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

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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.