The Law Commission

(LAW COM No 335)

CONTEMPT OF COURT: SCANDALISING THE COURT

Presented to Parliament pursuant to section 3(2) of the Law Commissions Act 1965

Ordered by the House of Commons to be printed on 18 December 2012

HC 839 London: The Stationery Office £xx.xx

THE LAW COMMISSION

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The terms of this report were agreed on 12 December 2012.

The text of this report, including Appendices A and B, is available on the Law Commission's website at http://lawcommission.justice.gov.uk/areas/contempt.htm. The Appendices are not included in the printed copy.

THE LAW COMMISSION

CONTEMPT OF COURT: SCANDALISING THE COURT

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CONTEMPT OF COURT: SCANDALISING THE COURT

To the Right Honourable Chris Grayling MP, Lord Chancellor and Secretary of State for Justice

INTRODUCTION

1. Scandalising the court, also known as scandalising the judiciary or scandalising judges, is a form of contempt of court, consisting of the publication of statements attacking the judiciary and likely to impair the administration of justice.

2. On 10 August 2012 we published Consultation Paper No 207, Contempt of Court: Scandalising the Court.[1] In that paper we asked whether the offence of scandalising the court should be retained, abolished, replaced or modified. The consultation period was originally set to end on 5 October 2012, but was extended to 19 October 2012 at the request of some judicial consultees. In this report we consider the responses and state our recommendations.

3. Originally, our consideration of scandalising the court formed part of our wider project on contempt of court.[2] An amendment to the Crime and Courts Bill was proposed by Lord Lester and others,[3] designed to abolish the offence: this was withdrawn upon the Government giving an undertaking to consider the issue in time to be dealt with within the Bill. We accordingly brought our consideration forward in order to produce recommendations in time to be considered within this legislative process.

4. Following our consultation, a similar amendment was proposed again.[4] In an online summary of our conclusions[5] we expressed support for this amendment: this report sets out the arguments and our conclusions in more detail.

[1] In this paper, "CP".

[2] Contempt of Court (2012) Law Commission Consultation Paper No 209.

[3] http://www.publications.parliament.uk/pa/bills/lbill/2012-2013/0004/amend/ml004-v.htm (last visited 6 Dec 2012). For details of this amendment and the debates thereon, see *Hansard* (HL), 2 Jul 2012, vol 738, col 555 and following: http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/120702-0002.htm#12070239000130 (last visited 6 Dec 2012).

[4] http://www.publications.parliament.uk/pa/bills/lbill/2012-2013/0049/amend/su049-ic.htm (last visited 6 Dec 2012).

[5] On Law Commission website at: http://lawcommission.justice.gov.uk/docs/cp207_Scandalising_the_Court_summary_of_conclusions.pdf.

THE CONSULTATION

5. In our consultation paper we asked three questions and made one provisional proposal, as follows.[6]

> 1. Consultees are asked whether they agree that the offence of scandalising the court should not be retained in its current form.[7]
>
> 2. We provisionally propose that the offence of scandalising the court should be abolished without replacement. Consultees are asked whether they agree.[8]
>
> 3. If consultees do not agree with our provisional proposal that the offence be abolished, they are asked whether they consider that the offence of scandalising the court should be retained or replaced in a modified form, and if so:
>
> (1) whether this should be done by retaining the offence as a form of contempt, but modifying it to include defences of truth, public interest or responsible journalism;
>
> (2) whether a new offence should be created separate from contempt, and if so how it should be defined;
>
> (3) in either case, what the mode of prosecution and trial for the offence should be.[9]

6. We received 46 responses, from sources including serving and retired members of the judiciary, professional and representative bodies, legal academics and members of the public. Of these, 32 agreed with the proposal that the offence of scandalising the court should be abolished without replacement. Nine expressed the view that an offence of this kind was needed, though most of these favoured a statutory offence, either as a form of contempt of court or as a separate offence. The rest expressed no decided view. A more detailed account of the responses is given in Appendix A to this report.[10]

7. We would like to thank all those who responded to our consultation paper, or who assisted us in the course of our consideration of scandalising the court.

BRIEF DESCRIPTION OF THE OFFENCE

8. Scandalising the court is a form of contempt of court. It generally takes the form of a publication, though it can include statements publicised by other means,

[6] CP p 33, Questions for Consultees.

[7] CP para 61.

[8] CP para 84.

[9] CP para 90.

[10] Appendix A may be viewed at http://lawcommission.justice.gov.uk/areas/contempt.htm. It is not included in the printed copy of this report.

such as holding banners outside a court[11] and letters to the judge.[12] Where one person makes a statement, whether orally or in writing, and another publishes it, both can be guilty of scandalising.[13] The statements must be derogatory of the judiciary: that is, either of individual judges or courts or of the judiciary in general or a section of it.

9. Unlike other forms of contempt by publication, scandalising contempt does not need to have the effect of prejudicing particular proceedings. For this reason, the conditions for this form of contempt are more restrictive than those for prejudicial statements about pending proceedings: there is more latitude for comment about cases that are concluded.[14] The test of liability is whether the statements are likely to undermine the administration of justice or public confidence therein.[15] This likelihood must be determined having regard to the circumstances,[16] though there is some authority for saying that allegations that a judge is partial or corrupt automatically amount to scandalising.[17]

10. As concerns the mental element, it is clear that the defendant must intend to publish something; what is less clear is whether there must be knowledge of the scandalous nature of what is published. In one case a person who innocently lent another a paper containing scandalising statements was held not to be in contempt.[18] It is not clear whether a professional publisher would be in contempt for publishing material which, unknown to him or her, contained scandalous statements.[19] It would seem that there is no requirement of an intention to undermine the administration of justice.[20]

11. It would seem that the offence only covers abuse of a fairly extreme and irresponsible kind.[21] Criticism in good faith, as part of a discussion of a question

[11] CP para 17; *Vidal, The Times*, 14 Oct 1922.

[12] *Freeman*, *The Times*, 18 Nov 1925.

[13] *A-G v O'Ryan and Boyd (1)* [1946] 1 IR 70.

[14] *Dunn v Bevan* [1922] 1 Ch 276; *Desmond v Glackin* [1993] 3 IR 1. The offence of scandalising can also be committed while proceedings are pending, with the same conduct constituting both forms of contempt: *Re Kennedy and McCann* [1976] IR 382.

[15] CP para 18; *Gray* [1900] 2 QB 36, 40.

[16] CP para 24(1).

[17] CP paras 24(2) and 25; Lord Atkin in *Ambard v A-G of Trinidad and Tobago* [1936] AC 322, 335: "provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice". Contrast *Solicitor General v Radio Avon Ltd* [1978] 1 NZLR 225, 231.

[18] *McLeod v St Aubyn* [1899] AC 549.

[19] D Eady and A T H Smith (eds), *Arlidge, Eady and Smith on Contempt* (4th ed 2011) ("Arlidge, Eady and Smith") para 5-252.

[20] CP para 37; *Borrie and Lowe: The Law of Contempt* (4th ed 2010) ("Borrie and Lowe") para 11.25; C J Miller, *Contempt of Court* (3rd ed 2000) ("Miller") para 12.28.

[21] CP paras 19 and 20; *R v Metropolitan Police Commissioner ex parte Blackburn (No 2)* [1968] 2 QB 150, 155 and 156.

of public interest, does not fall within the offence:[22] it is not clear whether this is a formal defence or simply an observation about the scope of the offence.[23] It is not clear whether the truth of the statements made, taken on its own, is a defence:[24] one suggestion is that, whatever the position may have been at common law, a court would now be bound to interpret the offence as including such a defence in order to comply with the Human Rights Act 1998.[25]

12. In England and Wales, the offence had almost fallen into disuse by the end of the nineteenth century, when it was revived in two cases.[26] Two further prosecutions occurred in 1930[27] and 1931,[28] the latter being the last successful prosecution for this offence. Lord Diplock described it as "virtually obsolescent" in 1985.[29]

13. Since 1900, most of the reported cases have been Commonwealth appeals to the Privy Council.[30] The offence is still sometimes prosecuted in Australia and some other Commonwealth countries.[31]

ARGUMENTS IN THE CONSULTATION PAPER

14. As mentioned before, the options in the consultation paper were to retain the offence, to abolish it or to replace it. In the paper we explored the arguments relating to each option.

15. The principal argument discussed in the paper for retaining the offence was that it aims to safeguard the authority of the judiciary, and that this aim is recognised as legitimate under the European Convention on Human Rights ("ECHR").[32] Further, if the object of the law of contempt as a whole is to discourage interference with the administration of justice, scandalising conduct falls within that object just as squarely as all other forms of contempt.[33] Some extreme cases, reported from

[22] CP paras 40 and 41; *Dallas v Ledger, Re Ledger* (1888) 4 TLR 432; *Ahnee v DPP* [1999] 2 AC 294; *Harris v Harris* [2001] 2 Family Law Reports 895, cited R Clayton and H Tomlinson, *The Law of Human Rights* (2nd ed 2008) ("Clayton and Tomlinson") para 15.100.

[23] CP para 42; see also Miller para 12.37.

[24] CP para 38; Arlidge, Eady and Smith para 5-257; Borrie and Lowe paras 11.22 and 11.23; Miller paras 12.32 and 12.33.

[25] Borrie and Lowe para 11.23.

[26] *McLeod v St Aubyn* [1899] AC 549; *Gray* [1900] 2 QB 36.

[27] *Wilkinson*, *The Times* 16 Jul 1930.

[28] CP para 5; *Colsey*, *The Times* 9 May 1931.

[29] *Secretary of State for Defence v Guardian Newspapers Ltd* [1985] AC 339, 347.

[30] *Ambard v A-G for Trinidad and Tobago* [1936] AC 322; *Perera v R* [1951] AC 482; *Maharaj v A-G of Trinidad and Tobago (No 1)* [1977] 1 All ER 411; *Badry v DPP of Mauritius* [1983] 2 AC 297; *Ahnee v DPP* [1999] 2 AC 294.

[31] CP para 6. See also *Re A-G's Application* [2009] FJHC 9, [2009] 4 LRC 711 (Fiji); *R v Hinds, ex parte A-G* (1960) 3 WIR 13; *Re Major v Government of the United States of America*, (2008) 75 WIR 1 (West Indies).

[32] Art 10(2) ECHR.

[33] CP para 58.

other jurisdictions,[34] are clearly such as to deserve public sanction, and might not always be capable of being prosecuted as mainstream criminal offences, such as public order offences.[35]

16. The principal arguments discussed in the paper for abolishing the offence without replacement included the following: that it is not enforced at present and appears to be obsolescent, that prosecutions can have the effect of increasing the harm caused by the act complained of,[36] and that it is counter-productive in that it conveys the impression that the judges are protecting their own.[37] The offence has also been criticised on the ground of freedom of expression,[38] and it has been argued that judges do not need a special protection not given to any other public officials.[39] The old argument that judges need protection because they cannot answer back has less force than it did.[40]

17. Finally, we discussed various possibilities for a replacement offence, ranging from that recommended by the Law Commission in 1979[41] to some proposals of law reform bodies in Australia.[42] We left these possibilities open to consultation but on balance took the view that the offence was redundant and that its abolition would leave no gap in the law.[43]

ARGUMENTS FOR AND AGAINST ABOLISHING THE OFFENCE

18. The arguments advanced in the consultation paper, together with those in the responses, may be grouped under the following heads, which we shall treat in order.

    (1) Whether the offence is an undue restriction on freedom of expression.

    (2) Whether the offence may be impugned as incompatible with the ECHR, or otherwise criticised on human rights grounds.

    (3) Whether the boundaries of the offence are unacceptably uncertain.

    (4) Whether the offence should be regarded as obsolescent and, therefore, unnecessary.

[34] See, eg, *Wong Yeung Ng v Secretary of Justice* [1999] HKCA 382; discussed by T Hamlett, "Scandalising the Scumbags: The Secretary for Justice vs the Oriental Press Group" (2001) 11 *Asia Pacific Media Educator* 20.

[35] CP paras 70 to 73. We discuss whether this is the case at para 80 and following below.

[36] See para 65 below.

[37] CP paras 64 and 65; see para 63 below.

[38] See para 19 below.

[39] CP paras 66 and 67.

[40] CP paras 77 to 83. For further discussion of the former position under the Kilmuir Rules, see Lord Taylor, "Justice in the Media Age" (1996) 62 *Arbitration* 258.

[41] Criminal Law: Offences Relating to Interference with the Course of Justice (1979) Law Com No 96; see para 75 below.

[42] CP para 89.

[43] CP para 84.

(5) Whether the offence, even if not prosecuted, has symbolic value.

(6) Whether the offence is in danger of being perceived as self-serving on the part of the judiciary.

(7) Whether prosecution for the offence has undesirable effects.

(8) Whether changing attitudes to judicial and other authority affect the need or justification for the offence.

Freedom of expression

19. The most important arguments of principle advanced against the offence are based on freedom of expression.[44] In a sense, this issue underlies all the other arguments: freedom of expression should not be infringed unless there is a strong reason for doing so, and the purpose of the other arguments is to explore whether such a reason exists.

20. Freedom of expression is a basic right under the ECHR.[45] Among the reasons advanced in its support are the following.[46]

(1) It promotes the self-fulfilment and development of those who express ideas and those who receive them.

(2) Truth is likely to emerge from the free expression of conflicting views in the market place of ideas.[47]

(3) It ensures that opinion and information about those who govern us or wish to govern us is available to the citizenship, and exposes errors or shortcomings in the process of government, including the administration of justice.

21. Freedom of expression must include the right to criticise the courts, but cannot be unqualified. Arguments for this right may be considered under two heads: claims to freedom for criticisms that are possibly justified (mainly argued for on grounds (2) and (3)) and claims to freedom for all criticism, however wrongheaded (more likely to be argued for on ground (1)).

22. Sir Sydney Kentridge QC pointed out in his response that most of the argument in the consultation paper seemed to concern freedom of criticism.

[44] Responses of Society of Editors; Newspaper Society; Guardian Newspapers; see Appendix A paras A.26 to A.28.

[45] Art 10 ECHR.

[46] *R v Secretary of State for the Home Department ex parte Simms* [2000] 2 AC 115, 126, cited by Sir Sydney Kentridge QC in his response: see Appendix A para A.43. See also Clayton and Tomlinson para 15.01.

[47] The argument in John Stuart Mill's *On Liberty* (1859 ed) ch 2.

> My principal criticism of the Commission's use of these authorities is that it seems to draw little distinction between criticism, including "outspoken" (per Lord Atkin) and "vigorous" (per Salmon LJ in *Blackburn (No 2)*) criticism on the one hand, and scurrilous abuse and the imputation of impropriety or dishonesty on the other.
>
> In other contexts, in particular the law of defamation, judges are accustomed to draw distinctions between vulgar abuse, comment (whether fair or not) and defamatory allegations of fact.

23. In short, Sir Sydney Kentridge QC advocates that the line should be drawn between criticism (to be exempt from liability) on one side, and vulgar abuse and defamatory allegations (both to be forms of scandalising) on the other. We agree that the law of defamation is familiar with these distinctions, but would point out that the line is drawn in a different place: vulgar abuse is specifically excluded from the scope of defamation.[48] In other words, in defamation both criticism and vulgar abuse fall on the exempt side of the line; lying or unsubstantiated allegations of fact fall on the other, so as to constitute defamation.

24. If the offence of scandalising the court is to be retained or replaced, there would be a case for a similar distinction. However, views may vary as to where the line should be drawn and standards may change: as observed by Mr Justice Munby (now Lord Justice Munby) in *Harris v Harris*,[49] much of what would formerly have been considered to be scurrilous abuse has today to be recognised as amounting to no more than acceptable if trenchant criticism. We discuss below[50] the possibility of an offence confined to untrue allegations of judicial corruption or misconduct.

Possibly justified criticism

25. In *Almon*,[51] the court explained the original justification for the offence of scandalising as follows.

> But the principle upon which attachments issue for libels upon courts is of a more enlarged and important nature — it is to keep a blaze of glory around them, and to deter people from attempting to render them contemptible in the eyes of the public.

Earlier in the same judgment the justification is given at greater length.

[48] P Milmo and others (eds), *Gatley on Libel and Slander* (11th ed, 2010) ("Gatley") para 3.35.

[49] [2001] 2 Family Law Reports 895 at [372], cited CP para 19.

[50] See para 75 and following below.

[51] (1765) Wilm 243, 270; 97 ER 94, 105.

> The arraignment of the justice of the judges, is arraigning the King's justice; it is an impeachment of his wisdom and goodness in the choice of his judges, and excites in the minds of the people a general dissatisfaction with all judicial determinations, and indisposes their minds to obey them; and whenever men's allegiance to the laws is so fundamentally shaken, it is the most fatal and most dangerous obstruction of justice, and, in my opinion, calls out for a more rapid and immediate redress than any other obstruction whatsoever; not for the sake of the judges, as private individuals, but because they are the channels by which the King's justice is conveyed to the people. *To be impartial, and to be universally thought so, are both absolutely necessary* for the giving justice that free, open, and uninterrupted current, which it has, for many ages, found all over this kingdom, and which so eminently distinguishes and exalts it above all nations upon the earth.[52]

This language suggests that "to be impartial" and "to be universally thought so" are two independent requirements, implying that the purpose of the offence is not confined to preventing the public from getting the wrong idea about the judges, and that where there are shortcomings, it is equally important to prevent the public from getting the *right* idea.

26. This may be thought a somewhat cynical interpretation of the reasoning in *Almon*, given the emphasis in that case on the importance of judges being impartial in fact. The judgment could be interpreted as relying on the more benign proposition that most judges are in fact impartial, so that to draw attention to the few exceptions risks undermining confidence in the innocent majority.

27. Even in this moderated form, this argument is unlikely to have much appeal today. Preventing criticism contributes to a public perception that judges are engaged in a cover-up and that there must be something to hide. Conversely, open criticism and investigation in those few cases where something may have gone wrong will confirm public confidence that wrongs can be remedied and that in the generality of cases the system operates correctly.

Unjustified criticism

IN PRINCIPLE

28. Sir Sydney Kentridge QC, after listing the three justifications for freedom of speech mentioned above in paragraph 20, observes:

> The question then is which of those purposes is served by abuse, scurrility or <u>false</u> allegations of conscious prejudice, corruption or other judicial misconduct. The obvious answer is none of them.

29. We are not certain that the three purposes given for freedom of expression should be regarded as exhaustive: there may be others, such as the avoidance of an atmosphere of fear and resentment.

[52] *Almon* (1765) Wilm 243, 256; 97 ER 94, 100 (our emphasis), cited CP para 10.

30. Another point is that these three purposes are served by the existence of freedom of expression in general. It should not be a question of considering each particular type of communication for which freedom is claimed, and asking whether *that communication* has these desirable effects. A great deal of material, falling within the ambit of the right to free expression, may be valueless or even deleterious. Its existence is simply the price to be paid for the existence of the freedom.

31. The adverse effects of measures for the suppression of complaints, even if limited to those that are wholly unjustified or abusive, appear to us to be as follows.

    (1) The measures may have a chilling effect, which also deters people from making complaints which are possibly justified.[53]

    (2) The suppression of unjustified criticism tends to fuel a suspicion that perhaps the criticism is not unjustified after all and that those in authority must have something to hide.

    (3) A society in which the expression of opinion is inhibited by fear is unpleasant to live in and will experience an accumulation of resentment, leading to instability in the long term.[54]

32. It is not clear whether the law of scandalising the court as it now stands has any of these effects.[55] If it does not, that may be because it is not enforced. More than one author cited in our consultation paper[56] has argued that in jurisdictions where the law of scandalising is enforced it does indeed have these effects.

IN PRACTICE

33. A more practical point is that, as several judges have pointed out, a great deal of extreme abuse of judges exists, much of it online, and does not appear to be doing any harm. The very extremity of the language prevents most readers from taking it seriously. As Lord Justice Elias observed in his response:

[53] The House of Lords referred to the "chilling effect" in connection with libel law in *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534, 539, citing, amongst others, *City of Chicago v Tribune Co* (1923) 139 NE 87 and *New York Times Co v Sullivan* (1964) 376 US 254. For the use of this phrase in other jurisdictions, see *Iorfida v MacIntyre* (1994) 21 OR (3d) 186, 93 CCC (3d) 395 at [20] (Canada); F Schauer, "Fear, Risk and the First Amendment: Unravelling the 'Chilling Effect'" (1978) 58 *Boston University Law Review* 685 (United States).

[54] J Spigelman, "The Forgotten Freedom: Freedom from Fear" (2010) 59 *International and Comparative Law Quarterly* 543.

[55] Guardian Newspapers, in their response, express the view that it has a chilling effect on publications; see Appendix A para A.28.

[56] Robertson and Nicol, cited CP para 66; Iyer, cited CP para 71.

> In cases where allegations of corruption are made, public confidence is not placated by prosecuting the party making the allegations; that might be seen as seeking to conceal wrong doing. It is necessary to show that the allegations are false. Usually they are too silly for anyone to believe in their truth, and in those cases it is not necessary to have criminal sanctions to uphold the dignity of the judges.

In the few cases where harm may result, as in the case of language inciting others to violence, this will be covered by other offences.[57]

34. The assertion that this material does no harm cannot of course be taken literally, as it may do some harm by causing distress to the judges attacked. This harm, however, is equivalent to that done by material abusing members of society other than judges, and is in any case not the harm targeted by the offence of scandalising.[58] The question is whether the material is doing harm by undermining public confidence in the judicial system. Evidence on this is inherently hard to come by, but the opinion of those judges who have responded to our consultation paper appears to be that no such harm is occurring.

35. More than one consultee was concerned by the volume of abusive material in circulation but agreed that prosecution for scandalising the court was too blunt a mechanism for dealing with that problem.[59] Some consultees saw a need for more political support and strengthened codes of press conduct, or an increased role for the Judicial Communications Office.[60]

36. In the consultation paper we conceded that the existence of this material did have one adverse effect, namely to promote the impression that the law can be flouted with impunity.[61] Sir Sydney Kentridge QC argues that this is in itself sufficient harm to justify the offence.

37. This would be a very powerful argument if the existence of this material promoted the impression that it was safe to "flout the law" in the sense of flouting the authority of the legal system as a whole. However, the argument in the consultation paper is that the law that is being "flouted with impunity" is specifically that against scandalising. That is, the undesirable impression which should be removed is that which flows from the combined facts that a law against scandalising exists, that it is widely contravened and that it is not being enforced. This could equally be cured by enforcing the offence more effectively or by abolishing it.

[57] See para 80 and following below.

[58] It is targeted by the two offences under the Public Order Act 1996: see para 81 and following below.

[59] Response of Professor John R Spencer QC, and the views expressed in the seminar; see Appendix A para A.15.

[60] See Appendix A paras A.9 and A.11.

[61] CP para 63(2).

38. Sir Sydney further argues that the statement in the consultation paper that the existence of this material does not appear to be doing harm is not backed by evidence. One purpose of the consultation was to find out whether, in the experience of the consultees, harm is in fact being done. If, after an adequate consultation period, both judges and prosecutors report an impression that it is not, that is evidence on which it is appropriate to act.

False allegations of fact

39. In short, one type of material attacking judges is criticism, to be accepted or refuted in a spirit of public debate. Another type is vulgar abuse, to be ignored with a "wry smile",[62] or in more extreme cases prosecuted as harassment or encouragement of offences of violence.[63] The remaining category is that of false allegations of fact.

40. One alternative to abolishing scandalising the court without replacement would be to create an offence of publishing false allegations of corruption or misconduct on the part of judges. This would be similar to the Law Commission's recommendation in 1979. We discuss this possibility below.[64]

41. The question then becomes simply whether such an offence is necessary to fill the gap that would be left by the abolition of scandalising or whether the availability of a civil action for defamation, together with offences such as those under the Malicious Communications Act 1988, affords sufficient protection.[65]

Human rights

42. The likely application of the human rights jurisprudence to the offence of scandalising the court was analysed in detail in the consultation paper.[66] Briefly, we concluded that the European Court of Human Rights was unlikely to hold that the existence of the offence was inconsistent with the Convention but might well disapprove of particular prosecutions, in this way reducing the scope of the offence.[67] A domestic court would adopt the same approach, as it is bound under section 6 of the Human Rights Act 1998 to interpret the offence in a way compatible with the Convention: that very fact reduces the possibility that the offence as a whole would be found to be incompatible with the Convention. We have seen nothing in the responses to persuade us to take a different view.

[62] Simon Brown LJ (now Lord Brown of Eaton-under-Heywood) in *A-G v Scriven* 4 Feb 2000, unreported, cited in Lord Pannick's speech, *Hansard* (HL), 2 Jul 2012, vol 738, col 557.

[63] See para 80 and following below.

[64] See para 75 below.

[65] See para 86 and following below.

[66] CP paras 43 to 56.

[67] Cases cited in CP para 48; conclusion in CP para 55.

43. Some of the responses cited North American opinions to show that the offence is unacceptable from the human rights point of view.[68] Others have pointed out that the North American approach is significantly different from that of the ECHR and should not be used as a guide in European and Commonwealth jurisdictions where the culture is different.[69]

44. Sir Sydney Kentridge QC made the same point at greater length in his F A Mann lecture entitled "Freedom of Speech: Is It the Primary Right?".[70] United States law traditionally regards freedom of speech, as enshrined in the First Amendment, as the paramount right that prevails over all others in case of conflict, unless there is a "clear and present danger that [the words] will bring about the substantive evils that Congress has a right to prevent".[71] Other common law countries, such as England and Wales and Australia, by contrast, acknowledge the importance of freedom of speech, but regard it as one right among others, with any conflict being resolved by way of a balancing exercise.[72] In our consultation paper[73] we drew attention to the same contrast. The position in Canada remained uncertain until the court in *Kopyto*,[74] disapproving of the scandalising offence, appeared to adopt an approach near to that of the United States. New Zealand declined to follow *Kopyto*,[75] thus remaining in the Anglo-Australian camp.

45. The point about contrasting cultural expectations is a valid one, but could equally be used in reverse. The facts in *Žugić v Croatia*,[76] for example, which concerned a disrespectfully worded notice of appeal, would be unlikely to lead to prosecution in England and Wales. The fact that the prosecution was held to be compatible with the Convention indicates that the European Court of Human Rights was prepared to accept that Croatian legal and social norms demanded a greater degree of deference than some other countries. That is no guide to whether a similar offence is necessary in England and Wales.[77]

46. In summary, on a North American approach, the entire offence of scandalising may well be both unconstitutional and contrary to human rights, as it was held to be in *Garrison v Louisiana*[78] and in *Kopyto*. We are not contending for any such position here. Under the ECHR there is no doubt either that the offence of scandalising the court is in principle a restriction on freedom of speech or that it

[68] In particular Lord Pannick QC and Lord Lester of Herne Hill QC; see Appendix A paras A.13 and A.5.

[69] For example, Sir Sydney Kentridge QC; see Appendix A para A.43.

[70] (1996) 45 *International and Comparative Law Quarterly* 253.

[71] *Schenck v United States* (1919) 249 US 47, 51 to 52.

[72] Justice R Sackville, "How Fragile Are the Courts? Freedom of Speech and Criticism of the Judiciary" [2005] *Federal Judicial Scholarship* 11.

[73] CP para 46.

[74] (1987) 47 DLR (4th) 213 (Ont CA).

[75] *S-G v Radio New Zealand* [1993] NZHC 423, [1994] 1 NZLR 48.

[76] App No 3699/08.

[77] We discuss the question of necessity at para 52 and following below.

[78] (1964) 379 US 64.

can be justified if it is necessary to protect the authority and impartiality of the judiciary. The remaining questions are:

(1) the judgment of fact on whether the offence is either necessary or effective for that purpose;

(2) whether there are policy reasons, irrespective of human rights, for retaining or abolishing the offence.

Both these questions are discussed in the following paragraphs.

Uncertainty

47. There are uncertainties about the conditions for the offence,[79] in particular:

(1) whether allegations of partiality or corruption are always caught by the offence, without the need to show that, in the circumstances of the individual case, the undermining effect is likely to occur;[80]

(2) whether there needs to be any intention to undermine the administration of justice;[81]

(3) whether discussion on a matter of public interest is a formal defence, imposing a burden on the accused to adduce evidence;[82]

(4) whether the truth of the statements made is a defence independent of that of discussion on a matter of public interest.[83]

48. Uncertainty is a ground for challenging an offence from the point of view of human rights, as article 7 of the ECHR requires that the criminal law must be sufficiently accessible and precise to enable an individual to know in advance whether his or her proposed conduct is criminal.[84] In addition, article 10 requires any restriction on freedom of expression, whether taking the form of a criminal offence or not, to be "prescribed by law", again meaning that the law must be formulated with sufficient precision to enable citizens to regulate their conduct.[85] The two tests, while used for different purposes, are similar and may conveniently be considered together.

49. In some cases, an offence is so uncertain that it is held not to satisfy the requirement of being "prescribed by law". The reasoning here is that, quite apart from the effect of any actual prosecution, the uncertainty has a chilling effect on

[79] CP para 60; see the responses in Appendix A paras A.23 and A.31.

[80] See footnote 17 above.

[81] We believe not (see para 10 above), but there is disagreement among the authorities: CP para 32.

[82] See para 11 above.

[83] See para 11 above.

[84] *Korbely v Hungary* (2010) 50 EHRR 48 (App no 9174/02) (Grand Chamber decision) at [70], cited CP para 44; Clayton and Tomlinson para 11.511.

[85] A Lester, D Pannick and J Herberg, *Human Rights Law and Practice* (3rd ed 2009) ("Lester, Pannick and Herberg") para 4.10.30; Clayton and Tomlinson para 15.299.

expression in general, as a person cannot know in advance whether a proposed statement will fall within the offence.

50. We do not believe that the offence of scandalising is as uncertain as that. The doubts mentioned, though important, apply only in limited factual situations, and in many cases will be rendered irrelevant by the availability of the defence of discussion on a matter of public interest. As argued in the consultation paper, the likely response of the European Court of Human Rights would be to disapprove of prosecutions on facts involving these doubts, rather than to disapprove of the existence of the offence.[86]

51. On either view, uncertainty could be viewed as a reason for reform rather than abolition. If from the human rights point of view an offence is justifiable as being necessary for one of the defined purposes, but objectionable on the sole ground of uncertainty, the obvious solution is to redefine it so as to remove the uncertainty.

Obsolescence and necessity

52. The ECHR states that a restriction on freedom of expression is justified if necessary for any of a number of purposes, including the protection of the rights of others and the authority and impartiality of the judiciary.[87] The offence of scandalising the court is clearly aimed at protecting the authority and (perceived) impartiality of the judiciary: the question is whether it is *necessary* for this purpose.

53. As mentioned, the last successful prosecution in England and Wales was in 1931. The language used in the offending publication in that case[88] was, by present day standards, exceedingly moderate and would not now lead to prosecution. Professor David Feldman has argued that, even given the broad interpretation of necessity accepted by the European Court of Human Rights, the restriction constituted by the law of scandalising is not "necessary",[89] and this would seem to be supported by the fact that it has not been used successfully for 80 years.

[86] CP para 48 and cases there cited; discussed in CP paras 49 to 56.

[87] Art 10(2) ECHR; Lester, Pannick and Herberg para 4.10.40; Clayton and Tomlinson para 15.273 and following.

[88] "Lord Justice Slesser, who can hardly be altogether unbiased about legislation of this type, maintained that really it was a very nice provisional order or as good a one as can be expected in this vale of tears": CP para 5.

[89] D Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd ed 2002) pp 970 to 971, cited in CP para 45; response of Chief Constable Andrew Trotter, see Appendix A para A.25.

54. In human rights jurisprudence, "necessary" does not mean indispensable, in the sense of there being no other existing or possible way of achieving the same protection. The meaning is rather broader: that there is a pressing social need,[90] that the restriction in question meets that need, and that it is not a disproportionate response.[91] The argument from obsolescence could, however, be adapted to that broader meaning. If *nothing* has been done in response to scandalous communications for the last 80 years, whether in the form of prosecutions for scandalising or for any other offence, despite the availability of scandalising, that indicates that there is no pressing social need.

55. As against that, one could advance the following arguments.

    (1) The reason for the absence of prosecutions for a given offence could well be that the conduct in question is rare, as the offence is an effective deterrent.[92] We do not believe that this is true of scandalising: conduct such as posting abusive blogs is frequent, but not prosecuted.

    (2) Another reason could be that the conduct in question falls within more than one offence: it may, therefore, have been prosecuted as another offence. There are several statutory offences covering some of the same conduct as scandalising the court, and we discuss them below.[93] However, there is little, if any, evidence about whether those responsible for abusive publications about the judiciary have in practice been prosecuted for these offences.

    (3) An offence, even if not necessary for practical prosecution purposes, can have value as a signal. We discuss this argument in the next few paragraphs.

56. In conclusion, we do not believe that the European Court of Human Rights would hold that the existence of the offence of scandalising is incompatible with the Convention, either on the ground of uncertainty or on the ground that it is not "necessary" for one of the approved purposes. It is more likely to object to particular prosecutions on one of these grounds.

Symbolic value

57. It is sometimes argued that, even if the offence is not prosecuted, its existence is a "signal" marking out the behaviour in question as undesirable.[94] As against that, it is argued that a signal is not effective unless it is enforced.[95]

[90] *Sunday Times v UK* (1979) 2 EHRR 245 (App no 6538/74) at [59]; Clayton and Tomlinson paras 15.239(ii) and 15.306.

[91] CP para 53; Lester, Pannick and Herberg para 4.10.28.

[92] Response of Sir Sydney Kentridge QC; see Appendix A para A.43. See also para 58 below.

[93] See para 80 and following below and Appendix B.

[94] See para 69 below.

[95] Response of Dr Findlay Stark; see Appendix A para A.16.

58. Sir Sydney Kentridge QC argued that in many cases, a law exists to stigmatise obviously undesirable behaviour, but there may be few prosecutions either because the behaviour is extreme and unusual or because the law is an effective deterrent. Were it shown for example that incest and bigamy were rarely prosecuted because they were rarely committed, the offences would remain important both as a deterrent and as a sign of social disapproval. In such cases, the symbolic effect of the law is important, regardless of the frequency of prosecution or indeed of offending.

59. We acknowledge the force of this argument, and could give further examples. The offence of genocide has never been prosecuted in an English court but no one could deny its importance as a statement of principle. It has been argued that the offence of high treason has fallen into disuse and should be abolished,[96] but against that it could be argued that it forms part of popular culture and has iconic value as part of a monarchical constitution. On a different but related point, Professor John Gardner has observed that a long-standing legal provision, even if not ideally drafted from a rational point of view, may have symbolic value by the fact of having entered popular culture.[97] He notes that the expressions "grievous bodily harm" and "actual bodily harm",

> and even their abbreviations "GBH" and "ABH", have entered the popular imagination, and now help to constitute the very moral significances which they quaintly but evocatively describe.[98]

60. However, we do not believe that the offence of scandalising the court falls into this iconic category. Most members of the public are unlikely to have heard of scandalising the court. If an offence, such as bigamy in the hypothetical example above, is rarely prosecuted because it rarely occurs, that is all to the good. The same cannot be said of an offence, such as scandalising, which covers a form of behaviour that occurs very frequently but is never prosecuted.

61. Once more, this is not an unequivocal argument for abolition without replacement. If the present offence of scandalising is lacking in symbolic value, because it is unknown to the public and never enforced, there are two possible cures. One is to abolish it. The other is to create an effective sanction and enforce it.

62. A further argument is that, whether or not the offence has value as a signal, its abolition would send a contrary signal, namely that abuse of judges is now to be regarded as acceptable.[99] This is an argument that the time is not right for abolition rather than that abolition is wrong in principle; on the other hand, following this reasoning, it is hard to know what time would be right. We also

[96] G McBain, "Abolishing the Crime of Treason" (2007) 81 *Australian Law Journal* 94.

[97] J Gardner, "Rationality and the Rule of Law in Offences Against the Person", in his *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (2007).

[98] J Gardner, "Rationality and the Rule of Law in Offences Against the Person", in his *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (2007) p 50.

[99] See responses of: Barling J, Appendix A para A.36; Alec Samuels, Appendix A para A.37; and Sir Sydney Kentridge QC, Appendix A para A.43.

believe that the risk is slight: we are not aware of any sudden increase in offensive publications following the abolition of blasphemous[100] and seditious libel.[101]

Self-serving

63. It is customary to emphasise that the offence exists to safeguard the integrity of the judicial system rather than the personal dignity of judges.[102] Nevertheless, there is something inherently suspect about an offence both created and enforced by judges which targets offensive remarks about judges.[103]

64. This concern would be met to some extent if the offence were restated in statute, because it would not then be a judge-made offence, though it would still be seen as an offence enforced by judges. Even when one takes into account the fact that the offence is intended to protect the standing of the judiciary and not that of any individual judge, it still appears anomalous that judges have this protection when other prominent persons, such as members of Parliament, do not.[104] It is naturally akin to other offences, such as seditious libel[105] and *scandalum magnatum*:[106] after the abolition of these, and of criminal libel in general,[107] the offence of scandalising the court looks increasingly isolated.[108]

Effect of prosecution

65. Prosecutions for scandalising the court, and for any offence devised to replace it, are likely to have some undesirable effects, particularly if there is a defence of truth, as would seem to be required by article 10 of the ECHR.

    (1) As argued above,[109] enforced silence is likely to create more ill-feeling than the original publication, not least the suspicion that judges are engaged in a cover-up and unfairly suppressing freedom of expression.

    (2) A prosecution gives further publicity to the offending allegations by bringing them back to public attention after memory of them may have begun to fade.[110] A web post may be visited by some dozens of people.

[100] Criminal Justice and Immigration Act 2008, s 79.

[101] Coroners and Justice Act 2009, s 73(a).

[102] CP para 40; *R v Commissioner of Police of the Metropolis ex parte Blackburn (No 2)* [1968] 2 QB 150.

[103] Response of Bruce Houlder QC DL, Director of the Services Prosecution Authority; see Appendix A para A.24.

[104] Response of Bar Council; see Appendix A para A.20.

[105] Abolished by Coroners and Justice Act 2009, s 73(a).

[106] Abolished by Statute Law Revision Act 1887.

[107] Scandalising the court could formerly be tried on indictment as a form of criminal libel: *Hart and White* (1808) 30 State Trials 1131; *Castro* (1873) LR 9 QB 230.

[108] Response of Professor John R Spencer QC; see Appendix A para A.15.

[109] See para 31 above.

[110] Response of Anthony Edwards; see Appendix A para A.30.

A prosecution reported in the newspapers may bring it to the attention of some millions.

(3) Web posts frequently accuse judges of being involved in large scale conspiracies and promoting a hidden social agenda. Prosecuting the authors of such posts would give them a platform on which to vent these allegations further.

(4) Where the contemnor was an unsuccessful litigant, the contempt proceedings would be taken as an opportunity to re-litigate the issues in the original proceedings.

(5) In cases where an issue is raised as to whether the allegations are true, the proceedings are liable to turn into a trial of the behaviour of the judge in question. They might also result in the public revelation of personal details (for example, sexual orientation) which, though not discreditable, might be matters which the judge would prefer to keep private.

Change in public attitudes

66. The offence of scandalising the court arose in an era where deferential respect to authority figures was the norm. This is clearly no longer the case to nearly the same extent as it was.[111] Even if the change is one to be regretted, it is questionable how far it can be reversed by coercive measures. The very fact of the change implies that any such measures would be unpopular and, therefore, ineffective. As Lord Pannick observed in a lecture:[112]

> If confidence in the judiciary is so low that statements by critics would resonate with the public, such confidence is not going to be restored by a criminal prosecution in which judges find the comments to be scandalous or in which the defendant apologises.

67. The question of principle is whether it is either justifiable or effective to use the criminal law to stigmatise a form of behaviour which public opinion does not regard as wrong. This is not something on which there is general agreement. According to Professor Duff,[113] for example, the function of the criminal law is confined to declaring society's judgment on acts which are wrong or, at most, to drawing boundaries. For example, the law is justified in setting 70 mph as the speed limit, but only because it was already accepted that it was wrong to drive dangerously fast. The opposing argument is that, in some instances, such as drink driving, the legislature may legitimately use the criminal law in order to educate public opinion as well as to reflect it.

68. Whatever one's views on the theoretical argument, there is one prudential caution. If the moral framework used by the legislature is too far out of accord with that accepted by the public, there is a danger of distortions such as juries

[111] Munby LJ in *Harris v Harris* [2001] 2 Family Law Reports 895 at [372]; CP para 19. See also Lord Taylor, "Justice in the Media Age" (1996) 62(4) *Arbitration* 258.

[112] 26th Sultan Azlan Shah Law Lecture (5 Sep 2012); see Appendix A para A.13.

[113] R A Duff, "Rule-Violations and Wrongdoings" in S Shute and A P Simester, *Criminal Law Theory: Doctrines of the General Part* (2002) pp 47 to 74.

refusing to convict, or of unpopular legislation backfiring by creating further resentment. This last danger is the one affecting both scandalising and any proposed replacement offence. By seeming to show the judges as concerned with shielding their own, such an offence will only strengthen any existing distrust or disrespect.

69. It is argued that the existence of the offence lays down a marker for responsible journalism, which will influence journalistic behaviour.[114] Many who are responsible for publications in the print media, broadcasting or online will have a procedure for checking that proposed material does not offend against the law governing libel and prejudicial contempt and, so the argument goes, should be equally careful to avoid scandalising the judiciary. In this way, the offence serves a purpose even if no prosecutions are brought.

70. We consider that, even in the case of publishers which adopt these procedures to check on the legality of the content, the influence is at least equally likely to go the other way. The standard of what qualifies as a discussion in good faith of a matter of public interest is influenced by, rather than influencing, the accepted journalistic practice of the time.[115] For example, in 1987 the *Daily Mirror* published upside down photographs of three Law Lords concerned in the Spycatcher litigation, with the caption "YOU FOOLS".[116] This would certainly have been regarded as scandalising contempt if it had been published a century earlier; but it is the practice of journalism, and not the law, that has changed.

71. In any case, this argument is only relevant to a fraction of the total material published. Much amateur online posting knows no such inhibitions, and the same may be said of the paper correspondence that judges often receive from dissatisfied litigants in person. According to more than one of the judges we have consulted, there is a great deal of extremely abusive online material concerning judges, particularly those sitting in family cases. This does not appear to be at all influenced by the existence of the offence and it is hard to see that a revised offence would make much difference.

REPLACING SCANDALISING

Civil procedure

72. It was suggested by some consultees[117] that, in the long term, the solution might be to replace the offence of scandalising the court by a civil procedure on the lines of an injunction or restraining order. A person who was found to have published offensive material would first be ordered to desist from offensive publication following a private hearing in chambers; only if the order was

[114] Responses of: McCombe LJ, Appendix A para A.40; Attorney General for Northern Ireland, Appendix A para A.42; Sir Sydney Kentridge QC, Appendix A para A.43; Alec Samuels, Appendix A para A.37.

[115] Response of Bruce Houlder QC DL; see Appendix A para A.24.

[116] CP para 20.

[117] Responses of Barling J, Appendix A para A.36 and Council of Circuit Judges, Appendix A para A.39.

breached would there be a public prosecution for contempt of court. Such a procedure would need to be introduced by statute and contain a clear definition of the type of material concerned.

73. The procedure appears to be designed to address online publications. The scheme would be that at any time after a scandalous publication is made, an order can be made requiring it to be removed. It could, however, be a problem that, whether in relation to online or any other form of publication, the procedure would only allow the punishment of repeat offending. Judges would not be able to make a restraining order unless there had already been a scandalous publication. If publications of this kind have bad effects sufficient to justify criminalising them, those effects are just as likely to flow from the first publication as from any repetition.

74. There are some further problems which will have to be resolved if there is to be a solution along these lines.

    (1) The fact that the order is made in private would reinforce the perception that judges are acting unaccountably in order to preserve their own dignity, and the proceedings for breach of the order would equally provide a platform for renewing the allegations.

    (2) In some cases the publisher might have serious grounds for arguing that the publication ought to be allowed because the allegations are true.[118] It is unclear at what stage of the proceedings this issue would be determined, or whether the judge making the order would always be different from the judge about whom the allegations were made.

    (3) In English law there is a general presumption against pre-censorship.[119] For this reason, in libel cases an interim injunction is not granted if the defendant shows that at the trial of the action he or she intends to prove that the statement in question is true.[120] A similar rule would presumably apply in the present context.

Offence of making false allegations

75. Another possibility would be a narrow targeted offence consisting of publishing false allegations of judicial corruption; this might possibly be extended to false allegations of other defined forms of misconduct.[121] This was mentioned in our consultation paper[122] as an alternative to abolition without replacement, but only

[118] Response of Elias LJ; see Appendix A para A.6.

[119] Clayton and Tomlinson para 15.25 and following.

[120] *Bonnard v Perryman* [1891] 2 Ch 269; Gatley para 27.6; Clayton and Tomlinson para 15.26.

[121] This would be similar to our recommendation in Criminal Law: Offences Relating to Interference with the Course of Justice (1979) Law Com No 96, for the creation of an offence of publishing or distributing a false statement alleging that a court or judge is or has been corrupt in the exercise of its or his or her functions. It did not specifically mention the abolition of scandalising the court: see CP para 57(2).

[122] CP paras 87 and 88.

one consultee[123] appears to favour this option. There would be significant problems with such an offence, principally the following.

76. By the nature of such an offence, there would have to be a defence of truth; this would probably also be necessary to ensure compliance with the ECHR. This would have the potentiality of turning the proceedings into a trial of the judge concerned. As Lord Carswell observed in his response:

> I am persuaded, however, that it would be better not to attempt to introduce such an offence into the law. If truth were to be a defence, a case which involved such a defence would generally require the judge concerned to give evidence, which could be used to make an opportunity for intrusive examination and give rise to unwelcome publicity in some of the media. Indeed, most prosecutions for the modified offence, whatever the basis of the offence and the defences, would provide a field day for anti-judicial commentators.

77. Although such an offence might work in relation to allegations against an individual judge, it is less clear that it would cover allegations against the judiciary collectively or a section of it. It is inherently harder to establish the truth or falsity of collective accusations. "Judge X accepts bribes" is a clear statement of fact which may in principle be shown to be true or false at a trial. "The judges of court Y are prejudiced against litigants in person" comes nearer to a statement of opinion which, even if wholly unfounded, could be regarded as simple criticism. For similar reasons, the law of defamation does not normally acknowledge the existence of libel against a group.[124]

78. One further decision that would need to be made is whether the new offence should impose strict liability for unverified statements, however honestly believed, as in the present law of defamation, or whether the offence should be restricted to deliberate lies.

    (1) Our impression, from the material shown to us by judges, is that, while the authors of much of the online material attacking judges appear to be disappointed litigants or conspiracy theorists, most of them honestly believe their allegations to be true. However much one might rationalise and modernise the offence, it would remain the case that prosecuting such individuals would create martyrs and provide a further platform for them to publicise their allegations.

    (2) Restricting the offence to deliberate lying would make its focus very narrow indeed. There may also be difficulty in proving the defendant's state of mind, though the legal system frequently has to confront similar issues, for example, in prosecutions for fraud.

79. In effect, this solution would amount to a revival of criminal libel, applicable only to libels against judges. The offence of criminal libel itself was obsolescent by the time it was abolished by section 73 of the Coroners and Justice Act 2009. It is

[123] Response of McCombe LJ; see Appendix A para A.40.

[124] Gatley para 7.9 and following.

hard to see that this limited form of it would have greater success. As Lord Justice Toulson observed in his response:

> I know of no case in which a judge would have wanted criminal proceedings, if possible, to be brought against somebody as a result of conduct to which the judge had been subjected in a judicial capacity, whether individually or as a member of a wider group, but such proceedings were impossible by reason of the non-existence of a suitable offence.
>
> …
>
> If some new offence were created, I see no reason to suppose that it would be used any more than the offence of scandalising the court has been used in recent years.

OFFENCES ALTERNATIVE TO SCANDALISING

80. There are several criminal offences covering some of the same behaviour that can constitute scandalising the court, and these would continue to be available whether or not the offence of scandalising is abolished. They are described in detail in Appendix B. [125]

81. Section 5 of the Public Order Act 1986 provides that it is an offence to use threatening, abusive or insulting words or behaviour, or disorderly behaviour, or to display any writing, sign or other visible representation which is threatening, abusive or insulting within the hearing or sight of a person likely to be caused harassment, alarm or distress. According to section 6, the mental element for the offence is that the defendant intended his or her words or actions to be threatening, abusive or insulting or was aware that they may be.[126]

82. Section 4A of the same Act is similar. The major differences are:

    (1) the section 4A offence does not require the offence to occur "within the sight or hearing" of a person likely to be caused harassment, alarm or distress;

    (2) however, in the section 4A offence the defendant must intend to cause some person harassment, alarm or distress; and

    (3) that person, or another person, must in fact experience harassment, alarm or distress.

83. One or both of these offences could cover, for example, a protester who carries a placard outside a court making abusive comments about a judge of that court. However, they do not cover private correspondence, such as a letter posted to the judge.[127] Nor would they seem to cover print publications or online

[125] Appendix B may be viewed at http://lawcommission.justice.gov.uk/areas/contempt.htm. It is not included in the printed copy of this report.

[126] See Appendix B para B.28 and following.

[127] *Chappell v DPP* (1989) 89 Cr App R 82; see Appendix B para B.21.

publications visible to the public but not specifically brought to the attention of the judge concerned.[128]

84. Section 127(1) of the Communications Act 2003 provides that a person is guilty of an offence if he or she sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character. The test is the objective tendency of the material in question: there is no requirement that any person should in fact be caused distress by it.[129] The sending of messages has been held to include the posting of tweets on Twitter.[130] On the same principle, it would also include web posts, which resemble most tweets in being made available to a general or limited public rather than sent to a specific person. On this assumption, this offence is apt to cover malicious material posted online about judges.

85. It is also an offence, under section 127(2) of that Act, to send by means of a public electronic communications network a message that the sender knows to be false for the purpose of causing annoyance, inconvenience or needless anxiety to another. The limits of this offence have not been tested in case law,[131] and it is less apt to cover scurrilous material about judges than the section 127(1) offence, as the main purpose of such material is likely to be to share imagined grievances with the public rather than to annoy the judge.

86. Section 1 of the Malicious Communications Act 1988 provides that it is an offence to send a letter, electronic communication or article of any description which conveys a message which is: indecent or grossly offensive; a threat; or information which the sender knows to be false. This offence would cover, for example, a threatening or offensive letter or email sent to a judge, including a letter inserted in a letter box rather than sent through the post.[132] However, it does not include a web post or similar material, as the offence only applies if the sender's purpose is to cause distress or anxiety to the recipient, and a web post has no specific recipient.[133] (One can imagine cases where a web post does have the purpose of causing distress or anxiety to a specific individual, for example, if it is worded in the form of an open letter to that individual. Even so, it would be straining language to describe that individual as the "recipient".)

87. The Protection from Harassment Act 1997 creates four offences of harassment, together with two procedures for restraining orders.

[128] See Appendix B para B.21.

[129] *DPP v Collins* [2006] UKHL 40, [2006] 1 WLR 2223; see Appendix B para B.45.

[130] *Chambers v DPP* [2012] EWHC 2157 (Admin), [2013] 1 Cr App R 1; see Appendix B para B.42.

[131] See Appendix B para B.53.

[132] *Chappell v DPP* [1989] 89 Cr App R 82; see Appendix B para B.7.

[133] See Appendix B para B.63.

(1) Section 1 of that Act forbids,[134] and section 2 criminalises,[135] harassment in its basic form. Harassment is defined as any course of conduct which is oppressive, unreasonable and calculated to cause harm and distress.[136] The offence is only committed if the defendant knew or ought to have known that the course of conduct amounts to harassment.[137] Acts which are pursued for the prevention or detection of crime or under legal authority and acts which are reasonable are excluded from the definition.[138] This offence could cover repeated and vexatious letters of complaint to a judge: it has been held in *DPP v Hardy*[139] that a course of conduct that initially takes the form of a legitimate inquiry or complaint may descend into harassment if unreasonably prolonged or persisted in.[140]

(2) Section 2A[141] creates an offence consisting of any course of conduct constituting harassment, by the above definition, which also amounts to stalking.[142] Section 2A(3) states that examples of acts or omissions which, in particular circumstances, amount to stalking include: following a person; contacting a person; publishing a statement or material relating to a person, and; watching or spying on a person.[143] This offence may cover, for example, blogs which repeatedly post aggressive and offensive material about judges.

(3) Section 4 creates an offence consisting of any course of conduct which causes another to fear that violence will be used against him or her.[144] The mental element of the offence[145] and the defences to it[146] are similar to those under section 1.

[134] See Appendix B para B.72.

[135] See Appendix B para B.73.

[136] See Appendix B para B.74 and following.

[137] See Appendix B para B.86 and following.

[138] See Appendix B para B.89 and following.

[139] [2008] EWHC 2874 (Admin), (2009) 173 Justice of the Peace Reports 10.

[140] See Appendix B para B.81.

[141] Inserted by Protection of Freedoms Act 2012, s 111(1); in force from 25 Nov 2012.

[142] See Appendix B para B.93.

[143] See Appendix B para B.95.

[144] See Appendix B para B.102.

[145] See Appendix B para B.109 and following.

[146] See Appendix B para B.111.

(4) A new section 4A, also inserted into the 1997 Act by the 2012 Act, provides that it is an offence to pursue a course of conduct which amounts to stalking and which causes the victim to fear violence or to suffer serious alarm or distress.[147] Again, the same mental element[148] and defences[149] apply.

(5) Sections 5 and 5A give the court power to make a restraining order respectively prohibiting a convicted or an acquitted defendant from doing specified acts amounting to harassment.[150]

88. Any of these offences could be committed against a judge, though those under sections 2 and 2A are more likely than those under sections 4 and 4A. These offences are wider than those under the Malicious Communications Act 1988 and the Communications Act 2003, in that they can cover publications in the print media[151] as well as letters addressed to an individual and electronic posts. However, they are not committed unless the conduct is persistent.[152]

89. Finally, in extreme cases the contents of a blog or similar communication may amount to an incitement to violence against the judge in question, and, therefore, constitute assisting and encouraging an offence under the Offences Against the Person Act 1861.[153]

90. It would seem that, between them, the listed offences cover most forms of scandalising by public demonstration, letter, email or online publication. The major omission is publication in the print media, including pamphlets distributed outside the court, which will only be covered if it amounts to harassment.[154]

91. One question is whether these offences are capable of covering publications making collective accusations against the judiciary or a section of it rather than an individual judge. If the material is sufficiently offensive or threatening, it could in principle be covered by the Public Order Act 1986 or the Communications Act 2003. It is unlikely to fall within the Malicious Communications Act 1988 or the Protection from Harassment Act 1997, which are mainly concerned with conduct aimed at individuals.

92. In addition to these criminal offences, there is the possibility of a civil action for defamation;[155] this will often be the only remedy (other than scandalising itself) for

[147] See Appendix B para B.116.

[148] See Appendix B para B.123 and following.

[149] See Appendix B para B.125.

[150] See Appendix B para B.126 and following.

[151] *Thomas v News Group Newspapers Ltd*, [2001] EWCA Civ 1223, [2002] Entertainment and Media Law Reports; see Appendix B para B.83.

[152] *Iqbal v Dean Manson Solicitors* [2011] EWCA Civ 123, [2011] Industrial Relations Law Reports 428; see Appendix B para B.79.

[153] For assisting and encouraging, see part 2 of the Serious Crime Act 2007.

[154] Or under the Public Order Act 1986 if the writing is publicly displayed.

[155] Reponses of: Lord Pannick QC, Appendix A para A.13; Elias LJ, Appendix A para A.6; Bar Council, Appendix A para A.20.

material published in the print media. Insulting remarks to judges in court will continue to be covered by contempt in the face of the court, whether or not scandalising the court is retained as a form of contempt.

CONCLUSIONS

93. In summary, on considering the consultation responses we have arrived at the following conclusions.

(1) The offence of scandalising the court is in principle an infringement of freedom of expression that should not be retained without strong principled or practical justification.

(2) We do not believe that the existence of the offence is in itself contrary to the ECHR, but there is a risk of particular prosecutions being disapproved on this ground. There is some doubt whether the offence should be regarded in England and Wales as "necessary" within the Convention test, even if prosecutions in other countries have been held to be so.

(3) There are uncertainties about the conditions for the offence, which will need to be resolved if the offence is retained.

(4) The disuse of the offence is a possible, though not conclusive, sign that it is not "necessary" in Convention terms and that its abolition is unlikely to have significant effects in practice.

(5) The offence, being not well known to the public, has only a limited symbolic value. The longer the period that elapses without a prosecution the less of this symbolic value remains. Abolition would not amount to a significant signal the other way.

(6) The offence may be regarded as self-serving on the part of the judges; this risk would be reduced but not removed if the offence were restated in statute, as the offence would no longer be judge-made, though it would still be enforced by them.

(7) Prosecutions for this offence, or for any offence devised to replace it, are likely to have undesirable effects. These include re-publicising the allegations, giving a platform to the contemnor and leading to a trial of the conduct of the judge concerned.

(8) The offence is no longer in keeping with current social attitudes, and is unlikely to influence the behaviour of publishers.

(9) Replacing the offence with an injunction procedure would not be a significant improvement.

(10) There does not appear to be significant demand for a new offence along the lines of the Law Commission's 1979 recommendations.

(11) There are several statutory offences covering the more serious forms of behaviour covered by scandalising, and civil defamation proceedings are available in the case of false accusations of corruption or misconduct.

94. Accordingly, we see no reason to alter our first preference as expressed in the consultation paper, namely the abolition of scandalising the court without replacement.

CONSEQUENCES OF ABOLITION

95. The proposed amendment[156] has been carefully drafted to ensure that it only covers publications and does not affect either contempt in the face of the court or publications which may impede or prejudice specific legal proceedings.[157]

96. The amendment only extends to England and Wales. If it is passed, it will be for the devolved authorities in Scotland and Northern Ireland to decide whether to follow suit.

97. If they do not, a question will arise about the position of the Supreme Court. Almost certainly, the answer is that it is a Scottish court when and only when hearing an appeal from a Scottish court, and similarly for Northern Ireland.[158] In other words, in each case it hears it forms part of one of the three legal orders within the United Kingdom: there is no separate "federal" legal order. It follows that it will usually be clear whether the offence of murmuring judges (for Scotland) or scandalising the court (for Northern Ireland) applies or not. There may be an exception when a judge of the Supreme Court is targeted as an individual without reference to any particular case. The prosecuting authorities for Scotland and Northern Ireland would presumably decide to bring charges only if the person responsible for the publication, or the subject matter of the scandalous allegations, had a substantial connection with those jurisdictions.

98. The amendment would only abolish scandalising the court as an offence or form of contempt at common law. It would have no effect on statutory forms of contempt such as those under section 12 of the Contempt of Court Act 1981 (relating to magistrates' courts),[159] section 118 of the County Courts Act 1984 (relating to county courts) or section 309 of the Armed Forces Act 2006 (relating to service courts). These sections do not in any case address scandalising publications.

99. A partial exception to this is the procedure under section 311 of the Armed Forces Act 2006. This section provides that:

> (1) This section applies if, in relation to proceedings before a qualifying service court, a person within section 309(6)[160] does any act ("the offence") that would constitute contempt of court if the proceedings were before a court having power to commit for contempt.

[156] See para 4 above.

[157] CP para 62.

[158] Compare Constitutional Reform Act 2005, s 45(2). This section concerns the effect of decisions of the court and does not directly address contempt of court.

[159] For a discussion of the magistrates' courts provision, see Contempt of Court (2012), Law Commission Consultation Paper No 209 para 5.48 and following. The other two provisions are similar.

[160] That is, a person within the United Kingdom, or a person outside it who is subject to service law or discipline at the time.

(2) The qualifying service court, unless it has exercised any power conferred by section 309 in relation to the offence, may certify the offence—

(a) if it took place in a part of the United Kingdom, to any court of law in that part of the United Kingdom which has power to commit for contempt;

(b) if it took place outside the United Kingdom, to the High Court in England and Wales.

(3) The court to which the offence is certified may inquire into the matter, and after hearing—

(a) any witness who may be produced against or on behalf of the person, and

(b) any statement that may be offered in defence,

may deal with him in any way in which it could deal with him if the offence had taken place in relation to proceedings before that court.

This section is capable of applying to conduct that would amount to scandalising a service court, but would cease to do so once scandalising is abolished as a civilian offence.

OUR RECOMMENDATION

100. **We recommend that scandalising the court should cease to exist as an offence or as a form of contempt in the law of England and Wales. This recommendation does not affect contempt in the face of the court, or liability for publications that may interfere with proceedings before any court.**

(*Signed)* DAVID LLOYD JONES, *Chairman*
ELIZABETH COOKE
DAVID HERTZELL
DAVID ORMEROD
FRANCES PATTERSON

ELAINE LORIMER, *Chief Executive*
12 December 2012

The Law Commission
(LAW COM No 335)

CONTEMPT OF COURT:
SCANDALISING THE COURT
Appendix A: Summary of Responses

THE LAW COMMISSION

APPENDIX A: SUMMARY OF RESPONSES

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APPENDIX A
SUMMARY OF RESPONSES

THE QUESTIONS

A.1 Consultation Paper No 207, Contempt of Court: Scandalising the Court asked three questions and made one provisional proposal, as follows.

> 1. Consultees are asked whether they agree that the offence of scandalising the court should not be retained in its current form.
>
> 2. We provisionally propose that the offence of scandalising the court should be abolished without replacement. Consultees are asked whether they agree.
>
> 3. If consultees do not agree with our provisional proposal that the offence be abolished, they are asked whether they consider that the offence of scandalising the court should be retained or replaced in a modified form, and if so:
>
> (1) whether this should be done by retaining the offence as a form of contempt, but modifying it to include defences of truth, public interest or responsible journalism;
>
> (2) whether a new offence should be created separate from contempt, and if so how it should be defined;
>
> (3) in either case, what the mode of prosecution and trial for the offence should be.

A.2 We received forty-six responses, excluding simple acknowledgments of receipt. The consultation period was originally set to end on 5 October 2012, but was extended to 19 October 2012 to allow for the long vacation.

A.3 Apart from the written responses listed below, a seminar involving fourteen High Court and Court of Appeal judges was held on the evening of 15 October 2012. There was general support for abolition of the offence: while some expressed concerns about the possible consequences of abolition none of them advanced a concrete alternative proposal. One judge, who was not able to attend the seminar, later proposed that the offence of scandalising the court should be considered in the course of the main contempt project.

THE RESPONSES

Favouring abolition without replacement

A.4 Lord Mackay of Clashfern supported the provisional conclusion, meaning the proposal for abolition without replacement. He made one correction of fact and mentioned one incident involving criticism of magistrates for which the offence would not have provided a remedy.

A.5 Lord Lester of Herne Hill QC supported the proposal for abolition and repeated some of the points in the consultation paper, quoting from the major textbooks.

A.6 Lord Justice Elias said that the offence was too broad and out of line with modern views. Where there is an allegation of dishonesty or corruption, that is addressed by the law of defamation, and in that case truth is a defence. In most cases the allegations are too silly to be believed and there is no need for a criminal offence. If, however, the offence is to remain, perhaps to deal with cases which might appear to have some basis, there would need to be a defence of truth otherwise the perception might be that the courts were seeking to gag the exposure of judicial wrongdoing. That would hardly be designed to secure public confidence in the judiciary.

A.7 Lord Justice Sullivan said that he was not in favour of retaining the offence.

A.8 Lord Justice Toulson supported abolition of the offence for the reasons given in the consultation paper.

A.9 Another judicial respondent said that he was not unsympathetic to the proposal for abolition and did not favour the introduction of a new offence. At the same time, he thought that there was the need for politicians to give more public support for the judiciary or a judge who has been attacked.

A.10 A further judicial respondent was in favour of the abolition of the offence, but expressed concern about criticism in the course of or at the conclusion of a hearing. Under our provisional proposals this would remain as a punishable contempt, as it falls under the head of contempt in the face of the court rather than of scandalising.

A.11 One tribunal judge expressed concern about various forms of vilification of the judiciary that had occurred in his experience, but agreed that prosecution was a blunt weapon. Scandalising can be regarded as unnecessary if other means of control, such as press codes of conduct, can be strengthened. He drew particular attention to the position of members of tribunals.

A.12 Lord Carswell referred to his speech in the House of Lords on 2 July. He agreed that the offence should not be retained in its present form, and should not be replaced by an offence of making untrue and scandalous allegations against a particular judge. The answers to the consultation questions were 1. yes 2. yes 3. does not arise.

A.13 Lord Pannick QC sent a copy of his Azlan Shah lecture dated 5 September 2012, in which he gave at greater length the arguments that he had used in the House of Lords.

A.14 Rt Hon Peter Hain MP supported our proposals for abolition, using some of the same arguments as Lord Pannick and enclosing the relevant passages from his book that had led to his attempted prosecution.

A.15 Professor John R Spencer QC of the University of Cambridge supported the abolition of scandalising, on the analogy of the other common law offences such as criminal libel that had already been abolished. He had some hesitation about press campaigns against individual judges, and thought that something should be done about these, though the existing offence was too antiquated to be a useful remedy.

A.16 Dr Findlay Stark of Jesus College Cambridge supported the proposal for abolition without replacement, pointing out that the law does not have value even as a "signal" unless it is enforced. He also considered what form a replacement offence might take, in case it should be decided (contrary to his view) that there should be one. He took the view that, should there be a replacement offence, it should continue to be a form of contempt, but be tried by the normal criminal procedure. He did not favour the introduction of a defence of responsible journalism.

A.17 Professor Clive Walker favoured abolition without replacement.

A.18 The Association of District Judges was concerned about the ability to combat online comment. However, having regard to the technical difficulties they agreed with the provisional proposal for abolition without replacement.

A.19 The Council of District Judges (Magistrates' Courts) agreed that scandalising the court should be abolished, and expressed the view that that offence does not apply to magistrates' courts.

A.20 The Bar Council supported the proposals, on the grounds that no other officials were protected in the same way and it was open to judges to bring libel proceedings.

A.21 The Law Society supported the proposals, repeating some of the arguments in the consultation paper.

A.22 The Justices' Clerks' Society agreed with the proposal for abolition without replacement.

A.23 The Crown Prosecution Service repeated the arguments about the uncertainty of the offence and the possible breach of article 10 and supported the abolition of the offence without replacement. It went on to say that, should the offence be retained, it should be modified to include defences of truth, public interest and responsible journalism.

A.24 Bruce Houlder QC DL, the Director of Service Prosecutions, agreed that the offence should be abolished and that it should not be replaced with a new offence. He commented in detail on the changed expectations on the press and on the perceived unfairness of judges being able to punish attacks on their own body.

A.25 Chief Constable Andrew Trotter of the British Transport Police supported the proposal to abolish the offence without replacement, and gave reasons including the fact that the offence had not been used for decades, that it appeared incompatible with the ECHR and that other remedies were available.

A.26 The Society of Editors supported the proposals, in the interests of freedom of expression.

A.27 The Newspaper Society supported abolition, arguing that there were many other legal constraints upon publication relating to legal proceedings.

A.28 Guardian Newspapers supported the abolition of the offence. They mentioned the uncertainties surrounding the offence and the importance of free speech.

A.29 6 King's Bench Walk submitted a response divided into two parts, a majority and a minority opinion. The majority opinion was in favour of abolition without replacement, giving detailed reasons on the same lines as those in the consultation paper.

A.30 Anthony Edwards agreed with the proposal to abolish the offence, saying that an allegation of scandalising is likely to receive more publicity than the original statement. If retained, it should be modified to include a defence of subjective belief in the truth of the statement. It should not be replaced by a statutory offence, as the difficulty of drafting this would be disproportionate to the need.

A.31 One consultee representing a local authority supported the abolition of the offence without replacement, citing its uncertainty, human rights concerns and the availability of other remedies. His answers to the consultation questions were therefore 1. yes 2. yes 3. does not arise.

A.32 David Iwi agreed with the proposal for abolition without replacement, and illustrated with a hypothetical series of events concerning an allegation of judicial bias.

A.33 Richard Jarman said "the existence of the offence is itself a scandal" and agreed with proposal 2 (abolition without replacement).

A.34 Vaughan Bruce said: "This offence should be abolished without being replaced since it is not required in any democratic society" without further comment.

A.35 An anonymous response described the abolition of the offence as a step in the right direction and proposed a series of further reforms to court procedure.

Favouring retention

A.36 Mr Justice Barling expressed the view that the time was not right for abolition. For the moment, the offence should be retained as a form of contempt at common law, and the various uncertainties should be clarified judicially. In the longer term, it could be replaced by a civil mechanism involving financial sanctions and the power to make an injunction.

A.37 Alec Samuels argued that abolition would be untimely and send the wrong signal. He did not advocate modification or replacement, though he said that defences should be spelled out in any new legislation.

A.38 Lord Gill wished the corresponding Scottish offence to be retained.

Favouring a replacement offence

A.39 The Council of Circuit Judges, in their collective response, agreed that scandalising the court was unacceptably uncertain in its current form, but did not want it either to be abolished without replacement or replaced by a normal criminal offence. They suggested that there should be a revised extension of the law of contempt, including the power to impose injunctions, or failing that a procedure modelled on the ASBO procedure.

A.40 Lord Justice McCombe favoured the abolition of the offence in the context of the overall review of contempt, and recommended replacing it "along the lines of the 1979 Commission suggestion"[1] or "what is suggested in 3(1)". Some websites went beyond intemperate criticism and contained incitement to violence: abolishing the offence without replacement would send the wrong message.

A.41 District Judge Ian Murdoch said that the offence should not be abolished, as even if not used it gives an added protection to the constitutional role of the courts which is unique. However, it should be made a separate criminal offence and not retained as contempt.

A.42 The Attorney General for Northern Ireland favoured codifying the existing offence, and incorporating a defence of honest and reasonable belief in the truth of the statement made.

A.43 Sir Sydney Kentridge QC argued that scandalising the court should be retained as a form of contempt, but modified to make clear that truth and public interest are defences and that criticism as such is not an offence.

A.44 The minority opinion from 6 King's Bench Walk[2] proposed a codified offence of strict liability contempt, subject to defences of truth and fair comment, and with a threshold requirement of substantial risk of serious harm.

A.45 Dr Findlay Stark,[3] while not favouring the introduction of a replacement offence, made some suggestions about what form such an offence might take if it were to be introduced. Professor John R Spencer[4] thought that something should be done about press campaigns against judges, but did not make any concrete suggestion.

SUMMARY

A.46 Out of forty-six responses, thirty-two are in favour of abolition without replacement (nineteen giving detailed reasons). Two favour retention, and another (the Lord President) may be interpreted as favouring retention, though confining itself to Scotland; two favour a replacement offence and four a revised form of contempt. The remaining responses express no decided preference.

1 The reference is to Criminal Law: Offences Relating to Interference with the Course of Justice (1979) Law Com No 96, which recommended the creation of an offence of publishing a false allegation of corruption.

2 For the majority opinion, see para A.29 above.

3 Para A.16 above.

4 Para A.15 above.

The Law Commission
(LAW COM No 335)

CONTEMPT OF COURT: SCANDALISING THE COURT
Appendix B: Offences Alternative to Scandalising

THE LAW COMMISSION

APPENDIX B: OFFENCES ALTERNATIVE TO SCANDALISING

CONTENTS

APPENDIX B
OFFENCES ALTERNATIVE TO SCANDALISING

B.1 This Appendix sets out the various criminal offences which cover some of the same ground as scandalising. As there are no reported cases of these offences being applied to attacks on judges,[1] we draw on the existing case law to consider their suitability as offences alternative to scandalising.

PUBLIC ORDER ACT 1986

Public Order Act 1986 section 4A

B.2 Section 4A provides that:

> (1) A person is guilty of an offence if, with intent to cause a person harassment, alarm or distress, he—
>
> (a) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or
>
> (b) displays any writing, sign or other visible representation which is threatening, abusive or insulting,
>
> thereby causing that or another person harassment, alarm or distress.

Type of conduct or words

B.3 The requirements that the conduct be "threatening, abusive or insulting" and the concepts of "harassment, alarm and distress" apply to both the section 4A and the section 5 offences.

B.4 Whether conduct is "threatening, abusive or insulting" seems to be an objective question of fact.[2] In *Hammond v DPP*[3] the Divisional Court held that in determining whether words or behaviour are insulting (or threatening or abusive), the traditional approach under *Brutus v Cozens*[4] is to be followed (that is, the words are to be given their ordinary meaning), but also full account must be taken of article 10 of the European Convention on Human Rights ("ECHR").[5] The House of Lords said in *Brutus* that "an ordinary sensible man knows an insult when he sees or hears it".[6] Words cannot be insulting (or, presumably, threatening or abusive) unless there is "a human target which they strike", and the defendant must be aware of that "human target", though it is not necessary

1 We are not aware whether any of the offences have been used for this purpose without the case being reported.

2 D Ormerod, *Smith and Hogan's Criminal Law* (13th ed 2011) ("Smith and Hogan") p 1097.

3 [2004] EWHC 69 (Admin), (2004) 168 Justice of the Peace Reports 601.

4 [1973] AC 854.

5 Lord Justice Hooper and D Ormerod (eds), *Blackstone's Criminal Practice* (2013) ("Blackstone's") para B11.74.

6 *Brutus v Cozens* [1973] AC 854, 862 by Lord Reid.

that he or she intended the conduct to be insulting.[7] "Disorderly behaviour" is a question of fact for the trial court to determine.[8]

B.5 Harassment, alarm and distress have not been defined. Until they, are they are assumed to have their ordinary English-language meaning.[9] In *R (R) v DPP*[10] the High Court described the terms "harassment", "alarm" and "distress" as relatively strong terms. "Distress" in this context requires emotional disturbance or upset.[11] However, when the defendant is accused of "harassment", there is no need to demonstrate that any person suffered real emotional disturbance or upset, but the harassment must be more than merely trivial.[12]

Where published and by what means

B.6 Both this offence and the offence under section 5 cover words and behaviour and the display of writing, signs or other visible representation. This covers posters,[13] sandwich boards[14] and flag-defacement.[15] "Writing" includes typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form.[16] This could, for example, cover carrying banners with abusive messages outside the court.

B.7 In *Chappell v DPP*[17] the Divisional Court held that the posting of an envelope, with writing containing abusive or insulting words concealed inside it, through the letter box of someone's home, could not amount to a "display". There is also an exception to the offences in sections 4A(2) and 5(2) of the 1986 Act where the defendant was inside a dwelling and the other person is also inside that or another dwelling. Such conduct would, however, be an offence under the Malicious Communications Act 1988, section 1.[18]

7 Smith and Hogan p 1098.

8 *Chambers v DPP* [1995] Crim LR 896.

9 Blackstone's para B11.63.

10 [2006] EWHC 1375 (Admin), (2006) 170 Justice of the Peace Reports 661 at [12].

11 Blackstone's para B11.76.

12 Smith and Hogan p 1101; *Southard v DPP* [2006] EWHC 3449 (Admin), [2007] Administrative Court Digest 53.

13 *Norwood v DPP* [2003] EWHC 1564 (Admin), [2003] Crim LR 888.

14 *Hammond v DPP* [2004] EWHC 69 (Admin), (2004) 168 Justice of the Peace Reports 601.

15 *Percy v DPP* [2001] EWCA Admin 1125, [2002] Crim LR 835.

16 Blackstone's para B11.56; Interpretation Act 1978, s 5 and sch 1.

17 [1988] 89 Cr App R 82.

18 Blackstone's paras B11.75 and B11.78.

B.8 In *S v DPP*[19] material on a website was assumed to be within the scope of the offence.[20] Abusive online material about a judge could therefore fall within the offence if the judge later saw it and experienced harassment, alarm or distress.

Impact on the victim

B.9 In contrast with the section 5 offence,[21] the victim of a section 4A offence must in fact experience harassment, alarm or distress.

B.10 There must be a causal connection between what the accused does and the victim's harassment, alarm or distress.[22]

B.11 The offence may be committed even if the material that eventually causes the harassment, alarm or distress is no longer in the public domain at the time it causes the reaction. In *S v DPP*[23] the police showed the victim an abusive photograph of him which had been put online but which had since been taken down. The offence was held to have been committed, as the chain of causation between the act of posting and the distress suffered was not broken.

Mental element

B.12 The offence requires proof of an intention to cause harassment, alarm or distress. The intention may be inferred from the words used,[24] although this is a matter for the tribunal of fact in each case.[25]

Defences

B.13 According to section 4A(3):

> (3) It is a defence for the accused to prove—
>
> (a) that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the writing, sign or other visible representation displayed, would be heard or seen by a person outside that or any other dwelling.
>
> (b) that his conduct was reasonable.

B.14 The equivalent defences to the offence under section 5 are discussed more fully below.[26] Conduct is "reasonable" if it is an exercise of ECHR rights in circumstances in which an interference with that exercise would not be justified under articles 10(2) and 9(2).[27] Cases which fall outside the scope of

[19] [2008] EWHC 438 (Admin), [2008] 1 WLR 2847.

[20] Blackstone's para B11.63.

[21] See para B.16 below.

[22] *Rogers v DPP* 22 Jul 1999, unreported; Blackstone's para B11.63.

[23] [2008] EWHC 438 (Admin), [2008] 1 WLR 2847.

[24] Blackstone's para B11.65.

[25] P Thornton and others, *The Law of Public Order and Protest* (2010) para 1.214.

[26] See para B.30 below.

[27] Blackstone's para B11.66.

scandalising, under the defence of discussion of matters of public interest, would for this reason also fall outside the section 5 offence.

B.15 In *Dehal v CPS*[28] the defendant, a practising Sikh, placed a poster on the notice board of his local temple. The poster accused the President of the temple of being a liar and a "hypocrite president". The defendant was convicted under section 4A. On appeal, Dehal claimed that his statements were reasonable because he believed that they were correct. He also asserted his right to freedom of expression under article 10. In allowing the appeal, Mr Justice Moses (now Lord Justice Moses) said:

> However insulting, however unjustified what the appellant said about the President of the Temple, a criminal prosecution was unlawful as a result of section 3 of the Human Rights Act and article 10 unless and until it could be established that such a prosecution was necessary in order to prevent public disorder.[29]

Public Order Act 1986 section 5

B.16 Section 5 of the Public Order Act 1986 provides that:

> (1) A person is guilty of an offence if he—
>
> (a) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or
>
> (b) displays any writing, sign or other visible representation which is threatening, abusive or insulting,
>
> within the hearing or sight of a person likely to be caused harassment, alarm or distress.

B.17 The section 5 offence is, essentially, the basic form of the offence of which the section 4A offence is an aggravated form.[30] Section 4A requires both an intention to cause harassment, alarm or distress and the actual causing of harassment, alarm or distress. Section 5 does not require either of these, but only that the conduct take place "within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby". A protestor or other person carrying an abusive message on a banner outside a court is more likely to commit the offence under section 5 than under section 4A, as the intention will generally be to spread the message to the public rather than to cause distress to the judge.

[28] [2005] EWHC 2154 (Admin), (2005) 169 Justice of the Peace Reports 581.

[29] [2005] EWHC 2154 (Admin), (2005) 169 Justice of the Peace Reports 581 at [12].

[30] P Thornton and others, *The Law of Public Order and Protest* (2010) para 1.206.

Type of conduct or words

B.18 There are two conditions governing the type of conduct or words. First, they must be "threatening, abusive or insulting".[31] Secondly, they must be likely to cause "harassment, alarm or distress". We noted above that the terms "harassment", "alarm" and "distress" are, according to the High Court, relatively strong terms, and that "distress" requires emotional disturbance or upset.[32] Whether a person was likely to be caused harassment, alarm or distress is a question of fact not law. It can, therefore, only be determined by the tribunal of fact in each particular case.[33]

B.19 For the purposes of sentencing, it is an aggravating factor that the victim is providing a public service.[34] This would clearly apply to abusive comments about judges.

B.20 Several cases where this provision has been used have involved abuse or insults directed at a group as a whole (although in each case there has been an individual or a number of individual victims who have been harassed, alarmed or distressed). In *Hammond v DPP*,[35] for example, an evangelical Christian preacher repeatedly carried a large double-sided sign with the words "Stop Immorality! Stop Homosexuality! Stop Lesbianism!" while preaching in a town centre. Some of the individuals who saw this placard found the words insulting or distressing, and the conviction was upheld. A sign making accusations against judges collectively is perhaps less likely to cause such a strong reaction, though examples could be devised.

Where published and by what means

B.21 As with section 4A, the section 5 offence covers words and behaviour and the display of writing, signs or other visible representation.

B.22 In the context of section 4A of the Public Order Act 1986, we noted above[36] that the Divisional Court in *S v DPP*[37] assumed that a photograph posted online could be a "visible representation" within the meaning of the 1986 Act. This might suggest that online postings could fall under section 5 as well as under section 4A. However, according to Lord Justice Kay:[38]

[31] For the meaning of this phrase see para B.4 above. On 12 December 2012 the House of Lords voted in favour of an amendment to remove the word "insulting": http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/121212-0002.htm (last visited 13 Dec 2012).

[32] See para B.5 above.

[33] P Thornton and others, *The Law of Public Order and Protest* (2010) para 1.190.

[34] Blackstone's para B11.72.

[35] [2004] EWHC 69 (Admin), (2004) 168 Justice of the Peace Reports 601; Blackstone's para B11.81.

[36] See para B.11above.

[37] [2008] EWHC 438 (Admin), [2008] 1 WLR 2847.

[38] *S v DPP* [2008] EWHC 438, [2008] 1 WLR 2847 at [12].

> There is a significant difference between the two sections: section 5 requiring the display to be "within the hearing or sight" of a person likely to be caused harassment, alarm or distress thereby. It may well be that by the time the Public Order Act 1986 was amended in 1994 [to include section 4A], the omission of the "sight and sound" requirement was conditioned by an appreciation of the problems created by the posting of offensive material on websites, although both statutes contain similar provisions about display by a person inside a dwelling and the effect on a person inside that or another dwelling: see sections 4A(2) and 5(2).

Mr Justice Walker also stressed[39] the fact that section 5 requires that the relevant acts take place within the sight or hearing of a person likely to be caused harassment, alarm or distress. It is not clear whether material posted online satisfies this additional requirement of being within a person's sight or hearing. It therefore does not follow from the decision in *S v DPP* that such material falls within section 5.[40]

B.23 Even if section 5 does exclude online postings, these acts are likely to be covered by the offences in the Communications Act 2003[41] and the Malicious Communications Act 1988.[42]

Impact on the victim

B.24 As noted in *Ball*[43] the conduct in section 5 does not have to be directed towards another person; and unlike in section 4A there is no need to prove that any person actually experienced harassment, alarm or distress. For this reason, a public accusation against a group of judges, such as the judges of a particular court, can in principle fall within the offence.

B.25 According to *Taylor v DPP*[44] there must be evidence that there was someone able to hear or see the accused's conduct. The prosecution does not have to call evidence that he or she did actually hear the words spoken or see the behaviour.[45]

B.26 In *Lodge v DPP*[46] the Divisional Court held that whether a person was likely to be caused harassment, alarm or distress is a matter of fact to be determined by the magistrates. It is sufficient if the other person in question (in that case a police

[39] *S v DPP* [2008] EWHC 438, [2008] 1 WLR 2847 at [15].

[40] J Rowbottom, "To Rant, Vent and Converse: Protecting Low Level Digital Speech" (2012) 71(2) *Cambridge Law Journal* 355, 361. Rowbottom notes that Geach and Haralambous assume that s 5 does apply to internet postings: N Geach and N Haralambous, "Regulating Harassment: Is the Law Fit for the Social Networking Age?" (2009) 73(3) *Journal of Criminal Law* 241, 254.

[41] See para B.37 and following below.

[42] See para B.60 and following below.

[43] [1990] 90 Cr App R 378.

[44] [2006] EWHC 1202 (Admin), (2006) 170 Justice of the Peace Reports 485.

[45] Blackstone's para B11.76.

[46] [1989] Crown Office Digest 179, (1988) *The Times*, 26 Oct 1988.

officer) feels alarm, harassment or distress on behalf of someone else, for example, a child.[47]

B.27 There is a defence, under section 5(3)(a), that the defendant had no reason to believe that there was a potential victim within hearing or sight, who was likely to be caused harassment, alarm or distress.

Mental element

B.28 Section 6(4) of the 1986 Act reads:

> (4) A person is guilty of an offence under section 5 only if he intends his words or behaviour, or the writing, sign or other visible representation, to be threatening, abusive or insulting, or is aware that it may be threatening, abusive or insulting or (as the case may be) he intends his behaviour to be or is aware that it may be disorderly.

B.29 In *DPP v Clarke*[48] the Divisional Court held that the defendant's intention or awareness under section 6(4) is to be tested subjectively in light of the whole of the evidence.

Defences

B.30 The defences, which it is for the defendant to prove, are set out in section 5(3):

> (3) It is a defence for the accused to prove—
>
> (a) that he had no reason to believe that there was any person within hearing or sight who was likely to be caused harassment, alarm or distress, or
>
> (b) that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the writing, sign or other visible representation displayed, would be heard or seen by a person outside that or any other dwelling, or
>
> (c) that his conduct was reasonable.

B.31 In *DPP v Clarke*[49] the Divisional Court confirmed that the test in relation to the defence under section 5(3)(c) (that the defendant's conduct was "reasonable") is objective. The first two defences are to be tested subjectively.[50]

B.32 Conduct is reasonable if it is an exercise of ECHR rights in circumstances in which an interference with that exercise would not be justified under articles 10(2) (the qualifications to the right to freedom of expression) and 9(2) (the

[47] Blackstone's para B11.76.

[48] [1992] 94 Cr App R 359.

[49] [1992] 94 Cr App R 359.

[50] P Thornton et al, *The Law of Public Order and Protest* (2010) para 1.198.

qualifications to freedom of religion).[51] In this case, the applicant's reasonableness defence was rejected, having regard to the "legitimate aim" of protecting the rights of others and preventing crime and disorder. In the same way, in the case of abusive material about judges, the reasonableness defence could be rejected having regard to the aim of protecting the authority and impartiality of the judiciary.

B.33 In *Percy v DPP*[52] the Divisional Court, relying on the reasonableness defence in section 5(3)(c) and on article 10 of the ECHR, held that a protester's conviction under article 5 for defacing the flag of the USA at an American airbase was incompatible with her Convention rights. The court noted that "article 10(1) protects in substance and in form a right to freedom of expression which others may find insulting", and that "restrictions under article 10(2) must be narrowly construed".[53]

B.34 In *Hammond v DPP*,[54] concerning the preacher carrying the "stop homosexuality" sign, the Divisional Court held that his defence under articles 9 and 10 of the ECHR was not made out. His refusal to stop displaying the sign when it was clearly causing offence was held not to be reasonable, and the justices' decision – that there was a pressing social need to restrict the defendant's right to freedom of expression under article 10 in order to promote tolerance towards all sections of society – was not overturned.

B.35 It has been noted that these cases "provide no clear pattern or a definitive answer as to the precise limits of the defence of reasonable conduct".[55]

B.36 In *Abdul v DPP*,[56] the Divisional Court dismissed the defendants' appeals against their convictions under section 5. The defendants had attended a parade by a regiment which had been deployed to Afghanistan and Iraq. They had chanted slogans such as "rapists", "murderers" and "go to hell". The Divisional Court noted that there is not, and cannot be, any universal test for resolving when speech goes beyond legitimate protest. Here, the protest took the form of personal insults directed towards the soldiers. The prosecution was held to be proportionate to prevent public disorder and protect the soldiers' reputations.

COMMUNICATIONS ACT 2003

Communications Act 2003, section 127(1)

B.37 Section 127(1) of the Communications Act 2003 provides that a person is guilty of an offence if he or she sends by means of a public electronic communications

[51] *Norwood v DPP* [2003] EWHC 1564 (Admin), [2003] Crim LR 888; see Blackstone's para B11.80.

[52] [2001] EWCA Admin 1125, [2002] Crim LR 835.

[53] *Percy v DPP* [2001] EWCA Admin 1125, [2002] Crim LR 835 at [27].

[54] [2004] EWHC 69 (Admin), (2004) 168 Justice of the Peace Reports 601; see para B.20 above.

[55] C Newman and B Middleton, "Any Excuse for Certainty: English Perspectives on the Defence of 'Reasonable Excuse'" (2010) 74(5) *Journal of Criminal Law* 472, 482.

[56] [2011] EWHC 247 (Admin), [2011] Crim LR 553.

network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character.

Type of conduct or words

B.38 The test of whether the communication is grossly offensive or of an indecent, obscene or menacing character is an objective one. In *DPP v Collins,*[57] concerning racist telephone messages about asylum and immigration sent to an MP, Lord Bingham held that:

> It is for the justices to determine as a question of fact whether a message is grossly offensive, that in making this determination the justices must apply the standards of an open and just multiracial society, and that the words must be judged taking account of their context and all relevant circumstances. [58]

Lord Carswell said:

> The messages would be regarded as grossly offensive by reasonable persons in general, judged by the standards of an open and just multiracial society. The terms used were opprobrious and insulting, and not accidentally so. I am satisfied that reasonable citizens, not only members of the ethnic minorities referred to by the terms, would find them grossly offensive.[59]

B.39 In *Chambers v DPP*,[60] concerning a jocular threat on Twitter to blow up an airport if it closed, the court examined "menacing" communications.[61] It held that a message which did not create fear or apprehension in those to whom it was communicated, or who might reasonably be expected to see it, fell outside section 127(1)(a), "for the very simple reason that the message lacks menace".[62] The discussion concerned messages which are potentially menacing, if at all, to the public at large: as seen in *DPP v Collins*,[63] different considerations may apply to communications which appear to menace some individuals but not others.[64]

B.40 In his discussion on the interpretation of "grossly offensive" communications in *DPP v Collins*,[65] Professor Gillespie argues that the House of Lords' suggestion, that because one section of society finds something grossly offensive the "whole

[57] [2006] UKHL 40, [2006] 1 WLR 2223.

[58] *DPP v Collins,* [2006] UKHL 40, [2006] 1 WLR 2223 at [9].

[59] *DPP v Collins,* [2006] UKHL 40, [2006] 1 WLR 2223 at [22].

[60] [2012] EWHC 2157 (Admin), [2013] 1 Cr App R 1.

[61] *Chambers v DPP* [2012] EWHC 2157 (Admin), [2013] 1 Cr App R 1 at [38].

[62] *Chambers v DPP* [2012] EWHC 2157 (Admin), [2013] 1 Cr App R 1 at [30].

[63] [2006] UKHL 40, [2006] 1 WLR 2223.

[64] See para B.45 and following below.

[65] [2006] UKHL 40, [2006] 1 WLR 2223.

of society" will, is questionable. According to him, it could be argued that this is one difference between "offensive" and "grossly offensive".[66]

B.41 This point may perhaps be relevant for offensive communications made to or about the judiciary if there was a case, where, for example, the whole of society would not view the communication as "grossly offensive" and yet, for some reason, it is grossly offensive to the judiciary. The application of section 127 in such cases may depend on the view of the "whole of society".

Where published and by what means

B.42 A message or other matter is "sent" as soon as it is posted on any public electronic communications network.[67] This includes, for example, communications made by webcam,[68] telephone messages,[69] text messaging,[70] email,[71] Facebook[72] and Twitter.[73] It is irrelevant whether the communication is received or by whom it is received.[74]

B.43 According to *Chambers v DPP*[75] a "tweet" on Twitter was a message sent by an electronic communications service for the purposes of section 127(1): accordingly, Twitter fell within its ambit. The Divisional Court in *Chambers* observed that:

> Whether one reads the "tweet" at a time when it was read as "content" rather than "message", at the time when it was posted it was indeed "a message" sent by an electronic communications service for the purposes of section 127(1).[76]

On the same principle, a web post would fall within the ambit of the Act: both twitter posts and web posts are public postings, although Twitter does have a communicative function which web pages may not have.

B.44 Professor Gillespie supports the decision in *Chambers* to include Twitter within the scope of section 127. He notes that, "the Communications Act 2003 was always intended to cover modern information and communication technologies, indeed its passing was sought to update the law".[77] Some commentators have

66 A Gillespie, "Offensive Communications and the Law" [2006] *Entertainment Law Review* 236, 237.

67 Communications Act 2003, s 32.

68 *I v Dunn* [2012] HCJAC 108, 2012 SLT 983.

69 *DPP v Collins* [2006] UKHL 40, [2006] 1 WLR 2223.

70 *Jude v HM Advocate* [2011] UKSC 55, 2012 SLT 75.

71 *Jude v HM Advocate* [2011] UKSC 55, 2012 SLT 75. See also A Gillespie, "Offensive Communications and the Law" [2006] *Entertainment Law Review* 236.

72 *R v Bland* [2012] EWCA Crim 664.

73 *Chambers v DPP* [2012] EWHC 2157 (Admin), [2013] 1 Cr App R 1 at [25].

74 *DPP v Collins* [2006] UKHL 40, [2006] 1 WLR 2223 at [8].

75 [2012] EWHC 2157 (Admin), [2013] 1 Cr App R 1; see para B.39 above.

76 [2012] EWHC 2157 (Admin), [2013] 1 Cr App R 1 at [25].

77 A Gillespie, "Twitter, Jokes and the Law", (2012) 76(5) *Journal of Criminal Law* 364, 365.

noted that the decision to extend the scope of public electronic communications network may have unintended implications, for example, leaving open the possibility that Twitter could be bound by certain regulatory requirements.[78] Rowbottom comments that section 127 "appears to be used as a general criminal control on digital communications".[79] He also raises concern as to whether the use of criminal sanctions for communications made via new media is always appropriate:

> The problem is that the existing laws dealing with such communications can be overly expansive and catch statements that might not warrant such serious treatment. Any such law should be tailored to deal with the most serious and deliberate cases of harassment or bullying.[80]

Impact on the victim

B.45 The offence is complete as soon as the message is sent: it is not necessary for receipt of the message to be demonstrated. It follows that liability for the offence cannot depend on any particular impact on the recipient.

B.46 The test is whether the message is "couched in terms liable to cause gross offence *to those to whom it relates*":[81] not necessarily to the recipient if any. Any liability of the defendant will arise "irrespective of whether the recipient was grossly offended/menaced/found it to be indecent or obscene".[82] On the contrary, an offence may be committed even where the communication was welcomed by the recipient, provided that it was liable to cause gross offence to those to whom it relates.[83]

B.47 In *DPP v Collins,*[84] Lord Brown of Eaton-under-Heywood contrasted section 127(1) with section 1 of the Malicious Communications Act 1988.[85] The latter requires the sender of a message to it to cause distress or anxiety to its immediate or eventual recipient. He added:

[78] C Watson, J Wheeler and B Ingram, "UK Twitter Judgment: The Law with Unintended Consequences?" (2012) 7(9) *World Communications Regulation Report* 37.

[79] J Rowbottom, "To Rant, Vent and Converse: Protecting Low Level Digital Speech" (2012) 71(2) *Cambridge Law Journal* 355, 364.

[80] J Rowbottom, "To Rant, Vent and Converse: Protecting Low Level Digital Speech" (2012) 71(2) *Cambridge Law Journal* 355, 375.

[81] *DPP v Collins* [2006] UKHL 40, [2006] 1 WLR 2223 at [9] by Lord Bingham (emphasis ours).

[82] Smith and Hogan p 1082.

[83] Smith and Hogan p 1082; *DPP v Collins* [2006] UKHL 40, [2006] 1 WLR 2223 at [26].

[84] [2006] UKHL 40, [2006] 1 WLR 2223.

[85] [2006] UKHL 40, [2006] 1 WLR 2223 at [25] to [27].

> Not so under section 127(1)(a): the very act of sending the message over the public communications network (ordinarily the public telephone system) constitutes the offence even if it was being communicated to someone who the sender knew would not be in any way offended or distressed by it. Take, for example, the case considered in argument before your Lordships, that of one racist talking on the telephone to another and both using the very language used in the present case. Plainly that would be no offence under the 1988 Act, and no offence, of course, if the conversation took place in the street. But it would constitute an offence under section 127(1)(a) because the speakers would certainly know that the grossly offensive terms used were insulting to those to whom they applied and would intend them to be understood in that sense.[86]

On the same reasoning, the offence could cover communications between two disappointed litigants including offensive remarks about judges.

Mental element

B.48 The mental element of the offence is one of basic intent.[87]

B.49 The offence is complete when the message is sent, provided the defendant is shown to have intended or been aware of the proscribed nature of his communication.[88]

B.50 Intention or awareness of the grossly offensive nature of the communication is required under section 127.[89] Lord Bingham in *DPP v Collins*[90] held:

> A culpable state of mind will ordinarily be found where a message is couched in terms showing an intention to insult those to whom the message relates or giving rise to the inference that a risk of doing so must have been recognised by the sender.[91]

B.51 In *Chambers*,[92] concerning "menacing" communications, the court held that where a message is intended as a joke it is unlikely that the mental element for the offence will be established.[93]

[86] [2006] UKHL 40, [2006] 1 WLR 2223 at [26].

[87] *Chambers v DPP* [2012] EWHC 2157 (Admin), [2013] 1 Cr App R 1 at [36]. We define specific intent offences as those for which the required mental element is one of knowledge, intention or dishonesty, and basic intent offences as all those for which the required mental element is not intention, knowledge or dishonesty (this includes offences of recklessness, belief, negligence and strict liability).

[88] Smith and Hogan p 1081.

[89] Blackstone's para B18.28.

[90] [2006] UKHL 40, [2006] 1 WLR 2223.

[91] *DPP v Collins* [2006] UKHL 40, [2006] 1 WLR 2223 at [11].

[92] [2012] EWHC 2157 (Admin), [2013] 1 Cr App R 1; see para B.39 above.

[93] *Chambers v DPP* [2012] EWHC 2157 (Admin), [2013] 1 Cr App R 1 at [38].

Communications Act 2003, section 127(2)

B.52 It is an offence, under section 127(2), to send by means of a public electronic communications network a message that the sender knows to be false for the purpose of causing annoyance, inconvenience or needless anxiety to another.

B.53 There are no reported cases specifically addressing section 127(2), but some guidance may be derived from *Collins*. The House of Lords in that case was concerned only with section 127(1) of the Act. However, many of their Lordships' observations were addressed to section 127 in general. They also stressed that many of their conclusions were based on the fact that section 127(1) is designed to protect the integrity of the public electronic communications network. Given that this is true also of section 127(2), it is reasonable to assume that the opinions expressed in relation to section 127(1) would apply also to section 127(2) except where precluded by the terms of subsection (2).

Type of conduct or words

B.54 It is an offence to send by means of a public electronic communications network a message that the sender knows to be false for the purpose of causing annoyance, inconvenience or needless anxiety to another. The offence could in principle cover publications about judges that contain outright untruths, such as misrepresentation of the grounds of a judgment.

B.55 In addition, section 127(2)(c) makes it an offence persistently to use a public electronic communications network for the purpose of causing annoyance, inconvenience or needless anxiety to another. Section 127(2)(c) assesses the cumulative effect of the communications and so could be particularly useful where a member of the judiciary was persistently targeted by communications which, although not grossly offensive, indecent, obscene or menacing as required under section 127(1), are sent for the purpose of causing annoyance, inconvenience or needless anxiety.

B.56 Although section 127(2)(a) is concerned with "false" messages, Professor Walden points out that it is unclear whether this would include messages which are "true in terms of content but were sent under 'false pretences', to cause annoyance, inconvenience or anxiety".[94] This may be relevant when considering this offence as an alternative to scandalising, as it is not clear whether communications which are true but which are sent to members of the judiciary under false pretences to cause annoyance would be covered by section 127(2)(a).

Where published and by what means

B.57 The subsection covers any communication published by any public electronic communications network. This would be interpreted in the same way as for the purposes of subsection (1), to include telephone, Twitter, email and so on.[95]

[94] I Walden, *Computer Crimes and Digital Investigations* (2007) para 3.207.

[95] See paras B.42 and following above.

Impact on the victim

B.58 As with section 127(1),[96] it would appear following *DPP v Collins*[97] that the offence is complete as soon as the message is sent. The message must be sent with the purpose of causing annoyance, inconvenience or needless anxiety to another, but, again following *Collins*, there is no requirement that the other be the immediate recipient of the message. Also, there appears to be no requirement that annoyance, inconvenience or needless anxiety has in fact been caused.

Mental element

B.59 The offence under section 127(2) differs from that under section 127(1), in that the sender must intend to cause annoyance, inconvenience or needless anxiety to another. To that extent, it is an offence of specific intent. However, it may be hard to prove that the person responsible for the publication intended to cause annoyance, inconvenience or needless anxiety.

MALICIOUS COMMUNICATIONS ACT 1988

Malicious Communications Act 1988 section 1

Type of conduct or words

B.60 Section 1(1) of the Malicious Communications Act 1988 provides that:

> (1) Any person who sends to another person—
>
> (a) a letter, electronic communication[98] or article of any description which conveys—
>
> (i) a message which is indecent or grossly offensive;
>
> (ii) a threat; or
>
> (iii) information which is false and known or believed to be false by the sender; or
>
> (b) any article or electronic communication which is, in whole or part, of an indecent or grossly offensive nature,

[96] See paras B.45 and following above.

[97] [2006] UKHL 40, [2006] 1 WLR 2223.

[98] As inserted by the Criminal Justice and Police Act 2001, s 43(1)(a). Section 1(2A) of the Malicious Communications Act 1988 ("the 1988 Act") states that "electronic communication" includes "(a) any oral or other communication by means of an electronic communications network; and (b) any communication (however sent) that is in electronic form." Geach and Haralambous note that since the insertion of "electronic communication" in 2001 there has been a continuous rise in prosecutions under the 1988 Act: N Geach and N Haralambous, "Regulating Harassment: Is the Law Fit for the Social Networking Age?" (2009) 73(3) *Journal of Criminal Law* 241, 250.

> is guilty of an offence if his purpose, or one of his purposes, in sending it is that it should, so far as falling within paragraph (a) or (b) above, cause distress or anxiety to the recipient or to any other person to whom he intends that it or its contents or nature should be communicated.[99]

B.61 This offence would cover, for example, a threatening email or grossly offensive letter sent to a judge.

B.62 In *Connolly v DPP*,[100] the court held that the words "indecent" and "grossly offensive" should be given their ordinary English meaning.[101] The fact that the defendant in that case had a political or educational motive for sending close-up photographs of aborted foetuses to pharmacists who supplied the "morning-after pill" did not preclude the communication from being indecent or grossly offensive.[102]

Where published and by what means

B.63 Section 1(1) of the Malicious Communications Act 1988 is broader in scope than section 127 of the Communications Act 2003, as it encompasses postal services and other "physical delivery mechanisms" as well as electronic communications.[103] It would not, however, cover a web post, which is not sent "to another person". Lord Bingham in *DPP v Collins*[104] noted that the object of the 1988 Act was "to protect people against receipt of unsolicited messages which they may find seriously objectionable".[105] The purpose of the 2003 Act, by contrast, was "to prohibit the use of a service provided and funded by the public for the benefit of the public for the transmission of communications which contravene the basic standards of our society".[106]

B.64 The Divisional Court in *Chappell v DPP*[107] held that posting a letter containing threatening, abusive or insulting words through a letter box would fall within the

[99] The genesis of the 1988 Act lies in the Law Commission's Report on Poison Pen Letters (1985) No 147. The recommendations made in the report are largely reflected in the 1988 Act: see G Broadbent, "Malicious Communications Act 1988: Human Rights" (2007) 71(4) *Journal of Criminal Law* 288, 288.

[100] [2007] EWHC 237 (Admin), [2008] 1 WLR 276.

[101] [2007] EWHC 237 (Admin), [2008] 1 WLR 276 at [10]. On the definition of "grossly offensive", see *DPP v Collins* [2006] UKHL 40, [2006] 1 WLR 2223 at [9] and [22].

[102] [2007] EWHC 237 (Admin), [2008] 1 WLR 276 at [9].

[103] I Walden, *Computer Crimes and Digital Investigations* (2007) para 3.198. For a discussion of other offences relating to behaviour which causes or which is likely to cause fear or alarm and an argument in favour of their reform, see P Alldridge, "Threats Offences – A Case for Reform" [1994] *Criminal Law Review* 176, 179 and 182 and following.

[104] [2006] UKHL 40, [2006] 1 WLR 2223.

[105] [2006] UKHL 40, [2006] 1 WLR 2223 at [7]. On *Collins*, see "Communications Act 2003: 'Grossly Offensive' Message" (2007) 71(4) *Journal of Criminal Law* 301, 303.

[106] [2006] UKHL 40, [2006] 1 WLR 2223 at [7]. Walden, however, questions the continued relevance of this distinction in light of "our modern liberalised and competitive communications industry": I Walden, *Computer Crimes and Digital Investigations* (2007) para 3.199.

[107] [1988] 89 Cr App R 82, 89.

ambit of section 1(1) of the Malicious Communications Act 1988 rather than section 5 of the Public Order Act 1986.[108]

Impact on the victim

B.65 The offence does not turn on the recipient's actual reaction, but rather on the intention of the sender.[109] The offence could, therefore, still be made out if a judge receives a message intended to cause distress or anxiety[110] which does not have this effect (for example, because the judge is "thick-skinned" by nature or accustomed to receiving such messages). Walden notes that the same would be true if the communication is never received.[111]

Mental element

B.66 The mental element of section 1(1) is specific intent: the sender of a message must act, at least in part, with the specific purpose of causing distress or anxiety to the immediate or eventual recipient of the message.[112] In *Connolly v DPP*,[113] Lord Justice Dyson (now Lord Dyson) noted that the nature of the communication may shed light on the defendant's state of mind.

Defences

B.67 Section 1(2) of the 1988 Act provides that:

> (2) A person is not guilty of an offence by virtue of subsection (1)(a)(ii) above if he shows—
>
> (a) that the threat was used to reinforce a demand made by him on reasonable grounds; and
>
> (b) that he believed, and had reasonable grounds for believing, that the use of the threat was a proper means of reinforcing the demand.

B.68 The defence contains both subjective and objective elements, to be considered in light of "all the circumstances".[114]

[108] See also *DPP v Collins* [2006] UKHL 40, [2006] 1 WLR 2223 at [7].

[109] Smith and Hogan p 1081.

[110] The message must also be either a threat, of an indecent or grossly offensive nature or contain false information, following s 1(1) of the 1988 Act. Geach and Haralambous argue that the 1988 Act "may be commended" as a result because unlike other offences (such as the offence of harassment under the Protection from Harassment Act 1997), it sets a minimum bar for the nature of the proscribed conduct: N Geach and N Haralambous, "Regulating Harassment: Is the Law Fit for the Social Networking Age?" (2009) 73(3) *Journal of Criminal Law* 241, 251.

[111] I Walden, *Computer Crimes and Digital Investigations* (2007) para 3.200.

[112] *Connolly v DPP* [2007] EWHC 237 (Admin), [2008] 1 WLR 276 at [9] and [22]. See also *DPP v Collins* [2006] UKHL 40, [2006] 1 WLR 2223 at [26].

[113] [2007] EWHC 237 (Admin), [2008] 1 WLR 276.

[114] *R (Trung) v Isleworth Crown Court* [2012] EWHC 1828 at [6].

ECHR implications

B.69 In *Connolly v DPP*[115] the court did not accept that prosecution under the 1988 Act infringed articles 9 and 10 of the ECHR.[116] Though those rights were engaged, their restriction was justified under articles 9(2) and 10(2) as being necessary for the protection of the "rights of others", namely the rights of the employees of the three pharmacies who were in receipt of the disturbing photographs.[117]

B.70 The court went on to note, however, that the "rights of others" are not to be given unlimited protection. Although freedom of expression did not encompass the right to cause distress or anxiety,[118] this would depend on the circumstances. The court considered two factors to be relevant: the offensiveness of the material[119] and the nature of the party requiring protection. For example, a doctor who routinely performs abortions and a Cabinet member who had spoken publicly on abortion "might well stand on a different footing" to the pharmacist's employees,[120] as they had more reason to expect that they would be exposed to such material and may be presumed to be to some extent prepared for it.

B.71 The court in *Connolly v DPP*[121] held further that the words "indecent or grossly offensive" could be interpreted compatibly with article 10 by reading into section 1 a provision to the effect that the Act had not enacted an offence which would be in breach of a person's Convention rights.[122]

PROTECTION FROM HARASSMENT ACT 1997

Protection from Harassment Act 1997 sections 1 and 2: harassment

B.72 Section 1 provides that:

[115] [2007] EWHC 237 (Admin), [2008] 1 WLR 276.

[116] On *Connolly,* see "Qualifications to Freedom of Expression" (2007) 12(2) *Communications Law* 72 and A Ashworth, "Malicious Communication: Defendant Anti-Abortionist – Sending Photographs of Aborted Foetuses" [2007] *Criminal Law Review* 729.

[117] See also *R (Trung) v Isleworth Crown Court* [2012] EWHC 1828 (Admin) at [10]: "Article 10 is a qualified article. A state is entitled by its law to circumscribe that right in the interests of public safety and of the rights of others, providing that it does so by law. The United Kingdom does so by law by the provisions of the Malicious Communications Act 1988 … ." by Mitting J.

[118] [2007] EWHC 237 (Admin), [2008] 1 WLR 276 at [28].

[119] [2007] EWHC 237 (Admin), [2008] 1 WLR 276. Dyson LJ held at [28] that "the more offensive the material, the greater the likelihood that such persons have the right to be protected from receiving it".

[120] [2007] EWHC 237 (Admin), [2008] 1 WLR 276 at [28]. The court's differentiation on the basis of profession has been criticised by some commentators. Khan, for instance, argues that the fact that doctors have stronger constitutions does not necessarily mean they will be immune from suffering offence, and notes that the court's approach could extend widely by including other professions such as abattoir or mortuary workers: A Khan, "A 'Right Not To Be Offended' under Article 10(2) ECHR? Concerns in the Construction of the 'Rights of Others'" [2012] *European Human Rights Law Review* 191, 194.

[121] [2007] EWHC 237 (Admin), [2008] 1 WLR 276.

[122] [2007] EWHC 237 (Admin), [2008] 1 WLR 276 at [12]. On the use of s 3 of the Human Rights Act 1998 in *Connolly* and other cases, see Blackstone's para A7.25 and S Turenne, "The Compatibility of Criminal Liability with Freedom of Expression" [2007] *Criminal Law Review* 866, 870 and following.

(1) A person must not pursue a course of conduct—

(a) which amounts to harassment of another, and

(b) which he knows or ought to know amounts to harassment of the other.

(1A) A person must not pursue a course of conduct—

(a) which involves harassment of two or more persons, and

(b) which he knows or ought to know involves harassment of those persons, and

(c) by which he intends to persuade any person (whether or not one of those mentioned above)—

(i) not to do something that he is entitled or required to do, or

(ii) to do something that he is not under any obligation to do.[123]

B.73 A person who pursues a course of conduct in breach of section 1 is guilty of an offence.[124]

Type of conduct or words

B.74 The 1997 Act does not provide exhaustive definitions of the type of conduct that is proscribed,[125] but it does provide examples.[126] Below we consider the relevant case law and its potential application to attacks on judges.

HARASSMENT

B.75 According to Lord Phillips MR in *Thomas v News Group Newspapers Ltd*,[127] "harassment" entails improper "oppressive and unreasonable" conduct targeted at an individual and calculated to cause alarm or distress.[128] Though either alarm

[123] Subsection (1A) was inserted by Serious Organised Crime and Police Act 2005, s 125(2)(a).

[124] Protection from Harassment Act 1997, s 2. The Crime and Disorder Act 1998, s 32 creates a racially or religiously aggravated form of this offence.

[125] *DPP v Ramsdale* [2001] EWHC Admin 106, *Independent* 19 Mar 2001.

[126] Protection from Harassment Act 1997, s 7(2).

[127] [2001] EWCA Civ 1233, *The Times* 25 Jul 2001 at [30].

[128] Protection from Harassment Act 1997, s 7(2); see also *Majrowksi v Guy's and St Thomas' NHS Trust* [2006] UKHL 34, [2007] 1 AC 224. Merely unattractive or unreasonable conduct will not suffice: see Lord Nicholls in *Majrowski* at [30].

or distress in isolation will suffice,[129] there is a minimum level of alarm or distress which must be suffered.[130]

B.76 Section 1 has been held to cover "harassment of any sort".[131] Baroness Hale in *Majrowski v Guy's and St Thomas' NHS Trust*[132] noted that the definition of harassment had been left deliberately wide, and so "a great deal is left to the wisdom of the courts to draw sensible lines between the ordinary banter and badinage of life and genuinely offensive and unacceptable behaviour".[133] Context is clearly important: in *Conn v Sunderland City Council*,[134] Lord Justice Gage observed that "what might not be harassment on the factory floor or in the barrack room might be harassment in the hospital ward and vice versa".[135]

COURSE OF CONDUCT

B.77 According to section 7(3):[136]

> (3) A "course of conduct" must involve—
>
> (a) in the case of conduct in relation to a single person (see section 1(1)), conduct on at least two occasions in relation to that person, or
>
> (b) in the case of conduct in relation to two or more persons (see section 1(1A)), conduct on at least one occasion in relation to each of those persons.

B.78 "Conduct" encompasses speech,[137] actions and omissions.[138]

B.79 Establishing a course of conduct, as opposed to a series of "separate and isolated incidents",[139] is an essential element of the offence. A one-off attack on a judge, for instance by a disappointed litigant, would not, therefore, suffice. In *Iqbal v Dean Manson (Solicitors)*,[140] Lord Justice Rix stated that "it is the course of conduct which has to have the quality of amounting to harassment, rather than

[129] Protection from Harassment Act 1997, s 7(2). See S O'Doherty, "From Fan to Fanatic" (2003) 167 *Justice of the Peace* 564, 565.

[130] Blackstone's para B2.163.

[131] *DPP v Selvanayagam, The Times* 23 Jun 1999 by Collins J.

[132] *Majrowksi v Guy's and St Thomas' NHS Trust* [2006] UKHL 34, [2007] 1 AC 224.

[133] *Majrowksi v Guy's and St Thomas' NHS Trust* [2006] UKHL 34, [2007] 1 AC 224 at [66].

[134] [2007] EWCA Civ 1492, [2008] IRLR 324.

[135] [2007] EWCA Civ 1492, [2008] IRLR 324 at [12].

[136] As substituted by Serious Organised Crime and Police Act 2005, s 125.

[137] Protection from Harassment Act 1997, s 7(4).

[138] In *R (Taffurelli) v DPP* [2004] EWHC 2791 (Admin), [2004] All ER (D) 390 (Nov) the deliberate failure to control dogs following a number of complaints was held to constitute "conduct".

[139] *Hills* [2001] 1 Family Law Reports 580 at [15].

[140] [2011] EWCA Civ 123, [2011] IRLR 428.

individual instances of conduct".[141] The matters said to constitute the course of conduct amounting to harassment must be "so connected in type and in context as to justify the conclusion that they amount to a course of conduct".[142]

B.80 The court will consider all the circumstances in determining whether there has been a course of conduct.[143] The fewer and further apart the incidents proven, the less likely it is a course of conduct will be established, but in *Lau v DPP*[144] the court considered that incidents as far apart as a year could qualify.[145] There is no requirement that the individual acts are similar in kind.[146]

B.81 Following *DPP v Hardy*,[147] a course of conduct that initially takes the form of a legitimate inquiry or complaint may descend into harassment if unreasonably prolonged or persisted in.[148]

Where published and by what means

B.82 Applying *Baron v CPS*,[149] the sending of letters to a judge could constitute harassment.

B.83 Following *Thomas v News Group Newspapers Ltd*,[150] the publication of press articles about judges could amount to harassment, although in light of the importance given to freedom of expression by the courts, the circumstances in which this could happen will be rare.[151] Lord Phillips (then Master of the Rolls) in *Thomas* held that "in general, press criticism, even if robust, does not constitute unreasonable conduct and does not fall within the natural meaning of

[141] [2011] EWCA Civ 123, [2011] IRLR 428 at [45].

[142] Blackstone's para B2.160, citing *Patel* [2004] EWCA Crim 3284, [2005] 1 Cr App R 27 and *Pratt v DPP* [2001] EWHC Admin 483, (2001) 165 Justice of the Peace Reports 800.

[143] *Sahin* [2009] EWCA Crim 2616 at [21]. In *Kelly v DPP* [2002] EWHC 1428 (Admin), [2003] Crim LR 45, three telephone calls made within a space of five minutes were held to amount to a course of conduct, taking into account the "separate and distinct" nature of the calls. In *Baron v CPS* 13 Jun 2000, unreported, two letters sent some four and a half months apart from each other amounted to a course of conduct.

[144] [2000] Crim LR 580.

[145] [2000] Crim LR 580 at [15]. This was followed by *Pratt v DPP* [2001] EWHC Admin 483, (2001) 165 Justice of the Peace Reports 800 in which only two incidents separated by three months were held to suffice.

[146] *Hills* [2001] 1 Family Law Reports 580. See also Smith and Hogan p 698. Since the offence of scandalising the court concerns the publication of statements attacking the judiciary, the acts in question would be of the same kind.

[147] [2008] EWHC 2874 (Admin), (2009) 173 Justice of the Peace Reports 10.

[148] Blackstone's para B2.160.

[149] Unreported, 13 Jun 2000. See A Hudson, "Privacy: A Right by Any Other Name" [2003] *European Human Rights Law Review* 73, 81.

[150] [2001] EWCA Civ 1233, *The Times* 25 Jul 2001; see para B.75 above. On *Thomas,* see J Coad, "Harassment by the Media" [2002] *Entertainment Law Review* 18.

[151] [2001] EWCA Civ 1233, *The Times* 25 Jul 2001 at [35] by Lord Phillips MR: "Before press publications are capable of constituting harassment, they must be attended by some exceptional circumstance which justifies sanctions and the restriction on the freedom of expression that they involve. It is also common ground that such circumstances will be rare". See also A Hudson, "Privacy: A Right By Any Other Name" [2003] *European Human Rights Law Review* 73, 82.

harassment".[152] Whether conduct is reasonable depends on the circumstances of the particular case.[153] An example of unreasonable conduct amounting to harassment which was agreed to by the parties to that case was the publication of press articles calculated to incite racial hatred of an individual.[154] Following *Trimingham v Associated Newspapers Ltd*,[155] the question of whether the subject of the publication is a "public figure" will be relevant to the reasonableness enquiry.[156]

Impact on the victim

B.84 The offence under section 1 requires the victim to be harassed in fact. This is implicit in the non-exhaustive definition of "harassment" in section 7(2), which includes alarming a person or causing the person distress.

B.85 Unlike section 4 of the Public Order Act 1986, the offence under section 1 of the 1997 Act could be made out even where the words are reported to a victim by a third party.[157]

Mental element

B.86 As provided in section 1(1)(b), the defendant must know or ought to know that the course of conduct amounts to harassment of another. Section 1(2) states that a defendant ought to know this "if a reasonable person in possession of the same information would think the course of conduct amounted to or involved harassment of the other".

B.87 This is an objective test; no concession can be made for conditions such as paranoid schizophrenia which may affect the defendant's perception.[158] In

[152] [2001] EWCA Civ 1233, *The Times* 25 Jul 2001 at [34]. At [24] Lord Phillips MR held that "harassment must not be given an interpretation which restricts the right to freedom of expression, save in so far as this is necessary in order to achieve a legitimate aim".

[153] *Thomas* at [249] to [250]. Lord Phillips MR held that the question of whether a series of publications constitutes harassment "requires a publisher to consider whether a proposed series of articles, which is likely to cause distress to an individual, will constitute an abuse of the freedom of the press which the pressing social needs of a democratic society require should be curbed": see [50]. In *Trimingham v Associated Newspapers Ltd* [2012] EWHC 1296 (QB), [2012] 4 All ER 717, Tugendhat J applied *Thomas.* His Lordship held that for a court to comply with s 3 of the Human Rights Act 1998, it must hold that journalistic speech is reasonable under s 1(3)(c) of the 1997 Act unless, "in the particular circumstances of the case, the course of conduct is so unreasonable that it is necessary (in the sense of a pressing social need) and proportionate to prohibit or sanction the speech in pursuit of one of the aims listed in art 10(2) … .": See [53]. Bryden and Salter argue that this is a "high hurdle" for an individual to surmount: C Bryden and M Salter, "Harassment: A High Hurdle" (2012) 162 *New Law Journal* 1106.

[154] [2001] EWCA Civ 1233, *The Times* 25 July 2001 at [37].

[155] [2012] EWHC 1296 (QB), [2012] 4 All ER 717.

[156] *Trimingham v Associated Newspapers Ltd* [2012] EWHC 1296 (QB), [2012] 4 All ER 717 at [93] and following by Tugendhat J.

[157] In *Kellett v DPP* [2001] EWHC Admin 107, [2001] All ER (D) 124 (Feb), the defendant made two telephone calls to the victim's employer, falsely alleging that she was defrauding the employer. The court held that the offence was made out when the employer informed the victim of the calls, thereby occasioning her distress: see [16] by Penry-Davey J.

[158] Blackstone's 2013 para B2.165, citing *R v C* [2001] EWCA Crim 1251, [2001] 2 Family Law Reports 757.

Crawford v CPS,[159] the court held that in assessing the presence of the mental element, nothing involving "cultural or racial differences should be taken into account, unless it is relevant and supported by proper evidence".[160]

B.88 In practice, where the defendant intends to cause alarm and distress and succeeds in doing so, this is likely to satisfy the requirements of section 1(1)(b).[161]

Defences

B.89 Section 1(3) provides that:

> (3) Subsection (1) or (1A) does not apply to a course of conduct if the person who pursued it shows—
>
> (a) that it was pursued for the purpose of preventing or detecting crime,
>
> (b) that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or
>
> (c) that in the particular circumstances the pursuit of the course of conduct was reasonable.

B.90 A defendant may rely on section 1(3)(a) only if the sole purpose of the course of conduct is the prevention or detection of crime.[162] Section 1(3)(a) does not require the course of conduct to be a reasonable means of achieving the purpose of preventing or detecting crime. However, if the course of conduct is "irrational or lacking in any reasonable connection to the avowed purpose of preventing or detecting crime", the court may find that the defendant was acting with a different purpose.[163] In *Hayes v Willoughby*,[164] Lord Justice Moses noted that in practice it would be unlikely for anyone who is not a member of a law enforcement agency to succeed in establishing the defence under section 1(3)(a).[165]

B.91 Section 1(3)(b) protects, among other things, the right to free expression.[166] In one of the first cases in which the 1997 Act was considered, Mr Justice Eady noted that the legislation was not intended to be used to stifle discussion of public

[159] [2008] EWHC 148 (Admin).

[160] [2008] EWHC 148 (Admin) at [55].

[161] *Baron v* CPS 13 Jun 2000, unreported, by Kennedy LJ.

[162] *Hayes v Willoughby* [2011] EWCA Civ 1541, [2012] 1 WLR 1510 at [11] by Moses LJ. If the defendant acts with more than one purpose, s 1(3)(c) should be relied on instead: see [15] of *Hayes.*

[163] *Hayes v Willoughby* [2011] EWCA Civ 1541, [2012] 1 WLR 1510 at [18].

[164] [2011] EWCA Civ 1541, [2012] 1 WLR 1510.

[165] *Hayes v Willoughby* [2011] EWCA Civ 1541, [2012] 1 WLR 1510 at [21]. See also Eady J in *Howlett v Holding* [2006] EWHC 41 (QB), *The Times* 8 Feb 2006 at [33].

[166] Blackstone's para B2.166; *Huntington Life Sciences v Curtin, The Times* 11 Dec 1997.

interest in public demonstrations.[167] The right to free expression under the ECHR has also been held to be relevant in applying the defence of reasonableness under section 1(3)(c).[168]

B.92 Whether the conduct was reasonable for the purpose of section 1(3)(c) is judged objectively,[169] and not on the basis of the defendant's personal characteristics. Thus in *R v C*,[170] the defendant's paranoid schizophrenia was held not to be relevant to the defence,[171] with the Court of Appeal pointing to the strong policy grounds of protection underpinning the legislation:

> The conduct at which the Act is aimed, and from which it seeks to provide protection, is particularly likely to be conduct pursued by those of obsessive or unusual psychological make-up and very frequently by those suffering from an identifiable mental illness. Schizophrenia is only one such condition which is obviously very likely to give rise to conduct of this sort.[172]

Protection from Harassment Act 1997 section 2A: stalking

B.93 The Protection of Freedoms Act 2012 inserted a new section 2A into the 1997 Act which creates an offence of stalking.[173] Section 2A(1) provides that:

> (1) A person is guilty of an offence if—
>
> (a) the person pursues a course of conduct in breach of section 1(1), and
>
> (b) the course of conduct amounts to stalking.

Type of conduct or words

B.94 For an offence under section 2A to be made out, the course of conduct in breach of section 1(1)[174] must also amount to stalking. A person's course of conduct amounts to stalking of another person if: it amounts to harassment of that person; the acts or omissions involved are ones associated with stalking; and the person

[167] *Huntington Life Sciences v Curtin, The Times* 11 Dec 1997; see also p 702.

[168] *Trimingham v Associated Newspapers Ltd* [2012] EWCH 1296 (QB), [2012] 4 All ER 717.

[169] In *DPP v Mosely, The Times* 23 Jun 1999 it was held that it would not be a defence to engage in a course of conduct amounting to harassment in breach of a High Court injunction because the defendant believed his conduct to be reasonable. See "Harassment – Defence that Course of Conduct Reasonable in Circumstances" [1999] *Archbold News* 2.

[170] *R v C* [2001] EWCA Crim 1251, [2001] 2 Family Law Reports 757.

[171] The appellant in that case sought to draw an analogy with the law of provocation and the law of duress, in which the "reasonable man" is imbued with the subjective characteristics of the accused. For an analysis of the court's reasons for rejecting this analogy, see G M Carey, "Harassment and the Reasonable Man" (2001) 165 *Justice of the Peace* 675.

[172] *R v C* [2001] EWCA Crim 1251, [2001] 2 Family Law Reports 757 at [18] by Hughes J. See D Ormerod, "Trial: Direction to Jury – Reasonable Person – Reasonable Conduct – Defendant Suffering from Paranoid Schizophrenia" [2001] *Criminal Law Review* 845.

[173] In force from 25 Nov 2012.

[174] See para B.72 and following above.

whose course of conduct it is knows or ought to know that the course of conduct amounts to harassment of the other person.[175]

B.95 Section 2A(3) provides examples of acts or omissions which, in particular circumstances, amount to stalking. These include: following a person; contacting a person; publishing a statement or material relating to a person or purporting to originate from a person; monitoring the use by a person of the internet, email or any other form of electronic communication; loitering in any place; interfering with any property in the possession of a person; and watching or spying on a person.

B.96 The list of examples given in section 2A(3) is non-exhaustive. Therefore, new forms of behaviour, such as electronic tracking of an individual, are not excluded from the remit of this offence.[176]

Where published and by what means

B.97 Section 2A encompasses letters addressed to an individual,[177] publications in the print media and electronic posts.[178] For example, a blog which repeatedly posted aggressive and offensive material about a judge could amount to stalking.

Impact on the victim

B.98 As under section 1, section 2A requires the victim to be harassed in fact.[179]

B.99 MacEwan notes that where the defendant acts covertly, the "victim impact" element of the offence may be absent.[180] This may occur, for example, where victims are monitored without their knowledge.[181]

Mental element

B.100 The mental element is the same as for the section 1 offence: the defendant must know or ought to know that the course of conduct amounts to harassment of another.[182] This would not be the case if the defendant acts covertly and the conduct never comes to the attention of the victim.[183] There does not appear to be any requirement that the defendant knew that the course of conduct amounted to stalking.

[175] Protection from Harassment Act 1997, s 2A(2).

[176] Blackstone's para B2.171.

[177] Protection from Harassment Act 1997, s 2A(3)(b).

[178] Protection from Harassment Act 1997, s 2A(3)(c).

[179] Protection from Harassment Act 1997, s 2A(2)(a). See para B.84 above.

[180] N MacEwan "The New Stalking Offences in English law: Will They Provide Effective Protection from Cyberstalking?" [2012] *Criminal Law Review* 767, 776.

[181] However, as Gillespie notes, where a third party discovers the covert surveillance and informs the victim of it, harassment (and therefore stalking) could be made out: see the response to MacEwan by A Gillespie, "Cyberstalking and the Law: A Response to Neil MacEwan" [2013] *Criminal Law Review* 35, 38 and *Kellett v DPP* [2001] EWHC Admin 107, [2001] All ER (D) 124 (Feb) at [16] (discussed at footnote 157 above).

[182] See paras B.86 to B.88 above.

[183] N MacEwan "The New Stalking Offences in English law: Will They Provide Effective Protection from Cyberstalking?" [2012] *Criminal Law Review* 767, 776.

Defences

B.101 There are no defences specific to section 2A, equivalent to the exclusions set out in section 1(3).[184] However, section 2A operates without prejudice to the generality of section 2;[185] and, as the section 2A offence must consist of conduct in breach of section 1(1), it follows logically that the exclusions in section 1(3) apply to the offence of stalking in section 2A. There is, however, no case law on this point.

Protection from Harassment Act 1997 section 4: putting people in fear of violence

B.102 Section 4(1) of the 1997 Act reads:

> (1) A person whose course of conduct causes another to fear, on at least two occasions, that violence will be used against him is guilty of an offence if he knows or ought to know that his course of conduct will cause the other so to fear on each of those occasions.

Type of conduct or words

COURSE OF CONDUCT

B.103 We discussed the phrase "course of conduct" above.[186] In determining whether there has been a "course of conduct", it is necessary to consider all the circumstances of the case. Relevant factors include the proximity in time and the degree of similarity and whether the defendant was intentionally waging a campaign against the victim. It is not necessarily the case that any two acts against the same victim which cause him or her to fear violence will always amount to a course of conduct.[187]

VIOLENCE

B.104 "Violence" is not defined in the Act. In the related context of public order offences, section 8 of the Public Order Act 1986 reads as follows:

> In this Part—
>
> …
>
> "Violence" means any violent conduct, so that—
>
> (a) except in the context of affray, it includes violent conduct towards property as well as violent conduct towards persons, and

[184] Contrast sections 4(3) and 4A(4), which explicitly set out defences to the offences in sections 4 and 4A: see paras B.111 and B.125 below.

[185] Protection from Harassment Act 1997, s 2A(6).

[186] See para B.77 and following above.

[187] *R v H* [2001] 1 Family Law Reports 580; see D Ormerod, "Harassment: Separate Incidents Not Linked" [2001] *Criminal Law Review* 318, 319.

(b) it is not restricted to conduct causing or intended to cause injury or damage but includes any other violent conduct (for example, throwing at or towards a person a missile of a kind capable of causing injury which does not hit or falls short).

Under the 1997 Act, by contrast, a fear of damage to property alone is insufficient – the fear in section 4 must be that violence will be used "against him".[188]

Where published and by what means

B.105 Following *Haque*,[189] the sending of threatening letters, emails and text messages to a judge would amount to a section 4 offence.

Impact on the victim

B.106 A fear of violence can be inferred from threats which are not directed specifically at the victim (for example, at his or her dog), but the victim must fear that violence will actually be used against him or her (that is, a fear of violence against others, even family members, is insufficient).[190] A threat to burn down the victim's house is sufficient.[191] There is no requirement in the Act that the violence which is feared must be immediate. This potentially creates a very broad offence.[192] The fear of violence must be experienced on at least two occasions; there is no scope for basing the offence on the cumulative effect of the defendant's actions.[193]

B.107 The defendant's conduct must actually cause the victim to fear that violence will be used against him or her – it is not sufficient for it to put the victim in fear of what *might* happen.[194] The effect it has on the victim can sometimes be inferred from the evidence, but if possible there should be direct evidence from the victim.[195]

B.108 The offence in section 4 has been interpreted as requiring proof of harassment. Thus, in *Curtis*,[196] Lord Justice Pill held that the prosecution must prove, in addition to the statutory requirements, the requirements identified by Lord Phillips

[188] See D Ormerod, "Harassment: Judge Wrongly Paraphrasing Language of the Act" [2000] *Criminal Law Review* 582, 584.

[189] [2011] EWCA Crim 1871, [2012] 1 Cr App R 5.

[190] Smith and Hogan p 704, citing *R v DPP* [2001] Crim L R 396; *Henley* [2000] Crim L R 582; *Caurti v DPP* [2002] Crim L R 131.

[191] *R (A) v DPP* [2004] EWHC 2454 (Admin), [2005] Administrative Court Digest 61.

[192] See D Ormerod, "Harassment: Judge Wrongly Paraphrasing Language of the Act" [2000] *Criminal Law Review* 582, 583.

[193] See D Ormerod, "Harassment: Whether Leaving Three Abusive and Threatening Phone Calls on the Victim's Voice Mail, Which Were Listened to at One Time, Capable of Constituting a Course of Conduct" [2003] *Criminal Law Review* 45, 47.

[194] Blackstone's para B2.177, citing *Henley* [2000] Crim L R 582 and *Caurti v DPP* [2002] Crim LR 131.

[195] *R v DPP* [2001] Crim L R 396.

[196] [2010] EWCA Crim 123, [2010] 1 WLR 2770; see D Ormerod, "*R v Curtis*: Harassment – Protection from Harassment Act 1997, s 4(1)" [2010] *Criminal Law Review* 638.

MR in *Thomas v News Group Newspapers Ltd*[197] (that the conduct was targeted at an individual, was calculated to alarm or cause him distress, and was oppressive and unreasonable). *Curtis* was followed in *Widdows*[198] and reluctantly in *Haque*.[199]

Mental element

B.109 Section 4(1) states that the defendant is guilty of the offence "if he knows or ought to know that his course of conduct will cause the other so to fear on each of those occasions". In addition, section 4(2) reads as follows:

> (2) For the purposes of this section, the person whose course of conduct is in question ought to know that it will cause another to fear that violence will be used against him on any occasion if a reasonable person in possession of the same information would think the course of conduct would cause the other so to fear on that occasion.

B.110 The effect of section 4(2) is that fear must have been caused on each occasion within the course of conduct.[200] The objective nature of the mental element ensures that the offence covers, for example, defendants with mental illnesses who do not appreciate the effect their actions are having.

Defences

B.111 Under section 4(3) of the 1997 Act:

> (3) It is a defence for a person charged with an offence under this section to show that—
>
> (a) his course of conduct was pursued for the purpose of preventing or detecting crime,
>
> (b) his course of conduct was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or
>
> (c) the pursuit of his course of conduct was reasonable for the protection of himself or another or for the protection of his or another's property.

B.112 The wording is similar to that in section 1(3).[201] However, the defence in section 4(3)(c) is narrower than that in section 1(3)(c),[202] as it is limited to

[197] [2001] EWCA Civ 1233, [2002] Entertainment and Media Law Reports; see para B.75 above.

[198] [2011] EWCA Crim 1500, [2011] Crim LR 959.

[199] [2011] EWCA Crim 1871, [2012] 1 Cr App R 5; see D Ormerod, "Putting a Person in Fear of Violence by Harassment: Defendant and Complainant Having Had Long, Close and Mainly Affectionate Relationship – Defendant Alleged to Have Been Violent to Complainant on Occasions During Relationship" [2011] *Criminal Law Review* 959.

[200] Blackstone's para B2.178.

[201] Para B.89 above.

[202] For the definition in section 1(3)(c), see para B.92 above.

pursuing a course of conduct that is reasonable for the protection of the defendant or another or their properties.[203] As in section 1(3)(c), it is the whole "course of conduct" which must be reasonable.[204]

B.113 There is one possible difficulty in relation to the defences. We noted above that a requirement of harassment has also been read into the section 4 offence.[205] It is therefore possible, following *Haque*,[206] that all the conditions applicable to section 1, including the exclusions in section 1(3), should be read in as well, thus making the narrower defences in section 4(3) redundant, though the position is far from clear and this would not seem to be the intended consequence of the way the offences were drafted.

B.114 Paragraphs (a) and (b) are identical in the two offences and would presumably be interpreted in the same way, for example, as protecting freedom of expression.[207] However, it is hard to envisage facts on which this last excuse will be relevant to the offence under section 4.

B.115 In addition, section 12 of the Act provides that:

> (1) If the Secretary of State certifies that in his opinion anything done by a specified person on a specified occasion related to—
>
> (a) national security,
>
> (b) the economic well-being of the United Kingdom, or
>
> (c) the prevention or detection of serious crime,
>
> and was done on behalf of the Crown, the certificate is conclusive evidence that this Act does not apply to any conduct of that person on that occasion.

Protection from Harassment Act 1997 section 4A: stalking which causes the victim to fear violence or to suffer serious alarm or distress

Type of conduct or words

B.116 Section 4A(1) of the 1997 Act[208] provides that:

> (1) A person ("A") whose course of conduct—
>
> (a) amounts to stalking, and
>
> (b) either—

[203] See case comment [2011] *Criminal Law Review* 959, 962.

[204] See case comment [2001] *Criminal Law Review* 396, 398.

[205] See para B.108 above.

[206] [2011] EWCA Crim 1871, [2012] 1 Cr App R 5 para [73], emphasis ours; see case comment at [2011] *Criminal Law Review* 962.

[207] See para B.91 above.

[208] Inserted by Protection of Freedoms Act 2012, s 111(2); in force from 25 Nov 2012.

(i) causes another ("B") to fear, on at least two occasions, that violence will be used against B, or

(ii) causes B serious alarm or distress which has a substantial adverse effect on B's usual day-to-day activities,

is guilty of an offence if A knows or ought to know that A's course of conduct will cause B so to fear on each of those occasions or (as the case may be) will cause such alarm or distress.

B.117 Again, "course of conduct" will have the meaning outlined above.[209] In defining "violence", the same considerations apply here as with the section 4 offence.[210]

B.118 As with the new section 2A offence, this new offence is based on the existing section 4 offence with the added requirement of stalking. However, section 4A(1)(b)(ii) is "new and significant", and may sometimes apply where the offence under section 4 does not.[211]

B.119 As Professor Finch notes, stalking is a nebulous concept that makes a precise legal definition difficult to formulate.[212]

Where published and by what means

B.120 Examples of conduct which can be associated with stalking are given in section 2A(3). One such action is "publishing any statement or other material relating or purporting to relate to a person".[213]

B.121 MacEwan notes that the new stalking offences (sections 2A and 4A) continue to cover internet-based communications with the victim, as well as the online publication of "information" about the victim.[214]

Impact on the victim

B.122 It is a central element of the offence, as outlined in section 4A(1), that the victim actually fears that violence will be used against him or her, or suffers serious alarm or distress which has a substantial adverse effect on the victim's usual day-to-day activities.

Mental element

B.123 The mental element, as outlined in section 4A(1), is that A knows or ought to know that A's course of conduct will cause B so to fear on each of those occasions or (as the case may be) will cause such alarm or distress.

[209] See para B.77 and following above.

[210] See para B.104 above.

[211] Blackstone's para B2.184.

[212] E Finch, "Stalking the Perfect Stalking Law: An Evaluation of the Efficacy of the Protection from Harassment Act 1997" [2002] *Criminal Law Review* 703, 703 to 704.

[213] Protection from Harassment Act 1997, s 2A(3)(c)(i).

[214] N MacEwan, "The New Stalking Offences in English Law: Will They Provide Effective Protection from Cyberstalking?" [2012] *Criminal Law Review* 767, 777 to 778.

B.124 Section 4A(2) and (3) further provide that:

> (2) For the purposes of this section A ought to know that A's course of conduct will cause B to fear that violence will be used against B on any occasion if a reasonable person in possession of the same information would think the course of conduct would cause B so to fear on that occasion.
>
> (3) For the purposes of this section A ought to know that A's course of conduct will cause B serious alarm or distress which has a substantial adverse effect on B's usual day-to-day activities if a reasonable person in possession of the same information would think the course of conduct would cause B such alarm or distress.

Again, this offence has an objective mental element ("ought to know"), which ensures that defendants who do not appreciate the effect their conduct is having (for example, because of mental illness) are caught by the offence.

Defences

B.125 Section 4A(4) provides that:

> (4) It is a defence for A to show that—
>
> (a) A's course of conduct was pursued for the purpose of preventing or detecting crime,
>
> (b) A's course of conduct was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or
>
> (c) the pursuit of A's course of conduct was reasonable for the protection of A or another or for the protection of A's or another's property. [215]

The wording is identical to that in section 4(3).[216] The same question arises here as in section 4 about whether the conditions of section 1, including the exclusions in section 1(3), are to be read into the offence.[217]

Protection from Harassment Act 1997 sections 5 and 5A: restraining orders

B.126 Section 5 of the 1997 Act provides:

[215] Protection from Harassment Act 1997, s 4A(4).

[216] See para B.111 above.

[217] See paras B.113 and B.114 above.

(1) A court sentencing or otherwise dealing with a person ("the defendant") convicted of an offence may (as well as sentencing him or dealing with him in any other way) make an order under this section.

(2) The order may, for the purpose of protecting the victim or victims of the offence, or any other person mentioned in the order, from conduct which—

(a) amounts to harassment, or

(b) will cause a fear of violence,

prohibit the defendant from doing anything described in the order.

(3) The order may have effect for a specified period or until further order.

…

(5) If without reasonable excuse the defendant does anything which he is prohibited from doing by an order under this section, he is guilty of an offence.

B.127 Section 5A[218] of the 1997 Act provides:

(1) A court before which a person ("the defendant") is acquitted of an offence may, if it considers it necessary to do so to protect a person from harassment by the defendant, make an order prohibiting the defendant from doing anything described in the order.

(2) Subsections (3) to (7) of section 5 apply to an order under this section as they apply to an order under that one.

B.128 It is not the case that orders under section 5A can only be made where there is uncontested evidence. However, the court must always, in open court, state the factual basis for the order. The standard of proof for the making of the order is the civil standard (that is, on the balance of probabilities). It may therefore be the case, without contradiction, that the evidence is not enough for the jury to convict (beyond reasonable doubt) for the criminal offences in the 1997 Act, but that the same evidence is sufficient (on the balance of probabilities) for the imposition of a restraining order. In addition, the power to impose an order under section 5A focuses on preventing future harm – this is a separate consideration from whether the defendant has already harassed the victim.[219]

[218] Inserted by Domestic Violence, Crime and Victims Act 2004, s 12(5).

[219] *Major* [2010] EWCA Crim 3016, [2011] Crim LR 328; see also A Gillespie, "Post-acquittal Restraining Orders" (2011) 75(2) *Journal of Criminal Law* 94, 94 to 95.

OTHER PROCEEDINGS

B.129 In addition to these criminal offences there is, of course, the possibility of a civil action for defamation. Insulting remarks to judges in court will continue to be covered by contempt in the face of the court.