The Law Commission

(LAW COM. No. 149)

CRIMINAL LAW

REPORT ON CRIMINAL LIBEL

Presented to Parliament by the Lord High Chancellor
by Command of Her Majesty

September 1985

LONDON

HER MAJESTY'S STATIONERY OFFICE

£5.80 net

Cmnd. 9618

The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Commissioners are—

The Honourable Mr. Justice Ralph Gibson, *Chairman.*

Mr. Trevor M. Aldridge.

Mr. Brian J. Davenport, Q.C.

Professor Julian Farrand.

Mrs. Brenda Hoggett.

The Secretary of the Law Commission is Mr. J. G. H. Gasson, and its offices are at Conquest House, 37–38 John Street, Theobald's Road, London WC1N 2BQ.

CRIMINAL LIBEL

CONTENTS

THE LAW COMMISSION

CRIMINAL LAW

CRIMINAL LIBEL

To the Right Honourable the Lord Hailsham of St. Marylebone, C. H., Lord High Chancellor of Great Britain

PART 1

INTRODUCTION

1.1 In this report we recommend the abolition of the common law offence of criminal libel and its replacement by a new statutory offence of criminal defamation which would be substantially narrower in scope. The offence would penalise anyone who communicates to any person false information which is seriously defamatory of another, knowing or believing that it is seriously defamatory of that other person and that the information is false. The maximum penalty for this offence, which would be triable only on indictment, would be two years' imprisonment and a fine. Effect would be given to these recommendations by the draft Criminal Defamation Bill forming Appendix A to this report.

1.2 Our provisional proposals for reform of the law were contained in Working Paper No. 84, Criminal Libel, published in November 1982. That working paper proposed the abolition of the common law offence of criminal libel and the creation of two offences to penalise respectively serious instances of criminal defamation and the sending of "poison-pen" letters and the like. A number of organisations and individuals responded to our requests for comment and criticism, and their views have been helpful to us in the formulation of our final recommendations. The names of those responding are set out in Appendix B to this report. For reasons which we have explained in our Report on Poison Pen Letters,[1] we have reported separately to you on that topic, and we do not refer further to this aspect of our work in this report.

1.3 Our working paper contained a detailed exposition of the history of the common law offence and of its constituent elements.[2] We do not repeat the historical development here, and our statement of the present law in Part II of this report is brief; further details relating to the common law offence are given, where necessary, in the course of the recommendations for a new offence. Part III outlines the provisional proposals made in our working paper and the response to them on consultation. Part IV summarises another matter treated in more detail in the working paper,[3] namely, the defects in the present law. Discussion of the arguments for and against the retention of criminal

[1] (1985) Law Com. No. 147.
[2] Working Paper No. 84, paras. 2.1–2.20 (history) and 3.1–3.30 (elements of the offence).
[3] See Working Paper No. 84, paras. 6.1–6.15.

sanctions in this area is to be found in Part V. Part VI examines the principles of a new offence of criminal defamation, Part VII gives details of the new offence and Part VIII deals with certain related matters. Part IX summarises our recommendations.

1.4 Our work on the offence of criminal libel has been undertaken in the course of our programme for codification of the criminal law; the new offence here recommended ought ultimately, in our view, to find a place in such a code. Codification entails the abolition of offences at common law, that is, offences developed solely or principally by means of judicial decisions, and, so far as may be necessary, the enactment of new statutory offences in their place. This process of abolition and replacement entails consideration of the need for the common law offence and the extent to which it requires to be replaced.

1.5 One general comment must be made before discussing further the common law offence. In our working paper we accepted[4] that the distinction between the criminal law and the civil law relating to defamation generally must remain. Nevertheless, a few of our commentators[5] urged a more radical restructuring of the law which would involve a wider consideration of the function and character of the civil law of defamation. We do not think this enlargement of the project to be practicable, at least for the forseeable future. The law of civil defamation was considered by the Faulks Committee on Defamation which reported in 1975.[6] It is now beyond doubt that there is no foreseeable prospect of its recommendations being implemented.[7] Reform of the civil law is beyond our terms of reference and in any event we would not contemplate work on that vast subject so soon after the consideration of it by another body. It is clear that extending our examination of the law beyond the confines of the criminal law would be of no immediate utility. Similarly, there would be little use in suggesting ancillary reforms which it is possible might put in a somewhat different perspective the need for the intervention of the criminal law, but of which there would appear in present circumstances to be no prospects of implementation. We have in mind here the provision of legal aid for a wide range of cases of civil defamation, which was also mentioned by some commentators. For the purposes of this report, we therefore assume, as we did in our working paper, that the civil law of libel will continue to exist in more or less its present form side by side with any criminal offence; that legal aid will continue to be unavailable for civil actions;[8] and that, if there is to be any substantial reform of the law at all, it must be advocated in the context of the criminal law.

---

[4] See Working Paper No. 84, para. 1.8.

[5] See e.g. (1982) 132 New L.J. pp. 1109–1110.

[6] Report of the Committee on Defamation (1975), Cmnd. 5909.

[7] See *Hansard* (H. L.), 29 October 1980, vol. 414, Written Answers, col. 396 (Lord Chancellor), and (H.C.)19 October 1982, Sixth Series, vol. 29, Written Answers, col. 80 (Solicitor-General), and para. 5.5(4), n. 9, below.

[8] See *Hansard* (H.C.), 19 March 1984, vol. 56, col. 698 (Attorney General) and 14 February 1985, vol. 73, col. 228. And see para. 5.5(4) and n. 9, below.

PART II

THE PRESENT LAW

2.1 Criminal or defamatory libel,[1] being a common law, that is, a judge-made offence is not defined in any statute, although the offence has been much altered by statute.[2] In outline the offence consists of the publication of defamatory matter in writing or some other form that is permanent. Words are "defamatory" if they "contain that sort of imputation which is calculated to vilify a man, and bring him . . . into hatred, contempt and ridicule".[3] To constitute the offence the libel must be serious and not trivial.[4] By section 6 of the Libel Act 1843, it is a defence if the defendant (on whom the burden of proof lies) can show that the statement was true and that its publication was for the public benefit. Defences of absolute and qualified privilege and fair comment may also be available.

2.2 It seems that publication to the person defamed alone may be sufficient provided that the defamatory matter has a tendency to lead to a breach of the peace; if there is no such tendency, publication to someone other than the person defamed is required.[5] With one exception, no consent is required before proceedings are instituted. Section 8 of the Law of Libel Amendment Act 1888 prohibits the prosecution of the proprietor, publisher, editor or any person responsible for the publication of a newspaper for any libel published in it without the order of a judge at chambers being first obtained.[6] Criminal libel is triable only on indictment in the Crown Court, where conviction carries a maximum penalty of twelve months' imprisonment or, in cases where publication is made with knowledge of the falsity of the defamatory matter, two years' imprisonment.[7]

Statistics of prosecutions

2.3 Prosecutions for criminal libel, quite common during the 19th century, are now infrequent. The offence was not listed separately in the Criminal Statistics until 1893. However, Mr. J. R. Spencer, to whose special study of the offence and further advice and assistance we are indebted, estimates[8] that during the 20 preceding years there were at least 24 trials a year. On average there were from 1893 to 1914, 22 trials a year; from 1915 to 1930, 15; and from 1931 to 1938, 19. Since 1940, however, the number of trials has fallen sharply. The following table, containing details abstracted from the Criminal Statistics for the years 1970–1983, shows the number of cases recorded by the police, and the number of defendants who were committed for trial, found guilty, or merely cautioned.

---

[1] The term "criminal libel" also covers other forms of libel, *viz.*, seditious libel, obscene libel and blasphemous libel; see further paras, 7.77 *et seq.*, below.

[2] See Working Paper No. 84, Part III and paras. 4.2 and 7.17, below.

[3] *Thorley* v. *Lord Kerry* (1812) 4 Taunt. 355, 364; 128 E.R. 367, 370 *per* Sir James Mansfield C.J., cited with approval by Viscount Dilhorne in *Gleaves* v. *Deakin* [1980] A.C. 477, 487.

[4] See *Gleaves* v. *Deakin* [1980] A.C. 477, 487 and 495, and Working Paper No. 84, paras. 3.6–3.7.

[5] See *R.* v. *Adams* (1888) 22 Q.B.D. 66 (C.C.R.) and *Gleaves* v. *Deakin, ibid.* at p. 490.

[6] See *Goldsmith* v. *Pressdram Ltd.* [1977] Q.B. 83 and Working Paper No. 84, paras. 3.25–3.27, and para. 7.67, below.

[7] Libel Act 1843, ss. 4 and 5.

[8] See J. R. Spencer, "Criminal Libel–A Skeleton in the Cupboard" [1977] Crim. L.R. 383, 389.

Year	As recorded by police	Committed for trial	Found guilty	Cautioned
1970	10	—	—	8
1971	13	1	1	3
1972	8	1	1	2
1973	19	—	—	3
1974	16	—	—	3
1975	9	—	—	—
1976	6	—	—	—
1977	5	2	—	—
1978	3	1	1	1
1979	5	—	—	—
1980	4	—	—	—
1981	5	—	—	2
1982	5	—	—	—
1983	—	—	—	—

Of the three people found guilty of the offence in the period covered by the table, one received a sentence of six months, one a suspended sentence, and the third a conditional discharge.[9] Information relating to prosecutions undertaken between 1948 and 1975 by the Department of the Director of Public Prosecutions was submitted by the Director to the Faulks Committee. From this[10] it is apparent that over 400 cases were referred to him in which alleged criminal libel was registered as one of the subjects. Out of these, thirteen were the subject of proceedings under the Justices of the Peace Act 1361 with a view to the defendants being bound over to keep the peace, while four were prosecuted for criminal libel. Of these, one in 1950 resulted in an acquittal, while three were convicted. The first, in 1957, was sentenced to one month's imprisonment, the second, in 1965, to a total of three years' imprisonment while the third, in 1971, was, as noted above, sentenced to six months' imprisonment. These figures are very small when compared with the statistics for civil actions for libel and slander.

[9] This was presumably the defendant in *R.* v. *Penketh* (1982) 146 J.P. 56 who on breach of the conditions was sentenced to 18 months' imprisonment, reduced by the C.A. to 9 months: see para. 5.5 n.7, below.

[10] We are indebted to the D.P.P. for permission to quote the statistics from this Memorandum.

PART III

THE WORKING PAPER AND RESPONSE TO IT

A. The proposals in Working Paper No. 84

3.1 Our working paper considered in detail the history and constituent elements of the common law offence.[1] In addition, it dealt in detail with other offences having some connection with the subject matter of criminal libel and the treatment of conduct of this character by the criminal law in other jurisdictions.[2] The defects of the common law offence were also covered in detail,[3] and our conclusion in regard to them was that the fundamental defects of the rules of the offence so vitiated it as to make it incapable of remedy by mere amendment. Remedy could be affected only by abolition of the offence and, if necessary, its replacement by a new statutory offence.

3.2 Accordingly the working paper discussed whether a new offence was necessary and concluded on balance that it was.[4] Any such offence, however, should be confined to deliberately defamatory false statements known or believed to be false.[5] We therefore provisionally proposed the creation by statute of such a limited new offence which, in outline, would have penalised anyone who published an untrue statement defamatory of any person, intending to defame him and knowing or believing the statement to be untrue.[6]

B. Comment on Working Paper No. 84

3.3 Of those responding to our request for comment on the provisional proposals, nearly all agreed with us that the common law offence should be abolished for the reasons given, and a large majority also agreed that there was a need for a new offence covering the worst cases of defamatory publications. And of that majority, nearly all favoured an offence similar in general principle to that proposed in the working paper. There was a substantial amount of comment in regard to the details of a new offence, particularly in relation to the stringent mental element which would have required proof that the defendant knew or believed the words complained of to be false; but we think that comment on this and other matters of detail is best reserved for the appropriate place in this report. This is also the place to mention the publication in 1984 by the Law Reform Commission of Canada of its Working Paper No. 35 on Defamatory Libel, which recommended that, in the new Criminal Code under consideration by it, there should be no offence corresponding to that of defamatory libel to be found in sections 264–265 of the present Code. We have benefited from our consideration of this Paper, although as will be apparent our own final recommendations differ from those of the Canadian Commission.

3.4 Before examining afresh the issue whether there is a need for a new offence, which a minority of our commentators vigorously disputed, we summarise our reasons for finding the common law offence to be unsatisfactory.

---

[1] See para. 1.3, above.
[2] See Working Paper No. 84, Parts IV and V.
[3] See Working Paper No. 84, Part VI.
[4] See Working Paper No. 84, para. 7.15.
[5] See Working Paper No. 84, para. 7.29.
[6] See Working Paper No. 84, para. 8.2.

PART IV

SHORTCOMINGS OF THE COMMON LAW

4.1 Some of the shortcomings which we believe to exist in the present law[1] stem in part from the differences between the criminal and civil law of libel, and some of these in turn arise out of special statutory provisions applicable to the criminal offence, introduced principally during the 19th century. The principal shortcomings are outlined in the following paragraphs.

4.2 Although section 6 of the Libel Act 1843 provides a defence of the truth of the publication in criminal proceedings, the truth of the words complained of is a complete defence to a civil action, while in criminal proceedings the defendant must, by virtue of this section, prove not only that the defamatory matter is true, but also that its publication was for the public benefit. Thus in what is a serious criminal offence, not only is the burden on the defendant to prove the truth but, even if proved, it is not by itself a complete defence; he is obliged in addition to prove a matter which is remarkably vague in content and unsuited, in our view, to be a criterion of criminal liability. To convict a person for telling the truth unless he can prove publication for the public benefit seems to us objectionable in principle; it is doubly so, where the burden of proving all these matters lies, not upon the prosecution, but upon the defendant. Further, a defendant may be convicted even though he has published what he honestly and reasonably believed to be true;[2] thus the offence constitutes an exception to the general rule that a person acting under a mistaken belief as to the existence of facts which, if true, would give him a defence, commits no crime.[3] These features of the offence, and the manner in which they work in combination with each other, go to the very nature of criminal libel and, in our view, make it unacceptable in modern conditions.

4.3 Other shortcomings of the common law offence, while less fundamental, appear almost equally difficult to justify. Criminal libel is wider than the tort because the Defamation Act 1952, which broadens the scope of defences in civil actions, does not apply to criminal libel.[4] Among the provisions which by virtue of this Act apply to civil, but not criminal, libel, are—

(i) section 4, which provides for a defence of unintentional defamation;[5]

(ii) section 5, which in substance widens the scope of the defence of justification;

(iii) section 6, widening the defence of fair comment;

(iv) section 7 (and Schedule), relating to the qualified privilege of newspapers in respect of certain reports and other matters;

---

[1] These are dealt with in greater detail in Working Paper No. 84, paras. 6.1-6.15.

[2] Subject to a maximum of 12 months' imprisonment under the Libel Act 1843, s.5; see para. 2.2 above.

[3] See e.g. *R.* v. *Tolson* (1889) 23 Q.B.D. 168, 181; *D.P.P.* v. *Morgan* [1976] A.C. 182.

[4] Defamation Act, s. 17(2).

[5] It is uncertain whether criminal libel would be committed in the situations covered by the civil defence: see J. R. Spencer, "Criminal Libel—A Skeleton in the Cupboard" [1977] Crim. 465, n.71, and [1979] C.L.J. 245, 250.

(v) section 9(1), which extends to broadcasts the statutory defence of qualified privilege covering the publication of extracts from Parliamentary papers; and

(vi) section 9(2), which extends to broadcasts the protection conferred on newspapers by section 7.

There is in our view no reason in principle why such restrictions upon liability should be confined to civil actions for defamation.

4.4 The common law may also be criticised on account of its vagueness and absence of any clear mental element. We have noted that only serious defamations are criminal: the law does not penalise trivial defamations. But this requirement, which it seems is for the jury to assess, is not linked to any criterion by which it is to be applied. As it stands it amounts merely to a rule that, if the jury regard the conduct as sufficiently serious to find it criminal, that conduct amounts to an offence: we regard this as unacceptable. It is uncertain whether proof is needed of an intention to defame[6] and, on one view of the law, the offence requires only an intent to publish the matter complained of. This again we regard as unsatisfactory in a serious offence triable only on indictment.

4.5 These criticisms are by no means exhaustive of those which may be levelled at the current state of the law, and we refer to others in the course of this report.[7] They are, however, sufficient in our view to demonstrate the unsatisfactory nature of the common law offence and to indicate that, particularly having regard to the fundamental defects outlined in paragraph 4.2 above, the offence is not capable of reform by mere statutory amendment. Even on the assumption that some offence is required in this area, we consider that elimination of these shortcomings could only be achieved by abolition of the common law and its replacement by a new statutory offence. We accordingly *recommend* the abolition of the common law offence.[8]

---

[6] This is examined in detail in Working Paper No. 84, paras. 3.12–3.15.

[7] See e.g. paras. 7.18 and 7.22, below.

[8] See Appendix A, cl. 6.

PART V

IS THERE A NEED FOR A NEW OFFENCE?

5.1 In our working paper we outlined certain special features which we believed to be material in regard to the relationship between defamation and the criminal law,[1] and set out in summary form what we considered to be the principal arguments for and against the creation of a new offence in place of the common law.[2] We think it would be convenient to quote these passages from our working paper, since it was against their background that the adverse comment upon these issues by a minority of our commentators was made. Where necessary, footnotes have been amplified.

5.2 The special features which we saw in the relationship between defamation and the criminal law were as follows:

"*(a)* While general principles of the liberty of the subject in a free society require that the criminal law should never be wider than can be shown to be strictly necessary, in a democracy freedom of speech has a positive importance of its own. If there is to be true freedom of speech, it must include freedom for the dissentient and discordant voice, and for the mistaken and misguided, as much as for anybody else.

(b) The history of criminal libel shows that one of its principal uses was once to protect the government from criticism.[3] If there is to be a new offence it must be drawn in terms which ensure that the new offence should not be available for the purposes for which criminal libel was used in the past.

(c) Our society has by its traditions been built upon trust and a respect for the truth. It is normal for people to tell the truth and there is a tendency for people to believe those facts which they are told, especially when read in a newspaper or other publication which purports to report factual news.

(d) In a democratic society public opinion is a powerful force. There are those who for their own purposes will seek to influence public opinion by whatever means are available to them, whether honest or dishonest. This may be done mischievously or for financial advantage or to achieve political ends. The history of the rise of the Nazi party in Germany shows how the deliberate lie may be used for political purposes and to influence public opinion.[4] The creation and maintenance of a non-democratic society may thus depend upon the technique of the deliberate lie. Because of the persuasive force of mass communication, a democracy may reasonably require that those in control of the channels of communication do not abuse their powers and that sanctions to prevent such abuse are effective.

---

[1] Working Paper No. 84, para. 7.7.

[2] Working Paper No. 84, paras. 7.13–7.14.

[3] This was particularly true of the period between the Jacobite Rising of 1745 and the passage of the Reform Act 1832 which "saw wave after wave of prosecutions for libel launched by the government on an overtly political basis": see Working Paper No. 84, para. 2.9.

[4] Cf. *R.* v. *Relf* (1979) 1 Cr. App. R. (S) 111, a prosecution under the Public Order Act 1936, s.5A (incitement to racial hatred) where at p.114 Lawton L.J. said: "The Court . . . has not overlooked the fact that in this class of case constant repetition of lies might in the end lead some people into thinking that the lies are true. It is a matter of recent history that the constant repetition of lies in Central Europe led to the tragedy which came about in the years 1939 to 1945".

(e) Rumour is an evil which is a manifestation of public credulity and of a desire for the sensational. There is a tendency to believe that 'there is no smoke without fire'. Rumour is easy to start, can be dangerous and unpleasant, and may be difficult to stop once started. There may be a public interest in having a procedure whereby the lack of truth in disturbing allegations may be formally declared.

(f) Defamation is concerned with a subject as intangible as a person's reputation. People are sometimes sensitive about their reputation to an extent which may seem absurd to others, or even, in retrospect, to the person defamed once the initial anger has subsided. Others may wish to use an attack on their reputation for some quite different purpose from its defence, for example, to establish the truth of some cause or belief. A criminal prosecution should not be allowed to become a substitute for a civil action if the latter would be sufficient or more appropriate. On the other hand, some defamatory statements made about a person may be much more damaging to him and long lasting in their consequences than any ordinary assault or theft. It is also possible that the damage done by a deliberately defamatory statement about one or more individuals could have long-lasting adverse consequences for a society generally."

5.3 Against this background we advanced the arguments for and against criminal sanctions in this field which we again quote from the working paper.

5.4 The arguments for *abolition of criminal libel without replacement* were, we said, as follows—

"(1) Enactment of a new offence, even in the most restricted terms, limited to cases where it is proved that the maker of the publication knew that the defamatory statement was false, would constitute an unacceptable restriction upon freedom of speech. While no-one would seek to justify publication of a defamatory untrue statement, made with knowledge of its falsity, it may still be argued that the existence of the offence might deter some writers or journalists from publishing material which they believe should be published because of a fear that they might be held criminally liable. In particular a jury might perhaps too readily infer that a man knew that a statement was false if the jury strongly disapproved of the publication. The fact that the existence of the present offence of criminal libel, in much wider terms, has not, so far as we know, undesirably restricted the freedom of expression of writers may be dismissed on the ground that a newly enacted offence might be more widely used and feared.

(2) Any person defamed has a remedy at civil law and the additional sanction of a criminal penalty is not necessary even in the worst cases. The civil remedy includes an award of damages and, where appropriate, an injunction to prohibit repetition of the defamatory statement.[5] Breach of the injunction may result in the offender being

[5] While the High Court may readily grant a final injunction at the trial of the action, interlocutory injunctions to prevent the repetition of a defamatory statement are only granted in the most exceptional cases. If there is any doubt whether the words are defamatory or the defendant says that he will plead justification, fair comment or qualified privilege and it is not obvious that the defendant is bound to lose, an interlocutory injunction should not be granted: see e.g. *Bonnard* v. *Perryman* [1891] 2 Ch. 269 and *Harakas* v. *Baltic Mercantile and Shipping Exchange Ltd.* [1982] 1 W.L.R. 958 (C.A.).

imprisoned or fined. If any particular class of persons, for example police officers, is thought to require special protection by means of criminal sanction then any necessary offence should be so limited and not of general application.

(3) Any new offence which is drawn in terms of acceptable narrowness, so as not to offend against the principle of freedom of expression, or against the ordinary rules of criminal procedure, would be capable of proof in so small a number of cases that it is not worth making provision for them: it is better to abolish the existing offence and to put nothing in its place. A new narrow offence would have no value as a deterrent. The existing offence is hardly ever used.

(4) Even if rules are provided, with the intention of limiting prosecution only to those cases which are grave, blatant and of real public importance, nonetheless the time of over-burdened criminal courts is likely to be spent on trials, which might well be long and complicated, about offences which are not important enough in social terms to justify the time spent upon them. Many such cases might well be expensive and also require the time and attention of investigating officers and prosecuting lawyers."[6]

5.5 The arguments for *retaining an offence* were as follows—

"(1) A defamatory statement may cause serious damage and much misery to the victim.[7] The consequences for him may be far more serious and long-lasting than those of other acts, such as an assault, or theft, which are accepted as criminal offences. An example of such a statement is that a school teacher has been abusing or indecently assaulting boys and girls in his charge; or that a candidate for an elected trade union office has been receiving secret payments from employers in return for indulgence to them in the handling of disputes.

---

[6] See Report of the Committee on Defamation (N.Z. Committee), Recommendations on the Law of Defamation, (1977), para. 449: "There are only limited resources in the community available for control of crime and they are better directed to serious crime against the person, his property or the maintaining of peace.". And see generally Canadian Law Reform Commission, Working Paper No. 35 (1984), Defamatory Libel, pp. 47–60.

[7] A recent case is *R.* v. *Penketh* (C. A. 16 October 1981) reported in (1982) 146 J. P. 56 as follows: "In 1978 P pleaded guilty to two counts for libel. The offences arose out of his treatment of a woman, B, who was married in 1964, had a son in 1967 and was widowed in 1973. In 1974 she answered an appeal by P for a pen friend. After a time he began to bombard her with letters and she decided that she did not wish to continue the correspondence. His reaction was to write to a number of people saying that he was the natural father of her child. He was put on probation on condition that he did not write to B and made no attempt to contact her, her son, relations and friends. He broke the condition and a fresh probation order was made in 1980. He breached the terms of that order by writing to her and calling on her. B said that his visit made her frightened for the safety of herself and her son, and made her son hysterical with fear. Over the years P had caused her and her son a lot of misery and upset. P was crippled as the result of a tubercular hip and of restricted intellectual capacity. He was sentenced to 18 months' imprisonment. The court said that P's disabilities prompted sympathy for him, but he clearly caused B and her child a great deal of anguish and all else having failed nothing short of imprisonment was likely to make much lasting impression on him. However, he had never been in prison before and it was right to try to deter him with a comparatively short sentence. After anxious consideration, because the reports from prison indicated that he was still obsessed with B, the sentence would be reduced to nine months. He should understand that if he offended in this way again he could hardly complain of an 18 month term, and if he pestered B or her son she could apply for relief."

(2) If damage to reputation is done intentionally and with knowledge that the statement is false, then the state of mind and blameworthiness of the maker of the statement are no different in character from the person who deliberately assaults another or damages his property. He has done an act which society generally would regard as just as deserving of punishment as those acts.

(3) Apart from the private damage done to the individual by such defamatory statements, there may thereby also be caused damage to the public interest: the person defamed may in consequence be hampered in performing services or functions of public importance. Confidence in his probity may be impaired. Interference may be caused to the proper working of democratic processes. This possible effect is not limited to public figures of national importance: it may apply to people whose field of work is more local, such as within a village, a local club, a medical practice, a school, or a local authority. There is accordingly a public interest in the provision of an effective public sanction against such conduct.

(4) The availability of a civil remedy is not so effective, or so readily available, or so satisfactory in all cases as to enable the offence of criminal libel to be abolished with safety or confidence without any replacement. If the defendant has money to pay damages and costs, and if the claimant can fund the litigation and is not only right but very clearly so, the civil remedy is generally effective. The claimant is not deterred by the risk of costs;[8] the untruth of the libel is publicly established; and the claimant is suitably, and sometimes generously, compensated. In many cases where the person who published the libel has no money the victim will be content to ignore it because he, and those who hear it, pay no attention to a defamatory statement from such a source. However, a gravely damaging libel may be published, and repeated, which the victim cannot afford to ignore but where the cost of litigation is prohibitive to him. Legal aid is not available for civil actions of libel or slander.[9] It is unlikely that it would ever seem sensible to make public money available for all actions of defamation that private persons might wish to bring. The burden and risk of costs is thus a very grave deterrent indeed. Moreover, the risk of an award of damages being made against him is no deterrent to a person who has no money with which to pay them. Thus if the only sanction against

[8] In many cases an order for costs in favour of a successful plaintiff will not ensure return of all that he has paid out: the assessment of costs which it is judged right for the defendant to pay may be considerably less than the costs which the plaintiff has incurred. A litigant will be warned of this risk.

[9] See Legal Aid Act 1974, s.7(1) and Sch. 1, Pt. II, para. 1. The Faulks Committee recommended that legal aid should be made available in defamation cases: Report of the Committee on Defamation (1975), Cmnd. 5909, para. 581. A similar recommendation was made in the Report of the Royal Commission on Legal Services (1979), Cmnd. 7648, para. 13.70. But see *Hansard* (H.C.), 7 December 1981, vol. 14, Written Answers, col. 281, where the Solicitor General said that he did not propose to make legal aid available in such cases; see also *Hansard* (H.C.), 19 March 1984, vol. 56, col. 698, and 14 February 1985, vol. 73, col. 228, to the same effect. See further, para. 1.5, above.

defamation were the possibility of a civil action, that sanction would in practice be available only to the well-to-do and generally be used only against those having some property. But the decision to institute a criminal prosecution would be taken without regard to the means of the accused or the person defamed.

(5) Although the present criminal offence is very little used (we have cited the statistics above),[10] it is impossible to know whether the existence of the offence has had any deterrent effect in the past and also impossible to know what the effect might be of the total abolition of criminal sanctions against defamation and the drawing of public attention to that abolition. Provided that the new offence is defined in terms that avoid contravention of the overriding principles of freedom of expression, and of the criminal law generally, it may be thought unwise to abolish all criminal sanctions in this area of defamation when such sanctions have for so long existed.

(6) Effective means can be provided to ensure that prosecutions are only pursued in clear cases where there is an undoubted public interest. Such means may be by limitation of the offence to cases which are of sufficient gravity, or by means of a provision for consent to prosecute, or both. We discuss the details of such machinery below."[11]

5.6 Our provisional conclusion was that, in the light of these arguments "on balance there should be an offence of criminal defamation aimed at the deliberate and defamatory lie": such publications were, we said, "as morally wrong as an attack on [a] person or [his] property and capable of doing serious harm both to an individual and society generally", and in such cases "it would be difficult to argue that freedom of speech would be unreasonably infringed by the existence of a criminal offence, provided that the offence is kept within narrow bounds".[12]

5.7 This provisional conclusion evoked some criticism, particularly from the Press. It is convenient to quote here from the editorial comment by *The Times*[13] which is representative of the criticisms made of our approach—

> "The real question is whether the Law Commission has made out a case for there to be criminal sanctions at all in this area of the law. Its principal argument is that a defamatory statement may cause serious damage and misery to the victim, sometimes more than other acts, as for example an assault or a theft, which are accepted as criminal. So it may, but so also may many other kinds of acts, some of which are civil wrongs and some of which are not even that, but none of which give rise to criminal liability. Why should this particular civil wrong be singled out for special treatment?

[10] See para. 2.3, above.
[11] See paras. 7.9 and 7.67–7.68, below.
[12] Working Paper No. 84, paras. 7.15–7.16.
[13] 25 November 1982; see also *The Guardian,* 25 November 1982 (editorial comment).

Another argument relied on by the Law Commission is that civil libel proceedings are expensive and difficult to mount (and legal aid is not available). The same is also true, however, of other types of civil proceedings. This is no reason for creating a criminal sanction on top of an existing civil liability. The civil remedy for libel, when invoked, is in fact effective: in addition to damages, an injunction is available to prevent repetition of the untrue statement, and breach of this is a contempt punishable by imprisonment.

What has to be asked is whether the public interest in protecting reputation is really so great that criminal sanctions are justified. If so, it is hard to understand why the old offence of criminal libel was so rarely used. The fact is that there are only limited sums available for the control of crime, and they are better directed to dealing with serious crimes against the person and property, and to the maintenance of law and order. . . . Had an offence of criminal libel not already existed would the Law Commission really have proposed the invention of it? . . . The right solution is to scrap criminal sanctions for libel altogether."[14]

5.8 Understandably, a substantial proportion of comments emphasised the investigative role of the Press. But cases of criminal libel in the recent past have only in relatively infrequent instances been concerned with the work of journalists,[15] and in none of these were journalists convicted of the offence. Other instances have been more serious and present more intractable problems for the opponents of criminal sanctions. In this connection, we do not think we can do better than refer to a recent article by Mr. J. R. Spencer, who commented upon the extract from *The Times* editorial quoted above. After instancing the case of *Penketh,* the report of which is set out in full above,[16] Mr. Spencer continues[17]—

"In *Fell,*[18] D, who was upset that his relationship with a married woman had ended, sprayed offensive libels about her in public places all over the town of Lytham St. Annes; the woman was so upset that she attempted to commit suicide. In *Leigh,*[19] D, who was accused of fraud, sought to discredit the police sergeant in charge of the investigation by printing 5,000 handbills and a number of posters accusing him of being persistently

[14] See also G. Robertson, "The Law Commission on Criminal Libel" [1983] Public Law 208 to similar effect at p.211. This article also stressed the complexity of the offence proposed in our working paper and suggested that different consultation methods might have produced provisional proposals of a different character: the writer instanced the public hearings of other law reform bodies, such as Canada and Australia. The complications which we attempted to expose in our working paper stemmed from our aim to keep the proposed offence as restricted as possible while preserving its practicability in use. It is also the case that the Australian Law Reform Commission in its report recommended an offence somewhat wider than our provisional proposal: see *Unfair Publication: Defamation and Privacy* (1979), Report No. 11 and Working Paper No. 84, para. 4.9.

[15] E.g. *Goldsmith* v. *Pressdram Ltd.* [1977] Q.B. 83; *Gleaves* v. *Deakin* [1980] A.C. 477 (criminal proceedings against journalists who had written a book); *Desmond* v. *Thorn* [1983] 1 W.L.R. 163.

[16] See para. 5.5, n. 7, above.

[17] "Criminal Libel: The Law Commission's Working Paper" [1983] Crim. L.R. 524 at pp. 527–528.

[18] *The Times,* 14 February 1976.

[19] *The Times,* 9 March 1971.

drunk, and engaging five men to distribute them. Earlier this century were the parallel cases of *Annie Tugwell*[20] and *Edith Emily Swann.*[21] These ingenious ladies framed people they irrationally disliked by composing a series of poison pen letters, posting them to themselves and to others, and then accusing the victims of their hatred of having sent them. In both cases the victim was prosecuted, and in one of the cases she was convicted and imprisoned, before the accusations were found to be false. And going back still further, there was *Greenhouse,*[22] who coveted his superior's job, and in the hope of relieving him of it, sought to get him the sack by putting about the story that he had been indecently assaulting little girls."

Mr. Spencer then comments—

"In cases like these, it is nonsense to say that 'the civil remedy for libel, when invoked, is in fact effective: in addition to damages an injunction is available to prevent repetition of the untrue statement, and breach of this is a contempt punishable by imprisonment.' First, the civil remedy cannot be invoked. Defamation actions have to be brought in the High Court. They are prodigiously expensive, even by comparison with other High Court actions, and there is no legal aid for them. Consequently, only the super-rich can use the civil remedy, unless the defendant happens himself to be rich enough to be able to pay the costs if he loses. Of course, it could be used in cases like *Penketh* and *Fell* if legal aid were made available for defamation actions. But since the tort of defamation is inordinately wide, and is only held in check by the very fact that most potential plaintiffs cannot afford to use it, this would be a far more dangerous threat to free speech than a limited criminal offence, and, fortunately, it is not remotely likely to happen.[23] So we must either have a criminal offence, or let the worst of libellers go free. And secondly, civil proceedings are surely not the proper answer for the Leighs, Penketh, Annie Tugwells, etc., even if their victims could afford to bring them. An award of damages is no deterrent to someone who has no money, and an injunction only says, 'We'll lock you up *if you do it again',* whereas in the worst of these cases, the defendant has usually achieved his object by doing it once. What is needed against the deliberate character assassin is neither damages, nor an injunction, but punishment for what he has done—as a deterrent both for him and for others like him—or a hospital order or suchlike if he turns out to be mad rather than bad. That such cases are rare is surely no objection to the creation of an appropriate offence. These cases are extraordinary, it is true, but they are also extraordinarily bad, and *pace The Times,* it is hard to think of any equally harmful behaviour which is not at present a crime. There is no reason why it should not be a crime, unless making it into one unreasonably hampers people in freely communicating with one another, or unreasonably interferes with newspapers in their job of disseminating news and views."

---

[20] *The Times,* 16 July—2 August 1910.
[21] Travers Humphries, *Criminal Days,* pp. 124 *et seq.*
[22] *The Times,* 12 May 1887.
[23] See paras. 1.5 and 5.5, above.

5.9 With respect, we would endorse the tenor of Mr. Spencer's comments: there are instances where defamatory publications may cause very serious damage to a person's life which it is in the public interest to prevent or, where the matter has already been published, to punish. Provided that the terms of any new offence are not such as to inhibit genuine freedom of speech and conform to the general principles of the criminal law, we consider that, not only can there be no objection in principle, but that such an offence is needed. In short, we are not persuaded by our commentators that either our provisional conclusion or the reasons which we gave for it were wrong to any substantial degree. We therefore conclude that the common law offence should not be abolished without its replacement by a new offence aimed at the deliberately defamatory lie and we so *recommend.* We consider next what kind of offence is needed and subsequently its detailed elements.

PART VI

WHAT KIND OF OFFENCE?

6.1 Before examining the details of a new offence, it is necessary to consider what type of offence would be most appropriate in place of criminal libel—that is, whether the offence should be one based upon principles of defamation rather than some other principles—and the scope of the offence: the matters at which, in broad terms, it is to be aimed.

A. Defamation or malicious falsehood?

6.2 In our working paper we assumed that, if there was to be a new offence in place of the common law, that offence should be based on the principles of the law of defamation, even though the offence should, we thought, be substantially narrower in scope than the one which it would replace. As an offence of defamation, it would penalise the publication of matter which was defamatory, however that term might be defined. While this approach was accepted by nearly all our commentators, nevertheless for the purposes of this report it requires to be examined and justified. The law of defamation is of very substantial complication. If the justification for any offence in this area lies in part in the harm which may be done both to the individual and to the public interest by the worst forms of "character assassination", it might be thought that the concept of economic harm, or possibly injury to health, deliberately inflicted or caused by untrue statements known to be false, but irrespective of whether they happened also to be defamatory, would be as good, or a better, basis or starting point.

6.3 The civil law recognises this concept in actions for malicious falsehood. To succeed in such an action the plaintiff must prove that (i) the words in question were false, (ii) they were published maliciously,[1] and (iii) special damage has followed as the direct and natural result of their publication.[2] An offence having similar elements would in some respects be somewhat wider than the offence proposed in the working paper and, indeed, would be wider than the existing common law offence in so far as it would extend to allegations which were not defamatory.[3] In other respects an offence so structured would be narrower in that some specific damage would have to be proved before criminal liability could be established. Further, much of the substantive criminal law is directed towards protection of the individual against wrongful harm to his person or property and such an offence could be seen as extending that protection against economic harm inflicted by means of untrue statements. To some of us, this conceptual basis for an offence in this area, whether as the sole basis, or as an additional basis to that of the defamatory statement, appeared

[1] See generally *Gatley on Libel and Slander*, 8th ed. (1981), paras. 301 *et. seq.* Malice here signifies some dishonest or improper motive, which will be inferred on proof that the words were calculated to produce actual damage, and that D knew that they were false when he published them or was recklessly indifferent as to whether they were false or not.

[2] The Defamation Act 1952, s.3(1) excludes the need to prove special damage in some cases if the words complained of are calculated to cause pecuniary damage to P and are in permanent form or are calculated to cause pecuniary damage to P in respect of his office, profession, calling, trade or business.

[3] An example of the damaging but not defamatory statement is that a person or company has become insolvent.

possibly viable but we have not pursued it further in this project for various reasons. Firstly, no general offence based upon causing harm by malicious falsehood exists in the law at present and we are not aware of any asserted need for one. Secondly, this project began as an examination of an existing offence of criminal defamation in order to see whether it should be retained or abolished and, if abolished, whether any part of the conduct covered by the offence should be covered by a new offence. In response to the working paper, while most of those who commented upon it endorsed our provisional view that some new offence would be needed if the common law offence of criminal libel were to be abolished, none of them advocated a basis of liability different from the concept of the defamatory statement which we proposed should form the basis of a new offence. The question of the extent to which the criminal law should cover cases where economic harm is deliberately inflicted or caused by untrue statements known to be false, and irrespective of whether the statement is defamatory, is one to which attention may have to be given hereafter, perhaps within the context of work upon offences of fraud. Whether defamation should bear the same meaning in the present context as it does in the civil law is an issue requiring separate consideration.[4]

B. Principles of a new offence

6.4 Our conclusion that a new offence should be aimed at the deliberately defamatory lie—what may loosely be termed "character assassination"—does imply that any such offence would differ substantially from criminal libel at common law which, as we have seen, is in some ways even wider in scope than the civil law. Specifically, we have concluded that a new offence must depart from the common law in several ways which, by eliminating some of the most serious defects of the common law offence, would result in a substantial narrowing of criminal liability. We outline these changes in the following paragraphs.

1. NO CRIMINAL LIABILITY FOR TRUE STATEMENTS

6.5 We have seen[5] that under the present law of criminal libel a man who publishes a statement which is defamatory of another will be guilty of a criminal offence unless he can prove that the statement was not only true in fact but also that its publication was for the public benefit. In this respect the criminal law differs markedly from the civil law, under which proof that the statement was true is an absolute defence.[6] We have concluded that it should not be a criminal offence to state the truth, even if the truth lowers a man's reputation in the eyes of others,[7] and however unpalatable the publication may be to the person about whom it is published. It seems to us that the principle of free speech in a democratic society requires that a man should not face the risk of prosecution for a crime because he has told the truth of another. (We speak here only in the context of defamation and intend no reference to contexts such as official secrets.) Further, it does not seem to us that there is any justification for the law permitting truth as a defence to a civil action in instances where it would not be available in the case of a criminal charge.

---

[4] See para. 7.3, below.

[5] See para. 4.2, above.

[6] Subject to the limited exceptions created by the Rehabilitation of Offenders Act 1974.

[7] It should be noted that a statement which is true may still be "defamatory" of another, if it tends to lower that person's reputation; for example, the revelation of a person's past misconduct which has hitherto passed unnoticed. Whether a statement is defamatory is thus separate from the question of its truth or falsity.

6.6 This conclusion does mean that it would be possible for a person, for example a journalist, to indulge in "muck-raking" and publish the results without liability under the criminal law if they happen to be true. To do this at present of a public figure would probably not constitute an offence, although it probably would if done in respect of a private individual unless there was some public benefit in publishing. Essentially, however, this is only an aspect of the general law against invasions of privacy, and the common law offence is in practice of very limited utility in this field.[8] We believe that greater weight must be accorded to the broader considerations to which we alluded in the preceding paragraph. We are fortified in our view by the fact that, upon consultation, no-one disagreed with this conclusion as expressed in our working paper.[9]

2. REQUIREMENT OF A MENTAL ELEMENT

6.7 We have noted that it is at present uncertain whether and, if so, to what extent the common law offence requires proof of a mental element. In any new offence aimed at penalising with a substantial period of imprisonment the worst cases of defamation, these doubts must in our view be resolved. It would be out of accord with the current trend in the law[10] for an offence, for which in serious cases imprisonment might be imposed, to be created without any requirement of a mental element, and we have no doubt that there should be some such requirement in a new offence of criminal defamation. Precisely how this element should be formulated is for later consideration,[11] but we have concluded, in the first place, that a person should not be guilty of an offence if he was unaware that the statement in question was defamatory of another and he had no intention of defaming him. Unintentional defamation should be excluded, and the principles represented in the civil law by cases such as *Hulton* v. *Jones*[12] and *Cassidy* v. *Daily Mirror*[13]—whose status in the context of criminal libel at common law is uncertain—should have no application to a new offence. Secondly, we have concluded that it should be impossible to convict a person for publishing what he honestly and reasonably believed to be true;[14] and as we explain below, the mental element which we favour goes somewhat further than this.[15]

3. NO CRIMINAL LIABILITY FOR TRIVIAL DEFAMATION

6.8 We have seen that it now appears to be the law that only serious defamations are penalised by criminal libel. This requirement, which as a substantive element of the common law may be of recent origin, is so vague as

[8] See Report of the Committee on Privacy (1972), Cmnd. 5012, Appendix I, para. 7. Compare Report of the Committee on Defamation (1975), Cmnd. 5909, para. 445(e).

[9] See Working Paper No. 84, paras. 7.10 and 7.31

[10] "The climate of both parliamentary and judicial opinion has been growing less favourable to the recognition of absolute offences over the last few decades; a trend to which section 1 of the Homicide Act 1957 and section 8 of the Criminal Justice Act 1967 bear witness in the case of Parliament, and in the case of the judiciary, is illustrated by the speeches of this House in *Sweet* v. *Parsley* [1970] A.C. 132" (*R.* v. *Sheppard* [1981] A.C. 394 at pp. 407-408 *per* Lord Diplock).

[11] See para. 7.33, below.

[12] [1910] A.C. 20, where words, defamatory on their face of the plaintiff, were intended by the defendant to refer to another, possibly fictional, person.

[13] [1929] 2 K.B. 331, where the words not defamatory on their face could, by reason of facts unknown to the defendant, be taken to be defamatory of the complainant.

[14] Cf. para 4.2, above, as to the position under the common law offence.

[15] See para. 7.33, below.

to amount to no more than a rule that, if a jury regard the defamation sufficiently serious to be criminal, the publisher is to be penalised. We do not think that a new offence should be stated in such terms, although we believe that the law should continue to exclude the possibility of conviction for trivial defamations.

6.9 With these conclusions in mind, we now consider in detail our recommendations for a new offence.

PART VII

A NEW OFFENCE OF CRIMINAL DEFAMATION

7.1 We recommend the creation of a new offence of criminal defamation in place of the common law offence of criminal libel. It would, in summary, penalise *anyone who communicates to any person false information seriously defamatory of another knowing or believing that it is seriously defamatory of that other person and that the information is false.* The offence would require the consent of the Attorney General for the institution of proceedings, and would be triable only on indictment, with a maximum penalty of two years' imprisonment and a fine. This Part of the report considers the constituent elements of this proposed offence; the draft Criminal Defamation Bill at Appendix A contains provisions in legislative form which would give effect to our recommendations.

A. The prohibited conduct (actus reus)

7.2 Under the general heading of the prohibited conduct, we examine the nature of the statement which would attract liability and particular requirements of and limitations upon the element of communication.

1. THE STATEMENT

(a) Definition of defamatory

7.3 Our recommendation is that, to attract criminal liability, the communication complained of must be defamatory; it must be false; and it must be not only defamatory but seriously defamatory. The requirement that it be defamatory is clearly fundamental to any offence of criminal defamation. But is the meaning of "defamatory" to be the same as in the civil law? If not, what limitations should be imposed upon the generally accepted meaning of the term?

7.4 In our working paper[1] we concluded that defamatory matter should be defined on the lines proposed by the Faulks Committee,[2] that is—

> "matter which in all the circumstances would be likely to affect a person adversely in the estimation of reasonable people generally".

We reached this conclusion after a review of various possibilities, including the possibility of providing no definition, and of definitions in terms of injury to a trade or occupation or economic loss. There was no general consensus of view on the matter on the part of our commentators: while some agreed with us, others thought a definition to be unnecessary, and there were those who thought the definition to be either too wide or too narrow.

7.5 Should there be any definition of what is defamatory? In our view, the principal argument against omission of a definition is that it would leave undefined an important element of a new statutory offence, an element, moreover, the meaning of which would not be plain to a jury without direction from a judge. The task of direction would itself not be easy. In a new offence

[1] Working Paper No. 84, paras. 8.9–8.13.
[2] Report of the Committee on Defamation (1975), Cmnd. 5909, para. 65.

having no definition of the term, it would not be clear whether "defamatory" would bear its dictionary meaning[3] or its legal meaning in the context of the civil law, which comprehends matter tending to make others shun or avoid the person defamed.[4] In any case of doubt, the term, as part of a penal statute, would have to be restrictively construed; thus in such a case it would, we think, bear its dictionary meaning. The argument for eliminating uncertainty therefore seems to us to be strong. But might not the provision of a definition lead in time to a divergence in the meaning of what is "defamatory" between civil and criminal law? Some of our commentators thought that there was a substantial danger of this, and it is also evident from our consultation that no definition is likely to command universal agreement.

7.6 On the balance of the arguments we have set out, our view remains that the term "defamatory" should be defined, but having regard to the diversity of opinion expressed in relation to our commendation of the Faulks Committee definition, we must reconsider how best this is to be done. The principal objection to this definition is that it may well be narrower than the accepted meaning in the civil law in so far as it does not expressly include matter tending to make others shun or avoid the person defamed (for example, in *Youssoupoff* the allegation was that the plaintiff had been raped), a category which it has been represented to us may in practice have more serious and distressing consequences than simple injury to reputation. But in other respects the definition is essentially no more than a restatement in modern terms of the classic and widely-accepted formulation of Lord Atkin:

> "would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?"[5]

7.7 We have reconsidered whether, in any new definition, there should be retained any reference to matter tending to make others "shun or avoid" the person defamed; and whether a definition in terms of matter only "likely to damage a person's reputation in the estimation of reasonable people generally" would be satisfactory. To say falsely of a woman that she has been raped or that she is a lesbian will not damage her reputation in the eyes of reasonable people but might do so in the eyes of some unreasonable people or some social group. Similarly, to say falsely of a man that he has provided information to the police of crimes committed by his neighbours will not damage his reputation in the eyes of reasonable people but it may cause him to be shunned and avoided in his neighbourhood or by his friends. In such circumstances harm and distress could be deliberately caused to the victim by false statements but the maker would not be caught by an offence limited to defamatory statements tending to lower the victim in the estimation of reasonable people generally. Despite these possible gaps we have reached the conclusion that it is better to limit the new definition to "matter likely to damage the victim's reputation in the estimation of reasonable people generally". The principal reasons for that decision are as follows:

---

[3] "Attack the good reputation of, speak ill of" (Concise Oxford Dictionary, 6th ed.).

[4] See *Youssoupoff* v. *Metro-Goldwyn Mayer Pictures Ltd.* (1934) 50 T.L.R. 581, 587 *per* Slesser L.J.

[5] *Sim* v. *Stretch* [1936] 2 All E.R. 1237, 1240.

(i) For the reasons explained above, the proposed new offence is based upon damage to reputation and not malicious falsehood. In order to punish the causing of harm the law should not appear to assert that reputation has been damaged when, in the view of ordinary reasonable people, it has not been damaged or when the particular reputation is one which the law should not protect. We believe that prosecutions brought on such a ground might bring the law into disrepute.

(ii) Having regard to the stringent limitations of the proposed offence in other respects, and the small number of occasions on which it is in consequence likely to be used, the number of victims likely to fall within the category of "shun and avoid" alone is probably very small. Some of them would in any event be likely to be covered by any definition based upon damage to reputation.[6] Moreover, the words "shun or avoid" would not make it possible to distinguish between the unfortunate victim of widely held but unreasonable views, such as a woman who has been falsely asserted to have been raped, and the person, such as an alleged police informer, who is not at present covered by the civil law. We do not wish to include a statutory provision which would risk widening the definition of what is defamatory beyond the limits of the civil law.[7]

These considerations lead us to the view that a better approach is that which would in other respects reflect, in language suited to modern legislation, the position in the civil law of defamation. In our view the Faulks Committee definition[8] largely achieves that aim. We prefer, however, to refer expressly to damage to reputation rather than "affecting a person adversely" since it specifies more precisely the gravamen of defamatory attacks upon a person. We, therefore, *recommend* a definition in terms of matter which would be likely to damage a person's reputation in the estimation of reasonable people generally,[9] subject, however, to consideration of how best to exclude the trivial defamation.[10]

(b) Serious damage to reputation

7.8 Exclusion of trivial defamations is as we have seen a requirement of the existing law, it being for the jury, it seems, to acquit if in all the circumstances they do not regard the defamatory statement as sufficiently serious to amount to the offence. While this is an important safeguard, we have criticised[11] the vagueness and circular character of the law as it stands. The notion of seriousness is not tied to any rule by reference to which it is to be applied. In our

[6] Cf. Report of the Committee on Defamation (1975), Cmnd. 5909, Appendix V, para. 8 and *Duncan and Neill on Defamation*, 2nd ed. (1983), para. 7.06.

[7] See further *Duncan and Neill on Defamation, ibid.*

[8] See para. 7.4, above.

[9] Appendix A, cl. 1(2).

[10] See para. 6.8, above.

[11] See para. 4.4, above.

working paper we provisionally proposed that the exclusion of trivial defamation be formulated in terms of the likelihood of causing significant harm,[12] emphasising that this was only one possible way of dealing with the requirement.[13] While most of our commentators agreed with the approach, some did make suggestions, most of which involved only a change of wording without any real change of substance. Other suggestions were, we thought, undesirable in principle: for example, a requirement of proof of harm being caused would need the evidence of the victim to that effect; while a requirement that the statement be misleading on a matter of public interest irrespective of its effect on the victim would, we believe, tend to restrict the availability of the offence to statements made about those occupying some kind of public office or prominence in society and would require the jury to consider the nebulous concept of the public interest.

7.9 On reconsideration, we think it possible to take a simpler course to avoid some of the difficulties which might be incurred with a provision specifying the likelihood of causing substantial harm. Such a provision, we now think, might unintentionally and undesirably imply a parallel with the civil action, the test being satisfied if the victim would have been likely to receive substantial damages. We believe it would be preferable so to define what is defamatory as to take account of the factor of seriousness rather than to provide a separate element of the offence. We have already suggested[14] that the definition of what is defamatory should be confined to matters which damage a person's reputation. We believe that exclusion of trivial cases may be achieved adequately and simply by further limiting what is defamatory for the purposes of the new offence to matter which would be likely to cause *serious damage* to the reputation of the person in question in the estimation of reasonable people generally.[15] The factor of seriousness would thereby be linked to the central concept of defamation. To a substantial extent such a linkage would, we believe, avoid the shortcomings of the common law offence in this context while providing a test of seriousness the assessment of which would place no unduly onerous task upon the jury.[15] We *recommend* accordingly.

(c) False information

7.10 In discussing certain principles which we have concluded should guide the formulation of a new offence, we said that there should be no criminal liability for true statements, however unwelcome these might be to the victim.[16]

---

[12] See Working Paper No. 84, para. 10.4(a).

[13] We drew on the experience of the Australian Law Reform Commission which, in their Report *Unfair Publication: Defamation and Privacy* (1979), Report No. 11, Appendix C, draft Commonwealth Bill for an Unfair Publication Act, cl. 56, formulated this requirement in these terms: "with intent to cause serious harm to a person (whether the person defamed or not) . . .". Cl. 57(1) further provides for a lawful excuse to a charge of the new offence if in the circumstances the defendant would have had a defence available under the Act to an action of defamation: and cl. 18 provides for a defence of triviality to defamation actions if "the defamatory matter and the particular circumstances of its publication were such that the plaintiff was not likely to be harmed.".

[14] See para. 7.7, above.

[15] The concept of damage or serious injury is one with which juries are familar in the context of actions for personal injury, and cases of bodily injury and grievous bodily harm under the Offences against the Person Act 1861, ss.18 and 20. See Appendix A, cl.1(1) and (2).

[16] See para. 6.5, above.

The falsity of the statement in question should therefore in our view be a requirement of the new offence. This fundamental requirement of policy is not, however, without its difficulties.

7.11 In the first place, a limitation to a statement of fact would be too restrictive for present purposes, since a falsehood may be conveyed by an indirect statement which implies the existence of certain facts: for example, "Everyone thinks X was involved in that robbery"; or "A has reported that B took a bribe", which in itself may be true but false as regards the activities of B. In principle the offence ought so far as possible to exclude the complexities of the civil law where a true statement containing a false defamatory imputation may ground liability.[17] Nonetheless sufficient guidance must be given to the courts as to the type of statements which are capable of falling within the offence. We think this problem is best solved by limiting the kinds of statement which may be penalised to those which "communicate false information" and by providing that such information may be communicated expressly or by implication.[18]

7.12 Another difficulty is the degree to which any information must be shown to be false. Should a person be penalised if a statement is substantially true but incidentally false? "X has twenty convictions for theft", but the defendant making this statement knows that it is only nineteen. And must it be proved that every part of a statement is false? The former case need not, in our view, be dealt with specifically, since it would hardly constitute a case of serious defamation to which the offence is limited.[19] There may well be borderline cases here, but we think they are best dealt with at the stage when the decision to prosecute is taken.[20] The latter case is provided for in the context of the civil law by section 5 of the Defamation Act 1952, but the purpose of this provision is to modify the defence of justification. This does not arise in the context of the proposed offence: its drafting makes clear that what is false must also be defamatory, and that without the latter requirement the statement would not fall within the terms of the offence.[21]

(d) Innuendo and comment

7.13 The terms of the draft Bill at Appendix A reflect the recommendations in the preceding pages that false information is to be seriously defamatory of a person "only if it would be likely seriously to damage his reputation in the estimation of reasonable people generally." The draft Bill further covers information communicated "expressly or by implication". We have considered whether these terms are appropriate to cover instances where the information consists of words which, by reason of some extraneous fact not stated in the publication but known to the person or class of persons who read it, extend beyond their natural and ordinary meaning, that is, a legal or true innuendo. [22]

[17] See *Gatley on Libel and Slander,* 8th ed. (1981), paras. 352–354.

[18] Appendix A, cl.1(1) and (3)(a).

[19]. See para. 7.9, above.

[20] The Crown would have to specify precisely what was the seriously defamatory information at issue. As to consent to prosecute, see paras. 7.67—7.68, below.

[21] Appendix A, cl. 1(1).

[22] See generally *Duncan and Neill on Defamation,* 2nd ed. (1983), paras. 4.17, *et seq.*

In the civil law the plaintiff must prove that these extraneous facts were known to the persons to whom the words were published, but the draft Bill makes no such express provision. Instead, it requires that the defendant should know or believe the information concerned to be false and seriously defamatory, an aspect of the mental element with which we deal in more detail below.[23] It must follow that, to attract liability, he must be aware of the circumstances which make the information in question defamatory in character. Secondly, the draft Bill provides that the information in question must be such as would be likely seriously to damage the person's reputation in the estimation of reasonable people generally. The test depends, not upon communication to reasonable people, but upon whether the information would be likely to have the stated effect on reasonable people. It assumes that reasonable people have the requisite knowledge of the victim and of all the relevant circumstances; in this respect, the assumptions made by the test do not differ from those of the civil law. Taken together, we believe that these provisions of the Bill deal adequately with the special case of the legal innuendo. Further express provision would in our view unduly complicate the draft Bill and produce no compensating benefit.

7.14 We have also considered whether the terms of the draft Bill cover, or should cover, information which consists only of comment, or comment upon published facts. Whether or not published matter amounts to comment is relevant in the context of the civil law to enable the publisher to plead the defence of fair comment. As will appear, that defence would not be relevant in the context of the new offence of criminal defamation. The term "information" would in our view be capable of covering both comment and the factual basis for such comment. For example, the opinion of an eminent theatrical critic that "Miss X is unfit to appear on the stage" contains, expressly or by implication,[24] information on two matters, namely, the opinion of the critic, and the unfitness of Miss X to appear on stage. A prosecution mounted with reference to the latter would, in terms of the new offence, require proof both that it was false and that the defendant knew it to be false and, on proof of the latter, no defence of fair comment could arise.[25] A prosecution with respect to the former would, we think, be extremely unlikely but again, on proof of knowledge of falsity (that is, proof that it was not the critic's real opinion), the defence could not succeed. In any event, although the term "information" is apt to cover both fact and opinion, it seems to us unlikely that proceedings would be instituted with regard to opinion alone, since in most instances it is unlikely that it would be possible to prove that communication of such opinion was seriously defamatory. If, however, this were capable of proof in the exceptional case, the terms of the draft Bill are as we have said sufficiently wide to deal with it.

2. COMMUNICATION OF INFORMATION

(a) Means of communication

7.15 Criminal libel at common law applies only in respect of written statements. In our working paper we provisionally proposed that a new offence

[23] See paras. 7.36 *et seq.*, below.

[24] See Appendix A, cl. 1(3)(a).

[25] The defence is defeated by proof of malice: see further para. 7.63, below and, generally, *Duncan and Neill on Defamation*, 2nd ed. (1983), para. 12.35.

should cover publication by any means of communication, whether by writing, broadcasting, speech or otherwise. Consultation for the most part agreed with us and we adhere to the view previously expressed. Slander is, of course, often transitory in character and the other requirements of the offence may be difficult to prove. But slanderous statements of a transitory nature, forming perhaps part of everyday gossip, would in any event be excluded from our recommendations by the requirement of the likelihood of serious damage to reputation. Other slanderous statements, however, such as those in the form of a whispering campaign or those delivered at a public meeting, may well be serious in effect and, provided that the other elements of the offence are capable of proof, we do not see why such oral statements, whether in public or in private, should be excluded. We *recommend* accordingly.[26]

7.16 In three respects, however, this recommendation needs some elaboration. In the first place, we now prefer to avoid the term "publish". Its use would raise questions as to the technicalities of publication under the civil law, for example, the presumption of fact, in the case of defamatory words on postcards or in telegrams, that publication occurs by the fact of transmission. We prefer the term "communicates", which we think is appropriate to convey the ordinary meaning of publication. Secondly, as we have noted,[27] it is necessary to provide that information may be communicated expressly or by implication. Thirdly, communication may take the form of words, or it may be by other means, such as by gestures or any form of visual image, and it is necessary expressly so to provide.[28] We *recommend* accordingly.

(b) Participation

7.17 At common law the probable absence of any requirement of intent to defame has the result of extending the range of those who may be liable: newspaper editors, publishers, printers, distributors may, subject to certain provisions, all be guilty of "publishing" the libel if it can be shown that they knew of the statement,[29] or even that they were merely negligent in being unaware of the statement. Section 7 of the Libel Act 1843 does, however, provide a defence in certain cases of vicarious liability if publication was without the defendant's "authority, consent or knowledge" and was not due to "want of due care or caution" on his part, the persuasive burden of proof lying on the defendant.[30]

7.18 This vicarious liability is not in accord with modern principles of criminal liability in the case of serious offences triable on indictment, and we

[26] See Appendix A, cl. 1(1) and cf. the views expressed in the Report of the Committee on the Law of Defamation (1948), Cmnd. 7536, paras. 36-40 and the Report of the Committee on Defamation (1975), Cmnd. 5909, paras. 86-91. We do not think there is any need for a provision for the protection of broadcasting authorities against a person using the media to broadcast slanderous statements (cf. the Contempt of Court Act 1981, s. 3(2)), since the need to prove the mental element, para. 7.36, below, will exclude liability unless participation by way of aiding and abetting can be proved.

[27] See para. 7.11, above.

[28] Appendix A, cl. 1(3)(b); cf. Defamation Act 1952, s. 16(2)

[29] *R.* v. *Munslow* [1895] 1 Q.B. 758, 765 *per* Wills J.

[30] Smith and Hogan *Criminal Law*, 5th ed. (1983), p. 775 and *R.* v. *Lemon* [1979] Q.B. 10, 29 (C.A.) (a case of blasphemous libel).

provisionally proposed in our working paper that in any new offence it should be necessary for the prosecution to prove participation in publication according to the normal principles of criminal responsibility.[31] This met with almost complete agreement on consultation, and we see no reason to alter our views. Thus under our recommendations conviction for aiding and abetting communication of the information at issue would be possible on proof of the necessary mental element, but vicarious liability would not. Printers and distributors would therefore be liable only if they were proved to have the requisite mental element.[32]

(c) Scope of the term "communication"

7.19 The common law offence imposes liability in some cases if publication of the defamatory statement is to the defamed person. We expressed the view in our working paper[33] that publication to a third party should always be required, as in the civil law, and we also took the view that this should in all cases also be a sufficient act of publication. There should be no need for publication on more than one occasion or to more than one third party: not only would this appear arbitrary, but it would seem to condone publication of a deliberate lie before a smaller number of persons or on fewer occasions. No-one disagreed with this on consultation, and we reaffirm our provisional view here: communication of the information about the victim by the defendant to one other person should be sufficient for the purposes of the new offence.[34]

7.20 The term "communication" may be thought to import its own possible difficulties of interpretation but, having considered some of these possibilities, we are satisfied that it does not require elaboration. For example, could it be argued that a bookseller communicates information on every occasion on which he sells a book alleged to contain false and seriously defamatory information? What about the position of a second-hand book-seller who sells such a book twenty years after its publication? It seems to us that the term "communicates" implies that the person communicating is aware that he is passing particular information to another. In this respect, we think the natural meaning of the term is to be distinguished from the legal meaning of "publication" in the civil law of defamation. Thus in the instances cited, a bookseller would, we believe, be liable only if he was aware that, in selling the book, he was communicating the information at issue, with in addition the mental element required by the offence of knowledge or belief as to the falsity of that information.[35] A bookseller would not be liable for selling a book of whose contents he was ignorant.

---

[31] Working Paper No. 84, para. 8.15.

[32] As to which, see paras. 7.33 *et seq.*, below; but see also para. 7.62, below as to unintentional communication.

[33] If a breach of the peace is likely; see para. 2.2, above.

[34] See Appendix A, cl. 1(1).

[35] See para. 7.33, below.

7.21 These do not exhaust possible difficulties with regard to communication, but it is convenient to return to these after a full discussion of the mental element of the new offence.[36]

3. THE PERSON DEFAMED

7.22 In many, if not most, instances, a new offence aimed at penalising the deliberate, defamatory lie may be expected to be of most utility in the case of communications about living, identifiable individuals. Special problems do, however, arise here because criminal libel at common law may, unlike the civil law, be capable of penalising a libel on a dead individual in certain cases,[37] and possibly also a libel on a class of persons if the object of the publication is to excite public hatred against then.[38] Moreover, the civil law itself is not entirely clear about liability for defamation of certain types of incorporated and unincorporated bodies. In none of these areas should the scope of a new offence be uncertain, and we think it desirable to examine the position afresh for the purposes of this report. We examine first the position at civil law and consider then to what extent the position requires to be clarified or changed in respect of the new offence.

(a) The position in the civil law

7.23 The general position is that any person may bring an action in respect of a libel or slander published of and concerning himself. Where an individual is defamed, the cause of action ceases with his death. In the case of corporate or unincorporated bodies, the position is as follows:—

Trading corporations and companies

These can sue in respect of matters affecting their business or trading reputation, and allegations against officers or employees reflecting on the company itself, but since they cannot be "injured in feelings",[39] some allegations actionable by an individual would not be defamatory of a company.

Non-trading corporations and companies

The position here is less clear, but it seems probable that there is no distinction between these and trading corporations.[40]

Partnerships

Partners in a firm may bring an action for defamation jointly in respect of words defamatory of the firm as a whole.

---

[36] See para. 7.62, below.

[37] *De Libellis Famosis* (1606) 5 Co. Rep. 125a; 77 E.R. 250, and *R.* v. *Hunt* (1824) 2 St. Tr. N.S. 69; compare *R.* v. *Labouchère* (1884) 12 Q.B.D. 320, 324, *per* Lord Coleridge C.J. It seems that the libel must have been published with intent to provoke a breach of the peace by the deceased's relations.

[38] See e.g. *R.* v *Osborn* (1732) 2 Barn. K.B. 166; 94 E.R. 425 and *R.* v. *Williams* (1822) 5 B. and Ald. 595; 106 E.R. 1308. There is authority to the contrary: see *R.* v. *Orme and Nutt* (1699) 1 Ld. Raym. 486; 91 E.R. 1224 and *R.* v. *Gathercole* (1838) 2 Lewin 237; 168 E.R. 1140.

[39] See *Lewis* v. *Daily Telegraph Ltd.* [1964] A.C. 234, 262 *per* Lord Reid.

[40] See *Duncan and Neill on Defamation,* 2nd ed. (1983), pp. 43–44; compare *Manchester Corporation* v. *Williams* [1891] 1 Q.B. 94 and *Bognor Regis U.D.C.* v. *Campion* [1972] 2 Q.B. 169.

Trade unions and employers' associations

A trade union "which is not a special register body[41] shall not be, or be treated as if it were, a body corporate".[42] By statute it is able to bring an action for defamation,[43] but it was held in *E.E.T.P.U.* v. *The Times* that it is not able to bring such an action in its own name for damages in relation to its reputation.[44] However, this case is inconsistent with earlier authority[45] and has been strongly criticised.[46] An employers' association may be incorporated or unincorporated;[47] the former has the rights of a non-trading corporation, the latter has by statute the right to sue in its own name.[48]

Other unincorporated associations

These cannot bring an action for defamation in their own name since they are not legal entities.

(b) Recommendations for the new offence

7.24 No difficulty arises in the case of living identifiable individuals. In the case of corporate or unincorporated bodies, we suggested in our working paper[49] that the position be settled by use of the term "person" which, by virtue of the Interpretation Act 1978, would be interpreted to include a body of persons corporate or unincorporate. This was criticised by one commentator, we think rightly, for widening the law so far as unincorporated bodies was concerned to an unacceptable extent. The term is unsuited for definitional purposes in a criminal offence, being imprecise and extremely wide,[50] and would extend the law well beyond the position obtaining in the civil law in an area where there is no demand or compelling reason to do so.

Corporate and unincorporated bodies

7.25 We have concluded that the certainty which so far as possible is a necessary attribute of all criminal offences would best be met in this context by

[41] I.e whose name was entered in the special register maintained under s. 84 of the Industrial Relations Act 1971.

[42] Trade Union and Labour Relations Act 1974, s. 2(1).

[43] *Ibid.*, s. 2(1)(c).

[44] [1980] Q.B. 585; so held, because, s. 2(1) having removed its corporate status, it did not possess a personality capable of being libelled: see *ibid.*, pp. 599-600.

[45] See *N.U.G.M.W.* v. *Gillian* [1946] K.B. 81.

[46] See *Gatley on Libel and Slander*, 8th ed. (1981), para. 970 and n. 87.

[47] Trade Union and Labour Relations Act 1974, s. 3(1).

[48] *Ibid.*, s. 3(1)(c).

[49] See Working Paper No. 84, para. 8.18.

[50] Cf. the definition of a "body of persons" in the Income and Corporation Taxes Management Act 1970, s. 526(5): "any body politic, corporate or collegiate, and any company, fraternity, fellowship and society of persons whether corporate or not corporate". In so far as such entities are unincorporated, we think this would be too wide for the purposes of an offence of criminal defamation.

defining which entities, other than individuals, may be capable of being defamed. Such a definition should, we think, include all corporate bodies.[51] Corporate bodies include, of course, trading corporations and their inclusion suggests to us that the position of trade unions should not be left in doubt, and that for present purposes they should be put in the same position as corporate bodies. Unincorporated employers' associations must, we think, be treated in parity with trade unions. Partnerships as such should not in our view be capable of being defamed, but if a defamatory lie about a firm is published which is capable of damaging each partner individually, there is no reason why a prosecution should not be brought. In summary, we *recommend* that, in addition to living individuals, a prosecution under the new offence should be capable of being instituted in respect of defamatory statements about corporate bodies, trade unions and unincorporated employers' associations.[52]

Defamation of the dead

7.26 We provisionally proposed in our working paper[53] that there should be no prosecution for defamation of the dead. Several of our commentators, however, thought that such prosecutions should be possible under a new offence. We agree that there are arguments of substance which support this view. The damage done to the living relations may in some instances be substantial, and there may therefore be thought to be a sufficient public interest in permitting such prosecutions. Moreover, having regard to the distress which is sometimes caused by the freedom, in the civil law, to defame the dead, it might be thought appropriate to rectify this by making it an offence. There are, however, arguments which in our view outweigh these considerations. Defamation of the living seems to us always to be more serious than defamation of the dead because there is in that case the harm and distress occasioned to the person defamed in addition to that caused to his relatives. And any offence would require a period of limitation from the date of death after which prosecutions would cease to be possible and this itself gives rise to problems. Our commentators, who disagreed on this point, suggested periods varying from five to fifty years, or no time-limit at all. A short period would probably not allow some of the most serious cases to come to court, whereas a long period might well result in trials becoming, inappropriately, the venue for the re-examination of history. There does not appear to us to be a widespread demand for a general extension of the law here and, in the absence of a demonstrable need, we do not think that it should be so extended. However, the public interest which justifies the creation of a new offence should be acknowledged to the extent that, if a person is defamed while he is alive, his subsequent death should not affect any decision which may be taken to institute proceedings in respect of the defamatory publication. We *recommend* accordingly.[54]

---

[51] This will therefore include all county and district councils: Local Government Act 1972, s. 2.

[52] See Appendix A, cl. 1(4).

[53] Working Paper No. 84, para. 8.17.

[54] See Appendix A, cl. 1(4). Under cl. 1 a person's liability will be determined by reference to the time of communication; the victim's subsequent death will therefore not affect an existing liability.

Group libels

7.27 While there is some ancient authority in support of the view that, in some circumstances, a libel on a class may amount to an offence, we see no reason to perpetuate this in a new offence. An offence covering group or class libel would extend the law beyond that obtaining in the civil law without any apparent need to do so, and any attempt to define for this purpose what was meant by a group would, we think, prove intractable. The limited situations where in former times it was believed that the offence was available are now largely covered by other offences.[55] Accordingly, we do not recommend that the new offence be available in respect of libels on a group or class.

4. BURDEN OF PROOF

7.28 The burden of proof in respect of the communication of false, defamatory information should in our view be on the prosecution. It should therefore be for the prosecution to prove that the information at issue was false and seriously defamatory. We have noted that under the common law it is for the defendant to prove the truth of the statement by way of defence.[56] Placing the burden on the prosecution is therefore an important change. A burden on the defence is justifiable in civil proceedings, but requires some special justification in criminal proceedings, when the interests of freedom of expression in principle require the burden to be on the prosecution. Almost all of our comentators agreed with us on this point.

5. TERRITORIAL CONSIDERATIONS

7.29 The draft legislation recommended in this report would create a crime only under the law in force in England and Wales. But a person communicating defamatory information may do so irrespective of jurisdictional boundaries. He may communicate with someone in Scotland or elsewhere outside the jurisdiction, or he may communicate from somewhere outside the jurisdiction with a person in England and Wales. We made it clear in our Report on the Territorial and Extraterritorial Extent of the Criminal Law[57] that it is our policy to examine territorial problems in the context of the individual statutory offences which we recommend as part of our work of codification. It is, therefore, necessary to consider whether the person responsible for communicating in each of the above examples should be liable to conviction by the courts in England and Wales, and whether there is a need for any express provisions to achieve this.

7.30 In broad terms, by our law all crime is territorial. As Lord Reid put it in *Treacy* v. *Director of Public Prosecutions*[58]—

> "when Parliament, in an Act applying to England, creates an offence by making certain acts punishable it does not intend this to apply to any act done by anyone in any country other than England . . . the presumption is well known to draftsmen, and where there is an intention to make an English Act or part of such an Act apply to acts done outside England that intention is and must be made clear in the Act."

---

[55] E.g. Public Order Act 1936, s. 5A (incitement to racial hatred).

[56] See paras. 4.2 and 6.5, above.

[57] (1978) Law Com. No. 91, paras. 6–8.

[58] [1971] A. C. 537, 551; see also *Air-India* v. *Wiggins* [1980] 1 W.L.R. 815, 819, *per* Lord Diplock.

Problems in determining where an offence has been committed may arise, in particular where the offence contains more than one main element, or where there is some doubt, on the language which is used, where some element of the offence begins and ends. Thus in *Treacy* the question arose as to whether "making a demand" with menaces under section 21 of the Theft Act 1968 was complete if the demand was posted here to someone outside England and Wales. The House of Lords divided on this issue, holding by a majority of 3 to 2 that the offence had been committed. We believe similar problems might arise in the context of an offence penalising a person who "communicates" defamatory information. While the ordinary rules of construction might suggest that communication from one person to another should, for the purposes of the offence, take place within England and Wales, it would certainly be possible to take the view that there was a sufficient act of communication by the defendant if he were, for example, to post the information at issue in this country to another outside it.

7.31 We do not think that the result so described would be right in the present instance. It seems to us that, so far as the law of England and Wales is concerned, the essence of the harm caused by communication of false defamatory information concerning a third party is the dissemination of that information in England and Wales: the purpose of the proposed offence is to penalise serious damage to reputation in this country. That damage cannot be done until dissemination is effected, that is, when communication is complete; and where that communication is completed in another country, the damage with which the offence is concerned must generally take place in that country. But in other jurisdictions harm to reputation may be controlled by other means and it is not, or should not in this instance be, the concern of the courts in this country to attempt to deal with such harm.

7.32 We therefore conclude that specific provision is needed to make clear that the offence is concerned with the communication of information to persons in England and Wales, irrespective of where the person communicating happens to be. The draft Bill makes provision accordingly.[59]

B. The mental element (mens rea)

1. SUMMARY OF RECOMMENDATION

7.33 The principles guiding the creation of a new offence which we have outlined above make clear that in our view the offence of criminal defamation recommended in this report should have a stringent mental element. This is necessary for the purpose of confining the offence, as we believe it should be confined, to the imposition of penalties for serious cases of the deliberately defamatory lie. What that mental element should be and how best to formulate it caused us substantial problems in our working paper and evoked the most comment on consultation. In order best to explain our conclusions in this report, we set out forthwith what we think would be the appropriate mental

[59] See Appendix A, cl. 1(1) and (2)(c).

element. We *recommend* that in the new offence of criminal defamation there should be the following requirements[60]—

(a) the defendant must have known or believed that the information in question was seriously defamatory of the victim;

(b) the defendant must have known or believed the information in question was false;

(c) the burden of proving such knowledge or belief should be on the prosecution.

The rest of this section explains how we have arrived at these conclusions.

2. KNOWLEDGE OF OR BELIEF AS TO THE DEFAMATORY CHARACTER OF INFORMATION

7.34 This aspect of the mental element is uncontroversial. On consultation no-one dissented from the view expressed in our working paper[61] that the new offence should require the prosecution to prove that the defendant intended by the statement to defame the victim. Unintentional defamation is relevant principally in two types of cases. First, the statement may have appeared entirely innocent but, because of facts unknown to the maker, was actually defamatory of the person about whom he was speaking.[62] Secondly, the maker of the statement may not have realised that the statement referred to any living person although, if he had known that fact, he would at once have realised that it was defamatory of him.[63] In civil defamation these problems are dealt with by section 4 of the Defamation Act 1952 which makes detailed provisions for an offer of amends to be made. We do not think that these provisions are suitable for the criminal law; rather, we think that there should be no liability at all in such cases.

7.35 On reconsideration, however, we believe that this aspect of the mental element is best expressed in terms of the defendant's knowledge of or belief as to the defamatory character of the information at issue, rather than as an intent to defame. Such an intent, in relation to the recommended definition of what is defamatory,[64] is ambiguous. Like the civil law, the test of what is defamatory under the offence is an objective one which assumes that reasonable people know about the victim and the libel. What, in that context, would an intent to defame connote? That D *wants* to damage V's reputation in the estimation of reasonable people? In fact D may only want a particular person to think badly of V, and may care little or nothing of the generality of people's reaction. He may, however, have little or no doubt that his communication would be likely to damage V's reputation in the eyes of reasonable people; in other words, he knows or believes that it is defamatory. This, it seems to us, is the appropriate test and at the same time succeeds in eliminating the difficulties relating to unintentional defamation in the civil law to which we have referred. In the great majority of cases such knowledge or belief would be proved by reference

[60] See Appendix A, cl. 1(1).
[61] Working Paper No. 84, paras. 8.21-8.22.
[62] *Cassidy* v *Daily Mirror Newspapers Ltd.* [1929] 2 K.B. 331.
[63] *E. Hulton & Co.* v. *Jones* [1910] A.C. 20.
[64] See para. 7.9, above.

to the words used, which in any likely prosecution under the new offence may be expected to be clearly and obviously defamatory on their face. Accordingly we *recommend* that the offence should require the prosecution to prove that the defendant knew or believed that the information in question was seriously defamatory of the victim.[65]

3. KNOWLEDGE OR BELIEF AS TO FALSITY

7.36 The general policy recommended in this report is to penalise by a new offence only the deliberately defamatory falsehood. To give effect to this policy it would be sufficient to require proof merely that the defendant knew or believed the information at issue to be seriously defamatory with, additionally, proof of actual falsity. In our view, however, this would impose criminal liability on too wide a range of material and would endanger freedom of speech to an unacceptable degree. Our problem is to reconcile the requirements of freedom of speech with the requirements of an offence which would in practice succeed in penalising the worst cases of defamatory lies and, in the latter context, to determine what degree of deliberation with reference to the communication of the false information should justify the imposition of criminal sanctions. We discussed a wide range of possible mental states in our working paper[66] and, in view of the comment evoked on this aspect, we believe that we must briefly explain the options there set out and consider the substantial response which we received on the issue from our commentators.

(a) Possible mental elements

7.37 The possible options canvassed in our working paper are summarised in the following paragraphs, together with the view we then took in relation to each of them.

Honest belief in the truth of the statement

7.38 Where a person has published an untrue defamatory statement in the belief, based on reasonable grounds, that it was true, he may, if he cannot justify it, be liable in a civil action for damages, but to impose criminal sanctions in such circumstances would, we said, interfere with freedom of expression to an unacceptable degree.

Negligence

7.39 A person publishing an untrue defamatory statement in the belief that it was true, albeit a belief not based on reasonable grounds, would be negligent. The social consequences of negligent publication were, we thought, not such as to require the act to be criminal: negligent conduct is normally treated as criminal only if the consequences are regarded as so grave as to require penalties for failure to take reasonable care, and the degree of blameworthiness in this context may vary greatly. The protection of freedom of expression should here take precedence if the belief in truth was genuine, even if unreasonable.

---

[65] See Appendix A, cl. 1(1). And see as to the legal innuendo, para. 7.13, above.
[66] Working Paper No. 84, paras. 7.19-7.29.

Recklessness

7.40 On the basis of the current state of the authorities as to recklessness,[67] a defendant would be guilty, in the event of a new offence penalising reckless statements without further definition, if:—

(i) the circumstances were such as would have drawn the attention of any ordinary prudent individual to the possibility that the defamatory statement was untrue;

(ii) the risk of the defamatory statement being untrue was not so slight that an ordinary prudent individual would feel justified in treating it as negligible;

(iii) the defendant either failed to give any thought to the possibility of the risk of the defamatory statement being untrue, or having recognised that there was a risk, nevertheless went on to take it.

We took the view that the concept of recklessness is not suitable for an offence of criminal defamation. In the case of some offences where recklessness is an alternative to intention, such as criminal damage under section 1 of the Criminal Damage Act 1971, if the risk of damage is substantial the harm done by the act can never justify a person taking that risk. But if there is a substantial risk of the falsity of a statement, there may nonetheless be a good reason for publishing it: it may be true and, if it is, the publisher may consider it to be in the public interest to publish. Recklessness as part of the mental element would thus impinge here to an unacceptable extent upon freedom of expression. Moreover, use of the word "recklessness" in statutes has given rise to difficulties.[68]

No belief in the truth of the defamatory statement

7.41 Absence of positive belief in the truth of a defamatory statement may differ hardly at all from knowledge of falsity, or it may be that a person has formed no belief as to the truth, but may think that its importance justifies publication. It may well be that some people, such as journalists, publish matter falling within the latter category and we would not wish them to be open to prosecution merely because they had formed a personal, positive belief in the truth of all that they wrote. Consequently, we took the view that if specification of "no belief in the truth" were the requisite mental element, the offence would require a further defence excluding liability on grounds of public interest or benefit in publication. However, it seemed undesirable to us that criminal liability should turn on assessment of public interest or benefit in such a context and that the category of absence of belief would, at its widest, unreasonably interfere with freedom of expression.

---

[67] In particular *Commissioner of Police of the Metropolis* v *Caldwell* [1982] A.C. 341 and *R.* v *Lawrence (Stephen)* [1982] A.C. 510 relating respectively to the Criminal Damage Act 1971, s.1 and reckless driving under the Road Traffic Act 1972, s.1.

[68] See *Elliot* v *C.* [1982] 1 W.L.R. 939 (Criminal Damage Act 1971, s.1(1)), *W.* v *Dolbey* [1983] Crim. L.R. 681 (malicious wounding under the Offences against the Person Act 1861, s.20) and *R.* v *Breckenridge* (1983) 79 Cr. App. R. 244 (rape under the Sexual Offences (Amendment) Act 1976, s.1). And see further, para. 7.48, below.

Knowledge or belief in the falsity of the statement

7.42 If a person publishes a defamatory statement known or believed by him to be false, as distinct from having an absence of belief as to its truth, there can be no objection of principle to criminal liability and, for that reason, this is the requirement which we selected in our provisional proposals.[69] But, as we stated in our working paper,[70] so confining this aspect of the mental element of a new offence must, apart from cases in a particular and special category, lead to certain problems of proof. These require separate examination.

(b) The problem of proof

7.43 A defendant who it is alleged knows or believes the statement at issue to be false may, because of the part which he himself played in the facts alleged, be taken to have known of the falsity, for example, if he asserts that he himself paid a bribe demanded by a chairman of a planning committee. If it is proved that no payment was made, the prosecution are in a position to satisfy the jury that the defendant must have known the statement was false. But if the defendant had played no part in the facts alleged, for example, asserting that the chairman had received bribes from unnamed sources, proof that the allegation was untrue would of itself provide no evidence that he knew or believed it to be false. In the absence of other evidence, the case could not succeed. Nor indeed, in the absence of other evidence, would there usually be sufficient for a prima facie case to justify the defendant's committal for trial by the magistrates. Thus, if the burden of proving knowledge or belief as to falsity were to remain on the prosecution, a new offence specifying this as the mental element would be likely to be effective only in the first type of case mentioned above, where the defendant knew, by virtue of his personal observation of, or participation in, the relevant acts, that the statement was untrue, or in the case where he had admitted it to be untrue.[71]

7.44 This problem is encountered in other areas of the criminal law and is solved by differing techniques. Sometimes, as in section 1(1) of the Perjury Act 1911,[72] no special provision is needed since the offence assumes that normally the defendant would have direct personal knowledge of the facts. In other instances techniques have been used or developed which have the effect of requiring the defendant to give evidence in order to avoid a finding of guilt. For example, in relation to the offence of handling stolen goods,[73] it is provided[74]

[69] See Working Paper No. 84, para. 7.29.

[70] See Working Paper No. 84, paras. 8.24, *et seq.*

[71] The position at common law is not free of difficulty here. The onus of proving, on a charge under the Libel Act 1843, s.4, that the defendant published a libel "knowing the same to be false" lies on the prosecution, but in practice, according to *R.* v *Wicks* (1936) 25 Cr. App. R. 168, 174, not only is the falsity of the libel presumed, but it suffices to show that the defendant had means of knowledge; the jury may then infer that he had knowledge. It may be doubted whether this correctly stated the law, since the court did not advert to *R.* v *Black, The Times*, 16 November 1932, where the Court of Criminal Appeal stated that it was a misdirection for the jury to be left with the impression that the onus of proof under s.4 as to the truth was on the defendant: it was for the prosecution to prove that what was published was false. Mr. J. R. Spencer kindly drew our attention to this otherwise unreported case.

[72] "If any person lawfully sworn as a witness . . . in a judicial proceeding wilfully makes a statement material to that proceeding, which he knows to be false or does not believe to be true, he shall be guilty of perjury . . .".

[73] Theft Act 1968, s. 22(1), which provides that "a person handles stolen goods if . . . knowing or believing them to be stolen he dishonestly receives the goods".

[74] Theft Act 1968, s. 27(3).

that, if it is proved that the defendant possessed the stolen goods, for the purposes of proving he knew or believed them to be stolen, evidence may be given that he had possessed other stolen goods from any theft occurring in the past twelve months, or that he had been convicted of theft or handling within the preceding five years. Another principle developed in this context is that, where it is proved that the defendant was in possession of property shown to have been stolen shortly before, the jury can be directed that they may infer that the defendant knew that the goods were stolen if he has offered no explanation to account for his possession, or if they are satisfied that any explanation given by him, consistent with innocence, was untrue.[75] In other offences, to ensure that evidence is put before the jury, it has been necessary to impose a burden of proof, usually a persuasive burden, on the defence. In most instances of serious crimes derived from the common law the burden in respect of defences is evidential only, save for the defence of insanity, but where the defendant has an excuse or other qualification upon liability, a persuasive burden is put on him because knowledge of the facts relating to the excuse or qualification would ordinarily be with him only.[76]

7.45 Our working paper explored in detail[77] techniques which might be used in order to make available to the court evidence of the defendant's knowledge or belief as to falsity in cases where he has not participated in or observed the matters forming the basis of the allegation. They may be summarised as follows—

(i) A provision to the effect that the court might infer the state of mind if the defendant failed to give evidence in relation to it. In so far as this would enable an inference to be drawn solely from failure to give evidence,[78] it would in substance place a persuasive burden on him without doing so expressly.

(ii) A requirement that, before the hearing, the defendant give notice to the prosecution of his grounds for not knowing or believing the statement to be false. Notice of the sources of information would of itself not amount to evidence of the defendant's state of mind; moreover, evidence is needed at the committal stage and such notice prior to committal proceedings would be impracticable.

(iii) An inference of knowledge of falsity derived from failure by the defendant to explain his means of knowledge, when told that the statement is false and asked for an explanation. This might be oppressive and, like (ii), would be unlikely to work satisfactorily.

(iv) Imposing upon the defendant a burden of proof, either evidential or persuasive, which, on proof of the other elements of the offence, including the falsity of the statement, would require evidence to be adduced that he did not know or believe that it was false. In the case of an evidential burden, if that evidence is accepted, an issue would be raised which the prosecution could rebut by evidence sufficient to prove

[75] See *Archbold*, 41st ed., (1982), para. 18–169.

[76] See e.g. Prevention of Crime Act 1953, s. 1; see further, para. 7.56, below.

[77] See Working Paper No. 84, paras. 8.33–8.41.

[78] Cf. the Criminal Law Revision Committee's Eleventh Report: Evidence (General) (1972), Cmnd. 4991, Annex 1, draft Criminal Evidence Bill, cl. 5, and Annex 2, Notes on draft Bill, p. 216.

beyond reasonable doubt that the defendant did know or believe the statement to be false. In the case of a persuasive burden, the defendant would be convicted unless he satisfied the court that it was more probable than not that he did not know or believe the statement to be false.

In our working paper, we provisionally concluded that only option (iv) would be satisfactory, and that, to be effective, a full persuasive burden would be necessary since, if an evidential burden sufficed, evidence as to the crucial question of the defendant's actual state of mind as distinct from sufficient evidence to raise an issue as to what it might have been, would not be before the court. Our view was, therefore, that a choice lay between an offence which would be likely to be effective only in the narrow range of cases where the defendant had personal knowledge of or participated in the relevant events (or had made an admission), or one requiring a shift in the persuasive burden of proof, which would be effective in both types of case outlined above.[79]

(c) Response on consultation

7.46 As we expected, the response to the matters outlined under headings (a) and (b) above, as set out in our working paper, was substantial. The two issues on which we particularly solicited views were whether the mental element provisionally proposed, knowledge or belief as to falsity, was satisfactory and, if so, whether a persuasive burden should be put on the defendant to prove that he did not know or believe the statement in question to be false.

7.47 A few of our commentators agreed with us on both issues, while others agreed in part. The objections on the part of others were twofold: our provisional proposals shifted the burden of proof, which was unacceptable, and, even if this were to be accepted, the mental element was too narrow in that it would allow acquittals "where none would doubt that immense moral culpability existed and deserved punishment". A substantial body of opinion preferred the concept of recklessness, suggesting liability, for example, where the defendant displays a reckless disregard for whether the false statement was true or false, or where he makes the statement recklessly, not knowing whether it is true or false, or simply where he was reckless as to whether the statement was true or not.

7.48 We have considered whether it would be satisfactory to use the concept of recklessness in this context, but have concluded that this would not be the right course. As we have explained above,[80] we believe that, by comparison with other offences in which recklessness is at present a sufficient mental element, there are considerations peculiar to criminal defamation which make that concept unsuited to that offence. In the case of an offence such as criminal damage, where recklessness is an alternative to intention, if the risk of damage would be regarded by the ordinary prudent individual as more than negligible,[81] it may be contended that the harm done by the act can never justify a person taking that risk. But in the case of criminal defamation, it seems to us

[79] See para. 7.43, above and Working Paper No. 84, paras. 8.41–8.44.
[80] See para. 7.40, above.
[81] See *R.* v. *Caldwell, ibid.* and n.67, above.

that, in assessing whether the risk of falsity was of sufficient substance not be regarded as negligible by the ordinary prudent individual[82], it would be necessary for the jury to consider how unlikely it was that the information was false. It might well be that there was a substantial likelihood of it being false, but the nature of the allegation might be such that an investigative journalist would consider it necessary to publish.[83] It is therefore clear that, without some kind of qualification, a mental element of recklessness would impinge to an unacceptable extent upon freedom of expression. To preserve that freedom of expression, we believe it would be necessary to provide a defence in the nature of publication for the public benefit or in the public interest. We are not convinced that such a defence would be satisfactory. It would require the jury to decide upon issues of vague and sometimes political content, as distinct from issues of fact, and would enable matters of public controversy extraneous to the case to be introduced. Another drawback to the use of recklessness, to which we have already adverted[84], is that the accepted meaning of the term where it is used in a statute has given rise to difficulties[85]. For these reasons, the concept of recklessness is in our view inappropriate to an offence of criminal defamation, and our commentators have not put forward any reason which would persuade us to alter the conclusion to the same effect to which we provisionally came in our working paper.

7.49 Other suggestions made by our commentators may, we believe, be considered rather more shortly. The drawbacks which we have discussed in the context of the use of the concept of recklessness would also attend two further suggestions which were made: first, that the offence should provide that the defendant would be liable to conviction even though he has a belief in the truth of what he says, provided his belief is not based on reasonable grounds; and secondly, that the defendant should be liable in the absence of positive belief in the truth of the statement. We have shown that, without a defence of public interest, these concepts would be likely to extend criminal liability too widely and would therefore require such a defence.[86] This, as we have said, is undesirable.[87]

---

[82] *Ibid.*

[83] The same conclusion would be reached if an alternative "subjectivist" approach to defining recklessness were adopted, e.g. that of our Report on the Mental Element in Crime (1978) Law Com. No. 89, para. 65 and Appendix A, draft Criminal Liability (Mental Element) Bill, cl. 4(2), in accordance with which the proposed offence would be committed if the defendant realised that the information might be false and, on the assumption that any judgment by him of the degree of that risk was correct, it was unreasonable for him to take that risk of it being false. This would entail consideration of the degree of risk of falsity and whether in the circumstances the defendant was justified in communicating it. The circumstances might be such that, having regard to the nature of the allegation, the investigative journalist might consider publishing to be justified even if there were a high degree of risk of falsity.

[84] See para. 7.40 and n. 68, above.

[85] See the cases cited at n. 68, above, in particular *R.* v *Breckenridge* where the Court of Appeal decided that recklessness in the statutory offence of rape under the Sexual Offences (Amendment) Act 1976, s. 1 bears a meaning different from that in other statutory offences.

[86] See paras. 7.41 and 7.48, above.

[87] See para. 7.48, above.

7.50 Another cogently argued suggestion was that "malice" rather than knowledge or belief as to falsity, should be specified, since the meaning of this term in the law of libel is well settled on the authorities. It would require proof that—

(i) the defendant's dominant motive in publication was to injure the victim or some other person or to procure some ulterior or collateral advantage for himself or another, and

(ii) the defendant published the statement knowing it to be untrue or without positive belief that it was true.[88]

However, we do not consider this concept to be suitable for a new statutory offence. While the meaning of malice is determined according to well-settled principles and authorities in civil actions for libel,[89] the term has a different meaning in the criminal law.[90] The use of the term "malice" would thus give rise to unacceptable confusion. This could be circumvented only by spelling out or defining its constituent elements in detail, and this would in our view give rise to complication and further difficulties of definition.

7.51 We have noted that many commentators found it unacceptable that the burden of proof should be reversed. There were, however, few suggestions as to how the problems exposed in the working paper might be met. It is possible that the problems would in practice be overcome in clear cases by the court finding that an inference of knowledge of falsity could properly be drawn. We revert to this matter below.[91] But we do not believe, as one commentator suggested, that requiring the defendant to give notice of his sources or grounds for belief would be the right answer. As we said in our working paper,[92] this would not in practice provide evidence of the defendant's state of mind; nor would it help at committal stage, where such evidence is needed for the purpose of providing a prima facie case.

(d) *Conclusions*

7.52 The foregoing survey and our critical comments will indicate that, notwithstanding a substantial quantity of helpful suggestions by our commentators, we do not consider that any more satisfactory form of mental element can be devised for the purpose of a new offence than the one which we provisionally proposed in our working paper, namely, a requirement that the defendant knew or believed the defamatory statement in question to be false. Others, including those suggested on consultation, might well in practice prove to be too wide in scope and therefore to an unacceptable degree constitute a threat to freedom of expression.

---

[88] See generally *Duncan and Neill on Defamation,* 2nd ed., (1983), Ch. 17.

[89] See para. 7.14, n.25, above and 7.63, below.

[90] Viz. subjective recklessness: see *R.* v. *Cunningham [1957] 2 Q.B. 396* and *W.* v. *Dolbey* [1983] Crim. L.R 681 (Offences against the Person Act 1861, ss. 20 and 23).

[91] Cf. J. R. Spencer, "Criminal Libel—The Law Commission's Working Paper" [1983] Crim. L. R. 524 at p.531; and see para. 7.61, n.99, below.

[92] See Working Paper No. 84, para. 8.36 and para. 7.45(ii), above.

7.53 Our conclusion is, therefore, that a mental element requiring proof that the defendant knew or believed the defamatory information at issue to be false is the only satisfactory choice consistent with the objective of confining the offence to penalising serious cases of deliberate defamatory lies. On the other hand, we recognise that, to recommend this mental element without more would in practice make for an offence which might well operate effectively only in a narrow range of cases.[93] What, then, are the possible options open to us to ensure that the offence is effective in cases where, in the absence of an admission, there may be no evidence as to what the defendant believed? There are in our view three courses worthy of consideration.

Burden on the prosecution

7.54 The first option would leave the onus on the prosecution to prove the defendant's knowledge or belief as to the falsity of the defamatory statement. As we have already explained, this would in effect mean that the cases in which all the evidence necessary for a successful prosecution would be made available to the court, both at committal stage and the hearing of the case, would probably be confined to those in which the defendant knew, by virtue of his personal observation of, or participation in, the relevant acts, that the information in question was untrue, or in which he had admitted it to be untrue, or in which by reason of particular circumstances the court would be able to rule that knowledge of falsity could properly be inferred by the jury from other evidence.[94] This would make for a narrow offence, which would nonetheless be effective in some of the most serious cases, such as *Penketh*.[95] In our view, this would be acceptable if no alternative were thought to be both workable in practice and generally acceptable in principle.

Shifting the burden of proof

7.55 As described above, a shift in the burden of proof to the defendant to prove that he did not know or believe the defamatory information to be false would make available to the court a wider range of evidence relating to this issue and hence permit the offence to be effective in a wider range of cases. The burden on the defendant might be evidential or persuasive. In the first case, the burden would be less onerous: it would require only that evidence be adduced sufficient to raise an issue as to the defendant's state of mind, whereupon the burden would again be on the prosecution to prove beyond reasonable doubt that the defendant did know or believe the information to be false. A persuasive burden would require the defendant to satisfy the jury on a balance of probabilities that he did not know or believe the statement to be false.

[93] See para. 7.43, above.

[94] E.g accusations by A of serious crimes committed by B at various times at which it could be proved that A had knowledge from which he would have known that B had not committed those crimes.

[95] (1982) 146 J.P. 56 see para. 5.5, n.7, above.

7.56 Of the two types of burden, the persuasive burden is the more satisfactory when assessed against the purpose of providing a fully workable offence. But in the present state of the criminal law we do not think it is acceptable. To justify such a burden exceptional reasons must exist, and arguably do exist in those offences where such a burden is currently imposed.[96] Having regard to the views expressed on our consultation and the general antipathy towards placing a burden on the defence in such a context, we do not think it possible to assert that the importance of an offence of criminal defamation for the general purposes of the criminal law as a whole is such that these exceptional reasons can rightly be said to exist in the present case.

7.57 An evidential burden, we believe, would be likely to be ineffective in many of the cases in which a burden on the defendant would be required for proof of his state of mind. If the burden were evidential, a defendant could cross-examine or call evidence of the means of knowledge which *might* have led him to believe the defamatory statement to be true, and thereby to raise an issue, but he would not have to give evidence of what was his *actual* state of mind: this crucial question need never be before the court. Further, we think it likely that even an evidential burden on the defence would meet with resistance; and since its utility would be very doubtful, we do not recommend its adoption.

Inference of knowledge or belief as to falsity

7.58 In this connection we have re-examined the methods adopted in other crimes in order to meet parallel problems which we outlined above, and in particular the principle relating to recent possession of stolen goods developed in the context of cases of handling under section 22 of the Theft Act 1968.[97] Where it is proved that the defendant had in his possession property which was shown to have been stolen a short time before he got possession, the principle, as developed by the courts, permits the jury to be directed that they may infer that the defendant knew the goods were stolen if he has offered no explanation to account for his possession of the property, or if they are satisfied that any explanation, consistent with innocence which he had given, was untrue.

[96] See e.g.. Prevention of Corruption Act 1916, s. 2: on a charge of prevention of corruption under the Prevention of Corruption Act 1906, a consideration is to be deemed to be given corruptly unless the contrary is proved; Prevention of Crime Act 1953, s. 1: penalising with up to two years' imprisonment and a fine on indictment anyone "who without lawful authority or reasonable excuse, the proof whereof shall lie on him, has with him in any public place any offensive weapon"; Sexual Offences Act 1956, s. 30(2) which presumes anyone who knowingly lives with a prostitute "to be knowingly living on the earnings of prostitution [penalised under subs. (1)], unless he proves the contrary" (see also ss. 6 and 47); Misuse of Drugs Act 1971, s. 28: proof of lack of knowledge to be a defence in proceedings for certain offences relating to possesion of controlled drugs; Magistrates' Courts Act 1980, s. 101: burden of proving any exceptions, excuses, etc. relied on by defendant to lie on him (the standard of proof is that of the balance of probabilities: *Islington London Borough Council* v. *Panico* [1973] 1 W.L.R. 1166). In regard to these offences, it may be observed that having an offensive weapon in a public place can properly be said to be an important mischief which may justify the reversal of the burden. In the case of the Misuse of Drugs Act 1971, s. 28, the social evil is obvious, as is the difficulty in obtaining evidence. In the case of the Prevention of Corruption Act 1916, s. 2, the criminal law is reflecting the civil law on the subject and in the limited field in which the Act applies the difficulty of obtaining positive evidence of corruption is again clear. In the case of the Magistrates' Courts Act 1980, s. 101, many of the offences are regulatory, where good regulation may require the defendant to explain his position and to be subject to regulation if he fails to do so in the specified circumstances in which the regulation would otherwise apply: and see e.g. the summary offence under the Representation of the People Act 1983, s. 106, n. 101, below.

[97] See para. 7.44, above.

Thus if the prosecution proves certain specified facts, the defendant may take one of two courses. He may say nothing, in which event the jury may infer that he knew the the goods to be stolen. Alternatively, he may give evidence to explain his possession; and if the jury reject that evidence, the jury may again infer guilty knowledge. In effect this operates in a way similar to the placing of an evidential burden on the defendant without, however, any express shift in the burden of proof.

7.59 We have been attracted by the idea of adopting such an inferential provision in the context of the offence of criminal defamation. It is possible to devise such a provision which, given legislative form, would at first sight assist in the kind of case where we contemplate difficulty in proving a defendant's state of mind. For example, given proof that the defendant has communicated false information which is seriously defamatory of the victim, specific provision could be made to permit the jury to infer that the defendant knew or believed it to be false if in those circumstances a reasonable person would have so believed, provided they are satisfied that any evidence given by the defendant about his belief is itself untrue.

7.60 We have, however come to the conclusion that such a provision would not operate satisfactorily in the context of the offence of criminal defamation as it does in the context of handling stolen goods. Experience has shown that, if goods are stolen, a person found in possession of them very soon after the theft is likely to have known that they were stolen from the circumstances in which he himself acquired them. If he acquired them innocently, the explanation of the circumstances of acquisition is a simple story to tell and one which it is reasonable to require of him. Communication of a seriously defamatory statement, however, is a very different primary fact and common experience does not indicate any clear answer as to whether those who publish such statements do or do not believe them to be true. The defamatory statement communicated would normally reveal little or nothing as to the information upon which the accused relied in making it, or as to the credibility of that information to the accused. Further, while in some cases a requirement that the grounds of belief be stated would not be particularly burdensome, there would be cases in which such a requirement would be exceedingly oppressive. What is required in the context of criminal defamation is evidence about the defendant's *actual* knowledge or belief; and it seems to us that an evidential provision would not succeed in securing this evidence without in substance putting a burden of proof upon the defendant which in order to exonerate him would require him to give that information. We have already rejected that option.

(e) Recommendation

7.61 Our conclusion as to the appropriate mental element, as already noted, is that the proposed offence of criminal defamation should require proof that the defendant knew or believed the false and seriously defamatory information at issue to be false; and we so *recommend.*[98] We have further concluded that no additional provision should be made which would assist in securing evidence of what it was that the defendant knew or believed. We have pointed out that the consequence of this omission is that it is in practice likely that the offence will

[98] See Appendix A, cl. 1 (1).

be of most value in those cases where it can be shown that the defendant knew or believed the information at issue to be false by virtue of his own personal participation in or observation of events, or where he has made an admission of falsity. It is possible that we overestimate the difficulties of proof in other cases;[99] but even if we do not, the new offence would be capable of dealing with the clearest cases of criminal defamation, which we have throughout this report emphasised is its primary purpose.

4. UNINTENTIONAL COMMUNICATION

7.62 We have already indicated that the act of communication implies awareness of the fact that information is being communicated. Given the stringent mental element recommended above, we also doubt if occasions will arise in practice in which a communication of information of the specified character and with the specified mental element will be made without the intention to communicate it. The risk of such liability exists in the context of provisions designed to prevent the dissemination of material containing false statements, such as the offence under section 14(1) of the Trade Descriptions Act 1968, penalising any person who in the course of a trade or business makes a statement which he knows to be false in relation to certain specified matters. The House of Lords has held[100] that this offence may be committed in circumstances where the statement has been made, even though steps have been taken to correct the falsity after it has come to the maker's knowledge, if after making it another has acted in reliance upon the correctness of the statement in question. That offence, however, is regulatory in character and differs markedly in purpose from our proposed offence. Where, for example, a political candidate distributes material prepared by his agent which contains false and seriously defamatory information about an opponent (which he knows to be false but which he does *not* know to be contained in the material), we believe he would be liable for communicating it only if, after learning of its presence, he then gives instructions for its further distribution.[101] That is the result which we intend and we do not think that any special provisions are required to deal with unintentional communication.

C. Defences

1. REDUCTION IN NUMBER OF DEFENCES

7.63 Defences to a civil action and to the common law offence play a prominent role in the law of defamation. We have seen that, as between the civil law and criminal libel, some of the defences differ, particularly as regards

[99] Cf. J. R. Spencer, "Criminal Libel: The Law Commission's Working Paper" [1983] Crim. L. R. at p.531: "perhaps [the problem of proof] is not so serious as the Law Commission fear. Where the statement is shown to be false, and circumstances suggest that the defendant knew it to be so, there exists a prima facie case against him, and a reasonable jury is likely in practice to convict if he gives no evidence; and in the absence of such circumstances, there is surely no reason to send him to trial at all, let alone to drive him into the witness-box having got him there."

[100] *Wings Ltd.* v. *Ellis* [1984] 3 W.L.R. 965.

[101] He would also be liable to be charged with an illegal practice under the Representation of the People Act 1983, s. 106, penalising anyone who, before or during an election, for the purpose of affecting the return of a candidate, makes or publishes a false statement of fact about the candidate's character or conduct, unless he can show that he had reasonable grounds for believing, and did believe, the statement to be true (summary; maximum penalty, level 3: s. 109).

the defences of truth and justification.[102] The new offence which we recommend will require proof by the prosecution that the defendant knew or believed the communication in question to be defamatory and false. These requirements will remove the need for any defence of unintentional defamation[103] or for any defence of justification.[104] Nor in our view is there a need for any defence of fair comment. At civil law[105] the defence can, if raised, be defeated by proof of express malice.[106] The requirements of the new offence would make the defence in large measure irrelevant since, on proof of the mental element, there would in most cases be sufficient evidence that the defendant was activated by malice.

2. ABSOLUTE PRIVILEGE

7.64 There remain, however, the defences of absolute and qualified privilege, which apply to criminal libel to the same extent and generally[107] in the same way as they do to the tort.[108] Absolute privilege is of limited scope but confers complete protection. Although the new offence of criminal defamation will require proof that the defendant knew or believed the information to be both false and seriously defamatory, commentators on our working paper agreed with our provisional view[109] that this requirement did not preclude the need to grant the protection provided by absolute privilege for statements made on particular occasions where that defence would apply. The privilege applies in respect of statements—

(a) made in the course of Parliamentary proceedings;
(b) protected by the Parliamentary Papers Act 1840;[110]
(c) made in the course of judicial or quasi-judicial proceedings;
(d) made by one officer of State to another in the course of duty;
(e) protected by the Parliamentary Commissioner Act 1967;[111]
(f) made in reports by the Monopolies Commission and the Director General of Fair Trading under the Competition Act 1980;
(g) which are fair and accurate reports in newspapers of judicial proceedings in the United Kingdom if published contemporaneously.[112]

---

[102] See paras. 4.2–4.3, above.

[103] See Defamation Act 1952, s. 4. The requirements of the mental element also make it unlikely that anyone would be convicted save where the words complained of were in their ordinary and natural meaning defamatory. We therefore make no provision in regard to special or innuendo meanings save those explained in para. 7.13, above.

[104] But see para. 7.12 and n. 20 above; and see Defamation Act 1952, s. 5.

[105] Fair comment has played a negligible part in the criminal law although it is probably available: see *Archbold*, 41st ed. (1982), para. 25.60.

[106] See para. 7.50, above.

[107] The differences are accounted for by the exclusion of criminal libel from the provisions of the Defamation Act 1952: see para. 4.3, above.

[108] See *R.* v. *Perry* (1883) 15 Cox C.C. 169 and *R.* v. *Rule* [1932] 2 K.B. 375; see also *R.* v. *Wicks* (1936) 25 Cr. App. R. 168, 173 and *R.* v. *Munslow* [1895] 1 Q.B. 758, 765.

[109] Working Paper No. 84, para. 8.45.

[110] Under s. 1, all reports, papers, votes and proceedings published by or under the authority of either Houses of Parliament.

[111] See s. 10(5).

[112] Such privilege appears to exist at present by virtue of the Law of Libel Amendment Act 1888, s. 3; and is limited to courts exercising judicial authority in the United Kingdom by the Defamation Act 1952, s. 3.

We do not recommend definition of the situations in which absolute privilege may be claimed. There are in our view no satisfactory definitions which could be devised to cover the statements falling within (c) and (d) above without there being a risk of the meaning in the criminal law diverging from that which emerges from the very extensive authority on these matters in the civil law;[113] and in this area, which is somewhat marginal to the criminal offence, we regard it as preferable that there should be no possibility of such divergence. Accordingly we *recommend* that the defence of absolute privilege should be available to charges of the new offence of criminal defamation, and that it should be provided that the circumstances in which it should be available are those in which it would be in an action for civil defamation.[114].

3. QUALIFIED PRIVILEGE

7.65 Qualified privilege is available in a wider range of situations than absolute privilege,[115] but the plea will be defeated if the prosecution adduces sufficient evidence to show that the defendant was actuated by malice in making the publication complained of. In this context malice, as we have noted,[116] means that the defendant was actuated by some improper motive in that he was not using the privileged occasion honestly for the purpose for which the law gives protection but was actuated by some indirect motive not connected with the privilege. In many instances it seems clear that an absence of belief in the truth of a statement is conclusive evidence of malice,[117] but in other cases this is not so. In addition to the absolute privilege which attaches to contemporaneous newspaper reports of judicial proceedings in the United Kingdom, if fair and accurate,[118] qualfied privilege attaches:—

(a) at common law, to publication without malice of a fair and accurate report of proceedings before a judicial tribunal exercising its jurisdiction in open court; and

(b) by section 7 of the Defamation Act 1952, to publication in a newspaper of any of the matters scheduled in the Act. Most of these matters again consist of reports which must be fair and accurate.

---

[113] We considered in this connection the definitions of "court" in the Contempt of Court Act 1981, s. 19 ("includes any tribunal or body exercising the judicial power of the State") and of "judicial proceedings" in our Report on Offences relating to Interference with the Course of Justice (1979) Law Com. No. 96, Appendix A, draft Administration of Justice (Offences) Bill, clauses 1–2. However, the first is unsatisfactorily imprecise while the second relies on the power to receive evidence on oath, which is not the sole criterion in the law of defamation for holding proceedings to be "quasi-judicial".

[114] Appendix A, cl. 2(1).

[115] E.g. statements made in the performance of a legal, social or moral duty to a person who has a corresponding duty or interest to receive them, statements made in the protection of a common interest to a person sharing the same interest, fair and accurate reports of judicial or Parliamentary proceedings.

[116] See para. 7.50, above.

[117] See *Horrocks* v *Lowe* [1975] A.C. 135, 149–150 *per* Lord Diplock: "if it be proved that (the defendant) did not believe that what he published was true, this is generally conclusive evidence of express malice, for no sense of duty or desire to protect his own legitimate interests can justify a man in telling deliberate and injurious falsehoods about another." Lord Diplock said that this did not apply in "the exceptional case where a person may be under a duty to pass on, without endorsing, defamatory reports made by some other person" but, as we note in this paragraph, there are other exceptions to the general proposition.

[118] See para. 7.64, above.

In these instances, publication of matter which the publisher knows to be false cannot, we think, be *conclusive* evidence of malice (although it may, depending on the circumstances of the case, be *some* evidence), since in many instances a publisher may properly publish reports of evidence in proceedings which he does not believe to be true, for example, in proceedings which lead to the acquittal of a defendant.[119] In such cases, he is aware that evidence adduced in support of the defendant's guilt may be false.

7.66 Although the mental element of the offence of criminal defamation is to include a requirement that the defendant knew or believed the statement at issue to be false, our analysis of qualified privilege demonstrates that, at least in theory, proof of that mental element would not in all cases provide sufficient evidence of the element of malice which would defeat a plea of qualified privilege. In the specific cases which we have mentioned, no general rule can be laid down as to what would be required to establish an improper motive. As a general principle, we do not think that there should be cases in which it would be possible to charge a person with criminal defamation but not to bring an action for defamation against him. Consequently, it seems to us that, on a charge of criminal defamation, qualified privilege should be available as a defence which, in general, should be subject to the same limitations, and capable of being defeated in the same circumstances, as it is in an action for civil defamation. We stress that the cases in which the defence would be in issue would in all probability be rare and in any event would be unlikely to be of the kind in which proceedings would be considered appropriate. Moreover, there are certain statutory exceptions to the qualified privilege bestowed upon newspapers by section 7 of the Defamation Act 1952 which we think it would be undesirable to retain in the application of the defence to criminal defamation.[120] We believe, too, that the accused should not bear the burden of proving that the defence is available: it should be sufficient for him to provide enough evidence to show that privilege is a live issue in the case. Subject to these qualifications, however, we think that qualified privilege, like absolute privilege, should be available as a defence to any charge of criminal defamation.[121] We *recommend* accordingly.

---

[119] Cf. *Gatley on Libel and Slander,* 8th ed. (1981), para. 786, n. 44.

[120] By s. 7(2) the defence is not available if at the plaintiff's request the defendant has refused to publish a reasonable letter or statement by way of explanation etc. We think this is inappropriate in the context of criminal proceedings; cf. para. 7.76, below. By s. 7(3), the section does not protect "the publication of any matter the publication of which is prohibited by law, or of any matter which is not of public concern and the publication of which is not for the public benefit." Cf. para. 7.48, above.

[121] See Appendix A, cl. 2. Clause 2(2) and (3) makes provision for excluding the exception to qualified privilege under the Defamation Act s. 7(2) and (3) applying in civil actions, and for placing an evidential burden upon the defendant to raise the issue of both absolute and qualified privilege. In the absence of cl. 2(3), the exception to liability which the clause provides would place a persuasive burden on the defendant to prove on a balance of probabilities that the defence applied: *R.* v *Edwards* [1975] Q.B. 27.

D. Procedural provisions

1. CONSENT TO PROSECUTION

7.67 At present no prosecution for criminal libel may be commenced against the proprietor, publisher, editor or any person responsible for the publication of a newspaper for any libel published in it without the orders of a "judge at chambers" being first obtained.[122] Although the person accused has the opportunity of being heard by the judge on the application for the order, no appeal lies from his decision. The procedure is unique to criminal forms of libel[123] and owes its origin to historical accident.[124] It is no part of the normal criminal process for a judge to be involved in deciding whether, in his discretion, criminal proceedings may be brought,[125] and, having regard to the development of other means of media communication where the provision has no application, it now appears anomalous. These reasons led us provisionally to propose in our working paper that these special provisions should no longer apply, and there was general, although not unanimous, agreement with this on consultation.

7.68 We did, however, take the view that the consent of the Director of Public Prosecutions should be required for the institution of proceedings and, indeed, that he should have sole conduct of proceedings for a new offence of criminal defamation.[126] Sole conduct of proceedings by the Director we thought desirable in order that the personal interest of the person defamed should not at any stage dictate the conduct of the proceedings; the Director's judgment in the public interest would be exercised not only in the decision whether to initiate proceedings but in the manner in which the proceedings were conducted. A number of our commentators disagreed with the proposal to keep the conduct of proceedings in the hands of the Director, including the Director himself, and we do not now favour it. It is, however, necessary to include a provision for consent to institution of proceedings since we believe that every case of criminal defamation will require particular consideration of whether it is in the public interest that the criminal law should intervene, having regard to the possible effects upon the victim of the defamatory information in question. We also accept the suggestion that, in offences closely concerned with the issue of freedom of speech, it is preferable to require the consent of the Attorney General to the institution of proceedings, as is currently the case in analogous areas.[127] We *recommend* accordingly.[128]

---

[122] Law of Libel Amendment Act 1888, s. 8.

[123] It applies also to blasphemous and seditious libel and was used to initiate proceedings in *Whitehouse* v. *Lemon* [1979] A.C. 617.

[124] See Working Paper No. 84, para. 2.12 and J. R. Spencer, "The Press and the Reform of Criminal Libel" in Glazebrook (ed.), *Reshaping the Criminal Law,* (1978), p. 266.

[125] See *R.* v. *Humphrys* [1977] A.C. 1, 46 *per* Lord Salmon.

[126] Working Paper No. 84, paras. 8.55-8.56.

[127] E.g. Theatres Act 1968, s. 8, which provides that no proceedings under ss. 2, 5 or 6 of the Act or for an offence at common law committed by the publication of defamatory matter in the course of a performance of a play may be instituted without the consent of the Attorney General.

[128] See Appendix A, cl. 4.

2. PROOF OF CONVICTIONS

7.69 Section 74 of the Police and Criminal Evidence Act 1984 provides that in any criminal proceedings the fact that a person other than the accused has been convicted of an offence shall be *admissible* in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that that person committed that offence.[129] By contrast, in cases of civil defamation, section 13 of the Civil Evidence Act 1968 provides for proof of conviction to be *conclusive* evidence that the person concerned committed the offence.[130] It is perhaps unlikely that consent to institution of proceedings would be granted where a convicted person sought to re-open the question of his guilt by means of criminal proceedings against someone for referring to his having committed the offence. It seems to us, however, that, having regard to the recent history of criminal libel,[131] this possibility should be altogether eliminated. This is why, in our working paper, we proposed a provision corresponding to section 13 of the 1968 Act. While most of those commenting on this agreed with us, two criticisms merit further attention.

7.70 The first comment took the form of a query as to whether it might not be possible to propose a provision similar to section 13 of the 1968 Act making the fact of an *acquittal* conclusive evidence of that acquittal in a trial on a charge of the new offence of criminal defamation. In relation to civil proceedings for defamation, this was in fact canvassed during the passage through Parliament of the Civil Evidence Bill, which became the Act of 1968, and was then rejected because the high standard of proof in criminal proceedings provided sufficient protection for the acquitted, and in any event "it could be greatly in the public interest that a rogue lucky enough to have got off should be publicly exposed".[132] In our view, it would be undesirable to depart from the policy of the 1968 Act; there has to our knowledge been no instance which indicates a need for a change of policy.

7.71 The second comment was to the effect that, if a provision such as we suggested were made, allowance should still be made for a person to prove that, notwithstanding his conviction, he did not commit an offence, because of the cumulative consequences of a wrongful conviction. The real issue, it seems

[129] This implemented a recommendation of the Criminal Law Revision Committee in their Eleventh Report, Evidence (General), (1972) Cmnd. 4991, paras. 217-219.

[130] This implemented a recommendation of the Law Reform Committee in their Fifteenth Report, The Rule in *Hollington* v. *Hewthorn* (1967), Cmnd. 3391, para. 30; and see *Hunter* v. *Chief Constable of the West Midlands Police* [1982] A.C. 529, 543-544 *per* Lord Diplock.

[131] In *Gleaves* v. *Deakin* [1980] A.C. 477 some of the libel charges were based on statements concerning previous convictions of the prosecutor: see *The Times*, 28 February 1980. Since s. 13 of the Civil Evidence Act 1968 did not apply to criminal libel, the defendants had to reprove the guilt of the prosecutor in the earlier trials by calling a number of prosecution witnesses who had given evidence in those trials to testify again as to the conduct which led to his convictions. The Criminal Law Revision Committee had previously rejected a provision parallel to s. 13 for criminal libel, recommending only the provision now to be found in s. 74 of the Police and Criminal Evidence Act 1984. However, the reasons given for rejecting a s. 13 provision in respect of criminal libel (the rarity of prosecutions and the unlikelihood of committal in the event of a convicted person attempting to re-open the question of his guilt by prosecuting someone for having referred to his having committed the offence) must be viewed in the light of the subsequent proceedings in *Gleaves* v. *Deakin*.

[132] *Hansard* (H.C.), vol. 763, col. 431 (24 April 1968).

to us, is whether the proof of conviction should be admissible evidence of the commission of the offence as it is under section 74 of the Police and Criminal Evidence Act 1984, or whether it should be conclusive evidence as under section 13 of the 1968 Act. The suggestion that, notwithstanding any provision applying to the new offence of criminal defamation, a person should be allowed to prove his innocence would, in substance require the general law under section 74 of the 1984 Act to be applied rather than a provision similar to section 13 of the 1968 Act, since it is only under the former that such proof would be admissible. We do not think this would be appropriate. We have already mentioned the unsatisfactory recent history of criminal libel at common law which suggests the need for further provision. In addition, it seems to us difficult to see why, if a convicted person may not use the avenue of the civil law of defamation to reopen the question of his guilt, he should be permitted to do so by means of the criminal law.

7.72 Our conclusion is therefore that provision corresponding to section 13 of the Civil Evidence Act 1968 should be made, to the effect that in proceedings for the new offence in which the question whether or not a person has committed a criminal offence is relevant to the matter in respect of which the proceedings have been instituted, proof that the person stands convicted of the offence shall be conclusive evidence that he committed it. We *recommend* accordingly.[133]

3. OTHER POSSIBLE PROVISIONS

7.73 Under section 11(1) of the Criminal Justice Act 1967 the giving of notice is presently required for evidence in support of an alibi; it provides that "on trial on indictment the defendant shall not without leave of the court adduce evidence in support of an alibi unless . . . he gives notice of particulars of the alibi", the period allowed for this being seven days from the date of committal. Such requirements do not at present figure elsewhere in the law, although the Royal Commission on Criminal Procedure considered that, notwithstanding possible problems in devising effective sanctions, there was scope for extending such defence disclosures where defences "by taking the prosecution by surprise can cause the trial to be adjourned while investigation is carried out to confirm or disprove them".[134]

7.74 Opportunities for disruption could well occur under the new offence of criminal defamation because of the exceptional difficulties of proof which it offers, and for that reason we provisionally proposed in our working paper[135] that notice should be required of the defendant in respect of three matters:

(a) indicating his intention to contest the allegation that the information at issue was false and to require the prosecution to prove that it was false;

(b) giving particulars of his grounds for not believing the information at issue to be false; and

---

[133] See Appendix A, cl. 5. The Police and Criminal Evidence Act 1984, s. 73 sets out a method of proving a conviction (or acquittal) and separate provision for this is therefore unnecessary. Sect. 74(4)(b) of the Act provides that s. 74 does not prejudice the operation of any enactment whereby a conviction is for the purpose of any other proceedings made conclusive evidence of any fact.

[134] See (1981) Cmnd. 8092, paras. 8.20 and 8.22.

[135] Working Paper No. 84, paras. 8.48, 8.57–8.58.

(c) indicating his intention to rely on the defences of absolute or qualified privilege.

On reconsideration, we have decided not to recommend any notice of this description. That which would have been required under (a) now seems to us superfluous, since proof of falsity on the part of the prosecution is an integral element of the offence; the requirement specified in (b) assumes the existence of proof of falsity; and we do not now think that a notice requiring the details in (b) would be justified. For the latter to work effectively it would require details of sources, including identification of names and addresses. Such a requirement would, we believe, be highly contentious and could be justified only for pressing reasons. However, the limitations upon the proposed offence which we have discussed above[136] make it likely that most prosecutions of the offence will concern cases in which proof of the knowledge or belief of the defendant as to falsity will be forthcoming because of the defendant's participation in or observation of matters in issue, or of his admission. In those cases a requirement to disclose sources is probably not needed. Thus the pressing reasons which might otherwise justify it would not be present. Since (a) and (b) are therefore not needed, we do not think that, on its own, a notice of intention to rely on the defences specified in (c) is sufficiently important to be retained. Both defences are likely to be exceedingly rare and argument in relation to them is more likely to centre on points of law than a dispute as to the facts. Consequently, the prosecution is highly unlikely to have to request an adjournment for further enquiries. In the circumstances, we do not recommend the adoption of a notice in relation to this or the other matters specified above.

E. Trial and penalty

7.75 Most of our commentators agreed with the provisional proposals in our working paper that a new offence of criminal defamation should be triable only on indictment, with a maximum penalty of two years' imprisonment and a fine. Criminal libel at common law is triable only on indictment and the new offence would be applicable only in the more serious cases which would be capable of prosecution under the existing law. Moreover, we take the view that if there is a dispute as to the facts in this kind of case it would be preferable for the matter to be resolved by a jury. For present purposes we are therefore content to adhere to our provisional view that the new offence should be triable only on indictment. Nevertheless, there may well be cases which could be dealt with adequately by a magistrates' court, in relation to which the Attorney General would regard it as in the public interest to give his consent to the institution of proceedings. Thus if and when it is decided to implement our recommendations by introducing legislation based upon our draft Bill, it will be for consideration whether the new offence should, by contrast with the provision made in regard to it in our Bill,[137] be triable either way, either summarily or on indictment. As regards the maximum penalty, one commentator suggested a

[136] See para. 7.61, above

[137] See Appendix A, cl. 3. In this connection it is noteworthy that the penalty initially imposed on the defendant in *Penketh* (see para. 5 n.7, above) was an order for conditional discharge. A substantial sentence of imprisonment was imposed only after persistent breach of that order.

maximum penalty of five years' imprisonment, but this seems to us too high and out of accord with general principles, having regard to the maxima which may be imposed for other offences dealing with what may loosely be termed abuses of freedom of expression.[138] Under section 4 of the Libel Act 1843 the maximum is two years' imprisonment and a fine for the common law offence where knowledge of the falsity of the libel is proved. We believe that this would be right for the new offence of criminal defamation, which likewise will require proof of knowledge or belief as to falsity, although it should be stressed that it is unlikely that any save the most exceptional case would merit imprisonment. Thus we *recommend* a maximum penalty of two years' imprisonment and a fine.[139]

7.76 In our working paper we suggested that, after the defendant has been convicted, it might be possible to give the court power to order him to publish a statement retracting his allegations, with the sanctions attaching to contempt of court in the event of failure to do so. This attracted little comment and we do not ourselves favour it. If the public interest is the determining factor in the decision to intitute proceedings, that interest is also best served by the normal processes of the finding of guilt and the sentence imposed on the defendant, together with the publicity attendant on the trial and conviction.

F. Abolition, repeals and consequential amendments

7.77 The offence of criminal defamation described in preceding sections is intended to replace, so far as we consider to be necessary, criminal libel at common law. In accordance with our recommendation for abolition of criminal libel, specific provision is made for this in our draft Bill.[140]

7.78 Consequential upon this abolition, there is a substantial quantity of legislation which is in need of repeal or amendment. We mention these in the following paragraphs.

7.79 Some of this legislation appears to be capable of applying to seditious or blasphemous libel and so cannot be repealed outright; but provision must be made to ensure that the relevant statutes could not be construed so as to have some application to the new offence.[141] The first of these, chronologically, is the *Libel Act 1792* (Fox's Libel Act), permitting the jury to give a general

[138] The maximum sentence for publication of obscene matter under the Obscene Publications Act 1959, s. 2, and presentation of obscene performances of plays under the Theatres Act 1968, s. 2, is three years' imprisonment; for incitement to racial hatred under the public Order Act 1936, s. 5A, two years' imprisonment.

[139] See Appendix A, cl. 3.

[140] See Appendix A, cl. 6. The term "defamatory libel" is used here: see para. 2.1, n. 1, above.

[141] See Appendix A, cl. 7(2).

verdict on the whole matter in issue in any trial of criminal libel, rather than being required to find a verdict of guilty on proof of publication.[142] Next is the *Libel Act 1843*. Sections 4 and 5 of this act make provision for the penalties for criminal libel, section 6 provides for a defence to that offence of truth and section 7 for a no-negligence defence. So far as these relate to criminal libel, all would be spent by virtue of the abolition of the common law offence.

7.80 The *Newspaper Libel and Registration Act 1881* and the *Law of Libel Amendment Act 1888* may be dealt with together. Section 4 of the 1881 Act[143] relates to receipt by magistrates' courts of evidence of defences on charges of criminal libel against proprietors, publishers or editors of newspapers. Section 9 of the 1888 Act makes a person charged with criminal libel, and his or her spouse, competent witnesses. The first provision would be spent insofar as it relates to defamatory libel if our recommendations were implemented. The second was surperseded by section 1 of the Criminal Evidence Act 1898 and section 80 of the Police and Criminal Evidence Act 1980. Section 8 of the 1888 Act, requiring the order of a judge at chambers for institution of certain proceedings for criminal libel may be repealed so far as it relates to defamatory libel.

7.81 By express provision in section 17(2), the *Defamation Act 1952* does not affect the law relating to criminal libel. However, if this subsection were repealed or restricted to blasphemous and seditious libel, other provisions of the Act might be construed as having some application to the new offence. The Bill therefore substitutes a new subsection in this Act.[144] Most of the provisions of the Act can have no application to the new offence of criminal defamation recommended in this report because express provision is made in the draft Bill in different terms for some of the matters covered by the Act; for example, broadcast statements, unintentional defamation and justification.[145] We have made clear that the defence of fair comment, which is modified by the 1952 Act,[146] is to have no application in relation to the new offence. There are, however, provisions in the 1952 Act which it seems to us should apply to the offence recommended in this report in the same way and to the same extent as they do to the civil law of libel and slander. In this connection we have already referred to the defences of qualified[147] and absolute privilege,[148] and we think that the provisions of the Act dealing with privilege must apply to the new offence with the exceptions which we have already discussed.[149]

---

[142] The Act is not necessary for the preservation of this jury power: modern jurisprudence would deny the judge alone the power to determine whether matter is defamatory. Under a modern statute, the court would decide whether matter was capable of being defamatory, while the jury would determine whether in the circumstances of the particular case it was defamatory.

[143] Sect. 5, also dealing with criminal libel, was repealed by the Criminal Law Act 1977, s. 65 and Sched. 13.

[144] See Appendix A, cl. 7(1).

[145] See Defamation Act 1952, ss. 1, 4 and 5 and see paras. 7.12, 7.15 and 7.34, above and Appendix A, cl. 1(1) and (3).

[146] See Defamation Act 1952, s. 6.

[147] See para. 7.66, above.

[148] See para. 7.65, above.

[149] See para. 7.66, above and Appendix A, cl. 2(2) and 7(1).

7.82 The *Theatres Act 1968* contains various provisions relating to defamation. The references to criminal libel at common law may be repealed. These occur, first, in section 4, which provides for words spoken in the performance of a play to be treated as publication in permanent form; special provisions are made in respect of publication for the offence recommended in this report which make such a provision otiose in relation to it.[150] Secondly, in section 7, relating to defamatory matter published during certain performances of plays, there is a reference to proceedings for an offence "at common law". A third reference appears in section 8. All these references are scheduled for repeal in the draft Bill.[151]

---

[150] See para. 7.16, above and Appendix A, cl. 1(3)(b).
[151] See Appendix A, Sched.

PART VIII

MISCELLANEOUS RELATED MATTERS

8.1 The preceding sections have described our recommendations for a new offence of criminal defamation and cover all the matters which in our view are necessary for inclusion in legislation creating the offence. There are, however, a number of disparate matters relating to the offence with which it is convenient to deal at this stage. They include matters raised in our working paper or by commentators on consultation in relation, for example, to the possibility of making further provision for a summary offence and special provision for particular classes of people such as the Royal Family, those in public service and police officers. We refer also to the possibility of special verdicts and the position as to punitive damages.

A. A summary offence?

8.2 One of our commentators suggested that, since the offence proposed in our working paper was to be triable only on indictment, there should in addition be a summary offence penalising publication of a defamatory statement which was likely to cause a breach of the peace. A genuine instance was given where it was thought that such an offence would have been useful, where a certified extract from a court register showing a person's conviction for an offence some years ago but unspent under the Rehabilitation of Offenders Act 1974 was photocopied and pasted on billboards and shop windows, causing distress.

8.3 It is certainly possible to view such instances as indicating a need for some sanction, but we do not think an offence based on the concept of the likelihood of a breach of the peace would be appropriate. In the first place, the concept is, as a result of decisions in the context of section 5 of the Public Order Act 1936,[1] not free of technicalities which in some circumstances will have the effect of restricting its application. More importantly, we do not think that the elements of any proposed offence should be such that they might encourage someone to think that his reaction to statements about him should be that he might cause a breach of the peace; still less should he be encouraged to think that, in order that a conviction might be secured, he should give evidence that such might have been his reaction. We stated our objection to this possible criterion in similar terms in our working paper[2] and a substantial number of commentators agreed with us. In our view the appropriate criterion for an offence dealing with defamatory statements is that described in preceding sections relating to the recommended offence of criminal defamation and, for the reasons which we there gave, we have recommended that the new offence should be triable only on indictment.[3] Other instances would properly fall to be dealt with as minor offences of criminal damage, if they involve pasting upon

[1] See *Parkin* v. *Norman* [1983] Q.B. 92, *Marsh* v. *Arscott* (1982) 75 Cr. App. R. 211, *Read* v. *Jones* (1983) 77 Cr. App. R. 246; see further Report on Offences relating to Public Order (1983), Law Com. No. 123, paras. 5.14–5.18, and the Review of Public Order Law (1985), Cmnd. 9510, para. 3.9.

[2] See Working Paper No. 84, para. 7.33.

[3] See para. 7.75, above; it will be noted that we there set out the arguments for making the offence triable either way and suggest that the matter may merit reconsideration in this respect if our draft Bill is enacted.

buildings or spraying buildings with paint,[4] under section 5 of the Public Order Act 1936, or under by-laws relating to posting of notices and the like. We therefore do not recommend the creation of a further summary offence having criteria different from the offence of criminal defamation recommended above.

B. Special protection for certain classes of people?

8.4 In our working paper[5] we questioned whether special protection might be needed for three categories of people in addition to that given by the offence of criminal defamation, having regard to the relatively narrow ambit of that offence, as proposed. The three categories concerned were the Sovereign and the Royal Family, persons prominent in the public service, and police officers. They require separate consideration here.

1. THE SOVEREIGN AND THE ROYAL FAMILY

8.5 In our working paper we expressed the view that no protection for the Sovereign and the Royal Family was needed in addition to the proposed offence of criminal defamation since the changes which we then proposed in the law would in practice make no difference to the Sovereign's position. Only one of our commentators disagreed with our view, suggesting that, if the prosecution had to prove the falsity of the statement plus a mental element, it would not be in the public interest for the Sovereign to testify in order to provide evidence of this. This is, in principle, no doubt correct, but it is germane to point out that, in what appears to be the only case in the last 150 years or so in which proceedings for criminal libel were taken in respect of a libel on the Sovereign,[6] King George V voluntarily undertook to prove the falsity of the allegation even though the burden of proving the truth lay upon the defendant; he did not in fact give evidence himself.

8.6 We adhere to the view expressed in our working paper that the changes which we recommend will not in practice be likely to affect the position of the Sovereign and the Royal Family. Accordingly, we recommend no special offence or other protection in addition to the new offence of criminal defamation.

2. PERSONS PROMINENT IN THE PUBLIC SERVICE

8.7 These include, as we said in our working paper, Ministers of the Crown, members of Parliament, the judiciary, those in senior positions in the Civil Service and other public bodies. It is, however, a group having no fixed boundaries. Our working paper suggested that society may have a particular interest in protecting the reputation of those selected to lead it, who, moreover, may feel reluctant to bring a civil action in respect of defamatory

[4] See the case of *Fell,* cited at para. 5.8. n.18, above, where the defendant was also convicted of criminal damage.

[5] See Working Paper No. 84, paras. 7.36–7.45.

[6] *R.* v. *Mylius, The Times,* 2 February 1911. The defendant acted as an agent in England for the distribution of a broadsheet published in Paris, which contained an allegation that King George V had committed bigamy in 1893. He was convicted on three counts of criminal libel and sentenced to twelve months' imprisonment. See further Kenneth Rose, *George V* (1983) pp. 82–86.

attacks. But we rejected any such special provision as unlikely to be acceptable; such discrimination between those distinguished from the rest by their position and function would hardly be countenanced by Parliament or the public. In addition, it would be almost impossible to define the persons who would thereby benefit save by reference to a cumbersome and controversial listing. On consultation, no-one disagreed with our provisional conclusion, which we therefore confirm.

3. POLICE OFFICERS

8.8 Police officers are peculiarly vulnerable in regard to malicious and defamatory statements made about them which may impede investigations into an offence or influence the outcome of a prosecution in which they are giving evidence. The new offence of criminal defamation would of course be available in respect of such statements, but the question is whether the police need some further protection in the form of other criminal offences of wider ambit.

8.9 Various other means of redress are open to the police at present. They may sue for libel, and regulations[7] permit the Police Federation to use its funds to defray the legal cost of members seeking to bring actions in respect of statements about their conduct as officers. A few such actions have been pursued in recent years,[8] but many more were not because of the lack of means of the defendant. Prosecutions for criminal libel are rare in such circumstances.[9] So also are prosecutions for the summary offence of wasting police time under section 5(2) of the Criminal Law Act 1967, and the common law offence of attempting to pervert the course of justice, both of which may in the appropriate circumstances be used in respect of unfounded allegations about the police.

8.10 While not underestimating the seriousness of such allegations, we took the view in our working paper that it was undesirable for any special offence to be made available to the police in addition to those which already exist, together with the offence recommended in this report. Most of our commentators agreed and did not dissent from our comment that in principle it is important that police officers should be treated so far as possible on the same terms as other members of society. The Police Federation, however, urged us to re-examine the issue, since in their view an operational police officer is not so treated, having regard to the disciplinary procedures arising from complaints which may prove to be false or malicious and the reluctance of the authorities to authorise prosecutions for the offences such as criminal libel, wasting police time or perverting the course of justice.

---

[7] The Police Federation (Amendment) Regulations 1977, S.I. 1977 No. 583.

[8] See e.g. *Riches and others* v. *News Group Newspapers, The Times,* 10 February 1984, in which ten police officers were each awarded damages for allegations in the *News of the World* in June 1978 concerning all the officers at a named police station; see further, [1985] 2 All E.R. 845. And see *Peters* v. *Observer Ltd., The Times,* 25 July 1985 (news item).

[9] See e.g. *R.* v. *Leigh, The Times,* 9 and 19 March 1971, para. 5.8, n.19, above.

8.11 It is true that complaints are subject to rigorous investigation[10] and that they may prove to be false or malicious in character. But in the present context, where what is contemplated are criminal proceedings for malicious complaints, there are issues of public interest which have to be taken into consideration before deciding whether to authorise prosecution. "The feelings of an officer [who is a target of a malicious complaint] must be balanced against our general concern that nothing should be done to deter those with genuine complaints from bringing them to the attention of the police"; and "an acquittal [in respect of a prosecution] might suggest that the original complaint had been fully justified".[11] This suggests that only in the clearest and most well-documented case will proceedings be taken, and indicates why proceedings for the offences to which reference is made above are authorised only on infrequent occasions. But it is in just this type of case that it might be appropriate for proceedings for the new offence which we recommend to be instituted. And it also follows that provision of a special, police-orientated offence in this context would be unlikely to make any significant difference in practice to the frequency with which criminal proceedings are authorised in respect of defamatory statements made in complaints against police, because of the considerations of the public interest which currently limit such authorisations in regard to all prosecutions of this kind. Consequently we do not think that we would be justified in recommending such an offence: the new offence of criminal defamation would in our view adequately cover those cases of malicious and defamatory complaints against the police which required in the public interest to be dealt with by means of criminal proceedings.

C. Special verdicts

8.12 In our working paper we made a tentative proposal for a provision, in cases where the falsity of the statement has been in issue,[12] for the court to require a jury which has returned a verdict of not guilty to a charge of the new offence to give a special verdict on the question whether they have found insufficient evidence to prove beyond reasonable doubt that the statement at issue was false.[13] The reason for this was the possible effect upon the reputation of a victim where a verdict of not guilty was returned, having regard to the fact that the public interest would be the determining factor in the decision to institute proceedings, rather than the wishes of the victim; the special verdict could provide clarification of the issue in so far as it would make clear whether the jury regarded the evidence not sufficient to establish that the statement was false.

8.13 Weighty reasons were advanced on consultation which persuade us not to recommend any provision for a special verdict. In cases where the falsity of the statement was in issue, there would be a risk of the proceedings becoming a trial of the victim's reputation, which is properly a matter for the civil courts. The requirement of a special verdict might in any event be almost impossible to

[10] See the provisions of Part IX of the Police and Criminal Evidence Act 1984, replacing the Police Act 1964, s. 49 and the Police Act 1976.

[11] See *Hansard* (H.C.), 5 December 1975, vol. 901, cols. 2165, 2166 (Under-Secretary of State for the Home Department in the debate on the Police Bill (Police Act 1976).

[12] See para. 7.74, above.

[13] See Working Paper No. 84, para. 8.61.

comply with, even if falsity was in issue, because the jury might acquit on failure to prove knowledge of the defamation, in which event the need to consider the issue of falsity would not arise. Furthermore, cases might occur in which, while the jury agreed to acquit, they did not agree on the grounds of acquittal. These and other reasons suggested by commentators[14] convince us that a special verdict of the kind which we contemplated in our working paper would not be advisable, and we do not now recommend it.

D. Stay of civil proceedings

8.14 Under the present law a prosecution for criminal libel may be pursued before, after or at the same time as a civil action in respect of the same defamatory statement.[15] In practice this gives rise to few difficulties because the court in civil proceedings has a discretionary power to stay the hearing of a civil action until after the trial of the criminal offence. The existence of this power would be enhanced in importance if our recommendations were to be implemented, since the new offence would focus upon the interest of the state in securing the defendant's conviction, irrespective of the interests of the victim of the publication. It would therefore be desirable, if not essential, in the event of criminal proceedings being instituted, for those proceedings to be concluded before any hearing of civil proceedings instituted by the person defamed. Since, however, the power to stay proceedings is acknowledged already to exist, we do not find it necessary to recommend any legislative provisions to secure this result.

E. Punitive damages

8.15 Finally, we advert to the position in regard to punitive damages. Many of the cases where at present a jury might award punitive damages in a civil action are ones where a conviction might be secured for the recommended offence of criminal defamation. Of the various categories of punitive damages, that which is most relevant in the present context is damages awarded where a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the compensation payable for the defamation and he publishes knowing that his conduct was wrongful or recklessly disregarding the wrongfulness.[16] Various proposals have been made for abolition of punitive damages.[17] At present it seems unlikely that this will happen. Whether or not the law is changed in this respect, we do not think the availability or non-availability of punitive damages should affect the provisions of the criminal law: here, as elsewhere, it is the public interest which must determine whether or not proceedings should be instituted.

---

[14] See J. R. Spencer, "Criminal Libel—The Law Commission's Working Paper" [1983] Crim. L.R. 524 at p.530.

[15] *Ex parte Edgar* (1913) 77 J.P. 283.

[16] See *Cassell and Co. Ltd.* v. *Broome* [1972] A.C. 1027.

[17] See Report of the Committee on Defamation (1975), Cmnd. 5909, para. 360, and also *Hansard* (H.L.), 6 May 1982, vol. 429, cols. 1293–1299.

PART IX

SUMMARY OF RECOMMENDATIONS

9.1 In this report we examine the common law offence of criminal (or defamatory) libel and conclude that the scale and character of its shortcomings are such that it should be abolished (Report, Part IV and draft Criminal Defamation Bill, clause 6).

9.2 In considering whether the common law offence should be replaced, we examine the arguments for and against retaining a criminal offence in relation to defamatory material and conclude that the weight of argument favours such retention for the purpose of penalising the gravest instances of defamation which amount to "character assassination" (Report, Part V).

9.3 Accordingly we recommend the creation of a new offence, to be known as criminal defamation. This would penalise anyone who communicated to any person false information which was seriously defamatory of another, knowing or believing both that it was false and that it was seriously defamatory (paragraphs 7.1–7.62 and draft Criminal Defamation Bill, clause 1(1)).

9.4 Unlike the present offence of criminal libel, the proposed offence of criminal defamation would, in accordance with the general principles of the criminal law, require proof by the prosecution of all the elements of the offence, including the falsity and seriously defamatory character of the information, and knowledge or belief on the part of the defendant that the information was false and seriously defamatory (paragraphs 7.29–7.32 and 7.52–7.61).

9.5 For the purposes of the proposed offence, false information would be seriously defamatory of a person only if it would be likely seriously to damage his reputation in the estimation of reasonable people generally (paragraphs 7.3–7.8 and 7.12–7.14 and draft Criminal Defamation Bill, clause 1(2)).

9.6 The offence would apply only in respect of information communicated to a person in England and Wales, whether the person communicating the information was at the time in England and Wales or elsewhere (paragraphs 7.29–7.32 and draft Criminal Defamation Bill, clause 1(1) and (3)(c)).

9.7 The defence of absolute and qualified privilege would be available in the circumstances in which they would be available to an action for civil defamation in respect of the defamatory information in question (paragraphs 7.64–7.66).

9.8 The offence would be triable only on indictment and the maximum penalty would be two years' imprisonment and a fine (paragraph 7.75 and draft Criminal Defamation Bill, clause 3).

9.9 No proceedings for the proposed offence of criminal defamation could be instituted save with the consent of the Attorney General (paragraphs 7.67–7.68 and draft Criminal Defamation Bill, clause 4).

(*Signed*) RALPH GIBSON, *Chairman*
TREVOR M. ALDRIDGE
BRIAN DAVENPORT
JULIAN FARRAND
BRENDA HOGGETT

J.G.H. Gasson, *Secretary*

31 July 1985

APPENDIX A

Draft
Criminal Defamation Bill

ARRANGEMENT OF CLAUSES

Clause

DRAFT

OF A

BILL

TO

A.D. 1985

Replace the common law offence of criminal libel with fresh provision for the punishment under the law of England and Wales of persons who communicate false defamatory information.

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

Criminal defamation.

1.—(1) A person commits the offence of criminal defamation if he communicates to any person in England and Wales information which is, and which he knows or believes to be, both false and seriously defamatory of a third person.

(2) For the purposes of this section false information is seriously defamatory of a person if, and only if, it would be likely seriously to damage his reputation in the estimation of reasonable people generally.

(3) For the purposes of this section it is immaterial—

(a) whether the information is communicated expressly or by implication,

(b) whether it is communicated in words or by pictures, visual images, gestures or other methods of signifying meaning, and

(c) whether the person who communicates it is in England and Wales or elsewhere.

(4) This section applies only where the person defamed is—

(a) an individual, or

(b) a body corporate, or

(c) a trade union or employers' association (within the meaning of section 28 of the Trade Union and Labour Relations Act 1974), 1974 c.52.

and is alive or in existence at the time of the communication.

EXPLANATORY NOTES

Clause 1

1. This clause creates a new offence, to be known as criminal defamation, which would replace the common law offence of criminal libel abolished by clause 6 (Report, parts IV and V).

2. *Subsection (1)* contains the main offence-creating provision. It provides that the offence of criminal defamation is committed if a person communicates to anyone in England and Wales information which is false and seriously defamatory about a third person and which the person communicating it knows or believes to be false and seriously defamatory. As in the case of most offences, but unlike criminal libel at common law, the burden of proving all the elements of the offence would rest upon the prosecution, including proof of the falsity and seriously defamatory character of the information and the defendant's knowledge or belief (Report, paragraphs 7.2–7.61).

3. *Subsection (2)* defines which information is to be regarded as seriously defamatory for the purposes of the offence. It provides that false information is seriously defamatory of a person only if it would be likely seriously to damage his reputation in the estimation of reasonable people generally (Report, paragraphs 7.3–7.8 and 7.12–7.14).

4. *Subsection (3)* contains further provisions relating to the nature of the information which is communicated and the person communicating it. Subparagraph (a) provides that the information may be communicated expressly or by implication. Information may be contained in statements made indirectly and this provision is intended to ensure that such statements are capable of being covered by the offence (Report, paragraphs 7.11–7.14). Subparagraph (b) provides that the information may be communicated by words, pictures, visual images, gestures or other methods of signifying meaning. This is based in part on section 16(1) of the Defamation Act 1952, but makes clear that the offence, unlike criminal libel, covers words both written and spoken (Report, paragraphs 7.16–7.17). Subparagraph (c) makes clear that the person communicating the information may be penalised by the offence whether he does so in England and Wales or elsewhere, although by subsection (1) the person to whom he communicates it must at the time be in England and Wales. Together, these provisions determine the territorial scope of the offence (Report, paragraphs 7.29–7.32).

5. *Subsection (4)* clarifies who, for the purpose of the offence, may be defamed. Subsection (1) makes clear that it may be anyone other than the person to whom the information in question is communicated. Subsection (4) specifies that the section applies only if the person defamed is, at the time of the communication, a living individual, a body corporate, a trade union or employers' association (Report, paragraphs 7.22–7.25).

Privileged communications.

2.—(1) A person does not commit the offence of criminal defamation by communicating information in circumstances which are such that he would have a defence of absolute or qualified privilege in a civil action for defamation.

(2) In determining for the purposes of subsection (1) above whether a defence of qualified privilege would be available by virtue of section 7 of the Defamation Act 1952 (publication in newspapers), subsections (2) and (3) of that section (which exclude the defence where the defendant fails to publish a satisfactory correction and where the publication is prohibited by law or not of public benefit or concern) shall be disregarded.

(3) Where sufficient evidence is given in proceedings for criminal defamation to raise the issue whether the communication was made in circumstances of the kind mentioned in subsection (1) above, it shall be for the prosecution to prove that it was not.

EXPLANATORY NOTES

Clause 2

1. The purpose of this clause is to make available the defences of absolute and qualified privilege in any case of criminal defamation charged under clause 1. As the report explains, other defences peculiar to the present law of defamation would not be available because the narrow scope of the offence would offer no occasion for them to be raised (paragraphs 7.64–7.66).

2. *Subsection (1)* provides that no offence of criminal defamation is committed if in the circumstances of the case the accused would have had a defence of absolute or qualified privilege in a civil action for defamation in respect of the communication of the information in question.

3. *Subsection (2)* provides that, in determining whether the defence of qualified privilege would be available, two specified subsections of section 7 of the Defamation Act 1952 (qualified privilege of newspapers) are to be disregarded. As paragraph 7.66 of the report explains, these provisions are inappropriate for consideration in the context of a criminal offence. Thus clause 2(2) has the effect of making available the defence of qualified privilege in respect of a charge of criminal defamation in certain cases where it would not be available in a civil action for defamation.

4. *Subsection (3)* has the effect of placing an "evidential" burden on the accused with respect to the defences of absolute and qualified privilege. In the absence of the subsection, it seems that the effect of the Court of Appeal's decision in *R.* v. *Edwards* [1975] Q.B. 27 in relation to the exception to liability provided by subsection (1) would be to place a persuasive burden upon the accused to provide sufficient evidence to prove on a balance of probabilities that the defences applied. Subsection (3) ensures that, provided sufficient evidence is adduced to raise the issue as to whether the defences are available, the burden is on the prosecution to prove beyond reasonable doubt that they are not (paragraph 7.66).

Criminal Defamation

Punishment.

3. A person guilty of criminal defamation shall be liable on conviction on indictment to imprisonment for a term not exceeding two years, or to a fine, or both.

Clause 3

1. This clause provides for the mode of trial of the offence of criminal defamation created by clause 1 and for its maximum penalty. The clause states that the offence is to be triable only on indictment and that its maximum penalty is to be two years' imprisonment and a fine (Report, paragraphs 7.75–7.76).

Criminal Defamation

Restriction on institution of proceedings.

4. No proceedings for the offence of criminal defamation shall be instituted except by or with the consent of the Attorney General.

EXPLANATORY NOTES

Clause 4

1. This clause provides for the requirement of the Attorney General's consent to the institution of proceedings (Report, paragraphs 7.67–7.68).

Conviction as conclusive evidence of commission of offence.

5.—(1) In any proceedings for the offence of criminal defamation in which the question whether a person other than the accused did or did not commit a criminal offence is relevant to any issue in those proceedings, proof that, at the time when that issue falls to be determined, that person stands convicted of that offence shall be conclusive evidence that that person committed that offence.

(2) For the purposes of this section a person shall be taken to stand convicted of an offence if, but only if, there subsists against him a conviction of that offence by or before any court in the United Kingdom or by a Service court outside the United Kingdom.

(3) Nothing in any of the following—

1973 c.62. *(a)* section 13 of the Powers of Criminal Courts Act 1973 (under which a conviction leading to probation or discharge is to be disregarded except as mentioned in that section)

1975 c.21. *(b)* section 392 of the Criminal Procedure (Scotland) Act 1975 (which makes similar provision in respect of convictions on indictment in Scotland), and

1950 c7 (N.I.) *(c)* section 8 of the Probation Act (Northern Ireland) 1950 (which corresponds to section 13 of the Powers of Criminal Courts Act 1973) or any legislation which is in force in Northern Ireland for the time being and corresponds to that section,

shall affect the operation of subsection (1) above; and for the purposes of that subsection any order made by a court of summary jurisdiction in Scotland under section 182 or 183 of the Criminal Procedure (Scotland) Act 1975 shall be treated as a conviction.

1984 c.60. (4) In this section "Service court" has the same meaning as in Part VIII of the Police and Criminal Evidence Act 1984, and references to conviction before a Service court shall be constructed in accordance with section 82(2) of that Act.

Clause 5

1. This clause makes provision for proof of conviction of an offence whenever that issue is raised in proceedings for an offence of criminal defamation in relation to any person other than the accused.

2. Section 74 of the Police and Criminal Evidence Act 1984 already provides that in any criminal proceedings proof of conviction of an offence by someone other than the accused is *admissible* in evidence for the purpose of proving that he committed it. *Subsection (1)* goes further in regard to proceedings for criminal defamation by providing that such proof of conviction is to be *conclusive* evidence that the person other than the accused whose conviction is in issue committed the offence. This provides a counterpart to section 13 of the Civil Evidence Act 1968 which makes provision in relation to proof of conviction in cases of civil defamation (Report, paragraphs 7.69–7.72).

3. *Subsection (2)* specifies which convictions may be proved under subsection (1), namely, convictions before any court in the United Kingdom or a Service court outside the United kingdom. A "Service court" is defined under *subsection(4)* by reference to the provisions of the Police and Criminal Evidence Act 1984.

4. *Subsection (3)* ensures that convictions or orders of courts under the statutory provisions specified in the subsection will be treated as convictions for the purposes of subsection (1).

5. Subsections (2) and (3) correspond, so far as appropriate, to sections 74(2) and 75(3) of the Police and Criminal Evidence Act 1984. Section 73 of that Act contains a method of proving a conviction which would be applicable in cases falling to be decided by reference to clause 5. Separate provision for this is therefore not needed.

Abolition of common law offence.

6. The common law offence of publishing a defamatory libel is hereby abolished for all purposes not relating to offences committed before the commencement of this Act.

Clause 6

1. This clause abolishes the common law offence of criminal or defamatory libel (Report, Part IV).

Consequential amendments and repeals.

7.—(1) For section 17(2) of the Defamation Act 1952 there shall be substituted the following:—

"(2) Nothing in this Act affects the law relating to blasphemous libel or seditious libel and, subject to section 2 of the Criminal Defamation Act 1985 (privilege), nothing in this Act affects the offence of criminal defamation under section 1 of that Act."

(2) The following enactments shall cease to have effect except so far as they relate to the offences of blasphemous libel or seditious libel:—

1792 c.60. *(a)* the Libel Act 1792,

1843 c.96. *(b)* section 7 of the Libel Act 1843,

1881 c.60. *(c)* section 4 of the Newspaper Libel and Registration Act 1881, and

1881 c.64. *(d)* sections 4, 8 and 9 of the Law of Libel Amendment Act 1888.

(3) The enactments mentioned in the Schedule to this Act are hereby repealed to the extent specified in the third column of that Schedule.

EXPLANATORY NOTES

Clause 7

1. This clause contains the amendments to existing legislation consequential upon the creation of the new offence of criminal defamation and the repeal of legislation made necessary by the abolition in clause 6 of criminal (defamatory) libel at common law.

2. *Subsection (1)* substitutes a new subsection (2) in section 17 of the Defamation Act 1952 (which at present ensures that the Act does not apply to defamatory, blasphemous or seditious libel at common law).

3. *Subsection (2)* ensures that certain provisions which at present apply to defamatory libel at common law would to that extent cease to have effect when that offence is abolished.

4. *Subsection (3)* repeals the legislation set out in the Schedule, all of which applies only to defamatory libel at common law.

Short title, commencement and extent.

8.—(1) This Act may be cited as the Criminal Defamation Act 1985.

(2) This Act shall come into force at the end of the period of two months beginning with the day on which it is passed.

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

EXPLANATORY NOTES

Clause 8

1. This clause provides for the short title, commencement and extent of application of the Bill.

Section 7(3).

SCHEDULE

ENACTMENTS REPEALED

Chapter	Short title	Extent of repeal
6 & 7 Vict. c.96.	The Libel Act 1843.	Sections 4 to 6.
44 & 45 Vict. c.60.	The Newspaper Libel and Registration Act 1881.	In section 4, the words from "as to the publication" to "true, and".
1968 c.54.	The Theatres Act 1968.	In section 4(1), the words from "(including" to "matter)". In section 7(2), the words from "or an offence" to "in the course of a performance of a play". In section 8, the words from "or an offence" to "play".

Schedule

1. This contains the enactments repealed, all of which refer to the common law offence of criminal (defamatory) libel to be abolished by clause 6 of the Bill.

APPENDIX B

ORGANISATIONS, JOURNALS AND INDIVIDUALS COMMENTING ON WORKING PAPER NO. 84: CRIMINAL LIBEL

British Printing Industries Federation
Mr. Derek Davis
The Right Honourable Lord Denning
Director of Public Prosecutions
Mr. Jeremy J. Evans
Sir James Goldsmith (*The Times*, 1 December 1982 (letter))
The Lord Goodman, C.H.
Haldane Society
Holborn Law Society
Home Office
Justices' Clerks' Society
Mr. William Kimber (*The Times*, 1 December 1982 (letter))
Justice of the Peace (26 February 1983)
The Law Society
The Law Society's Gazette (9 March 1983)
Mr. Philip Lewis
Lord Chancellor's Department
Mr. E. A. Marsh
New Law Journal (2 December 1982)
Police Federation of England and Wales
The Police Superintendents' Association of England and Wales
The Post Office
The Press Council
Prosecuting Solicitors' Society of England and Wales
Mr. Geoffrey Robertson ([1983] Public Law 208)
Society of Public Teachers of Law
Solicitor to the Department of Health and Social Services for Northern Ireland
The Spectator (27 November 1982)
The Senate of the Inns of Court and the Bar[1]
Mr. J. R. Spencer ([1983] Crim. L.R. 524)
Mr. Alastair Stewart
Professor G. J. Zellick

[1] The Commission received two sets of comments from the Senate. The first took the form of a submission by Anthony Arlidge Q.C. approved by the Committee of the Criminal Bar Association, with comments by the Senate's Law Reform Committee. The second consisted of a memorandum of comments prepared by Anthony Hoolahan Q.C., Richard Rampton, Derek Grange-Bennett and Michael Bloch, under cover of further comments by the Senate's Law Reform Committee.

Printed for Her Majesty's Stationery Office by Metcalfe Cooper Ltd.
Dd 0501 618 PS 5351885 C15 9/85

HER MAJESTY'S STATIONERY OFFICE

Government Bookshops

49 High Holborn, London WC1V 6HB
13a Castle Street, Edinburgh EH2 3AR
Princess Street, Manchester M60 8AS
Southey House, Wine Street, Bristol BS1 2BQ
258 Broad Street, Birmingham B1 2HE
80 Chichester Street, Belfast BT1 4JY

Government publications are also available through booksellers

ISBN 0 10 196180 4