Legislation Affecting the Substantive Criminal Law 1996 and 1997

J Paul McCutcheon

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# LEGISLATION AFFECTING THE SUBSTANTIVE CRIMINAL LAW 1996 AND 1997

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Introduction
Until the beginning of the 1990s reform of the substantive criminal law has not been a legislative priority. As a result the law consisted of an amalgam of common law and statutory provisions. The principles of liability and the general defences thereto have, in the main, been the material of the common law and their development has fallen within the judicial domain. A mixture of common law and statutory provisions governed particular offences. But even in this case legislation tended to be based on a common law background. Statutes usually were consolidating in nature, rather than codifying, as for example is the case with the Larceny Act, 1916. This coupled with the oblique, and increasingly outdated, manner in which important statutes, such as the 1861 legislation, were drafted led to an unsatisfactory state of affairs. The Oireachtas continued this for many years with changes to the substantive criminal law being secondary to other legislative concerns. For example, the offences of burglary and robbery were amended not as part of a reform of the law on dishonesty but in order to harmonise those offences with their equivalents in Northern Irish law so as to facilitate the operation of the Criminal Law (Jurisdiction) Act, 1976.

However, from about the mid-1980s onwards the need to reform major areas of the substantive criminal law became more obvious. This is reflected in the reports produced by the Law Reform Commission on various aspects of the criminal law. Legislative measures adopted in response to this demand include the Larceny Act, 1990 which deals with handling stolen goods and possession of implements, the Criminal Law (Rape)(Amendment) Act, 1990, the Criminal Damage Act, 1991, the Criminal Law (Sexual Offences) Act, 1993 and the Criminal Justice (Public Order) Act, 1994.

The bulk of criminal legislation enacted in 1996 and 1997 deals with procedural matters. However, the substantive law was not ignored and in this paper the principal measures are outlined. The many regulatory offences which were enacted as part of a general legislative package dealing principally with non-criminal subject matter are not considered.

General Principles
The general principles of liability are primarily the subject of common law, with statutory intervention being minimal. However some measures are relevant.

(i) Degrees of participation
The Criminal Law Act, 1997 abolished the distinction between felonies and misdemeanours. This is primarily a matter of procedural significance. However, the distinction had a bearing on the law of participation and the Act made the necessary consequential amendments to the law in this regard. It should be noted that the old law on participation in felony is still relevant since the scope of liability by participation remains unaltered. S. 7(1) provides for the punishment as a principal offender of a person who “aids, abets, counsels or procures” the commission of an indictable
offence. This provision covers principals in the second degree and those who previously would have been considered to be accessories before the fact. S. 7(2) deals with conduct after the commission of the principal offence:

"Where a person has committed an arrestable offence, any other person who, knowing or believing him or her to be guilty of the offence or some other arrestable offence, does without reasonable excuse any act with intent to impede his or her apprehension or prosecution shall be guilty of an offence."

This broadly covers those who previously would have been considered to be accessories after the fact. An arrestable offence is one that attracts a sentence of 5 years' imprisonment or more.

Liability for compounding an offence is dealt with by Criminal Law Act, 1997, s. 8(1):

"Where a person has committed an arrestable offence, any other person who, knowing or believing that the offence or some other arrestable offence has been committed and that he or she has information which might be of material assistance in securing the prosecution or conviction of an offender for it, accepts or agrees to accept for not disclosing that information any consideration other than the making good of loss or injury caused by the offence, or the making of reasonable compensation for that loss or injury, shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for a term not exceeding three years."

S. 8(3) provides that any other form of compounding is not an offence.

The Criminal Law Act, 1997 is silent on the question of misprision. With the abolition of felonies the common law offence of misprision of felony must fall into desuetude, but a substitute offence was not created. This may be contrasted with the inclusion of the offence of misprision of treason in the Treason Act, 1939, s. 3.

The Criminal Law Act, 1997 repeals the Accessories and Abettors Act, 1861 in toto. Aiding and abetting provisions in a number of other statutes are also repealed.

(ii) Abolition of common law offences

Where a statute creates new offences, or alters existing offences, it is now common practice to abolish the pre-existing common law offences. The placing of offences on a statutory footing has the effect of enhancing the clarity with which they are defined and minimises doubt. In addition a statute might contain a transition provision dealing with prosecutions for acts which were committed before the passing of the statute. The Non-Fatal Offences against the Person Act, 1997 abolished a number of common law offences but it did not contain a transition provision. The question that thus arose was whether an accused could be prosecuted in relation to conduct committed prior to the passing of the Act for a common law offence after the Act came into force. On the one hand it might be argued that with the abolition of the common law offence to persist in the prosecution is accuse the defendant of an offence which is not known to law; and of course s/he cannot be charged with the "new" statutory offence which replaced the common law offence. On the other hand it might be said that the accused is charged
with an offence which was known to the law at the time of the conduct in question. The Special Criminal Court and the High Court have delivered contradictory rulings on this issue and it awaits resolution at appellate level. The legislative response was the enactment of the Interpretation (Amendment) Act, 1997. In broad terms the Act provides that the abolition of a common law offence by statute does not affect the previous operation of the law; proceedings may be instituted in respect of the common law offence after the statute has come into force. S. 1(4) deals with potential constitutional issues which might arise:

“If, because of any or all of its provisions, this section would, but for the provisions of this subsection, conflict with the constitutional rights of any person, the provisions of this section shall be subject to such limitations as are necessary to secure that they do not so conflict, but shall otherwise be of full force and effect.”

Although it was enacted to deal with the immediate difficulty posed by the Non-Fatal Offences against the Person Act, 1997 the provisions of the Interpretation (Amendment) Act, 1997 apply in the case any statute which abolishes common law offences.

(iii) Offences by bodies corporate

It is now commonplace to enact a provision that specifies that officers and directors of corporate bodies may attract criminal liability in their individual capacities where offences are committed by the company; this liability is additional to that of the company. A typical provision is Litter Pollution Act, 1997, s. 25 (3):

“Where an offence under this Act which is committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any person who, when the offence was committed, was a director, manager, secretary or other similar officer of the body corporate or a person who was purporting to act in any such capacity, that person, as well as the body corporate, shall be guilty of an offence and be liable to be proceeded against and punished as if guilty of the offence committed by the body corporate.”

Similar provisions are found in, *inter alia*, Waste Management Act, 1996, s. 9; Dumping at Sea Act, 1996, s. 7(5); Protection of Young Persons (Employment) Act, 1996, s. 23; Metrology Act, 1996, s. 31; Control of Horses Act, 1996, s. 5; Trade Marks Act, 1996, s. 95; Credit Union Act, 1997, s. 172; Electoral Act, 1997, s. 74; Organisation of Working Time Act, 1997 s. 34(2); Chemical Weapons Act, 1997, s. 13(3).

(iv) Fines on summary conviction

The principal criterion for determining whether an offence is minor within the meaning of Art. 38 of the Constitution is the penalty to be imposed on conviction. The dividing line in terms of penalty between minor and non-minor offences is, in the final analysis, a matter for judicial determination. A number of statutes specify a maximum fine of £1,500 on summary conviction: Protection of Young Persons (Employment) Act, 1996, s. 25; Competition (Amendment) Act, 1996, s. 3; Control of Horses Act, 1996,
The £1,500 threshold might, in theory, be considered excessive with the result that the offences in question would be non-minor and not triable summarily. However, the threshold reflects a legislative estimate that that limit will pass constitutional scrutiny.

(v) Defences
A limited defence of emergency is provided by Protection of Young Persons (Employment) Act, 1996, s. 14. This, it can be assumed, is addition to any common law defence of necessity that might apply.

(vi) Punishment
The Criminal Law Act, 1997 limits the sanctions which may be imposed by a court on conviction. S. 11 abolished penal servitude, hard labour and prison divisions. From now on a court may only pass a sentence of imprisonment and earlier statutes are to be construed accordingly. S. 12 effects the abolition of corporal punishment as a sentence. These changes are primarily formal in nature as the distinction between imprisonment and penal servitude had by and large faded, while whipping as a punishment had fallen into disuse.

(vii) "On the spot" fines
The Litter Pollution Act, 1997, s. 28 makes provision for "on the spot” fines in relation to litter offences. A notice may be served by a litter warden, a Garda or, in the case of dog-related offences, a dog warden. A fine of £25 payable to the relevant local authority may be levied in this manner. The Minister for the Environment may, by regulation, vary amount of the fine to take account of changes in the value of money.

(viii) Prosecution of offences
In several instances particular provision is made in relation to the prosecution of offences. Most often this is to invest the body which is charged with the implementation of a statute with the power to initiate prosecutions. In some cases the body is invested solely with a power to initiate summary proceedings. Prosecution by the Attorney General, rather than the Director of Public Prosecutions, is provided for by in the Dumping at Sea Act, 1996, ss. 11 & 12.

Offences against the Person
The most significant legislative activity has been in relation to offences against the person. The principal measure is the Non-Fatal Offences against the Person Act, 1997 but it is supplemented by several other legislative provisions.

It had been accepted for quite some time that the law on offences against the person was in need of a significant overhaul. The Law Reform Commission reported on the matter in 1994 (Report on Non-Fatal Offences Against the Person LRC 45-1994) and many of its recommendations were adopted, in one form or another, in the Non-Fatal Offences Against the Person Act, 1997. That measure simplifies the law and eliminates the arcane and outdated distinctions that characterised both the common law and the
Offences against the Person Act, 1861. It abolished the common law offences of assault, battery, false imprisonment and kidnapping and repealed many of the offences contained in the 1861 Act. (The effects of the abolition of common law offences are considered above at pp. 2-3). The result is a simplified statutory scheme:

(i) Assaults
The summary offence of assault (£1,500 fine and/or 6 months’ imprisonment) is set out in s. 2:

“(1) A person shall be guilty of the offence of assault who, without lawful excuse, intentionally 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) In subsection (1)(a), ‘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,

(3) No such offence is committed if the force or impact, not being intended or likely to cause injury, 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.”

It is clear that “assault”, as defined in subs. (1), embraces the common law categories of assault and battery - it includes both the application of force and the apprehended application of force. Subs. (2) clarifies a point of some theoretical interest, namely that “force” includes the application of various forms of energy. Subs. (3) establishes the basis on which trivial contact that is part and parcel of everyday life (e.g. jostling in a bus queue) is not an assault. This again clarifies a theoretical point which was unsettled in the authorities and commentaries.

Assault causing harm is an offence under s. 3 which may be tried summarily (£1,500 fine and/or 12 months’ imprisonment) or on indictment (fine and/or 5 years’ imprisonment). “Harm” is defined in s. 1 as “harm to body or mind and includes pain and unconsciousness”. The inclusion of mental or psychological harm reflects developments in relation to “actual bodily harm” in the Offences against the Person Act, 1861, s. 47 (R v. Chan-Fook [1994] 1 WLR 689; R v. Ireland [1997] 1 All ER 112). However the definition is somewhat circular (“harm means harm”) and while the definition is broad it is not comprehensive. It is possible that recourse will be had to the definition of “bodily harm” in R v. Donovan [1934] 2 KB 498 at 509:

“... ‘bodily harm’ has its ordinary meaning and includes any hurt or injury calculated to interfere with the health or comfort of the prosecutor. Such hurt need not be permanent, but must, no doubt be more than merely transient and trifling.”
The intentional or reckless causing of serious harm is an indictable offence under s. 4, (fine and/or life imprisonment). “Serious harm” is defined in s. 1 as “injury which 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.” This is a somewhat more precise definition than that which was attributed to “grievous bodily harm” under the 1861 Act by the Supreme Court (The People (Attorney General) v. Messitt [1974] IR 406) and the House of Lords (DPP v. Smith [1961] AC 290).

It will be a question of fact whether the accused caused harm or serious harm. The precise boundaries between assault, assault causing harm and causing serious harm are difficult to draw and the definitions in the 1997 Act are liable to be supplemented by judicial interpretation, particularly at appellate level. Nevertheless it would appear that “serious harm” embraces a narrower range of harms than “grievous bodily harm” which it replaces.

S. 4 specifies the mens rea for the offence it creates (“intentionally or recklessly causes serious harm”). However, s. 3, dealing with the lesser offence of assault causing harm, is silent on the question of mens rea. English authority on the offence it replaced, namely assault occasioning actual bodily harm (Offences against the Person Act, 1861, s. 47), is to the effect that it is not necessary to prove mens rea as to the degree of harm inflicted - i.e. all the prosecution have to establish is that the accused intentionally or recklessly committed an assault which in fact resulted in actual bodily harm, the latter raising a question of causation only (R v Savage [1992] 1AC 699). It does not follow that an Irish court would or should adopt this approach in relation to the offence of assault causing harm and it is contrary to the general philosophy discernible from the Supreme Court’s decision in The People (DPP) v Murray [1977] IR 360.

There is curious difference in wording between s. 3 and s. 4. S. 3 specifies an assault which causes harm. “Assault” must be read in the light of s. 2 which defines the basic offence of assault. S. 4 simply requires an intentional or reckless causing of serious harm, the term “assault” being omitted from that provision. It seems, therefore, that a wider range of conduct than that encompassed by the term “assault” might come within s. 4. In other words it is conceivable that some acts which do not amount to an assault would, where serious harm is caused, come within s. 4. The strange result is that the more serious offence potentially embraces a wider range of conduct than the less serious offence. For example, some acts of poisoning do not constitute an “assault”. If the poisoning resulted in harm an offence under s. 3 would not be committed; however, if the poisoning caused serious harm the accused would, all other things being equal, be guilty under s. 4. Likewise an accused who, knowing s/he is HIV positive, has intercourse with a victim faces potential liability under s. 4 but not under s. 3. It is unfortunate that this potential difficulty was not addressed in the legislation. This is especially so since a related issue was identified in England, namely that “inflicting” grievous bodily harm does not imply an assault (R v. Wilson [1984] AC 242).

Absence of consent is expressed as an element of the actus reus of assault. With one exception (s. 23 dealing with consent by minor over 16 years’ of age to surgical, medical or dental treatment) the Act is silent on the question of consent in relation to
assault. S. 22 preserves the defences which are available at common law. According to the Explanatory Memorandum which accompanied the Bill, this includes the common law rules relating to consent in sports, dangerous exhibitions and medical treatments. The result is a juxtaposing of an ingredient of the actus reus and a general defence. For example, does consensual force in the case of sport avoid liability because there is no assault (lack of an actus reus) or because of the existence of a defence? While this might appear to be an academic question a practical difference might arise in relation to certain defences. It could be that the common law defence of consent is incorporated into the "new" law of assault, i.e. that consent is exculpatory if the force applied is not such as is likely to result in actual bodily harm or, where it is likely to result in that degree of harm, it falls into one of the exceptional categories recognised by law (R v. Brown [1994] 1 AC 212). This approach would, however, involve the resurrection of a conceptual category which the 1997 Act abandoned, namely "actual bodily harm". The common law defence might be varied to the extent that the consent threshold would now be "harm" within the meaning of the 1997 Act.

It should be noted that some statutory provisions relating to assault are unaffected by the 1997 Act: Larceny Act, 1916, s. 23(2) (assault with intent to rob); Criminal Justice (Public Order) Act, 1994, s. 18 (assault with intent to cause bodily harm or commit an indictable offence); Criminal Justice (Public Order) Act, 1994, s.19 (assault or obstruction of a peace officer). The pre-1997 Act authorities that were based on the categories contained in 1861 Act are still relevant in relation to these offences.

(ii) Syringe attacks, possession of syringes
S. 6 of the 1997 Act creates a series offences relating to syringe attacks. The offences in s. 6 fall into two broad categories. The first involves the use of a syringe in circumstances where the accused intends to infect the victim or where there is likelihood that the victim will believe that s/he may become infected:

- injuring, or threatening to injure, another by piercing his/her skin with a syringe with the intention of infecting the person with disease or where there is a likelihood of causing that person to believe that s/he may become infected
- spraying, pouring or putting, or threatening to spray, pour or put, blood or a fluid resembling blood with the intention of infecting the person with disease or where there is a likelihood of causing that person to believe that s/he may become infected
- in the course of committing one of the two preceding offences injuring a third person by piercing his/her skin with a syringe or spraying, pouring or putting blood or fluid resembling blood with the result that that person believe that s/he may become infected with disease

Central to the foregoing offences is an intention on the part of the accused to infect the victim or a fear on the victim's part that s/he may be infected. It is not necessary to prove infection, or risk of infection, in fact; nor is it necessary to prove that the syringe or blood was contaminated.

These offences may be tried summarily (£1,500 fine and/or 12 months' imprisonment) or on indictment (fine and/or 10 years' imprisonment).
The second group of offences created by s. 6 involves the use of a contaminated syringe or contaminated blood:

- intentionally injuring another by piercing the skin with a contaminated syringe
- intentionally spraying, pouring or putting contaminated blood into another
- in the course of committing the two preceding offences injuring a third person by piercing his/her skin with a contaminated syringe or spraying pouring or putting contaminated blood into the third person.

These offences are triable on indictment (life imprisonment).

Blood or fluid is "contaminated" if it contains a disease, virus, agent or organism which if passed into the blood stream could infect a person with a life threatening or potentially life threatening disease (s. 1(1)). This, of course, includes AIDS and the HIV virus but extends to any agent which could result in a life threatening disease e.g. the hepatitis virus. What is "life threatening" is not explained in the Act but it must be that the anomalous one year and a day rule does not govern the concept. In other words, a disease is life threatening even if the victim is likely to live for more than one year and a day after the attack, in which case the assailant would not be guilty of homicide when death results.

The possession of a syringe or blood in a container with intent to injure or threaten injury or to intimidate is an offence under s. 7. It is triable summarily (£1,500 fine and/or 12 months' imprisonment) or on indictment (fine and/or 7 years' imprisonment).

S. 8 creates two offences relating to the abandoning of syringes:

"(1)... a person who places or abandons a syringe in any place in such a manner that it is likely to injure another and does injure another or is likely to injure, cause a threat to or frighten another shall be guilty of an offence.

(2) 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."

The offence in subs. (1) is triable summarily (£1,500 fine and/or 12 months' imprisonment) or on indictment (fine and/or 7 years' imprisonment). The gravamen of the offence is the causing of injury to or frightening of the victim. The offence does not apply to the placing of syringes in the course of medical, dental or veterinary procedures (subs. (3)). Where a syringe is placed in the accused's dwelling it is a defence to show that he did not intentionally place it that it injured or was likely to injure etc. (subs. (4)) - in other words a drug addict who leaves his/her syringe on the kitchen table at home would have a defence. An offence is committed under subs. (1) whether the syringe is contaminated or not.

The offence in subs. (2) is triable on indictment (life imprisonment). The gravamen of this offence is the intentional causing of injury.
(iii) Poisoning
In many cases poisoning would amount to the offence of causing serious harm. Although the Law Reform Commission thought otherwise (LRC 45-1994, p. 259), it is doubtful whether poisoning could constitute the less serious offence of assault causing harm. An act of poisoning could not typically be described as application of force to or causing of an impact on the victim. The Non-Fatal Offences against the Person Act, 1997, s. 12 creates a “residual” poisoning offence which might be employed where the accused’s conduct does not fit within one of the other offences. The offence consists of intentionally or recklessly administering to or causing a person to take a substance which is known to be capable of “interfering substantially with the [victim’s] bodily functions” without that person’s consent. By virtue of subs. (2) a substance which induces sleep or unconsciousness is capable of interfering substantially with one’s bodily functions. Thus, “spiking” a person’s drink with a sleeping tablet would come within s. 12.

This offence is triable summarily (£1,500 fine and/or 12 months’ imprisonment) or on indictment (fine and/or 3 years’ imprisonment).

It should be noted that a specific offence of infecting a person with a disease or illness was not created. The Law Reform Commission had earlier advised against the creation of such an offence (LRC 45-1994, p. 262).

(iv) Intimidation, threats, harassment
The Non-Fatal Offences against the Person Act, 1997 creates several new offences which deal broadly with threats, intimidation and harassment. Some threats might in themselves constitute an assault where they induce a fear of suffering immediate force. Moreover, that conduct might amount to either assault causing harm or causing serious harm - “harm” includes harm to the mind and a sufficiently grave threat might result in the victim suffering serious trauma or nervous shock. Nevertheless it is clear that the law of assault in itself is insufficient to deal with the phenomenon of threatening conduct.

Under s. 5 it is an offence to make a threat to a person, intending that it be believed, to kill or cause serious harm to that person or another. The intent that it be believed by the person to whom it is made distinguishes serious threats from those that are spurious. Moreover, it is neither necessary nor sufficient to prove that the threat was believed, or had an effect on, the person to whom it is made.

An offence under s. 5 may be tried summarily (£1,500 fine and/or 12 months’ imprisonment) or on indictment (fine and/or 10 years’ imprisonment).

An offence of coercion is created by s. 9 of the Act which provides:

“(1) A person who, with a view 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, wrongfully and without lawful authority -
(a) uses violence to or intimidates that other person or a member of the family of the other, or
(b) injures or damages the property of that other, or
(c) persistently follows that other about from place to place, or
(d) 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, or
(e) follows that other with one or more other persons in a disorderly manner in
or through any public place,
shall be guilty of an offence."

The terms in which the offence of coercion is drafted are comprehensive and it
embraces all imaginable forms of conduct that might be considered intimidatory. The
right to peaceful picketing is protected by subs. (2), the terms which exclude attending
at or near a premises “in order merely to obtain or communicate information” from the
watching and besetting provisions in subs. (1)(d).

The offence of coercion is triable summarily (£1,500 and/or 12 months’ imprisonment)
or on indictment (fine and/or 5 years’ imprisonment)

The Non-Fatal Offences against the Person Act, 1997, s. 10(1) creates a more serious
offence of harassment, “without lawful authority or reasonable excuse”. In some cases
conduct which would otherwise amount to harassment might be done on lawful
authority or with reasonable excuse, in which case no offence is committed. The Law
Reform Commission suggested that overt surveillance by the Gardaí would be thus
excluded (LRC 45-1994, p. 258). The forms of harassment against which the section is
directed are “persistently following, watching, pestering, besetting or communicating
with the victim”. These may be achieved by any means including the use of telephone,
thus supplementing the offences in the Postal and Telecommunications Services Act,
1983. The concept of “harassment” is amplified in s. 10(2):

“For the purposes of this section a person harasses another where -
(a) he or she, by his or her acts intentionally or recklessly, seriously interferes
with the other’s peace and privacy or causes alarm, distress or harm to the other,
and
(b) his or her acts are such that a reasonable person would realise that the acts
seriously interfere with the other’s peace and privacy or cause alarm, distress or
harm to the other.”

It seems clear that stalking and persistently making unwanted communications with a
victim (e.g. unwanted protestations of undying love and affection) amount to the
offence of harassment. The mens rea component of the offence is set out in somewhat
ambiguous terms. In subs. (2)(a) it is uncertain whether it is merely the act which must
be intentional or reckless, or whether the accused must be shown to have been
intentional or reckless as to the consequence of the act, namely seriously interfering
with the victim’s peace and privacy etc. This point could be crucial since, as a matter
of general principle, it must be assumed that intent or recklessness is to be evaluated
subjectively. Applying the subjective test the question is whether the accused intended
or was reckless, not whether a reasonable person, in the same circumstances would
have intended or have been reckless. If subs. (2)(a) requires intent or recklessness both
as to the act and the consequence it leaves open the possibility of a successful defence
to the effect that the accused subjectively lacked intent or was not subjectively
recklessness as to the consequence. A defence of this nature is not improbable. It is often the case that harassers and stalkers act out of a sense of distorted affection or love and are ignorant as to the distress their conduct is liable to induce. For this reason the provision would be more effective were the specified intent or recklessness confined to the act. This view is reinforced by the fact that subs. (2)(b) makes specific provision in regard to the consequence and it introduces an objective element into the equation. The prosecution must prove that the acts were such that a reasonable person would realise that they would seriously interfere etc. In other words, it would not avail an accused to say that s/he did not realise the consequences of his/her conduct if a reasonable person would have appreciated those consequences. In these circumstances a person who persistently makes unwanted telephone calls could hardly say that it could not be realised that his/her conduct would cause distress to the victim.

The offence of harassment may be tried summarily (£1,500 and/or 12 months’ imprisonment) or on indictment (fine and/or 7 years’ imprisonment). A court on conviction, may also order the accused not to communicate with the victim or approach within a specified distance of the victim’s residence or place of business - this may be ordered either in addition to, or as an alternative to, any other punishment (subs. (3)). Breach of such an order is an offence which attracts the same penalty as harassment. Subs. (5) authorises a court to make an order under subs. (3) even where it decides not to convict the accused. This power enhances the protection which a court may extend to victims of harassment. It is especially useful where those whose conduct causes distress or alarm might evade conviction on “technical” grounds.

The Law Reform Commission expressed some doubt on the question whether persistent demands by a creditor would come within the offence of harassment (LRC 45-1994, p. 258). It might be argued that the creditor acts with reasonable excuse. Nevertheless, it is the case that an unscrupulous creditor might cause alarm or intimidate a debtor. The Non-Fatal Offences against the Person Act, 1997, s. 11 deals with such conduct. It embraces demands for repayment which (a) by their frequency are calculated to subject the debtor or his/her family to alarm, distress or humiliation or (b) which represent that criminal proceeding may be taken to enforce the debt or (c) where the accused falsely represents that s/he acts in some official capacity to enforce payment or (d) the accused utters a document which is falsely represented to have an official character. This offence is triable summarily (£1,500 fine).

An offence of intimidation is created by the Housing (Miscellaneous Provisions) Act, 1997, s. 18. It is directed against threats, intimidation, harassment, coercion, obstruction or interference with an officer or employee of a housing authority or health board or a member of his/her family or any person who provides or is to provide evidence in Housing Act proceedings. This offence is triable summarily (£1,500 fine and/or 12 months’ imprisonment).

(v) Endangerment
Two new offences of endangerment are created by the Non-Fatal Offences against the Person Act, 1997. S. 13 creates a general offence of endangerment where the accused intentionally or recklessly engages in conduct that creates a substantial risk of death or serious harm to another. The Act does not define “substantial risk” but it clear that negligible and improbable risks are excluded. It is likely that this provision will be
interpreted as raising a mixed question of fact and law - i.e. it is for the trial judge to rule whether a particular risk is capable of being construed as "substantial" while it will remain for the trier of fact to determine whether in fact it was substantial. The risk created must be of death or serious harm, and the definition of the latter has been set out above (at p. 6). The mens rea of the offence is intention or recklessness. In recommending the creation of this offence the Law Reform Commission indicated that it had Cunningham-recklessness in mind – i.e. that the accused actually adverted to the possibility of the risk materialising but acted regardless (LRC 45 -1994, pp. 295-296).

The offence of endangerment is triable either summarily (£1,500 fine and/or 12 months’ imprisonment) or on indictment (fine and/or 7 years’ imprisonment).

An offence of endangering traffic is created by s. 14(1):

“A person shall be guilty of an offence who -
(a) intentionally places or throws any dangerous obstruction upon a railway, road, street, waterway or public place or interferes with any machinery, signal, equipment or other device for the direction, control or regulation of traffic thereon, or interferes with or throws anything at or on any conveyance used or to be used thereon, and
(b) is aware that injury to the person or damage to property may be caused thereby, or is reckless in that regard.”

This offence replaces a number of offences that dealt with interfering with railways etc. In many cases conduct which endangers traffic will also amount to the offence of endangerment under s. 13. Nevertheless s. 14 is directed at a broader range of risks. It embraces risks of injury to the person and damage to property. The risk of injury to the person is not limited to that of death or serious harm - thus, a risk of harm should suffice. Moreover, the provision does not specify a requirement of “substantial” risk - it must be that lesser risks fall with the scope of the offence.

The offence of endangering traffic is triable either summarily (£1,500 fine and/or 12 months’ imprisonment) or on indictment (fine and/or 7 years’ imprisonment).

Specific provision in respect of the keeping of horses is made by the Control of Horses Act, 1996, s. 45:

“(1) The owner, keeper or person in charge or control of a horse who wilfully or recklessly permits the horse to pose a danger to a person or property or to cause injury to a person or damage to any property shall be guilty of an offence.”

The offence is committed where either injury is suffered or a danger of injury is created by the manner in which the horse is kept. The offence is triable either summarily (£1,500 fine and/or 6 months’ imprisonment) or on indictment (£10,000 fine and/or 2 years’ imprisonment).

(vi) Offences against personal liberty
The Non-Fatal Offences against the Person Act, 1997 has effected a general overhaul of the law on offences against the personal liberty. The common law offences of
Kidnapping and false imprisonment have been abolished and are replaced by a generic offence of false imprisonment. It had become clear that prosecutors preferred to charge offenders with false imprisonment rather than kidnapping, thus avoiding the need to prove the additional aggravating features of the latter offence. The offence of false imprisonment is defined in s. 15(1). It is committed where the accused intentionally or recklessly (a) takes or detains, or (b) causes to be taken or detained or (c) otherwise restricts the personal liberty of a person without his/her consent. It is clear that it is not necessary to establish any element of abduction or removal nor is holding for ransom or reward an element an element of the offence.

The absence of consent element is amplified in sub. (2): "... a person acts without the consent of another if the person obtains the other's consent by force or threat of force, or by deception causing the other to believe that he or she is under legal compulsion to consent." The first part of the subsection reiterates the general principle that force or the threat of force vitiates consent. However, as a matter of general principle consent might also be vitiated by fraud as to a material element of the proposed transaction. In this context the provision in the second part of subs. (2) concerning deception is potentially narrower than the position which hitherto existed at common law regarding taking by fraud. Clearly, it would apply to the case of a taking by a Garda or security officer who deceitfully informs a victim that s/he obliged to comply with a request to accompany him/her to a police station, or the manager's office or wherever. However, other frauds that might possibly induce consent to go with an accused (e.g. an accused might misrepresent the purpose for which the victim's consent is sought or a child might be persuaded by an accused to go with him/her) which the wording of the subs. (2) does not include. In the case of children the offences under ss. 16 and 17 could be charged (see below at pp. 13-14). However, the maximum penalty for those offences is 7 years' imprisonment and cases can be imagined where a greater penalty would be warranted.

No provision is made in s. 15 for a defence of lawful authority or reasonable excuse. However, the provisions in ss. 18-20 concerning the justifiable use of force would apply to the offence of false imprisonment (see below at pp. 14-15).

False imprisonment may be tried summarily (£1,500 fine and/or 12 months' imprisonment) or on indictment (life imprisonment).

Two offences of child abduction are created by ss. 16 and 17. An offence under s. 16 is committed where a child under the age of 16 years is taken, or caused to be taken, out of the State by a parent or guardian in defiance of a court order or without the consent of each person whose consent would by law be required (i.e. parents, or guardians or those to whom custody has been entrusted by a court order). It is a defence to show that the accused had been unable to communicate with those whose consent is required but believed that they would have consented had they been aware of the relevant circumstances (subs. (3)). A defence is also provided where the accused did not intend to deprive others of their rights in respect of the child (subs. (3)). The gravamen of this offence is the removal of the child in a manner that violates the interests of those entitled to custody of him/her. It is clearly directed at "tug of love" abductions, which is evidenced by the fact that removal must be out of the State. On the other hand, where a parent takes a child temporarily out of the State it is likely that no offence is
committed. In those circumstances the defences provided in subs. (3) are likely to arise. Thus it is improbable that a parent who, without the consent of the other, takes a child to Northern Ireland on a day trip or to Manchester to watch a football match would be guilty under s. 16. Of course, the parent might be guilty of a contempt of court where the child is the subject of a court order which prohibits his/her removal from the State.

An offence under s. 16 may be tried summarily (£1,500 fine and/or 12 months’ imprisonment) or on indictment (fine and/or 7 years’ imprisonment).

The other child abduction offence is contained in s.17:

“A person, other than a person to whom section 16 applies, shall be guilty of an offence who, without lawful authority or reasonable excuse, intentionally takes or detains a child under the age of 16 years or causes a child under that age to be so taken or detained -
(a) so as to remove the child from the lawful control of any person having lawful control of the child; or
(b) so as to keep him or her out of the lawful control of any person entitled to lawful control of the child.”

This offence applies to a person to whom s. 16 does not apply, i.e. a person who is not a parent, guardian or has not been entrusted by court order with custody of the child. Unlike the offence in s. 16 it is expressly provided that the offence must be without lawful authority or reasonable excuse. “Lawful authority” must be taken to refer to the circumstances in which the law would recognise an entitlement to take the child. Thus a Garda who lawfully arrests a child would act with lawful authority. It is unclear what amounts to a “reasonable excuse” and this category awaits judicial elucidation. There is a purposive dimension to the offence, outlined in pars. (a) and (b) of subs. (1). The abduction must be such as to deprive a parent etc. of lawful control of the child. Thus an uncle or grandparent who takes a child to the zoo or cinema without the parent’s consent would not be guilty on one of two possible grounds. The first is that it might be that the uncle or grandparent could successfully plead reasonable excuse; second, the object of the removal in this case is not to deprive the parent of lawful control of the child. Subs. (2) provides a defence that the accused believed the child to be over 16 years of age. The test in relation to the belief is subjective; s. 1(2) of the Act provides that an honest (i.e. not necessarily justifiable) belief is sufficient; however, s. 1(2) also provides that the presence or absence of reasonable grounds for such belief are to be considered by the trier of fact along with “other relevant matters”.

An offence under s. 17 may be tried summarily (£1,500 fine and/or 12 months’ imprisonment) or on indictment (fine and/or 7 years’ imprisonment).

(vii) Defences
Several sections of the Non-Fatal Offences against the Person Act, 1997 relate to defences. In s. 22 it is provided that the provisions of the Act have effect subject to any enactment or rule of law which provides lawful authority, justification or excuse for conduct. In effect, this preserves the law on general defences and each of the offences created by the Act attracts those defences.
Special provision is made in ss. 18-20 in relation to the justifiable use of force. S. 18(1) sets out the purposes for which the use of reasonable force by a person does not constitute an offence. These are (a) to protect him/herself or a family member or another from criminal injury, assault or detention, (b) to protect him/herself or (with the authority of that other) another from trespass to the person, (c) to protect his or her property from appropriation, destruction or damage by a criminal act or from trespass or infringement, (d) to protect another's property from a criminal act of appropriation, destruction or damage or (with the person's authority) trespass or infringement, or (e) to prevent a crime or a breach of the peace. An act against which force is directed is considered to be criminal even though the actor would be acquitted by reason of his/her age, insanity, duress, intoxication or on the grounds that the act was not voluntary (s. 18(3)). The question whether an act falls within categories (a) to (e) is to be determined according to the facts as the accused believed them to be (s. 18(5)). S. 18(6) is drafted in somewhat cumbersome terms but its thrust is that an accused is denied a defence where s/he knows that the force is to be used against a Garda who is acting in the course of his/her duty.

S. 19 deals with the use of force in effecting a lawful arrest. It provides that the use of force in those circumstances does not constitute an offence if the force employed is reasonable in the circumstances as the accused believed them to be. The question whether an arrest is lawful is to be determined according to the facts as the accused believed them to be (s. 19(3)).

By virtue of s. 1(2) a defence of belief in relation to ss. 18 and 19 is to be evaluated subjectively (see also at p. 14).

S. 20 explains the meaning of "use of force" in ss. 18 and 19. "Force" includes the application of force to and the causing of an impact on the body of another. It also includes the threatened use of force and the detention of a person without actual use of force. Subs. (4) provides that the opportunity to retreat is a factor to be taken into account in determining whether the use of force was reasonable.

Taken together ss. 18-20 broadly reflect the common law on the use of force in legitimate defence or in effecting an arrest. Moreover, the provision that matters are to be determined according to the facts as the accused believed them to be matches developments at common law. Ss. 18-20 now are the exclusive provisions on the use of force in these circumstances and any common law rules in this respect are abolished by s. 22(2). It is not inconceivable that subsequent interpretation of these provisions will result in deviations from the pre-existing common law. It should be noted that s. 22(2) does not affect other rules which govern the justifiable or excusable use of force, e.g. as in cases of necessity and consent.

S. 24 abolishes the common law rule which rendered teachers immune in respect of the physical chastisement of pupils. This gives legal effect to a position which had been reached administratively.
Sexual offences

The Sexual Offences (Jurisdiction) Act, 1996 extends the law on sexual offences to offences committed with children outside the State. The Act deals both with the commission of offences abroad and ancillary offences committed within and outside the State.

The Act applies to citizens of the State and persons who are ordinarily resident within the State. A person is “ordinarily resident” within the State if s/he has had his/her principal residence within the State for 12 months immediately prior to the commission of the offence (s. 2(7)). A child is a person under the age of 17 years (s. 1(1)). In determining a complainant’s age a court may have regard to his/her physical appearance and attributes (s. 8). This last provision should prove useful in a prosecution involving a complainant from a country which has an unreliable system of registration of births. But while it might relieve the prosecution of the strict proofs involved in producing evidence of date of birth it can be imagined that in many cases physical appearance alone might not be sufficient to convince a court that the complainant is, or was at the material time, underage.

Jurisdiction is extended by s. 2(1) which provides that a person is guilty of an offence done outside the State against a child if (a) it constitutes an offence against the law of the place where it is done and (b) if done within the State it would constitute one of a list of scheduled offences. The scheduled offences are unlawful carnal knowledge of minors (Criminal Law Amendment Act, 1935, ss.1 and 2), rape, sexual assault, aggravated sexual assault, rape under section 4 (i.e. Criminal Law (Rape)(Amendment) Act, 1990, s. 4), buggery of a person under 17 years of age (Criminal Law (Sexual Offences) Act, 1993, s. 3), gross indecency with a male under 17 years of age (Criminal Law (Sexual Offences) Act, 1993, s. 4) and sexual intercourse with or buggery of a mentally impaired person (Criminal Law (Sexual Offences) Act, 1993, s. 5). In these circumstances the accused is guilty of the scheduled offence and is liable to the same penalty. It should be noted that if the conduct is not an offence against the law of the country in which it occurs the Act does not apply even though the same conduct, if committed within the State, would constitute an offence. This takes account, inter alia, of different ages of consent in different countries. An attempt outside the State, by a citizen or person ordinarily resident in the State to commit one of the foregoing offences is penalised by subs. (2). Incitement, conspiracy and liability as a secondary party are covered by subs. (3) to (6). Any person who within the State aids, abets etc. the commission of an offence or incites or conspires to commit an offence is guilty of an offence; these provisions apply to those who are not citizens or are not ordinarily resident in the State. In addition, liability attaches to citizens and those ordinarily resident within the State who, outside the State, aid, abet, etc. the commission of an offence or incite or conspire to commit an offence.

Ss. 3 and 4 create ancillary offences. Under s. 3 it is an offence to transport, or make an arrangement to transport, a person abroad knowingly for the purpose of enabling that person to commit an offence against which the Act is directed. This provision is clearly is directed against those who organise sex tours, but its unqualified terms are such that any person who provides a transport service in the knowledge that the traveller intends to commit child sex offences abroad is liable. However, since the act must be done “knowingly” those who act negligently or even recklessly would not be
guilty. However, a person who is wilfully blind would be considered to have the requisite knowledge. S. 4 prohibits the publication of information that is intended to, or is likely to, promote, advocate or incite the commission of an offence.

Offences under ss. 3 and 4 may be tried summarily (£1,500 fine and/or 12 months’ imprisonment) or on indictment (£10,000 fine and/or 5 years’ imprisonment)

An accused may be tried anywhere within the State (s. 7). S. 9 applies the rule against double jeopardy - a person who has been acquitted or convicted of an offence outside the State may not be tried within the State in respect of the same acts.

Trade mark offences
The Trade Marks Act, 1996 governs fraudulent or dishonest conduct in relation to trade marks. It creates several offences which might be employed against those who manufacture or deal in “counterfeit” goods or make false representations concerning trade marks.

S. 92 penalises a range of activities relating to the use or application of a mark “identical to or nearly resembling” a registered trade mark. The activities include:

- applying such a mark to goods or material used in labelling, packaging or advertising goods
- selling, letting for hire, offering or exposing for sale or hire or distributing goods or labelling etc. material which bear a mark
- using material bearing a mark in the course of a business for labelling etc.
- possession of goods or material bearing a mark for any of the foregoing activities
- possession of goods or material bearing a mark with a view to assisting another to engage in the foregoing activities.

An offence is committed only where the accused acts with a view to gain for him/herself or another or with intent to cause loss to another. It is a defence to show that the accused believed on reasonable grounds that s/he was entitled to use the mark in relation to the goods question.

An offence under s. 92 may be tried summarily (£1,000 fine and/or 6 months’ imprisonment) or on indictment (£100,000 fine and/or 5 years’ imprisonment)

S. 93 creates offences involving the falsification of the Register of Trade Marks. It is an offence to make or cause to be made anything which falsely purports to be a copy of an entry on the Register or to produce, or cause to be produced, any such thing in the knowledge or belief that the thing is false.

An offence under s. 93 may be tried summarily (£1,000 fine and/or 6 months’ imprisonment) or on indictment (£200,000 fine and/or 2 years’ imprisonment).

S. 94 penalises the making of a false representation that a mark is a registered trade mark and the making of false representations as to goods or services for which a trade mark is registered.
An offence under s. 94 is triable summarily (£1,000 fine + £100/day for a continuing offence).

**Chemical weapons**
The Chemical Weapons Act, 1997 implements the United Nations Convention on the Prohibition of the Production, Stockpiling and Use of Chemical Weapons and on their Destruction (1993). The Act establishes a regime of inspection and enforcement and imposes duties to maintain records and provide information to the regulatory authority. The principal offences in the Act, which are contained in s. 3(1), embrace:

- the production, development, retention, use and transfer of a chemical weapon;
- the construction, conversion, maintaining and use of premises or equipment for the purpose of the preceding offences;
- engaging in preparations of a military nature to use a chemical weapon.

S. 3(3) extends jurisdiction in relation to these offences to acts committed outside the State by an Irish citizen; thus, an Irish national who assists in the chemical weapons industry of a foreign country would be guilty of an offence. Offences under s. 3 may be tried summarily (fine £1,500 and/or 12 months’ imprisonment) or on indictment (life imprisonment).

**Official secrets**
The Freedom of Information Act, 1997, s. 48 amends the Official Secrets Act, 1963. A person who is, or reasonably believes him/herself to be, authorised under the Freedom of Information Act to communicate information is deemed to be duly authorised for the purposes of Official Secrets Act, 1963, s. 4 (disclosing or obtaining official information) and thus is not guilty of an offence under the latter provision. S. 48 also provides a defence to charges under the Official Secrets Act, 1963, s. 5 (disclosure of information in official contracts) and s. 9 (disclosure of “military secrets”) where the accused was authorised, or reasonably believed him/herself to be authorised, by the Freedom of Information Act to act as s/he did.
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Centre for Criminal Justice

Background
The Centre for Criminal Justice was established in February 1997 at the University of Limerick in order to make a substantial contribution to Irish scholarship and learning on the subject of crime and criminal justice. Although based in the Department of Law its inter-disciplinary nature is reflected by active inputs from the Departments of Government and Society and Accounting and Finance.

Objectives
- to advance and disseminate knowledge of Irish criminal justice policy and the design, structure and operation of the Irish criminal justice system, through research, conferences and seminars
- to provide independent research and scholarship on diverse aspects of crime and criminal justice which will be of practical benefit to government policy-makers, the Garda Síochána, the Director of Public Prosecutions, the legal profession, the courts, the probation service, the prison service, the private security industry, crime victims' organisations, business and the general public
- to promote understanding of European and international co-operation on criminal justice and, in particular, how Ireland contributes to and is affected by this co-operation, through research, conferences and seminars
- to promote co-operation with other universities, the Garda Síochána and other public and private bodies with a view to advancing research on crime and criminal justice issues of particular relevance to Irish and European society
- to be a national and international centre of excellence for research on crime and criminal justice.

Activities
The Centre attracts research funding from external sources to support specific research projects in the general area of crime and criminal justice. Many of the projects are conceived and formulated by staff within the Centre, while others originate from external sources in the form of commissioned research. The research itself is carried out by the full-time experts within the Centre, augmented where necessary by temporary research assistants. The Centre has a deliberate policy of attracting research assistants who will register for a Masters or PhD by research. These students are supervised by full-time staff within the Centre.

The Centre's published output is spread over: articles in refereed journals, books and monographs. The results of some projects are published in a series produced by the Centre under the title *Limerick Papers in Criminal Justice*.

Conferences and seminars are a major feature of the Centre's activities. The Centre is also keen to develop strong working relations with criminal justice departments and centres in other universities, criminal justice agencies at home and abroad and any other body whose work is relevant to the study of crime and the management of crime through the criminal justice system.

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Mr Paul McCutcheon (Law)
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