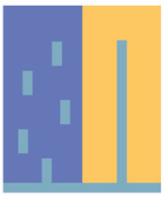

Criminal Law
Codification
Advisory Committee

An Coiste Comhairleach um Chódú an Dlí Choiriúil

DRAFT CRIMINAL CODE AND COMMENTARY

May 2010

Criminal Law Codification Advisory Committee

Draft Criminal Code and Commentary

May 2010

BAILE ÁTHA CLIATH
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INTRODUCTION

Contents

1. This draft integrates all of the work done to date on the Draft Criminal Code, thus realising one of the principal aims of codification: digesting the sources of law into a single instrument. In line with the Advisory Committee's First Programme of Work 2008-2009, the draft contains six numbered Parts, of which Part 2: Homicide Offences takes the form of an indicative heading only, to signal the fact that the Advisory Committee is mindful of the Minister for Justice, Equality and Law Reform's request that homicide offences be included in the inaugural criminal code. Subject to a successful outcome of the upcoming review of the codification project by the Department, it is envisaged that the codification of homicide offences, and their eventual insertion into the Draft Criminal Code, will take place post review.

2. The remaining Parts are as follows: Part 1: General Principles; Part 3: Non-Fatal Offences Against the Person; Part 4: Theft and Fraud and Related Offences; Part 5: Criminal Damage Offences; Part 6: Public Order Offences. Parts 2-6 have been sequenced in descending order of seriousness.

(a) The General Part

3. Part 1, dealing with general principles, is incomplete in the sense that it is currently confined to the rules of inculpation affecting such matters as the objective and fault elements of an offence, causation and consent; remaining matters of preliminary and general concern (such as provisions on the objectives of the Code, scope of the General Part, principles of construction, as well the articulation of the rules governing proof of criminal responsibility, double jeopardy, jurisdictional issues and general time limitations etc) and the general defences to a criminal charge will be added at a later date. Broadly speaking, this division of labour is designed to ensure that the bulk of the rules affecting the meaning and scope of offence definitions can now be seen in fully codified form. It also illustrates how the general principles codified in Part 1 interact with the offences codified in Parts 3-6; and how this interaction contributes to greater certainty and consistency when interpreting and applying offence provisions.

(b) The Special Part

4. Parts 3-6 inclusive are complete in the sense that all of the matter pertaining to their respective areas of substantive law has been included; although it goes without saying that these Parts will be kept under review as work on the Draft Code progresses. In addition, the current draft reflects the suggestions and observations made by the Advisory Committee in respect of earlier drafts.

5. Moreover, the relevant procedural, evidential and ancillary provisions have been included in the form of code chapters (as distinct from schedules) in all four substantive law Parts following the Advisory Committee's recommendation to that effect. Pending detailed consideration of the matter by the Advisory

Committee, the technique of codification (described below in paragraphs 7-23) has not as yet been systematically applied to this material.

(c) Codifying homicide offences and the general defences

6. Although the Department of Justice, Equality and Law Reform has yet to take a formal view on the matter, it seems likely that the completion of Part 1: General Principles, and work on Part 2: Homicide Offences, will take the form of codifying the draft Bills in these areas recently published (or, in the case of inchoate offences, shortly to be published) by the Law Reform Commission. With the exception of two proposals affecting the scope of the mental element in murder and the limits of the offence of conspiracy, respectively, these draft Bills are largely declaratory of the common law in their respective areas. So it would seem sensible to "codify" them as they are, as opposed to waiting until such time as the relevant legislation has been introduced and passed, and then codifying the resultant *law*. At all events, pending any decision the Department may make, the Advisory Committee may wish to consider this matter, along with other issues bearing on the future development of the Draft Code, during the period of the upcoming review.

The technique of codification

(a) The role of restatement

7. Unlike its more exotic cognates, the model of codification employed in the current draft is essentially a form of enhanced restatement. Apart from changes necessitated by the offence template (see section *(c),* below), the introduction of the triple fault alternative (see paragraphs 28-34, below) and the division of labour between the General and Special Parts, the emphasis throughout has been on preserving the integrity of the original statutory offence. Accordingly, there are no instances of law reform save those inherent in the codification process - such as the "plugging" of gaps in *mens rea* and the standardisation of fault terms in order to promote consistency and certainty across the Code (this issue is discussed in more detail in the Explanatory Notes to Head 1106 (Fault Elements)).

8. Similarly, in respect of the common law rules and principles codified in Part 1, the emphasis has also been on restatement; the aim has been to reduce the general principles of criminal liability to statutory form. Moreover, only those rules and principles which can be regarded as having been definitively settled by the courts have been fully codified. Where matters are still uncertain, as in the case of some of the rules bearing on the issue of consent, the relevant provisions have been codified in headline form only, leaving room for further development and clarification by the courts.

(b) Suggestions for law reform

9. Where work on the draft has suggested that there may be a need for limited law reform in a particular area, or where a member of the Advisory Committee has made an arguable case that such reform may be desirable, a suggestion to that

effect has been made in the Explanatory Notes to the relevant Head; see, for example, note 10 to Head 6108, suggesting that the penalties for riot and violent disorder may need to be adjusted to reflect the relative seriousness of these offences.

(c) The use of a standardised offence template

10. Offences have been codified in two stages. First, in the interests of consistency and accessibility, each offence has been formatted in accordance with the standard offence template outlined in the Committee's First Programme of Work 2008-2009, paragraph 2.17. Thus offence names now form part of the offence definition, while offence definitions across the Draft Criminal Code now have the form: "A person commits the offence of *x* if he or she…" Similarly, where relevant, exemptions from liability are rendered in the form: "A person does not commit an offence under this Head if…"

(d) The role of element analysis

11. Second, by way of promoting consistency and certainty in the application of the law, the *actus reus* of each offence has been broken down into three component parts in accordance with the principles of element analysis: *viz*., conduct, circumstance and result elements. By the same token, *mens rea* has been disaggregated as intention, knowledge and recklessness, and each of these terms has in turn been defined to reflect the exigencies of the particular objective element to which it is being applied. The details of this aspect of the technique of codification, together with the principles of element analysis on which it is based, are set out in the Explanatory Notes to Heads 1102 (Objective Elements) and 1106 (Fault Elements). The practical benefits of element analysis are illustrated in the analytic grid accompanying each codified offence.

(e) Offence names

12. In contradistinction to current legislative policy on the matter, an attempt has been made to fashion a consistent approach to the naming of offences. Broadly speaking, the following principles have been applied: (i) offence names should accurately reflect, though not necessarily spell out exhaustively, the content of an offence; (ii) where possible, offence names should be reasonably generic so as to facilitate future amendment without excessive degradation; (iii) in the interests of accessibility, offence names should be reasonably short so that they can be incorporated into the text of offence definitions without adding undue bulk. These principles should be read in conjunction with the discussion of code degradation in sections *(g)* and *(h)*, below.

(f) The policy of "one offence per Head"

13. Generally speaking, a policy of "one offence per Head" has been pursued throughout the draft. The advantages of the "one offence per Head" policy are twofold. First, it aids accessibility by aligning cross headings with offence names, and by making the Code's table of contents clearer and more informative for professional and ordinary users alike. Second, by ensuring that each offence

has a distinct section number, the "one offence per Head" policy arguably helps to reduce the risk of error by Gardaí and prosecutors when charges are being framed.

(g) The aggravating factor model

14. Where it was felt that the pursuit of the "one offence per Head" policy would lead to needless offence proliferation, what might be described as an integrated aggravating factor model has been employed. The essence of this model is that the aggravating factor is provided for *within* the Head dealing with the baseline offence, instead of being treated as a separate offence in a standalone Head as per the non-integrated version of the aggravating factor model – as used, for example, in aggravated assault in Head 3105.

15. Thus, in order to avoid needless proliferation in the case of two closely related offences, possession and aggravated possession of counterfeit currency have been combined in Head 4504 – an arrangement which reflects their original statutory coupling in section 35(1)-(2) of the Criminal Justice (Theft and Fraud Offences) Act 2001.

16. A key advantage of the aggravating factor model is that it enables the legislature to provide for additional aggravating factors without creating a series of new, standalone offences, and, consequently, without compromising the sequencing and numbering of existing offences in the affected Code chapter. Where an offence already exists in aggravated form – as in the case of aggravated assault - this can be done by the simple device of adding additional aggravating factors to the list already provided for in the offence definition.

17. However, this option is unavailable to the legislature in respect of offences which do not currently exist in aggravated form. Hence the need for the integrated version of the aggravating factor model as exemplified by possession and aggravated possession of counterfeit currency in Head 4504. As Head 4504 illustrates, by providing for aggravating factors within the baseline offence, this model obviates the risk of code degradation occasioned by adding offences out of sequence or by alphabetising the numbering system in order to keep new offences in sequence. As international experience shows, degradation of this kind is a serious impediment to maintaining a criminal code as a properly integrated corpus of clear and accessible rules.

(h) Offence consolidation

18. In view of the emphasis on restatement, the device of offence consolidation has been used sparingly. On the rare occasions on which it has been used, the aim has been to reduce needless offence proliferation, and, by way of example, to discourage such proliferation in the future. Accordingly, offences have been consolidated if and only if (i) they can be formatted as modes of committing a generic offence, (ii) their penalties are identical, and (iii) there is no loss of legal content involved in the exercise.

19. Thus the original statutory offences of making gain or causing loss by deception and obtaining services by deception (contrary to sections 6 and 7, respectively, of

the Criminal Justice (Theft and Fraud Offences) Act 2001) have been consolidated into a single offence of "deceiving with intent" (see Head 4102). Similarly, the offences of false accounting and suppression etc. of documents (contrary to sections 10 and 11, respectively, of the 2001 Act) have been consolidated into a single offence of "fraudulent practice" (see Head 4104).

20. The offence of attack with a contaminated syringe or blood contrary to Draft Criminal Code, Head 3109 provides an interesting example of consolidation in the field of offences against the person. On the principle that they represent two ways of committing the same offence, Head 3109 consolidates the syringe/blood attack offences in section 6(5)(a) and 6(5)(b) of the Non-Fatal Offences Against the Person Act 1997; *and*, by virtue of the fact that it involves the indirect infliction of the harm contemplated by the consolidated offence (and is thus covered by the causation rules in Head 1104), also incorporates the offence of intentionally placing a contaminated syringe contrary to section 8(2) of the 1997 Act (for discussion, see the Explanatory Notes to Head 3109).

(i) The classification of offences

21. In the interests of accessibility, the familiar divisions and subdivisions of the existing criminal calendar have been preserved in the Draft Criminal Code. Thus it is envisaged that homicide offences and non-fatal offences against the person will be housed in separate Parts (as opposed to a single, consolidated Part as favoured by some modern codes). Similarly, while consideration was given to amalgamating criminal damage offences and theft and fraud and related offences in a unified Part on property offences, it was decided that, given its established historical pedigree, the current division of labour better served the fundamental codification goal of accessibility.

22. By the same token, the contents of individual Parts track the contents of the original mini-codes. However, an attempt has been made to group offences within each Part according to the interests they are designed to protect. For example, unlike the mini-code on which it is based, Part 3: Non-Fatal Offences Against the Person contains separate Chapters on offences against bodily integrity (Chapter 31) and offences against personal autonomy (Chapter 32).

23. The advantage of grouping offences by protected interests is that it has enabled the Advisory Committee to pursue a limited policy of reclassification aimed at improving the overall accessibility of the Code. Details of this policy, and of the offences to which it has been applied, are given in the Introductions to Parts 3-6 inclusive.

Numbering

(a) The four-digit scheme explained

24. A four-digit numbering scheme has been used throughout the current draft. The principle underlying the scheme is to maximise ease of access to the Code for professional and ordinary users alike. Thus in any given code provision the first digit tracks the Part number, the second the Chapter number within that Part, and

the final two digits the section numbers within that Chapter, respectively. In the result, individual provisions can be cited using a simple numerical formula containing all the information coordinates needed to locate them in the Code. For example, burglary would be cited as Criminal Code, Section 4304; damaging property as Criminal Code, Section 5101; violent disorder as Criminal Code, Section 6107; and so on.

(b) The limits of the scheme

25. Although adequate for the purposes of this draft, the four-digit numbering system will need to be kept under review. Two problems will need to be addressed. For while a four-digit scheme allows for up to 99 sections in each Chapter, it can only accommodate nine or fewer Parts; and Parts with nine or fewer Chapters: in both cases because ten or more Parts/Chapters would require double-digit identifiers, thus knocking out the tracking system described in the preceding paragraph.

26. The problem of Parts with ten or more Chapters is unlikely to lead to practical difficulties in the short to medium term; the largest Part earmarked for inclusion in the inaugural criminal code – Part 4: Theft, Fraud and Related Offences – currently has seven Chapters. So the existing arrangement leaves ample room for the legislature to add new Chapters without degrading the numbering scheme. In contrast, the problem posed by a total of ten or more Parts will almost certainly give rise to practical difficulties in the foreseeable future, given that the Code in its final form is likely to contain additional Parts on sexual offences, offences against the state, offences against the administration of justice, and offences against the international community, bringing the total number of Parts to ten.

(c) Possible alternatives

27. This difficulty will have to be addressed if the inaugural code instrument is to be properly future-proofed against the various forms of degradation associated with a faulty numbering scheme. If we are to preserve the principle that the numerical identifier for each code provision should continue to track both the Part and Chapter in which it appears, consideration may have to be given to moving to a five-digit scheme; or to experimenting with a decimalised system. Alternatively, it may be possible to preserve the four-digit scheme by dropping or modifying the tracking system described in section *(a)*, above.

The triple fault alternative

(a) Rationale

28. The mental element in modern Irish statutory offences is normally intention and recklessness: *viz*., "A person commits an offence if he or she intentionally or recklessly …" The approach taken in the current draft has been to add knowledge to this formula, so that "a person commits the offence of *x* if he or she intentionally, knowingly, or recklessly …" The rationale for this approach – which derives from the codification goals of clarity and accessibility - is that separate and distinct mental states should be treated as such when defining fault terms of general application across the Code.

(b) Limitations of the current statutory scheme

29. Apart from the fact that it is an unrepresentative by-product of the law of murder, the practice of stretching the definition of intention to include knowledge is undesirable because it effectively reduces the latter to a species of intention when, outside the confines of murder, the criminal law itself has always treated knowledge as a fully-fledged fault element in its own right. Knowledge is a fault element in many important criminal offences including rape. As can be seen from a cursory glance at the contents of Part 4, it is also a specified fault element in a number of key offences in the Criminal Justice (Theft and Fraud Offences) Act 2001.

(c) Advantages of the tripartite scheme

30. The triple fault alternative recognises this reality by decoupling intention and knowledge, thereby allowing each concept to retain a unified meaning across the Code. In the result, intention has now been restored to its primary, common sense meaning of aim or purpose, while knowledge means what it has always meant in the context of the criminal law: knowing that a circumstance is likely to exist, or a result likely to happen, in the normal course of events.

31. It is important to stress that this change does not involve law reform; it merely restates the current statutory fault scheme in a more rational and transparent manner. Offences which formerly required proof of intention, artificially defined as including knowledge, will now require proof of intention *or* knowledge (for discussion, see the Explanatory Notes to Heads 1106 (Fault Elements), 1107 (Intention) and 1108 (Knowledge).

(d) The issue of readability

32. As already indicated, save where recklessness has been excluded by the original statutory offence, the triple fault alternative has been systematically added to offence definitions across the Code; in view of the syntax of the offence template, it typically prefaces the recitation of the objective elements of each offence.

33. Broadly speaking, this strategy has been adopted in the interests of improving the clarity and accessibility of offence definitions, and, in combination with the run-on rule described in the Explanatory Notes to Head 1106 (Fault Elements), in an effort to eliminate the *mens rea* "gaps" or "blind spots" associated with uncodified statute law.

34. The policy of expressly including the triple fault alternative in each offence definition has not however been pursued mechanically. On the contrary, each offence has been scanned to ensure that express inclusion would not compromise the readability of the offence definition. Where it was clear that readability would be impeded, the triple fault alternative has been omitted from the offence definition, thereby allowing the read-in rule of recklessness to apply. See, for example, Head 4103 (making off without payment) and the Explanatory Notes thereto. For discussion of the read-in rule, see Explanatory Notes to Head 1106 (Fault Elements).

Dealing with objective tests in the Code

(a) Accommodating the "person of reasonable firmness" test

35. There are several instances of objective tests in the Draft Code - many of which originated in the Criminal Justice (Public Order) Act 1994 - which pose difficulties from a codification perspective. While references to "the reasonable person" in statutes serve a similar function to a requirement of negligence as a fault element, it would neither be appropriate nor linguistically feasible to substitute all references to "the reasonable person" with negligence requirements across the Code.

36. For example, in the case of the offence of violent disorder, codified in Head 6107, section 15(1)(b) of the 1994 Act appears to apply an objective test to the issue of causing alarm to others: the question is whether the conduct of the assembled persons would cause a *person of reasonable firmness* present at that place to fear for his or her or another person's safety. By virtue of the automatic operation of the read-in rule (see Head 1106(4)) to circumstance and result elements that do not have a subjective fault requirement expressly associated with them as part of the offence definition, this means that the default requirement of recklessness would attach to Head 6107(d), with the result that it would have to be shown that the defendant had consciously disregarded a substantial and unjustifiable risk that the conduct would cause a person of reasonable firmness present to fear for his or her own or some other person's safety.

37. On the grounds that this would frustrate the legislative intent underpinning the objective test, and bearing in mind that the Advisory Committee has eschewed resort to negligence-based liability in this context, it was decided that the most effective way of preserving the "person of reasonable firmness test" as enshrined in the original statutory provision was to disapply the read-in rule to Head 6107(1)(d). Hence Head 6107(2).

(*b*) *Codifying "likelihood"*

38. References to "likelihood" in pre-codified legislation are also problematic. While recklessness will be read in under the Code in cases where there is no explicit fault element required for a circumstance or result element, recklessness in conjunction with "likelihood" would be tautologous and conceptually bizarre as its inclusion would involve conscious disregard of a substantial and unjustifiable risk that *x* is likely: in short, conscious disregard of the risk of a risk!

39. For example, section 5(3) of the 1994 Act appears to apply an objective test regarding the offensive nature of the conduct in the offence of disorderly conduct, codified in Head 6102 – it refers to conduct "likely to cause serious offence or serious annoyance". If left to its own devices, the read-in rule would attach a requirement of recklessness to this element, with the result that it would have to be proved that the defendant considered the risk that his behaviour might have the effect contemplated in section 5(3): namely, that is was likely to cause serious

offence or serious annoyance. Accordingly, by way of preserving the integrity of the objective component of the likelihood requirement as originally enshrined in section 5(3), Head 6102(2) disapplies the read-in rule to the codified version of that requirement in Head 6102(1)(b).

(c) The strict liability option

40. It is submitted that the best way of preserving existing objective tests in codified offence provisions is to provide expressly that the read-in rule of recklessness does not apply to these provisions. Consideration was given to employing the strict liability formula - *e.g.* "strict liability applies to *x*" - in order to block application of the read-in rule. However, the strict liability formula is inappropriate in this context for two reasons. First, imposing strict liability in relation to an objective element is not the same thing as having an objective (reasonable bystander) test apply to that element. Strict liability means what it says – liability in the absence of fault, whereas a reasonable bystander test presupposes fault, albeit in the form of negligence. Second, given that criminal liability normally requires proof of fault, it would be inappropriate to have so many offences in the Code subject to a strict liability component. It is, therefore, preferable explicitly to disable the read-in fault element in offence provisions where the legislature has applied an objective test to a circumstance or result element. However, as the read-in rule is confined to recklessness, the issue of whether it may also be necessary specifically to preclude the application of the higher fault elements of knowledge and intention to objective tests will be kept under review.

Lawful authority

41. All references to "without lawful authority" and "without lawful excuse" in pre-codified legislation have been omitted from the Special Part offences of the Draft Code. It is envisaged that as Part 1: General Principles – is expanded in due course, it will contain a Chapter on the "Rules of Exculpation" (*i.e.* the defences) with some form of lawful excuse/lawful authority defence therein.

Revised format of legislation

42. The Office of the Houses of the Oireachtas and the Office of the Parliamentary Counsel have recently announced a revised format for primary legislation. The present draft reflects the changes introduced by the new format. No marginal notes are used, with text appearing wider on the page than before. Moreover, there is no italicisation of paragraph numbering.

43. It might be noted in passing that the present draft – which is in Heads of Bill format – employs headings in underlined block capitals for each Head. This is purely for presentational purposes; when enacted, each section of the Code will be preceded by a cross-heading, as required by the revised legislative template.

Separation of adjectival law from offence provisions

44. In each Part of the Special Part, all relevant adjectival law has been separated from the substantive law and housed in a Chapter or Chapters after the offence provisions. Ideally, the adjectival law would eventually be codified in a separate Code of Criminal Procedure and Evidence, but for now, an attempt has been made to have a clear demarcation between the offences and ancillary material in the Code.

Miscellaneous general changes

45. Whereas the Criminal Damage Act 1991 and the Criminal Justice (Public Order) Act 1994 use male gender-specific language only, the Draft Criminal Code uses gender-neutral terminology throughout (*i.e.* "he or she", "his or her", etc), in line with modern drafting policy.

46. All references to the word "Act" from the four pre-codified Statutes have been replaced with the word "Part" throughout the draft and the word "section" has been replaced with "Head", etc.

47. All references to "cognate terms" have been excluded from the current draft. Such references are unnecessary in light of section 20(2) of the Interpretation Act 2005, which provides that: "Where an enactment defines or otherwise interprets a word or expression, other parts of speech and grammatical forms of the word or expression have a corresponding meaning."

48. In the offence penalty provisions, all fines have, for now, been rounded up to the nearest convenient Euro figure. However, it should be borne in mind that fines provisions in the Special Part as a whole will have to be adjusted to take account of the Fines Bill 2009, which is currently before the Oireachtas. The Bill provides for the indexation of fines for summary offences and for indictable offences tried summarily. All fines will have to be classified according to the classification system provided for in the Bill.

49. The word "accused" has been replaced with "defendant" throughout the draft.

50. General matters pertaining to individual blocks of offences are dealt with in the Introductions to their respective Parts.

ARRANGEMENT OF HEADS

PART 1

GENERAL PRINCIPLES

CHAPTER 10

Preliminary and General

CHAPTER 11

Rules of Inculpation

PART 2

HOMICIDE OFFENCES [INDICATIVE HEADING]

PART 3

NON-FATAL OFFENCES AGAINST THE PERSON

CHAPTER 30

Interpretation

Head	
3001	Interpretation (*Part 3*).

CHAPTER 31

Offences against Bodily Integrity

3101	Interpretation (*Chapter 31*).
3102	Assault.
3103	Assault causing harm.
3104	Causing serious harm.
3105	Aggravated assault.
3106	Threatening to kill or cause serious harm.
3107	Poisoning.
3108	Attack with a syringe or blood.
3109	Attack with a contaminated syringe or blood.
3110	Placing or abandoning a syringe.
3111	Endangerment.
3112	Endangering traffic.

CHAPTER 32

Offences against Personal Autonomy

3201	Interpretation (*Chapter 32*).
3202	Coercion.
3203	Harassment.
3204	Making a demand with menaces.
3205	Making an unlawful demand for payment of debt.
3206	False imprisonment.

CHAPTER 33

Procedural, Evidential and Ancillary Provisions

3301	Evidential value of certain certificates signed by medical practitioners.

PART 4

THEFT, FRAUD AND RELATED OFFENCES

CHAPTER 40

Preliminary and General

Head	
4001	Interpretation *(Part 4)*.

CHAPTER 41

Theft and Related Offences

4101	Theft.
4102	Deceiving with intent.

CHAPTER 42

Offences Relating to Stolen Property

CHAPTER 43

Offences Relating to Trespass

CHAPTER 44

Forgery Offences

4404	Possession and aggravated possession of a false instrument.
4405	Possession and aggravated possession of materials or implements for forgery.

CHAPTER 45

Counterfeiting Offences

4501	Interpretation *(Chapter 45)*.
4502	Counterfeiting currency.
4503	Passing and aggravated passing of counterfeit currency.
4504	Possession and aggravated possession of counterfeit currency.
4505	Possession and aggravated possession of materials or implements for counterfeiting.
4506	Import or export of counterfeit currency.
4507	Certain offences committed outside the State.

CHAPTER 46

Procedural, Evidential and Ancillary Provisions: Specific

4601	Interpretation *(Chapter 46)*.
4602	Withholding information regarding stolen property.
4603	Powers of arrest relating to making off without payment.
4604	Garda powers relating to trespass on land.
4605	Powers of arrest relating to trespass on land.
4606	Removal, storage and disposal of objects relating to trespass on land.
4607	Jurisdiction of the District Court.
4608	Garda powers relating to trespass on a building.
4609	Measures to detect counterfeiting.

CHAPTER 47

Procedural, Evidential and Ancillary Provisions: General

4701	Search warrants.
4702	Failure to comply with Garda acting on warrant.
4703	Forfeiture of seized property.
4704	Concealing facts disclosed by documents.
4705	Order to produce evidential material.
4706	Summary trial of indictable offences.
4707	Trial procedure.
4708	Alternative verdicts.
4709	Orders for restitution.
4710	Provision of information to juries.
4711	[Liability for offences by bodies corporate and unincorporated.]
4712	Reporting of offences.
4713	Evidence in proceedings.
4714	Jurisdiction of the District Court in certain proceedings.

PART 5

CRIMINAL DAMAGE OFFENCES

CHAPTER 50

Interpretation

Head	
5001	Interpretation *(Part 5)*.

CHAPTER 51

Criminal Damage Offences

5101	Damaging property.
5102	Damaging property with intent to defraud.
5103	Aggravated property damage.
5104	Threatening to damage property.
5105	Possessing any thing with intent to damage property.

CHAPTER 52

Defences

5201	Interpretation *(Chapter 52)*.
5202	Application of defences.
5203	Belief in consent.
5204	Protection of person or property.

CHAPTER 53

Procedural, Evidential and Ancillary Provisions

5301	Proceedings.
5302	Jurisdiction of District Court.
5303	Arrest without warrant.
5304	Search warrant.

PART 6

PUBLIC ORDER OFFENCES

CHAPTER 60

Interpretation

Head	
6001	Interpretation *(Part 6)*.

CHAPTER 61

Public Order Offences

6101	Intoxication in a public place.
6102	Disorderly behaviour in a public place.
6103	Abusive behaviour or display in a public place.
6104	Obstruction.
6105	Aggravated obstruction.
6106	Affray.
6107	Violent disorder.
6108	Riot.

CHAPTER 62

Procedural, Evidential and Ancillary Provisions

6201	Power to direct persons who are in possession of intoxicating substances, etc.
6202	Failure to comply with direction of member of Garda Síochána.
6203	Fixed charge offences.
6204	Control of access to certain events, etc.
6205	Arrest without warrant.
6206	Continuance of existing powers of Garda Síochána.

PART 1: GENERAL PRINCIPLES
RULES OF INCULPATION

ARRANGEMENT OF HEADS

PART 1

GENERAL PRINCIPLES

CHAPTER 10

Preliminary and General

CHAPTER 11

Rules of Inculpation

GENERAL DEFINITIONS

1001.— In this Code—

(1) "omission" means a failure to perform a bodily movement;

(2) "physical act" means a bodily movement that cannot be reduced to a more basic bodily movement, and includes an act of communication;

(3) "possession" means that the person knowingly—

(a) procures or receives the thing, or

(b) retains control of the thing when he or she could have relinquished control;

(4) "state of affairs" means being somewhere.

Explanatory Notes:

1. Head 1001, entitled "General Definitions", contains some definitions of general application across the Code. In due course other definitions will be added to Head 1001, which is likely to include definitions of the words "person", "property"[1] "building" and "public place"[2].

2. The definition of "omission" in subhead (1) is based on section 1.13(4) of the American Model Penal Code, section 701-118(3) of the Hawaii Penal Code and section 1.07(34) of the Texas Penal Code.

3. The definition of "physical act" in subhead (2) is based on the definition of "act" as set out in section 1.07(1) of the Texas Penal Code. The Texas Penal Code definition refers to "speech" rather than "communication"; whereas subhead (2) makes it clear that "physical act" includes "an act of communication". The inclusion of communication is designed to cater for offences that can be committed by means of a speech or communication act. An example of the former is the offence of threatening to kill or cause serious harm in Draft Criminal Code, Head 3106, which can be committed by making an oral threat. An example of the latter would be the offence of conspiracy which consists of an agreement - made by speaking, writing or gesticulating[3] - to do an unlawful act. Conspiracy will be included in the Draft Criminal Code along with the other inchoate offences of incitement and attempt.

4. The narrow definition of "physical act" as a bodily movement that cannot be reduced to a more basic bodily movement is a fundamental feature of the version of element analysis employed throughout the Draft Code. It is also essential to the

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[1] See Explanatory Note 1 to Draft Code, Head 3001, Explanatory Note 1 to Draft Code, Head 4001, Explanatory Note 1 to Draft Code, Head 5001.

[2] See Explanatory Note 1 to Draft Code, Head 6001.

[3] See McAuley and McCutcheon, *Criminal Liability* (Round Hall Sweet & Maxwell 2000), at 117.

tripartite division of the objective elements of an offence as set out in Head 1102. It is a basic principle of element analysis that the only bodily movements that satisfy the narrow definition are the basic limb or bodily movements which constitute the conduct element of an offence. For example, in threatening to kill or cause serious injury, the speech, writing or gestural act by which the threat was issued would be a "physical act" in the required sense; as would the basic finger movement involved in pulling or squeezing the trigger in a case of murder by shooting.

5. By contrast, pulling or squeezing the trigger would *not* be a "physical act" in the required sense precisely because it can be re-described in more basic terms as a mere finger movement. Similarly, piercing the skin of another with a syringe (contrary to Draft Criminal Code, Head 3108(1)(a)) would not be a "physical act" since it can be reduced to the bare hand or arm movement entailed in it. As explained in the Explanatory Notes to Head 1102 (Objective Elements), acts other than "physical acts" in this limited sense - such as "threatening" in Head 3106 or "pestering" in Head 3203 (Harassment) - are treated as features or characteristics of the basic bodily movements which underpin them; and, on this basis, are classified as circumstance elements for the purposes of element analysis.

6. The function of subhead (3) is to define the conditions whereby possession satisfies the conduct element of an offence under Head 1102(2). One of two conditions will suffice: a) if the person knowingly procures or receives the thing; or b) if that person knowingly retains control of the "thing" for a sufficient period to have been able to relinquish control. In short, the key to the definition of possession in subhead (3) is being aware that one is acquiring or retaining control of the "thing".

7. The "thing" refers to the physical object, not to its attributes or properties. (By analogy with the characteristics of a "physical act", the latter are treated as circumstance elements for the purposes of element analysis, and, accordingly, are governed by the fault requirements in the offence definition). Thus a person does not possess an item that has found its way into her suitcase without her knowledge. But she does possess an item she knows is in her suitcase even if she does not know it is stolen property (circumstance element) or an illegal substance (circumstance element).

8. Irish law contains a plethora of possession-based offences, dealing, for example, with possession of offensive weapons,[4] controlled drugs,[5] and any articles intended for use in a burglary, theft or deception.[6] Unfortunately none of the statutes creating these offences provide a definition of "possession", although the concept has effectively been defined at common law. In *Minister for Posts and Telegraphs v Campbell,* decided in 1966, Davitt P said that:[7]

> "[A] person cannot, in the context of a criminal case, be properly said to keep or have possession of an article unless he has control of it personally or by someone else. He cannot

4 See the Firearms and Offensive Weapons Act 1990.
5 See the Misuse of Drugs Act 1977 and the Misuse of Drugs Act 1984.
6 See section 15 of the Criminal Justice (Theft and Fraud Offences Act) 2001.
7 [1966] IR 69 at 73.

> be said to have actual possession of it unless he personally can exercise physical control over it; and he cannot be said to have constructive possession of it unless it is in the actual possession of someone over whom he has control so that it would be available to him if and when he wanted it … He cannot properly be said to be in control or possession of something of whose existence and presence he has no knowledge"

9. This definition was approved by the Court of Criminal Appeal in 1995.[8] Subhead (2) reduces the common law definition to statutory form.

10. Subhead (4) defines the term "state of affairs" as "being somewhere." This is intended to cater for the small number of offences whose definitional components cannot be described as circumstantial features or results of a basic physical act or omission (or possession), but seem instead to involve aspects or characteristics of the defendant's being somewhere - such as being in a public place, being somewhere without permission, or being somewhere in an intoxicated condition. For the moment, the only offence of this type requiring accommodation in the Code is that of intoxication in a public place in section 4 of the Criminal Justice (Public Order) Act 1994, which has been codified in Head 6101. But there may be others as the codification project proceeds. Hence the relevance of subhead (4).

[8] *People (DPP) v Foley* [1995] 1 IR 267 at 286.

ELEMENTS OF AN OFFENCE

1101.—(1) An offence consists of objective elements and fault elements.

(2) However, a provision of this Code creating an offence may provide that there is no fault element for an objective element.

(3) A provision of this Code creating an offence may provide different fault elements for different objective elements.

Explanatory Notes:

1. Head 1101 identifies the generic elements of an offence and is modelled on section 7 of the Australian Capital Territory Criminal Code. Head 1101(1) provides that offences contained in the Code normally comprise a combination of objective elements and fault elements. The Draft Criminal Code does not use the common law terminology of *actus reus* and *mens rea*, as these terms mask the key distinctions within and between the objective and fault elements of an offence on which the technique of codification is based. Moreover, the plain language of objective and fault elements is easier for code users to understand and better serves the communicative function of the criminal law than the traditional terminology.

2. Subhead (2) states that a provision of this Code creating an offence may, however, omit to provide a fault element for an objective element.

3. The legislature may wish to provide different fault elements for different objective elements in any offence provision. Accordingly, subhead (3) states that an offence may require different fault elements to be established for different objective elements.

OBJECTIVE ELEMENTS

1102.—(1) An "objective element of an offence" means a —

(a) conduct element,

(b) circumstance element, or

(c) result element.

(2) "Conduct element" means a physical act, an omission, possession or a state of affairs.

(3) "Circumstance element" means—

(a) a characteristic of—

(i) the conduct element, or

(ii) the result of the conduct element, or

(b) a condition under which the conduct element or result element occurs.

(4) "Result element" means a consequence caused by the conduct element.

Explanatory Notes:

(1) Introduction

1. Head 1102(1) defines an objective element of an offence as a "conduct element", "circumstance element" or "result element". The inclusion of the word "element" in these definitions is designed to ensure that they are construed as terms of art referring only to the objective elements of an offence; and thus to free up the use of the words "conduct", "circumstance" and "result" in their ordinary, non-technical sense elsewhere in the Code. The list of objective elements in Head 1102(1) is exhaustive and mutually exclusive. All objective elements fall into one or other of these categories.

2. The tripartite division of objective elements in Head 1102 is a key feature of the technique of element analysis on which codification is based. By sorting the objective elements of an offence into three mutually exclusive and exhaustive categories, Head 1102 provides the basis for a clear and consistent approach to the definition and construction of offences by the legislature and the courts, respectively. As we shall see presently, the scheme's narrow definition of conduct means that the definitional components of every offence in the Draft Criminal Code can be easily and convincingly classified as either a circumstance or result element, respectively.

3. By the same token, the tripartite scheme facilitates a proper match-up between fault and objective elements when offence definitions are being drafted by the legislature and/or applied by the courts. This can be seen clearly when Head 1102 is read in conjunction with Head 1107, which sets out the various ways in which the concept of intention maps on to individual objective elements. Thus in Head 1107(1)(b) intention as to a circumstance means that the defendant believes or hopes that the circumstance exists, whereas Head 1107(1)(c) provides that intention as to a result means that it is the defendant's objective or desire to cause the result. Similarly, Head 1108 performs a comparable function for the fault element of knowledge by indicating how the concept of awareness applies to circumstance and result elements, respectively.

(2) The conduct element

(a) The narrow definition of conduct

4. The conduct element is the most basic component of a criminal offence. Generally speaking, it consists of the bodily movement by which the defendant produces the circumstances and results prohibited by the offence definition. For example, in assault under Draft Criminal Code, Head 3102(1)(a) the conduct element would be the bodily movement involved in the application of force to the body of another; in false imprisonment under Head 3206(1)(a) it would be the bodily movement by which the victim was taken or detained; and so on.

(b) Conduct and the definition of offences

5. It is important to stress that the "conduct element" does not form part of an offence definition. In addition to their fault components, offence definitions specify the circumstances and results which must be proved for liability to attach; but typically make no reference to the conduct component underpinning these elements. Thus murder is defined as the intentional (fault element) killing (result element) of a human being (circumstance element); endangerment as intentionally or recklessly (fault element) creating a substantial risk of death or serious injury (result element); threatening to kill or cause serious harm as intentionally or recklessly (fault element) making to another a threat to kill or cause serious harm to that other or a third person (circumstance element), intending that other to believe it will be carried out (fault element); and so on.

6. Given that any number of bodily movements might be relevant, express reference to the conduct element would make offence definitions impossibly prolix and unwieldy. For example, the definition of murder would have to include a list of the different bodily movements by which death can be caused (by moving one's finger, arms, legs, feet, toes, etc.); just as endangerment would have to specify the various bodily movements by which the risk of death or serious injury can be created. Alternatively, there would be a need for an endless list of special-instance offences to cater for the infinite variety of basic physical acts by which these offences can be committed! When viewed through the prism of element analysis, the routine confinement of offence definitions to circumstance and result elements illustrates why these strategies are both unnecessary and undesirable.

(c) Proving the conduct element

7. Given that it does not form part of the definition of a criminal offence, it follows that the conduct element does not have to be independently proved. Because the conduct element has been narrowly defined as the basic physical act (or omission, possession or state of affairs) underpinning the offence definition, it is enough for the prosecution to prove the circumstance and result elements associated with it. For example, in the case of murder, it would be enough to establish that the defendant intentionally caused the death (result element) of a human being (circumstance element), since causing the death of a person necessarily entails proving or establishing that the defendant did or failed to do whatever brought about the death. In practice this means that evidence that the defendant deliberately killed his victim – for example, by taking aim and firing at him, or by laying in it wait for him and plunging a knife into his back - will normally be enough to convict, without there being a corresponding or additional requirement to prove that the finger or hand movements by which death was caused were also deliberate.

(d) The nature of conduct and denial of agency defences

8. In the result, save where the defendant introduces credible evidence that he may have been acting involuntarily, or that the prohibited result cannot be attributed to him as agent, thus requiring the state to prove beyond all reasonable doubt that he was in control of the bodily movement or omission underpinning the offence definition, the prosecution can ignore the conduct element altogether. For this reason, the vexed question of the inner nature of the conduct element, and the equally thorny problem of defining the legal criteria associated with it, will be considered in the context of denial of agency claims and the plea of involuntariness in the Heads dealing with the defences to a criminal charge. Although some codes deal with these matters in the provisions setting out the objective elements of an offence, it was felt that treating them in the context of the defences to a criminal charge more accurately reflects the actual role and significance of the conduct element in criminal proceedings.

(e) Conduct and the fault scheme

9. Finally, it should also be noted that the conduct element is not subject to the Code's fault scheme. The fault elements of an offence go to the objective elements contained in the offence definition; and, as we have seen, because of the way in which they are structured and articulated, offence definitions do not include a conduct element – so the issue of fault does not arise in that context. Accordingly, N/A has been inserted in the fault column opposite the conduct element in the analytic grid accompanying each offence in the Draft Criminal Code.

10. This is not to deny that the conduct element of an offence has a mental component. It does. In possession-based offences the mental component of the conduct element is knowledge (awareness that you have procured or received something, or that you retained control of something when you could have

relinquished it). In offences by commission, it is intention (to do a "physical act").

11. The point is that knowledge and intention is this context are not *fault* elements; they are mental states that become relevant if and only if the defendant claims that the conduct element cannot be attributed to him as agent, either because he was acting involuntarily (*i.e.*, that his body moved without him intending to move it) or, in the case of possession-based offences, because, for example, unbeknownst to him, someone secreted the thing in his belongings. In other words, the introduction of evidence of intention and knowledge in this context is a way of rebutting a denial-of-agency claim by the defendant, and, accordingly, in the traditional language of the criminal law, is an aspect of *actus reus*, not *mens rea.*

(f) The scope of the conduct element

12. Subhead (3) provides that the conduct element means "a physical act, an omission, possession or a state of affairs." In order to accommodate the spectrum of offences earmarked for inclusion in the inaugural Criminal Code, it was necessary to define "conduct element" so to include possession and states of affairs as well as acts and omissions. Accordingly, Head 1001 defines each of the four divisions or species of the conduct element.

13. There are many possession offences in Part 4: Theft, Fraud and Related Offences such as the offence under Head 4106 of possession of certain articles and possession of stolen property under Head 4203. By expressly stating that "conduct element" includes possession, there can be no doubt that mere possession of any thing is capable of amounting to a conduct element.

(g) Conduct and states of affairs

14. Although offences involving a state of affairs are likely to be comparatively rare in the Code, it has nevertheless been necessary to make express provision for them. As already indicated, this has been achieved by the simple device of providing that a state of affairs, defined as being somewhere, satisfies the conduct requirement. This arrangement accommodates the single example of a "state of affairs" offence encountered when codifying the four mini-codes: that of intoxication in a public place under section 4 of the Criminal Justice (Public Order) Act 1994. Thus the elements of the codified version of this offence in Head 6101 can be broken down as follows: being (conduct element) intoxicated (circumstance element) in a public place (circumstance element); or, more graphically, as: being somewhere (conduct element) that is a public place (circumstance element) while intoxicated or in an intoxicated condition (circumstance element).

15. This arrangement would also accommodate a *Larsonneur*-type offence of being or remaining (conduct element) in a foreign country (circumstance element) after the expiration of one's travel visa (circumstance element). In *Larsonneur*[9] the

[9] (1933) 149 LT 542.

defendant left England because her permission to stay there had expired. She went to Ireland, from where she was deported back to England. On her return she was convicted of being found in the UK contrary to the Aliens Order 1920. The Court of Criminal Appeal dismissed her appeal, in which she argued that her return to England was beyond her control.[10]

16. According to the American Model Penal Code and Commentaries,[11] an offence like vagrancy should not be defined or interpreted in such a way as to "refer to status or state of being rather than to condemn specific actions or omissions".[12] In the American case of *Robinson v California*[13] the Supreme Court held that a mere status or condition may not be punished. *Robinson* concerned an individual who was a drug addict. The Supreme Court held that the State of California violated the Fourteenth Amendment's "cruel and unusual punishment" prohibition by making it a crime for a person to be "addicted to the use of narcotics".

17. Ashworth has argued that the imposition of situational liability may be defensible if the law is so phrased "as to ensure that defendants are in control of their activities and know about their duty to avoid certain situations."[14] A defence of involuntariness will eventually be added to the Draft Criminal Code which will clarify that a state of affairs is involuntary if it is not within the person's control or exercise of will.

(3) The circumstance element

18. Head 1102(3) defines the circumstance element of an offence in opposition to the conduct element: "circumstance element" means a characteristic of the conduct element, or of the result of the conduct element; or a condition under which the conduct element occurs. This follows through on the logic of element analysis according to which the conduct element is the basic building block of a criminal offence. On this view, the conduct element is the bare behavioural substratum of the defendant's action – the limb movement which underpins it, whereas the circumstance element typically denotes a qualitative aspect of the defendant's behaviour included in the offence definition.

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10 See the American Model Penal Code and Commentaries Part I at 216 where the drafters state that a provision like Head 2.01 (Requirement of Voluntary Act) would have precluded liability in the *Larsonneur* decision.

11 Part I at 217.

12 In the Irish case of *King v AG* [1981] IR 233, the plaintiff succeeded in having a portion of section 4 of the Vagrancy Act 1824 which made certain conduct an offence if committed by a "suspected person or reputed thief" declared inconsistent with the Constitution so that his conviction under that section was invalidated. Henchy J stated at 257 that the "ingredients of the offence and the mode by which its commission may be proved are so arbitrary, so vague, so difficult to rebut, so related to rumour or ill-repute or past conduct, so ambiguous in failing to distinguish between apparent and real behaviour of a criminal nature …"

13 (1962) 370 US 660.

14 Ashworth *Principles of Criminal Law* (2006 5th edn Oxford) at 107.

(a) Circumstance as a feature of conduct

19. In most offences this means that the circumstance elements of an offence take the form of a characteristic or feature of the defendant's basic bodily movements. For example, in the offence of coercion in Draft Criminal Code, Head 3202, persistently following another or watching or besetting the premises of another are circumstance elements in this sense because they are qualities or attributes of the bodily movements involved in walking or driving behind someone, or sitting in front of their premises, respectively.

(b) Circumstance as a characteristic of a result

20. Occasionally, a circumstance element will be a characteristic of a result element. For example, Draft Criminal Code, Head 3111 provides that a person commits the offence of endangerment if he or she intentionally, knowingly or recklessly causes a substantial risk of death or serious harm to another. Here the result element is the creation of a risk of death or serious harm, whereas the requirement that the risk in question be substantial is a circumstance element by virtue of being a characteristic of the prohibited result.

(c) Circumstances as conditions

21. Sometimes, however, a circumstance element of an offence is neither an attribute of the conduct element nor a feature of the result element, but seems more accurately to consist of a condition under which the conduct element, or a result of the conduct element, occurs. For example, by virtue of Draft Criminal Code, Head 3102(1) a person commits the offence of assault if and only if he acts "without the consent of the other". In this context, lack of consent seems to be more in the way of a condition under which the conduct element of assault occurs, than an attribute or characteristic of the conduct element. Further examples of circumstance elements of this type include provisions relating to the age,[15] identity[16] or status [17] of the victim, or to the location in which an offence occurs.[18] In these examples the age, identity, and status of the victim, and the location in which the offence occurs, are circumstances in the classic sense that they refer to the conditions or environment in which the defendant acts.

22. The word "condition" in subhead (4)(a) may be defined in due course, if it is felt that its Code meaning is likely to differ from its ordinary English meaning. This issue will be kept under review. If a definition is provided, it may be preferable,

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15 See, for example, the offence of "cruelty to children" under section 246 of the Children Act 2001.

16 See section 19(1) of the Criminal Justice (Public Order) Act 1994 which provides for the offence of "assault or obstruction of a peace officer", as amended by section 185 of the Criminal Justice Act 2006, extending the protection to people providing medical services at or in a hospital, etc.

17 See section (1)(b)(i) and (ii) of the Criminal Justice Act 1964 providing for the offence of capital murder and section 19 of the Criminal Justice (Public Order) Act 1994 which provides for the offence of "assault or obstruction of a peace officer".

18 See section (4) of the Criminal Justice (Public Order) Act where the offence is being (conduct element) intoxicated (circumstance element as condition under which conduct element occurs) in a public place (circumstance element as condition under which conduct element occurs).

with a view to reducing unnecessary scatter, to locate it in Head 1102 rather than in the General Definitions section in Head 1001.

(4) The result element

(a) The link with the narrow definition of conduct

23. Subhead (4) defines "result element" as a consequence caused by the conduct element. This definition is easy to apply and has the added benefit of broadly corresponding with the everyday meaning of "result" as a non-legal term. It also underlines the importance of the narrow definition of conduct as the basic bodily movement or movements underpinning the offence definition. If conduct were more broadly defined to mean the conduct prohibited by the offence definition, in accordance with what is sometimes regarded as its natural meaning in this context, the effect would be to cast a shadow over the Code's causation rules. For if conduct includes results, it cannot also be said to cause them. By the same token, if conduct includes circumstances, there is likely to be widespread confusion as to how individual offence elements should be classified for the purposes of codification. .

24. Even if one takes the view that defining conduct as proscribed conduct is *not* likely to give rise to practical problems – on the grounds that criminal lawyers and judges know a result, or even a circumstance, when they see one – it has to be conceded that the broad definition scarcely makes for a logical scheme, and is unlikely to inspire public confidence in the coherence of the Draft Code as a whole.

(b) Distinguishing results from circumstances

25. The distinction between result and circumstance elements is crucial since, in the nature of things, the Draft Criminal Code's causation rules, set out in Head 1104, apply to the former but not to the latter. Generally speaking, the distinction between circumstances and results is reasonably straightforward and easy to apply as it coincides with the common-sense distinction between the attributes or characteristics of a basic action and the consequences which flow from it. Moreover, as the codification of the mini-codes illustrates, the distinction can be clearly signposted by the judicious use of causation language when results rather than circumstances are at issue and might otherwise be overlooked.

26. Thus there was no need for causation language when codifying endangerment in Head 3111(1) since the phrase "creates a substantial risk of death or serious injury to another" unambiguously denotes the presence of a result element. However, in the codified version of coercion (Head 3202(1)(b)) the term "causes alarm to [another]" has been substituted for the term "intimidates [another]". The original formulation could have been construed as referring to an aspect or feature of the defendant's conduct, to the fact that he was behaving in an intimidating manner, and thus as signalling a circumstance element; whereas the deliberate insertion of causation language makes it clear that the mischief being targeted by the legislature is rather the coercive or intimidatory *effect* of the defendant's conduct on others, which is plainly a result element.

CRIMINAL LIABILITY BASED ON AN OMISSION

1103.—(1) Criminal liability may be based on an omission if an offence definition so provides, or the duty to act exists at law.

(2) A duty to act in *subhead (1)* [includes duties] [means a duty]—

(a) naturally arising, including those that exist between parents and their dependant children and between cohabiting spouses,

(b) to provide adequate food, clothing, heating, medical aid or accommodation to another if the person has assumed responsibility for the welfare of that other and that other is unable to provide himself or herself with those necessities,

(c) to avoid or prevent danger to the life, safety or health of any child or vulnerable person if the person has assumed responsibility for the welfare of that other whether or not he or she is related to the person, or

(d) to avoid or prevent danger to the life, safety or health of another if the danger arises from an act of the person, from anything in the person's possession or from any undertaking of the person.

(3) Where an offence requires a particular fault element in respect of a result element, a person who lacks the fault element when he or she does a physical act that causes or may cause the result element nevertheless commits the offence if—

(a) the person becomes aware that he or she has done the physical act and that the result element has occurred and may continue, or may occur, and

(b) with the fault element required in the offence definition, the person fails to do what he or she can reasonably be expected to do that might prevent the result element continuing or occurring, and

(c) the result continues or occurs.

Explanatory Notes:

(1) Introduction

1. Head 1103(1) states that criminal liability may be based on an omission if the provision creating the offence so provides, or the duty to act exists at law.

2. Criminal liability for pure omissions only ever arises for *result* crimes (*e.g.* murder, manslaughter, causing serious injury, endangerment and false imprisonment) where the defendant can be fairly said to have "caused" the proscribed result. Certain offences in Ireland make it clear that an omission is capable of giving rise to criminal liability. For example, section 1(e) of the Criminal Damage Act 1991 provides that to damage includes "to make an

omission causing damage". Subhead (1) covers offences which unequivocally state that an omission is capable of giving rise to criminal liability.

3. Subhead (1) also provides that criminal liability can arise where the defendant omits to discharge his or her legal duty to perform an act. Generally speaking, an omission is unlikely to be the basis of liability for serious offences. Omissions liability has traditionally arisen in the murder or manslaughter setting, but it is quite conceivable that an omission to perform a legal duty could give rise to liability for endangerment under section 13 of the Non-Fatal Offences Against the Person Act 1997, as codified in Draft Criminal Code, Head 3111: a person could, by omission, intentionally or recklessly create a substantial risk of death or serious harm to another.[19]

(2) Legal duties to act

4. Under subhead (2) if a person owes any of the listed legal duties to another person or group of people and fails to discharge the duty, he or she may be criminally liable for the omission. Subhead (2) is based on section 5.1.7 of the Australian Model Criminal Code[20] except that it codifies *four* core legal duties to act which have long been recognised as relevant to omissions liability at common law. The Australian provision only refers to three duties, making no explicit reference to duties naturally arising, *i.e.* those between parents and their dependant children and between (co-habiting) spouses.

5. In the context of manslaughter, judges have found that duties to act exist at common law where: (a) a special relationship existed between the parties *e.g.* between parents and their children and between spouses; (b) the defendant voluntarily assumed the duty; (c) a contractual responsibility existed; (d) a statute established an obligation and (e) where prior conduct gave rise to the duty.

6. Subhead (2) streamlines these duties which are closely linked with the prevention of harm and reduces them to duties: (a) naturally arising, including those which exist between parents and their dependant children and between cohabiting spouses; (b) to provide adequate food, clothing, heating, medical aid or accommodation to another person such as an elderly parent or infirm sibling if the person has assumed responsibility for the welfare of that parent or sibling who is unable to provide himself or herself with those necessities; (c) to avoid or prevent danger to the life, safety or health of any child or vulnerable person if the person has assumed responsibility for the welfare of the child or vulnerable person whether or not he or she is related to the person; and (c) to avoid or prevent danger to the life, safety or health of another person such as an employee if the danger arises from an act of the person, from anything in the person's possession or control or from any undertaking of the person.

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19 See, for example, *the People (DPP) v Rosebury Construction Ltd and others* Irish Times Report 22 November 2001, discussed at paragraphs 17-18 below.

20 See Australian Model Criminal Code, Non Fatal Offences Against the person, section 5.1.7. ("Omissions"), available at http:www.ag.gov.au/agd/www/Agdhome.nsf/Page/publications (follow "Model Criminal Code" hyperlink; then follow "Chapter 5" hyperlink).

7. Clause 20(2) of *Criminal Law: Codification of the Criminal Law – A Report to the Law Commission*[21] contains a similar provision to subhead (2) which provides that:

> "a person is under a duty to do an act where there is a risk that the death of, or serious injury to, or the detention of, another will occur if that act is not done and that person *(a)* (i) is the spouse or a parent or guardian or a child of or (ii) is a member of the same household as; or (iii) has undertaken the care of, the person endangered and the act is one which, in all the circumstances, including his age and other relevant personal characteristics, he could reasonably be expected to do; or *(b)* has a duty to do the act arising from- (i) his tenure of a public office;[22] or (ii) any enactment; or (iii) a contract, whether with the person endangered or not."

(a) Duties naturally arising

8. At common law there has never been any legal controversy regarding liability for omissions in the context of duties naturally arising. These quintessential duties are therefore expressly codified in subhead (2)(a). Parents owe a duty to provide food, clothing, shelter and medical aid for their dependant children.[23] They must also refrain from abusing or harming them, or allowing them to be abused or harmed by someone else. Under subhead (2)(a), if a mother knows that her husband is brutally ill-treating her baby, she has a duty to intervene to stop the abuse.[24] Similarly, if she knows that her child is gravely ill she has a duty to summon a doctor or bring the child to hospital in a timely manner. By virtue of subhead (2)(a) a parent may commit murder or manslaughter by omission, *e.g.* if a mother intentionally starves her child to death it may be murder, whereas if she negligently fails to summon a doctor when the child is gravely ill she might be guilty of gross negligence manslaughter.

(b) Assumption of duty

9. Ashworth has argued for a "same household" criterion in relation to a duty to summon medical assistance in the case of an emergency; this would cover *de facto* relationships as well as marriage and extends duties to brothers, sisters,[25]

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21 (Law Com No 143) 1985.

22 See Williams "What should the Code do about omissions?" *7 Legal Stud.* 92 1987 at 104 where he strongly opposes the imposition of omissions liability for a crime such as manslaughter where a person fails to discharge the duty owed by them by virtue of the public office they hold. He questions: "Do we really want to convict firemen of manslaughter if they inexcusably fail to attend to a fire, in which someone dies? Do we wish to convict police officers of manslaughter if they fail to respond quickly to information that someone is being murdered?"

23 See section 246(5) of the Children Act 2001 which provides that a person shall be deemed "to have neglected a child in a manner likely to cause the child unnecessary suffering or injury to his or her health or seriously to affect his or her wellbeing if the person – (a) fails to provide adequate food, clothing, heating, medical aid or accommodation for the child, or (b) being unable to provide such food, clothing, heating, medical aid or accommodation, fails to take steps to have it provided under the enactments relating to health, social welfare or housing."

24 See section 246(1) of the Children Act 2001 which makes it an offence for any person "who has the custody, charge or care of a child wilfully to assault, ill-treat, neglect, abandon or expose the child, or cause or procure or allow the child to be assaulted, ill-treated, neglected, abandoned or exposed, in a manner likely to cause unnecessary suffering or injury to the child's health or seriously to affect his or her wellbeing."

25 See *R v Stone and Dobinson* [1977] 2 All ER 340.

aunts,[26] uncles, tenants and lodgers whose physical proximity to the defendant is established. According to Ashworth, the "same household" criterion would not extend to a man who picks up a woman in a bar and brings her home or on the host towards a dinner guest or the friend staying overnight.[27] Indeed, the Law Reform Commission of Canada confines the duty to "other family members living in the same household."[28]

10. Subhead (2)(b) makes no reference to a "same household" criterion, but is it highly likely that in practice the person accused of breaching a duty to act will generally be a member of the same household as the person to whom the duty was owed, *e.g.* a sibling or elderly parent.[29] Since relationships in the 21st century no longer necessarily accord with the nuclear family model and Civil Partnerships between homosexual couples are gaining legal standing in many jurisdictions, it is appropriate to impose a duty to act under Head 1103(2)(b) on people with a cohabiting partner – whether gay or straight – to provide "adequate food, clothing, heating, medical aid or accommodation" to that person if he or she is unable to provide these things for himself or herself.

11. Since subhead (2)(b) does not restrict the duty to blood relations, it could potentially apply where the person accused of the omission had undertaken to care for a sick tenant or lodger, who was incapable of caring for himself or herself due to infirmity. In most cases subhead (2)(b) would not impose a duty on a person to call the doctor for a one-night-stand if he or she took a bad turn. However, the situation may be different if the defendant and the deceased participated in excessive drinking or drug-taking together which resulted in the deceased falling ill, whereupon the defendant either did not seek medical treatment owing to fear (of damaging his or her reputation or being criminally prosecuted) or alternatively, assumed a duty of care by removing the deceased from the presence of other people who may have been able to intervene and access the necessary medical attention.[30] Alternatively, liability may arise for this scenario under subparagraph (d). Finally, it goes without saying that, in every case, criminal liability should only arise for an omission if the jury is satisfied that there is a sufficiently strong causal link between the failure to act and the prohibited result and the defendant had the requisite fault element in failing to act.

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26 See *R v Instan* [1893] 1 QB 450.

27 See Ashworth "The Scope for Criminal Liability for Omissions" (1989) 105 LQR 424, at 443.

28 See Working Paper No 46 *Omissions, Negligence and Endangering* at 14.

29 See Williams "What should the Code do about omissions?" *7 Legal Stud.* 92 1987 at 99 where he expressed the view that the duty owed by a spouse and children under 20(2)(a)(i) of *Criminal Law: Codification of the Criminal Law – A Report to the Law Commission* (Law Com No 143) 1985, should only apply to "a husband and wife, when cohabiting, in respect of each other." At 99-100 Williams states his opposition to a duty being imposed on children in respect of their parent, even if the child in question is a muscular 15-year-old boy who omits to save his drowning mother from a shallow pool. He argues that caring duties should not be imposed on people under 16.

30 See *R v Taktak* [1988] 34 A Crim R 334. See also *The People v Beardsley* (1907) 113 N.W. 1128 (Michigan) where the deceased woman stayed with the defendant for the weekend and took an overdose of tablets. The defendant knew that she was in a serious condition but nonetheless brought her to another apartment where she subsequently died. The court spoke disapprovingly of the deceased as being a woman over 30, who had been married before and frequently drank too much, holding that the defendant did not owe any duty of care to her as his mistress.

(c) Assumption of duty in relation to children and other vulnerable people

12. Subhead (2)(c) articulates a duty to protect children where the person has *assumed* such responsibility; this duty clearly covers foster children. It may also extend liability to people who have temporary custody of a child, such as people who run children's summer camps whereby camp facilitators would have a duty to prevent danger to the life, safety or health of any child in their custody, care or charge. The intentional, knowing, reckless or grossly negligent omission to perform the duty under subhead (2)(c) could result in a conviction for murder or manslaughter, respectively, if the omission causes the death of the child,[31] regardless of the fact that a person can be found guilty of the offence of cruelty to children under section 246 of the Children Act 2001 even where death results.

13. The duty extends to vulnerable people other than children, such as elderly people in a care facility or those in mental health institutions. Those who are charged with the care of elderly or mentally ill people are under a legal duty to avoid danger to the lives, safety and health of their charges and may be held criminally responsible if they fail to do so.

(d) Duty to perform dangerous activities with care, etc.

14. While subhead (2)(d) makes no explicit reference to duties arising in the employment or contractual context, its practical impact lies in that sphere. People whose jobs involve dangerous activities which may threaten the lives or safety of others if improperly performed are under a duty to perform those activities with care and attention or must give sufficient warning it they do not or cannot perform them. For example, a manager of a mine could be convicted of manslaughter if a fatal explosion occurs as a result of his failure to ventilate the mine. In *The People (DPP) v Cullagh*[32] the owner of a chairoplane ride was found guilty of gross negligence manslaughter for allowing the public access to the ride which he owned and controlled, knowing that the ride was in a decrepit state (*e.g.* it was 20 years old at the time of purchase and had lain in an open field for 3 years before the defendant bought it), when a woman died after her chair became disconnected from the ride. Under subhead (2)(d) the chairoplane owner would owe a duty of care to the victim and the public at large.

15. Irish statutes impose many legal duties on people to take due care in relation to the performance of dangerous activities/undertakings and the possession of dangerous things. For example, people are obliged to drive with due care and attention under the road traffic legislation.[33] Similarly, employers are legally obliged to maintain

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31 See *R v Gibbons and Proctor* [1918] 13 Crim App R 134 the father of the deceased girl and his *de facto* wife were convicted of murder for deliberately withholding food from the child. See http://www.doncasterfreepress.co.uk/free/Edlington-baby-murder-trial-verdict.4614164.jp where a father was convicted of murder and child cruelty in October 2008 for starving and injuring his baby daughter before fatally snapping her spine in two. The mother of the child was convicted of allowing the death of a child and child cruelty.

32 See Irish Times Report 31 May 2000. The chairoplane owner's conviction for gross negligence manslaughter was upheld in the Court of Criminal Appeal.

33 See section 52 of the Road Traffic Act 1961. Section 53(1) provides that: "A person shall not drive a vehicle in a public place at a speed or in a manner which, having regard to all the

safe working conditions under the Safety Health and Welfare and Work Act 1989 while the masters and owners of fishing boats are required to keep them well-maintained and safe under the Merchant Shipping Act 1981.[34]

16. Subparagraph (d) is very useful in that it articulates a general duty to discharge dangerous tasks with proper care and to keep potentially dangerous machines etc., in one's possession safely maintained. There is ample Irish case-law demonstrating the recognition of legal duties such as those contained in subparagraph (d). In the seminal gross negligence manslaughter case of *The People (AG) v Dunleavy*[35] the Court makes it clear that the statutory duty to drive carefully can give rise to liability for gross negligence manslaughter where the defendant's culpability is sufficiently high.

17. In *The People (DPP) v Rosebury Construction Ltd and Others,*[36] a construction company was fined almost £250,000 for offences under the Safety Health and Welfare at Work Act 1989, which caused the deaths of two men on a building site in 1998. One of the defendants, an employee of a sub-contractor, was given an 18 month suspended sentence for endangerment under section 13 of the Non-Fatal Offences against the Person Act 1997. All defendants initially faced manslaughter charges, but these charges were later dropped and the defendants pleaded guilty to the lesser charges. The construction company was obliged under the relevant Regulations made under the 1989 Act to provide supports for any trench which was more than 1.25 metres deep. The defendants failed to comply with this requirement. The trench in question was between 3.1 and 3.3 metres deep and there was evidence that there was equipment on site in the form of a trench box which could have provided support for a trench.

18. In a case such as *Rosebury*, a general legal duty to take care such as that contained in subparagraph (d) is a useful overarching public protection mechanism in addition to the explicit statutory regulations on construction companies etc., associated with the Safety Health and Welfare at Work Act 1989.

19. In *The People (DPP) v Barden*[37] the skipper of the Pisces fishing boat was charged with five counts of manslaughter, one count of endangerment contrary to section 13 of the Non-Fatal Offences Against the Person Act 1997 and one count of being the master and owner of a dangerously unsafe ship contrary to section 4 of the Merchant Shipping Act 1981. Five people drowned when the defendant's unseaworthy boat took in excessive amounts of water and capsized. The

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circumstances of the case (including the nature, condition and use of the place and the amount of traffic which then actually is or might reasonably be expected then to be therein) is dangerous to the public."

34 Section 4(1) of the Merchant Shipping Act 1981 provides: "If a ship is, having regard to the nature of the service for which the ship is intended, unfit by reason of the condition of the ship's hull, equipment or machinery or by reason of undermanning or by reason of overloading or improper loading to go to sea without serious danger to human life, then, subject to subsection (6) of this section, the master and the owner of the ship shall each be guilty of an offence.

35 [1948] IR 95.

36 Irish Times Report 22 November 2001.

37 Irish Times Report 24 November 2005.

defendant was found not guilty of manslaughter and endangerment but was convicted of running an unsafe vessel.

20. The point here is that the duty to operate a safe vessel under the 1981 Act is merely a specific statutory instance of the more general duty that exists at common law to avoid or prevent danger to the life, safety or health of another if the danger arises from an act of the defendant, from anything in his or her possession (*i.e.* a fishing boat) or from any of his or her undertakings (*e.g.* construction of buildings).

21. The great benefit of including subhead (2) is that it sets out in a single provision a comprehensive list of the sorts of duties relevant to omissions liability in the criminal law. Only four duties to act are identified which broadly correspond with the most frequently cited common law legal duties and importantly they also accord with common morality, *i.e.* they are duties which members of the public are likely to understand and support. It makes sense from a moral standpoint to impose a duty on a husband to call the doctor for his sick wife if she is unable to do so herself (although it is debatable whether the husband should be obliged to seek medical assistance for her if she is opposed to such treatment).[38] Similarly, there is nothing controversial about imposing a duty on people who are responsible for children and other vulnerable categories of people to prevent danger to the life, safety or health of their charges even if they are not related to them. Children and the elderly inhabitants of care homes are vulnerable and need to be protected by those who have custody of them, whether the carers are related to them or not. Lastly, it is in the interests of society at large to impose a duty of care on people who are engaged in dangerous tasks, or have dangerous machinery or animals in their possession to avoid or prevent danger to the life, safety or health of others.

(3) Supervening fault

22. Subhead (3) pertains to supervening fault, which is a specific instance of omissions liability. It is modelled on Clause 23 of the Draft Criminal Code for England and Wales. In a situation where an offence requires a particular fault element in respect of a result element, a person who lacks the fault element when he or she does an act that causes or may cause the result nevertheless commits the offence if the person becomes aware that he or she has done the act and the result has occurred and may continue, or may occur; and with the fault element required, the person fails to do what he or she can reasonably be expected to do that might prevent the result continuing or occurring and the result continues or occurs.

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[38] Arguably, no one should be criminally liable for failing to provide an adult of sound mind with a service (including necessary medical attention) that he or she does not want – still less for failing to force it on him or her. The right of individual autonomy is recognised in practice, so that the law does not force Jehovah's Witness to submit to blood transfusions these days. However, "Ms K", a pregnant Jehovah's Witness from the Congo was recently forced by the High Court to have a blood transfusion against her will on the basis that the child's right to life was protected under the Irish Constitution. See *Irish Independent* 22 September 2006.

23. The definition of a criminal offence may prohibit the doing of a positive act that causes a specified result – *e.g.* Head 3104 (Causing serious harm), or Head 5101 (Damaging property) – where the person at the time of his or her act has the required fault element *i.e.* intention, knowledge or recklessness in respect of the prohibited result element.

24. Subhead 3 operates so that Head 3104 and Head 5101 may be satisfied where a person - without the required fault element - does an act which creates a risk that the specified result element will occur and later becomes aware of what he or she has done. The person is now under a duty "to take measures that lie within one's power to counteract a danger that one has oneself created."[39] Failure to take such steps will give rise to criminal liability if the omission to act is made with the fault element required for the offence.

25. Subhead 3 restates and generalises the principle applied by the House of Lords in *R v Miller*, where a vagrant went to sleep leaving his cigarette burning and awoke to find the mattress smouldering. He left the room with the smouldering mattress without attempting to extinguish the fire and went to another room in the building to continue his sleep. The house itself caught fire and the vagrant was charged with arson.

26. Although the Court of Appeal upheld his conviction on the basis of a continuing act, the House of Lords took a different approach. It held that arson had been committed by the appellant's knowing omission to deal with the fire, and such an omission could satisfy the *actus reus* requirement because the appellant's unintentional starting of the fire created a legal duty. The duty is to take measures that lie within one's power to counteract a danger that one has oneself created. The relevant sorts of "danger" are those which threaten an interest protected by the criminal law such as life or health or property. Therefore, the duty arises where, unless the person intervenes, his or her earlier positive action will bring about the prohibited harm.

27. There is no reason to limit the application of the *Miller*[40] principle to cases of arson. It should apply to all result crimes. The original act need not be blameworthy in itself. Although the vagrant's act in *R v Miller* of falling asleep with a lighted cigarette was careless, the House of Lords was satisfied that the fire started "accidentally" which must mean under subhead (3) that the appellant initially lacked the fault element required for the offence.

28. For subhead (3) to apply, the person must become aware of what he or she has done and of the risk created. He or she must then fail to do an act which might prevent the occurrence or continuance of the result. Finally, the result element specified for the offence must occur, or if it has already occurred must continue, after the omission.

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39 See *R v Miller* [1983] 2 AC 161 at 176.

40 [1983] 2 AC 161.

CAUSATION

1104.—(1) A person causes a result element if—

(a) the conduct element attributed to him or her makes a more than minimal contribution to its occurrence, and

(b) the connection between the conduct element and the result element is —

(i) sufficiently strong, and

(ii) not too dependent on an intervening event or intervening conduct of another,

for it to be reasonable to hold the person liable for the result element.

(2) For the purposes of *subhead (1)* —

(a) a person may cause a result element directly or indirectly;

(b) the connection between a person's conduct element and the result element may be sufficiently strong notwithstanding an unusual susceptibility to injury on the part of the victim.

Explanatory Notes:

(1) Introduction

1. Head 1104 provides for the rules on causation. Causation governs the causal relationship between the conduct and result elements; it tells us when a particular result should be attributed to the conduct (*i.e.* the physical act or omission) of the defendant. Thus, causation is of relevance to any offence that contains a result element. The case law on causation is dominated by the offences of murder and manslaughter – where the result element is the causing of death – although it is important to bear in mind that there are many offences to be found across the criminal calendar which contain result elements. For instance, the offence of causing serious harm[41] requires that the defendant causes serious harm to the victim, and the offence of damaging property[42] requires that the defendant causes damage to property.

2. Causation is a question of fact for the jury.[43] It rarely presents difficulties at trial, however, and only exceptionally will a jury need to be directed as to the legal requirements for causation. Such cases typically arise where there are multiple causes at play, a victim possessing some unusual susceptibility to injury, an intervening act, or some combination of these factors. In the vast majority of

41 Section 4, Non-Fatal Offences against the Person Act 1997.
42 Section 2, Criminal Damage Act 1991.
43 *R v Pagett* (1983) 76 Cr App R 279.

cases, however, jurors will be expected to rely on their "common sense" in determining whether the defendant's conduct caused a given result.[44]

3. Much of the literature on causation makes reference to the "but for" or "*sine qua non*" test as a useful indicator of causation: *i.e.* but for the defendant's conduct, would the result have occurred? In the absence of any unusual circumstances, the *prima facie* answer it provides will generally be a conclusive one.[45]

4. In more difficult cases, however, a "but for" enquiry will not produce the appropriate answer. Indeed, as a matter of law, "but for" causation is neither necessary nor sufficient. Suppose A administers a deadly poison to B. Moments later, before the poison has taken effect, C shoots B in the head, killing him instantly. In this case it is clear that C has caused the death of B, although the "but for" enquiry would fail on the ground that but for C's conduct, B's death would have occurred anyway, due to the poison administered by A.

5. By the same token, the presence of "but for" causation will not always provide an appropriate outcome. This is illustrated by the case of *R v Hensler*[46], where the defendant wrote a begging letter making false pretences. The addressee was not deceived, although he sent the money asked for anyway. It was held that there was no offence of obtaining by false pretences because the false pretences had not *caused* the addressee of the letter to send the money. Thus, the defendant's conduct was deemed not to have caused the result in question, notwithstanding the fact that the money would not have been provided *but for* him sending the letter.

6. For the reasons outlined above, it is often necessary to go beyond the *sine qua non* enquiry in order to establish causation as a matter of law. To this end, a number of tests have been developed by the courts, although it should be noted at the outset that the case law is somewhat lacking in doctrinal consistency and fails to provide a singular, comprehensive test of causation.

(2) The appropriate threshold of causal contribution

7. It is clear that the defendant's conduct need not be the sole or even principal cause of the result in order for causation to be established. However, there has been a degree of variation in the language used by the courts in identifying the appropriate contributory threshold. The various authorities, which employ a multiplicity of terms, can be divided into two broad categories: those espousing that a causal contribution must be "more than *de minimis*", and those providing that such contribution need be "substantial". The former language is the norm in Canada[47], while the preponderance of Australian case law[48] is in line with the latter. The balance of English authorities leans in favour of the "more than *de*

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44 See *Campbell v The Queen* (1980) 2 A Crim R 157 at 161 per Burt C.J.

45 Simester and Sullivan, *Criminal Law: Theory and Doctrine* (3rd edn Hart, 2007) at 80.

46 (1870) 11 Cox Cr Cas 570.

47 See *Smithers v The Queen* (1977) 75 DLR (3d) 321. Although it is worth noting that the Supreme Court of Canada has endorsed a higher threshold of "substantial and integral cause" in the context of first degree murder: *Harbottle v The Queen* (1993) 84 CCC (3d) 1.

48 See *R v Bristow* [1960] SASR 210; *R v Hallett* [1969] SASR 141; *R v Bingapore* [1975] 11 SASR 469.

minimis" standard,[49] although a number of high profile judgments[50] have employed the term "substantial".

8. The distinction between a "more than *de minimis*" and "substantial" approach is arguably superficial. As a recent Law Commission working paper observes, the two phrases "may well mean the same thing".[51] This view is supported by Ormerod in *Smith and Hogan Criminal Law*:

> "It is sometimes said that D's conduct must be a 'substantial' cause but the use of the word is misleading and seems to mean only that D's contribution must be more than negligible or not be so minute that it will be ignored under the '*de minimis* principle'."[52]

9. In this jurisdiction the applicable standard of causal contribution was at issue in a recent decision of the Court of Criminal Appeal. In *DPP v Davis*,[53] the defendant applied for leave to appeal against his conviction for murder *inter alia* on the ground that there was insufficient evidence that the death of the deceased was caused by actions which could be attributed to him. The evidence at trial plainly established that the defendant had savagely assaulted the deceased, including by landing kicks to her upper body, the genital area in particular. There was, however, a suggestion that the deceased had incurred injuries from other causes; in particular, it was suggested that she had fallen down the stairs prior to the assault. Delivering the judgment of the Court, Hardiman J observed:

> "The cause of death was heart failure secondary to severe shock which was itself the cumulative result of the injuries described and in particular the very severe pain associated with them. Of these, probably the most significant contributor was the bladder and pelvic injuries. It seems overwhelmingly probable that the defendant's attack was the sole cause of all significant injuries. In point of law, however, it is unnecessary to go so far: it is sufficient if the injuries caused by the defendant were related to the death in *more than a minimal* way."[54]

10. In the earlier case of *People (Attorney General) v Gallagher*,[55] the Court of Criminal Appeal expressed itself to be "in substantial agreement" with the "more than *de minimis*" standard, though it was concerned that such wording "would confuse a jury who would not know the technical meaning which the Latin phrase has acquired."[56] From a codification perspective – where the goals of accessibility and certainty are paramount – the concern expressed in *Gallagher* would seem particularly relevant. Certainly, there is little justification for employing a Latin term when the same idea can be captured in plain English. Accordingly, subhead (1)(*a*) provides that the defendant's conduct must make a "more than minimal contribution" to the occurrence of a result in order to establish causal liability.

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49 See *R v Hennigan* [1971] 3 All ER 133; *R v Cato* [1976] 1 All ER 260.
50 See *R v Smith* [1959] 2 QB 35; *R v Blaue* [1975] 1 WLR 1411.
51 Law Commission of England and Wales, Working Paper on Causation (2002) at 7.
52 Ormerod, *Smith and Hogan Criminal Law* (11th Ed, Oxford, 2005) at 54).
53 [2001] IR 146.
54 *Ibid*, at 149. (Emphasis added).
55 [1972] IR 365.
56 *Ibid*, at 370.

(3) Direct and indirect causation

11. As a matter of law, the defendant's conduct need not bring about a result directly in order for him to incur liability. It is enough that he contributes significantly to the occurrence of the result: the causal contribution may flow directly *or* indirectly from his conduct.

12. This is aptly illustrated by the case of *R v Mitchell*.[57] Here, the defendant became involved in an altercation with an elderly man after trying to force himself into a queue at the post office. The defendant knocked over the man, who then fell against the deceased, an elderly woman, causing her to fall to the ground and fracture her femur. She died a few days later as a result of complications arising from the injury. The defendant was convicted of her manslaughter. On appeal he argued, *inter alia*, that the absence of direct physical contact between him and the deceased precluded his liability. The English Court of Appeal rejected this argument:

> "Although there was no direct contact between Mitchell and Mrs. Crafts, she was injured as a direct and immediate result of his act. Thereafter her death occurred. The only question was one of causation: whether her death was caused by Mitchell's act. It was open to the jury to conclude that it was so caused; and they evidently reached that conclusion."[58]

13. It is worth further illustrating this point with reference to the draft Part on Non-Fatal Offences against the Person. Head 3109(1), as it currently stands, provides that:

> "A person commits the offence of attack with a contaminated syringe or blood if he or she—
>
> (*a*) intentionally causes the piercing of another's skin with a contaminated syringe, knowing that the syringe is a contaminated syringe…"

14. The offence definition contains a result element, *viz.* the piercing of another's skin with a contaminated syringe. Applying the rules on causation, the defendant will be deemed to have caused such a result if his conduct contributes significantly to its occurrence, whether directly (*e.g.* by stabbing his victim with a contaminated syringe) or indirectly (*e.g.* by placing a contaminated syringe in such a manner that his victim sits on it).

15. Subhead (2)(*a*) restates the principle that a person may cause a result directly or indirectly. From a legal perspective, the inclusion of this provision is not strictly necessary – indeed, no such provision is to be found throughout the codified common law world – although it may be considered useful to include it for explanatory purposes.

(4) Breaking the chain of causation: intervening causes

16. The criminal law excludes from liability a person whose causal contribution is insignificant when compared to some extraordinary intervening natural event or

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57 [1983] 76 Cr App R 293.

58 *Ibid*, at 298.

the act of another person. In such cases it might be said that the defendant's conduct is merely "part of the history" preceding the occurrence of the result, or that it provides the "context" in which the result occurs and nothing more. This is known as the principle of *novus actus interveniens*.

(a) Intervening natural events

17. The basic rule is that an intervening natural event will only break the chain of causation if it is not reasonably foreseeable. In *The Queen v Hallett*,[59] the defendant fought with the deceased, rendering him unconscious. He left him lying on the shore, where he was drowned by the incoming tide. The Supreme Court of South Australia rejected the defendant's contention that the incoming tide precluded his causal responsibility for the death: this was no more than the ordinary operation of natural forces. It was acknowledged, however, that an "extraordinary" act of nature – such as a tidal wave – may break the chain of causation.

18. In *Bush v Commonwealth*, the deceased was assaulted by the defendant and received a wound, not necessarily mortal; she was taken to hospital, where she contracted scarlet fever and died. The court absolved the defendant of causal liability, providing that:

> "when there is a supervening cause, not naturally intervening by reason of the wound, the death is by visitation of providence, and not from the act of the party inflicting the wound… If the death was not connected with the wound in the regular chain of causes and consequences, there ought not to be any responsibility."[60]

(b) Intervening acts

19. Once again, it should be emphasised at the outset that the principles in this area have developed on an *ad hoc* basis, and it is difficult to extract from the case law any single, uniform test. Broadly speaking, two approaches can be identified. According to the first approach, a "free, deliberate and informed" act of a person other than the defendant will amount to a *novus actus*. This might be referred to as the "voluntary act" test, although the meaning of the term in this context is quite distinct from "voluntariness" as referred to in Head 1103.

20. The voluntary act test was applied recently by the House of Lords in *R v Kennedy (No. 2)*.[61] This case concerned a defendant who prepared a syringe of heroin and handed it to the deceased, who injected himself with the drug and died shortly thereafter as a result. The defendant was convicted *inter alia* of manslaughter. The question to be considered by the House of Lords was whether the defendant could be said to have committed an unlawful act contrary to section 23 of the Offences against the Person Act 1861 by "causing" the drug to be administered to the deceased. If no unlawful act could be established, there was no basis for a manslaughter conviction. The Court held that the deceased, in injecting himself

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59 [1969] SASR 141.

60 (1880) 78 Ky 268; cited by Hart and Honoré, *Causation in the Law* (2nd Edn Oxford, 1985) at 342.

61 [2008] 1 AC 269.

with the drug, had performed an informed, voluntary act, thus relieving the defendant of causal responsibility.

21. This case might be contrasted with the earlier case of *R v Pagett*,[62] where the defendant fired shots at police officers, using the deceased as a human shield against her will. The officers returned fire and the deceased was killed as a result. The defendant was convicted of manslaughter. On appeal, one of the issues to be considered was whether the conduct of the police officers in returning fire could amount to a *novus actus*. The Court of Appeal took the view that any reasonable act performed for the purpose of self-preservation, or done in the performance of a legal duty, could not be said to be "voluntary".[63]

22. The second approach which has been taken by the courts in relation to intervening acts is the "natural consequence" test. In essence, this means treating an intervening act no differently than an intervening natural event. Accordingly, the question to be posed is whether the intervening act was reasonably foreseeable. In *R v Roberts*,[64] the defendant assaulted the victim while driving a car. The victim jumped from the moving vehicle, sustaining concussion and grazes. Upholding the defendant's conviction for assault occasioning actual bodily harm, the Court of Appeal considered whether the injury sustained was "the natural result of what the alleged assailant said and did, in the sense that it was something that could reasonably have been foreseen as the consequence of what he was saying or doing?"

23. One interesting Irish case, dating back to the War of Independence, is worthy of note. *In re an Application for Compensation for Criminal Injury*, a police barracks was attacked by armed insurrectionaries, who in the course of the attack loopholed the yard wall of an adjacent house. Crown forces who relieved the barracks then burnt down the house and its contents. Compensation was sought for the malicious destruction of the property but was rejected on the grounds that the cause of the damage was the acts of the Crown forces acting under military command, and was therefore not "malicious". On appeal, this decision was reversed, the court taking the view that causal liability could be attributed to the insurrectionaries. It was held, per O'Connor M.R., that "although the immediate act of destruction was the act of the military, the damage done was the *natural and probable result* of the illegal act of the persons making the attack."[65] (emphasis added)

24. While both the "voluntary act" and "natural consequence" approach are capable of producing an appropriate answer to problems of causation, neither is suitable as an over-arching, uniform test. The case of *R v Blaue*[66] is particularly instructive in this regard. Here the deceased, who had been wounded by the defendant, refused a life-saving blood transfusion on religious grounds. The English Court of Appeal, upholding the defendant's conviction for manslaughter, rejected the

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62 (1983) 76 Cr App R 279.

63 *Ibid*, at 289.

64 (1971) 56 Cr App R 95.

65 [1922] 56 ILTR 7 (Court of Appeal in Southern Ireland). See further: *People (Attorney General) v McGrath* (1960) 2 Frewen 192.

66 (1975) 61 Cr App R 271.

contention that the deceased's refusal of the blood transfusion amounted to a *novus actus*. The basis on which the Court grounded its decision was the fact that the wound inflicted by the defendant was still an operating cause at the time of death, and the so-called "thin skull" principle that "those who use violence on other people must take their victims as they find them."[67]

25. It is clear that neither the "voluntary act" nor the "natural consequence" approach would provide a satisfactory outcome in *Blaue*. On any reasonable assessment, the deceased's act in refusing a blood transfusion was a voluntary one, in the sense that is was "free, informed and deliberate". Thus, according to the voluntary act approach, it would amount to a *novus actus*, relieving the defendant of causal liability. Under a "natural consequence" analysis the same result is achieved, as a victim's refusal of a blood transfusion can hardly be said to be "reasonably foreseeable".

26. *Kennedy* further illustrates the limitations of the "natural consequence" test. Recall that the case was resolved on a "voluntary act" analysis, on the basis that the deceased, in injecting himself with heroin, was performing a "free, informed and deliberate" act, amounting to a *novus actus interveniens*. According to the "natural consequence" test however, the causal chain would not be broken, as it was entirely foreseeable on the part of the defendant, who had prepared the syringe and handed it to him, that the deceased would then inject himself with the drug.

(c) Prescribing a coherent rule

27. As the preceding discussion explains, the law on intervening causes lacks a definitive, over-arching test. This poses a challenge for codification and the principle of completeness, which requires a reasonably comprehensive statement of the law on a given area.

28. The approach taken in subhead (1)(b) – which is modelled on section 13 of the Draft Criminal Code for Scotland – is simply to require that "the connection between the conduct and the result is sufficiently strong, and not too dependent on some intervening event or intervening conduct of another, for it to be reasonable to hold the person liable for the result."

29. This constitutes a general statement of the law, though it is unashamedly broad and lacking in detail. Thus, in cases where difficult questions of causation arise a judge will have considerable discretion to decide – informed by relevant case law – how the jury is to be directed, so long as any such direction is consistent with the general principle espoused in subhead (1)(b). This "minimalist" formulation is broadly in line with the approach taken in other common law jurisdictions that have codified the rules on criminal causation.[68] It recognises the fact that reducing this aspect of the law on causation to statutory form is fraught with difficulty, and that it is better to leave a measure of discretion to the courts as to

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67 (1975) 61 Cr App R 271, at 274.

68 See for example section 2.03 of the American Model Penal Code, which provides the model for causation provisions to be found in the criminal codes of a number of US jurisdictions.

how difficult cases of causation should be resolved. It should be emphasised once again, however, that such cases are rare.

(5) Unusual susceptibility to injury: the "thin skull" rule

30. Subhead (2)(b) gives effect to the principle[69] of causation that "one must take one's victim as he finds him", often referred to as the "thin skull" rule. In essence, the rule provides that a defendant may be deemed to have caused a particular result notwithstanding a particular vulnerability on the part of the victim. Thus, if A commits a minor assault on B, who unbeknown to A has an unusually thin skull, and B dies, then as matter of law A will be deemed to have caused B's death.

31. Subhead (2)(b) is modelled on section 13 of the Draft Criminal Code for Scotland. The effect of this provision is to make it clear that a defendant may not rely on some unusual vulnerability on the part of his victim as a factor to vitiate what is otherwise a sufficiently strong causal connection between his conduct and the result.

32. The English Court of Appeal in *Blaue* effectively extended the thin skull doctrine beyond consideration of a victim's physical characteristics, by taking into account her religious beliefs:

> "It has long been the policy of the law that those who use violence on other people must take their victims as they find them. This, in our judgment means the whole man, not just the physical man."[70]

33. This extension of the thin skull doctrine into the realm of the psychological characteristics of a victim is somewhat controversial and, though it may be justifiable considering the particular facts of *Blaue*, it would not seem suitable for restatement as a general principle. The consequences of doing so could be precariously far-reaching – McAuley and McCutcheon cite the example of the victim of an assault committing suicide because of an abnormal feeling of shame on his part.[71] It should be noted, however, that an Irish court presented with a set of facts analogous to *Blaue* could still reach the same result as the English Court of Appeal reached in that case, if it thought it reasonable to do so in the circumstances, by direct application of the "sufficiently strong" connection test in subhead (1)(b).

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69 *R v Hayward* (1908) 21 Cox CC 692; *R v Nicholson* (1926) 47 CCC 113; *State v Frazier* (1936) 399 Mo. 966; *Mamote-Kulang of Tamagot v R* (1964) 111 CLR 62.

70 (1975) 61 Cr App R 271 at 274.

71 McAuley and McCutcheon, *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 256.

CONSENT

1105.—(1) A person does not commit an offence in respect of another if that other consents to the conduct—

(a) causing serious harm or death, or

(b) carrying with it a substantial risk of causing serious harm or death

where an enactment or rule of law provides a defence of consent to such conduct.

(2) Unless otherwise provided by this Criminal Code, consent is ineffective if—

(a) the consent is given by a person who by reason of mental disorder, youth, intoxication, sleep or unconsciousness lacks sufficient understanding or knowledge so that he or she is not in a position to consent,

(b) the consent is given by a person who is deemed incapable of consenting by the law defining the offence,

(c) the consent is obtained by the use or threat of force against the person consenting or another, or

(d) the person consenting is mistaken about the nature of the act or the identity of the person doing what was consented to.

(3) The consent of a minor who has attained the age of 16 years to any surgical, medical or dental treatment which, in the absence of consent, would constitute a trespass to his or her person, shall be as effective as it would be if he or she were of full age; and where a minor has by virtue of this subhead given an effective consent to any treatment it shall not be necessary to obtain any consent for it from his or her parent or guardian.

(4) In *subhead (3)* "surgical, medical or dental treatment" includes any procedure undertaken for the purposes of diagnosis, and that subhead applies to any procedure (including, in particular, the administration of an anaesthetic) which is ancillary to any treatment as it applies to that treatment.

(5) Nothing in *subhead (3)* shall be construed as making ineffective any consent which would have been effective if that subhead had not been enacted.

Explanatory Notes:

(1) Introduction

1. Subhead (1) is concerned with the legal regime governing the limits to consent to bodily harm. The general rule in Irish law is that a person cannot consent to the infliction of serious harm or to the risk of serious of harm or death; although this rule is subject to a number of exceptions.

2. As matters stand, the rules on the limits to consent are scattered between legislation (the general rule) and the common law (the exceptions to the general rule). Moreover, the general rule has not been articulated as a positive rule of law; it has to be extrapolated from the offence scheme set out in the Non-Fatal Offences against the Person Act 1997. Similarly, the exceptions to the general rule have to be constructed from the case law; and, although the exceptions themselves are reasonably clear, their scope is uncertain.

3. The burden of the argument here is that the general rule on the threshold of consent should be explicitly stated in the Code. It is suggested that this arrangement would enhance accessibility by substituting a single statutory provision for the existing patchwork of offence definitions from which the general rule is derived, while at the same time eliminating the element of scatter associated with the current statutory scheme.

4. In an ideal world, the aims of codification would be best served by setting out the exceptions to the general rule as an integral part of this arrangement; all of the applicable consent rules of general application would then be housed in a single location. However, given the uncertainty surrounding their number and extent, not to mention the host of difficult policy issues involved in attempting to reduce them to statutory form, it is suggested that the exceptions to the general rule on the limits to consent should be allowed to continue at common law until such time as they are ripe for inclusion in the criminal code, or, it goes without saying, pending the introduction of legislation in the area.

(a) Existing law

5. In general, a person may give a valid consent to the infliction or risk of bodily harm that falls below the threshold of "serious harm". The following commentary explains how the general rule on the limits to consent can be deduced from the offence scheme in the Non-Fatal Offences against the Person Act 1997.

6. Because the absence of consent is a constituent element of the offence of assault, in section 2 of the 1997 Act, no offence is committed where the victim consents to the conduct alleged to constitute the assault. For instance, the presence of consent distinguishes a warm embrace between friends from the unwanted physical interference of a stranger. Though the conduct might well be the same in both cases, the absence of consent turns the conduct of the stranger into a criminal assault.

7. Since the definition of assault is carried over from section 2 to section 3 of the 1997 Act, consent on the part of the victim negatives an essential ingredient of the offence of assault causing harm. It follows that a person may legally consent to being caused "harm".

8. According to the definitional scheme in section 1 of the 1997 Act, the term "harm", for the purposes of the rules on the limits of consent, would appear to cover any form of bodily harm that falls below the threshold of "serious harm".

9. As a general rule, Irish criminal law does not permit a person to consent to the infliction of serious harm or the risk of serious harm or death. Since absence of consent is not a constituent element of the offence of causing serious harm, in section 4 of the 1997 Act, the issue of whether the victim consented is immaterial. In a similar vein, consent is not a basic ingredient of the offence of endangerment, in section 13 of the 1997 Act. It follows that a person is, in general, not legally permitted to consent to being put at risk of serious harm or death.

10. In relation to the other non-fatal offences against the person in the 1997 Act, the relevance of consent depends on whether consent has been made a constituent element of the offence in question. In view of the fact that consent is an element of the offences of poisoning and false imprisonment, the presence of consent on the part of the victim cancels out a key ingredient of these offences. In contrast, consent is irrelevant in the context of the syringe offences and the endangering traffic offence due to the fact that consent is not a definitional element of these offences.

11. The general rule on the limits to consent in Irish criminal law can be summarised as follows:

    (i) a person may give a valid consent to being caused bodily harm that falls below the threshold of "serious harm", as defined in section 1 of the 1997 Act.

    (ii) a person may give a valid consent to being subjected to the risk of bodily harm that falls below the threshold of "serious harm", as defined in section 1 of the 1997 Act.

12. The general rule on the limits to consent is subject to a number of common law exceptions. Section 22(1) of the 1997 Act has the effect of preserving the common law defence of consent, which is applicable to certain forms of conduct that involve the causing of serious harm and/or the risk of serious harm or death:

> "**22.** — (1) The provisions of this Act have effect subject to any enactment or rule of law providing a defence, or providing lawful authority, justification or excuse for an act or omission."

13. The notes accompanying the Heads of Bill pertaining to the 1997 Act provide a clear explanation of how section 22(1) is intended to operate in the context of the common law defence of consent. The notes provide that "the common law rules under which bodily harm caused with consent in the course of sports, dangerous exhibitions or medical treatments will apply to exempt the actor from criminal liability." It follows that a person may give a valid consent to the infliction or risk of serious bodily harm provided that the conduct in question falls within one of the common law exceptions.

14. The common law exceptions to the general rule are made up of an eclectic mix of activities: medical treatment, sports, horseplay, dangerous exhibitions, the risk of sexually transmitted diseases, body modification and religiously ordained activities.

15. It would appear that a given activity is recognised as meriting a special exemption from the general rule where the courts or legislature consider that a particular activity is "needed in the public interest". In *Attorney General's Reference (No.6 of 1980)* Lord Lane CJ explained the rationale for the exceptional categories in the following terms:

> "it is not in the *public interest* that people should try to cause, or should cause, each other actual bodily harm for no *good reason*. Minor struggles are another matter. So, in our judgment, it is immaterial whether the act occurs in private or public; it is an assault if actual bodily harm is intended and/or caused. This means that most fights will be unlawful regardless of consent. Nothing which we have said is intended to cast doubt upon the *accepted legality* of properly conducted games and sports…reasonable surgical interference, dangerous exhibitions etc. These apparent exceptions can be justified as… needed in the *public interest*..."[72] (emphasis added)

16. The above remarks were approved by the House of Lords in *Brown*.[73] Notwithstanding the line of academic criticism[74] aimed at the apparent lack of principle underpinning the formulation of the exceptional categories, it would appear that the approach of the courts, and occasionally the legislature, has been to give special treatment to activities that are perceived to be in the public interest. The exceptions are said to have an "accepted legality" because they are generally understood to be tolerated, and approved, by society.[75] Special treatment is given to activities such as sports and surgery because the courts and legislature wish to give expression to the public's desire that such conduct is beyond the reach of the criminal law.

(b) Codifying the rules on the limits to consent

17. Codification of the rules on the limits to consent involves restating the general rule and the exceptions to it in a codified form. As noted in the commentary above, the general rule can be deduced from the offence scheme in the 1997 Act, whereas the exceptions currently exist at common law.

18. The general rule can be reduced to statutory form with a satisfactory degree of clarity. This can be achieved by inserting a provision in the Code which states that the threshold of consent is set at "serious harm". The principal advantage of including a provision on the limits to consent in the Code is that it enhances legal certainty and comprehensibility by having a clear statement on the threshold of consent. This is preferable to having a situation where the reader must first engage in a process of deduction, by analysing the offence definitions of a range of offences, to ascertain the threshold of consent. There is clearly some scope for conflicting interpretations of the law in the latter case.

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72 [1981] QB 715 at 719.

73 [1994] 1 AC 212.

74 Ashworth, *Principles of Criminal Law* (5th edn Oxford University Press, 2006), at 318-325; Ormerod, *Smith &Hogan: Criminal Law* (11th edn Oxford University Press, 2005), at 524-538; Simester and Sullivan, *Criminal Law: Theory and Doctrine* (3rd edn Hart, 2007), at 685-704; Stuart, *Canadian Criminal Law* (5th edn Thomson, 2007), at 587-608; Williams, *Textbook of Criminal Law* (2nd edn Stevens & Sons, 1983), chapter 23.

75 McAuley and McCutcheon, *Criminal Liability* (Round Hall Sweet & Maxwell 2000), at 527-543, dissenting from the academic consensus referred to in the previous footnote, both in the discussion of the Hart-Devlin debate and in the course of their analysis of the decision in *Brown*.

19. A provision covering the rules on the limits to consent has been provided for in subhead (1) within the General Part Head on consent. Such an arrangement is typical of many American criminal codes,[76] and has also been adopted in section 111 of the Draft Criminal Code for Scotland. This option might be considered desirable in light of the fact that the rules on the limits to consent are relevant to a range of homicide offences and non-fatal offences against the person. By following this approach, repetition of the rules on the limits to consent in different offence sections would be avoided, resulting in a reduction in the volume of text.

20. A distinct advantage of this approach is that the rules on the limits to consent are located alongside the other code provisions on consent (such as the rules on ineffective consent and possibly the special rules on consent relevant to property offences and sexual offences). This arrangement significantly enhances accessibility by having all of the provisions on consent housed in a single location.

21. In an ideal world the principle of completeness suggests that the exceptions to the general rule on the limits of consent should be stated in the criminal code. However, the principle of completeness applies if and only if the relevant rules are sufficiently ripe for restatement; it does *not* apply to areas of law — such as the exceptional categories in consent — where the authorities are in an uncertain state.

22. It is submitted that the codification project is an inappropriate forum in which to define the limits of the exceptional categories. In view of the absence of a political mandate and the lack of resources, it is probably better to defer to the appropriate emanations of state to develop policy and legislation in relation to the various areas of law covered by the exceptions.

23. For the above reasons, it is recommended that a provision similar to section 22(1) of the 1997 Act, preserving the common law jurisprudence on the limits to consent, be retained in the inaugural criminal code. Section 22(1) ensures the continuing application of the common law exceptions, such as sport and medical treatment, to the offences contained in the 1997 Act:

> "**22.**—(1) The provisions of this Act have effect subject to any enactment or rule of law providing a defence, or providing lawful authority, justification or excuse for an act or omission."

A similar provision in the Code would have the effect of maintaining the *status quo*, by allowing the rules on the limits to consent to continue to be developed by the courts.

24. Subhead (1) provides that a person may exceptionally consent to conduct that causes serious harm or death, or conduct that carries with it a substantial risk of causing serious harm or death "where an enactment or rule of law provides a defence of consent to such conduct." The inclusion of this phrase has a similar

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[76] See, for example, Hawaii Penal Code, section 702-235; Alabama Penal Code, section 13A-2-7.

effect to section 22(1) of the 1997 Act, in preserving the common law jurisprudence on the limits of consent to bodily harm.

25. The references to "lawful authority, justification or excuse for an act or omission" in section 22(1) of the 1997 Act have been left out of subhead (1) pending consideration of the issue of lawful authority by the Advisory Committee.

26. It is worth noting that section 22(1) ensures the continued application of common law defences to offences contained in the 1997 Act. In this regard, the Advisory Committee has provisionally decided against codifying the defence of reasonable chastisement by parents[77], preferring to allow the defence to develop at common law.

27. It follows that the issue of common law defences will need to be kept under review as the codification project progresses. If it transpires that common law defences are to continue to operate post-codification there may be a case for including a provision, similar to section 22(1) of the 1997 Act, in the General Part, that is of general application across the spectrum of offences in the Special Part.

(2) Rules on ineffective consent

28. Subhead (2) codifies the rules on ineffective consent. The law on ineffective consent is made up of a number of legal principles governing the factors that render a seemingly valid consent ineffectual. In broad terms, consent is deemed to be ineffective where there is a lack of capacity to consent, or where consent is vitiated by the use of force, threat of force, fraud or mistake.[78]

(a) General principles of criminal liability

29. The rules on ineffective consent are general principles of criminal liability. They are rules of general application in the sense that they apply generally to offences where the absence of consent is a circumstance element of the offence definition.

30. The offences of assault in section 2, and false imprisonment, in section 15 of the 1997 Act may be cited as examples. Consent is a good defence in respect of these offences because the presence of consent negatives an essential ingredient of the offence definition. In contrast, the rules on ineffective consent are not relevant in the context of the offence of causing serious harm in section 4 of the 1997 Act because the absence of consent does not form part of the offence definition.

31. The rules on ineffective consent apply to a broad range of offences across the spectrum of the criminal law, including property offences[79], non-fatal offences against the person[80] and sexual offences.[81]

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77 *R v Hopley* [1860] 2 F & F 202.

78 For a detailed treatment of the law on ineffective consent in Ireland, see McAuley and McCutcheon, *Criminal Liability* (Round Hall Sweet & Maxwell 2000) 503-527.

79 For example, see offence of burglary, Criminal Justice (Theft and Fraud Offences) Act 2001, section 12.

32. As the rules on ineffective consent are general principles of criminal liability the most appropriate location for these rules is the General Part Head on consent. The scope of application of the rules on ineffective consent can be defined with precision and certainty, as applying solely to offences where the absence of consent is a circumstance element of the offence.

(b) Restatement of common law

33. The treatment of the issue of ineffective consent in Irish criminal law follows a well established pattern. Broadly speaking, where the offence can only be committed non-consensually *absence of consent* is specified as part of the offence definition, but the rules governing the meaning of consent are left to float at common law. It follows that codification of the rules on ineffective consent will entail restating the common law in the form of a statutory provision.

(3) Capacity

34. Under existing law, consent may be vitiated due to lack of capacity. Two different approaches to the issue of capacity co-exist in Irish criminal law. Firstly, under the common law a person is considered to lack capacity if he or she, by reason of some personal characteristic is incapable of consenting to a particular transaction. Secondly, the legislature has created a number of protective offences that depart from the common law position by imposing an objective test of capacity. Having both subjective and objective approaches to capacity operating in tandem is a well established aspect of Irish criminal law, and the common law world generally.

(a) Subjective test of capacity

35. The common law position is that a person lacks capacity where he or she, by reason of some personal characteristic, lacks sufficient understanding or knowledge to be able to consent to a particular transaction. This lack of capacity to consent could be due to a transient factor, such as intoxication[82] or sleep,[83] or might be attributable to youth[84] or a mental disorder.[85] Taking a *subjective* approach to capacity, the court will examine all the relevant personal characteristics of the individual to determine whether he or she in fact consented in a real sense to the transaction in question.

36. In a similar manner to the other rules on ineffective consent, the underlying rationale is that a person is not in a position to make a free choice where certain

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80 The rules on ineffective consent apply to the following offences in the 1997 Act: section 2 assault, section 3 assault causing harm, section 12 poisoning, section 15 false imprisonment, section 16 abduction of child by parent and section 17 abduction of child by other persons.

81 For example, see offence of rape, Criminal Law (Rape) Act 1981, section 2.

82 *R. v. Camplin* [1845] 1 Den 89.

83 *R. v. Mayers* [1872] 12 Cox CC 311.

84 *R. v. Harling* [1938] 1 All ER 307; *R. v. Howard* [1965] 3 All ER 684.

85 *R. v. Fletcher* [1886] LR 1 CCR 39.

incapacitating factors are operating so as to deprive the individual of the ability to consent in a true sense to a particular transaction.

(b) Objective test of capacity

37. Operating alongside the common law subjective test of capacity outlined above, the legislature occasionally takes an *objective* approach to the issue of capacity by enacting protective offences which apply to categories of vulnerable individuals and to which consent is not a defence. This second approach is objective in nature in that the law selects certain classes of individuals who are deemed incapable of consenting to a particular transaction regardless of their actual personal capabilities of consenting. The justification for such legislation is primarily paternalistic in so far as it affords greater protection to vulnerable groups, such as children or persons with mental disorders.

38. A classic example is the offence of defilement of a child under 17 in section 3 of the Criminal Law (Sexual Offences) Act 2006 which stipulates that the age of consent to sexual intercourse is 17. Under the provisions of the 2006 Act a person under the age of 17 is deemed legally incapable of consenting to intercourse irrespective of whether the person was capable as a matter of fact of so consenting. Other examples include the offence of sexual intercourse or buggery with a mentally impaired person in section 5 of the Criminal Law (Sexual Offences) Act 1993, and the child abduction offences in sections 16-17 of the Non-Fatal Offences against the Person Act 1997.

39. At the present juncture, it is probably unnecessary to codify the various objective tests of capacity that currently exist in the form of ad hoc statutory offences. These protective offences would ideally be included in the relevant chapter of the Special Part at a later phase in the codification project. For instance, the offence of defilement of a child under 17 in section 3 of the Criminal Law (Sexual Offences) Act 2006 can be included in the Code at a future date when sexual offences are being codified.

40. However, it might be considered desirable to include a provision in the General Part Head on consent that acknowledges the practice of the legislature in enacting protective offences.[86] Such a provision has been provided for in subhead (2)(b).

(c) Codifying the rules on capacity to consent

41. Subhead (2)(a) codifies the subjective test of capacity. Codification of the law on capacity to consent entails restating the common law subjective test of capacity in the form of a code provision. In many respects, the task is similar to putting a common law rule on a statutory footing. The phrase "lacks sufficient understanding or knowledge so that he or she was not in a position to consent" restates the common law test of capacity set out in *R v Howard*.[87]

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86 See section 2.11(3)(c) of the American Model Penal Code.

87 [1965] 3 All ER 684.

42. The phrase "Unless otherwise provided by this Act, consent is ineffective if…" is based on section 2.11(3) of the American Model Penal Code. Certain "Americanisms" have been removed from the original to make the subhead more readable.[88] The MPC formula is the one ordinarily used by the extant American criminal codes that have a General Part section on consent.[89] This locution has the advantage of being both clear and precise. This formulation makes it clear that the rules that follow are of *general* application, while at the same time expressly providing for the possibility of offence-specific deviations from the general principles where the legislature deems it desirable. This approach is arguably superior to that followed in the Draft Criminal Code for Scotland which appears to make the rules on ineffective consent of *universal* application, without explicitly allowing for flexibility within offence definitions.[90] Furthermore, for the sake of clarity, it is probably better to expressly mention the words "ineffective consent" in the phrase introducing the provisions on ineffective consent.

43. In a similar vein, the phrase "the consent is given by a person who by reason of" is modelled on section 2.11(3) of the MPC. The phrase adequately conveys the necessary causal link between the listed incapacitating personal characteristics and the lack of capacity on the part of the person consenting.

44. The term "mental disorder" is used in this subhead on the understanding that the inaugural criminal code might have a general definition along the lines of section 1 of the Criminal Law (Insanity) Act 2006. The term "mental disorder" is defined broadly in the Act of 2006, as including "mental illness, mental disability, dementia or any disease of the mind but does not include intoxication". This broad definition of "mental disorder" chimes well with the common law rule on capacity set out in *R v Fletcher*.[91]

45. The word "youth" is included in this subhead to provide for the common law rule that a person may, by reason of young age, lack sufficient understanding and knowledge to be in a position to give a true consent.[92] The term "youth" is taken from section 2.11(3)(c) of the American Model Penal Code. Other possibilities include "young age"[93] or "immaturity". In Ireland, the Children Act 2001 uses the term "child" throughout the statute.

46. The term "sleep" has been included in subhead (2)(a) to provide for the decision of *R v Mayers*[94] which extended the common law rules on capacity in this regard.

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88 The relevant part of section 2.11(3) of the American Penal Code reads as follows: "**Ineffective consent.** Unless otherwise provided by the Code or by the law defining the offense, assent does not constitute consent if:…"

89 For example, see section 13A-2-7 of the Alabama Penal Code and section 702-235 of the Hawaii Penal Code.

90 The relevant part of section 111 of the Draft Criminal Code for Scotland reads as follows: "For the purposes of any Part of this Act any consent given by a person is to be disregarded if at the time when the consent was given-…"

91 [1886] LR 1 CCR 39.

92 *R. v. Harling* [1938] 1 All ER 307; *R. v. Howard* [1965] 3 All ER 684.

93 Draft Criminal Code for Scotland, section 111.

94 [1872] 12 Cox CC 311.

If a person is asleep, he or she clearly lacks sufficient understanding and knowledge to be in a position to give a meaningful consent.

47. The term "intoxication" has been included in subhead (2)(a) to codify the principle that a person may lack capacity as a result of being intoxicated.[95] The term is used in section 211(3) of the MPC and several extant American criminal codes. It might be considered a suitable term, as it would appear to cover *all* intoxicating substances, including alcohol and drugs. The Law Reform Commission Report on Intoxication 1995 endorsed the approach taken in the MPC, by providing for a broad definition of "intoxication".[96] The definition of intoxication will need to be kept under review pending completion of work on the General Part defence of intoxication.

48. It might be considered worthwhile to include a catch-all term, such as "unconsciousness", that would cover other forms of unconsciousness that are not expressly provided for in this subhead, such as concussion. The term is used in the definition of rape in section 213 of the American Model Penal Code, section 36 of the Victoria Crimes (Rape) Act 1991 and in section 75(2)(d) of the Sexual Offences Act 2003 (England and Wales).

(4) Consent vitiated by the use or threat of force

49. It is generally accepted that under the common law a person's consent is vitiated by the use or threat of force. It will be seen from the discussion that follows that a number of important legal issues lurk beneath the (seemingly straightforward) rule that force vitiates consent.

50. To begin with, the offence of false imprisonment will be used to illustrate how the rule operates in practice. From a legal perspective, a woman who remains in a room because her assailant holds a knife to her throat clearly does not give a valid consent to being detained. Her consent is said to be more apparent than real when it is considered in the context of the imminent threat of personal harm. In the above scenario, the law deems the woman's consent to be ineffective in so far as her will is overborne to the extent that she is deprived of the freedom to decide whether to leave the room.

51. In the case of force or threats, the underlying rationale is that consent is vitiated where the external pressures are such that they destroy the reality of choice. In this regard, the criminal law is concerned with *real*, not ideal consent. The fact that a person would not in ideal circumstances have consented does not of itself negative the consent given. The unpleasantness of choice cannot be said to eradicate the existence of consent.

52. To illustrate the point, a female employee who agrees to engage in sexual intercourse with her employer, on threat of dismissal, gives a valid consent regardless of the disagreeable nature of the options before her. This is simply to recognise the fact that many of the decisions taken in life are the result of

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95 *R. v. Camplin* [1845] 1 Den 89.

96 Law Reform Commission, *Report on Intoxication* (LRC 51-1995) at 2.

choosing between evils. A reluctant consent is still a valid consent in law. It is only where some external factor operates so as to make the reality of a person's consent illusory that the law on ineffective consent is relevant.

53. Considering the heightened level of protection afforded by the criminal law to the interest of bodily integrity *generally*, it is of little surprise that the common law has developed a general principle that consent is vitiated by the use or threat of force. Thus, where a person's bodily integrity is threatened by the use of force the law treats any consent given as legally ineffective.

(a) Degree of force

54. There would appear to be no requirement that the use or threatened use of force reaches a particular threshold of violence in order to be capable of vitiating consent.[97] It follows that the force used or threatened need not be of a serious nature. What matters is that the individual's freedom to decide is sufficiently impaired: it is immaterial that the force is of a relatively minor nature so long as it deprives the individual of being able to give a true consent.

55. Common sense suggests that a person who submits to an act only because he believes that otherwise he will be overpowered and have it done to him anyway does not consent in law, even though the force necessary to overpower him will be small and non-injurious.[98] Indeed, the threat of force can be implied from the surrounding circumstances, whereby the victim submits, not on the basis of any express threat of force, but as a result of the fear of violence implicit in the facts before him or her.[99]

56. The point is illustrated in *R v Hallett*.[100] In this case, a woman was followed to her room by eight men who held her back against the door, all eight men committing the offence of rape against her one after the other. It was held that the victim's consent to sexual intercourse was ineffective if it proceeded merely from being overpowered by actual force, or from not being able from want of strength to resist any longer, or that from the number of assailants she considered any resistance dangerous and futile. Despite the relatively low level of force used and absence of express threats — she was held against a door — it is reasonable to assume that a woman's consent to intercourse would be vitiated by virtue of the implicit threat contained in the surrounding circumstances of being physically restrained in the company of eight drunken men.

57. The issue of the degree of force necessary to vitiate consent arose in the context of a charge of common assault in *R v Day*.[101] One evening a young girl was accompanied up a dark lane by the defendant who made an attempt to abuse her, without any violence on his part, or actual resistance on hers. In considering the

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97 Glanville Williams, *Textbook of Criminal Law* (1st edn Stevens & Sons, 1979) at 506.

98 *R v Hallett* (1841) 9 C & P 748, 173 ER 1036; *R v Day* (1841) 9 C & P 722, 173 ER 1026.

99 *R v Hallett* (1841) 9 C & P 748, 173 ER 1036; *R v Day* (1841) 9 C & P 722, 173 ER 1026; *R v Jones* (1861) 4 LT (NS) 154; *R v Olugboja* [1982] QB 320.

100 (1841) 9 C & P 748, 173 ER 1036.

101 (1841) 9 C & P 722, 173 ER 1026.

issue of ineffective consent in relation to the offence of assault, Coleridge J. made the following observations on consent:

> "…we must look at the nature of the circumstances from which consent is inferred. There is a difference between consent and submission; every consent involves a submission; but it by no means follows that a mere submission involves consent. It would be too much to say, that an adult submitting quietly to an outrage of this description, was not consenting; on the other hand, the mere submission of a child when in the power of a strong man, and most probably acted upon by fear, can by no means be taken to be such a consent as will justify the prisoner in point of law."

58. In a similar vein, a threat of false imprisonment might be interpreted as carrying an implicit threat of violence. This notwithstanding, some jurisdictions prefer to put the matter beyond doubt by expressly stating that a person's consent is ineffective if the person submits because he or she is unlawfully detained.[102]

59. For the purposes of codification, it would therefore seem appropriate to have a general rule to the effect that the use or threat of force vitiates consent rather than prescribing any threshold of violence which the level of force must reach. This would leave a residual power of interpretation to the court to decide whether the use or threatened use of force negates consent to a particular transaction by destroying the reality of choice. This involves an evaluation of the relationship between the type of force used or threatened and the transaction to which the consent is material, taking into account all the surrounding circumstances. The weighing of the force or threatened harm against the transaction consented to can be described as a form of proportionality test.[103]

60. In light of the above, it is recommended to eschew attempting to define the terms "force or threats of force". This is yet another instance of where the question of the limits to the principal of completeness is relevant.

(b) Use or threat of force directed at third parties

61. Despite the dearth of authority, it would seem reasonable to suppose that the use or threat of force directed at third parties can vitiate consent.[104] It is probably fair to say that a threat of violence in respect of a loved one, such as a person's child or spouse, would be sufficient to destroy the reality of consent for most people.

62. The underlying rationale in respect of force directed at third parties would appear to be the same as in the case of force used or threatened against the person consenting: in both cases the person consenting is deprived of his or her freedom to decide. Like with the other rules on ineffective consent, it is more appropriate to focus on the state of mind of the person consenting rather than on the conduct of the defendant.

63. In terms of code options, the matter could be put beyond doubt by expressly providing for the issue of force directed at third parties in the relevant General

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102 For example, see Australian Capital Territory Crimes Act 1900, section 92 P; Victoria Crimes (Rape) Act 1991, section 36(c).

103 McAuley and McCutcheon, *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 516.

104 Glanville Williams, *Textbook of Criminal Law* (1st edn Stevens & Sons, 1979), at 507.

Part section on consent. A number of common law jurisdictions have followed this approach.[105] Alternatively, rather than attempting to reduce this principle to statutory form, the issue of third parties could be allowed to remain at common law. Arguably, it would chime better with the principle of completeness to provide for the issue of force directed at third parties within the four corners of the Code.

(c) Other threats

64. Having regard to existing law, it is doubtful whether this limb of the rules on ineffective consent extends to threats of unpleasant consequences other than the application of force. Despite the existence of some marginal authorities,[106] purporting to extend the law beyond the scope of threats of force, it is more likely that Irish courts would take a more orthodox view of the common law, confining the scope of this rule to threats of force.[107]

65. In support of this view, it is notable that the Oireachtas took a minimalist approach to the issue of threats in the one instance where the rules on ineffective consent have been reduced to statutory form: section 15(2) of the Non-Fatal Offences against the Person Act 1997 covers threats of force *only*.

66. As the law is uncertain as to whether threats relating to personal reputation, economic matters or prosecution vitiate consent, it might be considered desirable that the General Part rules on ineffective consent be limited to addressing threats of force *only*. It is submitted that the other types of threats are best dealt with, if at all, by legislation making them separate offences.[108]

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105 For example, see Australian Capital Territory Crimes Act 1900, section 92 P; New Zealand Crimes Act 1961, section 128A; Victoria Crimes (Rape) Act 1991, section 36(c); Sexual Offences Act 2003 (England and Wales), section 75(2)(b).

106 In *R v McCoy* [1953] 2 SA 4, 15 EED 992 in a Rhodesian case, an air hostess broke a regulation of the company and McCoy, the manager, offered her a caning as an alternative to being disciplined by being grounded, which would have meant loss of pay. She accepted the offer, and the caning was administered in humiliating circumstances. McCoy was convicted of assault, one of the reasons given being that the women had not freely consented to the caning; in *R v Pollock and Divers* [1966] 2 All ER 97 it was decided that at common law extortion by threatening to accuse the complainant of participation in "unnatural practices" amounted to robbery, the inference being that what is otherwise consensual is vitiated by the threat to accuse; in the South African case of *State v Volschenk*, 1968 (2) PH H 283 (D) it was held that a threat of malicious prosecution for an imprisonable offence by a policeman would vitiate a woman's consent to sexual intercourse, so that the officer could be guilty of rape.

107 In the civil case of *Latter v Braddell* (1881) 50 LJQB 166, 488 it was held that no assault was committed when a mistress required her maid to be medically examined to see if she was pregnant. The maid submitted to the physical examination under tearful protest. Despite the apparent economic coercion and abuse of authority, the maid's action for assault failed; in the English case of *R v Kirby*, *The Times* December 20, 1961 the trial judge withdrew a charge of rape against a policeman who threatened to report a woman for an offence unless she had intercourse with him; in the Canadian case of *Guerrero* (1988) 64 CR (3d) 65 a threat to publish embarrassing photos was held not to vitiate consent.

108 For example, see offence of procuring intercourse by threats, Criminal Law Amendment Act 1885, section 3; offence of blackmail, Criminal Justice (Public Order) Act 1994, section 17.

(d) Codifying the rules on consent vitiated by the use or threat of force

67. Subhead (2)(c) provides for the common law rule that consent is ineffective where it is obtained by the use or threat of force.

68. Subhead(2)(c) uses the term "obtained", as this term effectively emphasises the necessary causal link between the use or threat of force and the person's decision to consent. The term "obtained" was used by the legislature when defining this limb of the rules on ineffective consent in the case of the offence of false imprisonment in section 15(2) of the Non-Fatal Offences against the Person Act 1997. Furthermore, other common law criminal codes frequently employ the term "obtained" in this context.[109] Alternatives to the term "obtained" include the following: "induced"[110], "by reason of" and "as a result of".

69. Subhead (2)(c) expressly provides that consent may be vitiated by *both* the use of force and the threat of force. For the sake of clarity, it might be considered desirable from a definitional perspective, to separate the conceptually distinct issues of the use of force and the threat of force. Some criminal codes conflate the issues of use of force and threat of force by simply stating that "consent is vitiated by force", on the understanding that the common law that trails the Code will ensure that both the use and threat of force are covered by the provision.[111] However, accessibility and comprehensibility would appear to be enhanced by making it clear within the Code's provisions on ineffective consent that the use *or* threat of force vitiates consent.

70. By virtue of including the phrase "the person consenting *or another*", subhead (2)(c) expressly provides that consent may be vitiated where force is directed towards the person consenting or a third party.[112] This settles the question of consent being vitiated as a result of force used against third parties rather than allowing the issue to remain floating at common law.

(5) Consent vitiated by mistake

71. It is often said that "fraud vitiates consent". Notwithstanding the utility of the phrase as a convenient short-hand for describing this aspect of the rules on ineffective consent,[113] this loose statement of principle needs to be narrowed down for the purposes of codification, as it fails to accurately communicate the

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109 For example, see Queensland Criminal Code, section 347(1); Criminal Code of Canada, section 265(3).

110 Section 2.11 of the American Model Penal Code, several extant American criminal codes and section 111 of the Draft Criminal Code for Scotland use the term "induced" when defining the rule that force vitiates consent.

111 For example, see Section 2.11 of the American Model Penal Code.

112 For example, see Australian Capital Territory Crimes Act 1900, section 92 P; New Zealand Crimes Act 1961, section 128A; Victoria Crimes (Rape) Act 1991, section 36; Sexual Offences Act 2003 (England and Wales), section 75(2)(b).

113 For the purposes of this paper, and discussion *generally*, the phrase "fraud vitiates consent" will be retained as a short-hand to describe this aspect of the rules on ineffective consent. This is without prejudice to the position set out below, to the effect that frauds vitiating consent are best viewed as a sub-set of the more general rule that mistakes as to the nature of the act or identity of the person vitiate consent.

substance of the law governing fraud, mistake and consent. Over the course of time, the jurisprudence has gradually delimited the parameters of the rule, with a good deal more precision than is evidenced in the rather bald statement that fraud vitiates consent.

72. As is the case with force, fraud operates as a vitiating factor where the person is deprived of the freedom to choose and again the question is one of identifying the frauds which have this effect.[114] The common law has placed some limits on the maxim that fraud vitiates consent by confining this limb of the rules on ineffective consent to frauds as to the nature of the act or the identity of the person.[115]

(a) Mistake as to the nature of the act

73. The common law rule that consent is ineffective where there is a mistake as to the nature of the act stems from a string of nineteenth century cases. In *R v Case*[116] consent was held to be ineffective where a physician obtained the complainant's assent to intercourse by pretending that he was treating her for a medical complaint. A case in a similar vein is that of *R v Flattery*,[117] where the defendant induced a woman to consent to intercourse by pretending to perform a surgical operation. In rather bizarre circumstances, the Court of Criminal Appeal in *R v Williams*[118] held that consent was vitiated where a singing master persuaded a female pupil to submit to intercourse under the pretence that it was treatment for breathing.

74. The above line of authority was considered in the seminal decision of the English Court for Crown Cases Reserved in *R v Clarence*.[119] Clarence, knowing that he was suffering from gonorrhoea, had intercourse with his wife, and successfully communicated the disease to her. It was accepted by the court that had the wife been aware of her husband's condition she would not have consented to intercourse with him. In holding that that the defendant was not guilty under sections 20 and 47 of the Offences Against the Person Act 1861, the court took the view that the wife's consent to intercourse was not vitiated by Clarence's non-disclosure of his condition. Stephen J. summed up the law in the following terms:

> "The only sorts of fraud which so far destroy the effect of a woman's consent as to convert a connection consented to in fact into rape are *frauds as to the nature of the act itself or as to the identity of the person who does the act*. I should myself prefer to say that consent in such cases does not exist at all, because the act consented to is not the act done." (emphasis added)

75. The decision in *R v Clarence* confirmed the common law position that the rules on ineffective consent are limited to frauds relating to the nature of the act or the identity of the person.

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114 McAuley and McCutcheon, *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 518.
115 *R v Clarence* (1888) 22 QBD 23.
116 (1850) 1 Den 580.
117 (1877) 2 QBD 410.
118 [1923] 1 KB 340
119 (1888) 22 QBD 23.

76. The decision of the High Court of Australia in *Papadimitropoulos v R*[120] is a good illustration of how the rule operates in practice. After going through a bogus marriage ceremony with the defendant the complainant consented to intercourse on the understanding that she was married to the defendant. On discovering that the act she engaged in with the defendant was in fact fornication rather than marital intercourse, the complainant claimed that she had been deceived as to the true nature of the act, and consequently had not given a valid consent. Her argument was that if she had known the truth at the time of the act she would not have consented to extra-marital intercourse.

77. However, the court held that the complainant's mistake did not run to the nature of the act so as to vitiate consent. It was sufficient that she knew that she was engaging in an act of a sexual nature and that she was having sexual intercourse with a particular individual, namely the defendant. The validity of the consent given was not affected by the fact that she mistakenly believed that the defendant was her husband at the time of intercourse.

78. As can be seen from the above paragraphs, the courts would appear to take a restrictive view of what constitutes the "nature of the act". The cases tend to focus on what might be called the *essential element of the act.*[121] For instance, the courts have consistently viewed the essential elements of the act of intercourse as being its sexual nature and the identity of the sexual partner.

79. Other matters which might induce a person to consent are considered to be collateral, and do not vitiate consent. For instance, where a man reneges on his promise to pay a prostitute for intercourse, her consent is not vitiated by the mistaken belief that she would be remunerated.[122] Even if she would not have engaged in intercourse but for the agreement to pay for intercourse, her consent is nonetheless valid as her mistake is taken to relate to a collateral matter. Regardless of the man's general dishonest character, all that is required for the consent to be valid is that the woman appreciates the sexual nature of the act of intercourse and that she is not mistaken as to the identity of the individual.

80. Focusing on the essential element of the act helps to explain decisions such as *Clarence* and *Papadimitropoulos.* In *Clarence*, the wife's mistake related to her husband's physical health, which can be viewed as a form of personal attribute. In *Papadimitropoulos*, the complainant's mistake can be seen as going to the moral quality of the act of intercourse, or perhaps the marital status of the defendant.

81. Drawing the line between the essential element of an act and collateral matters is not always a straightforward matter. This is evident from the body of case law on

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120 (1957) 98 CLR 249.

121 McAuley and McCutcheon, *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 520.

122 *R v Linekar* [1995] 2 Cr App R 49.

the non-consensual transmission of HIV via intercourse[123] and cases where ostensibly medical acts are performed for ulterior sexual purposes.[124]

82. On the question of HIV transmission, the issue of the limits to the principle of completeness comes to the fore. This is one of several grey areas in the law of consent. On the one hand, a court might be persuaded to depart from the limits set by *Clarence*, by recognising that HIV infection is such a serious matter that it goes to the very nature of the act of intercourse. On the other hand, judicial deference might lead a court to take a narrow interpretation of "nature of the act", and leave this sensitive decision on criminalisation to the legislature.

83. The issue of completeness arises again in cases where medical acts are performed for sexual purposes. As is the case with the issue of HIV transmission, the law is in a state of uncertainty.

84. One line of authority interprets the phrase "nature of the act" by focusing on the physical character of the act, while largely disregarding the purposes for which the act is performed.[125] A case in point is *R v Mobilio*.[126] In this case, a radiographer inserted and manipulated an ultrasound probe in the vaginas of a number of women. These actions of the defendant were not medically necessary and it was accepted that the acts were performed exclusively for the purposes of sexual gratification. It was argued on behalf of the complainants that they were mistaken as to the nature of the acts performed. They consented to medical treatment and did not consent to being an object of sexual gratification for the defendant.

85. In strictly applying *Papadimitropoulos*, the Victorian Court of Criminal Appeal held that while the complainants might not have been cognisant of the sexual motives of the defendant, it was clear that they appreciated the physical nature of the defendant's acts, and consequently gave a valid consent in law.

86. An alternative approach is to view the nature of the act as being determined, at least in part, by its purpose.[127] The purpose for which an act is performed might be so intrinsically linked to the nature of the act that it would be artificial, and indeed inappropriate, to draw a distinction between the nature and purpose of an act. While intimate medical examinations and some sexual acts might be identical in terms of the physical character of the act, it is arguable that their (radically) differing purposes go to the very nature of the act itself.

87. These competing bodies of authority are not easy to reconcile. It has been observed that the crucial difference between them lies in the interpretation of the phrase "nature of the act". For the purposes of codification, it may be desirable to adopt a broad formulation, such as, "nature of the act". Given the uncertain state

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123 *R v Cuerrier* [1998] 2 SCR 371; *R v Dica* [2004] EWCA Crim 1103; *R v Konzani* [2005] EWCA Crim 706.

124 *R v Harms* [1944] 2 DLR 61; *Papadimitropoulos v R* (1957) 98 CLR 249; *Bolduc and Bird v The Queen* (1967) 63 DLR (2d) 82; *R v Maurantonio* [1968] 2 CCC 115; *R v Mobilio* [1991] 1 VR 339; *R v Tabassaum* [2002] 2 Cr App R 328; *R v Green* [2002] EWCA Crim 1501.

125 *Papadimitropoulos v R* (1957) 98 CLR 249; *Bolduc and Bird v The Queen* (1967) 63 DLR (2d) 82; *R v Mobilio* [1991] 1 VR 339.

126 [1991] 1 VR 339.

127 *R v Harms* [1944] 2 DLR 61; *R v Maurantonio* [1968] 2 CCC 115.

of existing law, it would be very difficult, and perhaps undesirable, to define with more precision the phrase "the nature of an act". Accordingly, it is recommended that the courts be left a residual power of interpretation in this regard, rather than attempting to define the phrase "the nature of the act" in greater detail within the criminal code.

(b) Mistake as to the identity of the person

88. Under the common law it is now settled that consent is vitiated where a person is mistaken as to the identity of the person performing the act. The classic example is a woman who mistakenly believes that she is having intercourse with her partner, when in fact she is being intimate with somebody else. In *DPP v C* ,[128] Murray J held that if a person knows that consent to sexual intercourse is given because the woman concerned believes him to be another person then he knows that there is no consent by the woman to having sexual intercourse with him. In such a case, there is no requirement that the defendant makes an active attempt at impersonation to be found guilty of the offence of rape; it suffices that the defendant has the requisite *mens rea* as to the element of absence of consent on the part of the woman.

89. Murray J went on to say that authority could be found for the above statement of the law in the Irish case of *R v Dee*,[129] and the decision of the Court of Criminal Appeal of England and Wales, in *R v Elbekkay*.[130] The existing law can now be stated as follows: consent is ineffective where the person consenting makes a mistake as to the identity of the person doing what was consented to.

(c) Spontaneous mistake

90. It has been noted previously in relation to the issue of consent vitiated by force that the underlying rationale for the rules on ineffective consent is the individual's freedom of choice in relation to a particular transaction. It is the state of mind of the person consenting that is at issue rather than the conduct of the defendant. While the law on ineffective consent traditionally focused on the conduct of the defendant — typically force or fraud — the common law has gradually shifted to focusing on the fundamental question of whether the person consented in a true sense to the transaction in question.[131]

91. Although the term "fraud" is frequently used as a convenient short-hand in describing the rule, it is worth emphasising that the common law does not actually require an act of fraud on the part of the defendant for consent to be vitiated. While it is true that in some cases a fraudulent act on the part of the defendant will operate so as to negative consent by inducing a person to make a mistake, it is the effect of the fraud on the mind of the person consenting that is material rather than the fraud itself. Consent may also be vitiated where the person makes a

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128 [2001] 3 IR 345, at 360.

129 (1884) Cox CC 579.

130 [1995] Crim LR 163.

131 *Papadimitropoulos v R* (1957) 98 CLR 249; *R v Olugboja* [1982] QB 320; *R v Linekar* [1995] 2 Cr App R 49.

spontaneous mistake as to the nature of the act or the identity of the person in the absence of any act of deception inducing the mistake.

92. Thus, it is better to focus on whether the person laboured under a mistake rather than on the question of fraud on the part of the defendant. The point was stressed in *Papadimitropoulos*:

> "…in considering whether an apparent consent is unreal it is the mistake or misapprehension that makes it so. It is not the fraud producing the mistake which is material so much as the mistake itself…[an emphasis on fraud] tends to distract the attention from the essential enquiry, namely whether the consent is no consent because it is not directed to the nature and character of the act"[132]

93. Accordingly, consent vitiated by fraud is best viewed as part of a broader concept, namely that a mistake as to the nature of an act or identity of the person vitiates consent.

(d) Codifying the rules on consent vitiated by mistake

94. Subhead (2)(d) provides for the common law rule that consent is ineffective if the person consenting is mistaken about the nature of the act or the identity of the person. Subhead (2)(d) is based, in part, on section 36(f) of the Victoria Crimes Rape Act.[133] The merits attaching to this particular formulation are set out below.

95. Subhead (2)(d) focuses on the wider concept of mistake rather than on the question of fraud on the part of the defendant. The commentary explains that the issue of fraud is best viewed as part of the broader concept of mistake. This notwithstanding, some jurisdictions take a more restrictive approach to this issue by framing the provision in terms of fraud.[134] The existence of these fraud-based formulations can probably be explained by the fact that they were drafted at a time when the common law focused more on the conduct of the defendant rather than the state of mind of the person consenting. Arguably, a broad formulation based on the concept of mistake best represents the conventional view of the common law, as it stands today.

96. As the commentary above explains, it is inaccurate to say that all mistakes or frauds vitiate consent. Subhead (2)(d) takes on board the limits set by the common law in stipulating that only mistakes as to the nature of the act or the identity of the person vitiate consent. This arrangement is in contrast to a number of criminal codes that seemingly place no restrictions on the kinds of fraud that may vitiate consent, on the basis that the common law trailing the Code will elucidate the meaning of "fraud".[135]

97. It is observed in the commentary that the law is grey in a number of areas relating to the interpretation of the phrase "nature of the act". Rather than attempting to reconcile a wide number of competing authorities, by defining the phrase in

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132 *Papadimitropoulos v R* (1957) 98 CLR 249.

133 "the person is mistaken about the sexual nature of the act or the identity of the person…"

134 American Model Penal Code, section 2.11; Criminal Code of Canada, section 265(3).

135 Alabama Penal Code, Section 13A-2-7; Hawaii Penal Code, section 702-235; American Model Penal Code, section 2.11; Criminal Code of Canada, section 265(3).

greater detail, it is suggested that the courts be given a power of interpretation in this regard.

100. This is to acknowledge the limits to the principle of completeness, and to recognise that a code cannot realistically solve every interpretational ambiguity by defining everything. It is worth recalling the acknowledgment in the Report of the Expert Group on the Codification of the Criminal Law that:

> "Not only does codification not trench upon the interpretative function of the courts, it actually stimulates the development of an accompanying jurisprudence designed to elucidate the contents of the criminal code…In the common law world, the traditional judicial role is guaranteed by the imperative of explaining the provisions of the code to juries, on the one hand, and the need to resolve conflicts of interpretation between opposing counsel, on the other. Similarly, as the discussion of French and Italian criminal law illustrates, even in civil law countries the exigencies of legislative drafting ensure that criminal codes are destined to operate by way of a partnership between parliament and the judiciary: in short, between the authors and interpreters of the *lex scripta*"[136]

101. Accordingly, it is recommended that the phrase "nature of the act" be allowed to continue to develop at common law as is presently the case under existing law.

102. The broad phrase "identity of the *person*" has been adopted to take into account the shift in the common law away from a narrower formulation based on the identity of a spouse.

(6) Consent by a minor over 16 to medical treatment

103. Subheads (3)-(5) codify section 23 of the Non-Fatal Offences against the Person Act 1997. The formulation used in section 23 of the 1997 Act is based on section 8 of the Family Law Reform Act 1969 (England and Wales). The substance of section 23 of the 1997 Act would appear to be declaratory in nature, by putting on a statutory footing the common law rule that a minor who reaches the "age of discretion" can legally consent to medical treatment which, in the absence of consent would constitute an assault.

104. Under normal circumstances, the consent of a minor over 16 would be covered under the common law subjective test outlined above, since a person in this age bracket would typically have sufficient understanding and knowledge to be able to consent to the bodily contact inherent in medical treatment. The main function of the section is to clarify the law on this particular matter for the reassurance of doctors.

105. Section 23 of the 1997 Act is limited to "any surgical, medical or dental treatment". Any medical procedure falling outside the scope of section 23 (such as a blood donation or medical experiment) would fall to be considered under the ordinary common law rules set out above. In a similar vein, the consent of minors under 16 years to medical treatment is subject to the general common law principles on capacity.

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[136] *Codifying the Criminal Law,* Report of the Expert Group on the Codification of the Criminal Law (2004, Ireland), at paragraphs 2.156-2.157.

FAULT ELEMENTS

1106.—(1) A fault element for a particular objective element may be intention, knowledge or recklessness.

(2) Subhead (1) does not prevent an offence from providing other fault elements for an objective element of the offence.

(3)

(a) Where an offence contains a stated fault element, that fault element shall apply to all the circumstance and result elements of the offence unless a contrary purpose appears in the offence definition.

(b) For the purposes of *paragraph (a)*, "stated fault element" does not include ulterior intention.

(4)

(a) When no fault element is prescribed in an offence in relation to a circumstance or result element, a requirement of recklessness applies.

(b) The rule provided for in *paragraph (a)* may be referred to as the "read-in rule".

(5) The read-in rule does not apply where an offence definition is incorporated by reference into the definition of another offence.

(6)

(a) Where an objective element of an offence is subject to strict liability, the offence provision will state that "Strict liability applies to X".

(b) Where an offence is subject to strict liability, the offence provision will state that "Strict liability applies to this offence."

(7)

When an offence provides that—

(a) recklessness suffices to establish an objective element of an offence, such objective element is also established if a person acts intentionally or knowingly.

(b) knowledge suffices to establish an objective element of an offence, such objective element is also established if a person acts intentionally.

Explanatory Notes:

(1) Introduction

1. Head 1106 commences the Code's consideration of the fault elements which will be required for the imposition of criminal liability. As subhead (1) makes clear, Head 1106 provides for the fault elements going to the objective elements of an offence, and, accordingly, should be read in conjunction with Head 1102 which defines the objective elements. Head 1106 does *not* provide for fault elements in the form of ulterior intention or oblique ulterior intention which go to the defendant's motive or purpose for committing an offence – in other words, which do not apply to the objective elements of the offence. The fault elements of ulterior intention and oblique ulterior intention are dealt with in Head 1111.

2. Like the tripartite division of objective elements in Head 1102, the tripartite classification of fault elements – as intention, knowledge and recklessness - in subhead (1) is an essential feature of the technique of element analysis on which modern criminal law codification is based. Broadly speaking, the scheme has six key advantages.

(a) The fault scheme and legislative policy

3. First, it effectively tracks Irish legislative policy since the 1990s. By and large, that policy has been to define criminal fault as intention (including knowledge) or recklessness; whereas the triple fault alternative (of intention, knowledge or recklessness) decouples knowledge from intention while preserving the limits of criminal fault in line with existing legislative policy. Thus, while the codification process has revealed gaps and inconsistencies in some of the original statutory provisions dealing with fault, the vast bulk of the offences included in the Draft Criminal Code were already subject to the fault scheme set out in Head 1106.

4. Second, because the scheme is largely declaratory of existing statute law, its application across the Code has essentially been an exercise in restatement – the sole element of law reform being the plugging and elimination of the aforementioned gaps and inconsistencies, respectively, all of which are signalled in the Explanatory Notes accompanying each codified offence.

(b) Promoting clarity, consistency and certainty

5. Third, by standardising the fault terminology employed across the Code, the tripartite scheme promotes greater clarity, consistency and certainty in the definition and interpretation of criminal offences. Without exception, all criminal codes enacted since the promulgation of the American Law Institute's Model Penal Code (MPC) in 1962 have made a virtue of including a standardised vocabulary of key fault terms in the General Part. In the case of the MPC, this involved replacing dozens of more or less synonymous, but inconsistently interpreted, fault terms that had emerged over the centuries with four standard terms of general application: *viz.,* knowledge, purpose, recklessness and negligence.

6. The tripartite fault scheme set out in Head 1106 is designed to achieve a similar result in respect of the Irish statute law of crime, albeit that there were significantly fewer fault terms in need of standardisation than in the American case. Thus, on the grounds that it signifies motive or purpose, the phrase "with a view to" – as used, for example, to denote one of the fault elements of coercion in section 9 of the Non-Fatal Offences Against the Person Act 1997 - has been equated with intention; it will be seen that intention has been defined in terms of purpose in Head 1107. Similarly, the concept of awareness in the sense of being "aware that something is or may be the case" – as used, for example, to denote the mental element of affray, violent disorder and riot (in sections 16, 15 and 14, respectively, of the Criminal Justice (Public Order) Act 1994 – has been approximated to recklessness; as defined in Head 1109, recklessness means consciously and unjustifiably disregarding a substantial risk and thus comprehends such awareness.

7. By contrast, awareness in the sense of being "aware that something is likely to be the case in the ordinary course of events has been treated as a species of knowledge; it will be seen that this is the criterion of knowledge as defined in Head 1108 . Finally, the multiplicity of fault terms used to denote criminal motive going beyond the commission of an offence – such phrases as "with the purpose of", "in order to" – have been replaced with intention-based phrases such as "with intent to" or "with the intention of" in order to signal their status as species of "ulterior intention" as defined in Head 1111.

(c) Reducing scatter and enhancing accessibility

8. Fourth, by defining intention, knowledge and recklessness within the fault provisions themselves, the Draft Criminal Code's fault scheme obviates the need for recourse to the voluminous jurisprudence, national and comparative, on this matter, thereby reducing the element of scatter affecting the relevant law while at the same time enhancing its accessibility for code users.

(d) Integrating the fault and objective elements

9. Fifth, by defining each of the three fault terms of general application with reference to the objective elements of an offence as defined in Head 1102, the Code's fault scheme makes explicit provision for the different meaning of these terms when applied to circumstance and result elements, respectively. Thus Head 1107(1)(b) makes it clear that intention as to a circumstance means that the defendant believes or hopes that the circumstance exists, whereas Head 1107(1)(c) provides that intention as to a result means that it is the defendant's objective or desire to cause the result. Similarly, Head 1108 performs a comparable function for the fault element of knowledge by indicating how the concept of awareness applies to circumstance and result elements, respectively.

(e) Ensuring flexibility

10. Finally, as subhead (2) makes clear, the tripartite fault scheme is of general, not universal application; there is nothing to prevent the legislature from departing from the scheme where such departure is warranted by the exigencies of a

particular offence. For example, in the Part on Homicide Offences gross negligence will be the relevant fault element for one of the recognised species of involuntary manslaughter, namely, gross negligence manslaughter.

(2) The run-on rule

11. The purpose of subhead (3) is to resolve a common ambiguity in criminal legislation whereby the legislature prescribes a fault element for an offence but fails to make it clear whether the requirement applies to all the objective elements in the offence definition or only to that which it immediately introduces. For example, section 13(1) of the Non-Fatal Offences against the Person Act 1997 provides: "A person shall be guilty of an offence who intentionally or recklessly engages in conduct which creates a substantial risk of death or serious harm to another."[137] Taken at face value, it is unclear from this provision whether the fault elements of intention and recklessness should be read as running to the objective element of engaging in conduct, period, or, more expansively, to the multiple objective elements of engaging in conduct which creates a substantial risk of death or serious harm to another.

12. In order to meet this difficulty, subhead (3) provides for a run-on rule whereby a stated fault element will continue to apply to all the circumstance and result elements of an offence unless and until a contrary purpose appears in the offence definition. Thus in the example cited in the preceding paragraph, the effect of subhead (3) is that the fault element of "intentionally or recklessly" will be read as running to the substantial risk of death or serious harm and not just to the acts or omissions which happened to create that risk.

(a) The rule in action

13. The run-on rule has recently been recognised in all but name by the Supreme Court in *DPP v Cagney*.[138] The appellants' convictions for reckless endangerment under section 13 of the 1997 Act had been upheld in the Court of Appeal on the basis that the constituent parts of the offence were to be construed as "the applicant intentionally or recklessly, engaged in conduct, which created a substantial risk of death or serious injury"[139] to the deceased; in other words, the prosecution successfully argued that the stated fault elements were confined to the acts or omissions which generated the risk but did *not* apply to the risk itself.

14. The Supreme Court decided that this approach failed to make it clear that recklessness "involves not merely the taking of a risk but the *advertent* taking of the risk."[140] In quashing the convictions for the section 13 offence the Supreme Court held that the constituent parts of the offence are (a) intention or recklessness as to the conduct which creates a substantial risk of death or serious injury and (b) recklessness as to the nature of the risk. In essence, the Supreme Court ruled that

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137 See Draft Criminal Code, Head 3111(1) which codifies the offence of endangerment as follows: "A person commits the offence of endangerment if he or she intentionally, knowingly or recklessly creates a substantial risk of death or serious harm to another."

138 [2007] IESC 46.

139 *DPP v Cagney* [2007] IESC 46 at 9.

140 *Ibid*.

the stated fault element in section 13(1) runs to all of the objective elements of the offence and not just to the element it immediately prefaces or introduces.

15. A further example of the operation of subhead (3) can be seen in the offence of false imprisonment codified in Draft Criminal Code, Head 3206(1). Head 3206(1) provides that "A person commits the offence of false imprisonment if he or she intentionally, knowingly or recklessly- (a) takes or detains, (b) causes to be taken or detained, or (c) otherwise restricts the liberty of, another without that other's consent." On its face, this provision would be vulnerable to the construction that the stated fault element of intention, knowledge or recklessness runs to, but not beyond, paragraph (c) of the offence definition: in other words, that it does not go to absence of consent. The run-on rule in subhead (3) puts this matter beyond doubt: since no contrary purpose appears in the offence definition, the stated fault element runs to all of the circumstance and result elements including absence of consent.

16. Admittedly, the read-in rule in subhead (4) would produce the same result in this case. As will be seen presently, the read-in rule provides for the automatic attachment of the fault element of recklessness where no fault element has been prescribed for a circumstance or result element. So recklessness as to absence of consent in Head 3206(1) would be required by virtue of the read-in rule.

17. However, this does not mean that the run-on rule in subhead (3) is surplus to requirements. On the contrary, the run-on rule is essential when dealing with offences where the stated fault element is intention or knowledge. In offences of this kind, the run-on rule ensures that the stated fault element of intention or knowledge will apply to any apparently unqualified objective element; whereas, as already indicated, the effect of the *read-in* rule would be to lower the fault requirement for that element from knowledge to recklessness.

18. Consider, for example, the offence of placing a contaminated syringe in section 8(2) of the Non-Fatal Offences against the Person Act 1997. Section 8(2) provides that "A person who intentionally places a contaminated syringe in any place in such a manner that it injures another shall be guilty of an offence." Here the application of the read-in rule would mean that recklessness rather than the stated fault element of intention or knowledge would be attached to the seemingly "fault-free" injury component of the offence notwithstanding the absence of a contrary purpose in the offence definition; whereas the run-on rule ensures that the stated fault element of intention applies across the board precisely for that reason.

(b) The contrary purpose clause

19. The offence of endangering traffic in section 14 of the 1997 Act (codified in Draft Criminal Code, Head 3112) illustrates the operation of the "contrary purpose" clause in subhead (3)(a). Section 14 provides that "a person commits an offence who-(a) intentionally places or throws any dangerous thing upon a railway, road, street [etc], or interferes with or throws anything at or on any conveyance…, and (b) is aware that injury to the person or damage to property may be caused thereby, or is reckless in that regard." Here the effect of the run-on rule in subhead (3) is that the stated fault element of intention will apply not only to the

element it immediately qualifies, namely, that of placing or throwing a dangerous thing, but also to the more remote and seemingly unqualified element of interfering with or throwing anything at a conveyance. As no contrary purpose appears in the offence definition, the original intention runs on to that element. In contrast, by virtue of the disclosure of a contrary purpose in paragraph (b), in the form of the introduction of the fault element of recklessness, the original intention does *not* run on to the circumstance element of causing harm to, or damage to the property of, another.

(c) The run-on rule and ulterior intention

20. Subhead (3)(b) provides that the run-on rule does not apply where the stated fault element takes the form of ulterior intention. Unlike the standard fault elements of intention, knowledge and recklessness, ulterior intention does not go to the objective elements of an offence; typically it works by way of criminalising the defendant's motive for engaging in the conduct which constitutes the offence. For example, by virtue of Draft Criminal Code, Head 3204(1), "A person commits the offence of making demands with menaces if, with the intention of making a gain for himself or herself or another, or of causing loss to another, he or she intentionally, knowingly or recklessly makes any demand with menaces."

21. As this provision stands, there is no danger of the stated fault element of ulterior intention being interpreted as running on to the objective element of making any demand with menaces since the latter is itself qualified by the triple fault alternative. However, if the triple fault alternative were to be dropped from the offence definition, there would then be a risk that the stated fault element of intention might be applied across the board, thus trumping or ousting the less exacting fault requirements of knowledge and recklessness in respect of making demands with menaces. Hence the need to insulate the run-on rule from the element of ulterior intention as per subhead (3).

22. Nor is the aforementioned risk purely theoretical. Apart from the fact that the Advisory Committee may decide to omit the standard fault elements from an offence definition in order to enhance the provision's readability, omissions of this kind may also occur as a result of legislative oversight. By excluding ulterior intention from the ambit of the run-on rule, subhead (3) ensures that any such gaps in *mens rea* will be filled by the automatic operation of the read-in rule under subhead (4). In short, it ensures that recklessness rather than intention will be the governing fault element in these circumstances.

(3) The "read-in rule"

(a) Filling fault lacunae

23. The read-in rule in subhead (4) supplies the fault elements to any objective elements to which subhead (3) does not apply. For example, section 6(1) of the Criminal Justice (Theft and Fraud Offences) Act 2001 provides that: "A person who dishonestly, *with the intention* of making a gain for himself or herself or another, or of causing loss to another, by any deception induces another to do or refrain from doing an act is guilty of an offence." (emphasis added) In section

6(1) the only *mens rea* terminology used appears in the second clause of the offence definition – namely "with the intention of making a gain for himself or herself or another".

24. By virtue of the run-on rule in subhead (3), the requirement of ulterior intention in this offence runs to "making a gain for himself'' or "causing a loss to another". However as ulterior intention does not run to the objective elements of an offence, it does *not* go to the element in the final clause: namely "by any deception induces another to do or refrain from doing an act". In the result, in the absence of legislative direction to the contrary, the read-in rule in subhead (4) would apply to this element so that a fault element of recklessness would be required.

25. The read-in rule in subhead (4) fills in any gaps left following application of the run-on rule in subhead (3). Accordingly, where no fault element is specified for a circumstance or result element, recklessness will suffice under subhead (4)(a). Recklessness is widely recognised as the appropriate threshold for imposing criminal liability; hence its role as the default position in the Code's fault scheme. By virtue of this role, the read-in rule ensures that strict liability will not be imposed for code offences save where expressly endorsed by the legislature.

(b) Enhancing the readability of offence definitions

26. The read-in rule has another important function in the Code. In addition to filling gaps occasioned by a failure expressly to provide for *mens rea*, the read-in rule also gives the legislature the option of deliberately omitting *mens rea* where its express inclusion might detract from the readability of an offence definition. As will be seen in Part 6: Public Order Offences, the problem of unduly unwieldy offence definitions arises acutely in the context of the cognate offences of affray (Head 6106), violent disorder (Head 6107), and riot (Head 6108). Already complex by reason of their characteristic mix of individual and group elements, it was felt that there is a significant risk that the addition of the triple fault alternative of "intentionally, knowingly or recklessly" might compromise the accessibility of these offences for ordinary code users; and that the read-in rule should accordingly be relied on when drafting these offences for inclusion in the Code (See Heads 6106-6108 for details of this arrangement).

27. Subhead (5) makes it clear that the "read-in rule" under subhead (4) will not apply - in the absence of a stated fault requirement in an offence definition - if the offence definition incorporates another offence definition. For example, Draft Criminal Code, Head 3103 provides that a person commits an offence if he or she "assaults another in fact causing him or her harm". There is, therefore, an implied reference to the offence of assault under Head 3102: the fault element for Head 3103 is established in relation to assault under Head 3102 – *i.e.* the intentional or reckless application of force – and no read-in fault element will apply.

(4) Strict liability

28. Subhead (6) is directed at the contentious issue of strict liability. Criminal liability is strict if each objective element of an offence is not subject to a fault element. By virtue of subhead (5) the absence of a specified fault element in an offence

definition does not necessarily mean that no fault is required. Modern codes typically exclude strict liability save for a specific class of relatively minor offences. Subhead (6) provides: "(a) Where an objective element of an offence is subject to strict liability, the offence provision will state that "Strict liability applies to X"; and (b) Where an offence is subject to strict liability, the offence provision will state that "Strict liability applies to this offence." In the latter situation there would be no fault element for any of the objective elements of the offence. A clear statement in an offence provision that an objective element, or indeed the entire offence is subject to strict liability has the benefit of precision and simplicity. There can be no doubt in respect of the Oireachtas' intention.

(5) The "substitution rule"

29. Subhead (7) provides for the "substitution rule", so called because it deals with the permissible substitutes for prescribed fault elements.

30. Where an offence definition provides that recklessness suffices as the fault element for a particular objective element, the effect of the substitution rule is that proof of intention or knowledge will also suffice for that element. By parity of reasoning, where knowledge is required, proof of intention will suffice as a substitute. The substitution rule is based on the logical principle that the greater (intention) includes the lesser (knowledge and recklessness).

31. The principal advantage of the rule is that it enables the legislature to specify the minimum fault threshold for an offence where the inclusion of the triple (or double) fault alternative would compromise the readability of the offence definition. Thus the offence of possession of a false instrument in Draft Criminal Code, Head 4404(1) provides that: "A person commits the offence of possession of a false instrument if he or she knowingly or recklessly possesses a false instrument." Here the higher fault alternative of intention has been excluded on the grounds that the idea of intentionally (as opposed to knowingly) possessing something, though logically coherent, seems clumsy and might be confusing to code users. As this example shows, the beauty of the substitution rule is that this can be done without compromising the fault elements of an offence.

32. Subhead (7) does not correspond with any publicised common law rule. However, most US Codes follow the lead of the American Model Penal Code and include a substitution rule.[141] An additional advantage of codifying the substitution rule is that it gives voice to the important principle that the tripartite fault scheme in Head 1106 involves a hierarchy of fault terms running from intention through knowledge to recklessness.

[141] Section 2.02(5).

INTENTION

1107.—(1) A person acts "intentionally"—

(a) with respect to a circumstance element, if he or she believes or hopes that it exists, and

(b) with respect to a result element, if it is his or her objective or desire to cause such a result.

(2) For the purposes of *subhead (1)*, when intention is required in relation to an objective element of an offence, such intention is established although it is conditional, unless the condition eliminates the harm or wrong targeted by the offence.

Explanatory Notes:

(1) Introduction

1. Head 1107 establishes the meaning of the term intention as it relates to the objective elements of circumstances and results. It is an amalgamation of the approach to intention adopted by section 702-206(1) of the Hawaii Penal Code, section 206(1) of the Proposed Illinois Code, section 76-2-103(1) of the Utah Code as well as the American Model Penal Code formulation of purposely.[142]

2. Head 1108 is narrower than the common law understanding of intention as a "term of art" where the meaning of intention has been overly determined by the law of murder. Courts have artificially stretched the meaning of intention to cover knowledge of a virtual certainty that the forbidden result will occur, in order to cater for certain problematic cases of murder where the defendant did not intend to cause death or serious injury but knew that such a result would almost certainly occur.[143] Under Head 1107 intention as to result is given a more restricted meaning, characterised by desire to achieve that result.

3. There is no express requirement of conscious awareness in Head 1107. In intention the key issue is the defendant's objective or purpose, not his awareness of his objective or purpose. While objective or purpose is normally accompanied by such awareness, it was felt that conscious awareness should not be a *sine qua non* of intentional action. A defendant may set out to beat his victim to death and yet be so overcome with rage that he loses all sense of what he is doing. If the evidence discloses desire or purpose on his part, it should not matter that he may have been "beside himself" with rage when he did the deed. Moreover, as purpose or objective is normally inferred from conduct, it was felt that the express inclusion of a conscious awareness *requirement* might place an undue burden on the prosecution when proving intention.

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142 See section 2.02(2)(a) of the American Model Penal Code.

143 See *R v Woollin* [1999] 1 AC 82.

(2) The distinction between intention and knowledge

4. In defining the fault elements, the Code draws a distinction between acting intentionally and knowingly as defined in Head 1108 below. The essence of intention is a desire for a particular circumstance to exist or a certain result to occur. The utility of Head 1107 is that it breaks the definition of "intentionally" down into discrete subheads for the circumstance and result elements.

5. There was some initial disquiet among members of the Advisory Committee regarding the proposed meaning of "intentionally" in the Code, largely due to misapprehensions about how the proposed fault scheme and objective elements scheme would work in practice. The concern was that the definition in the draft was too narrow. It was also suggested that the definition could potentially involve a change to Irish law in a direction that would favour the defence, in the sense that the proposed fault scheme could entail a loss of content in respect of maximum fault or "intention-only" offences. In order to allay these fears, an issues paper was prepared on key aspects of the draft fault scheme.[144]

6. The issues paper sought to explore two key aspects of the Draft Fault Scheme: (i) whether the Scheme provides a satisfactory solution to the problem posed by maximum fault or "intention-only" offences and (ii) whether the definition of minimum fault offences (which have a threshold of recklessness) should include the sliding scale of subjective fault elements specified by the Scheme, *i.e.* "a person commits the offence of *x* if he or she intentionally, knowingly, or recklessly…"

7. Two important conclusions were reached about the Draft Fault Scheme. First, it was decided that maximum fault offences should be reconfigured to include knowledge as defined in the Scheme in order to accommodate awareness of virtually certain results and circumstances. For example, it was noted that Head 3109(1) of the Part on Non-Fatal Offences Against the Person, Doc. No.: SP/NFO/06 which codified section 6(5)(a) of the Non-Fatal Offences Against the Person Act 1997 should be adjusted as follows:

> "A person commits an offence (a) if he or she intentionally or *knowingly* causes the piercing of another's skin, or (b) if he or she intentionally or *knowingly* causes contaminated blood to be sprayed, poured or put upon another, knowing the blood is contaminated blood."[145] (emphasis added)

8. Second, it was decided that the Draft Fault Scheme's sliding scale of subjective fault elements should be included in the definition of offences as a way of maximising their readability for code users, and especially for the non-expert user. Accordingly, save where readability would be adversely affected, the fault

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144 See *Issues Paper on Key Aspects of the Draft Fault Scheme*, Doc. No: GP/02 (Research Unit Archive).

145 See *Issues Paper on Key Aspects of the Draft Fault Scheme*, Doc. No: GP/02 at paragraph 13. Draft Criminal Code Head 3109(1) has accordingly been amended and now provides that a person commits the offence of attack with a contaminated syringe or blood "if he or she intentionally or knowingly causes - (a) the piercing of another's skin with a contaminated syringe, or (b) contaminated blood or contaminated fluid to be sprayed, poured or put onto another."

elements of an offence have since been rendered in the form: "A person commits the offence of *x* if he or she intentionally, knowingly or recklessly …".

(3) Acts "intentionally"

9. The chief difference between the fault elements of intention and knowledge is the presence of desire in the former. Accordingly, a person acts intentionally in respect of a circumstance in subhead (1)(a) if he or she believes or hopes that it exists. The Code should distinguish as clearly as possible between intention and knowledge in respect of circumstances. It is, therefore, preferable for subhead (1)(a) to refer only to belief or hope that the circumstance in question exists. Belief and hope appear to be stronger subjective mental states than awareness. Hoping that there are people in the house one is burning down connotes a desire that the house is so occupied, whereas a mere awareness that people are likely to be inside does not indicate the person's preference as regards such occupation. On this basis - in order to emphasise that desire is central to intention - it is preferable to restrict intention as to circumstances so that the person must believe or hope that a circumstance exists or will exist rather than require simple awareness that the circumstance exists.

10. Subhead (1)(b) provides that a result element is not intentional unless it was the person's objective or desire to cause such a result.

(4) Conditional intention

11. Subhead (2) which is based on section 206(1)(d) of the Proposed Illinois Code and section 2.02(6) of the American Model Penal Code, provides that when intention is required in relation to an objective element of an offence, such intention is established although it is conditional, unless the condition eliminates the harm or wrong targeted by the offence.[146]

12. Sometimes a person is willing to commit an offence but his or her actions will not necessarily result in one. For example, if a thief grabs a handbag, meaning to keep the contents, he steals those contents only if there are any. Here, the thief's intention is conditional upon there being anything to steal. Such cases are not uncommon in the criminal law, especially in relation to offences involving ulterior intention.

13. The general rule at common law is that an intention to do or bring about something only if particular conditions exist is in law, an intention. Under subhead (2) a person still commits the crime of burglary if his or her intention was to steal only if no one was at home or if he or she found the object he or she sought, such as a television. The condition in this case does not negative the wrong that the law defining burglary is designed to control, regardless of whether the condition is fulfilled or not. On the other hand, it would not be attempted rape if the defendant's intention was to have sexual intercourse with a woman only if she consented. Here, the condition negatives the wrongdoing targeted by the

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[146] The phrase "harm or wrong" is derived from section 206(1)(d) of the Proposed Illinois Code. The formulation in section 2.02(6) of the American Model Code refers to the "harm or evil".

offence. However, if the man's goal was to overcome the woman's will if she resisted his advances, he would of course be guilty of the offence.

14. Subhead (2) will have to be kept under review. There may be undesired overlap with Head 1111 on ulterior intention. If a provision on conditional intention does remain in the Code, it is preferable to house it in Head 1106 which defines intention. Such an arrangement would reduce the element of scatter on the issue of intention.

KNOWLEDGE

1108.—A person acts "knowingly"—

(a) with respect to a circumstance element, if the person is aware that it exists or will exist in the ordinary course of events, and

(b) with respect to a result element, if the person is aware that his or her conduct will cause such a result in the ordinary course of events.

Explanatory Notes:

(1) Introduction

1. Head 1108 defines the meaning of knowledge under the Code, incorporating phrasing from section 702-206(2) of the Hawaii Penal Code, section 206(2) of the Proposed Illinois Code, section 14 of Australian Capital Territory Criminal Code, section 2.02(2)(b) of the American Model Penal Code and clause 18(a) of the Draft Criminal Code for England and Wales.

2. The difference between acting intentionally under Head 1107, and knowingly, according to Head 1108, is narrow but nevertheless conspicuous. The distinction rests in the fact that intention involves an objective or desire to cause a certain result, whereas knowledge is characterised by an awareness that a particular result will almost certainly follow.

3. The *Issues Paper on Key Aspects of the Draft Fault Scheme* noted that stretching the definition of intention to include knowledge is undesirable because it effectively reduces knowledge "to a species of intention when the criminal law itself has always treated it as a fully-fledged fault element in its own right." Knowledge is the governing fault element in many important criminal offences including rape.[147] It is also a specified fault element in a number of key offences in the Criminal Justice (Theft and Fraud Offences) Act 2001. For example, section 10(c), the offence of false accounting, provides that a person is guilty of an offence if he or she dishonestly, with the intention of making a gain for himself or herself or another, or of causing loss to another "in furnishing information for any purpose produces or makes use of any account, or any such document, which *to his or her knowledge*[148] is or may be misleading, false or deceptive in a material particular." (emphasis added) There is therefore, a compelling case for

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147 Section 2(1) of the Criminal Law (Rape) Act 1981 states: "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 does or does not consent to it". (emphasis added)

148 See Draft Criminal Code Head 4104 which consolidates section 10 (false accounting) and section 11 (suppression, etc., of documents) of the Criminal Justice (Theft and Fraud Offences) Act 2001 into the offence of "Fraudulent practices". Under subparagraph (c), a person commits the offence of fraudulent practices if he or she intentionally, knowingly or recklessly "in furnishing information for any purpose, produces or makes use of any account, or any such document, which *he or she knows* is or may be misleading, false or deceptive in a material particular". (emphasis added)

treating the concepts of knowledge and intention separately in the Draft Fault Scheme.

(2) Acts "knowingly"

4. Subparagraph (a) defines knowledge in relation to circumstances. A person acts knowingly with respect to a circumstance element if he or she is aware that it exists or will exist in the ordinary course of events. The reference to "will exist in the ordinary course of events" is meant to cover situations where an offence definition requires knowledge as to future facts. Subparagraph (a) is based on section 14 of Australian Capital Territory Criminal Code.

5. Subparagraph (b) sets out the definition of knowledge with respect to a result element, whereby a person acts knowingly if the person is aware that his or her conduct will cause such a result in the ordinary course of events. While other wording options are possible – virtual certainty, high probability, reasonable certainty, probability - these options are more problematic given their probabilistic nature. It is difficult to express a satisfactory legal test in terms of mathematical probabilities. By contrast, the ordinary course of events test makes intuitive sense and is easy to apply.

(3) Dealing with wilful blindness in the Code

6. Although the preponderance of English case-law[149] on possession equates a defendant's constructive knowledge with actual knowledge,[150] it was felt that this legal rule should not be enshrined in the Irish Criminal Code because it involves a redundant legal fiction. If a person suspects that the bag he has been paid to carry contains cocaine, and he has the opportunity to open the bag to determine if it does in fact contain cocaine but fails to do so, his state of mind is more akin to recklessness (as defined below in Head 1109) than knowledge. He does not *know* – he is not *aware* - that he is transporting cocaine, rather he consciously and

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149 See *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256 which is the leading English case on possession of illegal drugs. The first proposition enunciated is that a person is not in possession of an item that has been slipped into her bag or pocket without her knowledge. The second proposition is that if a person knows that an article or container has come under her control, she is deemed to be in possession of it even if mistaken about its contents, unless the thing is of a wholly different nature from what was believed. The distinction is overly narrow. Warner believed that certain bags contained scent when they really contained cannabis. The Court held that his mistake was not sufficiently fundamental as regards the nature of the substance. His knowledge that he had the bag was sufficient for liability. Lord Pearce stated at 427 that the mistake would not be sufficiently fundamental if D thought the containers held sweets or aspirins when in fact they held heroin.

150 See *Lewis* (1988) 87 Cr App R 270 where it was held that the appellant was rightly convicted of possessing controlled drugs when they were found in a house of which he was a tenant but which he rarely visited. His defence was that he neither knew nor suspected that drugs were on the premises. The Court of Appeal held that since he had the opportunity to search the house, he should be held to possess items that he did not know about but could have found. See Ashworth, *Principles of Criminal Law* (2006 5th edn Oxford) at 108-9 where the author states that the outcome in *Lewis* reduces the first proposition articulated in *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256 to vanishing point. "Surely it could equally be said, of the person into whose bag drugs are slipped by some third party, that she should could have searched her bag and found them? Probably this is another example of the so-called 'war on drugs' resulting in the distortion of proper legal standards."

unjustifiably disregards a substantial risk that he is transporting cocaine. It is desirable for the Code to call a particular state of mind by its proper name; and in this case the person is *reckless* as regards the circumstance element of the contents of the bag.

7. Likewise, if it crosses a person's mind that he is storing a box containing child pornography for a friend (who owns an adult store) and he doesn't open the box to set his mind at ease, he cannot be said to *know* what the box contains. A strong inkling that X is the case and a failure to act upon the suspicion is not the same as knowing for sure that X is the case. Wilful blindness may be almost as culpable a state of mind as actual knowledge, but it is *not* the same state of mind. There is nothing to be gained in terms of legal clarity, consistency or accessibility by persisting with the legal fiction that his wilful blindness is the same - or as good as actual knowledge - for the purposes of criminal liability.

8. Wilful blindness is a species of recklessness and should be treated as such in the Irish Criminal Code. Instances of wilful blindness as regards circumstance elements arising in possession cases will be governed by recklessness in Head 1109 below.

9. The principled configuration of "knowingly" and "recklessly" in relation to circumstance elements means that the possession offences codified in the Special Part (which currently only specify knowledge in the offence definition) have been redrafted to include an explicit reference to recklessness to cover situations of wilful blindness as regards the quality or nature of the thing possessed.[151]

[151] See, for example, Draft Criminal Code, Head 4203(1) where the offence of "possession of stolen property" has been codified to include a reference to recklessness in relation to the circumstance of the property being stolen. Head 4203(1) provides: "A person commits the offence of possession of stolen property if (otherwise than in the course of the stealing) he or she— (a) knowingly possesses any property, and (b) knows that the property was stolen or *is reckless* as to whether it was stolen." (emphasis added) Recklessness has also been inserted to attach to the circumstance element in Head 4505(1)(b) – the offence of "possession of materials or implements for counterfeiting".

RECKLESSNESS

1109.—(1) A person acts "recklessly"—

(a) with respect to a circumstance element, if he or she consciously and unjustifiably disregards a substantial risk that the circumstance exists or will exist, and

(b) with respect to a result element, if he or she consciously and unjustifiably disregards a substantial risk that his or her conduct will cause such a result.

(2) For the purposes of *subhead (1)*, a person unjustifiably disregards a risk if the risk is of such a nature and degree that considering the nature and purpose of the person's conduct and the circumstances known to him or her, its disregard involves a gross deviation from the standard of care that an ordinary person would observe in the same situation.

Explanatory Notes:

(1) Introduction

1. Head 1109, which is based on section 2.02(2)(c) of the American Model Penal Code, sets out the definition of recklessness with respect to circumstance and result elements.[152] There is no definition of "recklessly" as to conduct, as such a definition is unnecessary and would lead to confusion. Owing to the narrow definition of conduct as "a physical act, an omission, possession or status" in Head 1101(2) above, recklessness is inapt; its application in this context would mean, for example, that a person would have to consciously and unjustifiably disregard a substantial risk that his arm was moving!

2. Subhead (1)(a) provides that a person acts recklessly "with respect to a circumstance, if he or she consciously and unjustifiably disregards a substantial risk that the circumstance exists or will exist". Notwithstanding its literal endorsement in *People v Murray*,[153] the current draft slightly alters the syntax of the MPC definition of recklessness in order to make it clear that the taking of the particular substantial risk must be conscious *and* unjustifiable: the original formula is "consciously disregards a substantial and unjustifiable risk". The recklessness provisions of the Australian Commonwealth Code[154] and the Australian Capital Territory Code[155] are also expressed in terms of the taking of a risk being unjustifiable.

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152 Section 2.02(2)(c) of the American Model Penal which defines recklessly as follows: "A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation."

153 [1977] IR 360 at 403, per Henchy J.

154 See section 5.4.

155 See section 20 of Chapter 2, Part 2.2, Division 2.2.3.

(3) The subjective requirement

3. The criminal law conception of the word "conscious" in relation to recklessness refers to subjective, *i.e.* actual advertence to risk. "Conscious" has therefore been retained throughout Head 109 of the present draft so that there can be no doubt that the test for recklessness in the Code is essentially subjective.

4. Subhead (1)(b) provides that with respect to a result element, a person acts recklessly if he or she consciously and unjustifiably disregards a substantial risk that his or her conduct will cause such a result. Subhead (1)(b), therefore, clarifies that it is the taking of the particular risk which must be unjustifiable.

5. The phrase "acts recklessly" has been retained on the basis that "recklessly" is the word generally employed in offences in the Special Part to signify the fault element of recklessness and is also the term most often employed by the Oireachtas in legislation.[156] The words "being reckless"[157] will also be used occasionally in the Special Part – mostly in clauses also featuring ulterior intention, but the term "recklessly" will be the most frequently employed.

(4) The "unjustifiable" requirement

6. Subhead (2) requires that the person's conscious disregard of the risk of the circumstance or result element occurring must amount to a "gross deviation". The person must unjustifiably disregard a risk which is of such a nature and degree that considering the nature and purpose of the person's conduct and the circumstances known to him or her, its disregard involves a gross deviation from the standard of care that an ordinary person would observe in the same situation.

7. Recklessness involves both a state of mind and a failure to comply with a standard, *i.e.* the person must be aware of a risk and unreasonably take it. The requirement that the person's disregard of the risk amount to a gross deviation from the standard of care that an ordinary person would observe in a similar situation entails an analysis of the person's behaviour in relation to prevailing societal values.

8. If the person acts for the good of mankind or has some justification for running the risk – *e.g.* a surgeon who reasonably decides to perform a potentially fatal operation because it is the patient's only hope of survival - the nature and purpose of the risk-taking is socially valued, unlike that of the greedy arsonist who burns down his factory to collect the insurance money despite the known risk of serious injury to the night-watchman. The benefit of including an express reference to

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156 See section 4(1) of the Non-Fatal Offences against the Person Act 1997 which provides: "A person who intentionally or recklessly causes serious harm to another shall be guilty of an offence."

157 See the offence of aggravated property damage in Draft Criminal Code, Head 5103(1) which provides: "A person commits the offence of aggravated property damage if he or she—(a) intentionally, knowingly or recklessly damages any property, whether belonging to himself, herself or another, intending by the damage to endanger the life of another or knowing or *being reckless* as to whether the life of another would be thereby endangered". (emphasis added)

the nature and purpose of the person's conduct and his or her knowledge of the circumstances in subhead (2), is that it would unequivocally require the jury to examine the alleged recklessness in the wider context of the social utility/justifiability and moral quality of the physical act or omission etc., and the surrounding circumstances thereof.

TRANSFERRED FAULT AND DEFENCES

1110.—(1) In determining whether a person has committed an offence, where he or she intentionally, knowingly or recklessly causes a result element in relation to a person or thing capable of being the victim or subject-matter of the offence, he or she shall be treated as having intentionally, knowingly or recklessly caused that result element in relation to any other person or thing affected by his or her conduct.

(2) Any defence on which a person might have relied on a charge of an offence in relation to a person or thing within his or her contemplation is open to him or her on a charge of the same offence in relation to a person or thing not within his or her contemplation.

Explanatory Notes:

(1) Introduction

1. The function of Head 1110, which is based on clause 24 of the Draft English Code, is to articulate the common law rule governing transferred intention, which in its original incarnation was called the doctrine of transferred malice.

2. A provision on transferred fault is an essential tool for dealing with cases where the defendant intended to affect one person or thing and actually affected another person or thing. For example, if the defendant who is a bad shot, shoots at A, intending to kill him, but the bullet hits B and kills her, the doctrine of transferred fault means that the defendant will be liable for B's murder even though he intended to kill A. The defendant's fault element – an intention to cause death - in respect of A is transferred to B.

3. Similarly, if the defendant in a fit of temper picks up a plate and flings it towards the wall, reckless as to whether the plate will shatter on impact, and in fact the plate does not shatter but knocks over an expensive vase as it flies through the air, the defendant's recklessness in relation to the risk of damage to the plate will be transferred to that in respect of the broken vase.

(2) Same offence species

4. Fault can only be transferred within the same offence species. This means that if an offence can be committed only in respect of a particular class of person or thing, the person's intention or recklessness must relate to such a person or thing in order to be transferred. Hence, the words in subhead (1) – "a person or thing capable of being the victim or subject-matter of the offence". If, on the other hand, the person or thing actually affected is not so capable, the external elements of the offence are not made out and the question of transferring the actor's fault does not arise.

5. If an defendant attempts to punch another but misses because the intended victim ducks and instead his fist hits a statue on the mantelpiece causing it to fall and break, the defendant will not be liable for the breakage of the statue because he had the fault element – intention – for assault, but not for criminal damage (unless

in attempting to assault the person he consciously and unjustifiably disregarded a risk that he might also damage property). The harms targeted by the offences of assault and criminal damage are not of the same species, so the fault element for assault cannot (automatically) be transferred to the damage of the statue.

6. Subhead (1) treats an intention to affect A as an intention to affect B, who is actually affected. So where an offence requires an affecting of a person with intention to affect *him* or *her* (as opposed to "any person"), there can still be a conviction. A charge of the offence of murder committed against B with the intention of causing B's death can be proved by evidence of an intention to cause A's death.

7. Subhead (1) is worded so as to cater for situations where there is an irrelevant mistake about the identity of the victim or the subject-matter of an offence. The argument, "I thought B was A; I intended to hit A; therefore I did not intend to hit B", hardly needs an answer in the Code, but subhead (1) provides one.

(3) Transfer of defences

8. Subhead (2) provides for the transfer of defences so that a person who affects an unforeseen victim may rely on a defence that would have been available to him if he had affected the person or thing he had in contemplation. For example, if the defendant - who knows his wife is having an affair with A – finds B in bed with his wife and thinks it is A and shoots B dead in a moment of jealous rage, the defendant may be able to plead provocation in answer to a murder charge, since such a plea would have been open to him had A, in fact, been the person shot dead.

ULTERIOR INTENTION

1111.—(1) A person acts with ulterior intention where, with respect to some objective that is neither a conduct, circumstance nor result element of an offence—

(a) his or her mind is directed towards the achievement of that objective, or

(b) he or she is aware that that objective will be achieved in the ordinary course of events as a consequence of the achievement of some other objective to which his or her mind is directed.

(2) The terms "intending", "with intent to" or "with the intention of" shall be construed as importing a fault element of ulterior intention in the law defining an offence.

Explanatory Notes:

(1) Introduction

1. Inspired by Ian Leader-Elliot's formulation,[158] Head 1111 provides that a person acts with "ulterior intention" where, with respect to some objective that is neither a conduct, circumstance nor result element of an offence (a) his or her mind is directed towards the achievement of that objective, or (b) he or she is aware that that objective will be achieved in the ordinary course of events as a consequence of the achievement of some other objective to which his or her mind is directed.

2. Many criminal offences in Ireland do not deal with accomplished harms. Offences involving possession, terrorist activity, trafficking in controlled drugs or people and corruption proscribe conduct that is forbidden because it manifests a tendency to engage in wrongdoing or because it is accompanied by an intention to cause harm. Offences of this nature require a different approach to the delineation of their fault elements than traditional offences against the person, not least because, as there is no objective element to which the fault element can be attached, the latter operates more by way of a motive than a fault element *stricto sensu.*

3. In recent years, there has been an increase in the number of offences that take the form of a prohibition of possession of a thing with intent to commit an offence. For example, section 9(5) of the Firearms and Offensive Weapons Act 1990 provides that a person will be guilty of the offence of "possession of knives and other articles" if he or she has any article in a public place *intending to* cause injury to or to incapacitate or intimidate any person.

4. Though possession offences provide the most familiar instance of liability for ulterior intention, reliance on the concept is likely to be widespread in the Code. In most of these offences the conduct element derives its criminal character exclusively from the person's intended objective.

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[158] See Leader-Elliott "Benthamite Reflections on Codification of the General Principles of Criminal Liability: Towards the Panopticon" *9 Buff. Crim. L. Rev* 2005-2006, 391 at 429.

5. Given the proliferation of offences criminalising conduct accompanied by an ulterior intention, it is essential that the Code includes a provision dealing with the phenomenon. Subhead (1) makes it clear that in offences of ulterior intention involving possession, terrorism or human trafficking what is at issue is the person's underlying motive or purpose.

(2) Accommodating the phenomenon of oblique ulterior intention

6. Subhead (1)(b) has been inserted in order to accommodate instances of oblique ulterior intention in the Code. Ordinary oblique intention (where the fault element of intention is artificially stretched to encompass knowledge of a virtual certainty that the forbidden result will occur) will no longer exist in the Code owing to the structure of the Draft Fault Scheme which draws a distinct line between intention and knowledge, thus avoiding any confusing and needless overlap between the two fault elements.[159]

7. However, the proposed configuration of the fault elements of intention and knowledge has an impact upon the phenomenon of ulterior intention in the Code. While ulterior intention has not been subject to much legal analysis in this country, either by the judiciary or by academic writers, it is highly likely that ulterior intention at common law is not restricted solely to the defendant's objective or underlying motive for engaging in particular criminal conduct, but includes an *oblique* component in the sense that ulterior intention would extend to result *b,* if the defendant did something in order to achieve *a*, knowing that if he achieved *a, b* would also most likely follow.[160]

8. Accordingly, subhead (b) is a rule of construction which ensures that ulterior intention covers both a person's direct objective, as well as some other outcome which he or she knows is virtually coexistent with the accomplishment of the direct objective.

9. For example, Draft Criminal Code, Head 4101(1)**,** which codifies the offence of theft under section 4 of the Criminal Justice (Theft and Fraud Offences) Act 2001 provides: "A person commits the offence of theft if he or she intentionally, knowingly or recklessly appropriates property without the consent of its owner, *with the intention* of depriving its owner of it." In answer to a theft charge, the defendant could claim that he appropriated a colleague's digital camera without the consent of its owner with the intention of taking photographs at his sister's wedding. He may swear blind that in taking the camera it was not his intention to deprive the owner of it, arguing that he had no camera of his own and merely wanted to make a photographic record of his sister's nuptials. However, if the defendant knew that the appropriation of the camera and the successful taking of photos at the wedding necessarily entailed depriving the rightful owner of the camera, then ulterior intention under Head 1111(1)(b) would be established.

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159 See Heads 107 (intentionally) and 108 (knowingly) above.

160 See the Canadian case of *R v Chartland* [1994] SCR Lexis 928, which deals with oblique ulterior intention in the context of abduction of a person under 14.

10. Pre-code criminal offences incorporating ulterior intention adopt a multiplicity of phrases such as "with intent", "with the intention", "with the purpose of", "with a view to" and "in order to".[161] In an effort to standardise terminology across the Code, subhead (2) introduces a rule of construction so that when ulterior intention is to play a part of an offence definition, the word "intending" or the phrases "with intent to" or "with the intention of" will be used.

[161] See for example Firearms and Offensive Weapons Act 1990, section 9 ("intended"); Non-Fatal Offences against the Person Act 1997, sections 5 ("intending"), 6 ("with the intention of"), and 9 ("with a view to").

PART 3: NON-FATAL OFFENCES AGAINST THE PERSON

INTRODUCTION

1. This draft Part on Non-Fatal Offences Against the Person applies the technique of codification to the Non-Fatal Offences against the Person Act 1997 (hereinafter "the 1997 Act").

2. Changes to the text of specific provisions are considered under the relevant Heads. At the outset, however, the following changes of general concern to the draft as a whole should be noted.

Standardising terminology

3. An effort has been made in the draft to employ streamlined terminology and fully defined terms. For example, the undefined concept of "injury" has, where appropriate, been replaced with a reference to "harm", which *is* defined in the draft.

Reclassified offences/provisions

4. Section 7 of the 1997 Act (possession of a syringe) is essentially a weapons offence and has therefore been excluded from this Part on classification grounds.

5. The child abduction offences contained in sections 16 and 17 of the 1997 Act have also been excluded on grounds of classification. These offences do not sit well alongside non-fatal offences against the person. They are designed to protect parental custody rights rather than the bodily integrity, etc., of the child. Hence, while the child abduction offences undoubtedly belong in the Code, they would be more suitably housed in a Part on Offences against the Family or suchlike, to be codified at a later date.

6. Sections 18-20 of the 1997 Act have been excluded from the current draft on the basis that these provisions relate to the "justifiable use of force", a General Part matter which will be dealt with in due course.

Incompleteness

7. A number of offences that do not form part of the 1997 Act appear in the present draft. Head 3105 (aggravated assault)[162] and Head 3204 (making demands with menaces)[163] have been "imported" from the Criminal Justice (Public Order) Act 1994 for classification reasons.

Offence consolidation

8. Head 3109 consolidates the syringe/blood attack offences contained in section 6(5) of the 1997 Act, as well as the offence provided for in section 8(2) of the 1997 Act (intentionally placing a contaminated syringe). Consolidation has been achieved without loss of substantive legal content. The penalty for each of these

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[162] Derived from section 19(1) of the Criminal Justice (Public Order) Act 1994, as amended by section 185 of the Criminal Justice Act 2006 and section 41 of the Prisons Act 2007.

[163] Derived from section 17 of the Criminal Justice (Public Order) Act 1994.

offences is the same. The only difference between them is that the "attack" offences in section 6(5) address direct infliction of injury, whereas the "placing" offence in section 8(2) is concerned with indirect infliction of injury. From a codification perspective it is more efficient to have a single offence covering both direct and indirect inflictions of injury. By virtue of the operation of the rules on causation in the General Part (see Head 1104), the use of indirect language in subhead (1) – *i.e.* "causes" – ensures that both direct and indirect inflictions of injury are catered for by the offence. For the above reasons, a distinct offence of intentionally placing a contaminated syringe has not been included in the present draft.

ARRANGEMENT OF HEADS

PART 3

NON-FATAL OFFENCES AGAINST THE PERSON

CHAPTER 30

Interpretation

CHAPTER 31

Offences against Bodily Integrity

CHAPTER 32

Offences against Personal Autonomy

3201	Interpretation (*Chapter 32*).
3202	Coercion.
3203	Harassment.
3204	Making a demand with menaces.
3205	Making an unlawful demand for payment of debt.
3206	False imprisonment.

CHAPTER 33

Procedural, Evidential and Ancillary Provisions

3301	Evidential value of certain certificates signed by medical practitioners.

INTERPRETATION (PART 3)

3001.—In this Part—

"harm" means harm to body or mind and includes pain and unconsciousness;

"property" means property of a tangible nature, whether real or personal, including money and animals that are capable of being stolen;

"serious harm" means harm that creates a substantial risk of death or which causes serious disfigurement or substantial loss or impairment of the mobility of the body as a whole or of the function of any particular bodily member or organ;

"street" includes any road, bridge, lane, footway, subway, square, court, alley or passage, whether a thoroughfare or not, which is for the time being open to the public; and the doorways, entrances and gardens abutting on a street and any ground or car-park adjoining and open to a street, shall be treated as forming part of a street.

Explanatory Notes:

1. Head 3001 makes provision for definitions applicable to Part 3. In due course, these general definitions may be moved to a general interpretation section applicable to the Code as a whole. This will be kept under review.

2. According to section 1 of the 1997 Act, " 'harm' means harm to body or mind and includes pain and unconsciousness." Such is the breadth of this definition that almost any section 2 assault could conceivably fall under section 3 – after all, even the most minor of assaults is likely to involve some degree of pain. This state of affairs has been recognised by the Director of Public Prosecutions[164], who in 2000 issued guidelines as to when section 2 or section 3 should be charged:

> "Most minor assaults cause pain at the very least and could therefore be the subject of a section 3 charge. However, as a rule of thumb it is suggested that assaults which leave no visible bruise or laceration or result in no lasting pain or other long term consequences (including psychological damage or trauma) should be dealt with as a section 2 assault. All other assaults causing harm which is easily proved but which is not serious harm should be dealt with under section 3."[165]

3. While such a system may work perfectly well in practice, it raises problems from a codification perspective. A code should provide a clear statement of conduct rules. The 1997 Act falls down in this regard, as it provides little or no guidance as to what will amount to a section 3 assault and how this is to be distinguished from a section 2 assault. Moreover, a code should be self-contained. Relying on a set of external guidelines to provide a *de facto* delineation of the law is unsatisfactory. Consequently, there is a good case for having a narrower and more precise definition of "harm" for the purposes of the Code.

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164 See James Hamilton, 'The Summary Trial of Indictable Offences' [2005] 4(2) JSIJ 154.

165 HQ Directive No. 220/00.

4. For present purposes, the definition of "harm" in the 1997 Act is being retained in the draft. As the codification project progresses the definition of "harm" might be revisited to see if it is possible to find a satisfactory solution to the issue outlined in the preceding paragraphs.

5. Furthermore, as the term "harm" will form part of a number of code offence definitions, it is important that the definition of "harm" is continuously "road-tested" as the inaugural codifying instrument takes shape, so as to ensure its compatibility with all relevant Special Part offences.

INTERPRETATION (CHAPTER 31)

3101.—In this Chapter—

"assault" has the meaning it has in *Head 3102 (assault)*;

"contaminated blood" means blood that is contaminated with any disease, virus, agent or organism which if passed into the blood stream of another could infect the other with a life threatening or potentially life threatening disease;

"contaminated fluid" means fluid or substance that is contaminated with any disease, virus, agent or organism which if passed into the blood stream of another could infect the other with a life threatening or potentially life threatening disease;

"contaminated syringe" means a syringe that has in it or on it contaminated blood or contaminated fluid;

"syringe" includes any part of a syringe or a needle or any sharp instrument capable of piercing skin and passing onto or into a person blood or any fluid or substance resembling blood.

Explanatory Notes:

1. Head 3101 defines certain terms used in Chapter 31. These definitions are, with the exception of "assault", derived from section 1 of the 1997 Act.

2. A definition of "assault" has been included in the present Head, as this term is used in defining the offence contained in Head 3103 (assault causing harm) and Head 3105 (aggravated assault).

ASSAULT

3102.—(1) A person commits the offence of assault if he or she intentionally, knowingly or recklessly—

(a) directly or indirectly applies force to or causes an impact on the body of another, or

(b) causes another to believe on reasonable grounds that he or she is likely immediately to be subjected to any such force or impact,

without the consent of the other.

(2) A person does not commit an assault if the force or impact, not being intended or likely to cause harm, is in the circumstances such as is generally acceptable in the ordinary conduct of daily life and the defendant does not know or believe that it is in fact unacceptable to the other person.

(3) In this Head force includes—

(a) application of heat, light, electric current, noise or any other form of energy; and

(b) application of matter in solid, liquid or gaseous form.

(4) A person guilty of an offence under this Head shall be liable on summary conviction to a fine not exceeding €2,000 or imprisonment for a term not exceeding 6 months or both.

Explanatory Notes:

1. Head 3102 codifies the offence of assault, as provided for in section 2 of the 1997 Act. The content of the offence may be broken down as follows:

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A.	*Conduct:* Any act. AND
Intention/Knowledge/Recklessness.	*Result:* Directly or indirectly applies force to or causes an impact on the body of another. OR
Intention/Knowledge/Recklessness.	*Result:* Causes another to believe that he or she is likely immediately to be subjected to any such force or impact.
Intention/Knowledge/Recklessness.	AND *Circumstance:* That belief is held on reasonable grounds. AND

Intention/Knowledge/Recklessness.	*Circumstance:* The other does not consent.

2. In subhead (2) the word "injury" (as contained in section 2(3) of the 1997 Act) has been replaced with "harm".

3. Also in subhead (2), the words "A person does not commit *an assault* if" are designed to ensure that the defence extends to the offence of assault causing harm and is not limited to assault *simpliciter*.

4. In subhead (3)(b), a comma has been inserted between the words "solid" and "liquid".

ASSAULT CAUSING HARM

3103.—(1) A person commits the offence of assault causing harm if he or she assaults another causing him or her harm.

(2) Strict liability applies to the causing of harm referred to in *subhead (1)*.

(3) A person guilty of an offence under this Head shall be liable—

(a) on summary conviction to a fine not exceeding €2,000 or imprisonment for a term not exceeding 12 months or both, or

(b) on conviction on indictment to a fine or imprisonment for a term not exceeding 5 years or both.

Explanatory Notes:

1. Head 3103 codifies the offence of assault causing harm, as provided for in section 3 of the 1997 Act. The content of this offence may be broken down as follows (the shaded area of the box represents the elements of the offence of assault, which is incorporated by reference):

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A.	*Conduct:* Any act. AND
Intention/Knowledge/Recklessness.	*Result:* Directly or indirectly applies force to or causes an impact on the body of another. OR
Intention/Knowledge/Recklessness.	*Result:* Causes another to believe that he or she is likely immediately to be subjected to any such force or impact. AND *Circumstance:* That belief is held on reasonable grounds. AND
Intention/Knowledge/Recklessness.	*Circumstance:* The other does not consent.
AND	
Strict liability.	*Result:* Harm is caused to the other.

2. A question arises as to whether section 3 of the 1997 Act is an offence of strict liability. Criminal liability is strict if each objective element of an offence is not subject to a fault element.[166] Under the terms of the 1997 Act, the aggravating

[166] See McAuley and McCutcheon, *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 313; Ormerod, *Smith &Hogan: Criminal Law* (11th edn Oxford University Press, 2005) at 136;

factor that distinguishes section 3 assault from section 2 assault – *i.e.* the causing of harm – is not, *prima facie*, subject to an additional fault element. Accordingly, one interpretation would be that liability can be established under section 3 where the defendant commits an assault but does not intend to cause the harm that results or is not reckless in that regard. However, an alternative view is that a presumption of *mens rea* can be made out with respect to section 3 and that it is therefore not an offence of strict liability. Unfortunately, the scant case law on section 3 is unhelpful and contradictory.[167] A thorough assessment of the provision on the basis of general principles of criminal law is therefore warranted.

3. It is well established that where a statute is unclear as to whether or not *mens rea* is required in respect of an offence, the presumption of *mens rea* will apply. The general approach was articulated in the House of Lords case of *Sweet v Parsley*:

> "Sometimes the words of the section which creates a particular offence make it clear that mens rea is required in one form or another. Such cases are quite frequent. But in a very large number of cases there is no clear indication either way. In such cases there has for centuries been a presumption that Parliament did not intend to make criminals of persons who were in no way blameworthy in what they did. That means that 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."[168]

4. This is in line with the general principle that where statutory language is ambiguous, the interpretation most favourable to the defendant should be adopted. However, the presumption of *mens rea* is not absolute and may be rebutted. In the oft-quoted case of *Brend v Wood*, it was held, per Lord Goddard, that the presumption should apply "unless a statute either clearly or by necessary implication rules out *mens rea* as a constituent part of the crime".[169]

5. While the leading English authority of *Sweet v Parsley* saw the presumption being applied to offences that were completely silent on the issue of *mens rea*, the Irish Supreme Court was prepared to go one step further; in *DPP v Murray*,[170] the presumption was applied to an offence that was not entirely silent on the issue of *mens rea* but rather was only silent in this regard with respect to one of its objective elements. The Court held that while the defendants had certainly possessed the requisite *mens rea* for murder, they lacked *mens rea* as to the aggravating element of capital murder, namely the fact that the victim was a member of the Garda Síochána acting in the course of his duty.

6. It has been argued – notably by Charleton, McDermott and Bolger[171] – that there are strong parallels between the offence of assault causing harm and the offence under consideration in *Murray*. The old offence of capital murder was differentiated from the offence of murder by an additional objective element and a significantly increased penalty. Similarly, assault causing harm is differentiated

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Glanville Williams, *Textbook of Criminal Law* (2nd edn Stevens & Sons, 1983), at 927; Simister and Sullivan, *Criminal Law: Theory and Doctrine* (3rd edn Hart, 2007) at 165.

167 *Attorney General v Fay* (High Court, 22 July 2003); *Minister for Justice, Equality and Law Reform v Dolny* (Supreme Court, 18 June 2009).

168 [1970] AC 132 at 148 per Lord Reid.

169 (1946) 62 TLR 462 at 463.

170 [1977] IR 360.

171 Charleton, McDermott and Bolger, *Criminal Law* (Butterworths, 1999), at 714-715.

from assault *simpliciter* by an additional objective element (*i.e.* the causing of harm) and a significantly increased penalty (section 2 assault carries a maximum penalty of a €1,904.61 fine and 6 months imprisonment; section 3 carries a maximum penalty of an unlimited fine and 5 years imprisonment). According to Charleton *et al*, it follows that the legislature is presumed to have intended that an additional mental element is required for the proof of that aggravating factor.

7. However, section 3 might be distinguished from the authority of *Murray* on a number of grounds. Firstly, section 3 must be interpreted in the context of the 1997 Act as a whole. Of particular relevance here is section 4, concerning the offence of causing serious harm, where the result element of the offence (*i.e.* the causing of serious harm) is explicitly made subject to the *mens rea* requirement of intention or recklessness. Hence, it might reasonably be argued that the legislature clearly took a conscious decision not to make such an explicit requirement in respect of section 3 because it wished to create an offence of strict liability. Should the legislature have wanted to do otherwise, the argument goes, it would have simply included a stipulation similar to that found in section 4.

8. Secondly, it is useful to look at the history of section 3. After all, recent case law demonstrates that a court will be prepared to examine in some detail a provision's legislative antecedents when considering the matter of strict liability. A good example is the case of *CC v Ireland*,[172] where, in the context of the offence of unlawful carnal knowledge, the Supreme Court considered the legislative antecedents to the Criminal Law (Amendment) Act 1935, before deciding that the offence was subject to strict liability. Interestingly, an examination of the history of section 3 of the 1997 Act reveals that its predecessor, the offence of assault occasioning actual bodily harm,[173] was itself subject to strict liability – *i.e. mens rea* with respect to occasioning bodily harm did not have to be proved.[174]

9. Finally, in terms of applicable penalties, *Murray* was an extreme case, the outcome of which was literally a matter of life or death. Should the Court have decided to uphold capital murder as an offence of strict liability, the defendants would have suffered the death penalty, rather than a life sentence for the lesser offence of murder. As a general rule, offences prescribing more severe punishments are less likely to be upheld as offences of strict liability.[175] In this regard it is worth noting the decision in *Shannon Regional Fisheries Board v Cavan County Council*,[176] where a majority of the Supreme Court was satisfied that an offence which imposed a very similar maximum penalty to section 3 of the 1997 Act was subject to strict liability.

10. In light of the above, it would seem reasonable to conclude that the terms of section 3 successfully rebut the presumption of *mens rea*. Hence, subhead (2), following Head 1106(6), expressly provides that strict liability applies to the element of harm being caused to the victim of the assault. Explicitly stating that

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172 [2005] IESC 48.
173 Offences Against the Person Act 1861, section 47.
174 *R v Roberts* (1971) 56 Cr App R 95; *R v Savage* [1991] 4 All ER 698.
175 See for example *The Queen v Strawbridge* [1970] NZLR 909.
176 [1996] 3 IR 267.

an objective element of an offence is subject to strict liability promotes legal certainty.

11. Arguably the maximum penalty for the offence of assault causing harm is too low. In particular, the 5 year maximum sentence for this offence appears relatively light compared to the 10 year maximum sentence for criminal damage. Thus, a person who damages property by using it to injure another is – in theory at least – liable to a greater sentence for the injury to the property than the person. This seems inappropriate.

12. Moreover, at present there exists a vast gulf in the sentencing parameters for assaults causing harm and those involving *serious* harm. The former are subject to a maximum 5 years' imprisonment, the latter to life. Thus, the present scheme does not adequately cater for assaults approaching but not quite meeting the (very high) threshold of serious harm, which is defined as "harm that creates a substantial risk of death or which causes serious disfigurement or substantial loss or impairment of the mobility of the body as a whole or of the function of any particular bodily member or organ."

13. On the other hand, given the fact that assault causing harm is subject to a strict liability component, it might be argued that increasing the penalty for the offence in its current form is not proper. One option that could overcome these competing considerations would be to attach a minimum fault requirement of recklessness to the causing of harm and at the same time increase the maximum penalty for the offence (*e.g.* to 10 years or more).

14. In summary, it is recommended that policy-makers consider increasing the penalty for the offence of assault causing harm and abolishing the strict liability component of the offence.

CAUSING SERIOUS HARM

3104.—(1) A person commits the offence of causing serious harm if he or she intentionally, knowingly or recklessly causes serious harm to another.

(2) A person guilty of an offence under this Head shall be liable on conviction on indictment to a fine or imprisonment for life or both.

Explanatory Notes:

1. Head 3104 codifies the offence of causing serious harm, as provided for in section 4 of the 1997 Act. The content of the offence may be broken down as follows:

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A. Intention/Knowledge/Recklessness.	*Conduct:* Any act. AND *Result:* Causes serious harm to another.

AGGRAVATED ASSAULT

3105.—(1) A person commits the offence of aggravated assault if—

(a) he or she assaults or threatens to assault another and that other is—

(i) a person providing medical services at or in a hospital,

(ii) a person assisting such a person,

(iii) a peace officer acting in the execution of a peace officer's duty, or

(iv) a person acting in aid of a peace officer,

and he or she knows or is reckless as to whether the other is such a person so acting, or

(b) he or she assaults another with intent to resist or prevent the lawful apprehension or detention of himself or herself or any other person for any offence.

(2) In this Head—

"hospital" includes the lands, buildings and premises connected with and used wholly or mainly for the purposes of a hospital;

"medical services" means services provided by—

(a) doctors, dentists, psychiatrists, nurses, midwives, pharmacists, health and social care professionals (within the meaning of the Health and Social Care Professionals Act 2005) or other persons in the provision of treatment and care for persons at or in a hospital, or

(b) persons acting under direction of those persons;

"peace officer" means a member of the Garda Síochána, a prison officer, a member of the fire brigade, ambulance personnel or a member of the Defence Forces;

"prison" means a place of custody administered by or on behalf of the Minister (other than a Garda Síochána station) and includes—

(a) St. Patrick's Institution,

(b) a place provided under section 2 of the Prisons Act 1970,

(c) a place specified under section 3 of the Prisons Act 1972.

"prison officer" includes any member of the staff of a prison and any person having the custody of, or having duties relating to the custody of, a person in

relation to whom an order of a court committing that person to a prison is for the time being in force.

(3) A person guilty of an offence under this Head shall be liable—

(a) having elected for summary disposal of the offence, on summary conviction, to a fine not exceeding €5,000 or imprisonment for a term not exceeding 12 months, or both,

(b) on conviction on indictment to a fine or imprisonment for a term not exceeding 7 years or both.

[(4) The provisions of this Head and [*Head 6105 (aggravated obstruction)*] are in addition to and not in substitution for any provision in any other enactment relating to assault or obstruction of a peace officer.]

Explanatory Notes:

1. Head 3105 codifies the offence of assault of a peace officer, etc., as provided for in section 19(1) of the Criminal Justice (Public Order) Act 1994, as amended by section 185 of the Criminal Justice Act 2006 and section 41 of the Prisons Act 2007.

2. It is proposed that the assault component of the offence under section 19 of the 1994 Act ought to be separated from the obstruction component. While the assault component bears directly on the protected interest of bodily integrity, it is more appropriate to house the obstruction component of the offence in the Part of the Code pertaining to public order offences.[177]

3. The offence has been given the generic name of "aggravated assault", rather than a more specific and lengthy title such as "assault on a person providing medical services at a hospital or a peace officer, etc." This reduces the opportunity for code degradation (occasioned by the proliferation of special-instance offences) by leaving open the possibility of the legislature sometime in the future adding to the list of categories of victims under this offence: *e.g.* bus drivers, the elderly, etc.

4. Section 19 of the 1994 Act provides for the offence in terms of "any person who assaults or threatens to assault…". However, "assault" is not defined in the 1994 Act. It is suggested that the offence could be redefined in terms of the general offence of assault under Head 3102.

5. Accordingly, the content of the offence may be broken down as follows (the offence of assault, incorporated by reference, is represented by the shaded area):

[177] See Head 6105 which codifies the obstruction portion of section 19 of the 1994 Act and names the offence "aggravated obstruction."

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A.	*Conduct:* Any act.
	AND
Intention/Knowledge/Recklessness.	*Result:* Directly or indirectly applies force to or causes an impact on the body of another.
	OR
Intention/Knowledge/Recklessness.	*Result:* Causes another to believe that he or she is likely immediately to be subjected to any such force or impact.
Intention/Knowledge/Recklessness.	AND *Circumstance:* That belief is held on reasonable grounds.
	AND
Intention/Knowledge/Recklessness.	*Circumstance:* The other does not consent.
OR	
N/A.	*Conduct:* Any act.
	AND
Intention/Knowledge/Recklessness.	*Circumstance:* Conduct is of a threatening nature, to assault.
AND	
Intention/Knowledge/Recklessness.	*Circumstance:* That other is a person providing medical services at or in a hospital or a person assisting such a person.
Intention/Knowledge/Recklessness.	OR *Circumstance:* That other is a peace officer acting in the execution of a peace officer's duty.
Intention/Knowledge/Recklessness.	OR *Circumstance:* That other is any person acting in aid of a peace officer.
	OR
Ulterior Intention: defendant intends to resist or prevent the lawful apprehension or detention of himself or herself or any other person for any offence.	N/A.

6. Section 19(1) of the 1994 Act (as amended) only explicitly states the fault element of knowledge/recklessness with regard to the circumstance element of the victim being a peace officer acting in the course of his or her duty. Under a contextual interpretation of section 19(1), there is an arguable case that the legislature intended liability to be strict in relation to persons other than peace officers. On the other hand, it would seem logical and fair to apply the same fault element with respect to the other categories of persons listed in section 19(1). After all, it would appear to be both anomalous and unjust to require *mens rea* to be proven in

relation to the person being a peace officer acting in the course of his or her duty, but to require no proof of culpability as to the circumstance of the victim being a person assisting a peace officer. Given the marked reluctance of Irish courts (and the common law world *generally*) to countenance the use of strict liability in respect of the core elements of serious criminal offences, a court might be persuaded to apply the presumption of *mens rea* in the context of section 19(1).[178] In light of the above observations, it is suggested that the fault element of recklessness be applied across the board to all the persons listed in section 19(1).

7. Policy-makers may wish to consider that the scope of subhead (1)(a)(i) (based on section 19(1)(a) of the 1994 Act) might be considered unduly restrictive in confining the ambit of the offence to assaults committed "at or in a hospital". It is observed that many medical services are provided outside the hospital setting (such as community facilities or the scene of an accident).

8. The words "any other" in section 19(1)(d) of the 1994 Act appear to be superfluous and have therefore been excluded from the present Head.

9. The words "any other person" have been replaced with "another" in Head 3105(1)(b) to make the provision more readable.

10. In subhead (2), the definition of "prison" has been updated to take account of the Prisons Act 2007.

11. Subhead (4) incorporates section 19(5) of the 1994 Act, which was included in order to preserve offences relating to assault against persons in authority in other legislation. In due course, further consideration may need to be given to the appropriate location of this provision in the Code.

12. It should be noted that there are other assault provisions against persons in authority which will need to be examined in order to assess whether they should be incorporated into the Code, or more specifically into Head 3105, *e.g.* assault against a CAB officer or family member (section 15 of the Criminal Assets Bureau Act 1996).

[178] *C.C. v Ireland & Ors* [2006] IESC 33; *Sweet v Parsley* [1970] AC 132 at 148 per Lord Reid.

THREATENING TO KILL OR CAUSE SERIOUS HARM

3106.—(1) A person commits the offence of threatening to kill or cause serious harm if he or she by any means makes to another a threat to kill or cause serious harm to that other or a third person, intending that other to [fear] [believe] it will be carried out.

(2) A person guilty of an offence under this Head shall be liable—

(a) on summary conviction to a fine not exceeding €2,000 or imprisonment for a term not exceeding 12 months or both, or

(b) on conviction on indictment to a fine or imprisonment for a term not exceeding 10 years or both.

Explanatory Notes:

1. Head 3106 codifies the offence of threatening to kill or cause serious harm, as provided for in section 5 of the 1997 Act. The content of the offence may be broken down as follows:

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A.	*Conduct:* Any act. AND
Intention/Knowledge/Recklessness. AND	*Circumstance:* Conduct is of a threatening nature, to kill or cause serious harm, to the recipient of threat or a third person.
Ulterior Intention: intention to cause the other to believe that threat will be carried out.	N/A.

2. The name of the offence has been changed from "Threats to kill or cause serious harm" to "Threatening to kill or cause serious harm". The new formulation would appear to be a more elegant description of the offence.

3. Subhead (1) has been slightly reformatted in order to delineate more clearly the elements of the offence.

4. Section 5 of the 1997 Act requires the defendant to intend the other person to *believe* that the defendant's threat will be carried out. It is worth noting that the "sister offence" to section 5 in the context of the Criminal Damage Act 1991, namely section 3 (threatening to damage property – see Head 5104) requires the defendant to intend the other person to *fear* the threat will be carried out. Arguably, section 3 of the 1991 Act effectively provides for a lower culpability threshold than section 5 of the 1997 Act, if we take the view that it is possible to intend to put someone in *fear* of something happening, without intending to cause him to *believe* that it will. If this reasoning is correct, the resultant disparity is difficult to justify: why should an offence of threatening to kill require a higher

threshold of culpability than the offence of threatening to damage property, particularly when both offences carry the same maximum penalty of 10 years imprisonment?

5. Given the similarity between these offences, there would appear to be a good case for introducing harmonious terminology in the interests of consistency. The present Head should, arguably, be brought into line with Head 5104, with the concept of "fear" replacing "belief". Policy makers may wish to address this disparity in terminology.

POISONING

3107.—(1) A person commits the offence of poisoning if he or she—

(a) intentionally, knowingly or recklessly administers a substance to or causes a substance to be taken by another,

(b) knows that the substance is capable of interfering substantially with the other's bodily functions, and

(c) knows that the other does not consent to what is being done.

(2) For the purposes of this Head a substance capable of inducing unconsciousness or sleep is capable of interfering substantially with bodily functions.

(3) A person guilty of an offence under this Head shall be liable—

(a) on summary conviction to a fine not exceeding €2,000 or imprisonment for a term not exceeding 12 months or both, or

(b) on conviction on indictment to a fine or imprisonment for a term not exceeding 3 years or both.

Explanatory Notes:

1. Head 3107 codifies the offence of poisoning, as provided for in section 12 of the 1997 Act. The content of the offence may be broken down as follows:

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A.	*Conduct:* Any act. AND
Intention/Knowledge/Recklessness.	*Result:* Administers a substance to or causes a substance to be taken by another. AND
Knowledge.	*Circumstance:* Substance is capable of interfering substantially with the other's bodily functions. AND
Knowledge.	*Circumstance:* The other does not consent to what is being done.

2. Subhead (1) has been split into three limbs in order to delineate more clearly the elements of the offence.

3. Arguably, the maximum penalty for the offence of poisoning is relatively low in comparison with other offences. Policy-makers may wish to consider addressing this apparent penalty disparity.

ATTACK WITH A SYRINGE OR BLOOD

3108.—(1) A person commits the offence of attack with a syringe or blood if he or she intentionally or knowingly—

(a) pierces the skin of another with a syringe,

(b) sprays, pours or puts onto another blood, or any fluid or substance resembling blood,

(c) makes a threat to pierce the skin of another with a syringe, or

(d) makes a threat to spray, pour or put onto another blood, or any fluid or substance resembling blood,

with the intention of causing the other to believe that he or she may become infected with disease as a result of the action caused or threatened, or knowing that the other is likely to be so caused to believe.

(2) A person guilty of an offence under this Head shall be liable—

(a) on summary conviction to a fine not exceeding €2,000 or imprisonment for a term not exceeding 12 months or both, or

(b) on conviction on indictment to a fine or imprisonment for a term not exceeding 10 years or both.

Explanatory Notes:

1. Head 3108 codifies the offences provided for in section 6(1) and 6(2) of the 1997 Act. The suggested name of the offence ("attack with a syringe or blood") is derived from the 1997 Act, which provides the label of "syringe, etc., attacks".

2. The content of the offence may be broken down as follows:

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A.	*Conduct:* Any act. AND
Intention/Knowledge.	*Result:* Pierces the skin of another with a syringe. OR
Intention/Knowledge.	*Result:* Sprays, pours or puts onto another blood, or any fluid or substance resembling blood. OR
Intention/Knowledge.	*Circumstance:* Conduct is of a threatening nature, to pierce the skin of another with a syringe.

	OR
Intention/Knowledge. AND	*Circumstance:* Conduct is of a threatening nature, to spray, pour or put onto another blood, or any fluid or substance resembling blood.
Ulterior Intention: defendant intends to cause that other to believe that he or she may become infected with disease as a result of the action caused or threatened.	N/A.
	OR
Knowledge.	*Circumstance:* the other is likely to be caused to believe that he or she may become infected with disease.

3. No provision has been made for the offence under section 6(3) of the 1997 Act, as this will be covered by the General Part provision on transferred fault.[179]

4. The word "injury" has been removed from the offence definition. However, unlike other references to "injury" in the 1997 Act, the word "harm" has not been used to replace it. It is clear from the terms of the 1997 Act that the offence is committed simply by piercing the skin of another with a syringe with the requisite *mens rea*; this is reflected in the present Head.

5. For similar reasons, the phrase "as a result of the injury caused or threatened" has been changed to "as a result of the action caused or threatened".

6. A fault element of intention/knowledge has been inserted to apply to the act of piercing, threatening, etc. The 1997 Act is silent as to the *mens rea* for this aspect of the offence, though it would seem reasonable to apply a minimum culpability threshold of knowledge.

7. Sections 6(1) and 6(2) of the 1997 Act refer to the existence of "a likelihood of causing that other to believe that he or she may become infected with disease". In the present Head, this has been treated as a circumstance element, with knowledge being applied as the corresponding fault element. While recklessness is the default *mens rea* for the Code generally, knowledge seems more conceptually suitable in this instance. This is due to the fact that recklessness by definition requires advertence to a risk; to attach this definition to the concept of "likelihood" would require the defendant to have adverted to the risk of the existence of a likelihood – an unnecessarily difficult conception. The redraft, by attaching knowledge to the concept of "likelihood", requires simply that the defendant must know of the likelihood, *i.e.* he must be aware of the likelihood.

[179] Also known as transferred malice.

ATTACK WITH A CONTAMINATED SYRINGE OR BLOOD

3109.—(1) A person commits the offence of attack with a contaminated syringe or blood if he or she intentionally or knowingly causes—

(a) the piercing of another's skin with a contaminated syringe, or

(b) contaminated blood or contaminated fluid to be sprayed, poured or put onto another.

(2) A person guilty of an offence under this Head shall be liable on conviction on indictment to imprisonment for life.

Explanatory Notes:

1. Head 3109 codifies the syringe/blood attack offences contained in section 6(5)(a) and 6(5)(b) of the 1997 Act. Head 3109 also effectively incorporates the offence provided for in section 8(2) of the 1997 Act (intentionally placing a contaminated syringe).

2. The content of the offence may be broken down as follows:

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A.	*Conduct:* Any act.
	AND
Intention/Knowledge.	*Result:* Causes the piercing of another's skin with a syringe.
Intention/Knowledge.	AND *Circumstance:* That syringe is a contaminated syringe.
	OR
Intention/Knowledge.	*Result:* Causes blood, or any fluid or substance resembling blood, to be sprayed, poured, or put onto another.
Intention/Knowledge.	AND *Circumstance:* That blood is contaminated blood.

3. No provision has been made for the offence under section 6(5)(c) of the 1997 Act, as this is covered by the General Part provision on transferred fault (see Head 1110).[180]

4. References to "injuring" have been removed from this offence, for the same reason as discussed in relation to the offence of attack with a syringe or blood (see above).

5. Under the terms of the 1997 Act, the section 6(5)(a) offence may be committed by piercing another with a "contaminated syringe", a term that is defined in section 1 of that Act to cover a syringe which has in it or on it "contaminated blood" *or* "contaminated fluid". However, the section 6(5)(b) offence may only be

[180] Also known as transferred malice.

committed by spraying, etc., "contaminated blood" only. Thus, there is a lacuna, insofar as section (6)(5)(b) does not extend to spraying contaminated *fluid*. The present draft addresses this lacuna in subhead (1)(b), above.

6. An issue arises as to whether a defence of consent should be available for this offence. This would cater for the scenario where, for example, two HIV positive drug addicts knowingly and consensually inject each other with a contaminated syringe. Policy-makers may wish to consider the desirability or otherwise of providing for such a defence.

PLACING OR ABANDONING A SYRINGE

3110.—(1) A person commits the offence of placing or abandoning a syringe if—

(a) he or she intentionally, knowingly or recklessly places or abandons a syringe, and

(b) he or she knows that the syringe so placed or abandoned is likely to pierce the skin of, cause a threat to, or cause alarm to, another.

(2) *Subhead (1)* does not apply to a person placing a syringe whilst administering or assisting in lawful medical, dental or veterinary procedures.

(3) In a prosecution for an offence under *subhead (1)* where it is alleged that a syringe was placed in a place being a private dwelling at which the defendant normally resides, it shall be a defence for the defendant to show that he or she did not intentionally or knowingly place the syringe in such a manner that it was likely to pierce the skin of, cause a threat to, or cause alarm to, another.

(4) A person guilty of an offence under this Head shall be liable—

(a) on summary conviction to a fine not exceeding €2,000 or imprisonment for a term not exceeding 12 months or both, or

(b) on conviction on indictment to a fine or imprisonment for a term not exceeding 7 years or both.

Explanatory Notes:

1. Head 3110 codifies the offence of placing or abandoning a syringe as provided for in section 8(1) of the 1997 Act. The content of the offence may be broken down as follows:

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A.	*Conduct:* Any act. AND
Intention/Knowledge/Recklessness.	*Result:* Places or abandons a syringe. AND
Knowledge.	*Circumstance:* Syringe is placed or abandoned in such a manner that it is likely to pierce the skin of, cause a threat to, or cause alarm to, another.

2. Subhead (1) has been split into two parts in order to distinguish more clearly the objective elements of the offence (these are detailed in the box, above).

3. As regards the applicable fault elements for this offence, the 1997 Act is silent. This notwithstanding, it would seem unlikely that strict liability was intended to

apply to such a serious offence. According to Charleton *et al*: "the size of the penalty (7 years imprisonment), the non-regulatory nature of the offence and the fact that a heavy social stigma would attach to anyone convicted of it all point to it being an offence that requires the prosecution to prove a mental element. The mental element under s 8(1) would therefore appear to be recklessness."[181] It follows that a superior court, interpreting section 8(1) of the 1997 Act, would most likely apply the presumption of *mens rea* and decide that the appropriate fault element is intention or recklessness. For the above reasons, intention/ knowledge/recklessness has been included in the part of the offence definition concerned with the *placing or abandoning* of a syringe.

4. Section 8(1) of the 1997 Act also requires that the syringe is placed or abandoned "in such a manner that it is likely to injure…or frighten another". In the present draft, knowledge has been inserted so as to attach to the circumstance element of *the syringe being placed or abandoned in such a manner that it is likely to pierce the skin of or cause alarm to another*. This is in line with the common approach taken in the present draft of attaching knowledge to the concept of "likelihood" (see Head 3108 above).

5. The references to "in any place" and "does injure another" in section 8(1) of the 1997 Act appear to be superfluous and have been removed accordingly.

6. The reference to "injury" has been removed from this offence, for the same reason as discussed in relation to the offence of attack with a syringe or blood (see above).

7. With a view to using consistent terminology, the term "frighten" has been replaced with the phrase "causing alarm".

8. Subhead (3) codifies section 8(4) of the 1997 Act, the purpose of which would appear to be to provide a defence to a defendant who has recklessly (but not intentionally) placed a syringe in his private place of residence. A reference to knowledge has been inserted so as to achieve consistency with the changes made to the offence definition in subhead (1).

9. In subhead (3) the phrase "where it is alleged that a syringe is placed" has been replaced with "where it is alleged that a syringe *was* placed" (emphasis added). This is a minor, insignificant change to the text made for purely grammatical reasons.

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[181] Charleton, McDermott and Bolger, *Criminal Law* (Butterworths, 1999), at 720.

ENDANGERMENT

3111.—(1) A person commits the offence of endangerment if he or she intentionally, knowingly or recklessly creates a substantial risk of death or serious harm to another.

(2) A person guilty of an offence under this Head shall be liable—

(a) on summary conviction to a fine not exceeding €2,000 or imprisonment for a term not exceeding 12 months or both, or

(b) on conviction on indictment, to a fine or imprisonment for a term not exceeding 7 years or both.

Explanatory Notes:

1. Head 3111 codifies the offence of endangerment, as provided for in section 13 of the 1997 Act. The content of the offence may be broken down as follows:

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A.	*Conduct:* Any act. AND
Intention/Knowledge/Recklessness.	*Result:* Creates a substantial risk of death or serious harm to another.

2. The reference to "engages in conduct" as contained in section 13 of the 1997 Act has been excluded from the present draft for two reasons. First, the notion of intentionally or recklessly engaging in conduct does not fit with the General Part fault scheme, whereby fault elements do not attach to a conduct element. Secondly, the reference is unnecessary; endangerment is essentially a result element, the focus being on the creation of risk by the defendant. It follows that the type of conduct creating that risk is irrelevant, so long as the result is caused.

3. Accordingly, in the present draft, the fault requirement of intention/ knowledge/recklessness simply attaches to the result element of creation of risk by the defendant. This approach is in line with the decision of the Supreme Court in *DPP v Cagney*,[182] in which Hardiman J. defined recklessness in the context of endangerment as "advertence by the defendant to the serious risk of death or harm".

[182] [2007] IESC 46.

ENDANGERING TRAFFIC

3112.—(1) A person commits the offence of endangering traffic if he or she intentionally or knowingly—

(a) places or throws any dangerous thing upon a railway, road, street or waterway,

(b) interferes with or throws anything at or on any conveyance used or to be used thereon, or

(c) interferes with any machinery, signal, equipment or other device for the direction or regulation of traffic thereon,

and he or she knows that, or is reckless as to whether, harm to another or damage to property may be caused thereby.

(2) In this Head—

"conveyance" means any conveyance constructed or adapted for the carriage of a person or persons or of goods by land or water;

"railway" means a railway, a tramway, or a light railway or any part of a railway, tramway or light railway;

"waterway" means any route upon water used by any conveyance.

(3) A person guilty of an offence under this Head shall be liable—

(a) on summary conviction to a fine not exceeding €2,000 or imprisonment for a term not exceeding 12 months or both, or

(b) on conviction on indictment to a fine or imprisonment for a term not exceeding 7 years or both.

Explanatory Notes:

1. Head 3112 codifies the offence of endangering traffic, as provided for in section 14 of the 1997 Act. The content of the offence may be broken down as follows:

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A.	*Conduct:* Any act. AND
Intention/Knowledge.	*Circumstance:* Places or throws any thing.
Intention/Knowledge.	AND *Circumstance:* Thing is dangerous.
Intention/Knowledge.	AND *Result:* Said placing or throwing results in thing ending up upon a railway, road, street or waterway.

	OR
Intention/Knowledge.	*Circumstance:* Throws anything at any conveyance used or to be used on a railway, road, street or waterway.
Intention/Knowledge.	OR *Circumstance:* Throws anything.
Intention/Knowledge.	AND *Result:* Said throwing results in thing ending up on any conveyance used or to be used on a railway, road, street or waterway.
	OR
Intention/Knowledge.	*Circumstance:* Interferes with any machinery, signal, equipment or other device for the direction or regulation of traffic on a railway, road, street, waterway, or any conveyance used or to be used thereon.
	AND
Knowledge/Recklessness.	*Circumstance:* Harm to another or damage to property may be caused thereby.

2. Subhead (1) has been broken into several parts in the interest of promoting clarity.

3. The reference to "obstruction" in section 14(1)(a) of the 1997 Act gives rise to uncertainty as to the constituent elements of the offence. Specifically, it is not clear from the text whether there is a causal requirement that an obstruction be caused – after all, as a matter of common sense, how can an obstruction be "thrown"? Bearing in mind the legislative antecedents[183] to section 14, it would seem reasonable to conclude that any "obstruction" should be read as synonymous with any "thing". Hence, the reference in section 14(1)(a) to "obstruction" has been replaced in the redraft with a simple reference to "thing".

4. The word "control" in section 14(1)(a) of the 1997 Act would appear to be superfluous and has been removed from the offence definition.

5. The reference to "aware" in section 14(1)(b) of the 1997 Act has been equated to the fault element of knowledge, in line with the General Part fault scheme (see Head 1108 above).

6. The word "injury" has been replaced with "harm".

7. The reference to "the person" in section 14(1)(b) has been replaced with "another": on a literal reading, the original text could be construed as "the person" referring to the defendant, whereas clearly this is not the intended meaning.

8. The term "damage" will need to be defined in due course in relation to this offence. It is envisaged that employing a definition of "damage" of general applicability across the Code would be feasible.

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183 See Offences Against the Person Act 1861, sections 32-34.

9. The reference to "public place" in section 14(1)(a) of the 1997 Act is questionable. Presumably, the purpose of an endangering traffic offence is to criminalise those who jeopardise the safety of others (or property) by interfering with certain transport infrastructure, even if the risk created is lower than that required by endangerment *simpliciter* (which requires a risk of death or serious harm). However, the scope of the offence is arguably far too broad, as it applies not only to acts committed against certain transport infrastructure but also to acts committed in a "public place", which is defined as including "any street, seashore, park, land or field, highway and any other premises or place to which at the material time the public have or are permitted to have access, whether on payment or otherwise, and includes any train, vessel, aircraft or vehicle used for the carriage of persons for reward".[184]

10. Essentially, this creates an all-encompassing endangerment offence, but one with a lower risk threshold than endangerment *simpliciter*. Under the terms of the 1997 Act, a person could conceivably commit an offence of endangering *traffic* by throwing a rock in a field. Such is the breadth of the section 14 offence that it violates the principle of fair labelling. In substance, the offence is not confined to endangering traffic; it may more accurately be described as covering a form of "public" endangerment.

11. Interestingly, the reference to "public place" was not included in the Heads of Bill pertaining to the 1997 Act but rather was added during the drafting process by the Parliamentary Draftsman. Moreover, the Heads of Bill reveal that the offence was designed to be confined to traffic on land and water, in light of representations made by the Department of Transport, Energy and Communications to the effect that unlawful acts against the safety of air traffic are adequately dealt with under the Air Navigation and Transport Act 1975 (as amended). The definition of "public place", which encompasses aircraft, therefore runs contrary to this policy intention. Finally, it is worth noting that the reference to "public place" is not included in the offence on which the section is modelled, namely clause 86 of the Draft Criminal Code for England and Wales.

12. For the reasons provided above, the reference to "public place" has been excluded from the offence definition, in order to limit its scope to endangerment arising by virtue of interference with certain transport infrastructure and to distinguish it from the offence of endangerment *simpliciter*, as provided for in Head 3111. This would amount to a clear instance of law reform, but one which it is felt is necessary to ensure a logical distinction between the offences of endangerment and endangering traffic: the law as it currently stands effectively provides for two general offences of endangerment.

13. If policy-makers felt strongly inclined to retain the reference to "public place" in this offence, it is recommended the offence be renamed along the lines of "public endangerment".

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[184] See Non-Fatal Offences against the Person Act 1997, section 1.

INTERPRETATION (CHAPTER 32)

3201.—In this Chapter—

"member of the family" in relation to a person, means the spouse, a child (including step-child), grandchild, parent, grandparent, step-parent, brother, sister, half-brother, half-sister, uncle, aunt, nephew or niece of the person or any person cohabiting or residing with him or her.

Explanatory Notes:

1. Head 3201 makes provision for the definition of "member of the family", as provided for in section 1 of the 1997 Act. It may be possible to define this term in a general interpretation section applicable to the entire Code at a later stage if the term occurs in other offence provisions.

2. The reference to an adopted child in this definition appears to be superfluous in the light of section 18(d)(ii) of the Interpretation Act 2005, which provides that any reference to a child of a person shall be read as including a child adopted by that person under the Adoption Acts or a child adopted outside the State whose adoption is recognised by virtue of the law for the time being in force in the State. The reference to "adopted child" has therefore been excluded from the present draft.

COERCION

3202.—(1) A person commits the offence of coercion if, intending to compel another to do or abstain from doing any act which that other has a lawful right to do or abstain from doing, he or she intentionally or knowingly—

(a) uses violence against that other, or a member of the family of that other,

(b) causes alarm to that other, or a member of the family of that other,

(c) causes damage to the property of that other,

(d) persistently follows that other,

(e) together with one or more persons, follows that other in a disorderly manner in or through any public place, or

(f) watches or besets the premises or other place where that other resides, works or carries on business, or happens to be, or the approach to such premises or place.

(2) For the purpose of this Head attending at or near the premises or place where a person resides, works, carries on business or happens to be, or the approach to such premises or place, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of *subhead (1)(f)*.

[(3) A person does not commit an offence under this Head if his or her acts are lawful under *section 11* of the *Industrial Relations Act 1990*.]

(4) In this Head "public place" includes any street, seashore, park, land or field, highway and any other premises or place to which at the material time the public have or are permitted to have access, whether on payment or otherwise, and includes any train, vessel, aircraft or vehicle used for the carriage of persons for reward.

(5) A person guilty of an offence under this Head shall be liable—

(a) on summary conviction to a fine not exceeding €2,000 or imprisonment for a term not exceeding 12 months or both, or

(b) on conviction on indictment to a fine or imprisonment for a term not exceeding 5 years or both.

Explanatory Notes:

1. Head 3202 codifies the offence of coercion, as provided for in section 9 of the 1997 Act. The content of the offence may be broken down as follows:

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A.	*Conduct:* Any act. AND
Intention/Knowledge.	*Circumstance:* Uses violence against the other, or a member of the family of the other.
Intention/Knowledge.	OR *Result:* Causes alarm to the other, or a member of the family of the other.
Intention/Knowledge.	OR *Result:* Causes damage to the property of the other.
Intention/Knowledge.	OR *Circumstance:* Persistently follows that other.
Intention/Knowledge.	OR *Circumstance:* Follows the other with one or more other persons in a disorderly manner in or through any public place.
Intention/Knowledge. AND	OR *Circumstance:* Watches or besets the premises or other place where the other resides, works or carries on business, or happens to be, or the approach to such premises or place.
Ulterior Intention: intention to compel another to do or abstain from doing any act which that other has a lawful right to do or abstain from doing.	N/A.

2. In the interests of employing standardised and fully defined *mens rea* terminology in the Code, in subhead (1) the fault term "with a view to" – as contained in section 9(1) of the 1997 Act – has been approximated to (ulterior) intention (see Head 1111). Judicial and academic consideration of the former is thin on the ground. In *Lyons v Wilkins*,[185] the English Court of Appeal held that the term "with a view to" imported purpose rather than motive. In the recent case of *R v Dooley*,[186] the same court was of the opinion that a person acts with a view to *x*, if *x* is at least one of his objectives.

3. Simester and Sullivan suggest that "with a view to" is a slightly broader concept than intention, in that there is no requirement for any crystallized intention to be formed by the defendant.[187] On the other hand, Glanville Williams simply treats "with a view to" as a form of intention.[188] Similarly, in his commentary on section 17 of the 1994 Act, Hanly discusses the *mens rea* requirement of the offence in terms of intention.[189]

185 (1899) 1 Ch. 255 at 270.
186 *R v Dooley* [2006] 1 WLR 775 at 779.
187 Simester and Sullivan, *Criminal Law: Theory and Doctrine* (3rd edn Hart, 2007) at 152-153.
188 Williams, *Textbook of Criminal Law*, (2nd edn Stevens, 1983) at 830.
189 Hanly, *An Introduction to Irish Criminal Law* (2nd edn Gill & Macmillan, 2006) at 361.

4. In light of the above, it would seem reasonable to conclude that while there is arguably some distinction between "with a view to" and intention, the two concepts are sufficiently similar for the former to be subsumed within the latter for the purposes of codification. Significantly, this is in line with the approach taken by the legislature in the Criminal Justice (Theft and Fraud Offences) Act 2001, where a number of offences[190] closely modelled on the English Theft Act 1968 employed intention in the place of "with a view to".

5. The words "to compel another to abstain from doing or to do any act which that other has a lawful right to do or abstain from doing" have been reordered as follows: "to compel another to do or abstain from doing any act which that other has a lawful right to do or abstain from doing". This enhances the readability of the provision.

6. In subhead (1), a fault element of intention/knowledge has been inserted to apply to paragraphs (a)-(f) therein. The 1997 Act is silent as to the *mens rea* for this aspect of the offence, though it would seem reasonable to apply a minimum culpability threshold of knowledge.

7. The reference to "lawful authority" in section 9(1) of the 1997 Act has been excluded. It is envisaged that the General Part will provide for a general defence of lawful authority/excuse.

8. An issue arises in relation to the word "wrongfully" in section 9(1) of the 1997 Act. There is persuasive authority (pertaining to section 7 of the Conspiracy and Protection of Property Act 1875, from which section 9 of the 1997 Act derives) that in order to be "wrongful", the act in question must be independently unlawful, *i.e.* tortious.[191] This raises a matter of policy: in order to restate the law in its totality, in line with the codification principle of completeness, then it is arguable that a provision should be included in the offence definition providing for the requirement that an act be independently tortious (in other words, the meaning of "wrongfully" should be spelled out). On the other hand, it is somewhat unsatisfactory to incorporate by reference into the criminal law rules pertaining to a "foreign" scheme of civil wrongs, *i.e.* tort law.

9. Accordingly, the approach taken in the present draft is to present coercion a free-standing criminal law offence. This is in all likelihood an instance of law reform, as it expands the scope of the offence to non-tortious behaviour (so long as all of the elements of the offence are satisfied). That said, the offence as redrafted is by no means overly broad; in fact, much of the conduct caught by the provision is already criminalised under existing offences, in particular assault, harassment and damaging property.

10. It is worth noting that the main purpose of the restatement of the coercion offence in section 9 of the 1997 Act was to increase the penalty level for the offence

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190 See: section 10 of the 2001 Act, modelled on section 17 of the English Theft Act 1968; section 11 of the 2001 Act, modelled on section 20 of the English Theft Act 1968.

191 See *Ward, Lock and Co. v Operative Printers' Society* (1906) 22 TLR 327; *Fowler v Kibble* [1922] 1 Ch 487; *Thomas v National Union of Mineworkers (South Wales Area)* [1985] 2 All ER 1.

contained in section 7 of the Conspiracy and Protection of Property Act 1875. There is no evidence to suggest that any consideration was given to the substance of the offence and accordingly the meaning of the term "wrongfully" was not discussed in the Department of Justice, Equality and Law Reform files.

11. In subhead (1)(a), the archaic phrase "uses violence to" (as contained in section 9(1)(a) of the 1997 Act) has been replaced with "uses violence against".

12. In subhead (1)(b), in the interests of standardising terminology, the term "intimidates" (as contained in section 9(1)(a) of the 1997 Act) has been replaced by the term "causing alarm".

13. The term "injures" in section 9(1)(b) of the 1997 Act has been excluded in the interest of using standardised, fully defined terms. It should be noted, however, that the term might be relevant to animals which are the property of a person against whom the offence is committed. This will be taken on board when a general Code definition of "damage" is considered in due course.

14. The words "from place to place" in section 9(1)(c) of the 1997 Act are superfluous and have been removed.

15. Subhead (2) reproduces the peaceful picketing exception to liability contained in section 9(2) of the 1997 Act.

16. Subhead (3) might be considered useful so as to ensure that there is no *prima facie* criminalisation of peaceful trade union activity under this offence. Unlike subhead (2), section 11 of the Industrial Relations Act 1990 only applies to trade disputes, although its scope is wider insofar as it excuses a broader range of conduct.

17. Subheads (2) and (3) could become unnecessary in due course if and when a General Part defence of lawful authority/lawful excuse has been finalised. This will be kept under review.

18. The definition of "public place" has been included in subhead (4). In the 1997 Act this definition appears in the general interpretation provision in section 1. However, given the fact that the reference to "public place" has been removed from the offence of endangering traffic (see above), coercion is the only non-fatal offence against the person to which the definition is relevant. It may ultimately be decided to have a general definition of "public place" applicable across the Code as a whole; this will be kept under review.

HARASSMENT

3203.—(1) A person commits the offence of harassment if he or she—

(a) intentionally, knowingly or recklessly, and by any means, including by use of the telephone, persistently follows, watches, pesters, besets or communicates with another, and

(b) by so doing—

(i) intentionally, knowingly or recklessly causes serious interference with the other's peace and privacy or causes alarm, distress or harm to the other, [or] [and]

(ii) causes serious interference with the other's peace and privacy or causes alarm, distress or harm to the other, and his or her acts are such that a reasonable person would realise that the acts would seriously interfere with the other's peace and privacy or cause alarm, distress or harm to the other.

(2) *Head 1106(4)* (the "read-in rule") does not apply to *subhead (1)(b)(ii)*.

(3) A person does not commit an offence under *subhead (1)* if, in relation to the acts alleged to give rise to the offence, he or she had a reasonable excuse for so acting.

(4) Where a person is guilty of an offence under *subhead (1)*, the court may, in addition to or as an alternative to any other penalty, order that the person shall not, for such period as the court may, specify, communicate by any means with the other person or that the person shall not approach within such distance as the court shall specify of the place of residence or employment of the other person.

(5) Where an order is made under *subhead (4)*, a person who intentionally, knowingly or recklessly fails to comply with the terms of that order shall be guilty of an offence.

(6) If on the evidence the court is not satisfied that the person should be convicted of an offence under *subhead (1)*, the court may nevertheless make an order under *subhead (4)* upon an application to it in that behalf if, having regard to the evidence, the court is satisfied that it is in the interests of justice so to do.

(7) A person guilty of an offence under this Head shall be liable—

(a) on summary conviction to a fine not exceeding €2,000 or imprisonment for a term not exceeding 12 months or both, or

(b) on conviction on indictment to a fine or imprisonment for a term not exceeding 7 years or both.

Explanatory Notes:

1. Head 3203 codifies the offence of harassment, as provided for in section 10 of the 1997 Act. The content of the offence may be broken down as follows:

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A.	*Conduct:* Any act. AND
Intention/Knowledge/Recklessness.	*Circumstance:* Persistently follows, watches, pesters, besets or communicates with another. AND
Intention/Knowledge/Recklessness.	*Result:* Thereby causes serious interference with the other's peace and privacy or causes alarm, distress or harm to the other. [OR] [AND]
N/A.	*Result:* Thereby causes serious interference with the other's peace and privacy or causes alarm, distress or harm to the other.
Objective Test.	AND *Circumstance:* Defendant's acts are such that a reasonable person would realise that the acts would seriously interfere with the other's peace and privacy or cause alarm, distress or harm to the other.

2. Section 10 of the 1997 Act imposes a cumulative double fault requirement: subsection (2)(a) provides for intention/recklessness and subsection (2)(b) provides for an objective "reasonable person" test. This scheme gives rise to two significant difficulties, as it does not cater for the case of the "self-deluded stalker", nor does it criminalise the harassment of sensitive victims in certain instances.

(a) The problem of the self-deluded stalker

3. Subsection (2)(a) requires that the defendant *intentionally or recklessly* seriously interferes with the victim's peace and privacy or causes alarm, distress or harm to the victim. However, the self-deluded stalker by definition does not advert to the risk of causing such a result. In fact, the self-deluded stalker believes that his conduct is appreciated by the victim. By imposing cumulative subjective and objective fault requirements, section 10 would appear to allow the self-deluded stalker to escape criminal liability. This result would appear contrary to the policy objectives of introducing the offence of harassment in the first place. The section notes pertaining to section 10 of the 1997 Act state as follows:

> "Subsection (2) defines what is harassment. It is conduct which is such that a reasonable person would realise that it would seriously interfere with the other's peace and privacy or cause alarm, distress or harm to the other."

4. This would clearly indicate that the Department's intended approach was to apply an objective test of recklessness in order to criminalise behaviour that was objectively unreasonable.

(b) The problem of harassment of a sensitive victim

5. A further problem with the 1997 Act scheme for harassment is that it fails to criminalise the intentional, knowing or reckless harassment of a particularly sensitive victim where the conduct in question does not reach the level of objective harassment. Thus, even where the defendant knows or has adverted to the fact that someone is particularly sensitive and therefore appreciates the impact his conduct may have, the standard by which the law assesses the purported harassment is with reference to the "reasonable" victim.

(c) Proposed solution

6. Accordingly, in order to overcome the shortcomings of section 10 of the 1997 Act, the present draft in subhead (1)(b) proposes alternative objective and subjective tests (the "or" option). This approach reflects the law as it stands in England and Scotland.[192] It serves to criminalise not only harassment by a self-deluded stalker that is objectively unreasonable, but also the intentional, knowing or reckless harassment of a particularly sensitive victim where the conduct in question does not reach the level of objective harassment. To adopt such a scheme would amount to a clear instance of law reform, but one which would appear to be both necessary and desirable in order to achieve the policy objectives associated with the criminalisation of harassment.

7. If, on the other hand policy-makers were strongly inclined to retain the status quo, this could be achieved by pursuing the "and" option in subhead (1)(b).

8. By including "harassment" in the definitions section, section 10 of the 1997 Act is unnecessarily problematic, insofar as it makes it difficult to identify the elements of the offence. The fault elements and objective elements ought to be housed together in the offence definition section rather than being scattered across the offence provision under different headings. In the redraft, the offence has been reformatted accordingly to allow for a clearer and more precise statement of the elements of the offence.

9. In subhead (1) the words "by so doing" have been inserted at the beginning of paragraph (b) so as to stress the necessary causal connection between paragraphs (a) and (b).

10. The purpose of subhead (2) is to exclude the applicability of the General Part "read-in rule" under Head 1106(4), thus ensuring that the culpability requirement for subhead (1)(b)(i) is purely objective.

11. Under subhead (3), "reasonable excuse" is treated as a standalone exception to liability. This approach accords better with the offence template endorsed by the

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192 See Protection from Harassment Act 1997 (UK), sections 1 and 8.

Advisory Committee; after all, "reasonable excuse" is for all intents and purposes a defence. Moreover, it ensures that the "read-in" fault element of recklessness (see Head 1106(4)) will not apply; otherwise (assuming the defence has discharged its evidential burden in raising the defence) the prosecution would have to prove not only that the defendant did not have a reasonable excuse, but that he consciously and unjustifiably disregarded a substantial risk that he was acting without a reasonable excuse. According to the present draft, under subhead (3) the prosecution would merely have to prove that the defendant did not have a reasonable excuse, whether or not he adverted to that fact.[193] It is submitted that this approach is in line with the law as it stands under the 1997 Act.

12. In subhead (5), a fault element of intention/knowledge/recklessness has been inserted in relation to failure to comply with a court order. The 1997 Act is silent as to the *mens rea* for this aspect of the offence, though it would seem reasonable to apply a minimum culpability threshold of recklessness.

13. Also in subhead (5), the wording of section 10(4) of the 1997 Act has been slightly reformatted in order to accommodate the addition of an express fault element and retain clarity.

14. It is noted that the penalty for non-compliance with a court order relating to harassment is the same as for the substantive offence (*i.e.* up to 7 years imprisonment on indictment). This would seem very high and policy-makers may wish to consider revising the penalty accordingly.

[193] See further the Texas Penal Code, which also provides for a read-in rule of recklessness with respect to circumstance elements, and adopts this approach in relation to "reasonable excuse". According to section 38.10 – which concerns the offence of bail jumping and failure to appear – "It is a defence to prosecution under this section that the actor had a reasonable excuse for his failure to appear in accordance with the terms of his release."

MAKING A DEMAND WITH MENACES

3204.—(1) A person commits the offence of making a demand with menaces if he or she makes any demand with menaces, with the intention of making a gain for himself or herself or another, or of causing loss to another.

(2) A person does not commit an offence under this Head if he or she makes a demand with menaces in the belief—

(a) that he or she has reasonable grounds for making the demand, and

(b) that the use of the menaces is a proper means of reinforcing the demand.

(3) For the purposes of this Head, the nature of the act or omission demanded shall be immaterial and it shall also be immaterial whether or not the menaces relate to action to be taken by the person making the demand.

(4) A person guilty of an offence under this Head shall be liable—

(a) on summary conviction to a fine not exceeding €2,500 or imprisonment for a term not exceeding 12 months or both, or

(b) on conviction on indictment to a fine or imprisonment for a term not exceeding 14 years or both.

Explanatory Notes:

1. Head 3204 codifies section 17 of the Criminal Justice (Public Order) Act 1994. In substance, section 17 is more an offence against the person than a public order offence and the present draft reclassifies it accordingly. The offence has been renamed "making a demand with menaces". The existing offence name – "blackmail, extortion, and demanding money with menaces" – is not an accurate reflection of the content of the offence.

2. The content of the offence may be broken down as follows:

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A.	*Conduct:* Any act. AND
Intention/Knowledge/Recklessness.	*Result:* Makes any demand. AND
Intention/Knowledge/Recklessness. AND	*Circumstance:* Demand is made with menaces.
Ulterior Intention: intention to make a gain for himself or herself or another, or to cause loss to another.	N/A.

3. In the interests of employing standardised and fully defined *mens rea* terminology in the Code, in subhead (1) the fault term "with a view to" – as contained in section 17(1) of the 1994 Act – has been approximated to ulterior intention (as defined in Head 1111), for the same reasons as outlined in relation to the offence of coercion (see above).

4. In order to achieve compliance with the offence template endorsed by the Advisory Committee, the contents of section 17(2) of the 1994 Act has been split into two separate subheads. Section 17(2)(a) appears in the form of an exception to liability in subhead (2). Section 17(2)(b) appears in the form of an interpretive provision in subhead (3).

5. The references to "unwarranted" contained in section 17 have been excluded. These references do not accord well with the offence template; moreover, they are unnecessary, their removal resulting in no net loss of substance.

MAKING AN UNLAWFUL DEMAND FOR PAYMENT OF DEBT

3205.—(1) A person commits the offence of making an unlawful demand for payment of debt if he or she makes any demand for payment of a debt and—

(a) the demands by reason of their frequency are likely to subject the debtor or a member of the family of the debtor to alarm, distress or humiliation,

(b) the person falsely represents that criminal proceedings lie for non-payment of the debt,

(c) the person falsely represents that he or she is authorised in some official capacity to enforce payment, or

(d) the person utters a document falsely represented to have an official character.

(2) Strict liability applies to *subhead (1).*

(3) A person guilty of an offence under this Head shall be liable on summary conviction to a fine not exceeding €2,000.

Explanatory Notes:

1. Head 3205 codifies section 11 of the 1997 Act. The name of the offence has been changed to "making an unlawful demand for payment of debt". The existing name for the offence – "demands for payment of debt causing alarm, etc" – is misleading, as it implies the existence of a result element (*i.e.* that alarm be caused to the victim), where no such element exists.

2. The content of this offence may be broken down as follows:

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A.	*Conduct:* Any act. AND
Strict liability.	*Circumstance:* Makes any demand for payment of a debt. AND
Strict liability.	*Circumstance:* Demands are, by reason of their frequency, likely to subject the debtor or a member of the family of the debtor to alarm, distress or humiliation. OR
Strict liability.	*Circumstance:* Falsely represents that criminal proceedings lie for non-payment of the debt. OR

Strict liability.	*Circumstance:* Falsely represents that he or she is authorised in some official capacity to enforce payment. OR
Strict liability.	*Circumstance:* Utters a document falsely represented to have an official character.

3. The term "calculated to" in section 11 of the 1997 Act merits examination. This language is derived from the English offence[194] of unlawful harassment of debtors, upon which section 11 of the 1997 Act is modelled. In this regard, it is important to note the decision of the English High Court in *Norweb Plc. v Dixon*,[195] where it was held per Dyson J, citing the cases of *McDowell v Standard Oil Co.*[196] and *Turner v Shearer*,[197] that the term "calculated to" should be equated with "likely to" rather than "intended to".

4. While this interpretation of "calculated to" might be criticised as counter-intuitive (the ordinary meaning of the term would certainly suggest something more akin to intention), the more objective standard of likelihood would seem far more appropriate for an offence which, after all, is designed as a distinct, easily prosecutable offence, essentially targeting a specific form of harassment. Intention is not suitable as the applicable fault element (it would make little sense to impose a more onerous fault requirement than for harassment *simpliciter*). Hence, in the redrafted offence provision, the term "calculated to" has been replaced with a concept of likelihood – *i.e.* the offence contains a circumstance element to the effect that the demands made by the defendant are, by reason of their frequency, *likely to* subject the debtor or a member of the family of the debtor to alarm, distress or humiliation.

5. Following Head 1106(6), subhead (2) expressly provides that this is an offence of strict liability. Such a conclusion would appear to be in line with the policy intention in enacting section 11 already referred to – *viz.* to make provision for an easily prosecutable, minor offence to deal with what is essentially a form of harassment in the debt collection context.

194 Administration of Justice Act 1970 (UK), section 40(1).
195 [1995] 1 WLR 636.
196 [1927] AC 632.
197 [1972] 1 WLR 1387.

FALSE IMPRISONMENT

3206.—(1) A person commits the offence of false imprisonment if he or she intentionally, knowingly or recklessly—

(a) takes or detains,

(b) causes to be taken or detained, or

(c) otherwise restricts the personal liberty of,

another without that other's consent.

(2) For the purposes of this Head, and without prejudice to the generality of *Head 1105 (consent)*, a person acts without the consent of another if the person obtains the other's consent by deception causing the other to believe that he or she is under legal compulsion to consent..

(3) A person guilty of an offence under this Head shall be liable—

(a) on summary conviction, to a fine not exceeding €2,000 or imprisonment for a term not exceeding 12 months or both, or

(b) on conviction on indictment, to imprisonment for life.

Explanatory Notes:

1. Head 3206 codifies the offence of false imprisonment, as provided for in section 15 of the 1997 Act. The content of the offence may be broken down as follows:

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A.	*Conduct:* Any act.
	AND
Intention/Knowledge/Recklessness.	*Result:* Takes or detains another.
Intention/Knowledge/Recklessness.	OR *Result:* Causes another to be taken or detained.
Intention/Knowledge/Recklessness.	OR *Result:* Restricts the personal liberty of another.
	AND
Intention/Knowledge/Recklessness.	*Circumstance:* The other does not consent.

2. Section 15(2) of the 1997 Act has been excluded: the issue of ineffective consent (which is one of general principle) is dealt with in Head 1105.

3. Section 15(2) of the 1997 Act contains a clause to the effect that consent obtained by "force or threat of force, or by deception causing the other to believe that he or

she is under legal compulsion to consent" is ineffective. Subhead (2) makes provision for this clause, while making it clear that this does not prejudice the applicability of the General Part rules on ineffective consent contained in Head 1105. The references to force or threat of force in section 15(2) have been excluded, as this form of ineffective consent is adequately catered for by the General Part rules.

EVIDENTIAL VALUE OF CERTAIN CERTIFICATES SIGNED BY MEDICAL PRACTITIONERS

3301.—(1) In any proceedings for an offence alleging the causing of harm or serious harm to a person, the production of a certificate purporting to be signed by a registered medical practitioner and relating to an examination of that person, shall unless the contrary is proved, be evidence of any fact thereby certified without proof of any signature thereon or that any such signature is that of such practitioner.

(2) In this Head "registered medical practitioner" means a person registered in the General Register of Medical Practitioners established under *section 26* of the *Medical Practitioners Act 1978*.

Explanatory Notes:

1. Head 3301 codifies section 25 of the 1997 Act.

2. The terms "harm" and "serious harm" are defined in Head 3001.

PART 4: THEFT, FRAUD AND RELATED OFFENCES

INTRODUCTION

1. This draft Part on Theft, Fraud and Related Offences applies the technique of codification to the Criminal Justice (Theft and Fraud Offences) Act 2001 (hereinafter "the 2001 Act").

2. Changes to the text of specific provisions are considered under the relevant Heads. At the outset, however, the following changes of general concern to the draft as a whole should be noted.

Claim of right

3. A claim of right defence is provided for in a number of property offences, most notably theft. In the words of the Law Reform Commission, "[i]t has from the earliest of times been accepted that an honest belief by the defendant that he has the right to take the item affords him a defence even where this belief is unreasonable".[198]

4. Several offences in the 2001 Act require that the defendant acts "dishonestly". The term "dishonestly" is defined in section 2 of the 2001 Act as meaning "without a claim of right made in good faith". The approach proposed in the present draft is to exclude all references to "dishonestly" from offence definitions and deal with the matter as a subhead in the individual offence provisions where the claim of right defence applies. The rationale for doing so is threefold.

5. First, it means that the "read-in" fault element of recklessness does not apply. If the reference to "dishonestly" were to be left in as part of an offence definition, the operation of the "read-in" rule would in effect require the prosecution to prove that the defendant consciously disregarded a substantial and unjustifiable risk that he was acting dishonestly – *i.e.* without a claim of right made in good faith. Such a result would corrupt the meaning of the dishonesty requirement as provided for under the 2001 Act, where no such fault element of recklessness applies.

6. Secondly, from a drafting perspective there is considerable difficulty in accommodating the word "dishonestly" within each individual offence provision in which it is relevant. This is particularly the case now that the various "gaps" in *mens rea* have been plugged. To take the example of theft, section 4 of the 2001 Act provides that "a person is guilty of theft if he or she dishonestly appropriates property without the consent of its owner…". Thus, we can deduce that in order to make out a conviction for theft the defendant must, *inter alia*, act "dishonestly" (as defined in section 2), he must appropriate property, and he must do so without the consent of the owner. However, we are not told whether the act of appropriation must be intentional, reckless or otherwise. Moreover, we are not told whether the defendant must know that the consent of the owner is absent, whether he must be reckless in that regard, etc. Head 4101 of the present draft addresses these *mens rea* gaps by providing for a fault requirement of intention/knowledge/recklessness. Thus, the redrafted definition of theft provides

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198 Law Reform Commission, *Report on the Law Relating to Dishonesty* (1992) at 27-28.

that "[a] person commits the offence of theft if he or she intentionally, knowingly or recklessly appropriates property without the consent of its owner…". It is not possible to accommodate the term "dishonestly" within this new formulation without ending up with a draft that is confusing and/or cumbersome: *viz.,* "A person commits the offence of theft if he or she intentionally, knowingly or recklessly, and dishonestly, appropriates property…".

7. Thirdly, the use of "dishonestly" in the 2001 Act as a term of art meaning "without a claim of right made in good faith" is somewhat of a misnomer. As a matter of plain English, acting dishonestly means acting in a manner that is "discreditable as being at variance with straightforward or honourable dealing, underhand".[199] Thus, it is clear that a person who acts without a claim of right made in good faith does not necessarily act dishonestly (in its ordinary meaning), and vice versa.

8. In the Law Reform Commission's 1992 *Report on the Law Relating to Dishonesty* – from which the scheme of the 2001 Act is derived – it was acknowledged that the parameters of dishonesty and the absence of a claim of right are not identical. Nonetheless, the Commission recommended a dual definitional scheme whereby the "direct" language of dishonesty was employed, notwithstanding the fact that the term "dishonestly" was to be afforded a specific legal definition to mean "without a claim of right made in good faith".[200]

9. This scheme is problematic, particularly in the context of codification, where a rational and coherent definitional scheme is of paramount importance. The English experience has taught us that dishonesty is, to a large extent, a subjective concept which is incapable of being accorded a precise legal definition.[201] With this in mind, the 2001 Act sensibly eschewed the English model and retained the concept of absence of claim of right which had prevailed under the Larceny Act 1916. Absence of claim of right is a straightforward concept; what complicates matters in the 2001 Act is the label of "dishonesty" that is applied to it. As a result, much confusion persists as to the role of dishonesty in the 2001 Act. It is submitted that the solution proposed in the present draft – which focuses on the issue of claim of right and excludes all references to "dishonestly" – would go a long way in simplifying matters, while at the same time bringing about no change in the law.

10. In the present draft, the issue of claim of right is treated as a defence, placing an evidential burden on the defendant – *i.e.* the defendant would be required to make a *prima facie* case as to the *presence* of a claim of right made in good faith before the tribunal of fact could consider the matter. At first glance, this might appear to represent a change in the law. After all, a strict reading of the 2001 Act suggests that the prosecution must prove the *absence* of a claim of right in any prosecution for a "dishonesty" offence. However, it is submitted that any resultant change in the law is purely cosmetic. The prevailing reality would appear to be that in any

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199 The Oxford English Dictionary. 2nd ed. 1989. OED Online. Oxford University Press. 4 Apr. 2000 < http://dictionary.oed.com/cgi/entry/50066037>.

200 Law Reform Commission, *Report on the Law Relating to Dishonesty* (1992) at 141-145.

201 See McAuley and McCutcheon*, Criminal Liability* (Round Hall Sweet & Maxwell, 2000) at 82-84.

trial for a "dishonesty" offence under the 2001 Act, a defendant seeking to argue that he acted with a claim of right made in good faith must discharge an evidential burden; to all intents and purposes, the matter is treated as a defence. A trial judge will not allow the jury to entertain arguments such as "I thought I had the right to take it", unless the defence can make out a *prima facie* case.

Exclusion of section 9 offence

11. Section 9 of the 2001 Act provides for the offence of unlawful use of a computer. This offence has been excluded from the present draft on classification grounds. On balance, it would seem reasonable to conclude that section 9 is better classified as a computer crime (also known as cybercrime) than as a property offence.

12. In this regard, it should be noted that a "Criminal Justice (Cybercrime and Attacks against Information Systems) Bill" is in the process of being prepared. This Bill – designed to give effect to the Council of Europe Convention on Cybercrime (2001) and the EU Council Framework Decision on attacks against information systems[202] – will introduce a number of new computer crimes to the statute book. Thus, at a future date it should be feasible to introduce into the Code a discrete Part/Chapter on computer offences (including the section 9 offence). Such an offence category can be found in a number of codified common law jurisdictions.

Exclusion of Part 6 of the 2001 Act

13. Part 6 of the 2001 Act, which is concerned with corruption offences, has been excluded on grounds of classification. These offences are not property offences; indeed, international practice recommends that such offences are better classified as "offences against public administration" or suchlike. Offence categories of this nature can be found in the criminal codes of numerous common law jurisdictions. Accordingly, it is proposed that the contents of Part 6 be earmarked for codification at a later stage to that of the inaugural instrument.

Incompleteness

14. A number of offences that do not form part of the 2001 Act appear in the present draft. Head 4301 (trespass on land), Head 4302 (entering with intent) and Head 4303 (trespass on a building) have all been "imported" from the Criminal Justice (Public Order) Act 1994 for classification reasons.

Offence consolidation

15. Section 6 (making gain or causing loss by deception) and section 7 (obtaining services by deception) of the 2001 Act have been consolidated into a single offence of "deceiving with intent" (see Head 4102 below). Section 10 (false accounting) and section 11 (suppression, etc., of documents) have been consolidated into a single offence of "fraudulent practices" (see Head 4104 below). Both instances of offence consolidation have been achieved without loss of substantive legal content.

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[202] Council Framework Decision 2005/222/JHA of 24 February 2005.

16. Section 25 (forgery) and section 27 (copying a false instrument) of the 2001 Act have been consolidated into a single offence in Head 4402. Similarly, section 26 (using a false instrument) and section 28 (using a copy of a false instrument) have been consolidated into a single offence in Head 4403. Both instances of offence consolidation have been achieved without loss of substantive legal content by amending the definition of the term "instrument" to include a "copy of any document" (see Head 4401 below).

17. The Seanad section notes for the Criminal Justice (Theft and Fraud) Offences Bill state that the purpose of the said "copying" offences was to cater for changes in technology wrought by the development of the photocopier. It goes without saying that the criminal law needs to cater for acts of forgery involving the making or use of a copy of an instrument. It is important to stress that this does not entail the conclusion that copying *offences* (and nothing less than copying offences) will suffice for this purpose. It is preferable from a codification perspective to deal with the copying problem by amending the definition of instrument to include copies thereof. This obviates the need for duplicate forgery offences dealing exclusively with the making of copies of instruments.

Exclusion of section 65

18. Section 65 of the 2001 Act (effect of Act and transitional provisions) has not been provided for in this draft on the understanding that the inaugural codifying instrument will contain its own such provisions.

ARRANGEMENT OF HEADS

PART 4

THEFT, FRAUD AND RELATED OFFENCES

CHAPTER 40

Preliminary and General

CHAPTER 41

Theft and Related Offences

CHAPTER 42

Offences Relating to Stolen Property

CHAPTER 43

Offences Relating to Trespass

4301	Trespass on land.
4302	Entering with intent.
4303	Trespass on a building.
4304	Burglary.
4305	Aggravated burglary.

CHAPTER 44

Forgery Offences

4401	Interpretation *(Chapter 44).*
4402	Forgery.
4403	Using a false instrument.
4404	Possession and aggravated possession of a false instrument.
4405	Possession and aggravated possession of materials or implements for forgery.

CHAPTER 45

Counterfeiting Offences

4501	Interpretation *(Chapter 45).*
4502	Counterfeiting currency.
4503	Passing and aggravated passing of counterfeit currency.
4504	Possession and aggravated possession of counterfeit currency.
4505	Possession and aggravated possession of materials or implements for counterfeiting.
4506	Import or export of counterfeit currency.

CHAPTER 46

Procedural, Evidential and Ancillary Provisions: Specific

CHAPTER 47

Procedural, Evidential and Ancillary Provisions: General

4710	Provision of information to juries.
4711	[Liability for offences by bodies corporate and unincorporated.]
4712	Reporting of offences.
4713	Evidence in proceedings.
4714	Jurisdiction of the District Court in certain proceedings.

INTERPRETATION (PART 4)

4001.—(1) In this Part—

"building" includes an inhabited vehicle or vessel and any other inhabited temporary or movable structure, and any such vehicle, vessel, or structure at times when the person having a habitation in it is not there as well as at times when the person is there.

"deception" has the meaning given to it by *subhead (2)*;

"document" includes—

(a) a map, plan, graph, drawing, photograph or record, or

(b) a reproduction in permanent legible form, by a computer or other means (including enlarging), of information in non-legible form;

"gain" has the meaning given to it by *subhead (3)*;

"information in non-legible form" means information which is kept (by electronic means or otherwise) on microfilm, microfiche, magnetic tape or disk or in any other non-legible form;

"loss" has the meaning given to it by *subhead (3)*

"owner", in relation to property, has the meaning given to it by *subhead (4)*;

"premises" includes a vehicle, vessel, aircraft or hovercraft or an installation in the territorial seas or in a designated area (within the meaning of the *Continental Shelf Act 1968*) or a tent, caravan or other temporary or movable structure;

"property" means money and all other property, real or personal, including things in action and other intangible property;

"record" includes any information in non-legible form which is capable of being reproduced in permanent legible form;

"stealing" means committing an offence under *Head 4101 (theft);*

"stolen property" includes property that has been unlawfully obtained otherwise than by stealing;

"theft" has the meaning given to it by *Head 4101 (theft)*;

"unlawfully obtained" means obtained in circumstances constituting an offence.

(2) For the purposes of this Part a person deceives if he or she—

(a) creates or reinforces a false impression, including a false impression as to

law, value or intention or other state of mind,

(b) prevents another person from acquiring information which would affect that person's judgement of a transaction, or

(c) fails to correct a false impression which the deceiver previously created or reinforced or which the deceiver knows to be influencing another to whom he or she stands in a fiduciary or confidential relationship.

(3) For the purposes of this Part —

(a) "gain" and "loss" are to be construed as extending only to gain or loss in money or other property, whether any such gain or loss is temporary or permanent,

(b) "gain" includes a gain by keeping what one has, as well as a gain by getting what one has not, and

(c) "loss" includes a loss by not getting what one might get, as well as a loss by parting with what one has.

(4) For the purposes of this Part —

(a) a person shall be regarded as owning property if he or she has possession [or control] of it, or has in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest);

(b) where property is subject to a trust, the persons who own it shall be regarded as including any person having a right to enforce the trust, and an intention to defeat the trust shall be regarded accordingly as an intention to deprive of the property any person having that right;

(c) where a person receives property from or on behalf of another, and is under an obligation to that other person to retain and deal with that property or its proceeds in a particular way, that other person shall be regarded (as against the first-mentioned person) as the owner of the property;

(d) where a person gets property by another's mistake and is under an obligation to make restoration (in whole or in part) of the property or its proceeds or of the value thereof, then the person entitled to restoration shall to the extent of that obligation be regarded (as against the first-mentioned person) as the owner of the property or its proceeds or an amount equivalent to its value, and an intention not to make restoration shall be regarded accordingly as an intention to deprive that person of the property, proceeds or such amount;

(e) property of a corporation sole shall be regarded as belonging to the corporation notwithstanding a vacancy in the corporation.

Explanatory Notes:

1. Head 4001 makes provision for definitions applicable to Part 4, most of which are derived from section 2 of the 2001 Act. Some of these definitions may eventually be relocated to the definitional section of the General Part if such definitions are capable of general application across the Code. Common terms such as "building", "premises" and "property" are prime candidates for the General Part interpretation section. This will be kept under review.

2. Section 2 of the 2001 Act contains the following clause: "'appropriates' has the meaning given to it by *section 4(5)*". This clause has been excluded from Head 4001 on the basis that since "appropriates" is only relevant to Head 4101 (and is defined in that Head), there is no need to make reference to it in the general interpretation section.

3. In the 2001 Act, "building" is defined in section 12 (burglary), as that is the only provision in which the term is employed. In the present draft, the term is also of relevance to the offences of entering with intent (Head 4302) and trespass on a building (4303), both of which have been imported from the Criminal Justice (Public Order) Act 1994. For this reason, "building" has been made applicable to Part 4 generally. It should be noted that the term is not defined in the 1994 Act, although it would seem perfectly reasonable to apply the 2001 Act definition to the offences in Heads 4302 and 4303. Similarly, under the present draft, the 2001 Act definitions of "property", "gain" and "loss" are now applicable to the imported offences from the 1994 Act, insofar as such terms are relevant.

4. In subhead (1), the definitions of "gain" and "loss" have been listed separately in the list in the interests of accessibility.

5. The definition of "dishonestly" contained in section 2 of the 2001 Act has been excluded from the present draft for the reasons explained in the introduction to Part 4.

6. The reference to "ownership" in section 2 of the 2001 Act has been excluded. The term "owner" is already defined in the provision and section 20(2) of the Interpretation Act 2005 renders the definition of cognate terms unnecessary.

7. In subhead (4)(a), the reference to "control" is likely to be superfluous, as it is envisaged that "possession" will be defined in the General Part in terms of control. This will be kept under review.

8. In all of the definitions contained in Head 4001, references to cognate terms have been excluded. Such references are unnecessary in light of section 20(2) of the Interpretation Act 2005, which provides that: "Where an enactment defines or otherwise interprets a word or expression, other parts of speech and grammatical forms of the word or expression have a corresponding meaning."

9. Section 2(5) of the 2001 Act has been excluded. Paragraphs (a) and (b) of section 2(5) are unnecessary in light of section 9 of the Interpretation Act 2005. It may be necessary to include in the Code a general provision along the lines of paragraph

(c) of section 2(5) [203], although this is not an issue of relevance to the present draft.

[203] Paragraph (c) provides: "A reference in this Act to any enactment shall be construed as a reference to that enactment as amended, adapted or extended, whether before or after the passing of this Act, by or under any subsequent enactment."

THEFT

4101.—(1) Subject to *subheads (6)-(10)*, a person commits the offence of theft if he or she intentionally, knowingly or recklessly appropriates property without the consent of its owner, with the intention of depriving its owner of it.

(2) For the purposes of this Head, and without prejudice to the generality of *Head 1105 (consent)*, consent is ineffective if it is obtained by deception or intimidation.

(3) A person does not commit an offence under this Head if—

(a) the person acts with a claim of right made in good faith,

(b) the person believes that he or she has the owner's consent, or would have the owner's consent if the owner knew of the appropriation of the property and the circumstances in which it was appropriated, or

(c) except where the property came to the person as trustee or personal representative, he or she appropriates the property in the belief that the owner cannot be discovered by taking reasonable steps.

(4)

(a) This subhead applies to a person who in the course of business holds property in trust for, or on behalf of, more than one owner.

(b) Where a person to whom this subhead applies appropriates some of the property so held to his or her own use or benefit, the person shall, for the purposes of *subhead (1)* but subject to *subhead (3)*, be deemed to have appropriated the property or, as the case may be, a sum representing it without the consent of its owner or owners.

(c) If in any proceedings against a person to whom this subhead applies for theft of some or all of the property so held by him or her it is proved that—

(i) there is a deficiency in the property or the sum representing it, and

(ii) the person has failed to provide a satisfactory explanation for the whole or any part of the deficiency,

it shall be presumed, until the contrary is proved, for the purpose of *subhead (1)* but subject to *subhead (3)*, that the person appropriated, without the consent of its owner or owners, the whole or part of that deficiency.

(5) If at the trial of a person for theft the court or jury, as the case may be, has to consider whether the person believed—

(a) that he or she had acted with a claim of right made in good faith,

(b) that the owner of the property concerned had consented or would have consented to its appropriation, or

(c) that the owner could not be discovered by taking reasonable steps,

the presence or absence of reasonable grounds for such a belief is a matter to which the court or jury shall have regard, in conjunction with any other relevant matters, in considering whether the person so believed.

(6) Where property or a right or interest in property is or purports to be transferred for value to a person acting in good faith, no later assumption by that person of rights which that person believes himself or herself to be acquiring shall, by reason of any defect in the transferor's title, amount to theft of the property.

(7) A person cannot steal land, or things forming part of land and severed from it by or under his or her directions, except where the person—

(a) being a trustee, personal representative or other person authorised by power of attorney or as liquidator of a company or otherwise to sell or dispose of land owned by another, appropriates the land or anything forming part of it by dealing with it in breach of the confidence reposed in him or her,

(b) not being in possession of the land, appropriates anything forming part of the land by severing it or causing it to be severed, or after it has been severed, or

(c) being in possession of the land under a tenancy or licence, appropriates the whole or part of any fixture or structure let or licensed to be used with the land.

(8) For the purposes of *subhead (7)*—

(a) "land" does not include incorporeal hereditaments,

"licence" includes an agreement for a licence,

"tenancy" means a tenancy for years or any less period and includes an agreement for such a tenancy,

and

(b) a person who after the expiration of a tenancy or licence remains in possession of land shall be treated as having possession under the tenancy or licence, and "let" and "licensed" shall be construed accordingly.

(9) A person who picks mushrooms or any other fungus growing wild on land, or who picks flowers, fruit or foliage from a plant (including any shrub or tree) growing wild on any land, does not (although not in possession of the land) steal what is picked, unless he or she does it for reward or for sale or other commercial purpose.

(10) Wild creatures, tamed or untamed, shall be regarded as property; but a person cannot steal a wild creature not tamed or ordinarily kept in captivity, or the carcass of

any such creature, unless it has been reduced into possession by or on behalf of another and possession of it has not since been lost or abandoned, or another is in course of reducing it into possession.

(11) In this Head—

"appropriates", in relation to property, means usurps or adversely interferes with the proprietary rights of the owner of the property;

"depriving" means temporarily or permanently depriving.

(12) A person guilty of an offence under this Head shall be liable on conviction on indictment to a fine or imprisonment for a term not exceeding 10 years or both.

Explanatory Notes:

1. Head 4101 codifies the offence of theft as provided for in section 4 of the 2001 Act. It also codifies the various exceptions to theft contained in section 5 of the 2001 Act. Thus, exceptions to theft have been accommodated within the same Head as the offence definition of theft rather than being left in a separate Head. This is in the interests of accessibility as well as in ensuring conformity with the offence template endorsed by the Advisory Committee.

2. The content of the offence of theft may be broken down as follows:

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A.	*Conduct:* Any act.
	AND
Intention/Knowledge/Recklessness.	*Result:* Usurps proprietary rights of owner of the property.
	OR
Intention/Knowledge/Recklessness.	*Result:* Interferes with proprietary rights of owner of the property.
Intention/Knowledge/Recklessness.	AND *Circumstance:* interference is "adverse".
	AND
Intention/Knowledge/Recklessness.	*Circumstance:* Thing appropriated is property.
	AND
Intention/Knowledge/Recklessness.	*Circumstance:* Property is owned.
	AND
Intention/Knowledge/Recklessness.	*Circumstance:* Owner does not consent.
AND	
Ulterior Intention: intention to deprive the owner of the property.	N/A.

3. The word "and" in section 4(1) of the 2001 Act has been excluded on the grounds that it is superfluous.

4. The term "dishonestly" in section 4(1) of the 2001 Act has been excluded for the reasons explained in the introduction to Part 4. For the same reasons, the reference to "dishonestly" in section 4(4) of the 2001 Act has also been excluded, and replaced with a reference to a "claim of right made in good faith" (see subhead (5)(a) above). Subhead (3)(a) provides for the claim of right defence.

5. A fault element of intention/knowledge/recklessness has been inserted to apply in relation to appropriation, absence of consent, etc. The 2001 Act is silent as to the *mens rea* for this aspect of the offence, though it would seem reasonable to apply a minimum culpability threshold of recklessness.

6. Section 4(2) of the 2001 Act contains a clause to the effect that consent obtained by "deception or intimidation" is ineffective. Subhead (2) makes provision for this clause, while making it clear that this does not prejudice the applicability of the General Part rules on ineffective consent. It is considered necessary to retain the references to "deception and intimidation", as these terms have a special meaning in the context of theft.

7. The phrase in section 4(2) of the 2001 Act "For the purposes of this *section* a person does not appropriate property without the consent of its owner if" is replaced in subhead (3) of the present draft with "A person does not commit an offence under this Head if". This is in the interests of compliance with the offence template.

8. In subhead (3)(c), the brackets (as contained in section 4(2)(b) of the 2001 Act) have been excluded and a comma inserted after the word "representative".

9. Section 5(3)(a) of the 2001 Act defines three terms, namely "land", "tenancy" and "licence". However, contrary to standard drafting practice, these definitions do not appear in alphabetical order. This has been corrected in subhead (8)(a).

10. As a matter of good codification practice it is desirable to avoid scatter by including all relevant offence elements within the substantive definition of an offence. For example, in the case of harassment a decision was taken to incorporate the definition of "harasses" (as contained in section 10(2) of the Non-Fatal Offences against the Person Act 1997) into the core offence definition. In the case of theft, a similar argument could be made for incorporating the subhead (6) definition of "appropriates" into subhead (1), so as to avoid scatter of offence elements. However, attempts to do so produced an offence definition that was cumbersome and difficult to read. Hence, it seems reasonable to depart from standard practice and define "appropriates" in a separate subhead to the offence definition.

DECEIVING WITH INTENT

4102.—(1) A person commits the offence of deceiving with intent if he or she intentionally, knowingly or recklessly—

(a) induces another by any deception to do or refrain from doing an act, or

(b) obtains services from another by any deception,

with the intention of making a gain for himself or herself or another, or of causing loss to another.

(2) A person does not commit an offence under this Head if he or she acts with a claim of right made in good faith.

(3) For the purposes of this Head a person obtains services from another where the other is induced to confer a benefit on some person by doing some act, or causing or permitting some act to be done, on the understanding that the benefit has been or will be paid for.

(4) Without prejudice to the generality of *subhead (3)* a person obtains services where the other is induced to make a loan, or to cause or permit a loan to be made, on the understanding that any payment (whether by way of interest or otherwise) will be or has been made in respect of the loan.

(5) A person guilty of an offence under this Head shall be liable on conviction on indictment to a fine or imprisonment for a term not exceeding 5 years or both.

Explanatory Notes:

1. Head 4102 consolidates and codifies sections 6 and 7 of the 2001 Act. There is substantial overlap between the section 6 offence (making gain or causing loss by deception) and the section 7 offence (obtaining services by deception); in particular, the *mens rea* and penalties are identical. Thus, it makes good sense from a codification perspective to merge the two offences in the interests of minimising offence proliferation. This has been achieved with no net loss in terms of substantive law. The consolidated offence has been named "deceiving with intent". An alternative offence name could be "fraudulent deception".

2. The content of the offence may be broken down as follows:

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A.	*Conduct:* Any act. AND
Intention/Knowledge/Recklessness.	*Result:* Induces another to do or refrain from doing an act.
Intention/Knowledge/Recklessness.	AND *Circumstance:* Induces by any deception OR

Intention/Knowledge/Recklessness. Intention/Knowledge/Recklessness. AND Ulterior Intention: intention of making a gain for himself or another, or of causing loss to another.	*Result:* Obtains services from another. AND *Circumstance:* Services are obtained by any deception. N/A.

3. The reference to "dishonestly" has been removed from the offence definition, for the reasons explained in the introduction to Part 4. Subhead (2) provides for the claim of right defence.

4. A fault element of intention/knowledge/recklessness has been inserted to apply in relation to inducing, obtaining of services, deception, etc. The 2001 Act is silent as to the *mens rea* for this aspect of the offence, though it would seem reasonable to apply a minimum culpability threshold of recklessness.

MAKING OFF WITHOUT PAYMENT

4103.—(1) A person commits the offence of making off without payment if he or she—

(a) knows that payment on the spot for any goods obtained or any service done is required or expected, and

(b) makes off without having paid as required or expected, with the intention of avoiding payment on the spot.

(2) A person does not commit an offence under this Head if—

(a) he or she acts with a claim of right made in good faith, or

(b) the supply of the goods or the doing of the service is contrary to law or the service done is such that payment is not legally enforceable.

(3) A person guilty of an offence under this Head shall be liable on conviction on indictment to a fine not exceeding €4,000 or imprisonment for a term not exceeding 2 years or both.

Explanatory Notes:

1. Head 4103 codifies the offence of making off without payment, as provided for in section 8 of the 2001 Act.

2. The content of the offence may be broken down as follows:

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A.	*Conduct:* Any act. AND
Knowledge.	*Circumstance:* payment on the spot for any goods obtained or any service done is required or expected. AND
Intention/Knowledge/Recklessness. AND	*Result:* makes off without having paid as required or expected.
Ulterior Intention: intention of avoiding payment on the spot.	N/A.

3. The offence definition in subhead (1) has been split into two separate paragraphs in the interests of clarity and readability.

4. The reference to "dishonestly" has been removed from the offence definition, for the reasons explained in the introduction to Part 4. Subhead (2)(a) provides for the claim of right defence.

5. In subhead (1)(b), the word "and" – as contained in section 8(1) of the 2001 Act – has been excluded as it would appear to be superfluous. A comma has been inserted in its place, in the interests of readability.

6. The provisions contained in section 8(3)-(6) of the 2001 Act concerning powers of arrest have been re-housed as adjectival law.

FRAUDULENT PRACTICE

4104.—(1) A person commits the offence of fraudulent practice if he or she intentionally, knowingly or recklessly—

(a) destroys, defaces, conceals or falsifies any account or any document made or required for any accounting purpose,

(b) fails to make or complete any account or any such document,

(c) in furnishing information for any purpose, produces or makes use of any account, or any such document, which he or she knows is or may be misleading, false or deceptive in a material particular,

(d) destroys, defaces or conceals any valuable security, any will or other testamentary document or any original document of or belonging to, or filed or deposited in, any court or any government department or office, or

(e) by any deception procures the execution of a valuable security,

with the intention of making a gain for himself or herself or another, or of causing loss to another.

(2) A person does not commit an offence under this Head if he or she acts with a claim of right made in good faith.

(3) For the purposes of this Head a person shall be treated as falsifying an account or other document if he or she—

(a) makes or concurs in making therein an entry which is or may be misleading, false or deceptive in a material particular, or

(b) omits or concurs in omitting a material particular therefrom.

(4) *Subhead (1)(e)* shall apply in relation to—

(a) the making, acceptance, endorsement, alteration, cancellation or destruction in whole or in part of a valuable security, and

(b) the signing or sealing of any paper or other material in order that it may be made or converted into, or used or dealt with as, a valuable security,

as if that were the execution of a valuable security.

(5) In this Head, "valuable security" means any document—

(a) creating, transferring, surrendering or releasing any right to, in or over property,

(b) authorising the payment of money or delivery of any property, or

(c) evidencing the creation, transfer, surrender or release of any such right, the payment of money or delivery of any property or the satisfaction of any obligation.

(6) A person guilty of an offence under this Head shall be liable on conviction on indictment to a fine or imprisonment for a term not exceeding 10 years or both.

Explanatory Notes:

1. Head 4104 consolidates and codifies the offences contained in section 10 (false accounting) and section 11 (suppression, etc., of documents) of the 2001 Act. The fact that the fault elements and the penalties are the same for these offences means that consolidation is both straightforward and logical from a codification perspective. The new consolidated offence has been named "fraudulent practice".

2. The content of the offence may be broken down as follows:

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A.	*Conduct:* Any act.
	AND
Intention/Knowledge/Recklessness.	*Result:* destroys, defaces, conceals or falsifies any account or any document.
Intention/Knowledge/Recklessness.	AND *Circumstance:* document is made or required for any accounting purpose.
	OR
Intention/Knowledge/Recklessness.	*Result:* fails to make or complete any account or any such document.
	OR
Intention/Knowledge/Recklessness.	*Result:* furnishes information
Intention/Knowledge/Recklessness.	AND *Result:* produces, or makes use of any account, or any such document.
Knowledge.	AND *Circumstance:* account or document is or may be misleading, false or deceptive in a material particular.
	OR
Intention/Knowledge/Recklessness.	*Result:* destroys, defaces or conceals.
Intention/Knowledge/Recklessness.	AND *Circumstance:* destruction, defacement or concealment is of any valuable security, any will or other testamentary document or any original document of or belonging to, or filed or deposited in, any court or any government department or office.

Intention/Knowledge/Recklessness. AND Ulterior Intention: intention of making a gain for himself or another, or of causing loss to another.	OR *Result:* by any deception procures the execution of a valuable security. N/A.

3. The reference to "dishonestly" has been removed from the offence definition, for the reasons explained in the introduction to Part 4. Subhead (2) provides for the claim of right defence.

4. Where the 2001 Act is silent as to the *mens rea* running to circumstance or result elements in the offence definition, a fault element of intention/knowledge/ recklessness has been applied.

5. In subhead (1)(c) a comma has been inserted after the word "purpose", in the interests of enhancing readability.

6. Also in subhead (1)(c), the words "to his or her knowledge" (as contained in section 10(1)(c) of the 2001 Act) have been replaced with "he or she knows". This is in the interests of consistent terminology.

ROBBERY

4105.—(1) A person commits the offence of robbery if he or she steals, and immediately before or at the time of doing so, and in order to do so, intentionally, knowingly or recklessly—

(a) uses force on any person, or

(b) puts or seeks to put any person in fear of being then and there subjected to force.

(2) A person guilty of an offence under this Head shall be liable on conviction on indictment to imprisonment for life.

Explanatory Notes:

1. Head 4105 codifies the offence of robbery as provided for in section 14 of the 2001 Act.

2. The content of the offence may be broken down as follows (the shaded area of the box represents the elements of the offence of theft, which is incorporated by reference):

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A.	*Conduct:* Any act.
	AND
Intention/Knowledge/Recklessness.	*Result:* Usurps proprietary rights of owner of the property.
	OR
Intention/Knowledge/Recklessness.	*Result:* Interferes with proprietary rights of owner of the property.
Intention/Knowledge/Recklessness.	AND *Circumstance:* interference is "adverse".
	AND
Intention/Knowledge/Recklessness.	*Circumstance:* Thing appropriated is property.
	AND
Intention/Knowledge/Recklessness.	*Circumstance:* Property is owned.
	AND
Intention/Knowledge/Recklessness.	*Circumstance:* Owner does not consent.
AND	
Ulterior Intention: intention to deprive the owner of the property.	N/A.

AND	
Intention/Knowledge/Recklessness.	*Circumstance:* Force is used or threatened immediately before or at the time of theft, and in order to effect the theft.
	AND
Intention/Knowledge/Recklessness.	*Result:* Uses force on any person.
	OR
Intention/Knowledge/Recklessness.	*Result:* Puts any person in fear of being then and there subjected to force.
	OR
Intention/Knowledge/Recklessness.	*Circumstance:* Seeks to put any person in fear of being then and there subjected to force.

3. The offence definition in subhead (1) has been split into a number of paragraphs in the interests of clarity and readability.

4. In subhead (1), a fault element of intention/knowledge/recklessness has been inserted to apply in relation to the use of force, etc. The 2001 Act is silent as to the *mens rea* for this aspect of the offence, though it would seem reasonable to apply a minimum culpability threshold of recklessness.

5. In the interests of consistency and having fully defined terms, it would seem sensible to make the definition of "force"[204] contained in Head 3102 (assault) applicable to Head 4105, where it would appear to be equally as relevant. Indeed, the term "force" may be a suitable candidate for inclusion in the General Part interpretation section, applicable to the Code as a whole. This will be kept under review.

[204] "force includes—

(a) application of heat, light, electric current, noise or any other form of energy; and

(b) application of matter in solid, liquid or gaseous form."

POSSESSION OF CERTAIN ARTICLES

4106.—(1) A person commits the offence of possession of certain articles if—

(a) he or she, when not at his or her place of residence, is in possession of any article, with the intention that it be used in the course of, or in connection with, the commission of an offence under—

(i) *Head 3204 (making demands with menaces),*

(ii) *Head 4101 (theft)*,

(iii) *Head 4102 (deceiving with intent)*,

(iv) *Head 4105 (robbery)*,

(v) *Head 4304 (burglary)*, or

(vi) s*ection 112 (taking a vehicle without lawful authority)* of the *Road Traffic Act 1961*,

or

(b) he or she is in possession of any article made or adapted for use in the course of, or in connection with, the commission of an offence referred to in *subparagraphs (i)* to *(vi)* of *paragraph (a)*, and he or she knows or is reckless as to whether the article is so made or adapted.

(2) A person does not commit an offence under *subhead (1)(a)* if he or she can prove that at the time of the alleged offence the article concerned was not in his or her possession for a purpose specified in that subhead.

(3) A person does not commit an offence under *subhead (1)(b)* if—

(a) in relation to the acts alleged to give rise to the offence, he or she had a reasonable excuse for so acting, or

(b) he or she can prove that the article concerned was not made or adapted for use in the course of or in connection with the commission of an offence referred to in *subparagraphs (i)* to *(vi)* of *paragraph (a)* of *subhead (1).*

(4) Where a person is convicted of an offence under this Head, the court may order that any article for the possession of which he or she was so convicted shall be forfeited and either destroyed or disposed of in such manner as the court may determine.

(5) An order under *subhead (4)* shall not take effect until the ordinary time for instituting an appeal against the conviction or order concerned has expired or, where such an appeal is instituted, until it or any further appeal is finally decided or abandoned or the ordinary time for instituting any further appeal has expired.

(6) A person guilty of an offence under this Head shall be liable on conviction on indictment to a fine or imprisonment for a term not exceeding 5 years or both.

Explanatory Notes:

1. Head 4106 codifies section 15 of the 2001 Act, as amended by section 47 of the Criminal Justice Act 2007 and section 49 of the Criminal Justice (Miscellaneous Provisions) Act 2009. Submissions as to the suitability of this offence name and alternative suggestions would be welcome.

2. The content of the offence may be broken down as follows:

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A. Knowledge. Intention/Knowledge/Recklessness. AND Ulterior Intention: intention that the article be used in the course of or in connection with an offence as specified.	*Conduct:* Possesses. AND *Circumstance:* Possession is of any article. AND *Circumstance:* Possession occurs where defendant is not at his or her place of residence. N/A.
OR	
N/A. Knowledge/Recklessness.	*Conduct:* Possesses. AND *Circumstance:* Possession is of any article made or adapted for use in the course of, or in connection with, the commission of an offence as specified.

3. Also in subhead (1)(a), a comma has been inserted after the word "article" in the interests of clarity and readability.

4. Also in subhead (1)(a), the words "with the commission of" have been inserted in the interests of consistency with subhead (1)(b). The absence of these words would appear to have been a drafting oversight in the original text of the 2001 Act. Commas have been inserted into subhead (1)(a) for the same reason.

5. In subparagraphs (i)–(vi) of subhead (1)(a), section references have been added for *all* listed offences in the interests of clarity.

6. In subhead (1)(b) a fault element of knowledge/recklessness has been made applicable to the circumstance element of the article possessed being made or adapted for use in the course of, or in connection with, the commission of a specified offence. The 2001 Act is silent as to the *mens rea* for this aspect of the offence, though it would seem reasonable to apply a minimum culpability requirement of recklessness.

7. The reference to "lawful authority" in section 15(1A) of the 2001 Act has been excluded. It is envisaged that the General Part will provide for a general defence of lawful authority/excuse.

8. Subhead (2) provides for the defence contained in section 15(2) of the 2001 Act. The wording has been slightly altered in the interests of achieving consistency with the standard offence template.

9. Under subhead (3)(a), "reasonable excuse" is treated as a standalone exception to liability. This approach accords better with the offence template endorsed by the Advisory Committee; after all, "reasonable excuse" is for all intents and purposes a defence. Moreover, it ensures that the "read-in" fault element of recklessness will not apply; otherwise (assuming the defence has discharged its evidential burden in raising the defence) the prosecution would have to prove not only that the defendant did not have a reasonable excuse, but that he consciously disregarded a substantial and unjustifiable risk that he was acting without a reasonable excuse. According to the present draft, under subhead (3) the prosecution would merely have to prove that the defendant did not have a reasonable excuse, whether or not he adverted to that fact.[205] It is submitted that this approach is in line with the law as it stands under the 2001 Act.

10. Subhead (3)(b) provides for the defence contained in section 15(2A) of the 2001 Act. The wording has been slightly altered in the interests of achieving consistency with the standard offence template.

[205] See further the Texas Penal Code, which also provides for a read-in rule of recklessness with respect to circumstance elements, and adopts this approach in relation to "reasonable excuse". According to section 38.10 – which concerns the offence of bail jumping and failure to appear - it is a defence to prosecution under this section "that the actor had a reasonable excuse for his failure to appear in accordance with the terms of his release."

INTERPRETATION (CHAPTER 42)

4201.—(1) In this Chapter "principal offender", for the purposes of *Heads 4203* and *4204*, means the person who has stolen or otherwise unlawfully obtained the property alleged to have been handled or possessed.

(2) This Chapter is without prejudice to *section 31* (as substituted by *section 21* of the *Criminal Justice (Theft and Fraud Offences) Act 2001*) of the *Criminal Justice Act 1994*.

Explanatory Notes:

1. Head 4201 codifies section 16 of the 2001 Act.

2. Section 16(2), which provides for a definition of recklessness, has been excluded on the grounds that recklessness is defined along very similar lines in the draft General Part (see Head 1109) and made applicable to the Code as a whole. There would appear to be no compelling justification for retaining a distinct definition of recklessness for the offences of handling stolen property and possession of stolen property.

SCOPE OF OFFENCES RELATING TO STOLEN PROPERTY

4202.—(1) The provisions of this Chapter relating to property which has been stolen apply—

(a) whether the stealing occurred before or after the commencement of this Act, and

[(b) to stealing outside the State if the stealing constituted an offence where and at the time when the property was stolen, and references to stolen property shall be construed accordingly].

(2) For the purposes of those provisions references to stolen property include, in addition to the property originally stolen and parts of it (whether in their original state or not)—

(a) any property which directly or indirectly represents, or has at any time represented, the stolen property in the hands of the person who stole the property as being the proceeds of any disposal or realisation of the whole or part of the stolen property or of property so representing the stolen property, and

(b) any property which directly or indirectly represents, or has at any time represented, the stolen property in the hands of a handler or possessor of the stolen property or any part of it as being the proceeds of any disposal or realisation of the whole or part of the stolen property handled or possessed by him or her or of property so representing it.

(3) However, property shall not be regarded as having continued to be stolen property after it has been restored to the person from whom it was stolen or to other lawful possession or custody, or after that person and any other person claiming through him or her have otherwise ceased, as regards that property, to have any right to restitution in respect of the stealing.

Explanatory Notes:

1. Head 4202 codifies section 20 of the 2001 Act.

2. How jurisdiction clauses such as subhead (1)(b) are to be accommodated within the Code remains to be determined. A consistent approach to jurisdiction clauses would be desirable. The matter will be kept under review. For now subhead (1)(b) has been left in brackets.

POSSESSION OF STOLEN PROPERTY

4203.—(1) A person commits the offence of possession of stolen property if (otherwise than in the course of the stealing) he or she possesses stolen property, knowing that the property was stolen or being reckless as to whether it was stolen.

(2) In *subhead (1)*, strict liability applies to the circumstance element that the defendant is acting otherwise than in the course of the stealing.

(3) Where a person has in his or her possession stolen property in such circumstances (including purchase of the property at a price below its market value) that it is reasonable to conclude that the person either knew that the property was stolen or was reckless as to whether it was stolen, he or she shall be taken for the purposes of this Head to have so known or to have been so reckless, unless the court or the jury, as the case may be, is satisfied having regard to all the evidence that there is a reasonable doubt as to whether he or she so knew or was so reckless.

(4) A person to whom this Head applies may be tried and convicted whether the principal offender has or has not been previously convicted or is or is not amenable to justice.

(5) A person guilty of an offence under this Head shall be liable on conviction on indictment to a fine or imprisonment for a term not exceeding 5 years or both, but shall not be liable to a higher fine or longer term of imprisonment than that which applies to the principal offence.

Explanatory Notes:

1. Head 4203 codifies section 18 of the 2001 Act.

2. The content of the offence may be broken down as follows:

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A.	*Conduct:* Possesses (any property). AND
Knowledge/Recklessness.	*Circumstance:* Property was stolen property. AND
Strict liability.	*Circumstance:* Defendant was acting otherwise than in the course of the stealing.

3. The structure of the offence definition has been reconfigured to some degree, in the interests of clarity and readability.

4. The reference to "without lawful authority or excuse" in section 18(1) of the 2001 Act has been excluded. It is envisaged that the General Part will provide for a general defence of lawful authority/excuse.

5. Subhead (2) has been inserted so as to make it clear that no fault element applies in relation to the requirement that the defendant was acting otherwise than in the course of the stealing. Absent this provision the General Part read-in rule would apply, thus requiring the prosecution to prove that the defendant was reckless as to whether he was acting "otherwise than in the course of the stealing" – this would be an absurd result, as it is completely unrealistic to suppose a person would lend his mind to such a thought.

HANDLING STOLEN PROPERTY

4204.—(1) A person commits the offence of handling stolen property if (otherwise than in the course of the stealing) he or she intentionally or knowingly—

(a) receives or arranges to receive property, or

(b) undertakes, or assists in, the retention, removal, disposal or realisation of property by or for the benefit of another person, or arranges to do so,

and the property is stolen property, and he or she knows that the property was stolen or is reckless as to whether it was stolen.

(2) In *subhead (1)*, strict liability applies to the circumstance element that the defendant is acting otherwise than in the course of the stealing.

(3) A person does not commit an offence under this Head if he or she acts with a claim of right made in good faith.

(4) Where a person—

(a) receives or arranges to receive property, or

(b) undertakes, or assists in, the retention, removal, disposal or realisation of property by or for the benefit of another person, or arranges to do so,

in such circumstances that it is reasonable to conclude that the person either knew that the property was stolen or was reckless as to whether it was stolen, he or she shall be taken for the purposes of this Head to have so known or to have been so reckless, unless the court or the jury, as the case may be, is satisfied having regard to all the evidence that there is a reasonable doubt as to whether he or she so knew or was so reckless.

(5) A person to whom this Head applies may be tried and convicted whether the principal offender has or has not been previously convicted or is or is not amenable to justice.

(6) A person guilty of an offence under this Head shall be liable on conviction on indictment to a fine or imprisonment for a term not exceeding 10 years or both, but shall not be liable to a higher fine or longer term of imprisonment than that which applies to the principal offence.

Explanatory Notes:

1. Head 4204 codifies the offence of handling stolen property, as provided for in section 17 of the 2001 Act.

2. The content of the offence may be broken down as follows:

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A.	*Conduct:* Any act.
	AND
Strict liability.	*Circumstance:* Defendant was acting otherwise than in the course of the stealing.
	AND
Knowledge/Recklessness.	*Circumstance:* Property was stolen property.
	AND
Intention/Knowledge.	*Circumstance:* Receives or arranges to receive such property.
	OR
Intention/Knowledge.	*Circumstance:* Undertakes, or assists in, the retention, removal, disposal or realisation of such property, or arranges to do so.
Intention/Knowledge.	AND *Circumstance:* Retention, removal, disposal or realisation was by or for the benefit of another person.

3. The structure of the offence definition has been reconfigured to some degree, in the interests of clarity and readability.

4. The reference to "dishonestly" has been removed from the offence definition, for the reasons explained in the introduction to Part 4. Subhead (3) provides for the claim of right defence.

5. In subhead (1), a fault element of intention/knowledge has been inserted to apply in relation to receiving or arranging to receive property, etc. The 2001 Act is silent as to the *mens rea* for this aspect of the offence, though it would seem reasonable to apply a minimum culpability threshold of knowledge. After all, the *actus reus* of this offence overlaps to a large degree with the concept of possession and, as a matter of criminal law theory, knowledge is recognised as the standard fault requirement for possession-type offences. A useful authority in this regard is *People (Attorney General) v Nugent and Byrne*[206]. Here the Court of Criminal Appeal quashed a conviction for receiving stolen goods on the grounds that there was no evidence that the defendant had any knowledge of the existence of the goods in question.

6. Subhead (2) has been inserted so as to make it clear that no fault element applies in relation to the requirement that the defendant was acting otherwise than in the course of the stealing. Absent this provision the General Part read-in rule would apply, thus requiring the prosecution to prove that the defendant was reckless as to whether he was acting "otherwise than in the course of the stealing" – this would be an absurd result, as it is completely unrealistic to suppose a person would lend his mind to such a thought.

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206 [1964] 98 ILTR 139. See further *R v Cavendish* [1961] 2 All ER 856.

TRESPASS ON LAND

4301.—(1) A person commits the offence of trespass on land if he or she—

(a) intentionally, knowingly or recklessly—

(i) enters and occupies any land, or

(ii) brings onto or places on any land any object,

without the duly given consent of the owner, and

(b) such entry or occupation or the bringing onto or placing on the land of such object is likely to—

(i) substantially damage the land,

(ii) substantially and prejudicially affect any amenity in respect of the land,

(iii) prevent persons entitled to use the land or any amenity in respect of the land from making reasonable use of the land or amenity,

(iv) otherwise render the land or any amenity in respect of the land, or the lawful use of the land or any amenity in respect of the land, unsanitary or unsafe, or

(v) substantially interfere with the land, any amenity in respect of the land, the lawful use of the land or any amenity in respect of the land.

(2) *Head 1106(4)* (the "read-in rule") does not apply to *subhead (1)(b)*.

(3) In any proceedings for an offence under this Head it shall be presumed until the contrary is shown that consent under this Head was not given.

(4) In this Head—

"consent duly given" means consent given by—

(a) in the case of lands referred to in *subhead (5)(a)*, the relevant statutory body,

(b) in the case of lands referred to in *subhead (5)(b)*, the relevant trustees, and

(c) in any other case, the owner concerned;

"local authority" means a county council, a city council or a town council for the purposes of the *Local Government Act 2001*;

"object" includes any temporary dwelling (within the meaning of *section 69* of the *Roads Act 1993*) and an animal of any kind or description;

"owner" means—

(a) in relation to land, the person lawfully entitled—

(i) to possession, and

(ii) to the immediate use and enjoyment,

of the land as the owner, lessee, tenant or otherwise, or any person acting on behalf of that person;

(b) in relation to land referred to in *paragraph (a)* or *(b)* of *subhead (5)*, the relevant statutory body or trustees, as the case may be;

"statutory body" means—

(a) a Minister of the Government,

(b) the Commissioners of Public Works in Ireland,

(c) a local authority,

(d) a harbour authority within the meaning of the *Harbours Act 1946*, or a company established pursuant to *section 7* of the *Harbours Act 1996*,

(e) the Health Service Executive,

(f) a vocational education committee within the meaning of the *Vocational Education Acts 1930 to 1999*,

(g) any other body established—

(i) by or under any enactment (other than the *Companies Acts*), or

(ii) under the *Companies Acts*, in pursuance of powers conferred by or under another enactment,

and financed wholly or partly by means of moneys provided, or loans made or guaranteed, by a Minister of the Government or the issue of shares held by or on behalf of a Minister of the Government, and subsidiary of any such body.

(5) In this Head a reference to land includes—

(a) land provided or maintained by a statutory body primarily for the amenity or recreation of the public or any class of persons (including any park, open space, car park, playing field or other space provided for recreational,

community or conservation purposes) or is land within the curtilage of any public building,

(b) land held by trustees for the benefit of the public or any class of the public, and

(c) land covered by water.

(6) This Head does not apply to any public road within the meaning of the *Roads Act 1993*.

(7) This Head is without prejudice to any other enactment (including any other provision of this Act) or any rule of law.

(8) A person guilty of an offence under this Head shall be liable on summary conviction to a fine not exceeding €4,000 or imprisonment for a term not exceeding one month or both.

Explanatory Notes:

1. Head 4301 codifies the offence contained in section 19C of the Criminal Justice (Public Order) Act 1994, as inserted by section 24 of the Housing (Miscellaneous Provisions) Act 2002. In substance, section 19C is more a property offence than a public order offence and the present draft reclassifies it accordingly. The offence is concerned with certain acts involving trespass to land. As such, it would seem logical to house it alongside the other offences protecting against this harm: entering with intent, trespass on a building, burglary, etc.

2. The title afforded to section 19C of the 1994 Act – "entry on and occupation of land or bringing onto or placing an object on land without consent" – seems unnecessarily elaborate. For this reason, in the present draft the offence has been titled simply "trespass on land". Although the term "trespass" does not expressly form part of the offence definition, it is submitted that using the term in the offence name nonetheless provides an accurate description of the provision's content. The suggested offence name also accords well with the Head 4303 offence name (trespass on a building).

3. The content of the offence may be broken down as follows:

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A.	*Conduct:* Any act.
AND	
Intention/Knowledge/Recklessness. Intention/Knowledge/Recklessness.	*Result:* Entry and occupation. AND *Circumstance:* Entry and occupation pertains to any land. OR

Intention/Knowledge/Recklessness. Intention/Knowledge/Recklessness.	*Result:* Brings onto or places on. AND *Circumstance:* Bringing/placing pertains to any object on any land.
AND	
Intention/Knowledge/Recklessness.	*Circumstance:* Absence of duly given consent of the owner.
AND	
Objective Test.	*Circumstance:* Entry/occupation/placing is likely to (*i*) substantially damage the land, (*ii*) substantially and prejudicially affect any amenity in respect of the land, (*iii*) prevent persons entitled to use the land or any amenity in respect of the land from making reasonable use of the land or amenity, (*iv*) otherwise render the land or any amenity in respect of the land, or the lawful use of the land or any amenity in respect of the land, unsanitary or unsafe, or (*v*) substantially interfere with the land, any amenity in respect of the land, the lawful use of the land or any amenity in respect of the land.

4. The structure of the offence provision has been slightly reconfigured in order to achieve compliance with the standard offence template.

5. In subhead (1)(a), a fault element of intention/knowledge/recklessness has been inserted to apply in relation to entering, occupying, placing etc. without the owner's consent. The 1994 Act is silent as to the *mens rea* for this aspect of the offence, though it would seem reasonable to apply a minimum culpability threshold of recklessness.

6. In subhead (1)(b), the word "or" has been added to the end of paragraph (b)(iv).

7. The purpose of subhead (2) is to exclude the applicability of the General Part "read-in" rule, thus ensuring that the culpability requirement for subhead (1)(b) is purely objective. This would appear to be in line with the policy intention, particularly when one considers the relatively minor nature of the offence.

8. Subheads (3) and (8) are derived from section 19G of the 1994 Act.

9. Subheads (4) and (5) contain interpretation provisions applicable to Head 4301. These are derived from section 19A of the 1994 Act.

10. In subhead (4), the clause "except where the context otherwise requires" (as contained in section 19A of the 1994 Act) has been excluded. Such a clause would appear to be superfluous in light of section 20 of the Interpretation Act 2005.

11. Also in subhead (4), in paragraph (e) of the definition of "statutory body", the reference to "a health board" has been replaced with a reference to "the Health Service Executive". This change is necessary in light of the Health Act 2004. For

the same reason, the definition of “health board” contained in section 19A of the 1994 Act has been excluded.

12. Also in subhead (4), in paragraph (g) of the definition of “statutory body”, the words “1963-2001” after the references to the Companies Acts have been removed. Under section 21(2) of the Interpretation Act 2005, in an enactment which comes into operation after the commencement of the 2005 Act, a word or expression to which a particular meaning, construction or effect is assigned in Part 2 of the Schedule to that Act has the meaning, construction or effect so assigned to it. “Companies Acts” is defined in Part 2 of the Schedule as meaning "the Companies Acts 1963 to 2001 and every other enactment which is to be read together with any of those Acts". Thus, it would appear that the words "1963 to 2001" can safely be removed from paragraph (g) of the definition of "statutory body".

13. Subheads (6) and (7) are derived from section 19B of the 1994 Act.

14. Section 19C(3) of the 1994 Act has been re-housed as adjectival law, as have sections 19D, 19E, 19F, 19G (insofar as it is relevant) and 19H.

ENTERING WITH INTENT

4302.—(1) A person commits the offence of entering with intent if—

(a) he or she—

(i) intentionally, knowingly or recklessly enters any building or the curtilage of any building or any part of such building or curtilage as a trespasser, or

(ii) is within the vicinity of any such building or curtilage or part of such building or curtilage with intent to trespass thereon, and

(b) the circumstances give rise to the reasonable inference that such entry or presence was with intent to commit an offence or with intent to interfere unlawfully with any property situated therein.

(2) *Head 1106(4)* (the "read-in rule") does not apply to *subhead (1)(b).*

(3) A person guilty of an offence under this Head shall be liable on summary conviction to a fine not exceeding €2,500 or imprisonment for a term not exceeding 6 months or both.

Explanatory Notes:

1. Head 4302 provides for the offence of "entering building, etc., with intent to commit an offence" as provided for in section 11 of the Criminal Justice (Public Order) Act 1994. Section 11 is essentially a lesser form of burglary; it therefore makes good sense to house it alongside the latter offence. In substance, section 11 is more a property offence than a public order offence and the present draft reclassifies it accordingly. The offence name has been simplified to "entering with intent".

2. The content of the offence may be broken down as follows:

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A.	*Conduct:* Any act.
	AND
Intention/Knowledge/Recklessness.	*Result:* Entry.
Intention/Knowledge/Recklessness.	AND *Circumstance:* Place entered is a building, curtilage of building or part thereof.
Intention/Knowledge/Recklessness.	AND *Circumstance:* Enters as trespasser.
	OR
Intention/Knowledge/Recklessness.	*Circumstance:* Is within the vicinity of building, curtilage of building or part thereof.

AND Ulterior Intention: Intention to commit an offence or unlawfully interfere with any property situated therein.	N/A.
	AND
Objective Test.	*Circumstance:* circumstances give rise to the reasonable inference that such entry or presence was with intent to commit an offence or with intent to unlawfully interfere with any property situated therein.

3. Subhead (1) has been divided into a number of segments in the interests of clarity and readability.

4. A fault element of intention/knowledge/recklessness has been inserted to apply in relation to entering any building as a trespasser, etc. The 1994 Act is silent as to the *mens rea* for this aspect of the offence, though it would seem reasonable to apply a minimum culpability threshold of recklessness. This is consistent with the decision of the English Court of Appeal in *R v Collins*[207], where in the context of burglary it was held that the defendant must be aware that his entry constituted a trespass, or at least be reckless in that regard.

5. In subhead (1)(a)(i), the words "to enter" have been replaced with "enters". This is necessary so as to accommodate the offence definition within the standard offence template. Similarly, in subhead (1)(a)(ii), the words "to be" have been replaced with "is".

6. In subhead (1)(a)(ii), the phrase "for the purpose of trespassing thereon" has been replaced with "with intent to trespass thereon". Thus, "purpose" has been approximated to intention. This is in the interests of employing standardised *mens rea* terminology.

7. In subhead (1)(b), the split infinitive "to unlawfully interfere" has been replaced with "to interfere unlawfully".

8. Also in subhead (1)(b), the term "situate" has been replaced simply with "situated". This is in the interests of employing modern, straightforward and easily comprehensible language in the Code.

9. The purpose of subhead (2) is to exclude the applicability of the General Part "read-in" rule, thus ensuring that the culpability requirement for subhead (1)(b) is purely objective. This would appear to be in line with the policy intention,[208] particularly when one considers the relatively minor nature of the offence.

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207 [1972] 2 All ER 1105.

208 See Law Reform Commission, *Report on Vagrancy and Related Offences* (1985) at 88-89.

TRESPASS ON A BUILDING

4303.—(1) A person commits the offence of trespass on a building if—

(a) he or she intentionally, knowingly or recklessly trespasses on any building or the curtilage thereof, and

(b) the trespass is committed in such a manner as causes or is likely to cause fear in another.

(2) *Head 1106(4)* (the "read-in rule") does not apply to *subhead (1)(b).*

(3) A person does not commit an offence under this Head if, in relation to the acts alleged to give rise to the offence, he or she had a reasonable excuse for so acting.

(4) A person guilty of an offence under this Head shall be liable on summary conviction to a fine not exceeding €2,500 or imprisonment for a term not exceeding 12 months or both.

Explanatory Notes:

1. Head 4303 provides for the offence of trespass on a building, as provided for in section 13 of the Criminal Justice (Public Order) Act 1994. As with section 11 of the 1994 Act (codified in Head 4302, above) section 13 is essentially a lesser form of burglary; hence it makes good sense to house it alongside the latter offence. In substance, section 13 is more a property offence than a public order offence and the present draft reclassifies it accordingly.

2. The content of the offence may be broken down as follows:

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A.	*Conduct:* Any act. AND
Intention/Knowledge/Recklessness.	*Circumstance:* Trespasses on any building or the curtilage thereof. AND
Objective Test.	*Circumstance:* Trespass is committed in such a manner as is likely to cause fear in another.
Objective Test.	OR *Result:* Causes fear in another.

3. The offence definition in subhead (1) has been split into two limbs in order to accommodate the *mens rea* requirements (see further below).

4. In subhead (1)(a), a fault element of intention/knowledge/recklessness has been inserted to apply in relation to trespassing on any building, etc. The 1994 Act is silent as to the *mens rea* for this aspect of the offence, though it would seem

reasonable to apply a minimum culpability threshold of recklessness. Again, this is consistent with the decision of the English Court of Appeal in *R v Collins*[209].

5. Also in subhead (1)(a), the words "to trespass" have been replaced with "trespasses". This is necessary so as to accommodate the offence definition within the standard offence template.

6. In subhead (1)(b), the words "another person" have been replaced simply with "another".

7. The purpose of subhead (2) is to exclude the applicability of the General Part "read-in" rule, thus ensuring that the culpability requirement for subhead (1)(b) is purely objective. This would appear to be in line with the policy intention,[210] particularly when one considers the relatively minor nature of the offence.

8. Under subhead (3), "reasonable excuse" is treated as a standalone exception to liability. This approach accords better with the offence template endorsed by the Advisory Committee; after all, "reasonable excuse" is for all intents and purposes a defence. Moreover, it ensures that the "read-in" fault element of recklessness (see Head 1109) will not apply; otherwise (assuming the defence has discharged its evidential burden in raising the defence) the prosecution would have to prove not only that the defendant did not have a reasonable excuse, but that he consciously disregarded a substantial and unjustifiable risk that he was acting without a reasonable excuse. According to the present draft, under subhead (3) the prosecution would merely have to prove that the defendant did not have a reasonable excuse, whether or not he adverted to that fact.[211] It is submitted that this approach is in line with the law as it stands under the 1994 Act.

9. Sections 13(2) and 13(3)(b) of the 1994 Act, concerning Garda powers to issue certain directions (and an ancillary offence of failure to comply with said directions), have been re-housed as adjectival law.

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209 [1972] 2 All ER 1105.

210 See Law Reform Commission, *Report on Vagrancy and Related Offences* (1985) at 88-89.

211 See further the Texas Penal Code, which also provides for a read-in rule of recklessness with respect to circumstance elements, and adopts this approach in relation to "reasonable excuse". According to section 38.10 – which concerns the offence of bail jumping and failure to appear – "It is a defence to prosecution under this section that the actor had a reasonable excuse for his failure to appear in accordance with the terms of his release."

BURGLARY

4304.—(1) A person commits the offence of burglary if he or she—

(a) intentionally, knowingly or recklessly enters any building or part of a building as a trespasser with intent to commit an arrestable offence, or

(b) having intentionally, knowingly or recklessly entered any building or part of a building as a trespasser, commits or attempts to commit any such offence therein.

(2) In this Head, "arrestable offence" means an offence for which a person of full age and not previously convicted may be punished by imprisonment for a term of five years or by a more severe penalty.

(3) A person guilty of an offence under this Head shall be liable on conviction on indictment to a fine or imprisonment for a term not exceeding 14 years or both.

Explanatory Notes:

1. Head 4304 codifies the offence of burglary as provided for in section 12 of the 2001 Act.

2. The content of the offence may be broken down as follows:

<table>
<tr><th>FAULT ELEMENT</th><th>OBJECTIVE ELEMENT</th></tr>
<tr><td>N/A.

Intention/Knowledge/Recklessness.

Intention/Knowledge/Recklessness.

Intention/Knowledge/Recklessness.</td><td>Conduct: Any act.

AND

Result: Entry.

AND

Circumstance: Place entered is a building or part of a building.

AND

Circumstance: Enters as a trespasser.</td></tr>
<tr><td colspan="2">AND</td></tr>
<tr><td>Ulterior Intention: intention to commit an arrestable offence.</td><td>N/A.</td></tr>
<tr><td colspan="2">OR</td></tr>
<tr><td>Applicable fault element(s) for commission or attempted commission of relevant arrestable offence.</td><td>Applicable objective element(s) for commission or attempted commission of relevant arrestable offence.</td></tr>
</table>

3. In subhead (1)(a) and (1)(b), a fault element of intention/knowledge/recklessness has been inserted to apply in relation to entering a building as trespasser. The 2001 Act is silent as to the *mens rea* for this aspect of the offence, though it would seem reasonable to apply a minimum culpability threshold of recklessness. This is consistent with the decision of the English Court of Appeal in *R v Collins*[212].

4. The word "and" in section 12(1)(a) of the 2001 Act has been excluded, as it would appear to be superfluous.

5. It should be recalled that Head 1106(5) of the draft General Part provides that "The read-in rule does not apply where an offence definition is incorporated by reference into the definition of another offence." This clause will need to be expanded so as to cater for the two situations that arise in subhead (1)(b) above, namely: (*i*) where the offence definition incorporates by reference an *unspecified* offence; and (*ii*) where an offence definition incorporates by reference an *attempt* to commit an unspecified offence. It will be necessary to make it clear that the read-in rule does not apply in such situations. This is a purely technical matter and will be kept under review as work on the General Part progresses.

6. The definition of "building", as contained in section 12 of the 2001 Act is provided for in Head 4001 (Interpretation (Part 4)). The rationale for this is considered further in the explanatory notes to Head 4001.

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212 [1972] 2 All ER 1105.

AGGRAVATED BURGLARY

4305.—(1) A person commits the offence of aggravated burglary if he or she commits any burglary and at the time knowingly or recklessly has with him or her any firearm or imitation firearm, any weapon of offence or any explosive.

(2) In this Head—

"burglary" has the meaning it has in *Head 4304 (burglary)*;

"explosive" means any article manufactured for the purpose of producing a practical effect by explosion, or intended by the person having it with him or her for that purpose;

"firearm" means:

(a) a lethal firearm or other lethal weapon of any description from which any shot, bullet or other missile can be discharged,

(b) an air gun (which expression includes an air rifle and an air pistol) or any other weapon incorporating a barrel from which metal or other slugs can be discharged,

(c) a crossbow, or

(d) any type of stun gun or other weapon for causing any shock or other disablement to a person by means of electricity or any other kind of energy emission;

"imitation firearm" means anything which is not a firearm but has the appearance of being one;

"weapon of offence" means:

(a) any article which has a blade or sharp point,

(b) any other article made or adapted for use for causing injury to or incapacitating a person, or intended by the person having it with him or her for such use or for threatening such use, or

(c) any weapon of whatever description designed for discharge of any noxious liquid, noxious gas or other noxious thing.

(3) A person guilty of an offence under this Head shall be liable on conviction on indictment to imprisonment for life.

Explanatory Notes:

1. Head 4305 codifies the offence of aggravated burglary as provided for in section 13 of the 2001 Act.

2. The content of the offence may be broken down as follows (the shaded area of the box represents the elements of the offence of burglary, which is incorporated by reference):

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A.	*Conduct:* Any act. AND *Result:* Entry. AND *Circumstance:* Place being entered is a building or part of a building. AND *Circumstance:* Enters as a trespasser.
AND	
Ulterior Intention: intention to commit an arrestable offence.	N/A.
OR	
Applicable fault element(s) for commission or attempted commission of relevant arrestable offence.	Applicable objective element(s) for commission or attempted commission of relevant arrestable offence.
AND	
Knowledge/recklessness.	*Circumstance:* has with him or her any firearm or imitation firearm, any weapon of offence or any explosive.

3. In subhead (1), a fault element of knowledge/recklessness has been inserted to apply in relation to the requirement that the defendant has with him or her any firearm etc. (the 2001 Act is silent as to the *mens rea* for this aspect of the offence). As a matter of criminal law theory, knowledge is recognised as the standard fault requirement for possession-type offences.[213] This notwithstanding, under the General Part fault scheme, a minimum culpability requirement of recklessness is required in order to cater for the concept of "wilful blindness" (see further the commentary to Head 1108 which defines "knowledge").

[213] See *Minister for Posts and Telegraphs v Campbell* [1966] IR 69 at 73 per Davitt P.

4. Some of the definitions contained in subhead (2) may eventually be relocated to an interpretation section of more general application, should they become relevant for other offences.

5. A definition of "burglary" has been added to subhead (2). This makes it absolutely clear that "burglary" has the meaning ascribed to it under Head 4304. The recent decision of *Minister for Justice, Equality & Law Reform v Dolny* is a good illustration of the interpretation problems that can arise if it is not made explicitly clear that an offence definition is carried over into another offence.[214]

6. In the subhead (2) definitions of "firearm" and "weapon of offence", the word "or" has been inserted after the penultimate limb of each definition.

[214] [2009] IESC 48. In *Dolny*, the Court interpreted the assault component of the offence of assault causing harm (section 3 of the Non-Fatal Offences against the Person Act 1997) with reference to the dictionary definition of "assault", rather than the definition provided by section 2 of the 1997 Act.

INTERPRETATION (CHAPTER 44)

4401.—(1) In this Chapter—

"false", in relation to an instrument, has the meaning assigned to by *subhead (2)*;

"induce", in relation to a person, has the meaning assigned to it by *subheads (4)* to *(7)*;

"instrument" means any document, whether of a formal or informal character (other than a currency note within the meaning of *Chapter 45*) and includes any—

(a) disk, tape, sound track or other device on or in which information is recorded or stored by mechanical, electronic or other means,

(b) money order,

(c) postal order,

(d) postage stamp issued or sold by An Post or any mark denoting payment of postage that is authorised by An Post to be used instead of an adhesive stamp,

(e) stamp of the Revenue Commissioners denoting any stamp duty or fee, whether it is an adhesive stamp or a stamp impressed by means of a die,

(f) licence or certificate issued by the Revenue Commissioners,

(g) cheque, including traveller's cheque, or bank draft,

(h) charge card, cheque card, credit card, debit card or any card combining two or more of the functions performed by such cards,

(i) share certificate,

(j) certified copy, issued by or on behalf of an tArd-Chláraitheoir, of an entry in any register of births, stillbirths, marriages or deaths or in the Adopted Children Register,

(k) certificate relating to such an entry,

(l) a certificate of insurance,

(m) passport or document that can be used instead of a passport,

(n) document issued by or on behalf of a Minister of the Government and permitting or authorising a person to enter or remain (whether temporarily or permanently) in the State or to enter employment therein,

(o) registration certificate issued under Article 11(1)(*e*)(i) of the Aliens Order, 1946 (S.I. No. 395 of 1946) or the *Immigration Act 2004*,

(p) public service card,

(q) ticket of admission to an event to which members of the public may be admitted on payment of a fee,

(r) copy of any document (other than a currency note within the meaning of Chapter 45);

"making", in relation to an instrument, has the meaning assigned to by *subhead (3)*;

"prejudice", in relation to a person, has the meaning assigned to it by *subheads (4)* to *(7)*;

"share certificate" means a document entitling or evidencing the title of a person to a share or interest—

(a) in any public stock, annuity, fund or debt of the Government or the State or of any government or state, including a state that forms part of another state, or

(b) in any stock, fund or debt of a body (whether corporate or unincorporated), wherever established.

(2) For the purposes of this Chapter, an instrument is false if it purports—

(a) to have been made in the form in which it is made by a person who did not in fact make it in that form,

(b) to have been made in the form in which it is made on the authority of a person who did not in fact authorise its making in that form,

(c) to have been made in the terms in which it is made by a person who did not in fact make it in those terms,

(d) to have been made in the terms in which it is made on the authority of a person who did not in fact authorise its making in those terms,

(e) to have been altered in any respect by a person who did not in fact alter it in that respect,

(f) to have been altered in any respect on the authority of a person who did not in fact authorise the alteration in that respect,

(g) to have been made or altered on a date on which, or at a place at which, or otherwise in circumstances in which, it was not in fact made or altered, or

(h) to have been made or altered by an existing person where that person did not in fact exist.

(3) For the purposes of this Chapter, a person shall be treated as making a false instrument if he or she alters an instrument so as to make it false in any respect (whether or not it is false in some other respect apart from that alteration).

(4) For the purposes of this Chapter and subject to *subheads (5)* and *(7)*, an act or omission intended to be induced shall be to a person's prejudice if, and only if, it is one which, if it occurs—

(a) will result, as respects that person—

(i) in temporary or permanent loss of property,

(ii) in deprivation of an opportunity to earn remuneration or greater remuneration, or

(iii) in deprivation of an opportunity to gain a financial advantage otherwise than by way of remuneration,

or

(b) will result in another person being given an opportunity—

(i) to earn remuneration or greater remuneration from him or her, or

(ii) to gain a financial advantage from him or her otherwise than by way of remuneration,

or

(c) will be the result of his or her having accepted any false instrument as genuine in connection with his or her performance of any duty.

(5) An act that a person has an enforceable duty to do and an omission to do an act which a person is not entitled to do shall be disregarded for the purposes of this Chapter.

(6) In this Chapter, references to inducing a person to accept a false instrument as genuine include references to inducing a machine to respond to the instrument as if it were a genuine instrument.

(7) Where *subhead (6)* applies, the act or omission intended to be induced by the machine responding to the instrument shall be treated as an act or omission to a person's prejudice.

Explanatory Notes:

1. Head 4401 provides for a number of definitions applicable to Chapter 44. These definitions are derived largely from section 24 of the 2001 Act.

2. In subhead (1), for reasons of accessibility and consistency, the definitions of "false", "making", "prejudice" and "induce" (as contained in sections 30 and 31 of the 2001 Act) have been moved to the general interpretation provision in Head 4401. Moreover, these terms have been listed separately (unlike in the 2001 Act) in the interests of accessibility.

3. In subhead (1), the wording of section 24 of the 2001 Act has been adjusted to clarify that the term "instrument" includes a "copy of any document". Because the term "instrument" as defined in the 2001 Act would appear to encompass a copy of an instrument, there would already seem to be no clear reason for retaining the offences of copying a false instrument and using a copy of a false instrument (as contained in sections 27 and 28 of the 2001 Act) as separate standalone offences. The prohibited conduct targeted by these "copying" offences is adequately catered for by the offences of forgery and using a false instrument in sections 25 and 26 of the Act. By defining the term "instrument" as including "any document of a formal or informal character…", the existing definition of the term "instrument" (in section 24) would appear to cover "a copy of an instrument". This notwithstanding, it would seem sensible to put the matter beyond doubt by amending the definition of the term "instrument" to include expressly a "copy of any document". It makes good sense from a codification perspective simply to amend the definition of "instrument" rather than having special "copying" offences which duplicate the core forgery offences.

4. It might be noted that as a result of these changes to the definition of "instrument", the offences at Head 4402 and Head 4403 will apply to false copies of instruments in addition to copies of false instruments. Under the terms of the 2001 Act it would appear that falsified copies of genuine instruments are not covered by the various offences therein. This change to the law is more conceptual than anything else, and it is submitted that no adverse consequences arise under the new scheme.

5. In light of the above, the said "copying" offences in sections 27 and 28 of the 2001 Act have not been included in this draft and their repeal is suggested upon enactment of the Code. Moreover, references to "a copy of an instrument" as contained in section 31 of the Act have been omitted from the present draft.

FORGERY

4402.—(1) A person commits the offence of forgery if he or she makes a false instrument, with the intention that it shall be used to induce another to accept it as genuine and, by reason of so accepting it, to do some act, or to make some omission, to the prejudice of that other or any other person.

(2) A person guilty of an offence under this Head shall be liable on conviction on indictment to a fine or imprisonment for a term not exceeding 10 years or both.

Explanatory Notes:

1. Head 4402 codifies section 25 of the 2001 Act.

2. The content of the offence may be broken down as follows:

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A.	*Conduct:* Any act. AND
Intention/Knowledge/Recklessness.	*Result:* Makes a false instrument. AND
Intention/Knowledge/Recklessness.	*Circumstance:* Thing being forged is an instrument. AND
Intention/Knowledge/Recklessness. AND	*Circumstance:* The instrument is false.
Ulterior Intention: intention that the false instrument shall be used to induce another to accept it as genuine and, by reason of so accepting it, to do some act, or to make some omission, to the prejudice of that other or any other person.	N/A.

3. For grammatical reasons, a comma has been inserted after the term "instrument".

USING A FALSE INSTRUMENT

4403.—(1) A person commits the offence of using a false instrument if he or she uses an instrument that is, and which he or she knows to be, a false instrument, with the intention of inducing another to accept it as genuine and, by reason of so accepting it, to do some act, or to make some omission, or to provide some service, to the prejudice of that other or any other person.

(2) A person guilty of an offence under this Head shall be liable on conviction on indictment to a fine or imprisonment for a term not exceeding 10 years or both.

Explanatory Notes:

1. Head 4403 codifies section 26 of the 2001 Act.

2. The content of the offence may be broken down as follows:

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A.	*Conduct:* Any act. AND
Intention/Knowledge/Recklessness.	*Result:* Uses a false instrument. AND
Intention/Knowledge/Recklessness.	*Circumstance:* Thing being used is an instrument. AND
Knowledge. AND	*Circumstance:* The instrument is false.
Ulterior Intention: intention that the false instrument shall be used to induce another to accept it as genuine and, by reason of so accepting it, to do some act, or to make some omission, or to provide some service to the prejudice of that other or any other person.	N/A.

3. The reference to "belief" in section 26 of the 2001 Act has been approximated to intention, in line with the General Part fault scheme (see Head 1107). No express reference to intention is made in the offence definition, however, as it is sufficient to provide for knowledge and allow intention to apply by virtue of the substitution rule in the General Part.

POSSESSION AND AGGRAVATED POSSESSION OF A FALSE INSTRUMENT

4404.—(1) A person commits the offence of possession of a false instrument if he or she knowingly or recklessly possesses a false instrument.

(2) A person commits the offence of aggravated possession of a false instrument if he or she knowingly possesses a false instrument, with the intention that it shall be used to induce another to accept it as genuine and, by reason of so accepting it, to do some act, or to make some omission, or to provide some service, to the prejudice of that other or any other person.

(3) A person guilty of an offence under this Head shall be liable on conviction on indictment to a fine or imprisonment for a term not exceeding—

(a) in the case of an offence under *subhead (1)*, 5 years, or

(b) in the case of an offence under *subhead (2)*, 10 years,

or both.

Explanatory Notes:

1. Head 4404 codifies the offences contained in section 29(1)-(2) of the 2001 Act.

2. The offence name has been changed to provide for the concept of possession, to accommodate the aggravating factors model and to ensure consistency in nomenclature with similar counterfeiting offences in Head 4504.

3. The four possession offences contained in section 29 of the 2001 Act are dealt with in two separate Heads (4404 and 4405) to enhance accessibility, ensure consistency with similar counterfeiting offences and to facilitate the application of the aggravating factors model.

4. Head 4404 provides for two related offences, one of which is more serious than the other, owing to the higher level of culpability. For this reason, it is appropriate to label the more serious offence as an aggravated form of the basic offence. Applying the aggravating factors model enhances accessibility and conceptual consistency across the Code.

5. The content of the subhead (1) offence may be broken down as follows:

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A. Knowledge/Recklessness.	*Conduct:* Possesses (anything). AND *Circumstance:* Possession is of a false instrument.

6. The content of the subhead (2) offence may be broken down as follows:

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A. Knowledge. AND Ulterior Intention: intention that the false instrument shall be used to induce another to accept it as genuine and, by reason of so accepting it, to do some act, or to make some omission, or to provide some service to the prejudice of that other or any other person.	*Conduct:* Possesses (anything). AND *Circumstance:* Possession is of a false instrument. N/A.

7. Whereas section 29 of the 2001 Act lists the more serious offence first, Head 4404 reverses the order, putting the less serious offence first. This is in the interests of consistency; when applying the aggravated factors model, it is standard practice to list the offences in order of increasing gravity.

8. The reference to "without lawful authority or excuse" in section 29(2) of the 2001 Act has been excluded. It is envisaged that the General Part will provide for a general defence of lawful authority/excuse.

9. References to "custody or control" have been omitted in favour of the term "possesses", so as to achieve coherence with the definition of "possession" in Head 1001.

10. The references to "belief" in section 29(1)-(2) of the 2001 Act have been approximated to intention, in line with the General Part fault scheme (see Head 1107). No express reference to intention is made in the offence definition, however, as it is sufficient to provide for knowledge and allow intention to apply by virtue of the substitution rule in the General Part.

11. In subhead (1), a fault element of recklessness has been inserted in relation to the circumstance element of the thing possessed being a false instrument. This is necessary to cater for the concept of "wilful blindness" (see further the commentary to Head 1108 which defines "knowledge"). In subhead (2) knowledge has been left as the applicable *mens rea*; no issue of wilful blindness would appear to arise in relation to this offence, given the presence of the ulterior intention requirement.

12. In subhead (2), a comma has been inserted after the term "instrument" for grammatical reasons.

POSSESSION AND AGGRAVATED POSSESSION OF MATERIALS OR IMPLEMENTS FOR FORGERY

4405.—(1) A person commits the offence of possession of materials or implements for forgery if he or she possesses any machine, stamp, implement, paper or other material which is or has been, and which he or she knows is or has been, specially designed or adapted for the making of an instrument, with the intention that it would be used in the making of a false instrument.

(2) A person commits the offence of aggravated possession of materials or implements for forgery if he or she makes or possesses any machine, stamp, implement, paper or other material which is or has been, and which he or she knows is or has been, specially designed or adapted for the making of an instrument, with the intention—

(a) that it would be used in the making of a false instrument, and

(b) that the instrument would be used to induce another to accept it as genuine and, by reason of so accepting it, to do some act, or to make some omission, or to provide some service, to the prejudice of that other or any other person.

(3) In *subheads (1)* and *(2)*, references to a machine include references to any disk, tape, drive or other device on or in which a program is recorded or stored by mechanical, electronic or other means, being a program designed or adapted to enable an instrument to be made or to assist in its making, and those subheads shall apply and have effect accordingly.

(4) A person guilty of an offence under this Head shall be liable on conviction on indictment to a fine or imprisonment for a term not exceeding—

(a) in the case of an offence under *subhead (1)*, 5 years, or

(b) in the case of an offence under *subhead (2)*, 10 years,

or both.

Explanatory Notes:

1. Head 4405 codifies the offences contained in section 29(3)-(5) of the 2001 Act. The offences contained therein have been named as “possession of materials or implements for forgery” and “aggravated possession of materials or implements for forgery”. The 2001 Act does not provide any specific name for either of these offences.

2. The aggravated factors model has been applied to Head 4405 in a similar manner, and for the same reasons, as set out in Head 4404.

3. The content of the subhead (1) offence may be broken down as follows:

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A.	*Conduct:* Possesses (anything).
	AND
Knowledge.	*Circumstance:* Possession is of any machine, stamp, implement, paper or material which is or has been specially designed or adapted for the making of an instrument.
Ulterior Intention: intention that the thing possessed would be used in the making of a false instrument.	N/A

4. The content of the subhead (2) offence may be broken down as follows:

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A.	*Conduct:* Any act.
Knowledge.	AND *Result:* Makes any machine, stamp, implement, paper or material which is or has been specially designed or adapted for the making of an instrument.
	OR
N/A.	*Conduct:* Possesses (anything).
Knowledge.	AND *Circumstance:* Possession is of any machine, stamp, implement, paper or material which is or has been specially designed or adapted for the making of an instrument.
AND	
Ulterior Intention: intention that thing made or possessed would be used for the making of a false instrument, and that the false instrument would be used to induce another to accept it as genuine and, by reason of so accepting it, to do some act, or to make some omission, or to provide some service to the prejudice of that other or any other person.	N/A.

5. The reference to "without lawful authority or excuse" in section 29(4) of the 2001 Act has been excluded. It is envisaged that the General Part will provide for a general defence of lawful authority/excuse.

6. References to "custody or control" have been omitted in favour of the term "possesses", so as to achieve coherence with the definition of "possession" in Head 1001.

7. In subheads (1) and (2) the words “and which he or she knows is or has been” have been inserted to make it clear that it is an element of the offence that the machine, etc must be specially designed or adapted for the making of an instrument.

8. Also in subheads (1) and (2) a comma has been inserted after the term “instrument” for grammatical reasons.

INTERPRETATION (CHAPTER 45)

4501.—(1) In this Chapter—

"currency note" and "coin" mean, respectively, a currency note and coin lawfully issued or customarily used as money in the State or in any other state or a territorial unit within it and include a note denominated in euro and a coin denominated in euro or in cent and also any note or coin that has not been lawfully issued but which would, on being so issued, be a currency note or coin within the above meaning; and

"lawfully issued" means issued—

(a) by or under the authority of the European Central Bank,

(b) by the Central Bank of Ireland or the Minister for Finance, or

(c) by a body in a state (other than the State) or a territorial unit within it that is authorised under the law of that state or territorial unit to issue currency notes or coins.

(2) For the purposes of this Chapter, a thing is a counterfeit of a currency note or coin—

(a) if it is not a currency note or coin but resembles a currency note or coin (whether on one side only or on both) to such an extent that it is reasonably capable of passing for a currency note or coin of that description, or

(b) if it is a currency note or coin which has been so altered that it is reasonably capable of passing for a note or coin of some other description.

(3) For the purposes of this Chapter—

(a) a thing consisting of or containing a representation of one side only of a currency note, with or without the addition of other material, is capable of being a counterfeit of such a currency note, and

(b) a thing consisting—

(i) of parts of two or more currency notes, or

(ii) of parts of a currency note, or of parts of two or more currency notes, with the addition of other material,

is capable of being a counterfeit of a currency note.

Explanatory Notes:

1. Head 4501 codifies section 32 of the 2001 Act and provides for a number of definitions applicable to Chapter 45.

COUNTERFEITING CURRENCY

4502.—(1) A person commits the offence of counterfeiting currency if he or she intentionally, knowingly or recklessly makes a counterfeit of a currency note or coin, with the intention that he or she or another shall pass or tender it as genuine.

(2) A person guilty of an offence under this Head shall be liable on conviction on indictment to a fine or imprisonment for a term not exceeding 10 years or both.

Explanatory Notes:

1. Head 4502 codifies section 33 of the 2001 Act. In the interests of brevity, the name of the offence has been shortened from "counterfeiting currency notes and coins" to simply "counterfeiting currency".

2. The content of the offence may be broken down as follows:

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A.	*Conduct:* Any act. AND
Intention/Knowledge/Recklessness.	*Result:* Makes a counterfeit. AND
Intention/Knowledge/Recklessness. AND	*Circumstance:* Counterfeit is of a currency note or coin.
Ulterior Intention: intention that he or she or another shall pass or tender counterfeit as genuine.	N/A.

3. A fault element of intention/knowledge/recklessness has been inserted to apply in relation to the making of a counterfeit currency note or coin. The 2001 Act is silent as to the *mens rea* for this aspect of the offence, though it would seem reasonable to apply a minimum culpability threshold of recklessness.

PASSING AND AGGRAVATED PASSING OF COUNTERFEIT CURRENCY

4503.—(1) A person commits the offence of passing counterfeit currency if he or she intentionally, knowingly or recklessly delivers to another anything that is, and which he or she knows to be, a counterfeit of a currency note or coin.

(2) A person commits the offence of aggravated passing of counterfeit currency if he or she intentionally, knowingly or recklessly—

(a) passes or tenders as genuine any thing that is, and which he or she knows to be, a counterfeit of a currency note or coin, or

(b) delivers any such thing to another with the intention that that or any other person shall pass or tender it as genuine.

(3) A person guilty of an offence under this Head shall be liable on conviction on indictment to a fine or imprisonment for a term not exceeding—

(a) in the case of an offence under *subhead (1)*, 5 years, or

(b) in the case of an offence under *subhead (2)*, 10 years,

or both.

Explanatory Notes:

1. Head 4503 codifies section 34 of the 2001 Act. In the interests of brevity, the offence has been named "passing counterfeit currency" and "aggravating passing of counterfeit currency". The original title of "passing, etc. counterfeit currency notes and coins" is somewhat cumbersome and not conducive to applying the aggravating factors model.

2. Head 4503 provides for two related offences, one of which is more serious than the other. For this reason, it is appropriate to label one offence as an aggravated form of another. This application of the aggravating factors model enhances accessibility and conceptual consistency in the Code.

3. The content of the subhead (1) offence may be broken down as follows:

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A.	*Conduct:* Any act. AND
Intention/Knowledge/Recklessness.	*Result:* Delivers (anything) to another person. AND
Knowledge.	*Circumstance:* Thing delivered is a counterfeit of a currency note or coin.

4. The content of the subhead (2) offence may be broken down as follows:

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A. Intention/Knowledge/Recklessness. Intention/Knowledge.	*Conduct:* Any act. AND *Result:* Passes or tenders as genuine (anything). AND *Circumstance:* Thing passed or tendered as genuine is a counterfeit of a currency note or coin.
OR	
N/A. Intention/Knowledge/Recklessness. Intention/Knowledge. AND Ulterior Intention: intention that that person shall pass or tender thing as genuine.	*Conduct:* Any act. AND *Result:* Delivers (anything) to another person. AND *Circumstance:* Thing delivered is a counterfeit of a currency note or coin. N/A.

5. Whereas section 34 of the 2001 Act lists the more serious offence first, Head 4503 reverses the order, putting the less serious offence first. This is in the interests of consistency; when applying the aggravating factors model, it is standard practice to list the offences in order of increasing gravity.

6. The reference to "lawful authority or excuse" in section 34(2) of the 2001 Act has been excluded. It is envisaged that the General Part will provide for a general defence of lawful authority/excuse.

7. In subhead (1), a fault element of intention/knowledge/recklessness has been inserted to apply in relation to the act of delivering, etc. The 2001 Act is silent as to the *mens rea* for this aspect of the offence, though it would seem reasonable to apply a minimum culpability threshold of recklessness.

8. In subhead (2), a fault element of intention/knowledge/recklessness has been inserted to apply in relation to the act of passing, delivering, etc. The 2001 Act is silent as to the *mens rea* for this aspect of the offence, though it would seem reasonable to apply a minimum culpability threshold of recklessness.

9. The references to "belief" in section 34 of the 2001 Act have been approximated to intention, in line with the General Part fault scheme (see Head 1107). No express reference to intention is made in the offence definition, however, as it is

sufficient to provide for knowledge and allow intention to apply by virtue of the substitution rule in the General Part.

POSSESSION AND AGGRAVATED PASSING OF COUNTERFEIT CURRENCY

4504.—(1) A person commits the offence of possession of counterfeit currency if he or she knowingly or recklessly possesses a counterfeit of a currency note or coin.

(2) A person commits the offence of aggravated possession of counterfeit currency if he or she knowingly or recklessly possesses a counterfeit of a currency note or coin, intending either—

(a) to pass or tender it as genuine, or

(b) to deliver it to another with the intention that that other or any other person shall pass or tender it as genuine.

(3) A person guilty of an offence under this Head shall be liable on conviction on indictment to a fine or imprisonment for a term not exceeding—

(a) in the case of an offence under *subhead (1)*, 5 years, or

(b) in the case of an offence under *subhead (2)*, 10 years,

or both.

Explanatory Notes:

1. Head 4504 codifies section 35 of the 2001 Act. The offences contained therein have been renamed as "possession of counterfeit currency" and "aggravated possession of counterfeit currency". The original name of the offence ("custody or control of counterfeit currency notes and coins") is no longer appropriate now that the references to "custody or control" have been omitted from the offence definitions in favour of references to "possession" (see further below).

2. Head 4504 provides for two related offences, one of which is more serious than the other. For this reason, it is appropriate to label one offence as an aggravated form of another. This application of the aggravating factors model enhances accessibility and conceptual consistency in the Code.

3. The content of the subhead (1) offence may be broken down as follows:

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A.	*Conduct:* Possesses (anything). AND
Knowledge/Recklessness.	*Circumstance:* Thing possessed is a counterfeit of a currency note or coin.

4. The content of the subhead (2) offence may be broken down as follows:

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A.	*Conduct:* Possesses (anything).
	AND
Knowledge/Recklessness.	*Circumstance:* Thing possessed is a counterfeit of a currency note or coin.
AND	
Ulterior Intention: intention to pass or tender thing as genuine or to deliver it to another with the intention that that person or any other person shall pass or tender it as genuine.	N/A.

5. Whereas section 35 of the 2001 Act lists the more serious offence first, Head 4504 reverses the order, putting the less serious offence first. This is in the interests of consistency; when applying the aggravating factors model, it is standard practice to list the offences in order of increasing gravity.

6. References to "custody or control" have been omitted in favour of the term "possesses", so as to achieve coherence with the definition of "possession" in Head 1001.

7. The references to "belief" in section 35 of the 2001 Act have been approximated to intention, in line with the General Part fault scheme (see Head 1107). No express reference to intention is made in the offence definition, however, as it is sufficient to provide for knowledge and allow intention to apply by virtue of the substitution rule in the General Part.

8. In subheads (1) and (2), a fault element of recklessness has been inserted so as to cater for the concept of "wilful blindness" in relation to the circumstance element that the thing possessed is a counterfeit of a currency note or coin (see further the commentary to Head 1108 which defines "knowledge").

9. The reference to "lawful authority or excuse" in section 35(2) of the 2001 Act has been excluded. It is envisaged that the General Part will provide for a general defence of lawful authority/excuse.

POSSESSION AND AGGRAVATED POSSESSION OF MATERIALS OR IMPLEMENTS FOR COUNTERFEITING

4505.—(1) A person commits the offence of possession of materials or implements for counterfeiting if he or she possesses any thing that is or has been specially designed or adapted for making a counterfeit of a currency note or coin, and he or she knows or is reckless as to whether it has been so designed or adapted.

(2) A person commits the offence of aggravated possession of materials or implements for counterfeiting if he or she makes or possesses any thing with the intention of using it, or permitting any other to use it, to make a counterfeit of a currency note or coin to be passed or tendered as genuine.

(3) A person guilty of an offence under this Head shall be liable on conviction on indictment to a fine or imprisonment for a term not exceeding—

(a) in the case of an offence under *subhead (1)*, 5 years, or

(b) in the case of an offence under *subhead (2)*, 10 years,

or both.

Explanatory Notes:

1. Head 4505 codifies section 36 of the 2001 Act. The offences contained therein have been named as "possession of materials or implements for counterfeiting" and "aggravated possession of materials or implements for counterfeiting". The 2001 Act does not provide any specific name for either of these offences.

2. Head 4505 provides for two related offences, one of which is more serious than the other. For this reason, it is appropriate to label one offence as an aggravated form of another. This application of the aggravating factors model enhances accessibility and conceptual consistency in the Code.

3. The content of the subhead (1) offence may be broken down as follows:

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A. Knowledge/Recklessness.	*Conduct:* Possesses (anything). AND *Circumstance:* Thing possessed is or has been specifically designed or adapted for making a counterfeit of a currency note or coin.

4. The content of the subhead (2) offence may be broken down as follows:

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A.	*Conduct:* Possesses (anything). OR

N/A. Recklessness. AND Ulterior Intention: intention to use, or permit another to use, that thing, to make a counterfeit of a currency note or coin to be passed or tendered as genuine.	*Conduct:* Any act. AND *Result:* Makes (anything). N/A.

5. Whereas section 36 of the 2001 Act lists the more serious offence first, Head 4505 reverses the order, putting the less serious offence first. This is in the interests of consistency; when applying the aggravating factors model, it is standard practice to list the offences in order of increasing gravity.

6. References to "custody or control" have been omitted in favour of the term "possesses", so as to achieve coherence with the definition of "possession" in Head 1001.

7. The reference to "lawful authority or excuse" in section 36(2) of the 2001 Act has been excluded. It is envisaged that the General Part will provide for a general defence of lawful authority/excuse.

8. In subhead (1), a fault element of knowledge/recklessness has been inserted to apply to the circumstance element of the offence, *i.e.* that the thing possessed is or has been specifically designed or adapted for making a counterfeit of a currency note or coin. The 2001 Act is silent as to the *mens rea* for this aspect of the offence, though it would seem reasonable to apply a minimum culpability threshold of recklessness.

9. In subhead (2) the term "with the intention of" is used in place of the original language of the 2001 Act, *viz.* "intends". This change is necessary in order to comply with the linguistic marker laid down in the General Part for signalling ulterior intention (see Head 1111). Moreover, the elaborate ulterior intention in section 36 ("intends to use, or to permit any other person to use, for the purpose of making a counterfeit of a currency note or coin with the intention that it be passed or tendered as genuine") has been simplified in the interests of readability to read as follows: "with the intention of using it, or permitting any other to use it, to make a counterfeit of a currency note or coin to be passed or tendered as genuine".

IMPORT OR EXPORT OF COUNTERFEIT CURRENCY

4506.—(1) A person commits the offence of import or export of counterfeit currency if he or she intentionally, knowingly or recklessly imports into, or exports from, a member state of the European Union a counterfeit of a currency note or coin.

(2) A person guilty of an offence under this Head shall be liable on conviction on indictment to a fine or imprisonment for a term not exceeding 10 years or both.

Explanatory Notes:

1. Head 4506 codifies section 37 of the 2001 Act. In the interests of accuracy, as well as consistency with other offence names in this Chapter, the offence name has been changed from "import and export of counterfeits" to "import or export of counterfeit currency".

2. The content of the offence may be broken down as follows:

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A.	*Conduct:* Any act.
	AND
Intention/Knowledge/Recklessness.	*Result:* Imports.
Intention/Knowledge/Recklessness.	OR *Result:* Exports.
	AND
Intention/Knowledge/Recklessness.	*Circumstance:* Import is into/export is from, a member state of the European Union.
	AND
Intention/Knowledge/Recklessness.	*Circumstance:* Import/export is of a counterfeit of a currency note or coin.

3. The reference to "lawful authority or excuse" in section 37 of the 2001 Act has been excluded. It is envisaged that the General Part will provide for a general defence of lawful authority/excuse.

4. Intention/knowledge/recklessness has been inserted as the applicable fault element for this offence. Section 37 of the 2001 Act is silent as to the *mens rea* requirement, though it would seem reasonable to apply a minimum culpability threshold of recklessness.

CERTAIN OFFENCES COMMITTED OUTSIDE THE STATE

[**4507.**—(1) A person who outside the State does any act referred to in *Head 4502, 4503, 4504, 4505 or 4506* is guilty of an offence and liable on conviction on indictment to the penalty specified for such an act in the section concerned.

(2) *Head XX [codifying section 46 of the 2001 Act]* shall apply in relation to an offence under *subhead (1)* as it applies in relation to an offence under *Head XY [codifying section 45 of the 2001 Act]*.]

Explanatory Notes:

1. Head 4507 codifies section 38 of the 2001 Act.

2. How jurisdiction clauses such as the above are to be accommodated within the Code remains to be determined. A consistent approach to jurisdiction clauses would be desirable. The matter will be kept under review. For now Head 4507 has been left in brackets.

INTERPRETATION (CHAPTER 46)

4601.—(1) In this Chapter—

"Commissioner" means the Commissioner of the Garda Síochána;

"object" has the meaning given to it by *Head 4301(4) (trespass on land)*;

"owner" has the meaning given to it by *Head 4301(4) (trespass on land)*;

"statutory body" has the meaning given to it by *Head 4301(4) (trespass on land).*

(2) In this Head a reference to land shall be interpreted in accordance with *Head 4301(5) (trespass on land).*

[(3) This Chapter is without prejudice to any other enactment (including any other provision of this Act) or any rule of law.]

Explanatory Notes:

1. Head 4601 provides for a number of definitions applicable to Chapter 46. The definitions are derived from sections 19A and 19B of the 1994 Act, as inserted by section 24 of the Housing (Miscellaneous Provisions) Act 2002.

2. Submissions are welcome as to whether it is necessary to retain subhead (3), which is derived from section 19B of the 1994 Act.

WITHHOLDING INFORMATION REGARDING STOLEN PROPERTY

4602.—(1) Where a member of the Garda Síochána—

(a) has reasonable grounds for believing that an offence consisting of stealing property or of handling stolen property has been committed,

(b) finds any person in possession of any property,

(c) has reasonable grounds for believing that the property referred to in *paragraph (b)* includes, or may include, property referred to in *paragraph (a)* or part of it, or the whole or any part of the proceeds of that property or part, and

(d) informs the person of his or her belief, the member may require the person to give an account of how he or she came by the property.

(2) The person commits an offence if he or she—

(a) intentionally, knowingly or recklessly fails or refuses to give such account, or

(b) knowingly gives information that is false or misleading.

(3) Subsection (2) shall not have effect unless the person when required to give the account was told in ordinary language by the member of the Garda Síochána what the effect of the failure or refusal might be.

(4) A person does not commit an offence under this Head if, in relation to the acts alleged to give rise to the offence, he or she had a reasonable excuse for so acting.

(5) A person guilty of an offence under this Head shall be liable on summary conviction to a fine not exceeding €5,000 or imprisonment for a term not exceeding 12 months or both.

(6) Any information given by a person in compliance with a requirement under subsection (1) shall not be admissible in evidence against that person or his or her spouse in any criminal proceedings, other than proceedings for an offence under subsection (2).

Explanatory Notes:

1. Head 4602 codifies section 19 of the 2001 Act.

2. In subhead (2)(a), a fault element of intention/knowledge/recklessness has been inserted to apply in relation to the failure/refusal of a person to give an account. The 2001 Act is silent as to the *mens rea* for this aspect of the offence, though it would seem reasonable to apply a minimum culpability threshold of recklessness.

3. In subhead (2) generally, the wording of section 19(2) of the 2001 Act has been slightly reformatted in order to accommodate the addition of an express fault element and retain clarity.

4. Under subhead (4), "reasonable excuse" is treated as a standalone exception to liability. This approach accords better with the offence template endorsed by the Advisory Committee; after all, "reasonable excuse" is for all intents and purposes a defence. Moreover, it ensures that the "read-in" fault element of recklessness will not apply; otherwise (assuming the defence has discharged its evidential burden in raising the defence) the prosecution would have to prove not only that the defendant did not have a reasonable excuse, but that he consciously disregarded a substantial and unjustifiable risk that he was acting without a reasonable excuse. According to the present draft, under subhead (4) the prosecution would merely have to prove that the defendant did not have a reasonable excuse, whether or not he adverted to that fact. It is submitted that this approach is in line with the law as it stands under the 2001 Act.

POWERS OF ARREST RELATING TO MAKING OFF WITHOUT PAYMENT

4603.—(1) Subject to *subheads (3)* and *(4)*, any person may arrest without warrant anyone who is or whom he or she, with reasonable cause, suspects to be in the act of committing an offence under *Head 4103 (making off without payment)*.

(2) Where a member of the Garda Síochána, with reasonable cause, suspects that an offence under *Head 4103* has been committed, he or she may arrest without warrant any person whom the member, with reasonable cause, suspects to be guilty of the offence.

(3) An arrest other than by a member of the Garda Síochána may be effected by a person under *subhead (1)* only where the person, with reasonable cause, suspects that the person to be arrested by him or her would otherwise attempt to avoid, or is avoiding, arrest by a member of the Garda Síochána.

(4) A person who is arrested pursuant to this Head by a person other than a member of the Garda Síochána shall be transferred by that person into the custody of the Garda Síochána as soon as practicable.

Explanatory Notes:

1. Head 4603 codifies section 8(3)-(6) of the 2001 Act.

GARDA POWERS RELATING TO TRESPASS ON LAND

4604.—(1) Where a member of the Garda Síochána has reason to believe that a person is committing or has committed an offence under *Head 4301 (trespass on land)* the member—

(a) may demand of the person his or her name and address,

(b) may direct the person to leave the land concerned and to remove from the land any object that belongs to the person or that is under his or her control, and

(c) shall inform the person of the nature of the offence in respect of which it is suspected that person has been involved and the statutory consequences of failing to comply with a demand or direction under this subhead.

(2) Where a demand is made by a member of the Garda Síochána under *subhead (1)(a)*, a person commits an offence if he or she intentionally, knowingly or recklessly—

(a) refuses or fails to give his or her name and address when so demanded, or

(b) gives to the member a name or address that is false or misleading.

(3) Where a direction is made by a member of the Garda Síochána under *subhead (1)(b)*, a person who intentionally, knowingly or recklessly fails to comply with such a direction shall be guilty of an offence.

(4) A person guilty of an offence under this Head shall be liable on summary conviction to a fine not exceeding €4,000 or imprisonment for a term not exceeding one month or both.

Explanatory Notes:

1. Head 4604 codifies sections 19C(3) and 19D of the 1994 Act, as inserted by section 24 of the Housing (Miscellaneous Provisions) Act 2002.

2. In subheads (2) and (3), a fault element of intention/knowledge/recklessness has been inserted to apply in relation to the failure of a person to comply with a Garda direction. The 1994 Act is silent as to the *mens rea* for this aspect of the offence, though it would seem reasonable to apply a minimum culpability threshold of recklessness.

3. In subheads (2) and (3), the wording of section 19D of the 1994 Act has been slightly reformatted in order to accommodate the addition of an express fault element and retain clarity.

POWERS OF ARREST RELATING TO TRESPASS ON LAND

4605.—A member of the Garda Síochána may arrest without warrant a person—

(a) who fails or refuses to give his or her name and address when demanded under *Head 4604(1)(a)* or gives a name or address which the member has reasonable grounds for believing is false or misleading,

(b) who fails to comply with a direction given under *Head 4604(1)(b)*, or

(c) whom the member finds committing an offence under *Head 4301*.

Explanatory Notes:

1. Head 4605 codifies section 19E of the 1994 Act, as inserted by section 24 of the Housing (Miscellaneous Provisions) Act 2002.

REMOVAL, STORAGE AND DISPOSAL OF OBJECTS RELATING TO TRESPASS ON LAND

4606.—(1) Where a person fails to comply with a direction under *Head 4604(1)(b)*, a member of the Garda Síochána may remove or cause to be removed any object that the member has reason to believe was brought onto or placed on the land in contravention of *Head 4301* and may store or cause to be stored such object so removed.

(2) Where a member of the Garda Síochána is acting in the execution of his or her duty under this Head, any person who intentionally, knowingly or recklessly obstructs or impedes, [or assists a person to obstruct or impede] that member shall be guilty of an offence.

(3) A person guilty of an offence under this Head shall be liable on summary conviction to a fine not exceeding €4,000 or imprisonment for a term not exceeding one month or both.

(4) Where an object has been removed under this Head without the presence or knowledge of any person claiming to own, occupy, control or otherwise retain it, the Commissioner shall serve or cause to be served upon each such person whose name and address can be ascertained by reasonable enquiry, a notice informing the person where the object may be claimed and recovered, requiring the person to claim and recover it within one month of the date of service of the notice and informing him or her of the statutory consequences of his or her failure to do so.

(5) An object removed and stored under this Head shall be given to a person claiming possession of the object if, but only if, he or she makes a declaration in writing that he or she is the owner of the object or is authorised by its owner to claim it or is, for a specified reason, otherwise entitled to possession of it and, at the discretion of the Commissioner, the person pays the amount of any expenditure reasonably incurred in removing and storing the object.

(6) The Commissioner may dispose of, or cause to be disposed of, an object removed and stored under this Head if—

> (a) the owner of the object fails to claim it and remove it from the place where it is stored within one month of the date on which a notice under *subhead (4)* was served on him or her, or
>
> (b) the name and address of the owner of the object cannot be ascertained by reasonable enquiry.

(7) Where the Commissioner becomes entitled to dispose of or cause to be disposed of an object under *subhead (6)* and the object is, in his or her opinion, capable of being sold, the Commissioner shall be entitled to sell or cause to be sold the object for the best price reasonably obtainable and upon doing so shall pay or cause to be paid to the person who was the owner of the object at the time of its removal, where the name and address of the owner can be ascertained by reasonable enquiry, a sum equal to the

proceeds of such sale after deducting therefrom any expenditure reasonably incurred in its removal, storage and sale.

Explanatory Notes:

1. Head 4606 codifies section 19F of the 1994 Act, as inserted by section 24 of the Housing (Miscellaneous Provisions) Act 2002.

2. In subhead (2), a fault element of intention/knowledge/recklessness has been inserted to apply in relation to obstructing/impeding a Garda. The 1994 Act is silent as to the *mens rea* for this aspect of the offence, though it would seem reasonable to apply a minimum culpability threshold of recklessness.

3. Also in subhead (2), the wording of section 19F of the 1994 Act has been slightly reformatted in order to accommodate the addition of an express fault element and retain clarity.

4. Also in subhead (2), the reference to assisting another person in the commission of an offence has been bracketed for now. Such a reference may not be necessary once the General Part rules on complicity are in place. This will be kept under review.

JURISDICTION OF THE DISTRICT COURT

4607.—(1) This Head applies to *Heads 4301*, *4604* and *4606*.

(2) Notwithstanding any statutory provision or rule of law to the contrary, the jurisdiction of the District Court shall not, in summary proceedings in relation to an offence under a provision to which this Head applies, be ousted by reason solely of a question of title to land being brought into issue.

(3) Where in summary proceedings in relation to an offence under a provision to which this Head applies a question of title to land is brought into issue, the decision of a justice of the District Court in the proceedings or on the question shall not operate as an estoppel in, or a bar to, proceedings in any court in relation to the land.

Explanatory Notes:

1. Head 4607 codifies section 19H of the 1994 Act, as inserted by section 24 of the Housing (Miscellaneous Provisions) Act 2002.

GARDA POWERS RELATING TO TRESPASS ON A BUILDING

4608.—(1) Where a member of the Garda Síochána finds a person in a place to which *subhead (1)* of *Head 4303 (trespass on a building)* relates and suspects, with reasonable cause, that such person is or has been acting in a manner contrary to the provisions of that subhead, then the member may direct the person so suspected to do either or both of the following, that is to say:

(a) desist from acting in such a manner, and

(b) leave immediately the vicinity of the place concerned in a peaceable or orderly manner.

(2) Where a direction is made by a member of the Garda Síochána under *subhead (1)*, any person who intentionally, knowingly or recklessly fails to comply with the direction commits an offence.

(3) A person does not commit an offence under this Head if, in relation to the acts alleged to give rise to the offence, he or she had a reasonable excuse for so acting.

(4) A person guilty of an offence under this Head shall be liable on summary conviction to a fine not exceeding €1,000 or imprisonment for a term not exceeding 6 months or both.

Explanatory Notes:

1. Head 4608 codifies sections 13(2) and 13(3)(b) of the 1994 Act.

2. The reference to "lawful authority" in section 13(2)(b) of the 1994 Act has been excluded. It is envisaged that the General Part will provide for a general defence of lawful authority/excuse.

3. In subhead (2), a fault element of intention/knowledge/recklessness has been inserted to apply in relation to the failure of a person to comply with a Garda direction. The 1994 Act is silent as to the *mens rea* for this aspect of the offence, though it would seem reasonable to apply a minimum culpability threshold of recklessness.

4. Also in subhead (2), the wording of section 13(2)(b) of the 1994 Act has been slightly reformatted in order to accommodate the addition of an express fault element and retain clarity.

5. Under subhead (3), "reasonable excuse" is treated as a standalone exception to liability. This approach accords better with the offence template endorsed by the Advisory Committee; after all, "reasonable excuse" is for all intents and purposes a defence. Moreover, it ensures that the "read-in" fault element of recklessness (see Head 1106) will not apply; otherwise (assuming the defence has discharged its evidential burden in raising the defence) the prosecution would have to prove not only that the defendant did not have a reasonable excuse, but that he

consciously disregarded a substantial and unjustifiable risk that he was acting without a reasonable excuse. According to the present draft, under subhead (3) the prosecution would merely have to prove that the defendant did not have a reasonable excuse, whether or not he adverted to that fact. It is submitted that this approach is in line with the law as it stands under the 1994 Act.

MEASURES TO DETECT COUNTERFEITING

4609.—(1) In this Head—

"designated body" means:

(a) a body licensed to carry on banking business under the *Central Bank Act 1971*, or authorised to carry on such business under the *ACC Bank Acts 1978* to *2001*, or regulations under the *European Communities Acts 1972* to *1998*,

(b) a building society within the meaning of the *Building Societies Act 1989*,

(c) a trustee savings bank within the meaning of the *Trustee Savings Banks Acts 1989* and *2001*,

(d) An Post,

(e) a credit union within the meaning of the *Credit Union Act 1997*,

(f) a person or body authorised under the *Central Bank Act 1997*, to provide bureau de change business,

(g) a person who in the course of business provides a service of sorting and redistributing currency notes or coins,

(h) any other person or body—

(i) whose business consists of or includes the provision of services involving the acceptance, exchange, transfer or holding of money for or on behalf of other persons or bodies, and

(ii) who is designated for the purposes of this Head by regulations made by the Minister after consultation with the Minister for Finance; and

"recognised code of practice" means a code of practice drawn up for the purposes of this Head—

(a) by a designated body or class of designated bodies and approved by the Central Bank of Ireland, or

(b) by the Central Bank of Ireland for a designated body or class of such bodies.

(2) A designated body shall—

(a) withdraw from circulation any notes or coins received by it or tendered to it which it knows or suspects to be counterfeit, and

(b) transmit them as soon as possible to the Central Bank of Ireland with such information as to the time, location and circumstances of their receipt as may be available.

(3) Counterfeit or suspect currency notes or coins may be transmitted to the Garda Síochána under *subhead (2)* in accordance with a recognised code of practice.

(4) A recognised code of practice may include provision for—

(a) procedures to be followed by directors or other officers and employees of a designated body in the conduct of its business,

(b) instructions to them on the application of this Head,

(c) standards of training in the identification of counterfeit notes and coins,

(d) procedures to be followed by them on perceiving or suspecting that currency notes or coins are counterfeit,

(e) different such procedures to be followed in respect of different currencies,

(f) the retention of documents required for the purposes of criminal proceedings.

(5) Without prejudice to *Head 4711*, a designated body that contravenes a provision of *subhead (2)* of this Head or who provides false or misleading information on matters referred to in that subhead is guilty of an offence under this Head and liable—

(a) on summary conviction, to a fine not exceeding €2,000 or imprisonment for a term not exceeding 12 months or both, or

(b) on conviction on indictment, to a fine or imprisonment for a term not exceeding 5 years or both.

(6) Strict liability applies to *subhead (5)*.

(7) It shall be a defence in proceedings for an offence under this Head—

(a) for a designated body to show—

(i) that it had established procedures to enable this Head to be complied with, or

(ii) that it had complied with the relevant provisions of a recognised code of practice,

and

(b) for a person employed by a designated body to show that he or she transmitted the currency notes or coins concerned, or gave the relevant

information, to another person in accordance with an internal reporting procedure or a recognised code of practice.

(8) Where a designated body, a director, other officer or employee of the body—

(a) discloses in good faith to a member of the Garda Síochána or any person concerned in the investigation or prosecution of an offence under *Chapter 45* a suspicion that a currency note or coin is counterfeit or any matter on which such a suspicion is based, or

(b) otherwise complies in good faith with *subhead (2)* or with a recognised code of practice,

such disclosure or compliance shall not be treated as a breach of any restriction imposed by statute or otherwise on the disclosure of information or involve the person or body making the disclosure in liability in any proceedings.

(9) Every regulation made under this Head shall be laid before each House of the Oireachtas as soon as may be after it is made and, if a resolution annulling it is passed by either such House within the next 21 days on which that House has sat after the regulation is laid before it, the regulation shall be annulled accordingly, but without prejudice to the validity of anything previously done under it.

Explanatory Notes:

1. Head 4609 codifies section 39 of the 2001 Act.

2. In subhead (5), the words "those subsections" (as contained in section 39(5) of the 2001 Act) have been replaced with "that subhead". This would seem the correct approach from a drafting standpoint.

3. By virtue of the insertion of subhead (6), the offence contained in subhead (5) has been made subject to strict liability. This would appear to be in line with the intention of the framers of the 2001 Act.

SEARCH WARRANTS

4701.—(1) This Head applies to an offence under any provision of this Part for which a person of full age and capacity and not previously convicted may be punished by imprisonment for a term of five years or by a more severe penalty [and to an attempt to commit any such offence].

(2) If a Judge of the District Court is satisfied by information on oath of a member of the Garda Síochána that there are reasonable grounds for suspecting that evidence of, or relating to the commission of, an offence to which this Head applies is to be found in any place, the judge may issue a warrant for the search of that place and any person found there.

(3) A warrant under this Head shall be expressed and shall operate to authorise a named member of the Garda Síochána, alone or accompanied by such other persons as may be necessary—

(a) to enter, within 7 days from the date of issuing of the warrant (if necessary by the use of reasonable force), the place named in the warrant,

(b) to search it and any persons found there,

(c) to examine, seize and retain any thing found there, or in the possession of a person present there at the time of the search, that the member reasonably believes to be evidence of or relating to the commission of an offence to which this Head applies, and

(d) to take any other steps that may appear to the member to be necessary for preserving any such thing and preventing interference with it.

(4) The authority conferred by *subhead (3)(c)* to seize and retain any thing includes, in the case of a document or record, authority—

(a) to make and retain a copy of the document or record, and

(b) where necessary, to seize and, for as long as necessary, retain any computer or other storage medium in which any record is kept.

(5) A member of the Garda Síochána acting under the authority of a warrant under this Head may—

(a) operate any computer at the place which is being searched or cause any such computer to be operated by a person accompanying the member for that purpose, and

(b) require any person at that place who appears to the member to have lawful access to the information in any such computer—

(i) to give to the member any password necessary to operate it,

(ii) otherwise to enable the member to examine the information accessible by the computer in a form in which the information is visible and legible, or

(iii) to produce the information in a form in which it can be removed and in which it is, or can be made, visible and legible.

(6) Where a member of the Garda Síochána has entered premises in the execution of a warrant issued under this Head, he or she may seize and retain any material, other than items subject to legal privilege, which is likely to be of substantial value (whether by itself or together with other material) to the investigation for the purpose of which the warrant was issued.

(7) The power to issue a warrant under this Head is in addition to and not in substitution for any other power to issue a warrant for the search of any place or person.

(8) In this Head—

["commission", in relation to an offence, includes an attempt to commit the offence;]

"computer at the place which is being searched" includes any other computer, whether at that place or at any other place, which is lawfully accessible by means of that computer;

"place" includes a dwelling;

"thing" includes an instrument (within the meaning of *Chapter 44*), a copy of such instrument, a document or a record.

Explanatory Notes:

1. Head 4701 codifies section 48 of the 2001 Act, as amended by section 192 of the Criminal Justice Act 2006.

2. The references to the law of attempt in subheads (1) and (8) have been bracketed for now. Such references may not be necessary once the General Part rules on attempt are in place. This will be kept under review.

FAILURE TO COMPLY WITH GARDA ACTING ON WARRANT

4702.—(1) A person commits an offence if—

(a) he or she is found in or at the place named in the warrant by a member of the Garda Síochána acting under the authority of a warrant issued under *Head 4701*, and he or she intentionally, knowingly or recklessly—

(i) fails or refuses to give the member his or her name and address when required by the member to do so, or

(ii) gives the member a name and address that is false or misleading, or

(b) he or she is required to comply with a requirement under *Head 4701(5)(b)* and intentionally, knowingly or recklessly fails to comply as required.

(2) A person guilty of an offence under this Head shall be liable on summary conviction to a fine not exceeding €700 or imprisonment for a term not exceeding 6 months or both.

(3) A member of the Garda Síochána may arrest without warrant any person who is committing an offence under this Head or whom the member suspects, with reasonable cause, of having done so.

Explanatory Notes:

1. Head 4702 codifies section 49 of the 2001 Act. To accommodate the changes described below, the name of the Head has been changed from "obstruction of Garda acting on warrant" to "failure to comply with Garda acting on warrant".

2. Section 49(1)(a) has been excluded from subhead (1) as this aspect of the offence overlaps entirely with the offence contained in Head 6105 (aggravated obstruction), which criminalises anyone who *inter alia* resists, obstructs or impedes a peace officer acting in the execution of a peace officer's duty. As a matter of good codification practice, duplicate offences should be avoided where possible.

3. In subhead (1), a fault element of intention/knowledge/recklessness has been inserted in relation to failing to comply, etc. The 2001 Act is silent as to the *mens rea* for this aspect of the offence, though it would seem reasonable to apply a minimum culpability threshold of recklessness.

4. In subhead (1) generally, the wording of section 49 of the 2001 Act has been slightly reformatted in order to accommodate the addition of express fault elements as discussed above, and to retain clarity.

5. The reference to "without lawful authority or excuse" in section 49(1)(c) of the 2001 Act has been excluded. It is envisaged that the General Part will provide for a general defence of lawful authority/excuse.

6. The reference to "*paragraph (b)*" in section 49(1)(c) has been excluded as it would appear to be superfluous.

FORFEITURE OF SEIZED PROPERTY

4703.—(1) This Head applies to any thing that has been seized by a member of the Garda Síochána (whether the seizure was effected by virtue of a warrant under *Head 4701* or otherwise) and which the member suspects to be—

(a) any thing used (whether before or after the commencement of this Head), or intended to be used, for the making of any false instrument in contravention of *Head 4402 (forgery)*,

(b) any false instrument used (whether before or after the commencement of this Head), or intended to be so used, in contravention of *Head 4403*,

(c) any thing the possession of which is an offence under *Head 4404* or *4405*,

(d) any thing that is a counterfeit of a currency note or coin, or

(e) any thing used, whether before or after the commencement of this Head, or intended to be used, for the making of any such counterfeit.

(2) A member of the Garda Síochána may, at any time after the seizure of any thing to which this Head applies, apply to the judge of the District Court for the time being assigned to the district in which the seizure was effected for an order under this subhead with respect to it; and the judge may, if satisfied both that the thing is one to which this Head applies and that it is in the public interest to do so, subject to *subhead (4)*, make such order as the judge thinks fit for its forfeiture and subsequent destruction or disposal.

(3) Subject to *subhead (4)*, the court by or before which a person is convicted of an offence under *Chapter 44* or *45* may order any thing shown to the satisfaction of the court to relate to the offence to be forfeited and either destroyed or dealt with in such other manner as the court may order.

(4) The court shall not order any thing to be forfeited under *subhead (3)* or *(4)* where a person claiming to be the owner of or otherwise interested in it applies to be heard by the court, unless an opportunity has been given to the person to show cause why the order should not be made.

Explanatory Notes:

1. Head 4703 codifies section 50 of the 2001 Act.

2. The references in section 50(1) of the 2001 Act to copies of false instruments, etc have been excluded in light of the fact that under Head 4401, "instrument" is defined to include a copy of an instrument.

3. The reference to "without lawful authority or excuse" in section 50(1)(c) of the 2001 Act has been excluded. It is envisaged that the General Part will provide for a general defence of lawful authority/excuse.

4. References to “custody or control” have been omitted in favour of the term “possession”, so as to achieve coherence with the definition of “possession” in Head 1001.

CONCEALING FACTS DISCLOSED BY DOCUMENTS

4704.—(1) A person commits an offence if he or she—

(a) knows or is reckless as to whether an investigation by the Garda Síochána into an offence under this Part is being or is likely to be carried out,

(b) knows or is reckless as to whether a document or record is or would be relevant to the investigation, and

(c) intentionally or knowingly falsifies, conceals, destroys or otherwise disposes of that document or record or causes or permits its falsification, concealment, destruction or disposal.

(2) Where a person—

(a) falsifies, conceals, destroys or otherwise disposes of a document, or

(b) causes or permits its falsification, concealment, destruction or disposal, in such circumstances that it is reasonable to conclude that the person knew or [suspected]—

(i) that an investigation by the Garda Síochána into an offence under this Part was being or was likely to be carried out, and

(ii) that the document was or would be relevant to the investigation,

he or she shall be taken for the purposes of this Head to have so known [or suspected], unless the court or the jury, as the case may be, is satisfied having regard to all the evidence that there is a reasonable doubt as to whether he or she so knew or [suspected].

(3) A person guilty of an offence under this Head shall be liable on conviction on indictment to a fine or imprisonment for a term not exceeding 5 years or both.

Explanatory Notes:

1. Head 4704 codifies section 51 of the 2001 Act.

2. It should be noted that by virtue of the fact that three offences have been "imported" into the draft Part on Theft, Fraud and Related Offences from the Criminal Justice (Public Order) Act 1994, Head 4704 now applies to these offences, whereas under the 2001 Act this was not the case. It is submitted that this is nothing more than "incidental" law reform and that no adverse consequences arise.

3. Section 51 of the 2001 Act has been reformatted in order to delineate more clearly the elements of the offence.

4. The references to "suspects" in section 51 of the 2001 Act have been approximated to the fault element of recklessness.

5. In subhead (1)(c), a fault element of intention/knowledge has been inserted in relation to the falsification, concealment, etc of documents. The 2001 Act is silent as to the *mens rea* for this aspect of the offence, though it would seem both reasonable and logical to apply a minimum culpability threshold of knowledge.

ORDER TO PRODUCE EVIDENTIAL MATERIAL

4705.—(1) This Head applies to any offence under this Part that is punishable by imprisonment for a term of five years or by a more severe penalty.

(2) If a Judge of the District Court is satisfied by information on oath of a member of the Garda Síochána that—

(a) the Garda Síochána are investigating an offence,

(b) a person has possession or control of particular material or material of a particular description, and

(c) there are reasonable grounds for suspecting that the material constitutes evidence of or relating to the commission of the offence,

the judge may order the person to—

(i) produce the material to a member of the Garda Síochána for the member to take away, or

(ii) give such a member access to it,

either immediately or within such period as the order may specify.

(3) Where the material consists of or includes information contained in a computer, the order shall have effect as an order to produce the information, or to give access to it, in a form in which it is visible and legible and in which it can be taken away.

(4) An order under this Head—

(a) in so far as it may empower a member of the Garda Síochána to take away a document, or to be given access to it, shall also have effect as an order empowering the member to take away a copy of the document (and for that purpose the member may, if necessary, make a copy of the document),

(b) shall not confer any right to production of, or access to, any document subject to legal privilege, and

(c) shall have effect notwithstanding any other obligation as to secrecy or other restriction on disclosure of information imposed by statute or otherwise.

(5) Any material taken away by a member of the Garda Síochána under this Head may be retained by the member for use as evidence in any criminal proceedings.

(6)

(a) Information contained in a document that was produced to a member of the Garda Síochána, or to which such a member was given access, in accordance with an order under this Head shall be admissible in any criminal proceedings

as evidence of any fact therein of which direct oral evidence would be admissible unless the information—

(i) is privileged from disclosure in such proceedings,

(ii) was supplied by a person who would not be compellable to give evidence at the instance of the prosecution,

(iii) was compiled for the purposes or in contemplation of any—

(I) criminal investigation,

(II) investigation or inquiry carried out pursuant to or under any enactment,

(III) civil or criminal proceedings, or

(IV) proceedings of a disciplinary nature,

or unless the requirements of the provisions mentioned in *paragraph (b)* are not complied with.

(b) References in *sections 7 (notice of documentary evidence to be served on accused)*, *8 (admission and weight of documentary evidence)* and *9 (admissibility of evidence as to credibility of supplier of information)* of the *Criminal Evidence Act 1992*, to a document or information contained in it shall be construed as including references to a document mentioned in *paragraph (a)* and the information contained in it, and those provisions shall have effect accordingly with any necessary modifications.

(7) A judge of the District Court may, on the application of any person to whom an order under this Head relates or a member of the Garda Síochána, vary or discharge the order.

(8) Where an order is made under this Head, a person who intentionally, knowingly or recklessly fails or refuses to comply with that order commits an offence.

(9) A person does not commit an offence under this Head if, in relation to the acts alleged to give rise to the offence, he or she had a reasonable excuse for so acting.

(10) A person guilty of an offence under this Head shall be liable on summary conviction to a fine not exceeding €2,000 or imprisonment for a term not exceeding 12 months or both.

Explanatory Notes:

1. Head 4705 codifies section 52 of the 2001 Act, as amended by section 192 of the Criminal Justice Act 2006.

2. Section 52(6)(c) of the 2001 Act, an amending provision, has been excluded.

3. In subhead (8), a fault element of intention/knowledge/recklessness has been inserted in relation to failure/refusal to comply with a court order. The 2001 Act is silent as to the *mens rea* for this aspect of the offence, though it would seem reasonable to apply a minimum culpability threshold of recklessness.

4. Also in subhead (8), the wording of section 52(8) of the 2001 Act has been slightly reformatted in order to accommodate the addition of an express fault element and retain clarity.

5. Under subhead (9), "reasonable excuse" is treated as a standalone exception to liability. This approach accords better with the offence template endorsed by the Advisory Committee; after all, "reasonable excuse" is for all intents and purposes a defence. Moreover, it ensures that the "read-in" fault element of recklessness (see Head 1106) will not apply; otherwise (assuming the defence has discharged its evidential burden in raising the defence) the prosecution would have to prove not only that the defendant did not have a reasonable excuse, but that he consciously disregarded a substantial and unjustifiable risk that he was acting without a reasonable excuse. According to the present draft, under subhead (9) the prosecution would merely have to prove that the defendant did not have a reasonable excuse, whether or not he adverted to that fact. It is submitted that this approach is in line with the law as it stands under the 2001 Act.

SUMMARY TRIAL OF INDICTABLE OFFENCES

4706.—(1) The District Court may try summarily a person charged with an indictable offence under this Part if—

(a) the Court is of opinion that the facts proved or alleged constitute a minor offence fit to be tried summarily,

(b) the defendant, on being informed by the Court of his or her right to be tried with a jury, does not object to being tried summarily, and

(c) the Director of Public Prosecutions consents to the defendant being tried summarily for the offence.

(2) On conviction by the District Court for an indictable offence tried summarily under *subhead (1)* the defendant shall be liable to a fine not exceeding €2,000 or imprisonment for a term not exceeding 12 months or both such fine and imprisonment.

Explanatory Notes:

1. Head 4706 codifies section 53 of the 2001 Act.

TRIAL PROCEDURE

4707.—(1) In any proceedings for an offence [or attempted offence] under any of *Heads 4102 (deceiving with intent)* and *4104 (fraudulent practices)* it shall not be necessary to prove an intention to cause a loss to, or make a gain at the expense of, a particular person, without a claim of right made in good faith, and it shall be sufficient to prove that the defendant did the act charged without a claim of right made in good faith, with the intention of causing such a loss or making such a gain.

(2) Any number of persons may be charged in one indictment, with reference to the same theft, with having at different times or at the same time handled or possessed all or any of the stolen property, and the persons so charged may be tried together.

(3) Any person who—

(a) is a member of a partnership or is one of two or more beneficial owners of any property, and

(b) steals any property of or belonging to the partnership or such beneficial owners,

is liable to be dealt with, tried and punished as if he or she had not been or was not a member of the partnership or one of such beneficial owners.

(4) If on the trial of a person for stealing any property it appears that the property alleged to have been stolen at one time was taken at different times, the separate takings may, unless the trial judge directs otherwise, be tried together, to a number not exceeding 3, provided that not more than 6 months elapsed between the first and the last of the takings.

(5) Charges of stealing, handling or possessing any property or any part thereof may be included in separate counts of the same indictment and such counts may be tried together.

(6) Any person or persons charged in separate counts of the same indictment with stealing any property or any part thereof may be severally found guilty of stealing, handling or possessing the property or any part thereof.

(7) On the trial of two or more persons indicted for jointly handling or possessing any stolen property the court or jury, as the case may be, may find any of the defendants guilty if satisfied that he or she handled or possessed all or any part of such property, whether or not he or she did so jointly with the other defendants or any of them.

Explanatory Notes:

1. Head 4707 codifies section 54 of the 2001 Act.

2. The reference to the law of attempt in subhead (1) has been bracketed for now. Such a reference may not be necessary once the General Part rules on attempt are in place. This will be kept under review.

3. In subhead (1), references to the term "dishonesty" have been replaced with the words "without a claim of right made in good faith", in light of changes made elsewhere in the draft Part on Theft, Fraud and Related Offences.

ALTERNATIVE VERDICTS

4708.—(1) If, on the trial of a person for theft or for unlawfully obtaining property otherwise, it is proved that the person possessed or handled the property in such circumstances as to constitute an offence under *Head 4203 (possession of stolen property)* or *4204 (handling stolen property)*, he or she may be convicted of that offence.

(2) If, on the trial of a person for an offence under *Head 4203* or *4204* of possessing or handling stolen or otherwise unlawfully obtained property, it is proved that the person stole or otherwise unlawfully obtained the property, he or she may be convicted of the theft of the property or of the offence consisting of unlawfully obtaining the property.

Explanatory Notes:

1. Head 4708 codifies section 55 of the 2001 Act.

ORDERS FOR RESTITUTION

4709.—(1) Where property has been stolen and either—

(a) a person is convicted of an offence with reference to the theft (whether or not the stealing is the essential ingredient of the offence), or

(b) a person is convicted of any other offence but the first-mentioned offence is taken into consideration in determining his or her sentence,

the court by or before which the person is convicted may on the conviction (whether or not the passing of sentence is in other respects deferred)—

(i) order anyone having possession or control of the property to restore it to any person entitled to recover it from the convicted person,

(ii) on the application of a person entitled to recover from the convicted person any other property directly or indirectly representing the first-mentioned property (as being the proceeds of any disposal or realisation of the whole or part of it or of property so representing it), order that other property to be delivered or transferred to the applicant, or

(iii) order that a sum not exceeding the value of the first-mentioned property shall be paid, out of any money of the convicted person which was taken out of his or her possession when arrested, to any person who, if that property were in the possession of the convicted person, would be entitled to recover it from him or her.

(2) Where the court has power on a person's conviction to make an order against him or her under both *paragraph (ii) and paragraph (iii) of subhead (1)* with reference to the stealing of the same property, the court may make orders under both paragraphs, if the person in whose favour the orders are made does not thereby recover more than the value of that property.

(3) Where—

(a) the court makes an order under *subhead (1)(i)* for the restoration of any property, and

(b) it appears to the court that the convicted person has sold the property to a person acting in good faith or has borrowed money on the security of it from a person so acting,

then, on the application of the purchaser or lender the court may order that there shall be paid to the applicant, out of any money of the convicted person which was taken out of his or her possession when arrested, a sum not exceeding the amount paid for the purchase by the applicant or, as the case may be, the amount owed to the applicant in respect of the loan.

(4)

(a) The court shall not exercise the powers conferred by this Head unless in its opinion the relevant facts sufficiently appear from evidence given at the trial or the available documents, together with admissions made by or on behalf of any person in connection with any proposed exercise of the powers.

(b) In *paragraph (a)* "available documents" means—

(i) any written statements or admissions which were made for use, and would have been admissible in evidence, at the trial,

(ii) any depositions taken in any proceedings before the trial, and

(iii) any written statements or admissions used as evidence at the trial or in any such proceedings.

(5) The provisions of *Head 4202 (scope of offences relating to stolen property)* in relation to property which has been stolen shall have effect also in relation to the property referred to in this Head.

(6) This Head is without prejudice to the *Police (Property) Act 1897* (disposal of property in the possession of the Garda Síochána).

Explanatory Notes:

1. Head 4709 codifies section 56 of the 2001 Act.

PROVISION OF INFORMATION TO JURIES

4710.—(1) In a trial on indictment of an offence under this Part, the trial judge may order that copies of any or all of the following documents shall be given to the jury in any form that the judge considers appropriate:

(a) any document admitted in evidence at the trial,

(b) the transcript of the opening speeches of counsel,

(c) any charts, diagrams, graphics, schedules or agreed summaries of evidence produced at the trial,

(d) the transcript of the whole or any part of the evidence given at the trial,

(e) the transcript of the closing speeches of counsel,

(f) the transcript of the trial judge's charge to the jury,

(g) any other document that in the opinion of the trial judge would be of assistance to the jury in its deliberations including, where appropriate, an affidavit by an accountant summarising, in a form which is likely to be comprehended by the jury, any transactions by the defendant or other persons which are relevant to the offence.

(2) If the prosecutor proposes to apply to the trial judge for an order that a document mentioned in *subhead (1)(g)* shall be given to the jury, the prosecutor shall give a copy of the document to the defendant in advance of the trial and, on the hearing of the application, the trial judge shall take into account any representations made by or on behalf of the defendant in relation to it.

(3) Where the trial judge has made an order that an affidavit mentioned in *subhead (1)(g)* shall be given to the jury, the accountant concerned—

(a) shall be summoned by the prosecutor to attend at the trial as an expert witness, and

(b) may be required by the trial judge, in an appropriate case, to give evidence in regard to any relevant accounting procedures or principles.

Explanatory Notes:

1. Head 4710 codifies section 57 of the 2001 Act.

[LIABILITY FOR OFFENCES BY BODIES CORPORATE AND UNINCORPORATED]

[**4711.**—(1) Where—

(a) an offence under this Part has been committed by a body corporate, and

(b) the offence is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of, a person who was either—

(i) a director, manager, secretary or other officer of the body corporate, or

(ii) a person purporting to act in any such capacity,

that person, as well as the body corporate, is guilty of an offence and liable to be proceeded against and punished as if he or she were guilty of the first-mentioned offence.

(2) Where the affairs of a body corporate are managed by its members, *subhead (1)* shall apply in relation to the acts and defaults of a member in connection with the member's functions of management as if he or she were a director or manager of the body corporate.

(3) The foregoing provisions shall apply, with the necessary modifications, in relation to offences under this Part committed by an unincorporated body.]

Explanatory Notes:

1. Head 4711 codifies section 58 of the 2001 Act.

2. At this juncture, square brackets have been attached to Head 4711 pending completion of work on the principles of corporate criminal liability in the General Part.

3. In subhead (1), the word "*Act*" has been replaced with "*Part*". It follows that if Head 4711 were to be included in the inaugural codifying instrument this would result in some incidental law reform, by making the provisions contained in section 58 of the 2001 Act applicable to the offences imported from the Criminal Justice (Public Order) Act, 1994.

REPORTING OF OFFENCES

4712.—(1) In this Head—

"firm" means a partnership, a corporate or unincorporated body or a self-employed individual;

"relevant person" means a person—

(a) who audits the accounts of a firm, or

(b) who otherwise with a view to reward assists or advises a firm in the preparation or delivery of any information, or of any declaration, return, account or other document, which the person knows will be, or is likely to be, used for the purpose of keeping or auditing the accounts of the firm,

but does not include an employee of a firm who—

(i) in that capacity so assists or advises the firm, and

(ii) whose income from so doing consists solely of emoluments chargeable to income tax under *Schedule E*, as defined in *section 19* of the *Taxes Consolidation Act 1997*.

(2) Where the accounts of a firm, or as the case may be any information or document mentioned in *subhead (1)(b)*, indicate that—

(a) an offence under this Part (other than *Heads 4103, 4105, 4106, 4301 to 4305, 4702 and 4705*) may have been committed by the firm concerned, or

(b) such an offence may have been committed in relation to its affairs by a partner in the firm or, in the case of a corporate or unincorporated body, by a director, manager, secretary or other employee thereof, or by the self-employed individual concerned,

the relevant person shall, notwithstanding any professional obligations of privilege or confidentiality, report that fact to a member of the Garda Síochána.

(3) A disclosure in a report made in good faith by a relevant person to a member of the Garda Síochána under *subhead (2)* shall not be treated as a breach of any restriction imposed by statute or otherwise or involve the person in liability of any kind.

(4) A person who intentionally, knowingly or recklessly fails to comply with the duty imposed by *subhead (2)* shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding €2,000 or to imprisonment for a term not exceeding 12 months or both.

(5) A person does not commit an offence under *subhead (4)* if, in relation to the acts alleged to give rise to the offence, he or she had a reasonable excuse for so acting.

Explanatory Notes:

1. Head 4712 codifies section 59 of the 2001 Act.

2. In subhead (4), a fault element of intention/knowledge/recklessness has been inserted to apply in relation to failing to comply with the duty imposed by subhead (2). The 2001 Act is silent as to the *mens rea* for this aspect of the offence, though it would seem reasonable to apply a minimum culpability threshold of recklessness.

3. Under subhead (5), "reasonable excuse" is treated as a standalone exception to liability. This approach accords better with the offence template endorsed by the Advisory Committee; after all, "reasonable excuse" is for all intents and purposes a defence. Moreover, it ensures that the "read-in" fault element of recklessness (see Head 1106) will not apply; otherwise (assuming the defence has discharged its evidential burden in raising the defence) the prosecution would have to prove not only that the defendant did not have a reasonable excuse, but that he consciously disregarded a substantial and unjustifiable risk that he was acting without a reasonable excuse. According to the present draft, under subhead (3) the prosecution would merely have to prove that the defendant did not have a reasonable excuse, whether or not he adverted to that fact. It is submitted that this approach is in line with the law as it stands under the 2001 Act.

EVIDENCE IN PROCEEDINGS

4713.—For the purposes of any provision of this Part relating to specified conduct outside the State—

(a) a document purporting to be signed by a lawyer practising in the state or a territorial unit within it where the conduct is alleged to have occurred and stating that the conduct is an offence under the law of that state or territorial unit, and

(b) a document purporting to be a translation of a document mentioned in *paragraph (a)* and to be certified as correct by a person appearing to be competent to so certify,

shall be admissible in any proceedings, without further proof, as evidence of the matters mentioned in those documents, unless the contrary is shown.

Explanatory Notes:

1. Head 4713 codifies section 60 of the 2001 Act.

2. Section 60(2) of the 2001 Act has not been included in Head 4713 on the basis that section 60(2) relates to section 45 of the 2001 Act, which has been excluded from the present draft.

JURISDICTION OF THE DISTRICT COURT IN CERTAIN PROCEEDINGS

4714.—For the purposes of the exercise of jurisdiction by a judge of the District Court in proceedings for an offence under this Part committed on a vessel or hovercraft or on an installation in the territorial seas or in a designated area (within the meaning of the *Continental Shelf Act 1968*) the offence may be treated as having been committed in any place in the State.

Explanatory Notes:

1. Head 4714 codifies section 61 of the 2001 Act.

PART 5: CRIMINAL DAMAGE OFFENCES

INTRODUCTION

1. This draft Part on Criminal Damage applies the technique of codification to the Criminal Damage Act 1991 (hereinafter "the 1991 Act"). Broadly speaking, the exercise has proved unproblematic. The codified draft follows the model of restatement; there are no instances of law reform other than those inherent in the codification process – the "plugging" of gaps in *mens rea*, the streamlining of definitions such as "recklessness", etc necessitated by the draft Fault Scheme in the General Part.

2. Changes to the text of specific provisions are considered under the relevant Heads. At the outset, however, the following changes of general concern to the draft as a whole should be noted.

Exclusion of section 5 offence

3. The offence of "unauthorised accessing of data" (contained in section 5 of the 1991 Act) has been excluded from the present draft on classification grounds. The section 5 offence targets the practice of computer "hacking", *i.e.* deliberate, unauthorised access to data. The offence definition entails no damage component, however, and in this regard it would be out of place in a Part on Criminal Damage. To all intents and purposes, section 5 is a computer offence.

4. In this regard, it should be noted that a "Criminal Justice (Cybercrime and Attacks against Information Systems) Bill" is in the process of being prepared. This Bill – designed to give effect to the Council of Europe Convention on Cybercrime (2001) and the EU Council Framework Decision on attacks against information systems[215] – will introduce a number of new computer crimes to the statute book. Thus, at a future date it should be feasible to introduce into the Code a discrete Part/Chapter on computer offences (including the section 5 offence). Such an offence category can be found in a number of codified common law jurisdictions.

Aggravated property damage

5. The approach taken in the present draft is to accommodate the offence contained in section 2(2) of the 1991 Act (property damage committed with intent, etc., to endanger the life of another) and the offence contained in section 2(4) of the 1991 Act (arson) as a consolidated offence of "aggravated property damage".

6. From a codification perspective, this approach makes good sense. After all, both of these offences are, in essence, aggravated forms of criminal damage: to commit the section 2(2) offence, the defendant must damage property *adverting to the fact that life may be endangered thereby*. To commit an offence under section 2(4), he must damage property *by fire*. Both carry a maximum penalty of life imprisonment. Good codification practice recommends that offences which are no more than aggravated forms of a lesser offence should be consolidated where

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[215] Council Framework Decision 2005/222/JHA of 24 February 2005.

practicable. This serves to minimise offence proliferation, a phenomenon which international experience has shown to be the foremost cause of code degradation.

7. On balance, the view taken in the present draft was that to retain sections 2(2) and 2(4) as standalone offences would set an unhappy precedent. Consolidating the two offences can be viewed as a positive step in minimising offence proliferation and promoting conceptual consistency in the Code, without any loss of substantive legal content. Moreover, even though the structure of the 1991 Act clearly reflects a policy choice to retain sections 2(2) and 2(4) as separate offences, it should be borne in mind that this choice was made in the context of ordinary legislation. The exigencies of codification – itself a policy choice, and one that has been expressly endorsed by the legislature by the enactment of Part 14 of the Criminal Justice Act 2006 – are different, and include offence consolidation, where this can be achieved without loss of legal content. As a final point, it is worth noting that offence consolidation is not a novel concept in this jurisdiction. The statutory offence of assault in section 2 of the Non-Fatal Offences against the Person Act 1997 (which combined the common law offences of assault and battery) provides a useful precedent in this regard.

Lawful excuse

8. All references to "lawful excuse" have been omitted from the present draft; it is envisaged that the General Part will cater for some form of lawful excuse/lawful authority defence in due course. An interesting feature of the 1991 Act in this regard is the fact that "lawful excuse" performs a dual function. Firstly, the term is used in its normal statutory meaning, the same way, for example, as it is used in the Non-Fatal Offences against the Person Act 1997. Secondly, section 6 of the 1991 Act extends the meaning of "lawful excuse" in relation to a number of offences, thereby exempting the defendant from liability where he commits an act of criminal damage: (i) with the belief that he has or would have the consent of the owner of the property, or (ii) in order to protect person or property.

9. In the present draft, the section 6 exceptions to liability have been treated as standalone defences, thus divorcing them from the concept of "lawful excuse". Accordingly, Head 4203 provides for the defence of "belief in consent" and Head 4204 provides for the defence of "protection of person or property". This follows the approach taken in the Draft Criminal Code for England and Wales.

ARRANGEMENT OF HEADS

PART 5

CRIMINAL DAMAGE OFFENCES

CHAPTER 50

Interpretation

CHAPTER 51

Criminal Damage Offences

CHAPTER 52

Defences

CHAPTER 53

Procedural, Evidential and Ancillary Provisions

5301	Proceedings.
5302	Jurisdiction of District Court.
5303	Arrest without warrant.
5304	Search warrant.

INTERPRETATION (PART 5)

5001.—(1) In this *Part*—

"to damage" includes—

(a) in relation to property other than data (but including a storage medium in which data are kept), to destroy, deface, dismantle or, whether temporarily or otherwise, render inoperable or unfit for use or prevent or impair the operation of,

(b) in relation to data—

(i) to add to, alter, corrupt, erase, or move to another storage medium or to a different location in the storage medium in which they are kept (whether or not property other than data is damaged thereby), or

(ii) to do any act that contributes towards causing such addition, alteration, corruption, erasure or movement,

[(c) to do any act within the State that damages property outside the State,]

[(d) to do any act outside the State that damages property within the State, and]

(e) to make an omission causing damage;

"data" means information in a form in which it can be accessed by (any) electronic means and includes a (computer) program;

"property" means—

(a) property of a tangible nature, whether real or personal, including money and animals that are capable of being stolen, and

(b) data.

(2) Property shall be treated for the purposes of this *Part* as belonging to any person—

(a) having lawful possession of it,

(b) having in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest), or

(c) having a charge over it.

(3) Where as respects an offence under *Head 5101 (damaging property), 5102 (damaging property with intent to defraud), 5103 (aggravated property damage), 5104(1)(a) (threatening to damage property)* and *5105(1)(a) (possessing any thing*

with intent to damage property) —

(a) the property concerned is a family home within the meaning of the Family Home Protection Act 1976 or a dwelling, within the meaning of section 2(2) of the Family Home Protection Act 1976 as amended by section 54(1)(a) of the Family Law Act 1995, in which a person who is a party to a marriage that has been dissolved under the Family Law (Divorce) Act 1996, or under the law of a country or jurisdiction other than the State, being a divorce that is entitled to be recognised as valid in the State, ordinarily resided with his or her [former, then] spouse, before the dissolution and

(b) the person charged—

(i) is the spouse of the person who resides, or is entitled to reside in the home or is a party to a marriage that has been dissolved under the Family Law (Divorce) Act 1996, or under the law of a country or jurisdiction other than the State, being a divorce that is entitled to be recognised as valid in the State, and

(ii) is the subject of a protection order or barring order (within the meaning in each case of the Family Law (Protection of Spouses and Children Act 1981) or is excluded from the home pursuant to an order under section 16(a) of the Judicial Separation and Family Law Reform Act 1989, or any other order of a court,

Heads 5101 (damaging property), 5102 (damaging property with intent to defraud), 5103 (aggravated property damage), 5104(1)(a) (threatening to damage property) and *5105(1)(a) (possessing any thing with intent to damage property)* shall have effect as if the references therein to any property belonging to another, however expressed, were references to the home.

(4) Where property is subject to a trust, the persons to whom the property belongs shall be treated for the purposes of this Part as including any person having a right to enforce the trust.

(5) Property of a corporation sole shall be treated for the purposes of this Part as belonging to the corporation notwithstanding a vacancy in it.

(6) An offence committed under *Head 5103 (aggravated property damage)* by fire [may][shall] be charged as arson.

Explanatory Notes:

1. Head 5001 makes provision for definitions applicable to Part 5. These definitions are derived from section 1 of the 1991 Act. Some of these definitions, such as the definition of "property" may eventually be relocated to the "General definitions" section of the General Part (currently Draft Criminal Code, Head 1001) if such definitions are capable of general application across the Code.

2. It should be noted that paragraphs (c) and (d) of the definition of "to damage" contain jurisdiction clauses. To date, these are the first provisions to be codified that expressly provide for extra-territorial jurisdiction. The approach to be taken in the Code with respect to jurisdiction clauses will be dealt with as a general issue at a later stage. For present purposes it might simply be noted that if "to damage" is to be adopted as a definition of general application to the Code as a whole, the jurisdiction clauses contained in paragraphs (c) and (d) may have to be accommodated elsewhere, so as to confine their application to criminal damage.

3. Section 1(1) of the 1991 Act contains the following reference: "'compensation order' has the meaning assigned to it by *section 9(1)*". This reference has been excluded since it would appear to serve no purpose in light of the fact that section 9 of the 1991 Act was repealed by section 13 of the Criminal Justice Act 1993.

4. In subhead (2)(a), the phrase "having lawful custody or control of it" has been replaced with "having lawful possession of it", so as to comply with the definition of possession in Draft Criminal Code, Head 1001(3) which provides that possession means that "the person knowingly (a) procures or receives the thing, or (b) retains control of the thing when he or she could have relinquished control." While this definition of possession does not explicitly employ the word "custody" in the provision, custody is implied in subparagraph (a) by the phrase "procures or receives the thing possessed."

5. The phrase "and cognate words shall be construed accordingly" has been omitted since section 20(2) of the Interpretation Act 2005 provides that: "Where an enactment defines or otherwise interprets a word or expression, other parts of speech and grammatical forms of the word or expression have a corresponding meaning."

6. Section 1(6) has been omitted from the draft. Such a provision would appear to be unnecessary in light of the Interpretation Act 2005.

7. Subhead (6) provides: "An offence committed under Head 5103 (aggravated property damage) by fire [may][shall] be charged as arson." The purpose of this subhead is principally to preserve the descriptive label of "arson" in the offence of aggravated property damage under Head 5103 where property is damaged by fire. Subhead (6) provides two wording options, namely "may" or "shall" in relation to charging property damage by fire as arson under Head 5103. The language in section 2(4) of the 1991 Act provides that "an offence committed under this section by damaging property by fire *shall* be charged as arson." (emphasis added)

8. The word "shall" would seem to suggest that the DPP is obliged to prosecute criminal damage as arson in every case where fire is the chosen means of destruction. However, on the basis that current prosecution practice may not actually be to charge criminal damage by fire as arson in *every* instance (owing the additional evidential issue of proving that the damage was caused by fire rather than by any other means), it might be preferable to employ the word "may" rather than "shall" in order to clarify that the prosecution has the option of charging criminal damage by fire as arson or as criminal damage simpliciter. Moreover, the word "may" rather than "shall" would insulate the prosecution

against any potential oversight: the defence would be unable successfully to argue that a case of criminal damage involving fire should be thrown out because the prosecution was obliged to charge his or her client with arson (a form of aggravated criminal damage under Head 5103) rather than criminal damage (under Head 5101).

DAMAGING PROPERTY

5101.—(1) A person commits the offence of damaging property if he or she intentionally, knowingly or recklessly damages any property belonging to another.

(2) A person guilty of an offence under this Head shall be liable—

(a) on summary conviction to a fine not exceeding €1,500 or imprisonment for a term not exceeding 12 months or both, or

(b) on conviction on indictment to a fine not exceeding €13,000 or imprisonment for a term not exceeding 10 years or both.

Explanatory Notes:

1. Head 5101 codifies the offence of damaging property as provided for in section 2(1) of the 1991 Act. The content of the offence may be broken down as follows:

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A.	*Conduct:* Any act. AND
Intention/Knowledge/Recklessness.	*Result*: Causes damage to property. AND
Intention/Knowledge/Recklessness.	*Circumstance*: Property belongs to another.

2. Section 2(1) has been slightly reformatted in order to delineate more clearly the elements of the offence.

3. The reference to "without lawful excuse" in section 2(1) of the 1991 Act has been omitted as this defence will be covered in the General Part in due course.

4. The fault element of intention, knowledge or recklessness attaches to both the result element (causing damage to property) and the circumstance element (the fact that the property belongs to another person).

5. Section 2(6) of the 1991 Act provides a definition of recklessness. This provision was included in the Act in light of the controversial decision (recently overruled)[216] by the House of Lords in *R v Caldwell*,[217] where the Court promulgated an objective standard of recklessness in the context of criminal damage. Section 2(6) was designed to ensure that a subjective standard of recklessness would apply in this jurisdiction. Section 2(6) has been omitted from the present draft because recklessness is defined subjectively in Draft Criminal Code, Head 1109 and this definition is applicable to the Code as a whole.

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216 *R v G* [2003] 4 All ER 765.

217 [1981] 1 All ER 961.

DAMAGING PROPERTY WITH INTENT TO DEFRAUD

5102.—(1) A person commits the offence of damaging property with intent to defraud if he or she intentionally, knowingly or recklessly damages any property, whether belonging to himself, herself or another, with intent to defraud.

(2) A person guilty of an offence under this Head shall be liable—

(a) on summary conviction to a fine not exceeding €1,500 or imprisonment for a term not exceeding 12 months or both, or

(b) on conviction on indictment to a fine not exceeding €13,000 or imprisonment for a term not exceeding 10 years or both.

Explanatory Notes:

1. Head 5102 codifies section 2(3) the 1991 Act. The offence has been named "damaging property with intent to defraud". The content of the offence may be broken down as follows:

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A.	*Conduct:* Any act. AND
Intention/Knowledge/Recklessness. AND	*Result:* Causes damage to any property.
Ulterior Intention: intention to defraud.	N/A.

2. The fault element of intention, knowledge and recklessness has been inserted to attach to the result element of causing damage to any property. The 1991 Act is silent as to the *mens rea* for this result element, though it would seem reasonable to apply a minimum culpability threshold of recklessness.

AGGRAVATED PROPERTY DAMAGE

5103.—(1) A person commits the offence of aggravated property damage if he or she intentionally, knowingly or recklessly —

(a) damages any property, whether belonging to himself, herself or another, intending by the damage to endanger the life of another or being reckless as to whether the life of another would be thereby endangered,

(b) damages any property belonging to another by fire, or

(c) damages any property, whether belonging to himself, herself or another, by fire with intent to defraud.

(2) A person guilty of an offence under this Head shall be liable—

(a) on summary conviction to a fine not exceeding €1,500 or imprisonment for a term not exceeding 12 months or both, or

(b) on conviction on indictment to a fine or imprisonment for life or both.

Explanatory Notes:

1. Head 5103 codifies section 2(2) and 2(4) of the 1991 Act. The offence has been named "aggravated property damage". Subhead (1)(a) provides for property damage committed with the intention of endangering the life of another (or where the defendant knows or is reckless as to whether the life of another would be endangered). Subhead (1)(b) provides for damaging another person's property by fire. Subhead (1)(c) provides for damaging property, whether belonging to the defendant or another person, by fire with intent to defraud. Subheads (1)(a), (b) and (c) are in essence aggravating factors that give rise to a higher penalty. Thus, from a codification perspective, it makes sense to consolidate these aggravating factors into one offence. Head 5001(6) provides that an offence "committed under Head 5103(aggravated property damage) by fire [may][shall] be charged as arson."

2. The content of the offence may be broken down as follows:

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A.	*Conduct:* Any act.
	AND
Intention/Knowledge/Recklessness. AND Ulterior Intention: intention to endanger the life of another.	*Result:* Causes damage to any property. N/A.

OR Recklessness.	*Circumstance:* The life of another would be endangered by the damage.
OR	
Intention/Knowledge/Recklessness. Intention/Knowledge/Recklessness. Intention/Knowledge/Recklessness.	*Result*: Causes damage to property. AND *Circumstance*: Property belongs to another. AND *Circumstance:* Damage is caused by fire.
OR	
Intention/Knowledge/Recklessness. Intention/Knowledge/Recklessness. AND Ulterior Intention: intention to defraud.	*Result:* Causes damage to any property. AND *Circumstance:* Damage is caused by fire. N/A.

3. The reference to "without lawful excuse" in section 2(2) has been omitted as this defence will be covered in Part 1 in due course.

4. In subhead (1)(a) the fault element of intention, knowledge and recklessness has been inserted to attach to the damaging property component of the offence. The 1991 Act is silent as to the *mens rea* for this aspect of the offence, though it would seem reasonable to apply a minimum culpability threshold of recklessness.

5. The fault element of intention, knowledge and recklessness attaches to the circumstance element of damaging property *by fire* in subhead (1)(b). The 1991 Act is silent as to the *mens rea* for this element, though there is authority to the effect that the causing of damage *by fire* must be within the contemplation of the defendant.[218]

6. Finally, it should be noted that the offences under sections 2(1) and 2(2) of the 1991 Act when committed by fire are scheduled offences under the Criminal Law (Jurisdiction) Act 1976, which provides for extra-territorial jurisdiction with respect to offences committed in Northern Ireland. Consequential amendments to the schedule of the 1976 Act will therefore be necessitated by the Code.

[218] *R v Cooper (G) and Cooper (Y)* [1991] Crim LR 524.

THREATENING TO DAMAGE PROPERTY

5104.—(1) A person commits the offence of threatening to damage property if he or she intentionally, knowingly or recklessly makes to another a threat to damage—

(a) any property belonging to that other or a third person, or

(b) his or her own property in a way that he or she knows is likely to endanger the life of that other or a third person,

intending that that other would fear that the threat will be carried out.

(2) A person guilty of an offence under this Head shall be liable—

(a) on summary conviction to a fine not exceeding €1,500 or imprisonment for a term not exceeding 12 months or both, or

(b) on conviction on indictment to a fine not exceeding €13,000 or imprisonment for a term not exceeding 10 years or both.

Explanatory Notes:

1. Head 5104 codifies section 3 of the 1991 Act. The name of the offence has been changed from "threat to damage property" to "threatening to damage property". The new name would appear to be a more elegant description of the offence and it replicates the formulation of Draft Criminal Code, Head 3106, *i.e.* "threatening to kill or cause serious harm". The content of the offence may be broken down as follows:

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A.	*Conduct:* Any act. AND
Intention/Knowledge/Recklessness.	*Circumstance:* Conduct is of a threatening nature, to damage any property belonging to the recipient of the threat or a third person. OR
Intention/Knowledge/Recklessness. Knowledge. AND	*Circumstance:* Conduct is of a threatening nature, to damage his or her own property AND *Circumstance:* Damage threatened is of such a nature that it is likely to endanger the life of the recipient of the threat or a third person.
Ulterior Intention: intention to cause the other to fear that the threat will be carried out.	N/A.

2. The reference to "without lawful excuse" in section 3 of the 1991 Act has been omitted as this defence will be covered in the Part 1 dealing with General Principles.

3. In subhead (1) the fault element of intention, knowledge or recklessness has been inserted to attach to the *making of a threat*. The 1991 Act is silent as to the *mens rea* in this regard, though it would seem reasonable to apply a minimum culpability threshold of recklessness.

4. Section 3 of the 1991 Act requires the defendant to intend the other person to *fear* that the defendant's threat will be carried out. It is worth noting that the "sister offence" to section 3 in the context of the Non-Fatal Offences against the Person Act 1997, namely section 5 (threatening to kill or cause serious harm) requires the defendant to intend the other person to *believe* the threat will be carried out. Arguably, section 3 of the 1991 Act effectively provides for a lower culpability threshold than section 5 of the 1997 Act, if we take the view that it is possible to intend to put someone in *fear* of something happening, without intending to cause him to *believe* that it will. If this reasoning is correct, the resultant disparity is difficult to justify: why should an offence of threatening to kill require a higher threshold of culpability than the offence of threatening to damage property, particularly when both offences carry the same maximum penalty of 10 years imprisonment?

5. Given the similarity between these offences, there would appear to be a good case for introducing harmonious terminology in the interests of consistency. The offence of threatening to kill or cause serious harm (see Draft Criminal Code, Head 3106) should, arguably, be amended in due course so as to bring it into line with Head 5104 above, with the concept of "fear" replacing "belief". A submission was, however, received cautioning against amending the offence of threatening to kill or cause serious injury to bring it into line with Head 5104 on the basis that the issue is one of policy for the Oireachtas. Policy makers may wish to address this disparity in terminology.

POSSESSING ANY THING WITH INTENT TO DAMAGE PROPERTY

5105.—(1) A person commits the offence of possessing any thing with intent to damage property if he or she possesses any thing intending to use it or cause or permit another to use it to damage—

(a) any property belonging to some other person, or

(b) his or her own or the intended user's property—

in a way that he or she knows is likely to endanger the life of a person other than himself or herself or with intent to defraud.

(2) A person guilty of an offence under this Head shall be liable—

(a) on summary conviction to a fine not exceeding €1,500 or imprisonment for a term not exceeding 12 months or both, or

(b) on conviction on indictment to a fine not exceeding €13,000 or imprisonment for a term not exceeding 10 years or both.

Explanatory Notes:

1. Head 5105 codifies section 4 of the 1991 Act.

2. The content of the offence may be broken down as follows:

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A. AND Ulterior Intention: intention to use the thing or cause or permit another to use it to damage property belonging to some other person. OR Ulterior Intention: intention to use the thing or cause or permit another to use it to damage his own or the intended user's property in a particular way. AND Knowledge: OR Ulterior Intention: intention to use the thing or cause or permit another to use it to damage his own or the intended user's	*Conduct:* Possess (any thing). N/A. N/A. *Circumstance:* Damaging the property in such a way is likely to endanger the life of another. N/A.

property. AND Ulterior Intention: intention to defraud.	N/A.

3. References to "the possessor" in section 4 of the 1991 Act have been removed in the interests of employing consistent terminology throughout the Code. In any event, the reference seems somewhat cumbersome and unnecessary.

4. While the 1991 Act is silent as to the *mens rea* applicable to the conduct element of possessing "any thing", conventional criminal law theory supports the general proposition that a person cannot be held liable for possessing something unless he is aware of the fact that he possesses it. In the words of Davitt P: "He cannot properly be said to be in control or possession of something of whose existence and presence he has no knowledge."[219] Head 1001(3) makes it clear that a person must have consciously received *some* thing (or failed to relinquish it) before he or she can be deemed to possess it.

5. The reference to "in his custody or under his control" has been omitted in favour of the term "possesses". Head 1001(3) provides that possession means that "the person knowingly (a) procures or receives the thing, or (b) retains control of the thing when he or she could have relinquished control." While this definition of possession does not explicitly employ the word "custody", custody is implied in subparagraph (a) by the phrase "procures or receives the thing possessed."

6. The reference to "without lawful excuse" in section 4 of the 1991 Act has been omitted as this defence will be covered under the rubric of general principles in Part 1, above.

7. It should be noted that the offence of possessing a knife or other sharp article with intent to injure (section 9, Firearms and Offensive Weapons Act 1990) is subject to a maximum penalty of just 5 years' imprisonment on indictment. The maximum penalty attaching to the offence of possessing any thing with intent to damage property (10 years' imprisonment) would appear to be relatively high in comparison. Policy makers may wish to consider this apparent sentencing disparity.

[219] *Minister for Posts and Telegraphs v Campbell* [1966] IR 69 at 73.

INTERPRETATION (CHAPTER 52)

5201.—(1) For the purposes of this Chapter it is immaterial whether a belief is justified or not if it is honestly held.

(2) This Chapter shall not be construed as casting doubt on any defence recognised by law as a defence to criminal charges.

Explanatory Notes:

1. Head 5201 codifies the interpretative provisions contained in section 6(3) and 6(5) of the 1991 Act.

2. In both subheads, the word "section" has been replaced with "Chapter".

APPLICATION OF DEFENCES

5202.—*Heads 5203 (belief in consent)* and *5204 (protection of person and property)* apply to—

(a) any offence under *Head 5101 (damaging property)*,

(b) any offence under *Head 5103(1)(b) (aggravated property damage)*,

(c) any offence under *Head 5104 (threatening to damage property)* other than one involving a threat by the person charged to damage property in a way that he or she knows is likely to endanger the life of another, and

(d) any offence under *Head 5105 (possessing any thing with intent to defraud)* other than one involving an intent by the person charged of using, or causing or permitting the use of, something in his or her possession to damage property in such a way as aforesaid.

Explanatory Notes:

1. Head 5202, which codifies section 6(1) of the 1991 Act, provides for the application of specific defences (to be found in Heads 5203 and 5204) to certain criminal damage offences.

2. In paragraph (a), references pertaining to section 5 of the 1991 Act have been omitted, as the section 5 offence has been excluded from the Part on Criminal Damage Offences.

3. Paragraph (b) clarifies that the specific defences contained in section 6 of the 1991 Act apply to the section 2(1) offence when charged as arson under section 2(4). A submission was received by a member of the Advisory Committee confirming that the defences do apply to the section 2(1) offence when charged as arson.

4. The reference to "in his custody or under his control" in paragraph (d) has been replaced with "in his or her possession". Draft Criminal Code, Head 1001(3) clarifies that possession may have either a custodial and control component for the purposes of satisfying the conduct element of an offence.

BELIEF IN CONSENT

5203.—A person does not commit an offence to which this Head applies if at the time of the conduct alleged to constitute the offence he or she believed that the person whom he or she believed to be entitled to consent to or authorise the damage to the property in question had consented to or authorised it, or would have consented to or authorised it if he or she had known of the damage and its circumstances.

Explanatory Notes:

1. Head 5203, which codifies section 6(2)(a) of the 1991 Act, provides for the defence of "belief in consent" to the criminal damage offences specified in Head 5202.

2. The reference to "without lawful excuse" in section 6(2) of the 1991 Act has been omitted. In codification terms, a general term such as "lawful excuse" is an inappropriate label for what is in essence a discrete defence of "belief in consent", applicable only to certain criminal damage offences.

3. The phrase "at the time of the act or acts alleged to constitute the offence" in section 6(2)(a) of the 1991 Act has been replaced with "at the time of the conduct alleged to constitute the offence". The original language is problematic for two reasons. Firstly, to say that an act or acts can "constitute" an offence is conceptually inaccurate. This ignores other factors – such as *mens rea* and circumstance or result elements – that will often be required before an offence may be said to be "constituted". The word "conduct" has replaced the phrase "act or acts": it is designed to cover the objective elements and fault elements required in the relevant offence definition. A broad meaning of "conduct" is permissible in Head 5203 since the phrase "conduct element" is employed in Head 1102 of Part 1 in order to facilitate a wider meaning for the word "conduct" elsewhere in the Code, as and where necessary.

4. Section 6(2)(a) of the 1991 Act refers to the "person or persons" who the defendant believed to be entitled to consent to the damage in question. In Head 5203 this has been replaced simply with a reference to the "person" (in the singular). Under section 18(a) of the Interpretation Act 2005, "[a] word importing the singular shall be read as also importing the plural, and a word importing the plural shall be read as also importing the singular".

5. References pertaining to section 5 of the 1991 Act have been omitted, as the section 5 offence has been excluded from the Part on Criminal Damage Offences.

PROTECTION OF PERSON OR PROPERTY

5204.—(1) A person does not commit an offence to which this Head applies if he or she damaged or threatened to damage the property in question or, in the case of an offence under *Head 5105 (possessing any thing with intent to damage property)*, intended to use or cause or permit the use of something to damage it, in order to protect—

(a) himself, herself or another,

(b) property belonging to himself, herself or another, or

(c) a right or interest in property which was or which he or she believed to be vested in himself, herself or another,

and he or she acted reasonably in the circumstances as he or she believed them to be.

(2) For the purposes of this Head, a right or interest in property includes any right or privilege in or over land, whether created by grant, licence or otherwise.

Explanatory Notes:

1. Head 5204, which codifies section 6(2)(c) of the 1991 Act, provides for the defence of "protection of person or property" to the criminal damage offences specified in Head 5202.[220]

2. The reference to "without lawful excuse" in section 6(2) of the 1991 Act has been omitted. In codification terms, a general term such as "lawful excuse" is an inappropriate label for what is in essence a discrete defence of "protection of person or property", applicable only to certain criminal damage offences. It should be noted, however, that Head 5204 may become unnecessary if it can be subsumed under a General Part defence of "legitimate defence" or suchlike. This will be kept under review as work on Part 1 progresses.

3. Subhead (1) breaks up the content of section 6(2)(c) into a number of paragraphs in the interests of enhancing clarity and readability.

4. The phrase "and the act or acts alleged to constitute the offence were reasonable in the circumstances as he believed them to be" in section 6(2)(c) of the 1991 Act has been replaced with "and he or she acted reasonably in the circumstances as he or she believed them to be". The original language is problematic. To say that an act can "constitute" an offence is conceptually inaccurate. This ignores other factors – such as *mens rea* and circumstance or result elements – that will often be required before an offence may be said to be "constituted".

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[220] Section 6(2)(c) was substituted by section 21 of the Non-Fatal Offences against the Person Act 1997.

5. Subhead (2) codifies the interpretative provision contained in section 6(4) of the 1991 Act.

PROCEEDINGS

5301.—(1) Proceedings for an offence under *Heads 5101 (damaging property), 5102 (damaging property with intent to defraud)* and *5103 (aggravated property damage)* alleged to have been committed by a person outside the State in relation to data kept within the State or other property so situate may be taken, and the offence may for all incidental purposes be treated as having been committed, in any place in the State.

(2)

(a) Where a person is charged with an offence under *Heads 5101 (damaging property), 5102 (damaging property with intent to defraud)*, *5103 (aggravated property damage), Head 4104 (threatening to damage property)* and *5105 (possessing any thing with intent to damage property)* in relation to property belonging to another—

(i) it shall not be necessary to name the person to whom the property belongs, and

(ii) it shall be presumed, until the contrary is shown, that the property belongs to another.

(b) Where a person is charged with an offence under *Heads 5101 to 5103* in relation to such property as aforesaid, it shall also be presumed, until the contrary is shown, that the person entitled to consent to or authorise the damage concerned had not consented to or authorised it, unless the property concerned is data and the person charged is an employee or agent of the person keeping the data.

(3) A person charged with an offence under *Heads 5101 to 5103* in relation to data or an attempt to commit such an offence may, if the evidence does not warrant a conviction for the offence charged but warrants a conviction for an offence under section 5 of the Criminal Damage Act, 1991, be found guilty of that offence.

Explanatory Notes:

1. Head 5301 codifies section 7 of the 1991 Act.

2. It should be recalled that the offence of unauthorised access of data – as provided for by section 5 of the 1991 Act – has been excluded from the present draft. For this reason references to that provision have been removed.

3. In subhead (3) it would appear necessary to retain the reference to section 5, however.

JURISDICTION OF DISTRICT COURT

5302.—No rule of law ousting the jurisdiction of the District Court to try offences where a dispute of title to property is involved shall preclude that court from trying offences under this Part.

Explanatory Notes:

1. Head 5302 codifies section 8 of the 1991 Act.

ARREST WITHOUT WARRANT

5303.—(1) This Head applies to an offence under *Part 5* other than *Head 5304(4) (search warrant)*.

(2) Any person may arrest without warrant anyone who is or whom he or she, with reasonable cause, suspects to be in the act of committing an offence to which this Head applies.

(3) Where an offence to which this Head applies has been committed, any person may arrest without warrant anyone who is or whom he or she, with reasonable cause, suspects to be guilty of the offence.

(4) Where a member of the Garda Síochána, with reasonable cause, suspects that an offence to which this Head applies or an offence under *Head 5304(4)* has been committed, he or she may arrest without warrant anyone whom he or she, with reasonable cause, suspects to be guilty of the offence.

(5) A member of the Garda Síochána may arrest without warrant anyone who is or whom he or she, with reasonable cause, suspects to be about to commit an offence to which this Head applies.

(6) For the purpose of arresting a person under any power conferred by this Head a member of the Garda Síochána may enter (if need be, by force) and search any place where that person is or where the member, with reasonable cause, suspects him or her to be.

(7) This Head shall apply to an attempt to commit an offence as it applies to the commission of that offence.

(8) This Head shall not prejudice any power of arrest conferred by law apart from this Head.

Explanatory Notes:

1. Head 5303 codifies section 12 of the 1991 Act.

2. In subhead (1), the reference to section 5 of the 1991 Act has been omitted.

SEARCH WARRANT

5304.—(1) If a judge of the District Court is satisfied by information on oath of a member of the Garda Síochána that there is reasonable cause to believe that any person has in his or her possession or on his or her premises any thing and that it has been used, or is intended for use, in contravention of this Part—

(a) to damage property belonging to another, or

(b) to damage any property in a way likely to endanger the life of another or with intent to defraud,

the judge may issue a search warrant mentioned in *subhead (2).*

(2) A search warrant issued under this Head shall be expressed and operate to authorise a named member of the Garda Síochána, accompanied by such other members of the Garda Síochána as may be necessary, at any time or times within one month of the date of issue of the warrant, to enter if need be by force the premises named in the warrant, to search the premises and any persons found therein, to seize and detain anything which he or she believes to have been used or to be intended for use as aforesaid and, if the property concerned is data, to operate, or cause to be operated by a person accompanying him or her for that purpose, any equipment in the premises for processing data, inspect any data found there and extract information therefrom, whether by the operation of such equipment or otherwise.

(3) The Police (Property) Act, 1897, shall apply to property which has come into the possession of the Garda Síochána under this Head as it applies to property which has come into the possession of the Garda Síochána in the circumstances mentioned in that Act.

(4) A person commits an offence if he or she—

(a) intentionally, knowingly or recklessly obstructs or impedes a member of the Garda Síochána acting under the authority of a search warrant issued under this Head, or

(b) is found on or at the premises specified in the warrant by a member of the Garda Síochána acting as aforesaid and who intentionally, knowingly or recklessly fails or refuses to give the member his or her name and address when required by the member to do so or gives him or her a name or address that is false or misleading,

and shall be liable on summary conviction—

(i) in the case of an offence under *paragraph (a)*, to a fine not exceeding €1,500 or imprisonment not exceeding 12 months or both, and

(ii) in the case of an offence under *paragraph (b)*, to a fine not exceeding €650.

Explanatory Notes:

1. Head 5304 codifies section 13 of the 1991 Act.

2. In subhead (1), the words "without lawful excuse" have been replaced with "in contravention of this Act".

3. In subhead (1), the phrase "in his or her custody or under his or her control" has been replaced with "in his or her possession" in order to comply with the definition of possession contained in Draft Criminal Code, Head 1001(3).

4. Section 13(1)(c) of the 1991 Act, which pertains to section 5 of the 1991 Act, has been omitted. Accordingly, the reference to section 13(1)(c) contained in section 13(2) of the 1991 Act has also been omitted.

5. Subhead 4 has been has been slightly reformatted to follow the Code's offence template, *i.e.* "A person commits an offence if he or she …"

6. Section 13(4) did not specify any fault requirements for the embedded offences of obstructing or impeding a member of the Garda Síochána acting under the authority of a search warrant, or of failing to give a name and address to a member of the Garda Síochána or give a name and address which is false or misleading. By virtue of Draft Criminal Code, Head 1106(4) recklessness will be the read-in fault element where fault is not specified for any circumstance or result element across the Code. Intention, knowledge and recklessness have, therefore, been inserted into subhead (4)(a) and (b).

PART 6: PUBLIC ORDER OFFENCES

INTRODUCTION

1. This draft Part on Public Order Offences applies the technique of codification to the Criminal Justice (Public Order) Act 1994 (hereinafter "the 1994 Act"). The codification exercise has proved particularly challenging for the 1994 Act because of the need to separate the group components (the behaviour of persons *other* than the defendant) from the individual liability components in the offences of affray, violent disorder and riot. This exercise was necessary in order to conform with the Code's offence template which focuses primarily on individual liability: *viz.,* "A person commits the offence of [x] if he or she …". The proliferation of objective tests in the 1994 Act also posed difficulties from a codification perspective because of the automatic operation of the read-in rule (see Draft Criminal Code, Head 1106(4)) where no subjective fault element has been expressly included in an offence definition. The proposed solution to this problem of preserving objective tests in the Code is set out in paragraphs 14-19 below.

2. The codified draft follows the model of restatement; there are no instances of law reform other than those inherent in the codification process – the "plugging" of gaps in *mens rea* and the substitution of references to *awareness* (for example in Heads 6106 and 6107 covering the offences of affray and violent disorder) with the fault element of recklessness.

3. Changes to the text of specific provisions are considered under the relevant Heads. At the outset, however, the following changes of general concern to the draft as a whole should be noted.

Reclassified offences

4. There are several offences in the 1994 Act that are not proper public order offences and will therefore have to be reclassified as the codification project proceeds. In the context of statute law it was reasonable enough to house the offences mentioned below in the 1994 Act, but for the purposes of codification we require a more rigorous classification scheme.

5. It is submitted that sections 11 and 13 of the 1994 Act are misclassified. Section 11 deals with the offence of entering a building, etc., with intent to commit an offence while section 13 sets out the offence of trespass on a building. Section 11, in particular, substantially overlaps with the offence of burglary in section 12 of the Criminal Justice (Theft and Fraud Offences) Act 2001. Sections 11 and 13 of the 1994 Act are not really public order offences and are, therefore, addressed in the Part on Theft, Fraud and Related Offences in the Chapter 43 dealing with Offences Relating to Trespass because the dominant interest being targeted is the protection of property.[221]

6. Section 17 of the 1994 Act is also misclassified. Section 17 deals with the offence of "blackmail, extortion and demanding money with menaces". Section 17 is not essentially a public order offence and has been housed in Draft Criminal Code,

[221] Head 4302 provides for the offence of "entering with intent" as provided for in section 11 of the Criminal Justice (Public Order) Act 1994. Head 4303 provides for the offence of trespass on building, as provided for in section 13 of the 1994 Act.

Head 3204, in Chapter 32 which deals with Offences Against Personal Autonomy since the underlying interest is essentially concerned with individual freedom and autonomy.

7. Arguably, section 18 of the 1994 Act is both misclassified and probably superfluous. Section 18 deals with the offence of assault with intent to cause bodily harm or commit an indictable offence. Section 18 is not a true public order offence since it is chiefly concerned with the protection of bodily integrity rather than any threat to public peace and order.

8. Section 18 is very close to an *attempt* to commit assault causing harm/robbery/ etc. Accordingly, it is difficult to see the value in retaining section 18. After all, an assault will generally amount to a proximate act, as required to make out a charge of attempt.

9. It would appear that section 18 has not been used by prosecutors. According to a 2003 report commissioned by the National Crime Council although "section 18 of the CJPOA covers assault with intent to cause bodily harm, no offence has ever been proceeded with under this section; assaults are typically dealt with under the Non-Fatal Offences against the Person Act, 1997."[222]

10. In light of the above, there would appear to be no compelling argument for keeping the section 18 offence. It is submitted that section 18 should be repealed.

11. The offences contained in sections 19A-H of the 1994 Act are misclassified. These sections deal with offences relating to "entering and occupying land without consent" and the powers of the Gardaí to respond to such behaviour. The content of sections 19A-H essentially involves harm to property rather than breaches of public order since the dominant interest being targeted is interference with property in the form of trespass or damage to another person's land. Accordingly, the offences and ancillary matters set out in sections 19A-H have been codified in the Part on Theft, Fraud and Related Offences in Chapter 53 dealing with Offences Relating to Trespass.[223]

12. Section 23 of the 1994 Act is misclassified and has, therefore been omitted from this draft. Section 23 prohibits the advertisement of brothels and prostitution. The offence is not quintessentially a public order offence. It would seem that the interest being protected is public morality rather than public order. It is submitted that such an offence would be better housed in the Part on Sexual Offences and

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222 See *Public Order Offences in Ireland: A Report by the Institute of Criminology, Faculty of Law, University College Dublin for the National Crime Council* (Stationery Office, 2003) at 51.

223 Head 4301 codifies the offence contained in section 19C of the Criminal Justice (Public Order) Act 1994, as inserted by section 24 of the Housing (Miscellaneous Provisions) Act 2002. Head 4301(4) and (5) contain interpretation provisions (applicable to Head 4301) derived from section 19A of the 1994 Act; subheads (6) and (7) are derived from section 19B of the 1994 Act and subheads (3) and (8) are derived from section 19G of that Act. Head 4604 codifies sections 19C(3) and 19D, Head 4605 codifies section 19E and Head 4606 codifies section 19F of the 1994 Act.

Related Offences or suchlike (it is envisaged that this group of offences will be codified at a later date).

Allowing the "read-in rule" to operate

13. In the Draft Criminal Code the policy has normally been to include expressly the triple fault alternative (*i.e.* "intentionally, knowingly or recklessly…) as part of each offence definition in order to make the Code's conduct rules more comprehensible for ordinary code users. Since fault is an essential ingredient of the everyday understanding of wrongdoing the Code's commandments should avoid unnecessary scatter by specifying the relevant species of fault as in each offence definition. However, this policy is subject to the proviso that the inclusion of the triple fault alternative should not be pursued at the expense of clarity and accessibility. Accordingly, where its inclusion might lead to unduly cumbersome results or otherwise detract from the readability of an offence provision, it seems preferable to omit express reference to the requisite fault element in the offence definition, thus triggering the read-in rule provided for in Head 1106(4) which will automatically apply the default requirement of recklessness to the relevant provision.

14. In the current draft this has been done in respect of the "presence" component of the offences of affray, (Head 6106(1)(a)), violent disorder (Head 6107 (1)(a)), and riot (Head 6108(1)(a)); and in respect of the "violence" component of riot (Head 6108 (1)(b).

Head 6103: Abusive behaviour or display in a public place

15. The approach taken in the present draft is to accommodate the offence contained in section 6 of the 1994 Act (threatening, abusive, or insulting behaviour in public place) and the offence contained in section 7 of the 1994 Act (distribution of display in public place of material which is threatening, abusive, insulting or obscene) in the form of a consolidated offence of "abusive behaviour or display in a public place".

16. From a codification perspective, this approach makes good sense. After all, both of these offences are subject to the same penalty (on summary conviction, a fine not exceeding €1,000 or imprisonment for a term not exceeding 3 months, or both) and target similar wrongdoing. Good codification practice recommends that offences which essentially proscribe similar wrongdoing in an effort to prevent the occurrence of a particular harm *e.g.* a breach of the peace, should be consolidated where practicable. This serves to minimise offence proliferation, a phenomenon which international experience has shown to be the foremost cause of code degradation.

17. Offence consolidation is not a novel concept in this jurisdiction. For example, the offence of assault in section 2 of the Non-Fatal Offences against the Person Act 1997 combined the common law offences of assault and battery. The core of the

new offence in Head 6103 closely resembles section 4(1) of the English Public Order Act 1986.

Head 6105: Aggravated obstruction

18. Section 19 of the 1994 Act targets both assaults upon and obstruction of certain categories of persons, including peace officers, medical officers and their assistants. The assault component of section 19 has already been separated from the obstruction element and codified under an offence named "aggravated assault" in Draft Criminal Code, Head 3105(1). Head 6105 below codifies the obstruction of the persons covered in Head 3105(1), and is named "aggravated obstruction" in order to achieve uniformity in nomenclature, where possible, across the Code.

ARRANGEMENT OF HEADS

PART 6

PUBLIC ORDER OFFENCES

CHAPTER 60

Interpretation

CHAPTER 61

Public Order Offences

CHAPTER 62

Procedural, Evidential and Ancillary Provisions

6204	Control of access to certain events, etc.
6205	Arrest without warrant.
6206	Continuance of existing powers of Garda Síochána.

INTERPRETATION (PART 6)

6001.—In this *Part*—

"dwelling" includes a building, vehicle or vessel ordinarily used for habitation;

"private place" means a place that is not a public place;

"public place" includes—

(a) any highway,

(b) any outdoor area to which at the material time members of the public have or are permitted to have access, whether as of right or as a trespasser or otherwise, and which is used for public recreational purposes,

(c) any cemetery or churchyard,

(d) any premises or other place to which at the material time members of the public have or are permitted to have access, whether as of right or by express or implied permission, or whether on payment or otherwise, and

(e) any train, vessel or vehicle used for the carriage of persons for reward;

"violence" means any violent conduct so that—

(a) it includes violent conduct towards persons and property (except in the case of *Head 6106* (*affray*), and

(b) it is not restricted to conduct causing or intended to cause injury or damage but includes any other violent conduct (for example, throwing at or towards a person a missile of a kind capable of causing injury which does not hit or falls short).

Explanatory Notes:

1. Head 6001 makes provision for definitions applicable to Part 6. These definitions, with one exception, are derived from section 3 of the Criminal Justice (Public Order) Act 1994. Some of these definitions, such as the definition of "public place"[224] may eventually be relocated to the definitional section of Part 1 (currently Head 1001) if such definitions are capable of general application across the Code.

2. A definition of violence has been inserted, based on section 8 of the English Public Order Act 1986. The principle of completeness requires that all key,

[224] Section 1 of the Non-Fatal Offences against the Person Act 1997 defines "public place" as including any street, seashore, park, land or field, highway and any other premises or place to which at the material time the public have or are permitted to have access, whether on payment or otherwise, and includes any train, vessel, aircraft or vehicle used for the carriage of persons for reward.

frequently used definitions be included in the Code. The term "violence" is used in Heads 6106 (affray), 6107 (violent disorder) and 6108 (riot). No definition of violence was given in the Criminal Justice (Public Order) Act 1994, but it is submitted that a definition of "violence" in the Part on Public Order Offences would serve to enhance certainty and clarity as regards the elements of the offences concerned.

INTOXICATION IN A PUBLIC PLACE

6101.—(1) A person commits the offence of intoxication in a public place if he or she is present in any public place while intoxicated to such an extent as would give rise to a reasonable apprehension that he or she might endanger himself or herself or any other person in his or her vicinity.

(2) Strict liability applies to *subhead 1*.

(3) In this Head "intoxicated" means under the intoxicating influence of any alcoholic drink, drug, solvent or other substance or a combination of substances.

(4) A person guilty of an offence under this Head shall be liable on summary conviction to a fine not exceeding €500.

Explanatory Notes:

1. Head 6101 codifies the offence of "intoxication in a public place" as provided for in section 4 of the 1994 Act.

2. The content of the offence may be broken down as follows:

FAULT ELEMENT	OBJECTIVE ELEMENT
Strict liability.	*Conduct:* Status (being). AND
Strict liability.	*Circumstance*: Intoxicated. AND
Strict liability.	*Circumstance*: In a public place. AND
Strict liability.	*Circumstance:* Defendant is intoxicated to such an extent that it would give rise to a reasonable apprehension that he/she might endanger him/herself or another.

3. Section 4 of the 1994 does not explicitly provide for any fault element for any of the objective elements of the offence. Where no fault element is specified for circumstance and result elements recklessness will be the read-in fault element under Head 1106(4)(a).

4. Employing recklessness in relation to the circumstance elements would be too onerous for this offence. Given the nature of drunkenness and the altered state of reality it induces, the prosecution would encounter difficulties in proving that the intoxicated person consciously disregarded a substantial risk that he or she was intoxicated in a public place. Moreover, it would seem that the Oireachtas intended section 4 to be one of strict liability given the low original penalty – a

£100 fine.[225] This is the view taken by Charleton, McDermott and Bolger.[226] Accordingly, Head 6101(2) clarifies that subhead (1) is subject to strict liability.

5. Strict liability in relation to the conduct element may seem strange. Ordinarily, under the Code a person would have to know that he or she is moving his or her arm (an act) or failing to do so (an omission), in order to satisfy the conduct requirement. In the context of intoxication in a public place, the conduct element is simply *being somewhere* (wherever the alleged offence takes place).[227] Owing to the fact that the policy considerations underlying the offence are concerned with public protection and safety, it is arguably appropriate to relieve the prosecution of establishing fault in relation to all the objective elements.

6. The difficulty with this approach is that it seems to dispense with the conduct requirement as normally understood in the criminal law. For example, in circumstances where an intoxicated youth is dumped in the street by a taxi driver, the youth would technically satisfy the conduct element of the offence of intoxication in a public place, despite his absence of knowledge as to his *being* (wherever the alleged offence takes place). But this difficulty is more apparent than real because the youth should have an involuntariness defence.[228] An involuntariness defence will be added to Part 1 as the codification project progresses, so that people may be held blameless when the conduct alleged against them is overly contingent on forces outside their control or exercise of will.

7. Section 4(3) of the 1994 Act has been relocated to Head 6201(1) in Chapter 62, dealing with Procedural, Evidential and Ancillary Provisions.

8. The definition of "bottle or container" in section 4(4) has been moved to Head 6201(12) as it pertains to the powers of members of the Gardaí to direct people in possession of intoxicating substances.

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225 See section 6107 of the Proposed Illinois Criminal Code which includes a new offence of "public drunkenness; drug incapacitation". Section 6107, if introduced, would be a petty offence subject to absolute liability by virtue of section 205(4).

226 See *Criminal Law* (Tottel 2006) paragraph 9.206 at 764.

227 See Draft Criminal Code Head 1001(4) above.

228 See the problematic case of *Larsonneur* (1933) 149 LT 542 where a woman was deported from Ireland back to Britain and convicted of contravening the Aliens Order 1920. The Court of Appeal dismissed her appeal, in which she argued that her return to England was beyond her control.

DISORDERLY BEHAVIOUR IN A PUBLIC PLACE

6102.—(1) A person commits the offence of disorderly behaviour in a public place if he or she engages in any unreasonable behaviour in a public place—

(a) between the hours of 12 o'clock midnight and 7 o'clock in the morning next following, or

(b) at any other time, after having been requested by a member of the Garda Síochána to desist,

and having regard to all the circumstances, such behaviour is likely to cause serious offence or serious annoyance to any person who is, or might reasonably be expected to be, aware of such behaviour.

(2) *Head 1106(4)* (the "read-in rule") does not apply to *subhead (1)(b).*

(3) A person guilty of an offence under *subhead* (*1*) shall be liable on summary conviction to a fine not exceeding €1,000.

Explanatory Notes:

1. Head 6102 codifies section 5 of the 1994 Act. The offence has been renamed "disorderly behaviour in a public place".

2. The purpose of Head 6102 is to prohibit behaviour which falls short of threatening or insulting behaviour under Head 6103, "but which nevertheless can adversely affect the quality of people's lives."[229] The content of the offence may be broken down as follows:

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A.	*Conduct:* Any act. AND
Intention/Knowledge/Recklessness.	Circumstance: Unreasonable behaviour AND
Intention/Knowledge/Recklessness.	*Circumstance*: In a public place. AND
Intention/Knowledge/Recklessness.	*Circumstance*: Between the hours of 00:00 am and 07:00 am the following morning. OR
Intention/Knowledge/Recklessness.	*Circumstance*: At any other time, after having been requested by a member of the Garda Síochána to desist.

[229] See Charleton, McDermott & Bolger, *Criminal Law* (Tottel 2006) paragraph 9.208 at 765.

Objective test.	*Circumstance*: The defendant's behaviour is likely to cause serious offence or serious annoyance to any person who is, or might reasonably be expected to be, aware of such behaviour.

3. The reference to *conduct* in the offence definition has been replaced with the term "behaviour" in order to achieve parity with Head 6103 below.

4. The definition of "offensive conduct" has been incorporated into the substantive offence definition in subhead (1)(b). This is in line with the approach taken in Draft Criminal Code, Head 3203 (harassment), allowing for a clearer and more precise statement of the elements of the offence. The approach taken avoids scatter of the elements of the offence.

5. Section 5 of the 1994 Act is silent in relation to fault. Charleton, McDermott and Bolger assert that the offence "is one of strict liability and the test for offensive conduct is a purely objective one."[230] However, while the second part of this proposition is manifestly true (see paragraph 9, below), there is no evidence to support the first part. An objective test of liability is a species of fault, which, insofar as it relies on a reasonable person standard, may be roughly approximated with negligence; whereas strict liability applies even in the absence of negligence.

6. Accordingly, on the basis that the normal presumption of *mens rea* applies, the fault elements of intention, knowledge and recklessness have been applied to the majority of the circumstance elements of the offence. However, the triple fault alternative has been omitted from subhead (1)(a) on the grounds that its express inclusion might detract from the readability of the provision; the subhead will accordingly be governed by the read-in rule (see Draft Criminal Code, Head 1106(4)).

7. Section 5(3) is different as it appears to apply an objective test regarding the offensive nature of the conduct – *i.e.* it speaks of conduct "likely to cause serious offence or serious annoyance". In order to give effect to the objective test in this context, and bearing in mind the Advisory Committee's stated preference for an objective test over a form of negligence-based liability, subhead (2) disapplies the read-in rule to subhead (1)(b).

230 See *Criminal Law* (Tottel 2006) paragraph 9.208 at 765.

ABUSIVE BEHAVIOUR OR DISPLAY IN A PUBLIC PLACE

6103.—(1) A person commits the offence of abusive behaviour or display in a public place if he or she intentionally, knowingly or recklessly**—**

> (a) uses or engages in any threatening, abusive, or insulting words or behaviour, or
>
> (b) distributes or displays any writing, sign or visible representation which is threatening, abusive, insulting or obscene

in a public place with intent to provoke a breach of the peace or knowing or being reckless as to whether a breach of the peace may be occasioned.

[(2) In this Head**—**

> "a breach of the peace" occurs if harm is actually done or is likely to be done to a person, or in his or her presence, to his or her dwelling [property], or a person is in fear of being so harmed through an assault, an affray, violent disorder, riot or other disturbance.]

(3) A person guilty of an offence under this Head shall be liable on summary conviction to a fine not exceeding €1,000 or to imprisonment for a term not exceeding 3 months or both.

Explanatory Notes:

1. Head 6103 consolidates the offence of "threatening, abusive or insulting behaviour in public place" under section 6 and the offence of "distribution or display in public place of material which is threatening, abusive, insulting or obscene" under section 7 of the 1994 Act. Both offences are subject to the same penalty under the 1994 Act and target similar wrongdoing[231] (abusive conduct or words - spoken or written) and harms (potential breach of the peace), so it makes sense to consolidate them into a single offence from a codification standpoint.

2. Head 6103 has been named "abusive behaviour or display in a public place". This name would appear to be an elegant description of the elements of the combined offence. It has the merit of relative brevity and accuracy. The content of the offence may be broken down as follows:

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A.	*Conduct:* Any act (including words). AND
Intention/Knowledge/Recklessness.	*Circumstance:* Behaviour/words are threatening, abusive, insulting or obscene.

[231] See Charleton, McDermott and Bolger, *Criminal Law* (Tottel 2006) paragraph 9.209 at 765 where the authors claim that section 6 targets "foul-mouthedness and the preliminary abuse that can lead to more serious incidents".

	OR
Intention/Knowledge/Recklessness.	*Result:* Distributes or displays any writing, sign or visible representation.
	AND
Intention/Knowledge/Recklessness.	*Circumstance:* Writing, sign or visible representation is threatening, abusive, insulting or obscene.
AND	AND
Intention/Knowledge/Recklessness.	*Circumstance:* In a public place.
AND	
Ulterior Intention: intention to provoke a breach of the peace.	N/A.
OR	
Knowledge/recklessness.	*Circumstance:* A breach of the peace may be occasioned.

3. Sections 6 and 7 have been slightly reformatted in order to delineate more clearly the elements of the consolidated offences.

4. Apart from a reference to ulterior intention or recklessness in regard to provoking a breach of the peace, sections 6 and 7 of the 1994 Act are silent on the subject of *mens rea*.[232] Accordingly, the fault elements of intention, knowledge and recklessness have been inserted to apply to the circumstance elements of (a) the conduct (including words) being of a threatening, abusive, or insulting nature or (b) the writing, sign or visible representation being of a threatening, abusive, insulting or obscene nature and (c) in a public place. These fault elements also apply to the result element of distributing or displaying any writing, sign or visible representation.

5. The purpose of sections 6 and 7 of the 1994 Act is to prevent breaches of the peace.[233] However, there is no definition of "breach of the peace" in the 1994 Act.

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[232] See *Clifford v The DPP (At the Suit of Garda Susan McLouglin)* unreported High Court, 29 October 2008 where Charleton J analysed the elements of section 6 of the Criminal Justice (Public Order) Act 1994. At paragraph 10, Charleton J stated that "an intent to provoke a breach of the peace, the mental element encapsulated within *s. 6 of the Criminal Justice (Public Order) Act 1994,* requires that, before conviction, the court should be satisfied beyond reasonable doubt that in doing what he did by way of abusive words or behaviour, or other conduct within the section, the defendant's purpose was to provoke a breach of the peace. In this context, provoke is an ordinary word and may be explained, if explanation is necessary, as to inspire or to bring about. So, the issue is: did the rowdy person intend to provoke a breach of the peace? It is not necessary to prove that he succeeded."

[233] See *Clifford v The DPP (At the Suit of Garda Susan McLouglin)* unreported High Court, 29 October 2008 at paragraphs 7-9 where Charleton J discusses the concept of breaching the peace. At paragraph 7 he observes that the common law offence of breaching the peace was not abolished by section 6 of the Criminal Justice (Public Order) Act 1994. "Instead, the ease of proof of the mischief of abusive behaviour in public was reformed by relieving the prosecution, where they charge under the section, of proving that a breach of the peace actually occurred. In the charge before the District Court it was only necessary to prove a

This is unfortunate since the ulterior intention of provoking a breach of the peace (or being reckless as to the potential occasioning thereof) is a key component of the sections 6 and 7. It is therefore desirable to define "breach of the peace" for the purposes of the codified offence of Head 6103. Defining key terms in the Code is a fundamental component of the principle of completeness.

6. Indeed, it is likely that a definition of "breach of the peace" may need to be inserted at a later date into the General Part definitions section (currently Draft Criminal Code, Head 1001) since the term is relevant to other provisions likely to form part of the Code such as section 18(1)(e) of the Non-Fatal Offences against the Person Act 1997 (Justifiable use of force; protection of person or property, prevention of crime, etc.) and section 17 of the Offences Against the State Act 1939 (Administering unlawful oaths).

7. Although it goes without saying that the definition of this important concept is ultimately a matter for the Oireachtas on the advice of the Minister and the Attorney General, the ensuing discussion points to the likely shape a definition of breach of the peace might take.

8. A breach of the peace implies conduct "which goes beyond boisterousness."[234] In *Eroll Howell*[235] Watkins J defined breach of the peace as:

> "… whenever harm is actually done or is likely to be done to a person or, in his presence, to his property, or a person is in fear of being so harmed through an assault, an affray, or riot, unlawful assembly or other disturbance."

9. In *Thorpe v DPP*[236] Murphy J analysed the common law offence of breach of the peace as follows:

> "*Glanville Williams:* Arrest for Breach of Peace (1954) Crim. L.R. 578 pointed out that, apart from arrest for felony, the only power of arrest at common law is in respect of breach of the peace. However, there was a surprising lack of authoritative definition of what one would suppose to be a fundamental concept in criminal law. While a breach of the peace is supposed to underlie every crime, the narrower meaning encompasses a riot or unlawful assembly which has not yet become a riot. There may also be a breach of the peace without any general disorder where a unilateral battery or an assault is committed.
>
> Each of the instances involves some danger to the person, and it is submitted that this is the general meaning of a breach of the peace in criminal law.
>
> In English law, if there is no threat to the person it seems that a threat to property should generally be regarded as insufficient though it may well be that a threat to attack a dwelling house is looked upon with special severity and so is always a breach of the peace if the attack is imminent."

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particular form of conduct accompanied by the mental element of intent or recklessness, as set out in the section."

234 See *Clifford v The DPP (At the Suit of Garda Susan McLouglin)* unreported High Court, 29 October 2008 at paragraph 7.

235 (1981) 71 Cr App R 31 at 37.

236 [2007] IR 502 at 512.

10. In *Clifford v The DPP (At the Suit of Garda Susan McLouglin)*[237] Charleton J stated that the crime of breach of the peace occurs where a person finds himself, or herself:

> "in a situation where they reasonably fear that if they do not withdraw from it quite promptly, they may either be assaulted or that the disturbance in respect of which the accused stands charged may create the risk of a response which is disorderly and in consequence potentially violent, whereby, through direct or indirect means, bystanders may be caught up in violence. In this context, shoving, flying missiles, stampeding by a few people or a section of a crowd, and fighting within a group, constitute examples of the kind of indirect violence that may ensnare the uninvolved and so constitute a breach of the peace."

11. The Oxford Dictionary of Law defines "breach of the peace" in terms similar to those employed by Watkins J in *Eroll Howell*[238] as:

> "The state that occurs when harm is done or likely to be done to a person or (in his presence) to his property, or when a person is in fear of being harmed through an assault, affray, or other disturbance. At common law, anyone may lawfully arrest a person for breach of the peace committed in his presence, or when he reasonably believes that a person is about to commit or renew such a breach."[239]

12. For the purposes of Head 6103, subhead (2) has been inserted to provide that a breach of the peace occurs if harm is actually done or is likely to be done to a person, or in his or her presence, to his or her dwelling [property], or a person is in fear of being so harmed through an assault, an affray, violent disorder, riot or other disturbance.

13. Section 6 of the 1994 Act is now an offence for the purposes of a restriction on movement order pursuant to section 101 of the Criminal Justice Act 2006. This is an important point. Section 101 of the 2006 Act applies to section 6 of the 1994 Act but *not* section 7. Thus, it should be noted that any consequential amendments made to Schedule 3 of the 2006 Act will need to make it clear that section 101 of the 2006 Act applies to Head 6103(1) and *not* Head 6103(2).

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237 Unreported High Court, 29 October 2008 at paragraph 8.

238 (1981) 71 Cr App R 31 at 37.

239 *Oxford Dictionary of Law*, (Oxford University Press 6th ed, 2006) at 62.

OBSTRUCTION

6104.—(1) A person commits the offence of obstruction if he or she intentionally, knowingly or recklessly prevents or interrupts the free passage of any person or vehicle in any public place.

(2) A person does not commit an offence under this Head if, in relation to the acts which constitute the offence, he or she had a reasonable excuse for so acting.

(3) A person guilty of an offence under this Head shall be liable on summary conviction to a fine not exceeding €400.

Explanatory Notes:

1. Head 6104 codifies section 9 of the 1994 Act. The name of the offence has been changed from "wilful obstruction" to "obstruction" since *wilful* will not be a fault element in the Code, but will generally be approximated with the fault element of knowledge.[240] The content of the offence may be broken down as follows:

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A.	*Conduct:* Any act.
Intention/Knowledge/Recklessness.	*Result:* Prevents or interrupts the free passage.
	AND
Intention/Knowledge/Recklessness.	*Circumstance:* Of any person or vehicle.
	AND
Intention/Knowledge/Recklessness.	*Circumstance:* In a public place.

2. Section 9 has been slightly reformatted in order to delineate more clearly the elements of the offence.

3. The reference to "without lawful authority" in section 9 of the 1994 Act has been omitted (see introduction for further information).

4. Under subhead (2), "reasonable excuse" is treated as a standalone exception to liability. This approach accords better with the offence template endorsed by the Advisory Committee; after all, "reasonable excuse" is for all intents and purposes a defence.[241] Moreover, it ensures that the "read-in rule" under Head 1106(4)(a) importing recklessness will not apply; otherwise (assuming the defence has

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240 This was the approach taken in section 2.02(8) of the American Model Penal Code: "A requirement that an offense be committed wilfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements appears."

241 See Draft Criminal Code Head 3203 which codifies the offence of harassment where the "reasonable person" test in section 10 of the Non-Fatal Offences against the Person Act 1997 is treated as a form of objective test of liability.

discharged its evidential burden in raising the defence) the prosecution would have to prove not only that the defendant did not have a reasonable excuse, but that he consciously and unjustifiably disregarded a substantial risk that he was acting without a reasonable excuse. According to the present draft, under subhead (2) the prosecution would merely have to prove that the defendant did not have a reasonable excuse, whether or not he adverted to that fact.[242] It is submitted that this approach is in line with the law as it stands under the 1994 Act.

5. In subhead (1) the fault elements of intention, knowledge or recklessness[243] have been inserted to attach to the result element of preventing or interrupting the free passage of any person or vehicle. The 1994 Act stipulates a requirement of wilfulness in this regard. Wilfulness will not be defined as a fault element in the Code. The three fault elements defined in the General Part are intention, knowledge, and recklessness.[244]

6. "Wilfully" is a term frequently used in statutory offences. For example, section 246(1) of the Children Act 2001 provides that the fault element of wilfulness satisfies the offence of cruelty to children. However, the term "wilfully" in statutes is problematic.[245] Sometimes the term has been treated as a *mens rea* term. For example, in *Wilmott v Atack*[246] it was held that a person does not wilfully obstruct a police officer simply because he does a deliberate act which in fact obstructs an officer. An intention to obstruct must be established.

7. There is, however, a line of authority in which courts have imposed strict liability where the term "wilfully" has been used, so that it has been deemed to apply only to the act but not to some circumstance or result element of the offence. In *Hudson v MacRae*[247] a man was found guilty of wilfully fishing in private water, although he believed there was a public right to fish there. In *Cotterill v Penn*[248] conviction for wilfully killing a house pigeon followed when the defendant killed the bird in the belief that it was wild. In *Maidstone Borough Council v*

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242 See further the Texas Penal Code, which also provides for a read-in rule of recklessness with respect to circumstance elements, and adopts this approach in relation to "reasonable excuse". According to section 38.10 – which concerns the offence of bail jumping and failure to appear – "It is a defence to prosecution under this section that the actor had a reasonable excuse for his failure to appear in accordance with the terms of his release."

243 See section 42.03(a) of the Texas Penal Code which applies the fault requirements of intention, knowledge and recklessness for the offence of "obstructing highway or other passageway". See also Section 18-9-107 of the Colorado Criminal Code, where the offence of "obstructing highway or other passageway" can be committed intentionally, knowingly, or recklessly.

244 See Heads 1208-10.

245 See section 48(7) of the Safety, Health and Welfare at Work Act 1989 which states that it is an offence for a person *wilfully* to prevent, obstruct, impede, or delay an officer of customs and excise in the excise of any of the powers conferred on him under Section 38 of the 1989 Act. See section 50(1)(g) of the Dangerous Substances Act 1972 which makes it an offence to *wilfully* connive at forging, counterfeiting, giving, signing, uttering, making use, personating or pretending under the Act. Section 65(2) of the 1972 Act states that a person employed in any premises or on any ship, vessel or vehicle to which any provisions of the 1972 Act apply shall not *wilfully* and without reasonable cause do anything likely to endanger himself or others.

246 [1977] QB 498.

247 (1863) 4 B & S 585, DC.

248 [1936] 1 KB 53.

Mortimer[249] a person was convicted of wilfully destroying an oak tree in contravention of a tree preservation order even though he was unaware of the order and believed that permission had been given for the tree to be felled. While the conduct in these cases was wilful in the sense of being produced by the will, *i.e.* deliberate, there was no wilfulness in relation to key circumstances in the offence definitions – there was no knowledge, let alone intention in relation to the circumstances that the water was private, the pigeon was a house pigeon and the tree was under a protection order.

8. In *Sheppard*,[250] the most significant recent English case on the meaning of wilfulness, Lord Diplock said that if "wilfully" is given such a narrow construction as in the cases discussed above, then it is otiose because, even in offences of strict liability the law requires a voluntary - wilful – act or omission.[251] Accordingly, the term "wilfully" should mean that something more than a voluntary act or omission is required. In *Sheppard* it was held that in section 1 of the Children and Young Persons Act 1933 "wilfully" meant more than mere intention to do one of the physical acts described in the section (assault, ill-treat, etc) but extended to the consequences – "in a manner likely to cause him unnecessary suffering or injury to health." The defendant would only be guilty of wilful neglect by refraining to get medical aid if he knew there was a risk that the child's health would suffer, or in the absence of awareness of the risk, if he did not care whether the child needed medical treatment or not.

9. In *Attorney-General's Reference (No 3 of 2003)*[252] the court considered the House of Lord's interpretation of "wilful neglect" in *Sheppard* in the light of the decision of *R v G*[253] which reinstated *Cunningham*[254] subjective recklessness. The Court of Appeal stated that in its view *Sheppard* imposed a subjective test in which the characteristics of the defendant were to be taken into account in determining whether he "did not care."

10. In the wake of *Sheppard,* Smith and Hogan argue that while "wilfully" should be construed to mean "wilfully committing the crime",[255] it is highly unlikely that courts will consistently follow this line. By removing the ambiguous term "wilfully" from the Code there will be considerable gains in clarity and accessibility.

11. Since recklessness is the default fault element under Head 1106(4) for circumstance and result elements, it is arguably the appropriate baseline fault element for the circumstance and result elements specified in the offence of obstruction. Accordingly, the triple fault alternative has been inserted into subhead (1).

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249 [1980] 3 All ER 552, DC.

250 [1981] AC 394.

251 See Explanatory Note 5 to Head 6101 above.

252 [2004] EWCA Crim 868.

253 [2004] AC 1034.

254 [1957] 2 QB 396.

255 See Smith and Hogan *Criminal Law* (Oxford University Press, 11th ed, edited by Ormerod) at 147.

AGGRAVATED OBSTRUCTION

6105.—(1) A person commits the offence of aggravated obstruction if he or she intentionally, knowingly or recklessly resists, obstructs or impedes another and that other is—

(a) a person providing medical services at or in a hospital,

(b) a person assisting a person providing medical services at or in a hospital,

(c) a peace officer acting in the execution of a peace officer's duty, or

(d) a person assisting a peace officer in the execution of his or her duty,

and he or she knows that the other is such a person so acting or is reckless in that regard.

(2) In this Head—

"hospital" includes the lands, buildings and premises connected with and used wholly or mainly for the purposes of a hospital;

"medical services" means services provided by—

(a) doctors, dentists, psychiatrists, nurses, midwives, pharmacists, health and social care professionals (within the meaning of the Health and Social Care Professionals Act 2005) or other persons in the provision of treatment and care for persons at or in a hospital, or

(b) persons acting under direction of those persons;

"peace officer" means a member of the Garda Síochána, a prison officer, a member of the fire brigade, ambulance personnel or a member of the Defence Forces;

"prison" means a place of custody administered by or on behalf of the Minister (other than a Garda Síochána station) and includes—

(a) St. Patrick's Institution,

(b) a place provided under section 2 of the Prisons Act 1970,

(c) a place specified under section 3 of the Prisons Act 1972;

"prison officer" includes any member of the staff of a prison and any person having the custody of, or having duties relating to the custody of, a person in relation to whom an order of a court committing that person to a prison is for the time being in force.

(3) A person guilty of an offence under this Head shall be liable on summary conviction to a fine not exceeding €2,500 or to imprisonment for a term not exceeding 6 months or both.

Explanatory Notes:

1. Head 6105 codifies the obstruction portion of section 19 of the Criminal Justice (Public Order) Act 1994 and names the offence "aggravated obstruction." The assault component of the section 19 offence has been omitted due to misclassification: it has been codified as Draft Criminal Code, Head 3105(1) in an offence entitled "aggravated assault."

2. The offence under Head 6105 has been given the generic title of "aggravated obstruction", rather than a more specific and lengthy title such as "obstruction of a person providing medical services at a hospital or a peace officer, etc." Draft Criminal Code, Head 3105(1) was renamed "aggravated assault" for the same reason. If necessary, additional categories of victims could be added to Head 6105, thus reducing the risk of code degradation arising from an over-abundance of special-instance offences.[256]

3. The content of Head 6105 may be broken down as follows:

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A.	*Conduct:* Any act.
	AND
Intention/Knowledge/Recklessness.	*Result:* Resists, obstructs or impedes.
	AND
Intention/Knowledge/Recklessness.	*Circumstance:* Person providing medical services at or in a hospital.
	OR
Intention/Knowledge/Recklessness.	*Circumstance:* Person assisting such a person.
	OR
Knowledge/Recklessness.	*Circumstance:* a peace officer acting in the execution of a peace officer's duty.
	OR
Knowledge/Recklessness.	*Circumstance:* a person assisting a peace officer acting in the execution of his or her duty.

The reference to wilfulness has been removed from subhead (1). (See the discussion on wilfulness in paragraphs 6-12 of the Explanatory Notes to Head

[256] See Note 3 to Head 3105 in the Part on Non-Fatal Offences Against the Person.

6104 above) Recklessness is the appropriate baseline fault element in subhead (1), on the basis that it is the read-in fault element for circumstance and result elements across the Code in the absence of an express fault element in a particular offence definition. Accordingly, the triple fault alternative – "intentionally, knowingly or recklessly" has been inserted into the first line of subhead (1) to replace the original reference to wilfulness.

4. Section 19(3) has been slightly reformatted in order to delineate more clearly the elements of the offence. Head 6105 is similar in structure to Draft Criminal Code, Head 3105 which codifies the assault on a peace officer component of the section 19 offence, as amended by section 185 of the Criminal Justice Act 2006 and section 41 of the Prisons Act 2007.

5. Section 19(3) of the 1994 Act (as amended) only explicitly states the fault element of knowledge/recklessness with regard to the circumstance elements of the victim being (a) a person providing medical services in a hospital and (c) a peace officer acting in the execution of a peace officer's duty. Under a contextual interpretation of section 19(3), there is an arguable case that the Oireachtas intended liability to be strict in relation to persons aiding people providing medical services in hospitals or peace officers. However, it would seem logical and fair to apply the same fault element with respect to the other categories of persons listed in section 19(3)(b) and (d). It was noted above in the Explanatory Notes to Draft Criminal Code, Head 3105 which codifies section 19(1)of the 1994 Act that:

> "it would appear to be anomalous and unjust to require *mens rea* to be proven in relation to the person being a peace officer acting in the course of his or her duty, but to require no proof of culpability as to the circumstance of the victim being a person assisting a peace officer. Given the marked reluctance of Irish courts (and the common law world *generally*) to countenance the use of strict liability in respect of the core elements of serious criminal offences, a court might be persuaded to apply the presumption of *mens rea* in the context of section 19(1)."[257]

6. The same reasoning applies to Head 6105(1) and it is suggested that the fault elements of knowledge and recklessness be applied across the board to all the persons listed in section 19(3). This approach is in line with the one taken when codifying the offence of "aggravated assault" in Draft Criminal Code, Head 3105.

7. It was also noted in the Explanatory Notes to Head 3105 that it might be considered unduly restrictive to limit the ambit of that offence to assaults committed "at or in a hospital", since many medical services are provide outside the hospital setting, for example at the scene of an accident.[258] Given the fact that the offence of aggravated obstruction in Head 6105 aims to protect the societal interest of maintaining public order, there is an even stronger argument for stating that in subhead (1)(a) the offence can be committed in *any* place (public or private).

8. The definition of "prison" has been updated to take account of the Prisons Act 2007.

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257 See Explanatory Note 10 to Head 3105.

258 See Explanatory Note 11 to Head 3105.

AFFRAY

6106.—(1) A person commits the offence of affray if—

(a) he or she is present with one or more other persons at any place (whether that place is a public place or a private place or both),

(b) he or she intentionally, knowingly or recklessly uses or threatens to use unlawful violence towards one or more of those other persons,

(c) one or more of those other persons uses or threatens to use violence towards him or her or one or more of those persons present, and

(d) the conduct of the defendant and those other persons, taken together, is such as would cause a person of reasonable firmness present at that place to fear for his or her or another person's safety.

(2) *Head 1106(4)* (the "read-in rule") does not apply to *subheads 1(c)-(d).*

(3) For the purposes of this Head—

(a) a threat cannot be made by words alone;

(b) no person of reasonable firmness need actually be, or be likely to be, present at the place where the use or threat of violence occurred.

(4) A person guilty of an offence under this Head shall be liable—

(a) on summary conviction to a fine not exceeding €1,000 or to imprisonment for a term not exceeding 12 months or both, or

(b) on conviction on indictment to a fine or to imprisonment for a term not exceeding 5 years or both.

Explanatory Notes:

1. Head 6106 codifies section 16 of the 1994 Act which abolished and replaced the common law offence of affray. The content of the offence may be broken down as follows:

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A.	*Conduct:* Any act. AND
Intention/Knowledge/Recklessness.	*Circumstance:* Present with one or more other persons. AND
Intention/Knowledge/Recklessness.	*Circumstance:* At any place (public or private or both).

	AND
N/A.	*Circumstance:* one or more of those other persons uses or threaten to use violence towards each other or the defendant.
Intention/Knowledge/Recklessness.	*Circumstance:* Defendant uses unlawful violence against one of those persons.
	OR
Intention/Knowledge/Recklessness.	*Circumstance:* Defendant threatens to use unlawful violence against [another] [one of those persons].
	AND
Objective test.	*Circumstance:* the conduct of the persons, taken together, is such as would cause a person of reasonable firmness present at that place to fear for his or her or another person's safety.

2. Section 16 has been reformatted in order to delineate more clearly the elements of the offence.[259] In section 16 the group components of affray were sequenced before the individual liability components in the offence definition. In the current draft this sequencing of the elements of the offence has been reversed in order to comply with the definitional scheme in the offence template: *viz.,* "A person commits the offence of [x] if he or she…" As already indicated in the introduction, the offence template is designed to reflect the criminal law's primary focus on the liability of *individual* defendants.

3. As affray (Head 6106), violent disorder (Head 6107) and riot (Head 6108) are cognate offences with comparable individual components, they have been codified in the present draft in a format designed to enhance their accessibility by emphasising their shared characteristics. Thus each offence has been broken down into four constituent elements, each of which has been set out in a separate paragraph, with its own alphabetical identifier, in the offence definition. The four constituents are: the "presence" component (subhead (1)(a)); the "threat/violence" component (subhead (1)(b)); the "group" component (subhead (1)(c)); and the "alarm" component (subhead (1)(d)). In all three offences these components have been sequenced in the same order: *viz.*, subheads (1)(a)-(d) as per the preceding sentence.

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259 The Heads of Bill pertaining to the 1994 Act cite the English Law Commission as follows: "affray is designed to deal with a type of conduct in which, by contrast with offences against the person, both the identity of the victim and the extent of his injury are immaterial … [W]hile the fact that serious injuries are inflicted in the course of an affray may affect the general level of sentences imposed, it is not necessary to show that the particular defendant inflicted those particular injuries on a particular victim. The essence of affray lies rather in the fact that the defendant participates in fighting or other acts of violence inflicted on others of such a character as to cause alarm to the public."

4. Section 16(3) of the 1994 Act deals with the fault requirements for the offence of affray. It provides that a person shall not be convicted of the offence "unless the person intends to use or threatens to use violence or is aware that his conduct may be violent or threaten violence." On one view, this language suggests that section 16(3) requires proof of intention or *knowledge* in respect of the objective elements covered by the subsection. In other words, the concept of awareness as used in section 16(3) seems more akin to knowledge than it does to recklessness. At all events, this conclusion seems sound if the phrase "the person…is aware that his conduct may be violent or threaten violence" is an ellipsis for "the person…is aware that his conduct may be violent or threaten violence in the ordinary course of events." It will be recalled that knowledge is defined in terms of awareness in this sense in Head 1108.

5. There is also the consideration that the legislature chose not to use the term reckless in section 16(3), notwithstanding that recklessness had been defined in Irish case law as advertence to a risk that something might or may occur, and going on to run that risk; and that the legislature itself had adopted this definition in section 2(6) of the Criminal Damage Act, 1991.

6. Alternatively, the legislature's apparent disinclination to use the language of recklessness may have been influenced by the contemporary jurisprudence on that subject in England and Wales, which deviated sharply from the subjective approach to the concept of recklessness in Irish law as summarised at the conclusion of the preceding paragraph. In other words, there may have been a concern that, given that background, the mere use of the term recklessness could have given rise to controversy as to whether it implied a subjective or objective standard of culpability. Be that as it may, there is a clear difference between knowingly using or threatening to use violence, in the sense of being aware that violence is a virtually certain by-product of one's conduct, on the one hand, and being aware that one's conduct may be violent, on the other. On any reasonable view, the latter looks more like recklessness than knowledge, and it has accordingly been treated as such in the present draft.

7. Thus Head 6106(1)(b) provides that "A person commits the offence of affray if…he or she intentionally, knowingly or recklessly uses or threatens to use violence…"

8. It will be seen that no fault element has been inserted in subhead (1)(a). This is because the express inclusion of the triple fault requirement of "intentionally, knowingly or recklessly" would render the provision unduly cumbersome, and might affect its readability, at least for non-specialist code users. In the result, the read-in fault requirement of recklessness as provided for in Head 1106(4) will apply to subhead (1)(a).

9. Similarly, no fault element has been inserted in subhead (1)(c). As that paragraph deals with the conduct of persons other than the defendant, the question of fault is otiose. However, to ensure that the read-in rule does not automatically attach a requirement of recklessness to this element of the offence, subhead (2) disapplies Head 1106(4) – the read-in rule - to subhead (1)(c).

10. If left to its own devices, the read-in rule would also attach a requirement of recklessness to subhead (1)(d), with the result that the prosecution would have to prove that the defendant consciously disregarded a substantial and unjustifiable risk that the conduct of the assembly or group would cause a person of reasonable firmness present to fear for his or her own or some other person's safety.

11. However, section 16(1)(b) of the 1994 Act, like sections 14(1)(b) and 15(1)(b) appears to apply an objective test in respect of this matter: the issue is whether the conduct of the assembled persons would cause a person of reasonable firmness present at the place where the threat or use of violence occurred to fear for his or her or another person's safety. Moreover, the Advisory Committee has expressed a clear preference for an objective test rather than a form of negligence-based liability in this context. Accordingly, subhead (2) also disapplies the read-in rule to subhead (1)(d), thereby giving effect to the "person of reasonable firmness" criterion contained in the original statutory provision and codified in subhead (1)(d).

12. Subhead (3)(b) codifies the formula used in section 16(2)(b) of the 1994 Act.

13. Section 16(5) of the 1994 Act abolishing the common law offence of affray has been excluded.

VIOLENT DISORDER

6107.—(1) A person commits the offence of violent disorder if—

(a) he or she is present with two or more other persons at any place (whether that place is a public place or a private place or both),

(b) he or she intentionally, knowingly or recklessly uses or threatens to use unlawful violence,

(c) two or more of those other persons use or threaten to use unlawful violence, and

(d) the conduct of the defendant and those other persons, taken together, is such as would cause a person of reasonable firmness present at that place to fear for his or her or another person's safety.

(2) *Head 1106(4)* (the "read-in rule") does not apply to *subheads 1(c)-(d)*.

(3) For the purposes of this Head—

(a) it shall be immaterial whether the 3 or more persons use or threaten to use unlawful violence simultaneously;

(b) no person of reasonable firmness need actually be, or be likely to be, present at the place where the use or threat of violence occurred.

(4) A person guilty of an offence under this Head shall be liable on conviction on indictment to a fine or to imprisonment for a term not exceeding 10 years or both.

(5) A reference, however expressed, in any enactment before the commencement of this Code—

(a) to the common law offence of riot, or

(b) to the common law offence of riot and tumult,

shall be construed as a reference to the offence of violent disorder.

Explanatory Notes:

1. Head 6107 codifies section 15 of the 1994 Act which abolished and replaced the common law offences of rout and unlawful assembly.[260] The content of the codified violent disorder offence may be broken down as follows:

[260] In the Heads of Bill to the 1994 Act it was noted that the common law offence of rout was very close to riot except that the actual execution of the intended purpose (which would make it a riot) did not occur. Unlawful assembly was "an assembly of 3 or more persons for purposes forbidden by law or with intent to carry out any common purpose, lawful or unlawful, in such a manner as to endanger the public peace or to give firm and courageous

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A.	*Conduct:* Any act.
	AND
Intention/Knowledge/Recklessness.	*Circumstance:* Present with 2 or more other persons.
	AND
Intention/Knowledge/Recklessness.	*Circumstance:* At any place (public or private or both).
	AND
N/A.	*Circumstance:* Those others use or threaten to use unlawful violence.
	AND
Intention/Knowledge/Recklessness.	*Circumstance:* Defendant uses unlawful violence.
	OR
Intention/Knowledge/Recklessness.	*Circumstance:* Defendant threatens to use unlawful violence.
	AND
Objective test.	*Circumstance:* the conduct of the persons, taken together, is such as would cause a person of reasonable firmness present at that place to fear for his or her or another person's safety.

2. Section 15 has been reformatted in order to delineate more clearly the elements of the offence. In particular, the components of the section 15 offence have been sequenced in accordance with the requirements of the offence template as explained in the Explanatory Notes to the offence of affray, above.

3. Following the approach taken in affray, the triple fault alternative of intention, knowledge or recklessness has been applied to all of the circumstance and result elements of the offence of violent disorder. Thus awareness in section 15(3) has been approximated with the fault element of recklessness rather than knowledge. Unlike the situation in respect of the offence of riot, common purpose plays no part in the offence of violent disorder. Each of the three or more persons may have a different purpose or no purpose.

4. However, by parity of reasoning with the offence of affray, the triple fault alternative has been omitted from the presence requirement in subhead (1)(a) with a view to enhancing the readability of the provision; while subhead (2) disapplies the read-in rule under Head 1106(4) to subhead (1)(c), which deals with the conduct of persons other than the defendant, on the grounds of the non-applicability of the Code's fault scheme to third parties.

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persons in the neighbourhood of such assembly reasonable grounds to apprehend a breach of the peace in consequence of it."

5. Section 15(1)(b) of the 1994 Act, like section 14(1)(b), appears to apply an objective test to the question of whether violent disorder causes others to fear for their safety. The standard to be applied is whether the conduct of the assembled persons would cause a person of reasonable firmness present to fear for his or her or another person's safety; and the Committee has decided that the offence should be codified accordingly. Subhead (2) achieves this result by the simple device of disapplying the read-in rule to subhead (1)(d).

6. Section 15(6) of the 1994 Act abolishing the common law offences of rout and unlawful assembly has been excluded.

RIOT

6108.—(1) A person commits the offence of riot if—

(a) he or she is present with 11 or more other persons at any place (whether that place is a public place or a private place or both),

(b) he or she intentionally, knowingly or recklessly uses unlawful violence for a common purpose,

(c) the 11 or more other persons use or threaten to use unlawful violence for a common purpose, and

(d) the conduct of the defendant and those other persons, taken together, is such as would cause a person of reasonable firmness present at that place to fear for his or her or another person's safety.

(2) *Head 1106(4)* (the "read-in rule") does not apply to *subheads 1(c)-(d)*.

(3) For the purposes of this Head—

(a) it shall be immaterial whether the 12 or more persons use or threaten to use unlawful violence simultaneously at any place;

(b) the common purpose may be inferred from conduct;

(c) no person of reasonable firmness need actually be, or be likely to be, present at the place where the use or threat of violence occurred.

(3) A person guilty of an offence under this Head shall be liable on conviction on indictment to a fine or to imprisonment for a term not exceeding 10 years or both.

Explanatory Notes:

1. Head 6108 codifies section 14 of the 1994 Act which abolished and replaced the common law offence of riot. The codified offence may be broken down as follows:

FAULT ELEMENT	OBJECTIVE ELEMENT
N/A.	*Conduct:* Any act. AND
Intention/Knowledge/Recklessness.	*Circumstance:* Present with 11 or more other persons. AND
Intention/Knowledge/Recklessness.	*Circumstance:* At any place (public or private or both). AND

N/A.	*Circumstance:* The 11 or more other persons use or threaten to use unlawful violence for a common purpose. AND
Intention/Knowledge/recklessness.	*Circumstance:* Defendant uses unlawful violence for a common purpose. AND
Objective test.	*Circumstance:* the conduct of the persons, taken together, is such as would cause a person of reasonable firmness present at that place to fear for his or her or another person's safety.

2. Section 14 has been reformatted in order to delineate more clearly the elements of the offence. As in the case of the cognate offences of affray and violent disorder, the elements of the offence have been sequenced in accordance with the requirements of the offence template such that "A person commits the offence of [x] if he or she…"

3. Apart from the reference to using or threatening to use unlawful violence "for a common purpose", section 14 of the 1994 Act is silent on the subject of *mens rea*. By contrast, the English offence of riot in section 1 of the Public Order Act 1986, which is broadly similar to its Irish counterpart, is subject to an explicit *mens rea* requirement: by virtue of section 6(1) of the 1986 Act the defendant must be shown to have intended to use violence or to have been aware that his conduct may be violent, in addition to sharing a common purpose with 11 other people at the scene.

4. It appears from the Departmental files on the Criminal Justice (Public Order) Bill 1993 that the reason that an express fault requirement of this kind was not included in section 14 of the 1994 Act had to do with the fact that the offence of riot requires the actual, as opposed to a merely threatened, use of unlawful violence by the defendant for a common purpose. Although the Heads of Bill prepared by the Department of Justice, Equality and Law Reform had followed the English approach described in the previous paragraph, the opinion of the Office of the Parliamentary Counsel appears to have been that the express inclusion of *mens rea* in the form of intention or awareness (in the sense of recklessness) was otiose as these fault elements are already comprehended in the requirement that the defendant must be shown to have used violence for a common purpose.

5. Save where it would lead to unwieldy results, the policy to date in the codification project has been expressly to include the appropriate fault term for each of the objective elements of an offence, as per the standardised set of fault terms defined in Heads 1107-1109. As work on the Special Part has shown, the express inclusion of standardised fault terms in respect of each of the objective elements of an offence generally contributes to more comprehensible offence definitions, as well as helping to minimise uncertainty in the interpretation and application of these definitions in individual cases.

6. While mindful of the view of the Office of the Parliamentary Counsel that a stated fault element is superfluous in light of the common purpose element in riot, it was decided to include the triple fault alternative into subhead (1)(b) to put the issue of *mens rea* beyond doubt. In line with the general principles governing the allocation of fault in Head 1106 (Fault Elements), a minimum fault requirement of recklessness attaches to all of the circumstance elements of an offence. Accordingly, in the case of riot, the prosecution must at least show that the defendant consciously disregarded a substantial risk (a) that his conduct was violent *and* (b) that he used such violence for a common purpose, *e.g.* with a view to overthrowing the government. On this view, it would not be enough to prove the fact of violence and the existence of a common purpose, or even the intentional use of violence and the existence of a common purpose, since a defendant might have or share in a common purpose without intentionally, knowingly or recklessly using violence for that purpose.

7. By the same token, the triple fault alternative has been omitted from the presence requirement in subhead (1)(a) on the grounds that its express inclusion would detract from the readability of the provision. As in the case of corresponding elements of the offences of affray (Head 6106(1)(a)) and violent disorder (Head 6107(1)(a)), subhead (1)(a) will accordingly automatically attract the read-in fault element of recklessness provided for in Head 1106(4).

8. Following the approach taken in affray and violent disorder, subhead (2) disapplies the read-in rule to subheads (1)(c)-(d). Subhead (1)(c) deals with the conduct of third parties and is thus outside the proper limits of the Code's fault scheme. Subhead (1)(d) codifies the "person of reason firmness" test typically associated with the effect of riotous behaviour on others, and sanctioned by the Committee; it thus requires insulation from the subjective fault requirement triggered by the read-in rule. Policy-makers may are strongly advised to consider the seemingly anomalous position of the offence of riot within the scheme of public order offences generally.

9. If policy-makers believe that *mens rea* in the form of intention and awareness (in the sense of recklessness) should form part of the definition of riot in line with Heads 6106 (affray) and 6107 (violent disorder), the resultant offence begins to look like a form of aggravated violent disorder. Once the fault elements of intention, knowledge and recklessness have been added to the mix, the components of the offence of riot are essentially violent disorder + 12 (as opposed to 3) people acting for a common purpose + the actual (as opposed to the merely threatened) use of unlawful violence by the defendant, the additional requirements of a larger assembly of people and the actual use of violence by the defendant constituting aggravating factors over and above the core element of violent disorder. On this reasoning, riot looks like the more serious offence; whereas, in point of fact, both riot and violent disorder are subject to the same maximum penalty: *viz.*, 10 years imprisonment.

10. A possible solution to this problem would be to adjust the statutory maxima for these offences so as to reflect the fact that riot is indeed the more serious of the two, as well as being more difficult to prove by virtue of the additional burden it places on the prosecution in respect of the requisite material elements. In practice

this would probably mean either reducing the penalty for violent disorder to less than 10 years imprisonment,[261] or increasing the penalty for riot to a term of imprisonment significantly in excess of 10 years.

11. Riot has historically been concerned with challenges to policing and the administration of justice posed by large, tumultuous groups, *e.g.* the Land League, and the terror that mob violence can cause members of the public. (Indeed, the context of the enactment of the new statutory offence of riot in section 1 of the English Public Order Act was the miners' strike in England in the 1980s during which 10 people were killed) While violent disorder ordinarily addresses the fear and apprehension that may be caused by smaller groups who engage in public fighting or threats, there is nothing to preclude its application to larger, tumultuous groups which cause policing difficulties. Moreover, with violent disorder the prosecution need not prove that the assembled group used or threatened violence in order to further some common purpose.

12. The fact that riot (with its additional objective elements) is subject to the same maximum penalty as violent disorder may be seen by some as an argument for abolishing the offence altogether. As already indicated, if the Oireachtas had wished to maintain riot as a more serious public order offence than violent disorder, it would have made sense to attach a higher penalty to it. In the absence of a clear penalty differential setting it apart from the cognate offence of violent disorder, and bearing in mind the additional burdens it places on the prosecution, not to mention the fact that the offence does not appear to be used, the case for maintaining riot as a separate offence, at least in its current form, seems weak.

13. The reference to the abolition of the common law offence of riot in section 14(4) of the 1994 Act has been excluded.

[261] Indeed, the English offence of violent disorder as contained in section 2 of the English Public Order Act 1986 provides for a 5 year term of imprisonment for conviction on indictment. Riot, under section 1, is subject to a maximum 10 year term of imprisonment.

POWER TO DIRECT PERSONS WHO ARE IN POSSESSION OF INTOXICATING SUBSTANCES, ETC.

6201.—(1) Where a member of the Garda Síochána suspects, with reasonable cause, that an offence under *Head 6101 (intoxication in a public place), 6102 (disorderly behaviour in a public place)* or *6103(1)(a) (abusive behaviour in a public place involving threatening, abusive, or insulting words or behaviour)*, is being committed, the member concerned may seize, obtain or remove, without warrant, any bottle or container, together with its contents, which—

(a) is in the possession, in a place other than a place used as a private dwelling, of a person by whom such member suspects the offence to have been committed, and

(b) such member suspects, with reasonable cause, contains an intoxicating substance:

Provided that, in the application of this subhead to *Head 6102* or *6103(1)(a)*, any such bottle or container, together with its contents, may only be so seized, obtained or removed where the member of the Garda Síochána suspects, with reasonable cause, that the bottle or container or its contents, is relevant to the offence under *Head 6102* or *6103(1)(a)* which the member suspects is being committed.

(2) This subhead applies where a member of the Garda Síochána believes with reasonable cause that—

(a) a person is in a place other than a place used as a private dwelling, alone or accompanied by other persons,

(b) a bottle or container which contains an intoxicating substance is in the possession of the relevant person, and

(c) the relevant person is behaving in that place, or the relevant person and some or all of the accompanying persons are behaving in that place, in a manner that—

(i) gives rise to a reasonable apprehension for the safety of persons or the safety of property or for the maintenance of the public peace,

or

(ii) is causing, or gives rise to a reasonable apprehension that it is likely to cause, annoyance and nuisance to another person or interference with that other person's peaceful possession and enjoyment by that other person of his or her property.

(3) Where *subhead (2)* applies, the member may—

(a) seek an explanation from the relevant person as to all or any of the matters to which the relevant belief relates, and

(b) do one or more of the following, if the relevant person fails or refuses to give

such an explanation or if such an explanation is given, and in either case the member remains of the relevant belief:

(i) request the relevant person to immediately give the bottle or container to the member (or to another member of the Garda Síochána accompanying the member) and at the same time as the request is made give to the relevant person a warning in ordinary language that a failure or refusal to comply with the request may lead to the seizure of the bottle or container or to his or her arrest or to both (or words to the like effect);

(ii) if the relevant person fails or refuses to comply with the request, seize, detain and remove, without warrant, the bottle or container with the use, if necessary, of such force as is reasonable in the circumstances;

(iii) direct the relevant person and, if appropriate, some or all of the accompanying persons, to desist from behaving in the manner referred to in *subhead (2)(c)*;

(iv) direct the relevant person and, if appropriate, some or all of the accompanying persons, to leave immediately the place in a peaceful or orderly manner;

(v) request the relevant person to provide the member with his or her name and address.

(4) Where—

(a) a person fails or refuses to comply with a request made by the member under *subhead (3)(b)(i) or (v)*,

(b) a person fails or refuses to comply with a direction given by the member under *subhead (3)(b)(iii) or (iv),* or

(c) the member has reasonable grounds for believing that the name or address provided to the member, in compliance with a request by the member under *subhead (3)(b) (v)*, is false or misleading,

the member may arrest such person without warrant.

(5) A person commits and offence if he or she intentionally, knowingly or recklessly—

(a) fails or refuses to comply with a request made by the member under *subhead (3)(b)(i) or (v)*, or

(b) in purported compliance with a request made by the member under *subhead (3)(b)(v),* provides to the member a name or address which is false or misleading,

and shall be liable on summary conviction to a fine not exceeding €500.

(6) A person commits an offence if he or she intentionally, knowingly or recklessly fails to comply with a direction given by the member under *subhead (3)(b)(iii)* or *(iv)*.

(7) A person does not commit an offence under *subhead (6)* if, in relation to the acts which constitute the offence, he or she had a reasonable excuse for so acting.

(8) A person who is guilty of an offence under *subhead (6)* shall be liable on summary conviction to a fine not exceeding €1,000.

(9) Where the member or another member of the Garda Síochána has been given, or has seized, detained and removed, a bottle or container pursuant to *subhead (1)* or *(3)*, the member shall—

(a) dispose of the bottle or container in such a manner as he or she considers appropriate, and

(b*)* make and retain, or cause to be made and retained, a record in writing of the manner, date and place of such disposal.

(10) A member of the Garda Síochána may enter without warrant a place other than a place used as a private dwelling if the member has reasonable grounds for believing that—

(a) the matters specified in *subhead (2)(a), (b) and (c)*, or

(b) the matters specified in *paragraphs (a), (b) and (c)* of *subsection (1) of section 37A of the Intoxicating Liquor Act 1988* (inserted by *section 14 of the Intoxicating Liquor Act 2008)*,

are occurring in such place.

(11) Nothing in this Head shall prejudice the operation of the other provisions of *Part 6* or of the *Criminal Justice (Public Order) Act 2003.*

(12) In this Head—

"bottle or container" means a bottle or container irrespective of whether—

(a) the bottle or container is opened or unopened, and

(b) any or all of the contents of the bottle or container have been or are being consumed, and includes the contents of the bottle or container [but in *subhead (1)* does not include a bottle or container for a substance which is in the possession of the person concerned for a purpose other than the intoxication of that or any other person];

"relevant belief", in relation to a member of the Garda Síochána, means the belief referred to in *subhead (2)* of the member;

"relevant person" means the person first-mentioned in *subhead (2)(a)*.

Explanatory Notes:

1. Head 6201(1) consolidates a number of sections in the 1994 Act dealing with Garda powers to direct people in possession of intoxicating substances and related matters. Subhead (1) relates to the power of members of Garda Síochána to seize etc without warrant any bottle or container where they reasonably suspect it contains an intoxicating substance under section 4(3) of the 1994 Act.

2. In subhead (1)(1) the references to section 5 and 6 of the 1994 Act have been replaced with "Head 6102 (disorderly behaviour in a public place) and 6103(1)(a) (abusive behaviour in a public place involving threatening, abusive, or insulting words or behaviour). Head 6103 is a consolidated offence covering threatening, abusive, or insulting words or behaviour in a public place in subhead (1)(a) and the distribution or display in a public place of material which is threatening, abusive, insulting or obscene in subhead (1)(b). In accordance with section 4(3) of the 1994 Act, subhead (1) only refers to Head 6103(1)(a).

3. The word "private" before dwelling has been inserted into paragraph 1(1)(a) in order to maintain uniform terminology throughout Head 6201.

4. Subhead (2) codifies section 8A(1) of the 1994 Act. The phrase "place other than a place used as a private dwelling" has replaced "relevant place" in order to use the same terminology as employed in subhead 1(1).

5. In subhead (2)(c) the word "acting" has been replaced with "behaving". Given the use of the term "behaving" in Heads 6102 and 6103 it is preferable to use the word behaving in subhead (2)(c) which sets out the powers of Gardaí to act on reasonable beliefs regarding the conduct of people in certain circumstances – *e.g.* "the relevant person is behaving in that place…"

6. The phraseology in the first line of section 8A(1)(c)(ii), as codified in subhead (2)(c)(ii), is very peculiar – *i.e.* "is causing, or gives rise to a reasonable apprehension is likely to cause". The original phrase is linguistically inelegant and therefore has been rewritten as follows: "is causing or is likely to cause, or gives rise to a reasonable apprehension that it will cause, annoyance …".

7. Subhead (3) codifies section 8A(2) of the 1994 Act. Subhead (3)(iii) replaces the term "acting" with "behaving" in line with other provisions in Part 6.

8. Subhead (4) sets out section 8A(3) of the 1994 Act.

9. Subhead (5) codifies section 8A(4) of the 1994 Act which is an embedded offence. Subhead (5) has been has been slightly reformatted to follow the Code's offence template, *i.e.* "A person commits an offence if he or she …" Section 8A(4) is silent in respect of fault. By virtue of the fact that under Head 1106(4) recklessness will be read into offence provisions in the absence of a specified fault element for a circumstance or result element, it would seem appropriate to specifically impose recklessness as the minimum fault element in subhead (5).

10. Subhead (6) codifies section 8A(5) of the 1994 Act. The reference to "without lawful authority" has been removed, as this issue is likely to be covered in the General Part in due course. As with section 8A(4), section 8A(6) was silent in respect of fault. Subhead (6) employs recklessness as the minimum fault element.[262] The wording has been altered to follow the Code's offence template, *i.e.* "A person commits an offence if he or she …"

11. Subhead (7) accommodates the reference to "reasonable excuse" in section 8A(5). This approach has been adopted throughout Part 6, as well as in Part 4 dealing with Theft, Fraud and Related Offences.

12. Subhead (8) codifies section 8A(6) of the 1994 Act.

13. Subhead (9) codifies section 8A(7) of the 1994 Act.

14. Subhead (10) codifies section 8B of the 1994 Act, as inserted by section 19 of the Intoxicating Liquor Act 2008.

15. Subhead (11) codifies section 8A(8) of the 1994 Act. The word "Act" has been replaced with "*Part 6*".

16. Subhead (12) sets out the various relevant definitions contained in section 8A(9) of the 1994 Act. The definition of "bottle or container" is an amalgamation of the definition in section 8A(9), as well as that contained in section 4(4) of the 1994 Act, as amended by section 18 of the Intoxicating Liquor Act 2008.

17. The definition of "relevant place" has been omitted, because the phrase "*a place other than a place used as a private dwelling*" has been used throughout Head 6201.

[262] See Issues Paper 7, *Lawful Authority, etc*.

FAILURE TO COMPLY WITH DIRECTION OF MEMBER OF GARDA SÍOCHÁNA

6202.—(1) Where a member of the Garda Síochána finds a person in a public place and suspects, with reasonable cause, that such person—

> (a) is or has been behaving in a manner contrary to the provisions of *Heads 6101 (intoxication in a public place), 6102 (disorderly behaviour in a public place), 6103 (abusive behaviour or display in a public place)* or *6105 (obstruction)*, or
>
> (b) is behaving in a manner which consists of loitering in a public place in circumstances, which may include the company of other persons, that gives rise to a reasonable apprehension for the safety of persons or the safety of property or for the maintenance of the public peace,
>
> the member may direct the person so suspected to do either or both of the following, that is to say:
>
> > (i) desist from behaving in such a manner, and
> >
> > (ii) leave immediately the vicinity of the place concerned in a peaceable or orderly manner.

(2) A person commits the offence if he or she intentionally, knowingly or recklessly fails to comply with a direction given by a member of the Garda Síochána under this Head.

(3) A person does not commit an offence under this Head if, in relation to the acts which constitute the offence, he or she had a reasonable excuse for so acting.

(4) A person guilty of an offence under this Head shall be liable on summary conviction to a fine not exceeding €1,000 or to imprisonment for a term not exceeding 6 months or both.

Explanatory Notes:

1. Head 6202 codifies section 8 of the 1994 Act.

2. In subhead (1)(a) and (b) the word "acting" has been changed to "behaving" so as to achieve consistency with the rest of the Part on Public Order Offences.

3. The reference to "without lawful authority" in section 8 of the 1994 Act has been omitted as this matter will be addressed in the General Part in due course.

4. Subhead (2) codifies section 8(2) of the 1994 Act which addresses the offence of failure to comply with a direction of a member of the Garda Síochána. It has been slightly reformatted to follow the Code's offence template, *i.e.* "A person commits an offence if he or she intentionally, knowingly or recklessly fails…" Section 8(2)

is silent in respect of fault. By virtue of the fact that under Head 1106(4) recklessness will be read into offence provisions in the absence of a specified fault element for a circumstance or result element, it would seem appropriate to specifically impose recklessness as the minimum fault element in subhead (3) to attach to the circumstance elements of failure to comply with the direction of a member of the Garda Síochána to (a) desist from behaving in a manner which Garda reasonably suspects is contrary to the provisions of Heads 6101, 6102, 6103 or 6105 or (b) desist from loitering in a public place and (c) to leave the place in a peaceable or orderly manner.

5. Subhead (3) accommodates the reference to "reasonable excuse" in section 8(1)(b). This approach has been adopted throughout this Part and Part 4 dealing with Theft, Fraud and Related Offences.

FIXED CHARGE OFFENCES

6203.—(1) A member of the Garda Síochána who has reasonable grounds for believing that a person is committing, or has committed, an offence under *Head 6102 (disorderly behaviour in a public place)* (in this Head referred to as a "fixed charge offence") may serve on the person personally or by post the notice referred to in *subhead* (*5*) or cause it to be so served.

(2) A member of the Garda Síochána may, for the purposes of *subhead* (*1*)—

(a) request the person concerned to give his or her name and address and to verify the information given, and

(b) if not satisfied with the name and address or any verification given, request that the person accompany the member to a Garda Síochána station for the purpose of confirming the person's name and address.

(3) A person commits an offence if he or she intentionally, knowingly or recklessly—

(a) does not give his or her name and address when requested to do so under *subhead (2)(a)* or gives a name that is false or misleading, or

(b) does not comply with a request by a member of the Garda Síochána under *subhead (2)(b)*,

and is liable on summary conviction to a fine not exceeding €1,500.

(4) A member of the Garda Síochána who is of the opinion that a person is committing, or has committed, an offence under *subhead (3)* may arrest the person without warrant.

(5) The notice referred to in *subhead* (*1*) shall be in the prescribed form and shall state—

(a) that the person on whom it is served is alleged to have committed the fixed charge offence concerned,

(b) when and where it is alleged to have been committed,

(c) that a prosecution for it will not be instituted if—

(i) during the period of 28 days beginning on the date of the notice, the person pays in accordance with the notice the prescribed amount, or

(ii) within 28 days beginning on the expiration of that period, the person pays in accordance with the notice an amount which is 50 per cent greater than the prescribed amount,

and

(d) that in default of such payment the person will be prosecuted for the alleged offence.

(6) A payment referred to in *subhead* (*5*) shall be accompanied by the notice referred to in that subhead.

(7) Where a notice is served under *subhead* (*1*)—

(a) a person to whom the notice applies may make a payment in accordance with *subheads* (*5*)(*c*) and (*6*),

(b) the payment shall be received in accordance with the notice and the person receiving the payment shall issue a receipt for it,

(c) a payment so received shall not be recoverable by the person who made it, and

(d) a prosecution in respect of the alleged fixed charge offence to which the notice relates shall not be instituted during the periods specified in *subhead* (*5*)(*c*) or, if a payment is made in accordance with that subhead and *subhead* (*6*), at all.

(8)

(a) In a prosecution for a fixed charge offence it shall be presumed until the contrary is shown that—

(i) the relevant notice under this Head has been served or caused to be served, and

(ii) a payment pursuant to the relevant notice under this Head accompanied by the notice, duly completed (unless the notice provides for payment without the notice accompanying the payment), has not been made.

(b) Payments so made shall be paid into or disposed of for the benefit of the Exchequer in such manner as the Minister for Finance directs.

(9)

(a) The Minister may make regulations prescribing anything which is referred to in this Head as prescribed.

(b) Different amounts may be prescribed for a fixed charge offence under this Head and an offence under *Head 6101 (intoxication in a public place)* which is deemed by *subhead (10)* to be a fixed charge offence.

(c) Regulations made under this section may contain such incidental, supplementary and consequential provisions as appear to the Minister to be necessary for the purposes of the regulations.

(10) *Subhead 11* applies to a person who is suspected, with reasonable cause, by a member of the Garda Síochána of committing, or of having committed, an offence under *Head 6101 (intoxication in a public place)*.

(11)Where—

(a) a person to whom this subhead applies is arrested and brought to a Garda Síochána station, and

(b) he or she is a person whom the member of the Garda Síochána in charge of the station is authorised by *section 31* of the *Criminal Procedure Act 1967* to release on bail, the member may, instead of releasing the person on bail, release him or her unconditionally after—

(i) serving on the person personally a notice in the prescribed form stating the matters specified in *subhead (5)* or causing it to be so served, or

(ii) informing him or her that such notice will be served on him or her by post.

(12) Where a person to whom this subhead applies is not arrested, the member of the Garda Síochána referred to in *subhead* (*10*) may serve on the person personally or by post a notice in the prescribed form stating the matters specified in *subhead (5)* or cause it to be so served.

(13) On the service of a notice under *subhead (11)* or *(12)* the offence under *Head 6101 (intoxication in a public place)* is thereupon deemed to be a fixed charge offence, and *subheads (5), (6), (7) (8) (9)* and *(14)* apply and have effect accordingly in relation to it.

(14) In this Head—

"Minister" means Minister for Justice, Equality and Law Reform;

"person" means a person of not less than 18 years of age.

Explanatory Notes:

1. Head 6203 replicates sections 23A and 23B of the 1994 Act which were inserted by section 184 of the Criminal Justice Act 2006. Head 6203 essentially deals with Garda powers and various procedural matters which arise where a Garda has reasonable grounds for suspecting that a person is committing or committed an offence under Head 6102 (disorderly behaviour in a public place), referred to as a "fixed charge offence" in subhead (1) or under Head 6101 (being intoxicated in a public place) which is a "fixed charge offence" under subhead (10).

2. In order to enhance accessibility, "*disorderly behaviour in a public place"* has been inserted in brackets after Head 6102 in subhead (1) and "*intoxication in a public place*" has been inserted in brackets after Head 6101 in subheads (9) and (10).

3. Section 23A(3) did not specify any fault element for the offence of failing to give a correct name and address to a member of the Garda Síochána or to accompany the Garda to the station in order to confirm the name and address given by the person. This section is codified in subhead (3). By virtue of the fact that under Head 1106(4) recklessness will be read into offence provisions in the absence of a specified fault element for a circumstance or result element, it would seem appropriate to specifically impose recklessness as the minimum fault element in subhead (3), so that the person must (a) recklessly fail to give the correct name and address or to verify the information given, or (b) to recklessly fail to comply with the Garda's request to go to the Garda station to confirm such information. Accordingly, the fault elements of intention, knowledge and recklessness have been inserted in subhead (3).

4. Subhead (3) has been slightly reformatted to follow the Code's offence template, *i.e.* "A person commits an offence if he or she intentionally, knowingly or recklessly…"

5. Subheads (10)-(13) replicate section 23B of the 1994 Act. The numbering here has been slightly reformulated in order to fit into the consolidated provision and to accommodate the paragraph scheme of the Schedule.

6. The indentation in subheads (8) and (9) is in accordance with the formatting in section 23A of the 1994 Act.

CONTROL OF ACCESS TO CERTAIN EVENTS, ETC.

6204.—(1) If it appears to a member of the Garda Síochána not below the rank of superintendent that it is necessary in the interests of safety or for the purpose of preserving order to restrict the access of persons to a place where an event is taking or is about to take place which attracts, or is likely to attract, a large assembly of persons (in this Head referred to as the "event"), he or she may authorise any member of the Garda Síochána to erect or cause to be erected a barrier or a series of barriers on any road, street, lane, alley or other means of access to such a place in a position not more than one mile therefrom for the purpose of regulating the access of persons or vehicles thereto.

(2) Where a barrier has been erected in accordance with *subhead (1)*, a member of the Garda Síochána in uniform may by oral or manual direction or by the exhibition of any notice or sign, or any combination thereof—

(a) divert persons generally or particularly and whether in or on vehicles or on foot to another means of access to the event, including a means of access to that event on foot only, or

(b) where possession of a ticket is required for entrance to the event, prohibit a person whether in or on vehicles or on foot from crossing or passing the barrier towards the event where the person has no such ticket, or

(c) indicate that to proceed beyond the barrier while in possession of any intoxicating liquor, disposable drinks container or offensive article will render such liquor, container or article liable to confiscation.

(3) A member of the Garda Síochána shall not prohibit a person from crossing or passing a barrier erected under this section save for the purpose of diverting the person to another means of access to the event, if it appears to the member that the person is seeking to do so for the purpose only of—

(a) going to his or her dwelling or place of business or work in the vicinity of the event, or

(b) going for any other lawful purpose to any place in the vicinity of the event other than the place where the event is taking place or is about to take place.

(4) A person commits an offence if he or she intentionally, knowingly or recklessly—

(a) fails to obey a direction given by a member of the Garda Síochána under *subhead (2)* for the purpose of *subparagraph (a)* or *(b)*,

(b) fails to comply with the terms of a notice or sign exhibited under *subhead (2)* for the purpose of *subparagraph (a)* or *(b)*.

(5) A person guilty of an offence under *subhead 4* shall be liable on summary conviction to a fine not exceeding €1,000.

(6) Where in relation to an event—

(a) a barrier has been erected under *subhead (1)* and it appears to a member of the Garda Síochána that a person on foot or in or on a vehicle is seeking to cross or pass the barrier, or has crossed or passed the barrier, for the purpose of going to the place where the event is taking place or is about to take place, or

(b) it appears to a member of the Garda Síochána that a person is about to enter, or has entered, the place where the event is taking place or is about to take place,

and the person has, or the member of the Garda Síochána suspects with reasonable cause that the person has, in his or her possession—

(i) any intoxicating liquor,

(ii) any disposable container, or

(iii) any other article which, having regard to the circumstances or the nature of the event, could be used to cause injury,

the member may exercise any one or more of the following powers—

(I) search or cause to be searched that person or any vehicle in or on which he may be in order to ascertain whether he or she has with him or her any such liquor, container or other article,

(II) refuse to allow that person to proceed to the event or to proceed further, as the case may be, unless that person surrenders permanently to a member of the Garda Síochána as directed by the member such liquor, container or other article.

(7) Where a member of the Garda Síochána refuses to allow a person to proceed to the event or to proceed further by virtue of *subhead 6(b)(iii)(II)* and the person does not surrender the alcoholic liquor, disposable container or other article concerned, the member may require the person to leave the vicinity in an orderly and peaceful manner as directed by the member.

(8) A person commits an offence if he or she intentionally, knowingly or recklessly fails to comply with a requirement under *subhead (7)*.

(9) A person does not commit an offence under *subhead (8)* if, in relation to the acts which constitute the offence, he or she had a reasonable excuse for so acting.

(10) A person guilty of an offence under *subhead (8)* shall be liable on summary conviction to a fine not exceeding €1,000.

(11) In this Head—

"container" does not include a container for any medicinal product;

"disposable container" includes—

(a) any bottle, can or other portable container or any part thereof (including any crushed or broken portable container or part thereof) for holding any drink which, when empty, is of a kind normally discarded or returned to, or left to be recovered by, the supplier, and

(b) any crate or packaging designed to hold more than one such bottle, can or other portable container;

"event has the meaning assigned to it by *subhead (1)*;

"intoxicating liquor" includes any container containing intoxicating liquor, whether or not a disposable container.

Explanatory Notes:

1. The first five subheads of Head 6204 replicate section 21 of the 1994 Act setting out the powers of the Gardaí in respect of controlling the access of the public to certain events.

2. Section 21(4) of the 1994 Act did not specify any fault requirements for the offence. By virtue of Head 1106(4) above, recklessness will be the read-in fault element where fault is not specified for any circumstance or result element across the Code. Intention, knowledge and recklessness have, therefore, been inserted into subhead (4). Subhead (4) has been has been slightly reformatted to follow the Code's offence template, *i.e.* "A person commits an offence if he or she …"

3. Subheads (6) to (10) reproduce section 22 of the 1994 Act setting out the powers of the Gardaí to refuse the public access to certain events and seize intoxicating liquor and containers etc.

4. Section 22(3) of the 1994 Act did not specify any fault element for the offence. As with subhead (4) above, intention, knowledge and recklessness have been inserted into subhead (8) which codifies section 22(3). Subhead (8) has been slightly reformatted to follow the Code's offence template, *i.e.* "A person commits an offence if he or she …"

5. The reference to "without lawful authority" has been omitted from subhead (8), as this issue is likely to be addressed in the General Part in due course.

6. Subhead (9) accommodates the reference to "reasonable excuse" in section 22(3). This approach has been adopted throughout this Part and Part 4 dealing with Theft, Fraud and Related Offences.

7. Subhead 11 replicates section 20 of the 1994 Act and sets out various definitions which apply to Head 6204.

ARREST WITHOUT WARRANT

6205.—(1) Where a member of the Garda Síochána finds any person committing an offence under a relevant provision, the member may arrest such person without warrant.

(2) Where a member of the Garda Síochána is of the opinion that an offence has been committed under a relevant provision, the member may—

(a) demand the name and address of any person whom the member suspects, with reasonable cause, has committed, or whom the member finds committing, such an offence, and

(b) arrest without warrant any such person who fails or refuses to give his or her name and address when demanded, or gives a name or address which the member has reasonable grounds for believing is false or misleading.

(3) A person commits an offence if he or she intentionally, knowingly or recklessly—

(a) fails or refuses to give his or her name and address when demanded by virtue of *subhead (2)*, or

(b) gives a name or address when so demanded which is false or misleading.

(4) A person guilty of an offence under *subhead (3)* shall be liable on summary conviction to a fine not exceeding €1,000 or to a term of imprisonment not exceeding 6 months or both.

(5) In this Head "relevant provision" means *Head 3105 (aggravated assault), 3204 (making demands with menaces), 4302 (entering with intent), 4303 (trespass on a building), 6101 (intoxication in a public place)*, *6103 (abusive behaviour or display in a public place)*, *6104 (obstruction)*, *6105 (aggravated obstruction), 6106 (affray)*, *6107 (violent disorder)*, *6108 (riot).*

Explanatory Notes:

1. Head 6205 codifies section 24 of the 1994 Act.

2. Section 24(3) is codified in subhead (3) which has been slightly reformulated to clarify the elements of the offence and to follow the Code's offence template, *i.e.* "A person commits an offence if he or she …".

3. Section 24(3) did not specify any fault element for the offence of failing to give a name and address to a member of the Garda Síochána or give a name and address which is false or misleading. Since recklessness will be the read-in fault element in the Code where fault is not specified for any circumstance or result element (see Head 1106(4)), it is preferable to make it explicit that recklessness is the baseline fault element in subhead (3), so that the person must intentionally,

knowingly or recklessly (a) fail to give his or her name and address or (b) give a name or address that is false or misleading. Accordingly, the fault elements of intention, knowledge and recklessness have been inserted in subhead (3).

4. The various offences mentioned in section 24 of the 1994 have been codified in subhead (5) according to their relevant Head number in the Draft Code.

CONTINUANCE OF EXISTING POWERS OF GARDA SÍOCHÁNA

6206.— Any power conferred on a member of the Garda Síochána by *Part 6* is without prejudice to any other power exercisable by such a member.

Explanatory Notes:

1. Head 6206 codifies section 25 of the 1994 Act. The reference to "Act" has been replaced with "Part 6".

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