whether a man believed that a woman was consenting to sexual intercourse, the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction with any other relevant matters, in considering whether he so believed.

97. We are, however, here concerned with the extent to which in all offences the fact that a reasonable man must be taken to intend, or to be reckless as to, a result of his conduct or to know, or to be reckless as to, the existence of circumstances is relevant to the proof of those states of mind in the actual accused. Bearing in mind that we envisage this report as a stage in the creation of a comprehensive criminal code, we think that the general principle, of which section 8 of the Criminal Justice Act 1967 and section 1(2) of the Sexual Offences (Amendment) Act 1976 are particular applications, should be given statutory formulation. This would extend to intention and recklessness as to the result of conduct (and to foresight as a factor in determining these states of mind) and to knowledge and recklessness as to the existence of circumstances. We do not think it is satisfactory, if an offence requires a particular state of mind in respect of a prescribed element of an offence, in effect to change the nature of that requirement by identifying the actual state of mind of the defendant with the state of mind which a reasonable man in his position would have had. If the desired end is to make liability in respect of a particular requirement of an offence depend on negligence, it seems better to do so directly rather than by having recourse to such a fiction. If the general principle were embodied in a statutory formulation it would supersede section 8 of the Criminal Justice Act 1967 and section 1(2) of the Sexual Offences (Amendment) Act 1976 which could both be repealed.

98. *We therefore recommend* that—

(*a*) a court or jury, in determining whether a person has committed an offence, should decide whether—

(i) he intended a particular result of his conduct,

(ii) he was reckless as to such a result,

(iii) he foresaw that such a result might occur,

(iv) he knew that a particular circumstance existed, or

(v) he was reckless as to the existence of such a circumstance,

by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances; and

(*b*) it should be a relevant factor—

(i) for the purposes of (*a*)(i), (ii) and (iii) above that the result was a natural and probable consequence of that person's conduct,

(ii) for the purpose of (*a*) (iv) above that a reasonable man in his situation would have known that the circumstance existed, and

(iii) for the purpose of (*a*) (v) above that a reasonable man in his situation would have realised that there was a risk of the circumstance existing.

PART VI: SUMMARY OF RECOMMENDATIONS

99. The following gives a summary of the recommendations of this report. Reference is made to the paragraphs where the matters are discussed and, where the recommendations involve the need for legislation, to the draft clauses in Appendix A.

(1) For the purposes of any enactment to which this provision applies—

(i) a person should be regarded as intending a particular result of his conduct if, but only if, either he actually intends that result or he has no substantial doubt that the conduct will have that result (paragraphs 41-44 and clause 2);

(ii) a person should be regarded as knowing that a particular circumstance exists if, but only if, either he actually knows or he has no substantial doubt that that circumstance exists (paragraphs 45-49 and clause 3);

(iii) a person should be regarded as being reckless as to a particular result of his conduct if, but only if,—

(*a*) he foresees at the time of that conduct that it might have that result and,

(*b*) on the assumption that any judgment by him of the degree of that risk is correct, it is unreasonable for him to take the risk of that result occurring (paragraphs 50-60 and clause 4); and

(iv) where the enactment makes it an offence for a person to conduct himself in a specified way, being reckless as to whether a particular circumstance exists, he should be regarded as being reckless as to that circumstance if, but only if,—

(*a*) he realises at the time of that conduct that there is a risk of that circumstance existing and,

(*b*) on the assumption that any judgment by him of the degree of that risk is correct, it is unreasonble for him to take it (paragraphs 61-66 and clause 4).

(2) (*a*) Wherever a provision in or under a statute passed on or after an appointed day refers to intending, knowing or being reckless in relation to an offence, our recommendations as to those terms should apply unless the provision otherwise expressly provides (paragraphs 70-72 and clause 1).

(*b*) In the creation of new offences on or after the appointed day the use of terms, other than those which we have recommended for expressing the required mental element, should wherever possible be avoided (paragraphs 70–72).

(3) In respect of an offence which is created by a provision in or under a statute passed on or after the appointed day, it should be expressly stated to what extent liability depends on intention, knowledge or reck-

lessness, depends on an objective standard of conduct (whether expressed as liability for negligence or in some other way) or is intended to be strict (paragraphs 73–75).

(4) Wherever, in respect of any requirement of an offence which is created by a provision in or under a statute passed on or after the appointed day, there is no provision—

(*a*) making liability strict, or

(*b*) making liability depend on

(i) the presence or absence of any particular state of mind or

(ii) compliance with an objective standard of conduct,

then, to the extent that no such provision is made, the offence should involve on the part of the defendant intention or recklessness in relation to any result and knowledge or recklessness in relation to any circumstance (paragraphs 78–89 and clause 5).

(5) (*a*) Wherever, in respect of an offence which is created by a provision in or under a statute passed on or after the appointed day, liability is subject to a defence or exception which does not amount to a provision making liability depend on

(i) the presence or absence of any particular state of mind or

(ii) compliance with an objective standard of conduct,

then the defendant should not be liable if, when the conduct required for the commission of the offence occurred, he believed that any circumstance existed which, had it in fact existed, would have provided him with the defence or the exception from liability.

(*b*) For the purposes of (*a*) above the requirements as to proof of a belief that a circumstance existed should be the same as those which relate to proof of a circumstance which the offence provides as a defence or an exception from liability (paragraphs 90–91 and clause 6).

(6) (*a*) A court or jury, in determining whether a person has committed an offence, should decide whether—

(i) he intended a particular result of his conduct,

(ii) he was reckless as to such a result,

(iii) he foresaw that such a result might occur,

(iv) he knew that a particular circumstance existed, or

(v) he was reckless as to the existence of such a circumstance,

by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances; and

(*b*) it should be a relevant factor—

(i) for the purposes of (*a*)(i),(ii) and (iii) above that the result was a natural and probable consequence of that person's conduct,

(ii) for the purpose of (*a*) (iv) above that a reasonable man in his situation would have known that the circumstance existed, and

(iii) for the purpose of (*a*)(v) above that a reasonable man in his situation would have realised that there was a risk of the circumstance existing (paragraphs 92–98 and clause 7).

(*Signed*) SAMUEL COOKE, *Chairman*

STEPHEN EDELL.

W. A. B. FORBES.

NORMAN S. MARSH.

PETER NORTH.

J. M. CARTWRIGHT SHARP, *Secretary*.

12 *April* 1978.

APPENDIX A

Draft Criminal Liability (Mental Element) Bill

ARRANGEMENT OF CLAUSES

Standard tests for questions of criminal liability

Clause

DRAFT

OF A

BILL

TO

A.D. 1978.

Establish, in relation to offences created by or by virtue of Acts of Parliament passed after 1980, rules as to the effect of certain words used to define states of mind and as to the states of mind or standards of conduct required for liability where those words are not used; to provide that a person charged with such an offence is in certain cases not to be guilty of it if he believed in the existence of circumstances whose existence would have meant that he was not guilty; and to make further provision with respect to the proof of intention, knowledge, recklessness and foresight for the purpose of criminal liability.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Standard tests for questions of criminal liability

Establishment of standard tests for certain questions relating to criminal liability.

1.—(1) A court or jury determining whether a person has committed an offence created by a provision—

(*a*) which is contained in or made by virtue of an Act of Parliament passed after 31st December 1980, and

(*b*) which employs one of the key words specified in this Act

shall use the standard test under this Act for which that key word is appropriate when answering any question relating to him specified in subsection (2) below, unless the provision creating the offence declares that the test is not to be used.

(2) The questions mentioned in subsection (1) above are—

(*a*) the question of intention;

(*b*) the question of knowledge;

(*c*) the question of recklessness as to result; and

(*d*) the question of recklessness as to circumstances.

Clause 1

1. Clause 1 provides for the use of standard tests (specified in clauses 2, 3, 4(1) and 4(2)) in determining, in relation to liability for criminal offences created in the future, whether a person—

(*a*) intended a result of his conduct,

(*b*) knew of a circumstance,

(*c*) was reckless as to a result of his conduct, or

(*d*) was reckless as to whether a circumstance existed,

where the offence-creating provision uses one of the key words indicating intention, knowledge or recklessness (*subsection* (1)).

2. The standard tests apply (unless specifically excluded) where the key words are used in offences created by Acts passed after a specified date, or by instruments made under such Acts. The date will, in fact, be fixed so as to allow time for the legislation to be studied fully by those drafting offences, and the date in *subsection* (1) is simply by way of illustration.

3. The standard tests will also apply where any question of intention, knowledge or recklessness arises by reason of clause 5.

(3) In this Act, in relation to any person,—

"the question of intention" means the question whether he intended a particular result of his conduct;

"the question of knowledge" means the question whether he knew of any relevant circumstances;

"the question of recklessness as to result" means the question whether he was reckless as to whether his conduct would have any particular result; and

"the question of recklessness as to circumstances" means the question whether he was reckless as to whether any relevant circumstances existed.

(4) The standard tests for the questions specified in subsection (3) above are respectively specified in sections 2, 3, 4(1) and 4(2) below.

EXPLANATORY NOTES

Intention.

The standard tests and the key words

2.—(1) The standard test of intention is—

Did the person whose conduct is in issue either intend to produce the result or have no substantial doubt that his conduct would produce it?

(2) The appropriate key words are—

(*a*) the verb "to intend" in any of its forms; and

(*b*) "intent", "intention", "intentional" and "intentionally".

EXPLANATORY NOTES

Clause 2

1. *Subsection* (1) provides the standard test of intention.
2. *Subsection* (2) specifies the key words which import the above test.

Knowledge.

3.—(1) The standard test of knowledge is—

Did the person whose conduct is in issue either know of the relevant circumstances or have no substantial doubt of their existence?

(2) The appropriate key words are—

(*a*) the verb "to know" in any of its forms;

(*b*) "knowledge" and "knowingly"; and

(*c*) any of the words mentioned in section 2(2) above, if used so as to imply that the person whose conduct is in issue cannot intend to produce a particular result unless he knows some particular fact or facts.

Clause 3

1. *Subsection* (1) provides the standard test of knowledge.

2. *Subsection* (2) specifies the key words which import the above test.

3. The standard test of knowledge applies not only when any of the "knowledge" words specified in paragraphs (*a*) and (*b*) of *subsection* (2) is used, but also by virtue of paragraph (*c*) when any of the "intention" words specified in clause 2(2) is used so as to imply that knowledge of circumstances is required for liability. For example, where it is an offence for a person *intentionally* to administer a harmful substance to another, and the word "intentionally" is construed as requiring that the person administering the substance must know that it is harmful, the test of knowledge is that in *subsection* (1).

Recklessness.

4.—(1) The standard test of recklessness as to result is—

Did the person whose conduct is in issue foresee that his conduct might produce the result and, if so, was it unreasonable for him to take the risk of producing it?

(2) The standard test of recklessness as to circumstances is—

Did the person whose conduct is in issue realise that the circumstances might exist and, if so, was it unreasonable for him to take the risk of their existence?

(3) The appropriate key words for both tests are "reckless", "recklessness" and "recklessly".

(4) The question whether it was unreasonable for the person to take the risk is to be answered by an objective assessment of his conduct in the light of all relevant factors, but on the assumption that any judgment he may have formed of the degree of risk was correct.

Clause 4

1. *Subsection* (1) provides the standard test of recklessness as to result. This involves asking two questions.

(*a*) The first question—Did the person concerned foresee that his conduct might produce that result?—relates to the state of mind of that person and is to be decided on a subjective basis. If it is answered in the negative the second question will not arise.

(*b*) The second question—Was it unreasonable for the person to take the risk of his conduct producing that result?—is to be answered objectively, considering whether the risk ought to have been taken (see also *subsection* (4)).

2. *Subsection* (2) provides the standard test of recklessness as to circumstances. This also involves asking two questions.

(*a*) The first question—Did the person concerned realise that the circumstances might exist?—is to be decided on a subjective basis, and, again, if it is answered in the negative the second question will not arise.

(*b*) The second question—Was it unreasonable to take the risk of the circumstances existing?—is to be answered objectively, considering whether the risk ought to have been taken (see also *subsection* (4)).

3. *Subsection* (3) specifies the key words which import the above tests.

4. *Subsection* (4), apart from providing that the question of whether it was unreasonable to take the risk is to be answered by an objective assessment of the conduct of the person in question, requires the assessment to be made on the assumption that any judgment the person may have formed of the degree of risk was correct. Thus if it is found that a person thought that it was very probable his conduct would cause a particular prohibited result there may be little difficulty in holding that it was unreasonable for him to take the risk of causing that result. Yet where it is found that a person thought there was only the very slightest risk of his conduct causing that result it may be held, in the same circumstances, that it was not unreasonable for him to take the risk of causing that result. If it is found that the person formed no judgment of the degree of the risk, the question of whether it was unreasonable to take the risk will be decided by objective criteria.

Cases where the standard tests apply without the use of key words.

5.—(1) This section has effect where an offence is created by a provision contained in or made by virtue of an Act of Parliament passed after 31st December 1980 unless the provision creating the offence declares that it is not to have effect.

(2) Subject to subsection (4) below, a person is not guilty of an offence in relation to which this section has effect unless the prosecution establish that, using the standard test, an affirmative answer is to be given in respect of all relevant circumstances—

(*a*) to the question of knowledge, or

(*b*) to the question of recklessness as to circumstances.

(3) Subject to subsection (4) below, where a person can only be guilty of an offence in relation to which this section has effect if his conduct produces a particular result, he is not guilty of it unless the prosecution establish that, using the standard test, an affirmative answer is to be given in respect of that result—

(*a*) to the question of intention, or

(*b*) to the question of recklessness as to result.

(4) Where a provision creating an offence contains words indicating in respect of a particular circumstance or result—

(*a*) that a person can only commit the offence if he has a particular state of mind or if he does not comply with an objective standard of conduct, or

(*b*) that a person can commit it whatever the state of his mind or the standard of his conduct, or

(*c*) that there is an exemption from liability if a person does not have a particular state of mind or complies with an objective standard of conduct,

subsection (2) or (3) above shall be disregarded in relation to that circumstance or result.

Clause 5

1. This clause gives effect to the recommendation in paragraph 89 of the report that in any future offence, where there is no provision for fault or for strict liability in relation to a requirement of the offence, there should, in relation to that requirement, be a presumption that liability depends upon intention or recklessness as to any result of conduct, and upon knowledge of, or recklessness as to, any circumstance.

2. The presumptions apply, unless specifically excluded, to offences created by or under Acts passed after the date specified in clause 1(1) (*subsection* (1)).

3. Where the presumptions apply they are that—

(*a*) in relation to all relevant circumstances the prosecution must establish either knowledge or recklessness on the part of the defendant (*subsection* (2)), and

(*b*) in relation to the result of the defendant's conduct the prosecution must establish that he intended the result or was reckless as to it (*subsection* (3)),

and in each case the standard tests in clauses 2, 3, 4(1) and 4(2) are to be applied in determining whether there was intention, knowledge or recklessness.

4. The presumptions do not, however, apply if in relation to any circumstance or result—

(*a*) it is provided that a particular state of mind, or failure to observe an objective standard of conduct, is a requirement of the offence—*e.g.*, if it were made an offence (as by s. 19 of the Allotments Act 1922) by negligence to cause damage to an allotment garden (*subsection* (4)(*a*));

(*b*) it is provided that the offence can be committed regardless of the defendant's state of mind, or his observance of an objective standard of conduct—*e.g.*, if it were made an offence to be in possession of an explosive, whether or not the defendant knew that what he had in his possession was an explosive (*subsection* (4) (*b*)); or

(*c*) there is provided an exemption from liability if the defendant does not have a particular state of mind or if he complies with an objective standard of conduct—*e.g.*, if it were made an offence to pollute a river, subject to a defence that the defendant had taken all reasonable precautions against doing so (*subsection* (4) (*c*)).

In these cases there is no place for a presumption to operate.

Mistaken belief in exempting circumstances as a defence.

Defence of belief in exempting circumstances

6.—(1) This section has effect where an offence is created by a provision contained in or made by virtue of an Act of Parliament passed after 31st December 1980 unless the provision creating the offence declares that it is not to have effect.

(2) Subject to subsection (3) below, if the provision creating such an offence specifies exempting circumstances, a person charged with the offence is not guilty of it if at the time of the conduct alleged to constitute the offence he believed that exempting circumstances existed.

(3) Subsection (2) above does not apply where the provision contains words indicating that a person charged with the offence is not guilty of it if, in relation to any exempting circumstances, he had a particular state of mind or complied with an objective standard of conduct.

(4) For the purposes of this section a provision specifies exempting circumstances if it specifies, by way of defence, exception, proviso, excuse or qualification, circumstances the establishment of which has the effect that a person charged with the offence cannot be guilty of it.

(5) Any requirement as to proof of the existence of exempting circumstances shall apply also as to proof of belief in their existence.

Clause 6

1. This clause gives effect to the recommendation in paragraph 91 of the report that in any future offence, where liability is subject to a defence or exemption, the defendant should not be liable if he believed that any circumstance existed which, had it in fact existed, would have provided him with that defence or exemption.

2. The clause has effect where an offence-creating provision provides a defence, exception, proviso, excuse or qualification if a prescribed factual circumstance exists—*e.g.*, if it were made an offence knowingly to supply liquor to children, but subject to a defence that the liquor was in a properly corked and sealed vessel.

3. In such a case *subsection* (2) provides, in effect, for a defence—additional to that specifically provided by the offence-creating provision—that the defendant *believed* that the liquor was in a properly corked and sealed vessel; *cf.*, *Brooks* v. *Mason* [1902] 2 K.B. 743.

4. *Subsection* (2) does not, however, apply where the exempting provision itself indicates that a person is not liable if he had a particular state of mind or complied with an objective standard of conduct in relation to an exempting circumstance—*e.g.*, if in the above case the defence provided was that the liquor was in a properly corked and sealed vessel or the defendant believed *on reasonable grounds* that it was in a properly corked and sealed vessel (*subsection* (3)).

5. By *subsection* (5) the burden of proving the defendant's belief that the exempting circumstance existed is the same as the burden of proving that the circumstance itself existed. Thus, where there is a persuasive burden on the defendant in relation to an exemption (as there is, for example, by virtue of section 81 of the Magistrates' Courts Act 1952), a defendant wishing to rely upon his belief in facts that would have brought him within the exemption has a similar burden in relation to his belief.

Proof of intention, knowledge, recklessness and foresight.

Proof of intention etc.

7.—(1) A court or jury determining whether a person has committed an offence—

(*a*) shall not be bound in law to infer that any question specified in the first column of the Table below is to be answered in the affirmative by reason only of the existence of the factor specified in the second column as appropriate to that question, but

(*b*) shall treat that factor as relevant to that question, and decide the question by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.

TABLE

Questions	*Appropriate factors*
1. Whether the person charged with the offence— (*a*) intended to produce a particular result by his conduct; (*b*) was reckless as to whether his conduct would produce a particular result; (*c*) foresaw that his conduct might produce a particular result.	1. The fact that the result was a natural and probable result of such conduct.
2. Whether he knew a particular fact.	2. The presence of circumstances leading to the inference that a reasonable man in his situation would have known the fact.
3. Whether he was reckless as to whether particular circumstances existed.	3. The presence of circumstances leading to the inference that a reasonable man in his situation would have realised that the circumstances might exist.

1967 c. 80.
1976 c. 82.

(2) Section 8 of the Criminal Justice Act 1967 and section 1(2) of the Sexual Offences (Amendment) Act 1976 (which are superseded by this section) are hereby repealed.

(3) This section shall come into force at the expiration of a period of 2 months beginning with the date on which this Act is passed.

Clause 7

1. This clause widens and generalises section 8 of the Criminal Justice Act 1967. That section provides for a subjective, as against an objective, test in determining whether a defendant intended or foresaw the result of his actions. This clause applies the same test also to knowledge of facts or circumstances, and to recklessness as to results or as to facts or circumstances, thus giving effect to paragraph 98 of the report. The operation of this clause is not restricted to instruments made after the passing of the Bill.

2. *Subsection* (1)(*a*) provides that a court, considering in relation to a defendant any of the questions listed in column 1 of the Table in the subsection, shall not be bound in law to treat as conclusive of that question the factor listed in column 2 as appropriate to that question. The subsection goes on in paragraph (*b*), however, to make clear that in relation to each of those questions the appropriate factor is relevant and is to be taken into account with all the evidence.

3. The repeal by *subsection* (2) of the legislation mentioned there does not change the law, which is comprehensively covered by the new clause.

4. This clause comes into force 2 months after the Bill is passed (*subsection* (3)).

Supplementary

Short title and extent.

8.—(1) This Act may be cited as the Criminal Liability (Mental Element) Act 1978.

(2) This Act does not extend to Scotland or to Northern Ireland.

APPENDIX B

Membership of the Law Commission's Working Party upon the General Principles of the Criminal Law

Joint Chairmen:	Mr. Neil Lawson, Q.C.[1]
	Mr. Norman S. Marsh, Q.C.
Law Commission members:	The Honourable Mr. Justice Scarman, O.B.E.[2]
	Mr. T. R. Fitzwalter Butler
Members, other than representatives of the Law Commission:	*The Right Honourable Lord Edmund-Davies
	*The Common Serjeant, Mr. J. M. G. Griffith-Jones, M.C.
	Mr. J. H. Buzzard[3]
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	Mr. Michael Walker (research member)
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	Mr. G. V. Hart[5] (Home Office)
Secretary:	Mr. J. C. R. Fieldsend (Law Commission)
Assistant Secretary:	Mr. C. W. Dyment (Law Commission)

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* Also members of the Criminal Law Revision Committee at the time.
[1] Now the Honourable Mr. Justice Lawson.
[2] Now the Right Honourable Lord Scarman.
[3] Now His Honour Judge Buzzard.
[4] Now His Honour Judge Cox.
[5] Secretary of the Criminal Law Revision Committee at the time of Working Paper No. 31.

APPENDIX C

Organisations and individuals who commented on the Law Commission's Working Paper No. 31, "The Mental Element in Crime"

Association of Chief Police Officers
The Bar Council, Law Reform Committee
The Honourable Mr. Justice Bray
Professor P. Brett
Bristol University Faculty of Law
The British Institute of International and Comparative Law
Mr. R. J. Buxton
The Honourable Mr. Justice Crichton
Mr. P. J. Cronin
Professor J. Ll. J. Edwards
Professor E. Griew
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The Institute of Legal Executives
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The Law Society
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The Parliamentary Counsel
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The Right Honourable Lord Reid
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