The Law Commission

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CONTEMPT OF COURT: SCANDALISING THE COURT

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THE LAW COMMISSION

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THE LAW COMMISSION

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to the Crime and Courts Bill was proposed by Lord Lester and others,[3] designed to abolish the offence: this was withdrawn upon the Government giving an undertaking to consider the issue in time to be dealt with within the Bill.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