



The Law Commission

Working Paper No. 84

Criminal Libel

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This Working Paper, completed for publication on 21 September 1982, is circulated for comment and criticism only.

It does not represent the final views of the Law Commission.

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THE LAW COMMISSION
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CRIMINAL LAW
CRIMINAL LIBEL

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THE LAW COMMISSION

Working Paper No. 84

CRIMINAL LIBEL

Summary. In this Working Paper the Law Commission examines, as part of its programme of codification of the criminal law of England and Wales, the common law offence of criminal libel. It provisionally proposes the abolition of this offence and its replacement by a new statutory offence of criminal defamation. The new offence would be very much narrower than the common law offence. It is intended to penalise only the deliberate "character assassin", namely, a person who makes or publishes a statement about another person which is both untrue and defamatory and which he knows or believes to be untrue and which he intends should defame. The Law Commission also provisionally proposes a new summary offence to penalise those who send "poison-pen" letters. All the proposals in the Working Paper are provisional only and its purpose is to obtain the views of the public on them.

PART I

INTRODUCTION

1. In our Second Programme of Law Reform,¹ we recommended a comprehensive examination of the criminal law with a view to its codification. As part of this programme, we have undertaken to review the common law offence of criminal libel.² This Working Paper sets out our provisional proposals for reform.

1.2 The expression "criminal libel" in its widest sense covers four categories of offence: blasphemous libel, seditious libel, obscene libel and defamatory libel. These are now distinct common law offences in which the publication of words - the libel - is the basis of each offence. The Law Commission has already put forward provisional proposals for reform of the first two offences. In our Working Paper on Treason, Sedition and Allied Offences,³ we provisionally concluded that there was no longer a need to retain the common law offences of sedition, including seditious libel.⁴ And in our Working Paper on Offences against Religion and Public Worship⁵ we provisionally proposed that the common law offences of blasphemy and blasphemous libel should be abolished, and

1 (1968) Law Com. No. 14, Item XVIII, para. 2. See also Sixteenth Annual Report 1980-1981 (1982), Law Com. No. 113, paras. 1.8-1.11.

2 We should like to acknowledge our indebtedness to J.R. Spencer of Selwyn College, Cambridge for his assistance and for allowing us access to his research material on criminal libel.

3 (1977) Working Paper No. 72.

4 Ibid., paras. 76-78.

5 (1981) Working Paper No. 79.

that there should be no statutory replacement.⁶ So far as obscene libel is concerned, this offence would be abolished if the recommendations of the Report of the Committee on Obscenity and Film Censorship⁷ were to be implemented.

1.3 There remains defamatory libel.⁸ That offence was considered by the Faulks Committee on Defamation, which reported in 1975.⁹ Their Report dealt extensively with both English and Scots law¹⁰ but primarily with civil defamation.

1.4 Criminal libel remains a common law offence, although the common law has been much altered by statute. In a code a criminal offence exists because the code declares it to be so. The common law offence as such must be abolished because it exists outside the code. The question is what, if anything, should replace it. This Working Paper is issued in accordance with our usual

6 Ibid., para. 9.2.

7. (1979) Cmnd. 7772: Chairman, Professor Bernard Williams. In the course of a Parliamentary debate on this Report, the Minister of State at the Home Office said that "while [the Home Secretary] remains very willing to consider the possibility of legislation in this Parliament, he does not at present see any early prospect of general Government legislation in this field": Hansard (H.C.), 26 June 1981, vol. 7, col. 498.

8 Hereinafter we use the term "criminal libel" to mean the offence of defamatory libel.

9 Report of the Committee on Defamation (1975), Cmnd. 5909.

10 The Committee stated that they had striven towards assimilation of the laws of England and Wales and of Scotland "wherever it has appeared practicable": Report of the Committee on Defamation (1975), Cmnd. 5909, para. 15; and see paras. 4.1-4.2, below.

practice, by way of consultation with those interested in and willing to comment, whether in agreement or disagreement, on the proposals we put forward. We stress that these are provisional only. We shall then prepare and submit to the Lord Chancellor our final Report with a draft Bill annexed.

1.5 In Gleaves v. Deakin¹¹ in 1979 the House of Lords for the first time had occasion to consider the offence of criminal libel. Although the decision did not involve consideration of every aspect of the offence, the speeches ranged wider than was required by the narrow point of law at issue. Their Lordships were unanimous that some measure of reform of the law was necessary. Lord Diplock expressed his concern at the anomalous state of the present law thus:

"The examination of the legal characteristics of the criminal offence of defamatory libel as it survives today, which has been rendered necessary in order to dispose of this appeal, has left me with the conviction that this particular offence has retained anomalies which involve serious departures from accepted principles upon which the modern criminal law of England is based and are difficult to reconcile with international obligations which this country has undertaken by becoming a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms."¹²

At the subsequent trial, Comyn J. also called for reform of the law of criminal libel because, in his view, it was

11 [1980] A.C. 477.

12 Ibid., p. 482: see further para. 2.17, below. Lord Diplock had earlier voiced the same view in the course of the debates on the Rehabilitation of Offenders Bill: see Hansard (H.L.), 24 July 1974, vol. 353, col. 1809.

"wholly unfitted" to modern times.¹³

"I am one of the many judges who consider the law of criminal libel and of private prosecutions as extremely unsatisfactory ... I hope most sincerely that one good to come out of this case will be that the authorities will at long last take a look at the law of criminal libel and of the ability of the law of criminal libel to be brought by a private prosecutor and not a state prosecutor."¹⁴

The judge also said that "it would be no bad thing, if the authorities when considering criminal libel considered civil libel too". We consider the decision in Gleaves v. Deakin and the measures of reform of criminal libel suggested by the House of Lords later in this Paper.¹⁵

1.6 There are unusual features in both the civil and the criminal law of defamation. For example, in a civil action both liability and the amount of damages are decided by a jury.¹⁶ Some of the unusual features of the law of criminal libel are considered in detail below.¹⁷ While damages are intended to compensate the plaintiff for the injury to his reputation, there is no satisfactory

13 See The Times, 28 February 1980. Compare the view recently expressed by Lord Denning M.R. in Rank Film Distributors Ltd. v. Video Information Centre [1982] A.C. 380, at p. 411 (C.A.) (a case concerning the law of copyright and the privilege against self-incrimination): "... it would be ridiculous to suggest that there is any possibility of a charge in the criminal courts for libel. That would be mere moonshine."

14 See The Times, 27 February 1980 (a news item).

15 See in particular paras. 2.16-2.20 and 7.4, below.

16 Most civil actions are tried by judge alone. Defamation remains one of the exceptional classes of case which can be, and often is, tried by judge and jury.

17 See Part III, below.

yardstick by which they may be calculated if the plaintiff cannot show pecuniary loss, and the sums awarded by juries have on occasion been criticised. Civil libel is the area of the law in which in practice an award of punitive damages (i.e. damages intended to punish the defendant rather than compensate the plaintiff) is most likely to be made.¹⁸ But is it right that the plaintiff should receive punitive damages in addition to receiving those damages which the jury considers adequate to compensate him for the injury to his reputation? Should there not be some means whereby the plaintiff can be adequately, but not extravagantly, compensated for the injury and the defendant punished for his wrongdoing, for example by means of a fine payable to the State like any other fine? This is the pattern which is followed in some Continental countries.¹⁹

1.7 In English law the distinction between criminal and civil proceedings is fundamental. If changes were to be made so that the proceedings could both compensate the injured party and impose a criminal penalty, this would represent a radical change from the existing legal system. Moreover, any such scheme would be relevant, not merely in defamation cases, but in other fields such as actions for personal injury.

1.8 As we have already said, the Faulks Committee considered both criminal and civil defamation in the law of both England and Wales and Scotland as recently as 1975. That Committee did not recommend any such fundamental changes as we have mentioned above. It seems that there

18 See further para. 7.34, below.

19 See para. 4.13, below.

is no present intention of implementing the Faulks Committee Report.²⁰ For present purposes we accept that the distinction between the criminal and civil law must remain. Our intention is that the criminal law of England and Wales should be codified and it is to that end that we have considered the law of criminal libel as it exists within the present confines of criminal and civil procedure. The question, therefore, is whether there should be a criminal offence of libel, the primary objective of which would be to secure the punishment of the offender. It is assumed that the present civil law of libel (in which, as explained above, both compensatory and in appropriate cases punitive damages may be awarded) will continue to exist side by side with any criminal offence.

1.9 The structure of this Working Paper may be summarised as follows:-

Part II - Development of the law of criminal libel

To assist an understanding of the reasons for the anomalous state of the existing law, we trace the historical development of the offence from scandalum magnatum to the most recent House of Lords decision in 1979.

20 See Hansard (H.L.), 29 October 1980, vol. 414, Written Answers, col. 396, where the Lord Chancellor stated in answer to a question whether the Government intended to amend the Defamation Act 1952: "While the Government is willing to consider proposals for change, there is no present intention of introducing legislation". See also Hansard (H.L.), 6 May 1982, vol. 429, cols. 1298-1299.

Part III - The present law

In this Part, we give a detailed statement of the law of criminal libel as it stands today in England and Wales.

Part IV - Criminal libel in other jurisdictions

We examine whether and how defamation is penalised by the criminal law in other jurisdictions (including other parts of the United Kingdom) both at common law and in civil law systems.

Part V - The scope of related offences

We consider to what extent the criminal law of England and Wales provides alternative sanctions for defamatory statements.

Part VI - Defects of the present law

We set out what we believe are the most serious anomalies and shortcomings of the present law.

Part VII - Consideration of the need for criminal sanctions

We give detailed consideration to the arguments for and against the need to replace the common law offence by a new statutory offence.

Part VIII - A new offence of criminal defamation

We discuss the elements of a possible new statutory offence of criminal defamation to replace criminal libel.

Part IX - "Poison-pen" letters

We consider and put forward provisional proposals for a new summary offence specifically aimed at dealing with the mischief of poison-pen letters.

Part X - Summary of provisional conclusions and proposals

PART II

DEVELOPMENT OF THE LAW OF CRIMINAL LIBEL

2.1 Although the origins of the law of defamation can be traced back to such early and diverse sources as the Bible, Roman Law and the Anglo-Saxons,¹ our historical survey of the principal stages in the development of criminal libel begins at a later date.

2.2 The offence of scandalum magnatum (slander of magnates) was first created by a statute of 1275² which enacted that:

"none be so hardy to cite or publish any false news or tales whereby discord or occasion of discord or slander may grow between the King and his people or the great men of the realm; and he that doth so shall be taken and kept in prison until he hath brought him into the court which was the first author of the tale."

The offence was re-enacted in periods of turbulence in 1378,³ and 1388⁴ and later during the reigns of Mary and Elizabeth in 1554 and 1559.⁵ Scandalum magnatum "was imagined as a political weapon, it was put into the hands of the Council rather than of the common lawyers, and it

1 See P.F. Carter-Ruck, Libel and Slander (1972), pp. 34 et seq.

2 (3 Edw. 1) Stat. Westm. prim., c.34.

3 (2 Rich. II) Stat. 1, c.3. "Magnates" were defined as including peers, justices and certain named officials.

4 (12 Rich. II), c.11. Offenders could be punished "by the advice of the Council".

5 Clauses were added to punish seditious words, justices of the peace were given jurisdiction, and the punishment was loss of ears for words and loss of the right hand for writing.

was seldom used".⁶ These statutes are mentioned not only because they provided the foundations upon which the Star Chamber was to fashion the law of libel, but also because in an almost unbroken period beginning with scandalum magnatum and continuing through to 1832 there existed a common thread which was the essence of criminal libel, namely, the prevention of loss of confidence in government.⁷ Before we examine the Star Chamber's contribution to this, we must digress briefly and consider the beginnings of the civil action.

2.3 It was not until the beginning of the 16th century that the common law courts began to develop a civil action for slander. Although slander today means defamation by spoken words and other transient forms of communication, the common law courts then made no distinction between speech and writing.⁸ These courts gradually took over jurisdiction in this field from the ecclesiastical courts.⁹ The gist of the action was damage: unless the plaintiff could prove that he had sustained damage as a result of the words complained of, his action failed. There had, therefore, to be a publication to a third party and the action died with the

6 C.H.S. Fifoot, History and Sources of the Common Law (1949), p. 128.

7 See e.g. R. v. Tutchin (1704) 14 St. Tr. 1095, 1128: "it is very necessary for all governments that the people should have a good opinion of it" (per Holt C.J.).

8 See e.g. Boughton v. Bishop of Coventry and Lichfield (1584) 1 Anderson 119; 123 E.R. 385.

9 The jurisdiction of the ecclesiastical courts in this area was at its height towards the end of the 15th century: thereafter it declined. The last vestiges of this jurisdiction were finally removed by the Ecclesiastical Courts Act 1855.

victim. Finally, truth was a complete defence because, it was held, if the allegations in the words complained of were true, the plaintiff was not entitled to complain that he had lost his reputation.

2.4 This common law action for slander proved very popular with plaintiffs. Damages were found to be a better remedy than ecclesiastical penalties, especially since juries tended to award sums of money quite disproportionate to the wrong and to the ability of the wrongdoer to pay. The judges therefore sought to stem the flood of actions. First, they restricted the action of slander to well-settled categories (imputation of crime, imputation of incompetence in a trade or profession, imputation of certain diseases) unless the plaintiff could prove special damage. In addition, they adopted the rule of mitior sensus whereby words alleged to be defamatory per se were not held to be defamatory if a non-defamatory meaning could possibly be found.¹⁰

2.5 In the meantime another and distinct line of legal development had opened up. The Court of Star Chamber was established in 1488 only 12 years after Caxton had set up his first press at Westminster. That court -

10 A number of cases are referred to in R.E. Megarry, Miscellany-at-law (1955), pp. 192 et seq. For example, in James v. Rutlech (1599) 4 Co. Rep. 17a; 76 E.R. 900, the words complained of were: "Hang him, he is full of the pox. I marvel that you will eat or drink with him. I will prove that he is full of the pox." The action failed on the ground that the word "pox" would not support the innuendo "meaning thereby the French pox", as such an innuendo "endeavours to extend the general words, the pox, to the French pox, by imagination of an intent which is not apparent by any precedent words, to which the innuendo should refer. And the words themselves shall be taken in mitiori sensu."

"regarded with the deepest suspicion the printed word in general, and anything which looked like criticism of the established institutions of Church or State in particular... A publication of which the Star Chamber disapproved would be punished as either a blasphemous or else as a seditious libel. At the same time, the Star Chamber was anxious to suppress duelling. To this end it would punish defamatory libels on private citizens who had suffered insult thereby, in the hope that this remedy would be more attractive to the person insulted than the issue of a challenge to fight¹¹".¹²

Thus, although the court might award damages to the victim, the Star Chamber was mainly concerned to punish libels which weakened confidence in "the good governance of the realm", or which directly threatened state security, or which were likely to cause private disorder or a breach of the peace.

2.6 The Star Chamber's concern with public order and the desire to punish the defendant for his wickedness contrasts with the common law courts' concern with the damage caused to the victim's reputation. It is hardly surprising therefore that the nature of the criminal offence should differ in a number of important respects from the nature of the common law action for damages. In the light of the rationale of the offence, the Star Chamber developed its own rules. First, it did not matter whether the person libelled was alive or dead.¹³ Secondly, it did not matter that the libel had been

11 W. Holdsworth, A History of English Law 3rd ed., (1945), vol. 5, p. 210.

12 J.R. Spencer, "Criminal Libel - A Skeleton in the Cupboard", [1977] Crim. L.R. 383.

13 "A libelle is a breach of the peace, and is not to be suffered but punished - this is as poison in the Commonwealth, and no difference of the deade or lyvinge: and th' offence to the state dyes not": per Coke in Les Reportes Del Cases 226.

published only to the victim. Finally, and most importantly, truth was not a defence: "for in a settled state of Government the party grieved ought to complain for every injury done him in an ordinary course of law, and not by any means to revenge himself, either by the odious course of libelling, or otherwise."¹⁴ Further it was argued that the fact that it was true might make it more likely to result in a breach of the peace: "for as the woman said, she would never grieve to have been told of her red nose if she had not one indeed."¹⁵ It has been suggested that this rule was later modified for spoken words,¹⁶ if non-seditious, which could be justified by showing their truth, whereas written words were punished by the very fact that they were written.¹⁷ If so, it is possible that this distinction is one of the roots of the modern distinction between libel and slander.¹⁸

2.7 The Court of Star Chamber was abolished in 1641 but after the Restoration its criminal jurisdiction, including that in criminal libel, was inherited by the

14 De Libellis Famosis (1606) 5 Co. Rep. 125a, 125b; 77 E.R. 250, 251.

15 W. Hudson, "A Treatise on the Court of Star Chamber" (written before 1635), in Hargrave, Collectanea Juridica (1791), vol. 2, p. 103. Hence the aphorism, "The greater the truth, the greater the libel".

16 As with the common law courts, the Star Chamber punished spoken as well as written words. Nevertheless, the number of prosecutions for written words far exceeded those for spoken.

17 Hudson, (op. cit. n. 15, above), p. 104.

18 W. Holdsworth, A History of English Law 3rd ed., (1945), vol. 5, p. 211.

Court of King's Bench,¹⁹ whose judges had been represented in the Star Chamber. Printed attacks on Church and State showed no sign of diminishing and a much less inhibited climate of morals and manners brought with it a greater incidence of those "high and haughty" utterances calculated to disturb the peace and provoke more duelling. Administered as they were by the same court, the pre-existing common law of slander and the inherited jurisdiction in libel were bound to interact. The rule of mitior sensus and the requirement of proof of special damage did not apply to libel and in King v. Lake²⁰ Sir Matthew Hale C.B. held that they did not apply to a civil claim in respect of defamatory words which were written and published. However, both continued to apply to civil actions for slander, viz. spoken words. The application of some of the principles of libel developed by the Star Chamber to the tort of libel in the King's Bench marks the development of the distinction between libel and slander found in the tort of defamation today. On the other hand, in the tort the principle that the truth (justification) was a defence was retained for both libel and slander. This principle was not, however, transferred to the crime where the Star Chamber rule that truth was no defence was retained. But it was made clear that spoken words defamatory of a private person were not a crime.²¹

19 R. v. Summer and Hillard (1665) 1 Sid 270; 82 E.R. 1099 was the first case after the abolition of the Star Chamber deciding that defamatory libel should continue to be an offence.

20 (1668) Hardres 470; 145 E.R. 552.

21 R. v. Penny (1687) 1 Ld. Raym. 153; 91 E.R. 999. Nevertheless, seditious or blasphemous spoken words or words likely to cause a breach of the peace were indictable.

2.8 A number of cases in the 18th century²² revealed judicial unease about allowing awards of damages in civil actions for written words without proof of special damage, although no case is reported where the distinction drawn in King v. Lake²³ was denied. Even in the case which finally settled the distinction between libel and slander,²⁴ Sir James Mansfield C.J.²⁵ remained unconvinced, seeing no good reason why an action should lie for written words which did not lie for those spoken.²⁶

2.9 As we have noted,²⁷ there were two classes of libel punished by the Star Chamber - those which were a threat to the security of the State ("political libels") and those likely to cause private disorder ("private libels") - and this distinction was maintained by the Court of King's Bench. The troubled times from the defeat of the Jacobite Rising of 1745 to the passage of the Reform Act 1832, marked by the rise of party government against a background of apparent threats to the internal and external stability of the country, saw

22 E.g. Bell v. Stone (1798) 1 Bos. & Pul. 331; 126 E.R. 933.

23 (1668) Hardres 470; 145 E.R. 552; and see para. 2.7, above.

24 Thorley v. Lord Kerry (1812) 4 Taunt. 355; 128 E.R. 367.

25 Sir James Mansfield C.J. was unrelated to Lord Mansfield: the former changed his name from Manfield, while the family name of the latter was Murray. Cf. Faulks Committee Report, para. 79.

26 Thorley v. Lord Kerry (1812) 4 Taunt. 355, 364; 128 E.R. 367, 371. The Faulks Committee recommended that the distinction between libel and slander in civil proceedings be abolished and that slander be assimilated to libel for the purpose of such proceedings: Report of the Committee on Defamation (1975), Cmnd. 5909, para. 91.

27 See para. 2.5, above.

wave after wave of prosecutions for libel²⁸ launched by government on an overtly political basis.²⁹ During this period the judges began progressively to encroach upon the function of juries in such cases; at one time the only function left to the jury was to decide the question whether the alleged libel had been published or not, a matter not usually disputed. Thus in 1770 Lord Mansfield C.J. held that whether a publication amounted to a libel was a question for the judge, not the jury.³⁰ This ruling stood until it was reversed by Fox's Libel Act of 1792 ("An Act to remove doubts respecting the functions of juries in cases of libel"), which provided that on a trial

28 Among the more notable were the prosecutions of John Wilkes in 1763-1766, the Dean of St. Asaph in 1784, and Tom Paine in 1792. Even the judiciary were not immune. Johnson J., who was a judge of the Irish Court of Common Pleas, was convicted in 1805 for a libel on the Lord Lieutenant of Ireland, the Lord Chancellor of Ireland and a judge of the Irish Court of King's Bench: (1805) 6 East 583; 102 E.R. 1412 and 7 East 65; 103 E.R. 26.

29 Prosecutions for political libels were invariably begun not on indictment but on the Attorney General's *ex officio* information, for which (by contrast with informations begun by private individuals, n. 33, below) the leave of the court was not required. This procedure was disadvantageous to the defendant in a number of ways, in particular because the defendant was not apprised of the evidence on which the Crown relied until the opening of the prosecution's case, making cross-examination and calling of evidence in rebuttal more difficult. There was also no possibility of the prosecution being dismissed at an early stage by justices finding that there was no *prima facie* case, or by a grand jury that there was "no true bill". The procedure was last used in 1911 in *R. v. Mylius* (see para. 7.39, below) and having been described by the Criminal Law Revision Committee as "plainly unnecessary" was finally abolished by the Criminal Law Act 1967, s.6(6). See generally J. Ll. J. Edwards, *The Law Officers of the Crown* (1964), pp. 262-267.

30 *R. v. Almon* (1770) 20 St. Tr. 803; *R. v. Miller* (1770) 20 St. Tr. 870.

on an indictment for libel³¹ the jury might give a general verdict upon the whole matter put in issue and should not be required by the court to find the defendant guilty merely on proof of publication. After the passing of this Act, prosecutions became rare and, although there was a series of political prosecutions in 1839, such cases are in practice now obsolete.³²

2.10 While prosecutions for libels on individuals continued,³³ important statutory changes were made in the 19th century. Largely as a result of pressure from newspaper proprietors and editors,³⁴ who often appeared as defendants in libel prosecutions, a Select Committee of the House of Lords was appointed in 1843 to consider the

31 The Act applied to defamatory, seditious and blasphemous libels.

32 The Report of the Select Committee of the House of Lords on the Law of Defamation and Libel in 1843 was confined to the law affecting private libels since the Committee considered that political libel had become by then a dead issue: see para. 2.10, below.

33 Until 1884 prosecutions by private individuals were frequently begun by criminal information as well as by indictment. Unlike the Attorney General (n. 29, above), private individuals had to obtain the leave of the court to file an information. But in *R. v. Labouchere* (1884) 12 Q.B.D. 320, the Divisional Court (Lord Coleridge C.J. giving the judgment of the court) held that in general the court ought not to exercise its discretion in favour of granting an information at the suit of a private individual (as distinct from someone in a public office or position). Thereafter the normal procedure was by indictment and private criminal informations were eventually abolished by the Administration of Justice (Miscellaneous Provisions) Act 1938, s.12. See generally W. Holdsworth, *A History of English Law* 3rd ed., (1944), vol. 9, pp. 236-245.

34 They complained not so much of the principle of criminal liability for defamation, as of the details of the law: see J.R. Spencer, "The Press and the Reform of Criminal Libel", in Glazebrook (ed.), *Reshaping the Criminal Law* (1978), 266, 270.

"Law of Defamation and Libel", that is, both civil and criminal. A Report³⁵ was published and in the same year the Libel Act 1843 was passed implementing most of the Committee's recommendations. Much of Lord Campbell's Act, as it is known, remains in force today. The 1843 Act replaced the common law maximum penalty of an unlimited period of imprisonment and a fine with one of a year's imprisonment (and a fine)³⁶ and provided for a heavier maximum penalty of two years' imprisonment (and a fine) in the case where a false defamatory libel had been published with knowledge of its falsity.³⁷ The Act also reduced the severity of the vicarious liability rule, whereby a man was responsible for the publication of a libel by his agent even though he had not personally authorised it.³⁸ But the most significant of the changes made by the Act so far as criminal libel was concerned was that relating to the truth of the alleged libel.

2.11 As we have already noted,³⁹ at common law the truth of the matter published, though always a defence to a civil action for libel,⁴⁰ was never a defence to a criminal charge of libel. Thus in R. v. Burdett,⁴¹ a libel implied that the yeomanry and soldiers who dispersed the Manchester meeting ("Peterloo") had committed murder;

35 H.L. papers 1843, Session Paper 18.

36 Sect. 5.

37 Sect. 4.

38 Sect. 7. See J.R. Spencer, op. cit. (n. 34, above) at p. 273, and para. 3.16, below.

39 See para. 2.6, above.

40 It was well established by 1787: J'Anson v. Stuart 1 T.R. 748; 99 E.R. 1357.

41 (1820) 4 B. & Ald. 95; 106 E.R. 873.

it was held that evidence of the truth of the imputation was inadmissible.⁴² This rule was the most resented of all at the time by the press. Despite this, the Select Committee of 1843 reported that in their view truth alone should cease to be a defence even to a civil action:

"... there are many cases in which a wrong may be maliciously done to an individual for which a remedy should be given by making public what may be proved to be true, - as where the imputation refers to some personal defect, or an error of conduct long atoned for and forgotten".⁴³

The Committee recommended that the truth of the imputation should not be an absolute defence to an action for libel or slander unless it was proved that it was for the benefit of the community that the truth should be made known. In the event the Committee's recommendation, although incorporated in the draft Bill, was rejected in the House of Commons except in relation to criminal proceedings for libel. Thus section 6 of the Libel Act 1843 made truth a defence to a prosecution for libel provided the defendant could prove both that it was true and "that it was for the public benefit that the said matters charged should be published". This represents the existing law of criminal libel. For civil defamation it still remains an absolute defence that the defamatory imputation is true.⁴⁴

42 See also *R. v. Brigstock* (1833) 6 Car. & P. 184; 172 E.R. 1199, where it was held that evidence of the truth of the libel was also inadmissible to enable the jury to decide whether, if the facts were true, the remarks were or were not within the limits of free discussion.

43 H.L. papers 1843, Session Paper 18, p. iv.

44 Subject to the limited exceptions created by the Rehabilitation of Offenders Act 1974: see para. 7.32, below.

2.12 As a result of objections from the newspaper interests, this time against the very principle of criminal liability for libel, further changes in the law of criminal libel were brought about first in the Newspaper Libel and Registration Act 1881 and later in the Law of Libel Amendment Act 1888. The broad purpose of the 1881 Act was to confer a measure of protection upon those responsible for the publication of newspapers, the proprietors of which themselves formed a powerful group of M.P's at that time.⁴⁵ Thus the Act conferred a limited privilege upon newspaper reports of public meetings. More significantly, however, it made the consent of the newly created Director of Public Prosecutions a prerequisite for a prosecution in respect of a libel in a newspaper.⁴⁶ In fact, contrary to the hopes of the Bill's promoters, there was a substantial increase in prosecutions for criminal libel.⁴⁷ This trend was encouraged in particular by Sir Augustus Stephenson, who held the combined offices of Director of Public Prosecutions and Treasury Solicitor. In the years 1884 to 1888 he gave his consent on 27 occasions, having received a total of 82 requests. But, as Spencer records, only 5 of the 27 cases reached the sentencing stage, the majority of the remainder being dropped at the trial after suitable

45 This group of M.P's had been successful in getting a further Select Committee appointed on the Law of Libel in 1878. Two reports were published which both concentrated mainly on the effects of the law on the press.

46 Newspaper Libel and Registration Act 1881, s.3. The Director of Public Prosecutions was established by the Prosecution of Offences Act 1879.

47 For a fuller account of criminal libel prosecutions in the period 1881-1888, see J.R. Spencer, "The Press and the Reform of Criminal Libel", in Glazebrook (ed.), Reshaping the Criminal Law (1978), p. 277 et seq.

apologies from the defendants.⁴⁸ It was left to Lord Coleridge C.J., "a determined opponent of criminal libel",⁴⁹ to propose an amendment to a Bill before Parliament in 1888, which was concerned mainly with civil libel, depriving the Director of his power to permit or forbid a libel prosecution against a newspaper. The amendment would have made the consent of either the Attorney General or a judge in chambers a prerequisite for a prosecution for libel against anyone. After further amendments,⁵⁰ the resulting provision became section 8 of the Law of Libel Amendment Act 1888, still in force today, which provides that no prosecution for a libel in a newspaper can be commenced without the leave of a "judge at chambers".⁵¹

48 Ibid., at p. 279, n. 81.

49 Ibid., at p. 280.

50 Lord Coleridge agreed to limit his amendment to newspaper libels after objections, voiced by Lord Halsbury L.C. and Lord Herschell, that it would have the effect of depriving private individuals of their right to take criminal proceedings for libel against other private individuals: Parliamentary Debates (3rd series), 24 July 1888, vol. 329, cols. 313-315.

51 See Goldsmith v. Pressdram Ltd. [1977] Q.B. 83 and para. 3.26, below. The House of Lords in Gleaves v. Deakin [1980] A.C. 477 suggested that no prosecution for criminal libel should be instituted without the leave of either the Director of Public Prosecutions or the Attorney General: see further paras. 2.16-2.20 and 7.4, below.

2.13 The Law of Libel Amendment Act 1888 was the last piece of legislation to be enacted which directly concerned criminal libel.⁵² Since then statutory changes in the law of defamation have been solely concerned with civil defamation. The principal statutory reform was the Defamation Act 1952 which gave effect to the changes in the law recommended in the Report of the Committee on the Law of Defamation (Chairman, Lord Porter).⁵³ The Act made important reforms in the law of civil defamation, but it had no effect on criminal libel save in so far as it increased the substantial differences between civil and criminal libel.⁵⁴ Three specific changes made by the 1952 Act to civil defamation may be mentioned here. First, section 1 provides that the broadcasting of words by means of wireless telegraphy for general reception is to be treated as publication in permanent form. Thus whether a person speaking on radio or T.V. is reading from a script or not, his words if defamatory will amount in any case to

52 Earlier, the Criminal Code Commissioners had produced a draft Code in 1879 (C.2345) based on what was believed to be the then existing law. Sect. 227 defined a defamatory libel as "matter published without legal justification or excuse, designed to insult the person to whom it is published, or calculated to injure the reputation of any person by exposing him to hatred contempt or ridicule". A marginal note against the words "designed to" says - "This is the existing law, the criminality of libel depending on its tendency to produce a breach of the peace." Sects. 229 to 237 contain provisions excluding liability on the grounds broadly of fair comment and privilege.

53 (1948) Cmd. 7536. The Committee considered some aspects of criminal libel but made no recommendations for changes in the law: see *ibid.*, paras. 23-32.

54 The Defamation Act 1952, s.17(2) expressly excludes any of the changes made by the Act from applying to criminal libel.

libel, not slander, and be actionable without proof of special damage.⁵⁵ Secondly, section 5 provides that "a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges". This provision only applies to civil libel. Therefore the old law remains,⁵⁶ namely that, if an alleged criminal libel contains several distinct allegations and the defendant fails to prove the truth of any one of them, the jury are bound to convict,⁵⁷ whereas, if the allegation complained of is general in its nature, it is sufficient to prove as much of the plea of truth as would justify the libel.⁵⁸ Thirdly, the Act provides that where a libel is unintentional, it is a defence that a suitable offer of amends has been made.⁵⁹

2.14 We turn now to consider the historical development of criminal libel specifically with regard to the element of breach of the peace.⁶⁰ As we have already seen,⁶¹ the offence was created by the Star Chamber in order to maintain confidence in government and to counter threats to the peace. It was often stated that the

55 The Faulks Committee recommended that criminal libel should apply to broadcasting in the same way: see further para. 3.2, below.

56 See Gleaves v. Deakin [1980] A.C. 477, 493, per Lord Edmund-Davies.

57 R. v. Newman (1853) 1 El. & Bl. 558; 118 E.R. 544.

58 R. v. Labouchere (1884) 12 Q.B.D. 320.

59 Defamation Act 1952, s.4.

60 A full statement of the present law is in Part III, below.

61 See para. 2.6, above.

offence was based on the tendency of the published libel to provoke a breach of the peace and it was not, therefore, surprising that this tendency either in general or particular should later have become an ingredient of the offence. Thus Hawkins said:

"The court will not grant this extraordinary remedy [by information], nor should a grand jury⁶² find an indictment, unless the offence be of such signal enormity that it may reasonably be construed to have a tendency to disturb the peace and harmony of the community."⁶³

This passage was cited with approval by Lord Coleridge C.J. in R. v. Labouchere,⁶⁴ and in a number of other cases⁶⁵ in the 19th century the courts appeared to suggest that such a tendency was an essential ingredient of the offence. On the other hand, it is clear that convictions occurred in many cases in which the libel was published in circumstances where there was very little risk of a breach of the peace being caused by violence on the part of the person defamed.⁶⁶

62 Grand juries exercised a partly judicial function in deciding whether or not there was a case for the accused to answer. Towards the end of their long history they provided an alternative procedure to magistrates' committal proceedings. They were abolished for all but exceptional cases by the Administration of Justice (Miscellaneous Provisions) Act 1933 and finally by the Criminal Justice Act 1948.

63 Hawkins' Pleas of the Crown 6th ed., (1788), Book 1, ch. 73.

64 (1884) 12 Q.B.D. 320, 322-3. See also para. 2.10, n.33, above.

65 See e.g. R. v. Holbrook (1878) 4 Q.B.D. 42, 46, per Lush J.; and Coleridge L.C.J. in R. v. Adams (1886) 16 Cox C.C. 544 and R. v. Deverell (1889) 86 L.T. Jo. 300 (see para. 2.19, below).

66 See the cases cited by J.R. Spencer in "Criminal Libel - A Skeleton in the Cupboard", [1977] Crim. L.R. 465, 466.

2.15 The question of the correctness of this approach arose in R. v. Wicks⁶⁷ where the Court of Criminal Appeal was asked to decide whether the trial judge had been correct to reject a submission on behalf of the defendant that there was no case to go to the jury because there was no evidence that the libel was likely to result in a breach of the peace. The court held that the prosecution had neither to allege in the indictment nor to prove that the libel in question was likely to cause a breach of the peace. In upholding the Recorder's direction, du Parc J. (delivering the judgment of the court) said:

"It is true that a criminal prosecution for libel ought not to be instituted, and, if instituted, will probably be regarded with disfavour by Judge and jury, when the libel complained of is of so trivial a character as to be unlikely either to disturb the peace of the community or seriously to affect the reputation of the person defamed There is ... no ground for the suggestion made at the Bar that it is incumbent upon the prosecution to prove that the libel in question would have been unusually likely to provoke the wrath of the person defamed, or that the person defamed was unusually likely to resent an imputation upon his character. We find no support for this theory in any judgment. On the contrary, the law remains what it was stated to be by Mansfield C.J., in Thorley v. Lord Kerry,⁶⁸ when he said: 'There is no doubt that this was a libel, for which the plaintiff in error might have been indicted and punished; because, though the words impute no punishable crimes, they contain that sort of imputation which is

67 (1936) 25 Cr. App. R. 168. W wrote a letter to C (who was awaiting trial charged with offences at the instance of an insurance company for which G acted as solicitor) making a number of imputations on the character of G. W was convicted of publishing the libel knowing it to be false and sentenced to twelve months' imprisonment: see generally J.R. Spencer, "Criminal Libel in Action - The Snuffing of Mr. Wicks", (1979) 38 C.L.J. 60.

68 (1812) 4 Taunt. 355, 364; 128 E.R. 367, 370.

calculated to vilify a man, and bring him, as the books say, into hatred, contempt and ridicule; for all words of that description an indictment lies."⁶⁹

This was followed by Wien J. in Goldsmith v. Pressdram Ltd.⁷⁰ in 1977 and the House of Lords have since confirmed the correctness of the ruling in R. v. Wicks. They decided unanimously in Gleaves v. Deakin⁷¹ that, even if at one stage a tendency to lead to a breach of the peace had been an essential element of criminal libel, it had ceased to be so now.⁷²

Gleaves v. Deakin

2.16 In Gleaves v. Deakin two authors and two publishing companies were defendants to a private prosecution for criminal libel brought against them by Mr. R.C.A. Gleaves⁷³ in respect of allegations made against him in a book entitled Johnny Go Home. During committal proceedings, the defendants sought to call

69 (1936) 25 Cr. App. R. 168, 172-173.

70 [1977] Q.B. 83. For the details of the case, see para. 3.26, below.

71 [1980] A.C. 477.

72 Ibid., at pp. 483 (per Lord Diplock), 487 (per Viscount Dilhorne), 490 (per Lord Edmund-Davies) and 495 (per Lord Scarman). Cf. the uncertain position with regard to the element of a breach of the peace in blasphemous libel following the decision in Whitehouse v. Lemon [1979] A.C. 617 and our discussion of this aspect of that offence in Offences against Religion and Public Worship (1981), Working Paper No. 79, paras. 3.3-3.4 and 6.1-6.2.

73 This was one of a number of private prosecutions for criminal libel (and other offences) brought by Mr. Gleaves against a number of defendants. Following this unsuccessful prosecution (see n.75, below), the Attorney General entered a series of nolle prosequis bringing other prosecutions to a halt: see The Daily Telegraph, 1 March and 19 April 1980.

evidence of the general bad reputation of the prosecutor.⁷⁴ Their purpose was to show that the alleged libel could not have affected the prosecutor's actual reputation and hence that it was not so serious as to require the intervention of the State by way of criminal proceedings. The magistrate refused to allow the evidence to be adduced and committed the defendants for trial.⁷⁵ The magistrate's decision was upheld by the Divisional Court.⁷⁶ On appeal to the House of Lords, it was held that in committal proceedings for the offence of criminal libel the examining magistrate's sole function is to decide whether there is sufficient evidence to put the accused on trial for the offence, and that therefore evidence of the general bad reputation of the prosecutor, like evidence of the truth of the statements complained of,⁷⁷ is not relevant to the proceedings at that stage and is accordingly inadmissible. Although no comprehensive definition of a criminal libel was put forward, the speeches contained a number of general observations regarding the scope of the offence, together with suggestions as to how the law might be reformed.

74 By reason of his previous convictions for violence and homosexual offences.

75 Evidence of the prosecutor's bad reputation was tendered by the defence at the subsequent trial which lasted 13 days at the Central Criminal Court before Comyn J. and a jury. The defendants were unanimously acquitted on all eight counts. The judge ordered that both prosecution and defence costs should be paid out of public funds: see The Times, 12-28 February 1980.

76 Sub. nom. R. v. Wells Street Stipendiary Magistrate, Ex parte Deakin [1978] 1 W.L.R. 1008.

77 R. v. Carden (1879) 5 Q.B.D. 1.

2.17 As we have already noted,⁷⁸ Lord Diplock began his speech⁷⁹ by stating that in his view the offence "has retained anomalies which involve serious departures from accepted principles upon which the modern criminal law of England is based and are difficult to reconcile with international obligations which this country has undertaken by becoming a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms."⁸⁰ He was the only judge in the case to raise the question of the compatibility of criminal libel with the European Convention. Lord Diplock pointed out that Article 10 of the Convention guarantees freedom of expression subject to a state being able to impose restrictions or penalties -

"only to the extent that [they] are necessary in a democratic society for the protection of what (apart from the reputation of individuals and the protection of information received in confidence) may generically be described as the public interest. In contrast to this the truth of the defamatory statement is not in itself a defence to a charge of defamatory libel No onus lies upon the prosecution to show that the defamatory matter was of a kind that it is necessary in a democratic society to suppress or penalise in order to protect the public interest. On the contrary, even though no public interest can be shown to be injuriously affected by imparting to others accurate information about seriously discreditable conduct of an individual, the publisher of the information must be convicted unless he himself can prove to the satisfaction of a jury that the publication of it was for the public benefit. This is to turn Article 10 of the Convention on its head."⁸¹

78 See para. 1.5, above.

79 [1980] A.C. 477, 482.

80 (1953) Cmd. 8969.

81 [1980] A.C. 477, 483.

Lord Diplock saw no reason to doubt that on the few occasions when the D.P.P. or the police had prosecuted the offence it could be shown not only that the defamatory matter was false but also that repression of the publication by penal sanctions was necessary in the public interest. Private prosecutors were under no duty to consider whether the prosecution was necessary in the public interest. To avoid the risk of our failing to comply with our international obligations under the European Convention, Lord Diplock suggested that the Attorney General's consent be required for the institution of any prosecution for criminal libel. The Attorney General could then consider whether the prosecution was necessary on any of the grounds specified in Article 10.2⁸² and if not, he should refuse his consent.⁸³

82 By Art. 10(2) "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary." In The Sunday Times v. United Kingdom (1979) 2 E.H.R.R. 245, 281, the European Court of Human Rights said: "whilst emphasising that it is not its function to pronounce itself on an interpretation of English law adopted in the House of Lords, the court points out that it has to take a different approach. The court is faced not with a choice between two conflicting principles but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted." It has been suggested that "the ruling throws doubt on the compatibility of the law of criminal and blasphemous libel with Art. 10 of the Convention": see (1979) 123 S.J. 416-417.

83 Lord Keith of Kinkel ([1980] A.C. 477, 494) agreed with Lord Diplock's observations and concurred in the speech of Viscount Dilhorne (see para. 2.18, below).

2.18 Viscount Dilhorne pointed out that, although a judge has to consider whether the public interest requires a prosecution when application is made for leave to institute the prosecution of a newspaper for criminal libel,⁸⁴ examining magistrates are not charged with deciding whether or not a prosecution should be instituted; nor is "public interest" relevant when examining magistrates decide whether or not to commit for trial.⁸⁵ In any event, he said, "'public interest' has no precise meaning." On the wider question of the distinction between civil and criminal libels, Viscount Dilhorne rejected the suggestion that criminal libels are libels which have a tendency to disturb or provoke a breach of the peace and accepted du Parcq J's judgment in R. v. Wicks, quoted above,⁸⁶ as correct:

"A criminal libel must be serious libel. If the libel is of such a character as to be likely to disturb the peace of the community or to provoke a breach of the peace then it is not to be regarded as trivial. But to hold as du Parcq J. did, in my view rightly, that the existence of such a tendency suffices to show that the libel is a serious one, is a very different thing from saying that proof of its existence is necessary to establish guilt of the offence."⁸⁷

He too thought that no prosecution for criminal libel should be brought without the leave of the Attorney General or the Director of Public Prosecutions, because each would have regard to the public interest. He did not

84 Law of Libel Amendment Act 1888, s.8; see Goldsmith v. Pressdram Ltd. [1977] Q.B. 83 and para. 3.26, below.

85 [1980] A.C. 477, 486. Cf. Lord Edmund-Davies (ibid., at p. 491); see para. 2.19, below.

86 See para. 2.15, above.

87 [1980] A.C. 477, 487.

regard it as very desirable that judges should have any responsibility for the institution of prosecutions and by inference proposed the repeal of section 8 of the Law of Libel Amendment Act 1888.⁸⁸

2.19 Lord Edmund-Davies referred to what he regarded as "this startling state of affairs", namely, that anyone "who considers ... that he has been defamed in writing may, ... (unless he be libelled in a newspaper) ignore his civil remedy for damages and institute proceedings for criminal libel so that his alleged defamer may be imprisoned or fined".⁸⁹ He too cited the passage from *du Parcq J's* judgment in *R. v. Wicks* with approval, saying that risking a breach of the peace was "no longer a sine qua non of this type of criminal libel", but that the existence of such a risk makes the case for the prosecution that much stronger. He regarded as a clear and accurate description of the offence in its present form the following passage from Lord Coleridge C.J.'s direction to the jury in *R. v. Deverell*⁹⁰ (omitting that part which indicates that risk of breach of the peace is a sine qua non):

"... there ought to be something of a public nature about [a libel] to justify the interfering of the Crown as representing the public by proceeding by indictment. The Crown was the prosecutor in a case of indictment, and, therefore, an indictment for libel ought to be something which interested the Crown, which concerned the general interests of the public If a libel was repeated, and was infamous, ... no man could be expected to submit to it, and the libeller should be indicted, by all means; but ... when it was clearly an

88 See para. 2.12, above.

89 [1980] A.C. 477, 488.

90 (1889) 86 L.T. Jo. 300.

individual squabble between two people ... it was well-settled law that it ought not to be, and was not, in point of law, a proper subject of indictment."⁹¹

The examining magistrate therefore simply had to determine on the admissible evidence whether the statement in question was "sufficiently serious to justify, in the public interest, the institution of criminal proceedings".⁹² In this case the magistrate, he thought, had reached the right answer. As to reform of the law, Lord Edmund-Davies said that he did not agree with those who suggested that criminal libel should be abolished: "Such proceedings do serve some useful purpose and should not be abolished unless and until adequate substitute provisions have been made". In any event, he suggested that two reforms were badly needed: (1) a requirement of the fiat of the Attorney General for all prosecutions for criminal libel, and (2) a provision similar to section 5 of the Defamation Act 1952⁹³ applicable to criminal libel.

2.20 Lord Scarman said that he too agreed with the speech of Viscount Dilhorne. He cited part of the passage from *du Parcq J's* judgment in *R. v. Wicks* quoted above,⁹⁴ and continued:

"It is plain ... that the learned judge was emphasising that it is the gravity of the libel which matters. The libel must be more than of

91 [1980] A.C. 477, 491.

92 *Ibid.* Cf. Viscount Dilhorne (at p. 486): see para. 2.18, above,

93 Sect. 5 provides that "a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges": see para. 2.13, above.

94 See para. 2.15, above.

a trivial character: it must be such as to provoke anger or cause resentment. The emphasis of the passage, as Wien J. recognised in Goldsmith's case,⁹⁵ ... is upon the character of the language used. In my judgment, the references in the case law to reputation, outrage, cruelty or tendency to disturb the peace are no more than illustrations of the various factors which either alone or in combination contribute to the gravity of the libel. The essential feature of a criminal libel remains - as in the past - the publication of a grave, not trivial, libel."⁹⁶

He said that this view was also supported by the statutory development of the law, referring in particular to section 6 of the Libel Act 1843⁹⁷ and section 4 of the Newspaper Libel and Registration Act 1881.⁹⁸ Lord Scarman agreed that examining magistrates ought not to be given the responsibility of deciding on the institution of proceedings, but that that responsibility should be given to a prosecuting authority: "the consideration of the public interest at that stage, being in private, would not prejudice the complainant who, if the decision should be not to authorise prosecution, would still have his civil remedy unembarrassed by premature publicity of matters and allegations damaging to his reputation and character."⁹⁹

95 Goldsmith v. Pressdram Ltd. [1977] Q.B. 83, 87, see para. 3.26, below.

96 [1980] A.C. 477, 495.

97 See para. 2.11, above.

98 See para. 3.28, below.

99 [1980] A.C. 477, 496.

Statistics

2.21 Criminal libel was not listed separately in the Criminal Statistics until 1893. It has however been estimated¹⁰⁰ that during the 20 preceding years there were at least 24 trials a year. On average there were from 1893 to 1914, 22 trials a year; from 1915 to 1930, 15; and from 1931 to 1938, 19. Since 1940, however, the number of trials has fallen sharply. The following table, containing details abstracted from the Criminal Statistics for the years 1970-1980, shows the number of cases recorded by the police, and the number of defendants who were committed for trial, found guilty, or merely cautioned.

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

Of the three people found guilty¹⁰¹ of the offence in the period covered by the table, one received a sentence of

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

101 But see para. 5.10, n.21, below.

six months,¹⁰² one a suspended sentence, and the third a conditional discharge. Information relating to prosecutions undertaken between 1948 and 1975 by the Department of the Director of Public Prosecutions was submitted by the Director to the Faulks Committee. From this¹⁰³ it is apparent that over 400 cases were referred to him in which alleged criminal libel was registered as one of the subjects. Out of these, thirteen were the subject of proceedings under the Justices of the Peace Act 1361 with a view to the defendants being bound over to keep the peace,¹⁰⁴ while four were prosecuted for criminal libel. Of these, one in 1950 resulted in an acquittal, while three were convicted. The first, in 1957, was sentenced to one month's imprisonment, the second, in 1965,¹⁰⁵ to a total of three years' imprisonment while the third, in 1971, was, as noted above, sentenced to six months' imprisonment.

2.22 These figures are very small when compared with the statistics for civil actions for libel and slander. Information as to the number of writs for libel and slander issued each year is not available, since they are not

102 R. v. Leigh, The Times, 9 and 19 March 1971; see para. 7.40, n.79, below.

103 We are indebted to the D.P.P. for permission to quote the statistics from this Memorandum.

104 See e.g., para. 9.5, n.7, below.

105 R. v. Forbes, The Times, 24 September 1965: the defendant made a malicious complaint against a police officer on two separate occasions, and was sentenced to 18 months' imprisonment for each offence to run consecutively.

separately recorded. However, during 1980,¹⁰⁶ 163 actions for libel and slander were set down for trial in the High Court (142 in 1979).¹⁰⁷ A total of 36 (32) actions resulted in judgment for the plaintiff, 7 (0) for the defendant. The majority of the remainder were either settled or withdrawn by the leave of the court.

106 Judicial Statistics: England, Wales and Northern Ireland 1980 (1981), Cmnd. 8436, Table C. 6(d).

107 Judicial Statistics: England, Wales and Northern Ireland 1979 (1980), Cmnd. 7977, Table C. 6(d).

PART III
THE PRESENT LAW

A. The prohibited conduct

1. General

3.1 Criminal libel consists of the publication of defamatory matter in writing, or in some other form that is "permanent" in the sense that it is not merely transient. Spoken words or gestures, even if defamatory, cannot amount to libel.¹

3.2 It has never been decided whether broadcasting can amount to criminal libel at common law. Although the Defamation Act 1952 clarified the position in regard to civil proceedings, by providing that the broadcasting of words (including pictures, visual images, gestures and other methods of signifying meaning) for general reception by wireless telegraphy should be treated as publication in permanent form,² that Act does not apply to criminal libel.³ The Faulks Committee commented that -

"no prosecution for criminal libel could be brought in the case of a live broadcast unless it could be proved that the persons broadcasting

1 However, defamatory words spoken in the course of the performance of a play are capable of amounting to a criminal libel: see Theatres Act 1968, s.4. Prosecutions in such cases can only be brought by or with the consent of the Attorney General.

2 Defamation Act 1952, ss. 1 and 16.

3 Ibid., s.17(2). According to Gatley on Libel and Slander 8th ed., (1981), para. 1600, n.50, in an unreported prosecution in respect of a broadcast it was argued that a broadcast play was not a libel and the prosecution was dismissed.

were reading from scripts and that some listeners or viewers knew this. In the case of recorded broadcasts presumably it would be easy to show that some listeners or viewers knew that the matter complained of was in a permanent form."⁴

The Committee recommended that criminal libel should apply to broadcasting.⁵

2. The definition of a defamatory statement

(a) General

3.3 The meaning of the word "defamatory" has primarily been canvassed in cases of civil libel, though in 1812 Sir James Mansfield C.J. indicated the nature of a defamatory imputation for the purpose of the crime in the following words:

"... [the words] contain that sort of imputation which is calculated to vilify a man, and bring him, as the books say, into hatred, contempt and ridicule; for all words of that description an indictment lies."⁶

This passage was cited with approval in 1936 in R. v. Wicks,⁷ in 1977 in Goldsmith v. Pressdram Ltd.,⁸ and in 1979 in Gleaves v. Deakin.⁹

4 Report of the Committee on Defamation (1975), Cmnd. 5909, para. 436.

5 Ibid., para. 448(a).

6 Thorley v. Lord Kerry (1812) 4 Taunt. 355, 364; 128 E.R. 367, 370.

7 (1936) 25 Cr. App. R. 168, 173: see para. 2.15, above.

8 [1977] Q.B. 83, 87. Wien J. said, "I stress those last nine words."

9 [1980] A.C. 477, 487 (per Viscount Dilhorne).

3.4 In 1840 Parke B. defined libel as "a publication, without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt, or ridicule".¹⁰ However, that definition was inapt to cover every case and it was judicially criticised.¹¹ Since 1936 the test suggested by Lord Atkin in Sim v. Stretch¹² has been the one most favoured. That test is -

"would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?"¹³

The Faulks Committee recommended the following new definition which is along the lines suggested by Lord Atkin but brought up to date:

"Defamation shall consist of the publication to a third party of matter which in all the circumstances would be likely to affect a person adversely in the estimation of reasonable people generally."¹⁴

(b) Innuendoes

3.5 There is very little authority on the question whether a defamatory innuendo suffices to ground a prosecution for criminal libel. In civil libel a "true"

10 Parmiter v. Coupland (1840) 6 M. & W. 105, 108; 151 E.R. 340, 342.

11 For example, both Scrutton and Atkin L.J.J. thought it inadequate: Tournier v. National Provincial and Union Bank of England [1924] 1 K.B. 461, at p. 477 and p. 487 respectively.

12 [1936] 2 All E.R. 1237 (H.L.).

13 Ibid., at p. 1240. Lord Atkin repeated his view that the definition suggested by Parke B. was "probably too narrow".

14 Report of the Committee on Defamation (1975), Cmd. 5909, para. 65.

or "legal" innuendo¹⁵ arises "where, by reason of some extraneous facts not stated in the publication but known to the person or class of persons who read it, the words have some extended meaning ...".¹⁶ The plaintiff must plead the innuendo, and also particularise in the statement of claim the extrinsic facts and matters relied upon in support of it. Such authority as there is suggests that the principles applying in civil cases would apply equally to criminal libel.¹⁷ Thus, any alleged innuendoes must be set out in the indictment in addition to the allegedly defamatory words.¹⁸

3. Seriousness

3.6 In confirming, as the House of Lords did in Gleaves v. Deakin,¹⁹ that the tendency of a libel to disturb the peace of the community or to provoke a breach of the peace is no longer an essential ingredient of the common law offence, the House of Lords established an alternative limitation on the offence, namely, that a

15 As distinct from the "false" or "popular" innuendo, which is what the ordinary man would infer from the words by considering them in the context in which they are published. Such an innuendo is to be regarded as part of the natural and ordinary meaning of the words.

16 Report of the Committee on Defamation (1975), Cmnd. 5909, para. 97.

17 In R. v. Yates (1872) 12 Cox C.C. 233, an indictment charging the defendant with having published a libel was held bad "for want of innuendoes". The decision does not indicate whether it is necessary in criminal libel for the defendant to know about the innuendo. See further paras. 3.12-3.13, below.

18 See Archbold 41st ed., (1982), para. 25-57.

19 See [1980] A.C. 477, at pp. 486-487, 490, 495 and paras. 2.16 et seq. above.

criminal libel must be a serious, not a trivial, libel.²⁰ It seems that the state of the law is now such that seriousness is an element of the common law offence and that whether or not a libel is serious is a question of fact for the jury to determine. Nevertheless, it may be thought that the authorities prior to Gleaves v. Deakin do not clearly support this view of the law. Thus in R. v. Wicks,²¹ the Court of Criminal Appeal said only that, "it may well be that cases will sometimes occur in which juries may properly refuse to convict a man accused of criminal libel where the offence is trivial".²² If seriousness had been an element of the offence at the time, the Court would have been bound to say that juries must acquit where they so find. More recently, in Goldsmith v. Pressdram Ltd.²³ Wien J. apparently took the view that the seriousness of the libel was a consideration separate from the question whether there was a clear prima facie case of criminal libel, and this would suggest that seriousness was merely a factor relevant to the exercise of the judge's discretion to authorise a prosecution, rather than an element of the offence.²⁴ Perhaps the first and clearest indication that seriousness is a

20 See further para. 3.7, below. At the trial Comyn J. directed the jury that a criminal libel was "a written statement so serious in itself, and so greatly affecting a person's character and reputation, as to justify invoking criminal law and punishment instead of, or as well as, the civil law and damages": The Times, 25 February 1981 (news item).

21 (1936) 25 Cr. App. R. 168.

22 Ibid., at p. 172.

23 [1977] Q.B. 83.

24 Ibid., at p. 88: see further para. 3.26, below. See also Gatley on Libel and Slander 8th ed., (1981), para. 1593, n.13.

requirement of the offence came in an obiter dictum of Lord Denning M.R. in Goldsmith v. Sperrings Ltd.²⁵ where he said:

"Now there is a distinction between a criminal libel and a civil libel. A criminal libel is so serious that the offender should be punished for it by the state itself. He should either be sent to prison or made to pay a fine to the state itself. Whereas a civil libel does not come up to that degree of enormity. The wrongdoer has to pay full compensation in money to the person who is libelled and pay his costs - and he can be ordered not to do it again. But he is not sent to prison for it or made to pay a fine to the State. When a man is charged with criminal libel, it is for the jury to say on which side the line falls. That is to say, whether or not it is so serious as to be a crime. They are entitled to, and should, give a general verdict of "guilty" or "not guilty"."

This passage was cited with approval in R. v. Wells Street Stipendiary Magistrate, Ex parte Deakin by Lord Widgery C.J. who described it as "perhaps the most convenient, comprehensive and modern definition of criminal libel."²⁶ The Lord Chief Justice said that one of the requirements of criminal libel was that the wrong was so serious that it required the intervention of the State.²⁷

3.7 In the House of Lords, Viscount Dilhorne referred to the dictum of Lord Denning quoted above, and said that he did not regard it as an attempt to define criminal libel but as stating the different consequences which flow from criminal and civil libel.²⁸

25 [1977] 1 W.L.R. 478, 485.

26 [1978] 1 W.L.R. 1008, 1011.

27 Ibid.

28 [1980] A.C. 477, 486.

"A judge can of course in his summing up or at the end of the case for the prosecution, tell the jury that he regards the libel as so trivial that they should return a verdict of not guilty. If despite his advice, they return a verdict of guilty, he can always grant an absolute discharge."

Later in his speech Viscount Dilhorne states clearly that "a criminal libel must be serious libel",²⁹ Lord Scarman, who (with Lords Diplock and Keith) agreed with Viscount Dilhorne's speech, said that "the essential feature of a criminal libel remains - as in the past - the publication of a grave, not trivial, libel."³⁰ Finally Lord Edmund-Davies, as we have already noted,³¹ referred to Lord Coleridge's direction in R. v. Deverell³² as a clear and accurate description of the offence in its present form. Although Lord Coleridge did not specifically refer to seriousness, his reference to the need for the libel to be "infamous" and his exclusion of "an individual squabble between two people" may be taken to mean much the same thing. Moreover, Lord Edmund-Davies later says that the examining magistrates have to determine whether the statements were sufficiently serious to justify, in the public interest, the institution of criminal proceedings.³³ Whether "seriousness" is by itself an appropriate limitation on the offence is a question to which we return later.³⁴

29 Ibid., at p. 487.

30 Ibid., at p. 495.

31 See para. 2.19, above.

32 (1889) 86 L.T. Jo. 300.

33 [1980] A.C. 477, 491.

34 See para. 6.10, below.

4. Publication

3.8 As the injury done by a libel arises from the effect it produces on its readers, publication is an essential ingredient of the offence.³⁵ The mere composition of a libel is not an offence. However, by contrast with the position in civil libel where publication to someone other than the person defamed is required, publication to the person defamed appears to be sufficient for the purpose of criminal libel. But it seems that, if the libel is published only to the person defamed, then the risk of a breach of the peace is, exceptionally, a necessary ingredient of the offence.³⁶ Thus the jury in R. v. Wicks³⁷ were directed that a defamatory libel consisted in the writing and publishing of "... words written of a man which are likely to provoke him to commit a breach of the peace or, if seen by others, to hold him up to hatred, ridicule or contempt, or to damage his

35 It has been held that a communication between a husband and wife does not amount to publication because for this purpose a husband and wife are treated as one person: see Wennhak v. Morgan (1888) 20 Q.B.D. 625, and Duncan and Neill, Defamation (1978), para. 8.20, n. 1; cf. Gatley on Libel and Slander 8th ed., (1981), para. 248 ("it is by no means certain that this is still the law") and Midland Bank Trust Co. Ltd. v. Green (No. 3) [1979] Ch. 496 and [1982] 2 W.L.R. 1 (C.A.).

36 R. v. Adams (1888) 22 Q.B.D. 66 (C.C.R.); defendant who sent a young woman a letter proposing intercourse with her for money was guilty of criminal libel on the ground that this tended to provoke a breach of the peace on the part of the woman or of "those connected with her". See also R. v. Brooke (1856) 7 Cox C.C. 251. Although the House of Lords in Gleaves v. Deakin [1980] A.C. 477 clearly held that the risk of a breach of the peace was not an essential ingredient of the offence, and Lord Edmund-Davies (at p. 490) cited R. v. Adams as a case where Lord Coleridge had adopted the "old approach", none of their Lordships adverted to the case where publication was only to the victim.

37 (1936) 25 Cr. App. R. 168.

reputation" (emphasis added). This part of the direction was specifically approved by the Court of Criminal Appeal.³⁸

3.9 Everyone who is concerned in the publication is prima facie liable as a principal.³⁹ For example, in the case of a libel in a newspaper, the writer of the article, the editor, proprietors, printers and distributors of the newspaper will all be liable as principals.⁴⁰ Where there have been several publications of the same libel, a separate charge may be brought in respect of each publication.

5. Who may be defamed?

3.10 Any living person may be defamed by any other person.⁴¹ There is some authority which shows that in certain circumstances criminal libel extends to defamation

38. Ibid., at p. 172.

39 Accessories and Abettors Act 1861, s.8.

40 See also paras. 3.14 and 3.16, below.

41 The common law rule preventing a wife from prosecuting her husband for criminal libel (R. v. The Lord Mayor of London (1886) 16 Q.B.D. 772) was reversed by the Theft Act 1968, s.30(2).

of the dead,⁴² unlike civil libel.⁴³ It seems that in these cases the libel must have been published with the intention of provoking a breach of the peace on the part of the deceased's relations⁴⁴ and, if so, this constitutes a further exception to the general rule in criminal libel that there is no longer a requirement that the libel has a tendency to lead to a breach of the peace.⁴⁵ A company or corporation may be the victim of a criminal libel⁴⁶ and may also be indicted on such a charge.⁴⁷

42 De Libellis Famosis (1606) 5 Co. Rep. 125a; 77 E.R. 250, and R. v. Hunt (1824) 2 St. Tr. N.S. 69; cf. R. v. Labouchere (1884) 12 Q.B.D. 320, 324, per Lord Coleridge C.J. See G. Zellick, "Libelling the Dead", (1969) 119 N.L.J. 769.

43 The Faulks Committee recommended that the personal representatives of a defamed person who had died before starting an action should be entitled to sue for an injunction and actual or likely pecuniary damage suffered by the deceased or his estate; and that for a period of five years from the date of death certain near relatives of the deceased should be entitled to sue for a declaration that the matter complained of was untrue, an injunction, and costs as the court might think fit, but not damages: Report of the Committee on Defamation (1975), Cmnd. 5909, para. 423. A private member's Bill "to extend the protection of the law of libel fifty years beyond the death of the person libelled" was given a formal First Reading in the House of Commons in 1978 but progressed no further: Hansard (H.C.), 1 August 1978, vol. 955, col. 336. As to the provisions of the Broadcasting Act 1980, see para. 8.17, n. 21, below.

44 See R. v. Topham (1791) 4 Term Rep. 126; 100 E.R. 931 and R. v. Ensor (1887) 3 T.L.R. 366, 367, per Stephen J. Cf. Wills J. who, in charging the grand jury in R. v. Ensor, said that attacks on the dead were libellous because they tended to a breach of the peace: ibid.

45 See Gleaves v. Deakin [1980] A.C. 477, at pp. 483, 487, 490 and 495.

46 R. v. Jenour (1741) 7 Mod. 400; 87 E.R. 1318.

47 Triplex Safety Glass Co. Ltd. v. Lancegaye Safety Glass (1934) Ltd. [1939] 2 K.B. 395, 408 (C.A.).

3.11 In civil libel no one can maintain an action unless the words used are such as to lead persons acquainted with the plaintiff to believe that they refer to him as an individual.⁴⁸ However, in criminal libel the position is unclear. There is old authority for the proposition that an indictment lies where the object of publication was to excite public hatred against a class of persons.⁴⁹ On the other hand, there is also authority to the contrary.⁵⁰

48 Knupffer v. London Express Newspaper Ltd. [1944] A.C. 116; and see Orme v. Associated Newspapers Group Ltd., The Times, 4 February 1981.

49 See e.g., R. v. Osborn (1732) 2 Barn. K.B. 166; 94 E.R. 425 and R. v. Williams (1822) 5 B. and Ald. 595; 106 E.R. 1308.

50 R. v. Orme and Nutt (1699) 1 Ld. Raym. 486; 91 E.R. 1224 and R. v. Gathercole (1838) 2 Lewin 237; 168 E.R. 1140. Archbold 41st ed., (1982), para. 25-52 (7) takes the view that some individual must be libelled, directly or by implication, but adds: "Possibly a writing which is defamatory of a corporation in the way of its business, and a writing which is defamatory of a body of men which is clearly designated and identifiable may also be indictable."

B. The mental element

1. Mens rea

3.12 There is no clear statement in any of the modern authorities as to the precise extent to which mens rea is required in criminal libel.⁵¹ It is arguable that the prosecution need show no more than that the defendant intended to publish the statement complained of⁵² and that the defendant's state of mind in regard to the question whether he realised at the time of publication that the statement was defamatory of another is irrelevant. In R. v. Wicks, for example, du Parc J. stated that the offence, like the tort, was one of strict liability: "it was recognised at the end of the 18th century that libel was an exception to the general rule that mens rea was necessary to constitute a criminal offence".⁵³ Yet the only authority cited in support of this was a case⁵⁴ holding that the vicarious liability rule applied to criminal as well as to civil libel. While some authorities during the 18th and 19th centuries can be read as supporting the view that criminal libel is an offence

51 The point, for example, was not discussed in Gleaves v. Deakin [1980] A.C. 477. The question as to what mens rea is required in blasphemous libel was the main issue in Whitehouse v. Lemon [1979] A.C. 617. The House of Lords affirmed that, while the defendant must intend to publish, he need not intend that the words should amount to a blasphemous publication: ibid., at p.644 (Viscount Dilhorne), pp. 664 and 665 (Lord Scarman), and pp. 657-658 (Lord Russell of Killowen). Although several references were made to authorities on the mens rea required in seditious and obscene libel, the House did not discuss the question of the mens rea in criminal libel.

52 See further para. 3.14, below.

53 (1936) 25 Cr. App. R. 168, 173.

54 R. v. Walter (1799) 3 Esp. 21; 170 E.R. 524.

of strict liability,⁵⁵ other authorities suggest that a mens rea of an intent to defame is a requirement.⁵⁶ One possible explanation for the uncertainty is that in all the reported cases of criminal libel, the words have been defamatory of another on the face of them.⁵⁷ The interesting question whether the defendants in the civil case of E. Hulton & Co. v. Jones⁵⁸ and Cassidy v. Daily Mirror Newspapers Ltd.⁵⁹ could have been convicted of criminal libel remains unanswered.

3.13 Does the use of the word "maliciously" in section 5 of the Libel Act 1843⁶⁰ signify a requirement of proof of an intent to defame? Lord Russell of Killowen C.J. explained the meaning of the word in this context in R. v. Munslow.⁶¹

55 R. v. Hunt (1824) 2 St. Tr. N.S. 69; R. v. Harvey and Chapman (1832) 2 B. & C. 257; 107 E.R. 379; R. v. Munslow [1895] 1 Q.B. 758. The last-mentioned case is discussed further in para. 3.13, below.

56 See R. v. Lord Abingdon (1794) 1 Esp. 226; 170 E.R. 337; R. v. Creevey (1813) 1 M. & S. 373; 105 E.R. 102; R. v. Evans (1821) 3 Stark. 35; 171 E.R. 759; R. v. Ensor (1887) 3 T.L.R. 366.

57 One exception as already noted is R. v. Yates (1872) 12 Cox C.C. 233: see para. 3.5, n. 17, above.

58 [1910] A.C. 20. Lord Shaw expressly said in holding that liability for the tort was strict: "as I am not acquainted by training with a system of jurisprudence in which criminal libel has any share, I desire my observations to be confined to the question of civil responsibility" (*ibid.*, at p. 26).

59 [1929] 2 K.B. 331.

60 "If any person shall maliciously publish any defamatory libel, every said person, being convicted thereof, shall be liable to fine or imprisonment ...": see para. 3.30, below.

61 [1895] 1 Q.B. 758, 761.

"The word 'maliciously' was introduced in order to shew that, though the accused might be prima facie guilty of publishing a defamatory libel, yet if he could rebut the presumption of malice attached to such publication he would meet the charge ... in the absence of evidence of the motive for publication, the law attaches to the fact of publication the inference that the publication was malicious. But the accused may be able to show that, though the matter is defamatory, it was published on a privileged occasion, or he may be able to avail himself of the statutory defence that the matter complained of was true, and that its publication was for the public benefit; and those classes of cases were meant to be excluded from the purview of the section by the use of the word 'maliciously'."

The classes of case which were "meant to be excluded ... by the use of the word 'maliciously'" were not necessarily intended by Lord Russell to be exhaustive. On the facts of this particular case the defendant must have known that his words referred to the prosecutor and that they defamed him.⁶² The question of the defendant's knowledge did not need to be discussed by the court because it was not in issue.

3.14 As regards publication of the libel, the defendant must knowingly have published the statement complained of, not merely the book or paper of which it formed part.⁶³ It has been held, for example, that a newspaper boy was not guilty where he sold a newspaper containing a defamatory statement which he did not know was there.⁶⁴ However, it may be that such a person would be guilty if his lack of knowledge that the

62 See the report of the case at 11 T.L.R. 213: the defendant wrote a series of letters accusing the prosecutor of "serious moral misconduct".

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

64 An unreported decision of Wills J. referred to by Smith J. in R. v. Allison (1888) 16 Cox C.C. 559, 563.

publication contained the libel or that the publication was of such a character that it was likely to contain libellous matter was due to negligence, because in such a case there is civil liability for libel, the burden of proof resting on the defendant to disprove negligence once it is proved that the defamatory statement emanated from him.⁶⁵

3.15 It is immaterial that the defendant believed, in the light of his own principles, that words which were in fact defamatory did not have that characteristic. For example, if the defendant believed it to be morally praiseworthy to commit a certain kind of crime, his imputation that a particular individual had committed it would be defamatory.

2. Vicarious liability

3.16 Section 7 of the Libel Act 1843 provides that when a defendant pleads not guilty to the publication of a libel, evidence which establishes a "presumptive case" of publication against him "by the act of any other person by his authority" may be rebutted by him on proof of evidence "that such publication was made without his authority, consent, or knowledge, and that the said publication did not arise from want of due care or caution on his part". It has been decided that this section is not limited to the situation where the defendant did not consent to the publication of the book or paper containing the libellous statement, but extends to the case where he did not consent to the publication of the statement.

65 Emmens v. Pottle (1885) 16 Q.B.D. 354; Vizetelly v. Mudie's Select Library Ltd. [1900] 2 Q.B. 170. This so-called defence of "innocent dissemination" only applies to a person who has taken a subordinate part in disseminating the publication, and not the author, printer or "the first or main publisher of a work which contains a libel".

Thus a general authority given by a newspaper proprietor to his editor to publish what the latter thought suitable did not suffice to make the proprietor criminally liable for a defamatory statement inserted in the newspaper without his knowledge or consent.⁶⁶ It appears that the defendant is liable for a publication by his servants or agents unless he proves that he has complied with the statutory conditions, that is to say, that a "persuasive" burden of proof rests on him.⁶⁷

C. Defences

3.17 Upon a charge of publishing a criminal libel, a defendant may raise any one of the following defences:

- (i) that the words are not defamatory;⁶⁸
- (ii) that the words do not bear the innuendoes alleged;⁶⁹
- (iii) that the publication was accidental;⁷⁰
- (iv) that the publication had been made without the defendant's knowledge or consent;⁷¹
- (v) justification, that is to say, that:

66 R. v. Holbrook (1878) 4 Q.B.D. 42, 50-51, per Lush J.; approved by Lord Edmund-Davies in Whitehouse v. Lemon [1979] A.C. 617, 650 (dissenting) (a case of blasphemous libel).

67 Smith and Hogan, Criminal Law 4th ed., (1978), p. 795 and R. v. Lemon [1979] Q.B. 10, 29 (C.A.); cf. R. v. Bradlaugh (1883) 15 Cox C.C. 217, 226-231, which suggests inferentially that the defendant bears only an evidential burden.

68 See para. 3.3, above.

69 See para. 3.5, above.

70 See para. 3.14, above.

71 See para. 3.16, above.

- (a) the defamatory words are true, and
- (b) it was for the public benefit that they should be published;⁷²
- (vi) that the words were published on a privileged occasion;⁷³
- (vii) that the words are fair comment on a matter of public interest.⁷⁴

Those under (i) to (iv) are defences which may be raised under a general plea of not guilty at the trial. Justification and, possibly, also fair comment must be specially pleaded.⁷⁵ Otherwise, privilege and fair comment may be proved under the plea of not guilty.⁷⁶

1. Justification and public benefit

3.18 Section 6 of the Libel Act 1843 provides a defence in criminal proceedings of truth published for the public benefit.⁷⁷ To avail himself of the statutory defence, the defendant has specially to plead justification and give written particulars as to the truth of the defamatory statement and as to the facts by reason of which it was for the public benefit for the statement to be published. It is open to, but not necessary for, the

72 See paras. 3.18-3.19, below.

73 See para. 3.20, below.

74 See para. 3.21, below.

75 Libel Act 1843, s.6 (justification); and see Halsbury's Laws of England 4th ed., (1979), vol. 28, para. 285 and Duncan and Neill, Defamation (1978), para. 20.17, for the view that fair comment should be specially pleaded.

76 Archbold 41st ed., (1982), para.25-60 and Gatley on Libel and Slander 8th ed., (1981), para. 1598.

77 See para. 2.11, above.

prosecution to reply generally, denying the matters specified in the plea of justification.⁷⁸ The section further provides that if the defendant fails to establish his plea of justification and is convicted, the court may take that plea (and the evidence adduced to prove or disprove it) into account in "aggravation or mitigation" of sentence.

3.19 The defence can only be advanced at the trial and not at the committal stage.⁷⁹ The onus of proving the truth of the statement lies on the defendant who must also prove the facts by reason of which it was for the public benefit for the statement to be published.⁸⁰ Accordingly, the person defamed need give no evidence to rebut the allegations made in the plea of justification, leaving the defendant to prove that the libel was true and that the publication was for the public benefit. Section

78 See the specimens of indictment, pleas of justification and of replication in Archbold 41st ed., (1982), paras. 25-54 and 25-66.

79 R. v. Carden (1879) 5 Q.B.D. 1 and see Gleaves v. Deakin [1980] A.C. 477, 487. An exception to this is provided for by the Newspaper Libel and Registration Act 1881, s.4: see para. 3.28, below. It is possible also that, if a charge is brought under the Libel Act 1843, s.4, the defendant may be able to lead evidence of the truth of the libel at the committal proceedings: see Ex parte Ellissen, an unreported decision referred to in R. v. Carden.

80 In R. v. Perryman, The Times, 19 January - 9 February 1892, an editor accused a solicitor of two serious company frauds. The jury found that the editor's defence of justification failed on one of the two counts and that, although the other was justified as being true, it was found not to be in the public interest that either allegation be published. In Gleaves v. Deakin, (see para. 2.16, n. 75, above), Comyn J. directed the jury that the defendants had the burden of proving justification and public benefit on a balance of probabilities. (We are grateful to counsel for the defendants for information on this point.)

6 also provides that, unless the defendant pleads justification, the court shall "in no case" inquire into the truth of the libel. Its falsity is presumed.

2. Publication on a privileged occasion

3.20 There is clear authority that the defence of privilege applies to criminal libel to the same extent and in like manner (as a general rule)⁸¹ as it applies to the tort.⁸² Privileged occasions are of two kinds - absolute and qualified. Absolute privilege is of limited scope but confers complete protection.⁸³ The defence of qualified privilege, on the other hand, applies to a wider

81 The differences are accounted for by the exclusion of criminal libel from the provisions of the Defamation Act 1952; see paras. 3.29 and 6.6, below.

82 The defence of qualified privilege succeeded, for example, in R. v. Perry (1883) 15 Cox C.C. 169, and in R. v. Rule [1937] 2 K.B. 375 (which was followed in the civil case of Beach v. Freeson [1972] 1 Q.B. 14). In R. v. Wicks (1936) 25 Cr. App. R. 168 it was apparently assumed by the Court of Criminal Appeal that absolute and qualified privilege were capable of applying to a charge of criminal libel: ibid., at p. 173. See also R. v. Munslow [1895] 1 Q.B. 758, 765 per Wills J. The Faulks Committee recommended that the defence of privilege (absolute and qualified) should be "declared to be" available, subject to rebuttal, in criminal libel: Report of the Committee on Defamation (1975), Cmnd. 5909, para. 448(c).

83 Examples of absolute privilege include statements made in the course of judicial or Parliamentary proceedings, communications between solicitor and client, statements made by one officer of state to another in the course of duty etc.: see further Gatley on Libel and Slander 8th ed., (1981), ch.12.

range of situations,⁸⁴ but it may be defeated on proof by the prosecution that the defendant was motivated by "express malice" in making the publication. Broadly speaking, in order to defeat a plea of qualified privilege the prosecution must establish that the defendant's sole or dominant motive was an improper one.⁸⁵ An absence of belief in the truth of the defamatory matter is generally conclusive evidence of malice.⁸⁶ In the case where the defendant believed the statement to be true, the publication may nevertheless be actuated by improper motive, though in that case the judge or jury should be very slow to infer that such motive was the prime or dominant one.⁸⁷

84 Examples of qualified privilege include statements made in the performance of a legal, social or moral duty to a person who has a corresponding duty or interest to receive them, statements made in the protection of a common interest to a person sharing the same interest, fair and accurate reports of judicial or Parliamentary proceedings etc.: see further Gatley, op. cit., chs. 13 and 14.

85 See Horrocks v. Lowe [1975] A.C. 135 (a civil case of slander).

86 Except where a defendant may be under a duty simply to pass on, without endorsing, defamatory reports made by another person; ibid., at pp. 149-150, per Lord Diplock.

87 Ibid., at pp. 150-1.

3. Fair comment on a matter of public interest

3.21 In contrast with privilege, there is very little authority as to whether the defence of fair comment on a matter of public interest applies to criminal libel.⁸⁸

A few 19th century authorities seem to indicate that the defence was available in criminal prosecutions as well as civil actions, at least perhaps as a form of qualified privilege.⁸⁹ More recently in Goldsmith v. Pressdram Ltd. Wien J. expressly refrained from deciding whether the defence was available in criminal libel.⁹⁰ Halsbury's

88 In outline, to establish the defence of fair comment in tort the defendant must show:

- (i) that the facts, if any, on which the comment is based are true (subject to the Defamation Act 1952, s.6),
- (ii) that the expression of opinion is such that an honest man could have made, notwithstanding that he held strong, exaggerated or even prejudiced views,
- (iii) that the subject matter of the comment is of public interest, and
- (iv) that the facts relied on as founding the comment were in the defendant's mind when he made it.

The defence is destroyed if the defendant can prove that the publisher was actuated by express malice: see further Gatley, op. cit., chs. 15 and 16.

89 See e.g., R. v. Newman (1853) 1 El. & Bl. 558, 569; 118 E.R. 544, 551; R. v. Ensor (1887) 3 T.L.R. 366, 367, per Stephen J.; R. v. Ledger, The Times, 13 and 14 January 1880; R. v. Carden (1879) 5 Q.B.D. 1, 8 and 14 (D.C.).

90 [1977] Q.B. 83, 90. Reports of the case at both [1976] 3 W.L.R. 191, 197 and [1977] 2 All E.R. 557, 563 show Wien J. as having stated, without citation of authority, that the defence did not apply in criminal proceedings and the latter report is referred to by Smith and Hogan, Criminal Law 4th ed., (1978), p. 794. But the Queen's Bench report must be regarded as authoritative. See further para. 3.26, below.

Laws of England,⁹¹ while pointing out that there appears to be no reported case in which the defence of fair comment has succeeded, states that the defence, if properly pleaded as in a civil action, is available. Archbold⁹² and Russell on Crime⁹³ take the same view. The Faulks Committee did not discuss the point but simply recommended that the defence should be "declared to be" a defence subject to rebuttal as in civil actions.⁹⁴

D. Procedural and other provisions

3.22 Criminal libel is an offence triable only on indictment. There is one statutory exception to this, contained in section 4 of the Newspaper Libel and Registration Act 1881. But, as we shall see,⁹⁵ section 4 is now of limited importance.

3.23 Apart from the special provisions relating to newspaper libels,⁹⁶ the procedure on a prosecution for criminal libel is similar in many respects to the procedure on a prosecution for other indictable offences. The following summarises general points of procedure of particular relevance.

91 4th ed., (1979), vol. 28, para. 285.

92 41st ed., (1982), para. 25-60.

93 12th ed., (1964), pp. 803-805.

94 Report of the Committee on Defamation (1975), Cmnd. 5909, para. 448(c).

95 Para. 3.28, below.

96 See paras. 3.25-3.28, below.

- (i) A prosecution may be commenced by any person, including a private prosecutor,⁹⁷ even if he is not the person defamed.⁹⁸
- (ii) A person may sue for a civil remedy and prosecute for the criminal offence concurrently⁹⁹ (although the civil proceedings may, in the discretion of the court, be stayed or adjourned until the criminal proceedings have been completed).
- (iii) If a prima facie case of criminal libel is disclosed to the police, the chief officer of police must report it to the Director of Public Prosecutions.¹⁰⁰
- (iv) With the important exception of prosecutions in respect of newspaper libels,¹⁰¹ no consent for a prosecution is required. However, as in any criminal case, the Attorney General, either by himself or by any other person acting under his direction, may intervene

97 See e.g., Gleaves v. Deakin [1980] A.C. 477; see paras. 2.16 et seq., above, and (vii), below.

98 See e.g., R. v. Hunt (1824) 1 St. Tr. N.S. 69.

99 Ex parte Edgar (1913) 77 J.P. 283. The Faulks Committee recommended that a civil action for defamation should be declared to be no bar to a prosecution for criminal libel (whether or not such an action has been concluded): Report of the Committee on Defamation (1975), Cmnd. 5909, para. 448(d).

100 See the Prosecution of Offences Regulations 1978, S.I. 1978/1357, reg. 6(2) and the list of offences to be reported published in March 1979 and set out in Archbold 41st ed., (1982), para. 1-124.

101 See para. 3.25, below.

and enter a nolle prosequi at any time after the bill of indictment has been signed, bringing the prosecution to a halt.¹⁰²

- (v) A prosecution is commenced in the usual way by laying an information ex parte (hearing one side only) before a justice of the peace who then decides whether to issue a summons.¹⁰³ A High Court judge has a general power to grant a voluntary bill of indictment on application, thus bypassing committal proceedings.¹⁰⁴

- (vi) At committal proceedings, the only function of the examining magistrate is to decide "whether there is sufficient evidence to put the accused on trial for the alleged offence" (per Viscount Dilhorne)¹⁰⁵ or "to determine on the admissible evidence whether the

102 See e.g., para. 2.16, n. 73, above. The Director of Public Prosecutions has power under the Prosecution of Offences Act 1979, s.4 to take over at any stage the conduct of any criminal proceedings with a view to offering no evidence: see e.g., R. v. Director of Public Prosecutions, Ex parte Raymond (1980) 70 Cr. App. R. 233 (C.A.).

103 A justice of the peace, however, does have a residual discretion "in exceptional circumstances" to hear a defendant for the purpose of reaching his decision whether to issue a summons: see R. v. West London Metropolitan Stipendiary Magistrate, Ex parte Klahn [1979] 1 W.L.R. 933.

104 An application for a voluntary bill was granted in Whitehouse v. Lemon, The Times, 21 December 1976 (a case of blasphemous libel). See generally Archbold 41st ed., (1982), paras. 1-96 and 1-104 to 1-107.

105 Gleaves v. Deakin [1980] A.C. 477, 486.

[statements] were sufficiently serious to justify, in the public interest, the institution of criminal proceedings" (per Lord Edmund-Davies).¹⁰⁶

(vii) Since a private prosecutor may not act in person as an advocate before the Crown Court, he must either instruct solicitors and counsel to appear on his behalf, or ask the Director of Public Prosecutions to take over the case for him; otherwise the prosecution would fail for want of prosecution when the trial commences.¹⁰⁷ Legal aid is not available to begin a criminal prosecution.¹⁰⁸ However, the trial judge has a discretion to order before trial, the payment of the costs of instructing solicitors and counsel out of central funds, if the prosecutor himself has no means and the D.P.P. is not prepared to take over the prosecution.¹⁰⁹ The same discretion may be exercised at the conclusion of the case whether or not there has been a conviction.

(viii) A defendant is eligible for legal aid in the same way as any other defendant to a criminal charge.¹¹⁰

106 Ibid., at p. 491.

107 R. v. George Maxwell (Developments) Ltd. [1980] 2 All E.R. 99 (Chester Cr. Ct.).

108 But see the recommendations contained in the Report of the Royal Commission on Criminal Procedure (1981), Cmnd. 8092, paras. 7.50-7.51.

109 As occurred in Gleaves v. Deakin; see The Guardian, 28 February 1980. See also the Costs in Criminal Cases Act 1973, s.3(1).

110 See Criminal Justice Act 1967, s.73.

E. Special provisions relating to newspapers¹¹¹

3.24 We have already referred¹¹² to the fact that most of the statutory provisions which brought about changes in the libel laws were introduced in the 19th century largely as a result of pressure from newspaper proprietors. Although some of the reforms had the effect of altering the law of libel generally, many of these provisions were directed solely towards alleviating the position of newspaper editors and proprietors relating to prosecutions for criminal libel. Since the late 19th century there have been very few such prosecutions.¹¹³ It will be necessary to consider later in this Working Paper whether the special provisions applying to newspapers can be justified today. We therefore think it important to consider these special provisions here in some detail.

1. Order of a judge in chambers required for a prosecution

3.25 Section 8 of the Law of Libel Amendment Act 1888 prohibits the prosecution of the proprietor, publisher, editor or any person responsible for the publication of a

111 For a general discussion of the history of private libel prosecutions against newspapers, see Spencer, "The Press and the Reform of Criminal Libel", in Glazebrook (ed.), Reshaping the Criminal Law (1978), p. 266.

112 See paras. 2.10 and 2.12, above.

113 Spencer records no more than a dozen from 1888 to 1978: op. cit., (n. 111), p. 281.

newspaper¹¹⁴ for any libel published in it without the order of a judge at chambers being first obtained. An application for an order must be made on notice to the person accused, who must also have an opportunity of being heard. No appeal lies against the judge's decision to allow or refuse leave to prosecute.¹¹⁵

114 A "newspaper" is defined in the Newspaper Libel and Registration Act 1881, s.1 (as applied by the Law of Libel Amendment Act 1881, s.1) as "any paper containing public news, intelligence, or occurrences, or any remarks or observations therein printed for sale, and published in England or Ireland periodically, or in parts or numbers at intervals not exceeding 26 days" and "any paper printed in order to be dispersed, and made public weekly or oftener, or at intervals not exceeding 26 days, containing only or principally advertisements".

115 Ex parte Pulbrook [1892] 1 Q.B. 86 (D.C.).

3.26 Until recently there had been little authority on the section. It was, however, fully considered in Goldsmith v. Pressdram Ltd.¹¹⁶ by Wien J. whose judgment, although not directly in point, received at least the implicit approval of the House of Lords in Gleaves v. Deakin.¹¹⁷ Wien J. emphasised the discretionary nature of the judicial power under the section, but declined to lay down principles for guidance in future applications.¹¹⁸ However, he explained in some detail the principles extracted from the cases by which he himself was guided in

116 [1977] Q.B. 83; a private prosecution was commenced by a chairman of a number of large and well-known companies against the editor, publishers and main distributors of the magazine "Private Eye" in respect of an alleged libel in one issue. At the same time a large number of writs for libel were issued against the magazine and its distributors, including 37 secondary wholesale and retail distributors: as to which see Goldsmith v. Sperrings Ltd. [1977] 1 W.L.R. 478 (C.A.). Leave to commence the prosecution under s.8 of the Law of Libel Amendment Act 1888 was granted by Wien J. on application by the prosecutor. The judge said that the magazine (published at fortnightly intervals) fell within the definition of a newspaper (see n. 114, above). Subsequently the prosecution offered no evidence, and Bristow J. at the Central Criminal Court ordered verdicts of not guilty to be entered against each of the defendants. The D.P.P. was apparently offered the opportunity to take over the case, but he declined to do so: The Times 17 May and 2 June 1977. At the same hearing, leave to withdraw the record was given in such civil actions as had not already been settled. For an account written by one of the defendants of the background to these proceedings, see R. Ingrams, Goldenballs (1979).

117 [1980] A.C. 477, 485-486 and 490.

118 [1977] Q.B. 83, 88. Leave was sought and obtained under s.8 in Whitehouse v. Lemon [1979] A.C. 617 (a case of blasphemous libel contained in a newspaper) but the grounds on which Bristow J. gave leave at a private hearing are not reported. The conditions laid down by Wien J. were followed by Taylor J. in Desmond v. Thorn, The Times, 21 April 1982: see the following note.

arriving at his decision to grant the application. He laid down three conditions which had to be satisfied for an order to be made, namely:

- (i) there must be a clear prima facie case, that is, one that is so clear that it is beyond argument that there is a case to answer;¹¹⁹
- (ii) the libel must be serious enough to make it proper to invoke the criminal law. Unusual likelihood of a breach of the peace is not necessary either as an ingredient of the offence or as a precondition of the making of an order, but its presence or absence might be material in determining whether the libel was so serious that the criminal law should be invoked;¹²⁰ and
- (iii) the public interest must require the institution of criminal proceedings. On this question, it was immaterial (a) that damages might, or might not, afford an adequate remedy; (b) that it was or was not likely that the respondent would be able to meet any award; or (c) that the applicant was or was not in a position to sue for damages. On the other hand, the fact that

119 In Desmond v. Thorn, *ibid.*, an application for leave to bring proceedings for criminal libel against two reporters, the editor and proprietors of a Sunday newspaper was refused. The court looked at all the circumstances as it was bound to do and decided that "it was far from satisfactory whether there was a case so clear as to be beyond argument a case to answer". Furthermore, the public interest did not require a prosecution: see condition (iii), below.

120 See para. 2.15, above.

the applicant occupied a position of importance ought not to be disregarded.¹²¹

3.27 Section 8 of the 1888 Act applies only to the proprietor, publisher, editor or person responsible for the publication of a newspaper. Accordingly, an order is not necessary if the prosecution is to be brought against a contributor to a newspaper whether he be a journalist, reporter,¹²² advertiser or the author of a letter, and the same is probably true of printers and distributors, although in Goldsmith v. Pressdram Ltd. an application to prosecute the distributors was included in the application for an order under the section.¹²³

2. Committal proceedings

3.28 Section 4 of the Newspaper Libel and Registration Act 1881 applies to committal proceedings before a magistrates' court against a proprietor, publisher, editor or person responsible for the publication of a newspaper for a libel published therein.¹²⁴ It empowers the magistrates' court to receive evidence by way of defence

121 Goldsmith v. Pressdram Ltd. [1977] Q.B. 83, 88 and 91-92.

122 But in Desmond v. Thorn an application to prosecute two reporters was included in the application for an order under s.8: see n. 119, above.

123 See n. 116, above, and Duncan and Neill, Defamation (1978), 20.05, n.3.

124 Sect. 5 of the 1881 Act, which provided for the summary trial, with the consent of the accused, of charges against newspaper proprietors and others responsible for the publication of newspapers for libels published in them was repealed by the Criminal Law Act 1977, ss. 17 and 65, and Sched. 13.

that could have been received at a trial on indictment,¹²⁵ and to dismiss the case if it considers "after hearing such evidence that there is a strong or probable presumption that the jury on the trial would acquit the person charged". This provision is an exception to the general rule that justices have no power in committal proceedings to receive evidence of the truth of a libel on a plea of justification under section 6 of the Libel Act 1843.¹²⁶ However, it is doubtful whether section 4 of the 1881 Act is of any practical importance, since a judge in giving leave under section 8 of the Law of Libel Amendment Act 1888 will already have found that "it is beyond argument that there is a case to answer".¹²⁷

3. Privilege

3.29 We have already considered the defence of privilege as it applies to criminal libel in general.¹²⁸ Two heads of privilege are applicable only to newspaper reports. First, by section 3 of the Law of Libel Amendment Act 1888 privilege attaches to a fair and accurate report in any newspaper of proceedings publicly heard before any court exercising judicial authority if

125 Thus it seems that the question at issue in Gleaves v. Deakin [1980] A.C. 477, namely, whether evidence of the prosecutor's bad reputation was admissible in committal proceedings, would have been answered in the affirmative if the prosecution had been in respect of a libel in a newspaper: ibid., at p. 489 per Lord Edmund-Davies.

126 See para. 3.19, above.

127 Goldsmith v. Pressdram Ltd. [1977] Q.B. 83, 88, per Wien J.: see para. 3.26, above.

128 See para. 3.20, above.

published contemporaneously.¹²⁹ Secondly, section 4 of that Act provides that the protection of qualified privilege should apply to fair and accurate reports in a newspaper of public meetings¹³⁰ and of certain bodies and persons. This section was repealed by section 18(3) of the Defamation Act 1952, and replaced by wider provisions, but without affecting the law relating to criminal libel.¹³¹

F. Penalties

3.30 The Libel Act 1843 prescribes two separate maximum penalties for the common law offence. By section 5, "if any person shall maliciously¹³² publish any defamatory libel, [he] shall be liable to fine or imprisonment, or both, ... such imprisonment not to exceed the term of one year".¹³³ Section 4 of that Act provides that a person who maliciously publishes a defamatory libel "knowing the same to be false" shall be liable to a

129 Most text books state that the privilege is absolute. The Faulks Committee recommended that the privilege should be declared absolute: Report of the Committee on Defamation (1975), Cmnd. 5909, para. 191. The extension of this section by the Defamation Act 1952, s.9 to cover reports which are broadcast applies only to civil libel: *ibid.*, s.17(2). The Contempt of Court Act 1981, s.4(3) defines "contemporaneously" for the purposes of that Act and the Law of Libel Amendment Act 1888.

130 As defined in the section.

131 Defamation Act 1952, s.17(2). We refer to the consequential anomalies at para. 6.6, below.

132 See para. 3.13, above.

133 As in any other crime, a defendant may in addition be ordered to find sureties to keep the peace: see *R. v. Trueman* [1913] 3 K.B. 164 (C.C.A.).

maximum term of two years' imprisonment and a fine.¹³⁴ Where a charge is laid under section 4, it is for the prosecution to prove that the defendant knew of the falsity of the libel, although in practice it suffices to establish that the defendant had means of knowledge, since the jury may then infer that the defendant had knowledge.¹³⁵ If the prosecution fails to prove the requisite knowledge on an indictment pursuant to section 4, the defendant may be convicted and sentenced under section 5.¹³⁶

134 The Libel Act 1843, s.3 made it punishable with 3 years' imprisonment to publish or threaten to publish a libel about another in order to extort money etc. This offence was subsequently re-enacted in similar terms in the Larceny Act 1916, s.31. Such conduct is now caught by the general offence of blackmail: Theft Act 1968, s.21.

135 R. v. Wicks (1936) 25 Cr. App. R. 168, 174.

136 Boaler v. R. (1888) 21 Q.B.D. 284, 285.

PART IV

CRIMINAL LIBEL IN OTHER JURISDICTIONS

A. Scotland

4.1 There is at present no exact equivalent to the offence of criminal libel in Scotland.¹ In former times, however, an action for defamation could be brought in the civil court, the commissary court or the criminal court depending on the remedy which was sought, the nature of the defamatory words or the status of the injured party. It seems that in the 16th and 17th centuries defamation actions were principally tried in the commissary courts (ecclesiastical courts) where the commissaries had power to impose fines or terms of imprisonment as well as giving the remedies of palinode (retraction) and an award of damages in solatium to the complainer. Furthermore, the institutional writers classified defamation as a crime, under the heading of verbal injury.² Yet, from the 18th century the civil remedy gradually superseded the criminal sanction for defamation.³ Several factors probably contributed to this: private prosecutions were beginning to die out by the mid-19th century; in a civil action there was no need to obtain the consent of the procurator fiscal; fines were fairly nominal; and the burden of proof

1 Richardson v. Wilson (1879) 7 R 237, 242, per Lord Deas.

2 See J. Erskine, An Institute of the Law of Scotland 8th ed., (1870) Book IV, Tit. iv, para. 80; D. Hume, Commentaries on the law of Scotland respecting Crimes (1797), vol. 1, ch. X, p. 340; G.J. Bell, Principles of the Law of Scotland 10th ed., (1899), s.2043.

3 D.M. Walker, The Law of Delict in Scotland 2nd ed., (1981), p. 732.

was lower in a civil action. Thus, apart from the specific offences mentioned in the next paragraph, the only sanction for defamation in Scotland today is a civil action.⁴

4.2 There are several offences in Scotland which penalise certain types of defamatory utterances which may fall within the scope of criminal libel in England and Wales. Thus, there is the offence of making a false accusation or allegation of a criminal offence, the gravamen of which is wasting the time of the police by telling them lies.⁵ This offence only covers a very small part of the ground covered by criminal libel. In any event, apart from criminal libel, there are corresponding offences in England and Wales which specifically deal with the same type of conduct.⁶ Secondly, there is the common law offence of breach of the peace.⁷ Although this offence is frequently prosecuted and is used in a wide variety of circumstances,⁸ the authorities cited in the leading textbook,⁹ do not indicate its use in circumstances falling

4 The Faulks Committee, which considered the law of defamation both in England and Wales and in Scotland, referred to the absence of any specific offence of criminal libel in Scotland but did not in the circumstances recommend any alteration of the existing position: Report of the Committee on Defamation (1975), Cmnd. 5909, para. 449.

5 See G.H. Gordon, The Criminal Law of Scotland 2nd ed., (1978), paras. 1-38 to 1-39 and 48-39.

6 See paras. 5.8-5.9, below.

7 Gordon, op. cit., paras. 41-01 to 41-11.

8 Because of the width of the common law offence, the offence under s.5 of the Public Order Act 1936, which applies in Scotland, is hardly ever prosecuted: see Gordon, op. cit., para. 39-17, n. 35.

9 Gordon, op. cit., para. 41-03.

within the scope of criminal libel in England and Wales.¹⁰ There are also the common law offences of slandering or "murmuring" judges¹¹ and of threatening (whether orally or in writing) to do a man any serious injury to his reputation.¹²

B. Northern Ireland

4.3 So far as Northern Ireland is concerned, the law of England and Wales relating to criminal libel appears to apply in the Province. Section 15(2) of the Defamation Act (Northern Ireland) 1955 provides that nothing in that Act (which is identical to the Defamation Act 1952) shall affect the law of criminal libel.

C. Republic of Ireland

4.4 The law of civil and criminal defamation in the Republic of Ireland is based substantially on the law of England and Wales. Statutory provisions are now contained in the Defamation Act 1961, which consolidates with amendments a number of English measures previously forming part of the law of Ireland and makes provisions similar to those in the Defamation Act 1952. Part II of the 1961 Act contains provisions relating to criminal proceedings for defamation which are in almost identical terms to the

10 In most instances the statements penalised will be verbal, but we have been told of a recent unreported case where the accused was convicted of a breach of the peace for carrying or displaying placards bearing defamatory statements about a named individual.

11 Gordon, op. cit., para. 51-03. In some cases, such utterances might also constitute contempt of court.

12 Gordon, op. cit., para. 29-61, citing Jas. Miller (1862) 4 Irv. 238, 244. The offence covers threats "to burn a man's house ... to put him to death, or to do him any grievous bodily harm, or to do any serious injury to his property, his fortune, or his reputation".

following sections of the English statutes:

Fox's Libel Act 1792, s.1,¹³

Libel Act 1843, ss.4-7,¹⁴

Newspaper Libel and
Registration Act 1881, ss.4 and 5,¹⁵

Law of Libel
Amendment Act 1888, s.8.¹⁶

D. Other common law systems

1. Canada

4.5 The Canadian Criminal Code provides for an offence of defamatory libel which is based largely on the provisions in the English draft Code of 1879.¹⁷ Thus, slander is not an offence. Section 262(1) defines a defamatory libel as "matter published,¹⁸ without lawful justification or excuse, that is likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or that is designed to insult the person of or concerning whom it is published".¹⁹ Such a libel is punishable with a maximum term of imprisonment of

13 Defamation Act 1961, s.5.

14 Ibid., ss.6, 7, 11, 12.

15 Ibid., ss.9 and 10. Sect. 5 has now been repealed in England and Wales, see para. 3.28, n. 124, above.

16 Ibid., s.8.

17 C.2345, Appendix: see para. 2.13, n. 52, above.

18 Publication to the person defamed is sufficient: s.263

19 In R. v. Georgia Straight Publishing Ltd. [1970] 1 C.C.C. 94, 4 D.L.R. (3d) 383 (B.C. Co. Ct.) it was held that the test whether a statement is a defamatory libel is an objective one and that it is no defence that the statement was not intended to be defamatory or that it was meant as a joke.

two years or if the defendant publishes it with knowledge of its falsity, a maximum of five years.²⁰ A number of defences are specifically provided which have much in common with English law. Thus section 275 provides that "no person shall be deemed to publish a defamatory libel where he proves²¹ that the publication of the defamatory matter in the manner in which it was published was for the public benefit at the time it was published and that the matter itself was true." But, in contrast to English law, it is specifically provided that no person shall be deemed to publish a defamatory libel by reason only that he publishes defamatory matter "that, on reasonable grounds, he believes is true, and that is relevant to any subject of public interest, the public discussion of which is for the public benefit."²² The Canadian Criminal Code also provides for defences of privilege and fair comment.²³

2. Australia

4.6 In Australia the law of criminal defamation differs from state to state. In the states which have a criminal code, that is, Queensland, Western Australia²⁴ and Tasmania, criminal defamation is provided for in more or less identical terms:

"Any person who unlawfully publishes any defamatory matter concerning another is guilty of a misdemeanour, and is liable to imprisonment for twelve months, and to a fine of six hundred dollars. If the offender knows the defamatory

20 Sects. 264 and 265. In either case the defendant may be fined in addition to, or in lieu of, imprisonment: s.646(1).

21 On a balance of probabilities.

22 Sect. 273.

23 Sects. 269-272 and 274.

24 See further para. 4.9, below.

matter to be false, he is liable to imprisonment with hard labour for two years and to a fine of one thousand dollars."²⁵

No distinction is drawn between libel and slander. Publication is unlawful unless it is protected, justified, or excused by law.

4.7 In the Australian Capital Territory the Defamation Act (N.S.W.) 1901, containing provisions for criminal libel which supplanted the common law, still applies. In New South Wales itself the New South Wales Law Reform Commission reviewed the law of defamation in 1971. The Commission considered that there was a need to retain criminal sanctions for defamation to meet serious cases and recommended the creation of a new statutory offence in place of criminal libel covering both written and spoken defamation.²⁶ This offence is now contained in section 50(1) of the Defamation Act 1974 (N.S.W.) -

"A person shall not, without lawful excuse, publish matter defamatory of another living person -

(a) with intent to cause serious harm to any person (whether the person defamed or not), or

(b) where it is probable that the publication of the defamatory matter will cause serious harm to any person (whether the person defamed or not) with knowledge of that probability."

The scheme of this section and the following section (which amplifies the meaning of 'lawful excuse') is to allow a criminal sanction to be applied in a case where the accused

25 The Criminal Code (Qld.), s.380; The Criminal Code (W.A.), ss.350 and 360; The Criminal Code (Tas.), s.212.

26 Report of the Law Reform Commission on Defamation (1971), L.R.C. 11, para. 57. The Commission also recommended the abolition of punitive damages in civil proceedings.

would be liable in civil proceedings for damages but only where the mental state of the accused satisfies paragraph (a) or (b) of section 50.

4.8 The common law applies in the states of South Australia and Victoria and in the Northern Territory.²⁷ The Criminal Law and Penal Reform Committee of South Australia recently submitted its Report on the Substantive Criminal Law.²⁸ The Committee's Report referred to the rationale of including libel as a criminal offence as having been stated to be its tendency to endanger the public peace.²⁹ In the Committee's view "this tendency can be restrained sufficiently by the civil remedy of damages which is available to the injured party". In the light of this and the fact that the number of prosecutions had fallen off, the Committee recommended that criminal libel (which it described as including blasphemous or seditious libels, libels affecting the administration of justice and other defamatory libels) "should not be retained except for libels in relation to affairs of State and the administration of justice".³⁰

4.9 In pursuance of the agreement reached at the Second Australian Law Reform Agencies Conference in 1975 that inter-state publication of newspapers, magazines and

27 In each of these states, statutory provisions have been separately enacted which follow the 19th century English statutes concerning the law of libel.

28 July 1977.

29 Ibid., p. 249, citing R. v. Holbrook (1878) 4 Q.B.D. 42, 46, per Lush J. The decision on this point has been overruled in England and Wales by Gleaves v. Deakin [1980] A.C. 477, 490; see paras. 2.16 et seq., above.

30 I.e., seditious libel and bringing the administration of justice into disrepute: ibid., p. 249. In both cases it would be a defence that the matter published was true and was in the public interest.

other media developments made it desirable that defamation law should be uniform throughout Australia, the Australian Law Reform Commission in 1979 published a comprehensive report on Unfair Publication: Defamation and Privacy.³¹ The Commission discussed the possibility of abolishing criminal sanctions for defamation. While recognising the force of the arguments in favour of abolishing criminal defamation without replacement, a majority of the Commission supported the retention in restricted form of some criminal sanction,³² expressing their reasons as follows:³³

"... cases may be imagined in which no civil remedy is adequate. They will include cases where the publisher is bankrupt or has no means at all to meet a verdict. A criminal sanction to deter such cases is justified. A criminal offence should be retained but redefined so as to ensure that it will be available only in cases of a deliberately untrue statement made recklessly and with malicious motives."

The Commission recommended an offence in terms similar to the offence in the New South Wales Defamation Act 1974,³⁴ but with the important modification that "no one should be convicted unless he knows the statement to be [false]³⁵ or is recklessly indifferent to the question of truth or falsity".³⁶ In the same year the Western Australian Law Reform Commission recommended adoption of the Commonwealth

31 (1979), Report No. 11.

32 One Commissioner dissented, favouring complete abolition of criminal defamation: ibid., para. 204.

33 Ibid., para. 203.

34 See para. 4.7, above.

35 The Report actually says "true", but presumably this is an error.

36 Para. 205. See further para. 7.22, below. The Report was commended to the Standing Committee of Attorneys-General by the Australian Federal Cabinet; at a meeting in February 1982 the Attorneys-General reached agreement on the preparation of a draft model Bill.

Commission's proposals regarding criminal defamation in place of the provisions of the Criminal Code of that state.³⁷

3. New Zealand³⁸

4.10 The New Zealand Crimes Act 1961 provides for an offence of criminal libel in terms very similar to the Canadian Criminal Code.³⁹ However, there are a number of differences. Thus, slander is made an offence if the defamatory words are - "(a) Spoken ... within the hearing of more than 12 persons at a meeting to which the public are invited or have access ...; or (b) Broadcast by means of radio or television".⁴⁰ Publication of a criminal libel differs from the common law in so far as the Act requires publication to some person "other than the person defamed".⁴¹ No prosecution for criminal libel (or criminal slander) may be commenced without the leave of a Judge of the Supreme Court.⁴² The Defamation Act 1954 permits a magistrate not only to receive matters of defence,⁴³ but also to dismiss the case if, upon such evidence, there is a strong or probable presumption that the jury would acquit.

37 Report on Defamation (1979), Project No. 8, para. 22.6.

38 See generally F.B. Adams, Criminal Law and Practice in New Zealand 2nd ed., (1971), pp. 430-437.

39 See para. 4.5, above.

40 Sect. 216.

41 Sect. 211(2)(b).

42 Sect. 213.

43 E.g., justification, qualified privilege, etc.

4.11 The Committee on Defamation recently recommended the abolition of the offence,⁴⁴ on the grounds that:

"Criminal libel is rarely used in New Zealand.⁴⁵ Its functions in the criminal law are now either catered for by other statutory provisions or are outside the scope of other criminal offences and it is a harsh provision from the point of view of the defendant. The most compelling reason for its abolition, in our view, is that the civil action available for defamation provides adequate protection for defamatory statements and renders the criminal action superfluous."⁴⁶

4. United States of America

4.12 Since the decisions of the Supreme Court in 1964 in New York Times Co. v. Sullivan⁴⁷ and Garrison v. Louisiana⁴⁸ the laws of civil and criminal libel have to be judged against the standards of the First Amendment to the United States Constitution which guarantees freedom of speech and of the press.⁴⁹ The Supreme Court in Garrison also ruled that the breach of the peace rationale for criminal libel was obsolete, in effect making civil and

44 Report of the Committee on Defamation (N.Z. Committee), Recommendations on the Law of Defamation (1977), para. 459. It may be noted that the Committee did not recommend the abolition of punitive damages: ibid., para. 391. The recommendations of the Committee have not yet been implemented.

45 The most recent reported case cited by the Committee was Edwards v. Barnes (1951) 46 M.C.R. 87: Report, ibid., para. 447.

46 Ibid., para. 455.

47 (1964) 376 U.S. 254.

48 (1964) 379 U.S. 64.

49 For a recent comparison of the different approaches to the laws of defamation in the United States and England, see F. Schauer, "Social Foundations of the Law of Defamation: A Comparative Analysis", (1980) 1 Journal of Media Law and Practice, 3.

criminal libel alike so far as the appropriate constitutional standards are concerned. As a result of these and other decisions following this line, many of the state criminal libel statutes have been struck down on the grounds that they are unconstitutional.⁵⁰ The current state of the law in the U.S.A. with regard to both civil and criminal libel is summarised by one American commentator in the following terms -⁵¹

"... the American law of defamation since New York Times v. Sullivan⁵² has been based upon a constitutionally inspired distinction between public officials and public figures,⁵³ on the one hand, and private individuals on the other. Statements about the former are privileged, even if factually false, and the privilege is defeated only if the plaintiff can prove that the words

50 The American Law Institute's Model Penal Code (1962) makes no provision for an offence of criminal libel. The reasons for this omission were stated in comments on an earlier draft of the code as follows: "It goes without saying that penal sanctions cannot be justified merely by the fact that defamation is evil or damaging to a person in ways that entitle him to maintain a civil suit. Usually we reserve the criminal law for harmful behavior which exceptionally disturbs the community's sense of security.... It seems evident that personal calumny falls into neither of these classes in the U.S.A. that it is therefore inappropriate for penal control, and that this probably accounts for the paucity of prosecutions and the near desuetude of private criminal libel legislation in this country." M.P.C. Tentative Draft No. 13, (1961), para. 250.7, Comments at 44. See Garrison v. Louisiana (1964) 379 U.S. 64, 69.

51 Schauer, op. cit., (n. 49, above), at pp. 9-10.

52 (1964) 376 U.S. 254.

53 Public figures are those who have prominence in society at large, who have voluntarily assumed positions of special prominence or who have been active or prominent in particular controversies: Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323. They include leading figures in private associations, trade unions, large companies, and those in the entertainment and sporting field.

were false and that the defendant either knew them at the time to be false, or at least suspected their falsity and proceeded to publish despite these suspicions. Statements about private individuals are not so privileged, but the plaintiff must still prove falsity, negligence, and damage, and can recover presumed or punitive damages only upon proof of actual malice."

Thus the burden on a plaintiff or a prosecutor in the U.S.A., even if not a public figure or public official, is much greater than at common law.

E. Civil law codes

4.13 By contrast with common law jurisdictions, in most modern systems of law based on the civil law defamation is primarily a matter for the criminal law, and only secondarily a civil wrong.⁵⁴ Two examples may be cited. In France defamation is usually prosecuted in the criminal courts where the person defamed can appear as a "partie civile" and recover damages.⁵⁵ The defendant is also liable to criminal penalties.⁵⁶ The prosecution must commence within three months of the date of first publication.⁵⁷ A defamation is defined as "any allegation

54 See R.W.M. Dias and B.S. Markesinis, The English law of Torts: A Comparative Introduction (1976), pp. 174-177.

55 Art. 32 of the Law relating to the Liberty of the Press (29 July 1881). Awards of damages tend to be lower than those in English courts: Dias and Markesinis, op. cit., p. 174.

56 Thus in a case reported in The Times, 15 March 1982, the French Minister of the Interior was found guilty of slandering the Mayor of Paris in alleging that he had protected a gambling club proprietor who had been murdered. The Court imposed a fine of 1,500 francs (£125) and awarded the Mayor the one franc symbolic compensation claimed.

57 29 July 1881, Art. 65.

or imputation of facts which bears on the honour or standing of the person or body about whom the allegation is made."⁵⁸ No distinction is made between written and oral defamation. The defendant must prove that he had good reason to make the publication and no malicious intention. Defences akin to fair comment and privilege are available; so also is truth, subject to three exceptions:

1. Where the alleged defamation concerns the private life of an individual.
2. Where the allegation refers to events of more than ten years ago.
3. Where the allegations refer to facts in respect of which an amnesty has been granted or in respect of which the period of limitation has expired or where an adverse verdict has been reversed.

4.14 In Germany the law of defamation is based principally upon the Criminal Code.⁵⁹ There are three different concepts of defamation, namely, insult, slanderous statements and a deliberate and intentional defamation knowing the statement to be untrue. In the case of slanderous statements, proof of truth, similar to the English plea of justification, is a defence, but in the case of deliberate and intentional defamation knowing the statement to be untrue, there is no defence. Whether civil or criminal proceedings are instituted, either a prison sentence or a fine or both may be imposed.

58 Ibid., Art. 29.

59 Arts. 185-187. Civil actions, although possible, are rare in practice: see Dias and Markesinis, op. cit., p. 175.

F. Conclusions

4.15 Our examination of the treatment of criminal defamation in a number of different jurisdictions has shown that there is no uniform policy amongst the legal systems of the world. Although many of the common law systems provide for a criminal offence of defamation, much greater reliance is placed on civil actions for defamation. Prosecutions on the whole seem to be very rare. By contrast, civil law jurisdictions tend to treat defamation as primarily criminal. It is noticeable that in the six common law jurisdictions where the criminal law of defamation has recently been considered, three⁶⁰ have recommended abolition of criminal sanctions while the other three⁶¹ have recommended or adopted an offence more narrowly drawn than the English common law offence.

60 I.e., South Australia, New Zealand and the U.S.A. (Model Penal Code): see paras. 4.8, 4.11 and 4.12 n. 50, above.

61 I.e., New South Wales, Australia (Commonwealth), and Western Australia: see paras. 4.7 and 4.9, above.

PART V

THE SCOPE OF RELATED OFFENCES AND LEGAL CONTROLS

5.1 In this Part we consider criminal offences and other legal controls which might be used as alternatives to a prosecution for criminal libel. It will be borne in mind that the most likely alternative to a criminal prosecution for libel is a civil action for defamation. Indeed, by comparison with the civil action, a criminal prosecution is a rarity. But, for the reasons given in the Introduction,¹ we are not examining the present law of civil defamation in this Working Paper.

A. Public Order Act 1936, section 5

5.2 The principal offence in the field of public order which requires consideration is section 5 of the Public Order Act 1936,² as substituted by section 7 of the Race Relations Act 1965. Section 5 now provides that -

"Any person who in any public place or at any public meeting

(a) uses threatening, abusive or insulting words or behaviour, or

(b) distributes or displays any writing, sign or visible representation which is threatening, abusive or insulting,

with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned, shall be guilty of an offence and

1 See paras. 1.6-1.8, above.

2 The Public Order Act 1936 is under review by the Home Office. The consultative paper, Review of the Public Order Act 1936 and related legislation (1980), Cmd. 7891, states that the Government provisionally sees no need to alter s.5: see paras. 102-103.

shall on summary conviction be liable to imprisonment for a term not exceeding six months or to a fine not exceeding £1,000 or to both."³

Since a writing which is threatening, abusive or insulting may also be defamatory, there may be cases under section 5 which would also constitute an offence of criminal libel. The offences, of course, are not co-extensive: in some respects the offence under section 5 is wider than criminal libel and in others it is narrower.

5.3 On the one hand, section 5 is wider than criminal libel in that the former penalises not only the distribution or display of writing, but also the use of threatening etc. words or behaviour, whereas only words in a permanent form fall within the scope of the latter. Secondly, words which are threatening, abusive, or insulting need not necessarily be defamatory of any individual or group of persons.⁴ Thirdly, it is no defence to a prosecution under section 5 that the words were true and published for the public benefit, fair comment or privileged.

3 The provision as to penalty, making the offence summary only, was added by the Criminal Law Act 1977, Sched. 1. Sect. 54(13) of the Metropolitan Police Act 1839 and s. 35(13) of the City of London Police Act 1839 provide summary offences in similar terms, but in *Offences against Public Order* (1982), Working Paper No. 82, we provisionally propose their repeal: *ibid.*, paras. 7.19-7.22.

4 See *Brutus v. Cozens* [1973] A.C. 854.

5.4 On the other hand, section 5 is clearly narrower in that it requires the penalised conduct to occur "in any public place or at any public meeting".⁵ There is no such limitation upon criminal libel. Secondly, while section 5(b) requires distribution or display of the written material, criminal libel only requires publication to at least one other person. Finally, under section 5 there must be either an intent to provoke a breach of the peace, or a breach of the peace must be "likely to be occasioned" by the conduct in question. In criminal libel, as we have already seen, the tendency of the words to lead to a breach of the peace is only evidence of the seriousness of the libel and is no longer a requirement of the offence.⁶

B. Public Order Act 1936, section 5A

5.5 By section 5A(1) of the Public Order Act 1936, added to that Act by section 70 of the Race Relations Act 1976 -

"A person commits an offence if -

(a) he publishes or distributes written matter which is threatening, abusive or insulting;
or

5 By s.9(1) (as amended by the Police Act 1964, s.64 and Sched. 10, and the Criminal Justice Act 1972, ss.33 and 66(7)), "public place" includes any highway and any other premises or place to which at the material time the public have or are permitted to have access, whether on payment or otherwise; "public meeting" includes any meeting in a public place and any meeting which the public or any section thereof are permitted to attend, whether on payment or otherwise; and "meeting" means a meeting held for the purpose of the discussion of matters of public interest or for the purpose of the expression of views on such matters.

6 See para. 3.6, above. The possible exceptions to this are noted in paras. 3.8 and 3.10, above.

(b) he uses in any public place or at any public meeting words which are threatening, abusive or insulting,

in a case where, having regard to all the circumstances, hatred is likely to be stirred up against any racial group in Great Britain by the matter or words in question."

Prosecutions under this section may not be instituted without the consent of the Attorney General. The maximum penalty on summary conviction is six months' imprisonment or a fine of £1,000 or both, and on indictment two years' imprisonment or a fine, or both. Although there is ancient authority which suggests that a person may be guilty of criminal libel if it is proved that the object of the publication was to excite the hatred of the public against the class libelled,⁷ a prosecution for criminal libel as opposed to a prosecution under section 5A where the conduct of the defendant falls within that section seems extremely unlikely today. But there is clearly a possibility at least that some overlap exists between the conduct penalised by these two offences.

C. Binding over procedure

5.6 An alternative procedure to a prosecution for criminal libel, and one to which resort has been had on a number of occasions in the context of libels, is the use of the power of justices of the peace to require a person appearing before them to enter into a recognisance, with or without sureties, to keep the peace or to be of good behaviour.⁸ In essence the power to bind over is preventive rather than punitive, and derives from both

7 R. v. Osborn (1732) 2 Barn. K.B. 166; 94 E.R. 425, see para. 3.11, above.

8 See generally D.G.T. Williams, Keeping the Peace (1967), ch. 4; G.L. Williams, "Preventive Justice and the Rule of Law", (1953) 16 M.L.R. 417; Stone's Justices' Manual 114th ed., (1982), pp. 612-614.

the common law and the Justices of the Peace Act 1361. Indeed, a person does not have to commit an offence before the justices may exercise their power; nor does the prospective conduct have to be either violent or criminal in nature. Consequently, while binding over has been criticised on a number of grounds,⁹ it has been regarded as a useful remedy in cases of, for example, poison-pen letters,¹⁰ where the possibility of imprisonment for refusal to be bound over and the threat of forfeiture of the recognisance for a subsequent breach of the order may be sufficient to prevent further offensive letters being sent to the recipient.¹¹

D. Post Office Act 1953, section 11 and
British Telecommunications Act 1981,
section 49(1)

5.7 These offences are considered in relation to poison-pen letters in Part IX, below.

9 We are currently reviewing the law and practice on this matter under a reference from the Lord Chancellor, the terms of which are: "To examine the power to bind over to keep the peace and be of good behaviour under the Justices of the Peace Act 1361 and at common law together with related legislation, to consider whether such a power is needed and, if so, what its scope should be, and to recommend legislation accordingly, including such legislation upon procedural and any other matter as appear to be necessary in connection therewith."

10 We examine the problem of poison-pen letters in Part IX, below.

11 See e.g., Lansbury v. Riley [1914] 3 K.B. 229, 235, per Avory J.; Sawyer v. Bell (1962) 106 S.J. 177 and see further para. 9.5, below.

E. Offences against the administration of justice

5.8 A verbal attack upon a court or a judge may constitute the offence of contempt under the head known as scandalising the court.¹² Broadly, the conduct prohibited is (a) scurrilous abuse of a judge as a judge or of a court and (b) attacks upon the integrity or impartiality of a judge or a court. Cases under this head of contempt are very rare. The Report of the Committee on Contempt¹³ (the "Phillimore Committee") concluded that penal sanctions were still required in this field and that the law of defamation would not provide sufficient protection, since what required protection was the administration of justice: "this branch of the law of contempt ... is only incidentally, if at all, concerned with the personal reputations of judges".¹⁴

12 See Ambard v. A.-G. for Trinidad and Tobago [1936] A.C. 322.

13 (1974) Cmnd. 5794, paras. 159-167. The Committee recommended that a new offence replacing this head of contempt should form part of the law of criminal libel, with a defence of truth coupled with public benefit. Our own Report on Offences relating to interference with the Course of Justice (1979), Law Com. No. 96 recommended a narrower offence than the one proposed by the Phillimore Committee: see *ibid.*, paras. 3.64-3.70 and Appendix A, draft Administration of Justice (Offences) Bill, cl. 13. The Contempt of Court Act 1981, which implements many of the recommendations of the Phillimore Committee, does not deal with scandalising the court. In the Second Reading debate on the Bill, the Lord Chancellor indicated that the Law Commission's recommendations had superseded Phillimore on this matter but that the Law Commission's Report was still being considered by the Home Office: Hansard (H.L.), 9 December 1980, vol. 415, col. 696.

14 (1974) Cmnd. 5794, para. 162.

5.9 Section 5(2) of the Criminal Law Act 1967 penalises wasteful employment of the police by knowingly making a false report showing that an offence has been committed. The maximum penalty for this summary offence is six months' imprisonment or a fine of £200 or both. The consent of the Director of Public Prosecutions is required for the institution of proceedings. In some cases where, for example, a person makes a malicious complaint against a police officer alleging that an offence has been committed it would be possible for a prosecution to be brought under section 5(2).¹⁵ The Court of Appeal in R. v. Rowell,¹⁶ however, indicated that prosecution under this section was not an appropriate way of dealing with the person who so exposed another to the risk of arrest and possible imprisonment pending trial. It was for this reason that we recommended in our Report on Offences relating to Interference with the Course of Justice¹⁷ a specific offence, triable either way with a maximum penalty of five years' imprisonment, of falsely implicating another in the commission of an offence intending to induce the person to whom the false indication is given or some other person to pursue a criminal investigation in relation to the person indicated.¹⁸ This is one of a number of offences which we have recommended in our Report to replace the offence of perverting the course of justice, including conspiracy, attempt and incitement to do so,

15 See further paras. 7.40-7.44, below.

16 (1977) 65 Cr. App. R. 174, 179. R was convicted of attempting to pervert the course of justice by falsely alleging that he had been robbed and threatened with a firearm by T, thereby causing a police investigation of T's conduct.

17 (1979) Law Com. No. 96, para. 3.97.

18 Ibid., Appendix A, cl. 23. We proposed that the consent of the Director of Public Prosecutions be required for the institution of proceedings for this offence.

charges for which have also been brought on occasion to deal with false allegations against police officers.¹⁹

There is clearly an overlap here between this offence and some instances of criminal libel.²⁰

F. Other offences

5.10 Other offences may have some, albeit a more marginal, relevance to situations presently covered by criminal libel. Charges of criminal damage, for example, may be possible in cases where the libel is made visible to the public by painting or spraying on property.²¹

19 See e.g. *R. v. Machin* [1980] 1 W.L.R. 763 (C.A.). M. had made false statements and complaints to the effect that he had been unlawfully assaulted by police officers. His conviction for attempting to pervert the course of justice was upheld on appeal. If a prima facie case of attempting to pervert the course of justice is disclosed to the chief officer of police, it must be reported to the D.P.P.: Prosecution of Offences Regulations 1978, S.I. 1978/1357, reg. 6(2).

20 See para. 7.42, below.

21 A defendant pleaded guilty and was convicted at Preston Crown Court of charges of criminal damage and criminal libel after spraying "offensive libels" about a woman in aerosol paint around Lytham, Lancashire: *The Times*, 14 February 1976, noted by J.R. Spencer, "Criminal Libel - A Skeleton in the Cupboard", [1977] Crim. L.R. at p. 390, n. 48. This case did not figure in the statistics for criminal libel for the year 1976: see para. 2.21 and n. 101, above; presumably it was noted only as a case of criminal damage.

PART VI

DEFECTS OF THE PRESENT LAW

A. Comparison with the tort

6.1 It will be apparent from our description of the constituent elements of criminal libel that the offence is in a number of respects wider than the tort (that is, the civil action for libel): and it has been said that "this is unusual, because in such cases it is usually the tort which is wider than the crime, and with reason. The law usually punishes people only for the worst (and therefore most unusual) types of misbehaviour, but makes them pay damages in a wider range of situations. But here it is the other way round."¹

6.2 The principal distinctions between the crime and the tort are:

(i) the truth of the words complained of is a complete defence to a civil action, but in criminal proceedings the defendant must prove not only that the defamatory matter is true but also that its publication was for the public benefit;²

(ii) the provisions of the Defamation Act 1952 amending the civil law of defamation do not apply to criminal libel;³

1 J.R. Spencer, "Criminal Libel - A Skeleton in the Cupboard", [1977] Crim. L.R. 465, 467.

2 Libel Act 1843, s.6: see para. 3.18, above.

3 Defamation Act 1952, s.17(2): see para. 2.13, above.

(iii) to amount to a criminal libel, publication to a third party is not essential;⁴

(iv) criminal libel may possibly extend to defamation of the dead;⁵

(v) an indictment may possibly lie where the object of publication is to excite public hatred against a class of people.⁶

6.3 We know of no case since the 19th century where a prosecution has been brought in circumstances falling within any of the last three categories. As we have already seen, with regard to each of these three categories the law is in an uncertain state. Nevertheless, it is unsafe to assume that the law has been changed and the very uncertainty in relation to these categories is itself a serious drawback which requires resolution if the offence is to remain.

1. Proof of truth is not a complete defence

6.4 It is not simply that the criminal law is in this respect wider than the civil law, but the question also arises whether as a matter of principle it should be a criminal offence based upon defamation for a person to state the truth. Although we know of only one reported case⁷ in the last 100 years in which a defendant was successfully prosecuted because his defamatory statement was, although true, not published for the public benefit, there is no room for doubt that mere proof that the words were true is not by itself a defence.

4 See para. 3.8, above.

5 See para. 3.10, above.

6 See para. 3.11, above.

7 See R. v. Perryman, The Times, 19 January-9 February and para. 3.19, n. 80, above.

2. Public benefit

6.5 Under the Libel Act 1843 the defendant has to prove not only that the words were true but also that it was for the "public benefit" that they were published. No guidance is given by the statute as to the meaning of these words and as a test to determine criminal liability they are remarkably vague words. Is the extent of the publication relevant to determine whether or not the particular publication was for the public benefit? If so, there may be an overlap with the defence of qualified privilege. Moreover, this defence must either admit of expert evidence (perhaps of great length) being admitted on both sides or no evidence on the issue. In the former case the jury may have an almost impossible task to perform; in the latter, they presumably have to rely on their good sense in an area in which they may not have sufficient personal knowledge to form any proper judgment.

3. Defamation Act 1952

6.6 Criminal libel is also wider than the tort because the Defamation Act 1952, which broadens the scope of defences in civil actions, does not apply to criminal libel. A number of anomalies were thereby created. Lord Edmund-Davies in Gleaves v. Deakin⁸ drew attention to one of them. Section 5 provides that:

"... a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges".

He pointed out that:

"if an alleged criminal libel contains several distinct allegations and the defendant fails to

8 [1980] A.C. 477, 493.

prove the truth of any one of them the jury should in duty convict ..., whereas if the allegation complained of is general in its nature it is sufficient to prove as much of the plea of truth as would justify the libel. Section 5 ... has no application to criminal libel. It is high time it did, for no one should be liable to be convicted in the circumstances envisaged".⁹

We agree that, if libel or its like is to remain an offence, the suggested change would be a welcome improvement in the law. But there are other provisions in the 1952 Act which have created undesirable divergencies between civil and criminal libel which may be mentioned:

- (i) section 4, which provides for a defence of unintentional defamation;¹⁰
- (ii) section 6, which widens the defence of fair comment;¹¹
- (iii) section 7 (and the Schedule), which relates to the qualified privilege of newspapers in respect of certain reports and other matters;

9 Ibid.

10 To succeed, a defendant in a civil action has to prove that the words complained of were published by him innocently in relation to the person defamed, that he has made an offer of amends as required by s.4 and that this offer of amends has been refused by the plaintiff and has not been withdrawn by the defendant. It is uncertain whether or not criminal libel would be committed in the situations covered by the civil defence: see J.R. Spencer, "Criminal Libel - A Skeleton in the Cupboard", [1977] Crim. L.R. 465, n. 71, and [1979] C.L.J. 245, 250, and paras. 3.12-3.13, above.

11 Sect. 6 has a similar effect on fair comment to that of s.5 on justification.

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

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

As with section 5, there seems no reason in principle why these provisions should be restricted to civil defamation; otherwise there is potential criminal liability where no civil liability exists.

B. Strict liability and negligence

6.7 By comparison with most other criminal offences triable only on indictment, criminal libel suffers the shortcoming of being in some respects a crime of negligence¹² and in others possibly even a crime of strict liability. As we have noted, proof of an intention to defame may be unnecessary.¹³ On one view of the present law, therefore, all that is required is that the defendant must have intended to publish that which defames, not that he actually intended to defame in the manner complained of. In the context of the crime of blasphemous libel, the dissenting minority in the House of Lords in Whitehouse v. Lemon¹⁴ were clear that by so excluding the necessity to prove an intent to blaspheme on the part of the publisher, the effect of the majority's decision was to make the offence of blasphemous libel one of strict liability.

12 See para. 3.14, above.

13 See para. 3.12, above; and compare the provisions with regard to unintentional defamation in the Defamation Act 1952, s.4: see para. 6.6(i), above.

14 [1979] A.C. 617, 637 (Lord Diplock), 656 (Lord Edmund-Davies).

The majority, however, did not regard it as an offence of strict liability.¹⁵ In our review of that offence, we said that in our view the absence of mens rea as to an important part of the offence, not only means that the offence is one of strict liability, but also that such absence "runs contrary to the general principle developed during the past century that mens rea is normally required as to all the elements of the actus reus both in common law and statutory crimes, save in special cases of regulatory offences".¹⁶ The same criticism may be advanced against criminal libel, although, as we have said, there is an uncertainty here as to the precise scope of the existing law.

C. No defence of mistaken belief as to truth

6.8 Criminal libel constitutes an exception to the general rule in criminal law that a person who acts under a mistaken belief as to the existence of facts which, if true, would give him a defence commits no crime.¹⁷ Thus, if a person publishes a defamatory statement which he believes to be true, he is nonetheless guilty if it is not in fact true, however reasonable were the grounds for his belief that it was true.¹⁸

15 Ibid., 639-640 (Viscount Dilhorne), 657 (Lord Russell), 662 (Lord Scarman). But see commentaries by J.C. Smith in [1979] Crim. L.R. at p. 312 and J.R. Spencer, [1979] C.L.J. at p. 249.

16 See Offences against Religion and Public Worship (1981), Working Paper No. 79, para. 6.3.

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

18 Of course, he will not be liable in such circumstances to the heavier penalty prescribed by s.4 of the Libel Act 1843 for publishing a libel with knowledge of its falsity.

D. Burden of proof as to truth

6.9 Another important defect of criminal libel in our view relates to the burden of proof. In criminal libel the burden of establishing the defence under section 6 of the Libel Act 1843 that the defamatory statement was true and was published for the public benefit rests on the defendant as a persuasive burden, that is, the matter must be taken as proved against him unless he satisfies the jury on the balance of probabilities to the contrary.¹⁹ Thus, for example, if a defendant is unable to produce admissible evidence to prove the truth of the statement which he made on information received from an apparently reliable source, he is liable to be convicted of the offence whether or not the statement is in fact true. This is a potential consequence of the presumption of falsity which, in the interests of freedom of speech, we regard as unacceptable in the context of a criminal offence.²⁰

E. "Seriousness"

6.10 Although the offence is wider than the tort in the ways described above, in one, albeit uncertain, respect it is narrower. In Gleaves v. Deakin the House of Lords established that a criminal libel must be a serious, not a trivial, libel and it seems that it is ultimately for the jury to say whether the libel proved is

19 See para. 3.19, n. 80, above. The same persuasive burden rests on the defendant to establish the defences of privilege and fair comment: see paras. 3.20 and 3.21, above.

20 See further para. 7.18, below.

so serious as to be a crime.²¹ However, the notion of seriousness, as it exists, is not tied to any rule by reference to which it is to be applied; it is not clear, for example, whether in assessing the seriousness of the libel the jury should have regard to the defendant's motive or purpose in publishing the libel, the position of the person defamed, the harm likely to be caused, the likelihood of a breach of the peace, or whatever. Moreover, there is circularity in a rule which says that conduct of a certain kind is a criminal offence if the jury regard it as sufficiently serious to call it criminal.²² There are of course cases where the use of such a term as "serious" in other criminal offences can clearly be justified; for example, section 18 of the Offences against the Person Act 1861 under which it is an offence to cause grievous bodily harm with intent to do so. There the seriousness of the harm marked by the word "grievous"²³ indicates, not the boundary between criminality and non-criminality, but that between a greater and a less serious crime, where the distinction

21 See paras. 3.6-3.7, above.

22 Comparison may be made with the crime of manslaughter by "gross negligence", a common law offence where in substance the jury must say whether the negligence is bad enough to attract criminal liability; for criticisms of this, see Smith and Hogan, Criminal Law 4th ed., (1978), p. 319 and the Criminal Law Revision Committee's Fourteenth Report, Offences against the Person (1980), Cmnd. 7844, para. 121. This kind of manslaughter is excluded from the Committee's recommended new offence of manslaughter (ibid., para. 124).

23 The Criminal Law Revision Committee has recommended the replacement of s.18 of the 1861 Act by an offence of causing "serious" injury with intent: see Fourteenth Report, Offences against the Person (1980), Cmnd. 7844, para. 157.

affects only the maximum penalty which may be imposed. Notwithstanding such specific criticisms which we have attached to the notion of seriousness in the existing law of criminal libel, there may, we think, be a case for excluding the trivial defamation from the ambit of any offence which is enacted in its place. But we think that this ought to be achieved either by a requirement of the consent of a prosecuting authority or by the use of more specific terms or both, and then only in the context of a more restricted offence than the present law. These issues are considered further below.²⁴

F. Possible incompatibility with European
Convention on Human Rights

6.11 We have set out above²⁵ Lord Diplock's dicta in Gleaves v. Deakin²⁶ which suggested that the offence of criminal libel contains elements which "are difficult to reconcile with international obligations which this country has undertaken by becoming a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms". While not expressing a decided view that the offence is indeed incompatible with the Convention, the possibility that it is so in the way described by Lord Diplock clearly adds great weight to the view that it ought not to remain in its present form.

24 See paras. 8.4 et seq., below.

25 Paras. 1.5 and 2.17, above.

26 [1980] A.C. 477, 482.

G. Only written publications penalised

6.12 A further anomaly is that whereas written words, if defamatory, may be criminal, spoken words may not. We have already mentioned that the distinction between libel and slander arose largely by reason of historical accident.²⁷ This anomaly was long ago heightened by the introduction of broadcasting. The Faulks Committee recommended that the distinction between libel and slander be abolished for civil proceedings,²⁸ but made no recommendation for the widening of criminal libel to include slander save that, as we have noted,²⁹ the Committee recommended that criminal libel should apply to broadcasting. If conduct in this field is to remain criminal at all, we doubt whether there can be any sufficient justification for maintaining what amounts to an artificial distinction between written and spoken words (even if the former is extended to include all forms of broadcasting) as a factor determining whether or not conduct is to be criminal.³⁰

27 See paras. 2.3-2.8, above.

28 Report of the Committee on Defamation (1975), Cmnd. 5909, paras. 86-91.

29 See para. 3.2, above.

30 Other offences which involve punishing people for the use of words do not make this distinction, see e.g., Public Order Act 1936, ss.5 and 5A, paras. 5.2-5.5, above.

H. Special protection for newspapers

6.13 We have already noted the provisions of the Law of Libel Amendment Act 1888 which have the effect of protecting those responsible for the publication of newspapers from prosecutions for criminal libel, in particular the requirement of section 8 that prosecutions against such persons require the leave of a judge in chambers.³¹ Since 1888 the means of mass communication have multiplied and newspapers form only one branch of the communications media. The special protection afforded by the 1888 Act to newspaper proprietors appears anomalous in the light of these developments; and it is in any event anomalous that newspaper publishers and editors are protected, while their journalists and others are not.³²

6.14 For similar reasons, we think there can no longer be any justification for retaining the provision of section 4 of the Newspaper Libel and Registration Act 1881 empowering a magistrates' court in committal proceedings against a proprietor, publisher, editor or person responsible for the publication of a newspaper for a libel published therein to hear evidence by way of

31 See paras. 3.25-3.27, above.

32 Although see Desmond v. Thorn, The Times, 21 April 1982, and para. 3.27, n. 122, above. The Faulks Committee recommended that the protection given by s.8 should be extended to include the proprietors, publishers, editors of periodical publications or any other person responsible for the publication of such periodicals and contributors thereto (whether or not employed) or all broadcasting authorities and persons paid to present or contribute to the programmes of such authorities (whether or not employed): Report of the Committee on Defamation (1975), Cmnd. 5909, para. 448(e).

defence which could have been received at a trial on indictment.³³ We have pointed out that the provision probably has little practical importance.³⁴

I. Proof of convictions

6.15 A final criticism is that provisions in the Civil Evidence Act 1968 which apply to civil defamation do not apply to criminal proceedings and so fewer matters are admissible in evidence in criminal libel prosecutions to prove justification. Section 13 provides that in civil actions for defamation in which the question whether or not a person has committed a criminal offence is relevant to an issue arising in the action, proof that the person stands convicted of the offence is conclusive evidence that he committed it.³⁵ But, where one person states that another has been convicted of a criminal offence, it is not open to a defendant to a prosecution for criminal libel in respect of the statement merely to prove the fact of the conviction; the defendant has to show on a balance of probabilities that the prosecutor was more likely to have been guilty than not. Thus in Gleaves v. Deakin several of the libel charges were based on statements concerning previous convictions of the prosecutor.³⁶ Since certificates of the fact of his previous convictions were not admissible to prove the prosecutor's guilt, the defendants had to re-prove the guilt of the prosecutor in

33 See para. 3.28, above.

34 Ibid.

35 This section followed the recommendation of the Law Reform Committee in their Fifteenth Report, The Rule in Hollington v. Hewthorn (1967), Cmnd. 3391, para. 30.

36 See The Times, 28 February 1980 for a report of the conclusion of the trial. It should be noted that the Gleaves proceedings were not solely in respect of matters for which he had already been convicted.

the earlier trials by calling a number of prosecution witnesses who had given evidence in those trials to testify again as to the conduct which led to his convictions. It is interesting to note that the Criminal Law Revision Committee rejected a suggestion that a provision corresponding to section 13 was needed for criminal libel. The Committee commented that:

"prosecutions for libel are very rare: and in the unlikely event of an attempt by a person convicted of an offence to reopen the question of his guilt by means of criminal proceedings against somebody for referring to his having committed the offence it can hardly be supposed that a justice would see fit to issue a summons or that a judge would give leave to prefer a voluntary bill of indictment."³⁷

Having regard to the proceedings in Gleaves v. Deakin, some modification of this assessment is clearly needed.

37 In consequence the Criminal Law Revision Committee only went so far as to recommend that convictions of persons (other than the accused) should be made admissible in criminal proceedings as evidence of the fact that the person convicted was guilty of the offence charged: see Eleventh Report: Evidence (General) (1972), Cmnd. 4991, paras. 217-219.

PART VII

CONSIDERATION OF THE NEED FOR CRIMINAL SANCTIONS

A. Should the present law be retained?

7.1 In 1968 the Law Commission recommended that there should be a comprehensive examination of the criminal law with a view to its codification.¹ Codification of the criminal law means that all offences which exist by force of the common law must be abolished as common law offences and, if they are to continue to exist, must be re-enacted as statutory offences within the code. Criminal libel is a common law offence. If the process of codification is to be carried out, criminal libel will only remain as a criminal offence if Parliament passes a statute which declares the conduct in question to be a crime. In some instances, where the Law Commission has proposed the abolition of a common law offence, it has at the same time been able to propose the creation by statute of a new offence having much the same characteristics as the existing common law offence. However, our statement of the defects in the present law of criminal libel, and of the authoritative criticisms which have been directed at it,² will have made clear that, in our view, it is impossible to propose the enactment of a new offence of criminal libel in terms of the existing common law offence.

7.2 We have seen that criminal libel is an offence which has been much regulated and altered by a series of statutes over the last two hundred years.³ In particular,

1 See para. 1.1, above.

2 See Part VI, above.

3 See paras. 2.9-2.13, above.

until 1843⁴ the truth of the defamatory statement was irrelevant: the defendant was punished simply for writing and publishing something unpleasant about another person. After 1843⁵ the accused had a defence if he could persuade the jury that the statement in question was not only true but was also published for the public benefit. From 1888,⁶ leave of a judge in chambers was required for the institution of proceedings against newspaper proprietors, editors, etc. However, notwithstanding these various statutory alterations to the common law, the present offence of criminal libel is one which does not afford a satisfactory basis for codification. The present offence contains provisions which are undesirable as a matter of principle.

7.3 Our principal objections to the terms in which the present offence is defined are:

- (1) that a man can be convicted for stating the truth about another if the jury take the view that publication was not for the public benefit;
- (2) that the burden does not lie upon the prosecution to prove that the defamatory statement is untrue but upon the defendant to prove that the statement is true and that publication was for the public benefit;
- (3) that a defendant may be convicted although he published what he honestly believed on reasonable grounds to be true.

4 See para. 2.11, above.

5 Libel Act 1843, s.6; see paras. 2.11 and 3.18-3.19, above.

6 Law of Libel Amendment Act 1888, s.8: see paras. 2.12 and 3.25, above.

We have referred to other objections to the present offence in Part VI of this Working Paper. They might be capable of cure by minor amendments. The three matters which we have listed above, however, and in particular as they work in combination with each other, go to the very nature of the present offence and in our view make it unacceptable. A further important objection, as we have stated above, is that it is possible under the present law for a man to be guilty of criminal libel when he could not be liable in a civil action in respect of the same publication. This, again, seems to us to be surprising, and something which would require clear justification.

Would it be satisfactory to codify the present law but add a requirement that in all cases leave to prosecute be required?

7.4 At present the leave of a judge in chambers is required before a newspaper can be prosecuted for criminal libel.⁷ In Gleaves v. Deakin⁸ the view was expressed in the House of Lords that the existing law would be improved if leave to prosecute were made necessary in all cases, and that such leave would more appropriately be given either by the Director of Public Prosecutions or the Attorney General.⁹ That amendment of the law would be an improvement upon the existing situation, and would prevent some cases which should not be started as criminal prosecutions from reaching the courts. As appears below, it is our provisional view that a requirement of leave to prosecute would be necessary with reference to any new offence of criminal libel to ensure that only in cases of

7 Ibid,

8 [1980] A.C. 477.

9 [1980] A.C. 477 at p. 484 (per Lord Diplock), p. 488 (per Viscount Dilhorne), p. 493 (per Lord Edmund-Davies), p. 496 (per Lord Scarman): see paras. 2.16 et seq, above.

substantial public interest would criminal proceedings be launched. If, however, we are right in our view that the nature and width of the present offence are unacceptable, then a provision for control by "leave to prosecute" would be no more than a palliative and could not provide a substitute for the complete reform of the law which in our view would be required to eliminate the defects we have described.

B. Is there need for any offence of criminal defamation?

1. Preliminary considerations

7.5 It is clear without question that some actions must be treated as crime, such as murder or theft. It is, we think, similarly clear that some sorts of defamation, for example unintended defamation by honest mistake, should not be a crime. Some law reform agencies, whose views we have considered with much respect, have reached the conclusion that no defamation, however grave, should be treated as criminal.¹⁰ The question is whether there is any sort of defamation which ought to be punishable as a crime, and if so, what are the reasons which justify the enactment of any such offence. Those reasons, if they can be correctly stated and weighed, will suggest the limits of any new offence. Moreover, in considering the creation of a new crime it must be borne in mind that any such crime would have effect not only in cases which are prosecuted to conviction but also in influencing those who produce publications of all sorts in the conduct of their activities. The existence of a new offence of criminal libel may, if it is too wide, or feared to be too wide in its effect, do more harm in restricting what ought to be published than it may do good in preventing publication of what should not be published.

10 See paras. 4.8, 4.11 and 4.12, n. 50, above.

7.6 We shall not attempt in this Working Paper any detailed statement of the theoretical justification for criminal sanctions. We hope that it is sufficient to say that we would not propose the creation of a new criminal offence of defamation unless there was a widespread acceptance that the conduct to be penalised could not be justified by any standards of ordinary morality and, in addition, was such as to do harm to other individuals or to the general public.¹¹ Further, such harm must appear to be of such gravity that a general consensus exists that the law is justified in imposing suitable punishment. By "suitable" punishment we have in mind not only the sanction of imprisonment for the worst cases, but also the other penalties generally available to the criminal courts, including, for example, a suspended sentence, a probation order¹² or a fine.

7.7 There are special features concerning the relationship between defamation and the criminal law to which we think attention must be drawn at this stage.

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

11 See para. 7.14(3), below.

12 See R. v. Penketh (1982) 146 J.P. 56 and n. 30, below.

- (b) The history of criminal libel shows that one of its principal uses was once to protect the government from criticism.¹³ If there is to be a new offence it must be drawn in terms which ensure that the new offence should not be available for the purposes for which criminal libel was used in the past.
- (c) Our society has by its traditions been built upon trust and a respect for the truth. It is normal for people to tell the truth and there is a tendency for people to believe those facts which they are told, especially when read in a newspaper or other publication which purports to report factual news.
- (d) In a democratic society public opinion is a powerful force. There are those who for their own purposes will seek to influence public opinion by whatever means are available to them, whether honest or dishonest. This may be done mischievously or for financial advantage or to achieve political ends. The history of the rise of the Nazi party in Germany shows how the deliberate lie may be used for political purposes and to influence public opinion.¹⁴ The creation and maintenance of a non-democratic society may thus depend upon the technique of the deliberate lie. Because of the persuasive force of mass communication, a democracy may

13 See paras. 2.2 and 2.5, above.

14 Cf. R. v. Relf (1979) 1 Cr. App. R.(S) 111, 114, per Lawton L.J.

reasonably require that those in control of the channels of communication do not abuse their powers and that sanctions to prevent such abuse are effective.

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

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

7.8 The above are some of the considerations which we think should be borne in mind in deciding whether or not there should be any criminal offence which may be committed by the making or publishing of a defamatory statement. We note that neither the Porter Committee¹⁵ nor the Faulks Committee¹⁶ recommended the abolition of criminal libel. The latter said that, in their view, it was "to the public advantage that a person who is guilty of serious indefensible libel should be liable to be proceeded against under criminal law".¹⁷ That Committee made recommendations for only a few fairly minor changes to the existing criminal law.¹⁸ We would not depart lightly from the principle of the recommendations of two such committees. On the other hand, we think it fair to say that neither of those two bodies had to consider criminal libel in the context in which we have to consider it¹⁹ and that both of them were principally concerned with reform of the civil law of defamation.

2. The arguments considered

7.9 Before considering in detail the arguments for and against the creation of such an offence, we wish to state three matters of principle upon which we have reached a firm conclusion.

15 Report of the Committee on the Law of Defamation (1948), Cmd. 7536. See para. 2.13, above.

16 Report of the Committee on Defamation (1975), Cmd. 5909, para. 448.

17 Ibid., para. 41.

18 We have already noted most of these recommendations: see paras. 3.2, 3.20, n. 82, 3.21, 3.23, n. 99, and 6.14, n. 32, above.

19 See para. 1.8, above.

(a) No criminal liability for true statements

7.10 In the first place, under the present law of criminal libel a man who publishes a statement which is defamatory of another will be guilty of a criminal offence unless he can prove that the statement was not only true in fact but also that its publication was for the public benefit.²⁰ In this respect the criminal law differs markedly from the civil law.²¹ In the civil law proof that the statement was true is an absolute defence.²² We have come to the conclusion that it should not be a criminal offence to state the truth, even if the truth lowers a man's reputation in the eyes of others,²³ and however unpalatable the publication may be to the person about whom it is published. We have considered the arguments based upon concern for a person who long ago was guilty of misconduct and to whom much distress and damage may be caused by vindictive publication of the facts.²⁴ It seems to us, however, that the principle of free speech in a democratic society requires that a man should not face the risk of prosecution for a crime because he has told the truth of another. (We speak here only in the context of defamation and intend no reference to contexts such as official secrets.) Further, it does not seem to us that there is any justification for the state

20 Libel Act 1843, s.6: see paras. 3.18-3.19, above.

21 See paras. 6.4-6.5, above.

22 Subject to the limited exceptions created by the Rehabilitation of Offenders Act 1974: see further para. 7.32, below.

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

24 See para. 7.31, below.

of law in which the truth is always a defence to a civil action, where only damages and an injunction may be claimed, but by itself is no defence to a criminal charge. It is therefore from this standpoint, namely that publication of the truth, however defamatory, should not constitute a criminal offence, that we go on to consider whether there should be any, and if so what, crime based upon the making of a defamatory statement.

(b) No criminal liability without knowledge that the statement is defamatory

7.11 The second matter of principle upon which we have reached a firm conclusion is that a person should not be guilty of an offence if he was unaware that the statement in question was defamatory of another and he had no intention of defaming him. This would exclude unintentional defamation.²⁵

(c) No criminal liability for trivial defamation

7.12 The third matter of principle to be mentioned before assessing the arguments for and against the creation of a new offence is that a person should not be guilty of any offence unless the matter published constituted a serious defamation: there should be no possibility of conviction for a trivial defamation. This in substance seems now to be the existing law,²⁶ but its formulation in any new offence is a matter to be considered in detail elsewhere.²⁷

25 See para. 3.12, above.

26 See paras. 3.6-3.7, above.

27 See para. 8.4, below.

(d) Arguments for abolition of criminal libel without replacement by any new offence

7.13 The principal arguments, in our view, are as follows:

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

of the defamatory statement.²⁸ Breach of the injunction may result in the offender being imprisoned or fined. If any particular class of persons, for example police officers, is thought to require special protection by means of a criminal sanction then any necessary offence should be so limited and not of general application.

- (3) Any new offence which is drawn in terms of acceptable narrowness, so as not to offend against the principle of freedom of expression, or against the ordinary rules of criminal procedure, would be capable of proof in so small a number of cases that it is not worth making provision for them: it is better to abolish the existing offence and to put nothing in its place. A new narrow offence would have no value as a deterrent. The existing offence is hardly ever used.
- (4) Even if rules are provided, with the intention of limiting prosecution only to those cases which are grave, blatant and of real public importance, nonetheless the time of over-burdened criminal courts is likely to be spent on trials, which might well be long and complicated, about offences which are not important enough in social terms to

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

justify the time spent upon them. Many such cases might well be expensive and also require the time and attention of investigating officers and prosecuting lawyers.²⁹

(e) Arguments for retaining an offence

7.14 The principal arguments in favour of keeping some form of offence of criminal defamation are, in our view, as follows:

- (1) A defamatory statement may cause serious damage and much misery to the victim.³⁰ The consequences for him may be far more serious and long-lasting, than those of other acts, such as an assault, or theft, which are accepted as criminal offences. An example of such a statement is that a school teacher has been abusing or indecently assaulting boys and girls in his charge; or that a candidate for an elected trade union office has been receiving secret payments from employers in return for indulgence to them in the handling of disputes.

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- 29 See Report of the Committee on Defamation (N.Z. Committee), Recommendations on the Law of Defamation, (1977), para. 449: "There are only limited resources in the community available for control of crime and they are better directed to serious crime against the person, his property or the maintaining of peace."
- 30 A recent instance is *R. v. Penketh* (1982) 146 J.P. 56 in which Mrs X, a widow with a young child, heard a broadcast in which an appeal was made for a pen friend for P. Out of kindness she wrote to P and he replied. Soon he began to bombard her with letters and she did not want to hear from him further. P then wrote to her son's headmaster and others stating that he was the natural father of her child. He pleaded guilty to criminal libel and was placed on probation for three years with a condition that he wrote no letters to, and made no attempt to contact, Mrs X or anyone connected with her. After repeated breaches of various probation orders, P was sentenced to eighteen months' imprisonment (reduced on appeal to nine months').

- (2) If damage to reputation is done intentionally and with knowledge that the statement is false, then the state of mind and blameworthiness of the maker of the statement are no different in character from the person who deliberately assaults another or damages his property. He has done an act which society generally would regard as just as deserving of punishment as those acts.
- (3) Apart from the private damage done to the individual by such defamatory statements, there may thereby also be caused damage to the public interest: the person defamed may in consequence be hampered in performing services or functions of public importance. Confidence in his probity may be impaired. Interference may be caused to the proper working of democratic processes. This possible effect is not limited to public figures of national importance: it may apply to people whose field of work is more local, such as within a village, a local club, a medical practice, a school, or a local authority. There is accordingly a public interest in the provision of an effective public sanction against such conduct.
- (4) The availability of a civil remedy is not so effective, or so readily available, or so satisfactory in all cases, as to enable the offence of criminal libel to be abolished with safety or confidence without any replacement. If the defendant has money to pay damages and costs, and if the claimant can fund the litigation and is not only right but very clearly so, the civil remedy is generally effective. The claimant

is not deterred by the risk of costs,³¹ the untruth of the libel is publicly established; and the claimant is suitably, and sometimes generously, compensated. In many cases where the person who published the libel has no money the victim will be content to ignore it because he, and those who hear it, pay no attention to a defamatory statement from such a source. However, a gravely damaging libel may be published, and repeated, which the victim cannot afford to ignore but where the cost of litigation is prohibitive to him. Legal aid is not available for civil actions of libel or slander,³² It is unlikely that it would ever seem sensible to make public money available for all actions of defamation that private persons might wish to bring. The burden and risk of costs is thus a very grave deterrent indeed. Moreover, the risk of an award of damages being made against him is no deterrent to a person who has no money with which to pay them. Thus if the only sanction against defamation were the possibility of a civil action, that sanction would in practice be

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- 31 In many cases an order for costs in favour of a successful plaintiff will not ensure return of all that he has paid out: the assessment of costs which it is judged right for the defendant to pay may be considerably less than the costs which the plaintiff has incurred. A litigant will be warned of this risk.
- 32 See Legal Aid Act 1974, s.7(1) and Sched. 1, Pt. II, para. 1. The Faulks Committee recommended that legal aid should be made available in defamation cases: Report of the Committee on Defamation (1975), Cmnd. 5909, para. 581. A similar recommendation was made in the Report of the Royal Commission on Legal Services (1979), Cmnd. 7648, para. 13.70. But see Hansard (H.C.), 7 December 1981, vol. 14, Written Answers, col. 281, where the Solicitor General said that he did not propose to make legal aid available in such cases.

available only to the well-to-do and generally be used only against those having some property. But the decision to institute a criminal prosecution would be taken without regard to the means of the accused or the person defamed.

- (5) Although the present criminal offence is very little used, (we have cited the statistics above)³³ it is impossible to know whether the existence of the offence has had any deterrent effect in the past and also impossible to know what the effect might be of the total abolition of criminal sanctions against defamation and the drawing of public attention to that abolition. Provided that the new offence is defined in terms that avoid contravention of the over-riding principles of freedom of expression, and of the criminal law generally, it may be thought unwise to abolish all criminal sanctions in this area of defamation when such sanctions have for so long existed.
- (6) Effective means can be provided to ensure that prosecutions are only pursued in clear cases where there is an undoubted public interest. Such means may be by limitation of the offence to cases which are of sufficient gravity, or by means of a provision for consent to prosecute, or both. We discuss the details of such machinery below.³⁴

33 See para. 2.21, above.

34 See paras. 8.4 and 8.53, below.

3. Provisional conclusion

7.15 We have stated in concise form the main points of the arguments which seem to us to relate to the question whether any offence of criminal libel is required or justified. Our provisional conclusion is that a statutory offence should be created in place of the present law. It is, in our provisional view, clearly required and justified at least to deal with the worst sort of case, namely, the publication of a deliberately defamatory statement which is false and known by the defendant to be false, and where there is a clear public interest in prosecution of the offender. An attack upon a person by means of a deliberate lie, which is gravely defamatory, is, we think, as morally wrong as an attack on his person or property and capable of doing serious harm both to an individual and society generally. In cases of "character assassination" such as this we think it would be difficult to argue that freedom of speech would be unreasonably infringed by the existence of a criminal offence, provided that the offence is kept within narrow bounds.

7.16 Our provisional conclusion, then, is that on balance there should be an offence of criminal defamation aimed at the deliberate and defamatory lie. We invite comment upon it in the light both of the arguments which we have set out in the preceding paragraphs and of the consideration of the very considerable difficulties which we have found³⁵ in formulating a new offence in a way which is both workable in practice and consistent with the limited objectives we have had in mind.

35 See paras. 7.17-7.29, and 8.24-8.41, below.

C. Should any new offence extend beyond the deliberately defamatory statement published with knowledge that the statement is false?

7.17 Our provisional conclusion is that an offence should be retained which would penalise the person who deliberately defames another with knowledge that the defamatory statement is untrue. Before we approach the problems of formulating the possible elements of such an offence, it is necessary to determine whether the offence should extend at all beyond such narrow bounds.

Burden of proving the falsity of the statement

7.18 As a necessary preliminary to determination of the breadth of a new offence, we refer to an issue concerning the burden of proof which we regard as vital to any new offence, however formulated. We have said that, in our view, it should not be a criminal offence to publish the truth about another.³⁶ Under the present law the burden of proving that the defamatory statement is true (and that it is also for the public benefit that it be published) is upon the accused and it is not for the prosecution to prove that it is false.³⁷ We have said that we regard that provision of the law to be unacceptable³⁸ and we propose that in any new offence the burden of proving that the libel is untrue would be upon the prosecution. This is an important change. It is appropriate for the defendant in civil proceedings to be required to prove the truth of his defamatory statement, for the victim should not have to prove that he has not been guilty of some misconduct which another has chosen to allege against him.³⁹ But such a requirement is

36 See para. 7.10, above.

37 See paras. 3.18-3.19, above.

38 See para. 6.9, above.

39 See also Report of the Committee on Defamation (1975), Cmnd. 5909, para. 141.

inappropriate in criminal proceedings. There may be cases in which the defendant has been informed that misconduct has occurred, perhaps in the public service, and has, in the belief that he is acting responsibly, published the allegation. He may be unable to produce admissible evidence from his informants of the truth of the allegations, and, if so, he may be held liable in civil proceedings. It seems to us, however, that the interest of freedom of expression requires that the burden be placed upon the prosecution in a criminal case to prove that the libel was false. Our examination of the proper width of any new offence proceeds upon the basis that the burden of proving publication of an intentionally defamatory statement, and that the statement is untrue, should be upon the prosecution.⁴⁰

1. Honest belief in the truth of the statement

7.19 We have no doubt that any new offence must not extend so far as to penalise any person who has published an untrue defamatory statement in the honest belief that it was true, having formed that belief on reasonable grounds. Such a person has taken the risk of publishing a defamatory statement and, in civil proceedings, if he cannot justify the statement he will be ordered to pay damages. But it does not seem to us that the social evil of the results of the publishing of a defamatory statement in such circumstances requires the availability of a criminal penalty. If a person who believes on reasonable grounds that a defamatory statement is true could be punished by the criminal law for publishing it, then the interference with freedom of expression would, in our view, be unacceptable.

40 See further para. 8.3, below.

7.20 Between the person who publishes the untrue defamatory statement knowing it to be false, and the person who does so believing it to be true on reasonable grounds, there is a wide area of gradations from deliberate wrongdoing to the honest discharge of what may be seen as a public duty. The problem is to determine what degree of deliberation or irresponsibility or negligence with reference to the publication of the false defamatory statement should justify the imposition of a criminal sanction. It is convenient to work across this wide area from honest innocence towards deliberate publication of what is known to be false.

2. Negligence

7.21 The first clearly distinguishable stage is that of the person who honestly believes the untrue defamatory statement to be true but does so on grounds which, by the objective standard of the reasonable man, are not reasonable. That is the concept of negligence. In our provisional view, the person who is negligent should not for that reason alone be guilty of a criminal offence. The degree of blameworthiness in cases of negligence may vary greatly. Harm done by mere negligence, without recklessness, is not normally treated as criminal unless the social consequences of negligence in a particular context are seen as being so grave that punishment must be imposed to enforce reasonable standards of care: an obvious example is the offence of careless driving which is less grave than that of reckless driving.⁴¹ We have emphasised that it should not be criminal to publish the truth of another.⁴² If a man honestly but mistakenly believes that what he publishes is true, he is mistaken as to the essential fact which, upon our basic proposal,

41 See Road Traffic Act 1972, ss. 2-3.

42 See para. 7.10, above.

could make what he did criminally wrongful.⁴³ We think that the social consequences of the negligent publication of untrue defamatory statements, honestly but mistakenly believed to be true, are not such as to require the act to be treated as criminal. The protection of freedom of expression should, we think, at this point prevail. The misguided, and the foolish, and the partisan, and even the unreasonable, should not be open to punishment by the criminal law for publishing what they honestly albeit mistakenly believed to be true. Accordingly, a defamatory statement made in these circumstances should in our view not fall within the bounds of any new criminal offence.

3. Recklessness

7.22 The second clearly distinguishable stage between honest innocence and deliberate publication of what is known to be false is the state of mind denoted by the term "recklessness". In their 1979 Report on Unfair Publication: Defamation and Privacy, the Australian Law Reform Commission recommended an offence which would extend to cases where the accused "knows the statement to be false or is recklessly indifferent to the question of truth or falsity".⁴⁴ We have considered that Report and the recommendations made in it with the greatest respect, and have derived much assistance from it, but our provisional conclusion is that the new offence which we propose should not be capable of commission by recklessness.

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

44 The proposals provided that defences available in a civil action for defamation should apply to the new offence: see Report, para. 205. These defences include truth, fair comment, absolute and limited privilege, fair report, protected dissemination and triviality.

7.23 If recklessness as to the falsity of the defamatory statement were defined in accordance with our Report on the Mental Element in Crime,⁴⁵ the offence could be committed if the defendant realised that the statement might be untrue, and, on the assumption that any judgment by him of the degree of that risk was correct, it was unreasonable for him to take that risk of it being untrue. On the other hand, if the new offence provided that it could be committed by recklessness as to untruth, without any definition of the meaning of recklessness, the decisions in Commissioner of Police of the Metropolis v. Caldwell⁴⁶ and R. v. Lawrence (Stephen)⁴⁷ would appear to cause the accused to be guilty if:

- (i) the circumstances were such as would have drawn the attention of any ordinary prudent individual to the possibility that the defamatory statement was untrue;
- (ii) the risk of the defamatory statement being untrue was not so slight that an ordinary prudent individual would feel justified in treating it as negligible;
- (iii) the defendant either failed to give any thought to the possibility of the risk of the defamatory statement being untrue, or, having recognised that there was a risk, nevertheless went on to take it.⁴⁸

45 (1978) Law Com. No. 89, para. 65 and Appendix A draft Criminal Liability (Mental Element) Bill, cl. 4(2).

46 [1982] A.C. 341.

47 [1982] A.C. 510.

48 See R. v. Pigg [1982] 1 W.L.R. 762, 772 (citation by Lord Lane C.J. of Lord Diplock in R. v. Lawrence (Stephen) [1982] A.C. 510, 526).

7.24 It seems to us that the proposed offence of criminal defamation is unsuited for either concept of recklessness. Examples of the use of recklessness in current criminal statutes are section 1 of the Criminal Damage Act 1971 and section 1(1) of the Sexual Offences (Amendment) Act 1976.⁴⁹ In the case of damage or destruction of the property of another, if the risk of such damage is perceived there can in the ordinary case be no reason for doing the act which does the damage. In the case of sexual intercourse with a woman, if there is the possibility of the woman not consenting to it there can be no reason or justification for a man to persist in the act. It is for that reason that recklessness in such cases is treated as the alternative to intention. On the other hand, in the case of the publication of a defamatory statement with reference to which there is a perceived risk that it may be untrue, there may well be good reason for making the publication: the statement may in fact be true and, if it is, a man who publishes it is exercising his right of free expression, and may be acting in a way which he believes to be for the public benefit. Put at

49 Sect. 1(1) of the Criminal Damage Act 1971 provides that "A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence." Sect. 1 of the Sexual Offences (Amendment) Act 1976 provides that "For the purposes of s.1 of the Sexual Offences Act 1956 (which relates to rape) a man commits rape if - (a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it; and (b) at that time he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it; ... (2) It is hereby declared that if at a trial for a rape offence the jury has to consider whether a man believed that a woman was consenting to sexual intercourse, the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction with any other relevant matters, in considering whether he so believed."

its shortest, then, the harm done by rape or criminal damage can never justify a man taking any unjustifiable or substantial risk,⁵⁰ but the requirements of free speech may justify such a risk when making a defamatory statement. This in our view is a very substantial argument for not extending the scope of any new offence to defamatory statements made recklessly.

7.25 There is another consideration which in our view militates against such an extension. Whichever test of recklessness⁵¹ is adopted, the jury would have to consider the nature of the risks taken by the defendant, which it seems to us would entail consideration of questions such as -

(i) how unlikely was it that the defamatory statement was untrue; or

(ii) was there any, and if so, what, public interest or benefit in publication.

We do not think that such complications could be avoided by making special provisions defining, for example, the circumstances capable of being treated as relevant in assessing the "reasonableness" of taking a risk that the defamatory statement was untrue. Issues would inevitably arise in some cases as to the "reasonableness" of publishing a defamatory statement which, to the knowledge of the defendant might be untrue, but which he alleges ought to be published for the public benefit and in the public interest. We do not consider that matters of this nature, which involve judgments on such issues rather than findings of fact, are suitable for decision by a jury in a criminal trial.

50 See [1982] Crim. L.R. 447 (comment on R. v. Pigg).

51 See para. 7.23, above.

4. No belief in the truth of the defamatory statement

7.26 Another stage in that area between honest innocence and deliberate publication of what is known to be false is that in which the man, who publishes the deliberately defamatory and untrue statement, has at that time no positive belief in its truth. Should the absence of honest belief in the truth of a deliberately defamatory statement, which is proved to have been untrue, in all cases result in guilt of this offence? Provisionally, we think not. This category of "no honest belief" seems to us to be too wide. If the accused publishes what he knows to be false, he has published a lie. If the accused publishes a damaging and defamatory statement, without any positive belief in its truth, his state of mind may vary between, on the one hand, one which differs hardly at all from knowledge of falsity, when he knows that in all probability the allegation is false; and, on the other hand, one no worse than ordinary negligence, where he has formed no belief that the allegation is true, but thinks that it probably is true, and that its importance justifies publication.

7.27 The answer to the question of how to deal with the man who has no positive belief in the truth of a defamatory statement must depend upon assessment of the degree of care which may rightly be demanded from those who publish defamatory statements, and in particular from journalists and those who engage in public controversy. We can understand a desire to penalise anyone who has not formed an honest belief in the truth of a defamatory statement which he has published; but the requirement of honest belief in truth as an essential justification for publication of a defamatory statement is unsatisfactory if, as we think likely, some honest and responsible people do on occasions publish defamatory statements without having formed any positive belief as to their truth but having

judged only that they may well be true and that it is reasonable to publish them in the public interest. If the offence were defined so that it could be committed on proof of an absence of honest belief in the truth of the defamatory statement, it seems to us that it would be necessary to enact a special provision which would defend the honest journalist, or person in a similar position, from conviction for a criminal offence. That provision might be to the effect that the defendant should not be convicted if, despite having no belief in the truth of the defamatory statement, he believed on reasonable grounds that the matter published ought in the public interest to be published and he was not actuated by malice towards the person defamed. However, it seems to us that there is a risk of a new law of criminal defamation, defined in such terms and even with such a protecting provision, causing unreasonable interference with the freedom of expression. A person might be deterred from writing what he wishes to write by a fear that a jury might find that he was not entitled to its protection. Furthermore, such a provision would complicate the trial and cause difficulty for the jury. We think that there is much to be gained from keeping any new offence of criminal defamation within a definition as clear and simple as can be achieved while serving the essential social purpose.

5. Knowledge or belief in the falsity of the statement

7.28 The final stage in the area between honest innocence and deliberate publication of what is known to be false is the deliberate publication of what is known or believed to be false. Only the person who published what he knew or believed to be a lie would be guilty. This is a significantly narrower range of possible liability than those hitherto considered: there is a significant distinction between an absence of belief in the truth of a defamatory statement and a belief in its

untruth. We can see no objection of principle to criminal liability expressed in such terms. If a person can be shown to have deliberately published a false defamatory statement which he knows or believes to be false, our provisional view is that he ought to be liable under any new offence of criminal defamation.

6. Provisional conclusion

7.29 In our review of the arguments for and against the provision of a new offence in place of common law criminal libel, we came to the provisional conclusion that an offence was needed to penalise those cases where, in addition to the presence of a public interest in prosecution, the defendant has published a deliberately defamatory false statement which is known by him to be false.⁵² We have considered whether there are other situations which require an offence, and our provisional conclusion is that any new offence of criminal defamation should in substance be limited to cases where the defendant has invented, or knows or believes that someone else has invented, the defamatory statement; in other words, where he has published a deliberately defamatory false statement which he knows or believes to be false. An offence so limited is in our view consistent with a proper balance between the requirements of freedom of speech and the public interest in preventing publication of deliberate

52 See para. 7.16, above.

and defamatory statements.⁵³ We are aware that an offence having these elements will necessarily apply to only a few defamatory publications, because few will fall within the category of statements known or believed to be untrue. Our conclusions are provisional in character and we welcome comment upon them. If there is felt to be a need for a wider criminal liability, for example, liability for defamatory statements which are made either recklessly or negligently, we hope that those commenting will indicate their views and their reasons for favouring an extension of liability. Equally we hope that those who favour the abolition of criminal libel without any replacement will comment on our conclusions. We recognise that some may feel that the offence which we propose would be so narrow and of such limited utility as not to be worth enacting; the best solution on this view would again be to abolish criminal libel without replacement. We welcome comment from any who take this point of view, as well as from any who agree with our provisional conclusion.

7.30 Before examining in Part VIII of this Working Paper how an offence of criminal defamation, limited in the way we have just described, might be formulated, several issues remain to be considered. These we have

53 We have no reason to believe that an offence which is limited in this way would contravene any of the provisions of the European Convention on Human Rights. In X v. Federal Republic of Germany (1975) E.C.H.R. Decisions and Reports, 3, p. 159, the European Commission were of the opinion that a conviction for one of the crimes of defamation under the German Criminal Code (see para. 4.14, above) was an interference with the applicant's freedom of expression contrary to Art. 10(1), but that such an interference was fully justified under the terms of Art. 10(2) as being "a measure necessary ... for the protection of the reputation of others." The applicant's case was held to be inadmissible. Cf. Lord Diplock's observations in Gleaves v. Deakin [1980] A.C. 477, 482 on the compatibility of the present offence of criminal libel with the European Convention: see paras. 1.5, 2.17 and 6.11, above.

grouped under two separate headings. Under the first, we examine three specific problems in order to see whether they are of such importance as to cause us to alter our provisional conclusion regarding the basis of any new offence. Under the second heading, we consider whether further offences may be needed for particular categories of people who might be thought to be in need of some special protection against defamatory statements.

D. Specific problems relating to a new offence

1. Libels in respect of past misconduct

7.31 Our proposal that there should be no criminal liability for the publication of statements which are true⁵⁴ does mean that in one respect we may be differing from a conclusion of the Faulks Committee. That Committee considered that if criminal libel were to be abolished another remedy would be required, inter alia, for "libels on people who in the distant past have committed some crime or who have otherwise misbehaved themselves".⁵⁵ The Committee did not express any conclusion on whether the other remedy would be one which lay in the field of the criminal or the civil law but we are not making proposals for the creation of any other remedy. At present, of course, such a defamatory statement would not be a criminal offence if it were both true and published for the public benefit.⁵⁶ Our proposals involve the abolition of the requirement that the publication be for the public benefit.⁵⁷ We accept that under our proposals it would be possible for a person, if he wishes to do so,

54 See para. 7.10, above.

55 Report of the Committee on Defamation (1975), Cmd. 5909, para. 445(e).

56 Libel Act 1843, s.6: see paras. 3.18-3.19, above.

57 See para. 7.10, above.

to go on a "muck-raking" enquiry and to publish the results of what he found out. To do this of a public figure would at present probably be no crime but to do it of a private individual probably would be unless there was some public benefit in the publication. There may be a possible danger here in thus removing part of the existing criminal law, especially since there would be no liability in a civil action;⁵⁸ however, in our view, this aspect of the law is but a part of the larger question of whether there should be a general law against invasions of privacy. The Younger Committee considered this matter in detail and reported in 1972.⁵⁹ The Committee decided that no general law of privacy was required at present.⁶⁰ In relation to the question whether the law provided a possible protection against the publication of private but accurate information, the Committee concluded that, although criminal libel in theory provided some protection in this field, its usefulness was in practice very limited.⁶¹ We do not therefore think that our proposed abolition of criminal libel in the field of true statements will undermine any of the reasoning upon which the Younger Committee reached its conclusion.

7.32 We are fortified in the view which we have expressed above by our consideration of the passage of the Rehabilitation of Offenders Act 1974. Clause 8 of the Bill provided a civil remedy as the main enforcement provision of the Bill. In its original form this clause excluded the defence of justification in actions for defamation founded on the publication of matters tending

58 In some instances, however, there may be liability in a civil action for breach of confidence.

59 Report of the Committee on Privacy (1972), Cmnd. 5012.

60 Ibid., paras. 33-44.

61 Ibid., Appendix I, para. 7.

to show that the plaintiff had committed or been tried for a "spent" offence.⁶² This clause was extensively amended because of opposition on the grounds that it interfered with the freedom to publish the truth. Section 8 of the Act now preserves the defences of justification, fair comment and privilege with the sole qualification that truth is no defence if the publication is "proved to have been made with malice".⁶³ We are impressed by the fact that, with the limited exception of proof of malice, the truth is allowed to prevail as a defence. These objections were made in the light of a civil remedy for damages; they seem to us far stronger in the context of a criminal offence of defamation. In our view, to provide a criminal sanction relating to true statements concerning past misconduct generally would be inconsistent with the attitude recently shown by Parliament.

2. Breach of the peace

7.33 It has been suggested that it should only be a crime to publish a defamatory statement if that statement has the tendency to lead to a breach of the peace.⁶⁴ We have already seen⁶⁵ that in the 19th century the law seemed to be moving in that direction and that long ago one of the purposes of criminal libel was to cut down the amount

62 A "spent" conviction is defined in the Rehabilitation of Offenders Act 1974, s.1. Broadly speaking, certain convictions become spent, and the person convicted rehabilitated, after the expiry of certain defined periods, the duration of which differs according to the length of sentence.

63 Sect. 8(5).

64 See in particular The Times, 17 May 1977 and 28 February 1980 (editorials). As to what constitutes a "breach of the peace", see R. v. Howell (Errol) [1982] Q.B. 416 and R. v. Chief Constable of Devon and Cornwall, Ex parte Central Electricity Generating Board [1982] Q.B. 458.

65 Paras. 2.5 and 2.14, above.

of duelling. But in R. v. Wicks⁶⁶ in 1936 it was held that a tendency to lead to a breach of the peace was not a requirement of criminal libel. We would certainly not consider penalising unintended defamation, by honest mistake, which has a tendency to lead to a breach of the peace.⁶⁷ But, in our view, it would also be wrong to propose that a tendency to lead to a breach of the peace should be the basis of any new offence of criminal defamation penalising only deliberate and defamatory liars, such as we have provisionally proposed above. There may well be defamatory statements of the utmost gravity, from the point of view of their effects upon individuals or society, where nonetheless there is no question of their having a tendency to lead to a breach of the peace. The criterion is therefore incompatible with the principal purpose of the possible offence which we have in mind. Moreover, although the criterion of a tendency to lead to a breach of the peace is essentially an objective one upon which the views of a jury would be decisive, we do not think that the elements of any proposed offence should be such that they might encourage someone to think that his reaction to a defamatory statement should be that he might cause a breach of the peace; still less should he be encouraged to think that, in order that a conviction might be secured, he should give evidence that such might have been his reaction. To make a tendency to lead to a breach of the peace the criterion for liability would represent a major alteration in the purposes of the offence. It would become an offence which was essentially linked to public order and would have a substantial, although not complete, overlap with section 5 of the Public Order Act 1936.⁶⁸ Such an overlap would, in our view, be both confusing and undesirable.

66 (1936) 25 Cr. App. R. 168: see para. 2.15, above.

67 See paras. 7.5 and 7.11, above.

68 See paras. 5.2-5.4, above.

3. Punitive damages and the criminal law

7.34 The Faulks Committee recommended the abolition of punitive damages⁶⁹ in civil libel actions.⁷⁰ The Committee recognised that if this proposal were accepted it might result in more prosecutions for criminal libel.⁷¹ Although there is no present intention of implementing the Faulks Report generally, this particular proposal has recently been revived.⁷²

7.35 Many of the cases where at present a jury might award punitive damages in a civil action are ones where a conviction might lie for our proposed offence of criminal defamation. It may well be that alteration of the law of criminal libel might in theory have some effect on the arguments⁷³ which have been put forward for and against punitive damages. However, we do not consider that any inability to award punitive damages in civil actions should affect the criminal law and we have not taken into account, in considering a new offence, the possible abolition of punitive damages.

69 So far as is relevant in the present context, punitive damages may be awarded where a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the compensation payable for the defamation and he does so knowing that his conduct was wrongful or recklessly disregarding the wrongfulness: see Cassell and Co. Ltd. v. Broome [1972] A.C. 1027.

70 Report of the Committee on Defamation (1975), Cmnd. 5909, para. 360.

71 Ibid., paras. 41 and 447.

72 Lord Wigoder introduced an amendment to the Administration of Justice Bill which would have abolished punitive damages in actions for defamation, but after a debate the amendment was withdrawn: see Hansard (H.L.), 6 May 1982, vol. 429, cols. 1293-1299.

73 See ibid., and Report of the Committee on Defamation (1975), Cmnd. 5909, paras. 351-359.

E. Are there categories of people who require special protection?

7.36 The offence which we have provisionally proposed is intended to be a narrow one. This will mean that there may be many serious untrue defamatory statements not subject to criminal sanctions. This raises the question whether further offences may be needed for particular categories of people who might be thought to be in need of some special protection from defamatory statements, in particular, persons prominent in the public service, the Sovereign and members of the Royal Family, and police officers.

1. Persons prominent in the public service

7.37 We have here in mind such persons as Members of Parliament, the judiciary, those in senior positions in the Civil Service and in other public bodies. The class of persons might be extended to include those in senior positions in the churches, public enterprises, trade unions, etc. Not only are such persons peculiarly vulnerable to defamatory statements made about them but it may be argued that our society has a particular interest in protecting the reputation of those persons who are selected to lead it. Moreover, such people may, by reason of their position, feel constrained from bringing a civil action to defend themselves and their reputations against defamatory attacks made upon them.

7.38 Any offence based upon the protection of persons prominent in the public service would resemble the offence of scandalum magnatum which was obsolete for centuries before its final abolition in 1887.⁷⁴ We do not believe that Parliament or the public would countenance an offence of criminal defamation giving wider protection to those

74 Statute Law Revision Act 1887, and see para. 2.2, above.

distinguished by their position and function from that which the law accords to others. This objection is one of principle. The second objection is more technical but is of some importance. It would be impossible to define with sufficient or satisfactory certainty who would fall within the scope of the special protection. A general reference to "prominent" or "senior" persons in the public service would be far too vague. Possibly the only satisfactory means of definition would be by reference to a specified list of "public officers", but this would be as cumbersome as it was controversial and would require frequent amendment. Finally, judges and Members of Parliament do at present have certain special protection by reason of the doctrine of contempt of court⁷⁵ and contempt of Parliament.⁷⁶ In the very exceptional cases where special protection is thought to be required it is already given by the law, albeit not by means of the law of criminal defamation. For these reasons we do not propose a special offence based on defaming persons prominent in public life.

2. The Sovereign and members of the Royal Family

7.39 The Faulks Committee singled out libels on the Sovereign or a member of the Royal Family as one of the classes of cases for which another remedy would be needed

75 See para. 5.8, above. It should be noted that we have recommended a specific offence to supplement the protection afforded by the law of contempt, which at present prohibits, in broad terms, scurrilous abuse of a judge acting as a judge, and attacks upon the integrity or impartiality of a judge or court: see Report on Offences relating to Interference with the Course of Justice (1979), Law Com. No. 96, Appendix A, cl. 13. The proposed offence is aimed primarily at preserving the integrity of the course of justice rather than the special protection of a limited class of individuals.

76 See T. Erskine May, Parliamentary Practice 19th ed., (1976), p. 136.

if criminal libel were abolished.⁷⁷ We doubt how far criminal libel is, in practice, relevant in considering the special position of the Sovereign and the need to protect the Sovereign from defamatory statements. We are aware of only one case in the last 150 years or so in which criminal libel proceedings have been taken in respect of a libel on the Sovereign and in that case the prosecution successfully undertook to prove the untruth of the statement.⁷⁸ We do not consider that the changes we propose to the law of criminal defamation will in practice make any difference to the Sovereign's position.

3. Police officers

7.40 It has from time to time been suggested that criminal libel is a useful weapon for dealing with those who make false allegations of a serious kind against police officers.⁷⁹ Police officers are obviously in a vulnerable position in this regard. A defamatory statement made against a police officer has a particular seriousness when its purpose is to prevent or impede the investigation of a criminal offence or to influence the

77 Report of the Committee on Defamation (1975), Cmnd. 5909, para. 445(b).

78 R. v. Mylius, The Times, 2 February 1911. The defendant acted as an agent in England for the distribution of a broadsheet published in Paris, which contained an allegation that King George V had committed bigamy in 1893. He was convicted on three counts of criminal libel and sentenced to twelve months' imprisonment.

79 See e.g., J.R. Spencer, "Criminal Libel - A Skeleton in the Cupboard", [1977] Crim. L.R. 465, 472. An example of a prosecution for criminal libel involving an allegation of misconduct by a police officer is R. v. Leigh, The Times, 9 and 19 March 1971. The defendant, while awaiting trial on a charge of fraud, employed five men to distribute 5,000 handbills accusing the detective involved in the case of being persistently drunk: the defendant was sentenced to six months' imprisonment.

outcome of a prosecution in which that officer will be giving evidence for the Crown. The offence which we have provisionally proposed above would be available for use in relation to allegations against police officers as it is available for use in relation to allegations made against any other person. The question is whether police officers require some further or additional protection.

7.41 First, we must examine the other means of redress which are open to the police at present. A police officer may exercise his right as a member of the public to bring a civil action for defamation; the relevant regulations prescribe that the Police Federation may use its own funds to defray the legal costs incurred by a member (who include officers up to the rank of superintendent) seeking to bring such an action in respect of a statement relating to his conduct as a member of the police force or which disparages him in the office of constable or otherwise casts doubt upon his fitness to be a member of a police force.⁸⁰ According to figures supplied to us in 1980, the Police Federation has assisted 10 of its members to commence civil actions for libel since 1976 and advised against proceedings being taken in a much larger number of cases which had been referred to them by aggrieved members. The majority of such cases were not pursued because of the lack of means of the proposed defendant.

7.42 Next, the making of defamatory statements concerning police officers may in many cases amount to the commission of the summary offence under section 5(2) of the Criminal Law Act 1967 of wasting police time.⁸¹ Furthermore, if the circumstances warrant it, a prosecution might lie for the common law offence of attempting to

80 The Police Federation (Amendment) Regulations 1977, S.I. 1977/583.

81 See para. 5.9, above.

pervert the course of justice.⁸² Neither of these offences is, however, concerned directly with the protection of a police officer's reputation so much as with the wider public interest in maintaining the integrity of the administration of justice.

7.43 In many instances the defamatory allegation is that the police officer has himself committed some criminal offence. In our Report on Offences relating to Interference with the Course of Justice, we recommended that a new criminal offence be created of "false implication of offences".⁸³ If our recommendation in the above Report is implemented by Parliament, we consider that many of the matters of which police officers may at present rightly complain in relation to protection of their position would be removed or alleviated by the creation of this offence.

7.44 We are aware that allegations against police officers have to be investigated and taken seriously, however absurd they may appear to be, and that many of the allegations are of a malicious nature and motivation. Nevertheless, we are opposed to any proposal that police officers should be given some special protection. There are, in our view, strong reasons of principle why police officers should not be singled out in this way from other members of society generally. It is one of the important traditions of this country that police officers are to be treated as closely as possible on the same terms as other members of society and we see no need to give them special protection against malicious or unpleasant complaints about them.

82 Ibid.

83 (1979) Law Com. No. 96, para. 3.97 and Appendix A, draft Administration of Justice (Offences) Bill, cl. 23: see further para. 5.9, above.

7.45 We would welcome views on whether special provision should be made in relation to any of the three groups we have mentioned above or in relation to any other groups of people. If it is suggested that special provision is required, we hope that those making such suggestions will indicate what is the special protection which they would wish to see recommended.

PART VIII

A NEW OFFENCE OF CRIMINAL DEFAMATION

A. Introduction and summary

8.1 In Part VII of this Working Paper we gave reasons for provisional conclusions that defects in the present law of criminal libel required the abolition of the present offence; that criminal libel should not be abolished without replacement by a new offence; and that a new offence should be narrowly restricted and limited to cases where an untrue defamatory statement is shown to have been published with knowledge or belief that it was false. Defining the elements of an offence within those limits has raised many problems and they are dealt with in this Part. If any wider offence than that which we have provisionally proposed is considered to be desirable or necessary, then we ask for suggestions as to the ways in which it should be formulated in the light of the problems and difficulties described in this Part of the Working Paper.

8.2 The purpose of the new offence of criminal defamation which we provisionally propose is to penalise anyone who publishes an untrue statement defamatory of any person, intending to defame him and knowing or believing the statement to be untrue. Its elements, which we consider in detail below, may be summarised as follows¹ -

1 It should be noted that we set out the constituent elements of the proposed offence not as a draft of a future Bill but merely to indicate the concepts we have in mind.

The prohibited conduct

- (a) No statement should be the subject of criminal proceedings unless it was untrue, defamatory, and likely to cause the victim significant harm; the burden of proving these elements would lie on the prosecution (paragraphs 8.3-8.7).
- (b) "Defamatory" should be defined as "matter which in all the circumstances would be likely to affect a person adversely in the estimation of reasonable people generally" (paragraphs 8.8-8.13).
- (c) "Publication" would extend to any means of communication, whether by broadcasting, writing, speech or otherwise (paragraph 8.14).
- (d) It would be necessary to prove that the defendant himself was a party to the defamatory publication itself and not merely to the publication of the book, etc. in which it was contained (paragraph 8.15).
- (e) Publication to the person defamed alone would not suffice: publication would have to be to some third party (paragraph 8.16).
- (f) Publication of defamatory material about the dead or about a company struck off the register would not be a criminal offence (paragraphs 8.17-8.18).

The mental element

- (g) The defendant must have intended to defame and must have known or believed the statement to be untrue. The burden of proving the intent to defame should rest on the prosecution; as to the defendant's knowledge or belief, the burden should

rest on the prosecution to prove that the defendant knew or believed the statement to be untrue, or alternatively rest on the defendant to prove on a balance of probabilities that he did not know or believe the statement to be untrue (paragraphs 8.20-8.44).

Defences

- (h) The defence of absolute privilege would apply to the offence to the same extent as it applies to civil proceedings for defamation. There should be a special defence for a person who is under a duty to pass on a statement which he does not necessarily believe to be true (paragraphs 8.45-8.49).

Mode of trial and penalty

- (i) The offence should be triable only on indictment, with a maximum penalty of two years' imprisonment or a fine or both (paragraphs 8.50-8.51).

Procedural provisions

- (j) The Director of Public Prosecutions should have sole responsibility for the conduct of proceedings (paragraphs 8.53-8.56).
- (k) The defendant should be obliged to give particulars before trial of the grounds of his not believing the statement to be false (paragraph 8.57).
- (l) The defendant should be obliged to give notice before the trial if he requires the prosecution to prove the falsity of the statement in question (paragraph 8.58).

- (m) There should be a provision corresponding to section 13 of the Civil Evidence Act 1968 (fact of conviction of any offence to be conclusive evidence of the commission of the offence) (paragraph 8.60).
- (n) Where the defendant has made no admission as to the falsity of the statement in issue, and the jury has returned a verdict of not guilty, there might be a provision whereby the court could require the jury to return a special verdict as to whether the statement in question was true (paragraphs 8.61-8.63).
- (o) Where both civil and criminal proceedings are in progress relating to the same publication, the judge in the civil action should have a discretion to stay that action until after trial of the criminal offence (paragraphs 8.64-8.65).

B. The prohibited conduct (actus reus)

1. Untrue statement

8.3 In Part VII we took the view that publication of statements which were true should not be capable of constituting a crime of defamation.² We thought this principle should apply even in those circumstances in which the statement related to some misbehaviour in the distant past, and where the publication was an intrusion upon the privacy of the person about whom it was made.³ An essential element of the proposed offence is that only a statement which is untrue may be the subject of proceedings for criminal defamation. The burden of proving that the

2 See para. 7.10, above.

3 See paras. 7.31-7.32, above.

statement is untrue should be on the prosecution; we have discussed this above.⁴

2. Exclusion of trivial defamation

8.4 It is our purpose that any new offence of criminal defamation should be used only in cases of importance and where there is a clear public interest in the bringing of criminal proceedings.⁵ Effective means must be provided to ensure that the law of criminal defamation is not invoked in cases which are trivial. We propose below that proceedings for the new offence of criminal defamation should not only require the consent of the Director of Public Prosecutions but should in all cases be conducted by him.⁶ A judgment independent of any person who regarded himself as defamed would therefore be made as to whether a prosecution was required in the public interest or whether the injured party should be left to his civil remedy. We believe that in the vast majority of cases this requirement of consent would be an effective means of excluding the trivial defamation.

8.5 Under the present law, it has been said, it is for the jury to say whether the libel is so serious as to be a crime.⁷ This means that the judge has the power to stop a case going to the jury if, as a matter of law, the libel is so trivial that it could not amount to a criminal libel. If the judge has not stopped the case, the jury must acquit if in all the circumstances they do not regard the defamatory statement as sufficiently serious. We think that this power of the judge and jury is an important safeguard in addition to the requirement of the consent of

4 See para. 7.18, above. By the untruth of the statement, we refer to its substantial untruth: cf. Defamation Act 1952, s.5.

5 See para. 7.14(3) and (6), above.

6 See paras. 8.55-8.56, below.

7 See paras. 3.6-3.7, above.

the Director of Public Prosecutions. For this reason, the definition of the offence must be such as to exclude the trivial defamation.

8.6 For the purposes of a statute it would clearly be undesirable to adopt the test referred to in the existing authorities. The judges have not been seeking to formulate a precise definition but rather to express a general concept. In a statute a precise formulation is required and it would clearly be undesirable to adopt the circularity of stating that a libel is only criminal when it is sufficiently serious to be a crime.⁸ The precise technique for excluding the trivial defamation is essentially a matter for the draftsman of the Bill which will be annexed to our Report. For present purposes we are seeking comments on the concepts which are discussed in this Working Paper in order that we may take them into account in the preparation of the Report and draft Bill. One possible way of excluding the trivial defamation is to provide that the prosecution must prove that the harm likely to be suffered in consequence of the defamation was not insignificant. The Australian Law Reform Commission, in their draft offence, have gone rather further than this: they refer to defamation which causes "serious harm".⁹ Another possible word for use in this connection might be "substantial" harm.

8 See para. 6.10, above.

9 Unfair Publication: Defamation and Privacy, (1979), Report No. 11, Appendix C, draft Commonwealth Bill for an Unfair Publication Act, cl. 56: "with intent to cause serious harm to a person (whether the person defamed or not) or with knowledge of the probability that the publication of the defamatory matter will cause serious harm to a person (whether the person defamed or not) ...". Cl. 57(1) further provides for a lawful excuse to a charge of the new offence if in the circumstances the defendant would have had a defence available under the Act to an action of defamation: and cl. 18 provides for a defence of triviality to a defamation action if "the defamatory matter and the particular circumstances of its publication were such that the plaintiff was not likely to be harmed".

8.7 Proof of likelihood of harm should rest upon the jury's assessment of the likely effect of the defamatory statement upon the particular person defamed. It should not be necessary for the prosecution for these purposes to prove that the defendant foresaw or intended the infliction of such harm. Nor would it be appropriate to provide that the required degree of harm should be such as would have been suffered by a reasonable person; the defendant must have known who he was defaming and he should take his victim as he finds him. Furthermore, it would be wrong to introduce at this point the question whether the defendant knew or believed the defamatory statement to be false. For reasons which we discuss below,¹⁰ the issue of the knowledge or belief of the defendant that the defamatory statement was untrue may require special procedural rules and, if this be the case, that issue should be excluded from the question of triviality. Even if no special procedural rules are required, we consider that the issue of triviality should be divorced from the knowledge or belief of the defendant and should be judged simply from the likely results to the person defamed.

3. "Defamatory" statements

8.8 To commit the offence of criminal defamation the defendant must have published a statement which is defamatory and, in our view, the prosecution should be required to prove that it was defamatory. But should there be a statutory definition of what is defamatory? There are several possible ways of dealing with this question.

10 See paras. 8.24 et seq., below.

(a) Absence of definition

8.9 The first possibility would be to leave the meaning of "defamatory" without a statutory definition, as is the case with the civil law now. We have already noted¹¹ that the meaning of "defamatory" has changed over the years and it may continue to be modified by the courts unless or until a statutory definition is provided for both the criminal and the civil law. It may be thought that if "defamatory" is defined for the purposes of the new criminal offence, and is not defined for civil proceedings, a risk is created of divergence between the definitions applicable in the civil and criminal courts. It does not seem to us that this risk is great or that any serious inconvenience is likely to arise if the risk became a reality. On balance, it would seem unsatisfactory not to provide a definition for such an important element in a new criminal offence.¹² How, then, should the word be defined?

(b) The Faulks Committee definition

8.10 One possible definition is that proposed by the Faulks Committee for civil defamation, that is, "matter which in all the circumstances would be likely to affect a person adversely in the estimation of reasonable people"

¹¹ See paras. 3.3-3.4, above.

¹² Both the Australian and the Western Australian Law Reform Commissions recommended statutory definitions of "defamatory matter" which would apply both to the civil law remedies and to the proposed criminal offences: "published matter concerning a person which tends - (a) to affect adversely the reputation of that person in the estimation of ordinary persons; (b) to deter ordinary persons from associating or dealing with that person; or (c) to injure that person in his occupation, trade, office or financial credit": see A.L.R.C., Unfair Publication: Defamation and Privacy (1979), Report No. 11, para. 84 and L.R.C. (Western Australia), Report on Defamation (1979), Project No. 8, para. 5.1.

generally".¹³ While acceptable for the purposes of civil defamation, is this definition, notwithstanding the proposed provision as to triviality, such as to make the proposed offence unduly wide unless subject to restriction?

(c) Injury to trade or occupation

8.11 Another possible course would be to impose, or to add to any provision about triviality, a requirement as to the nature of the injury or harm likely to be caused by the defamatory statement. Thus the test might require proof that in all the circumstances the statement would be likely to injure a person in relation to his occupation, trade, profession or calling. That is one of the criteria under the present law for slander to be actionable without proof of special damage.¹⁴ No doubt many cases which might be thought sufficiently serious to justify proceedings would fall within such a limitation but we think that it is undesirable to limit a general offence in this manner, since defamation can cause serious harm in other ways.

(d) Economic loss

8.12 It would be possible to provide that a defamatory statement could constitute criminal defamation only if economic loss has in fact been suffered by the person defamed. We think that a test of economic loss is inappropriate in this context. That which, in our view, is the essence of the new criminal offence of defamation which we propose is the publication of a deliberately defamatory statement knowing or believing it to be false and, provided that the defamatory statement is shown not to be trivial, the question whether any demonstrable damage

13 Report of the Committee on Defamation (1975), Cmnd. 5909, para. 65.

14 See Defamation Act 1952, s.2; and see the Slander of Women Act 1891.

has in fact been suffered should be treated as irrelevant. The harm likely to be suffered as a result of the defamatory statement, and any harm in fact suffered, could in some cases be relevant to penalty.

(e) Conclusion

8.13 We see no need for any other restrictive definition. We have also indicated above¹⁵ why it would be inappropriate to make the likelihood of a breach of the peace resulting from the defamatory statement a test or requirement for criminal defamation. We provisionally conclude that there should be a definition of "defamatory" for the purposes of the proposed offence, and that this definition should be the one recommended by the Faulks Committee without further restriction.

4. Mode of publication

8.14 Should the offence be limited to statements which are written or in some other permanent form, or should it extend to cover publication by any form of communication including oral statements? While we propose that any new offence should be much narrower than the present offence of criminal libel, we think that there should be no distinction between written and spoken material in this context, and the offence would in that respect be wider.¹⁶ Any slanderous statements such as may form a part of everyday gossip in the ordinary course of conversation would, however, be excluded from the offence

¹⁵ See para. 7.33, above.

¹⁶ In this one respect the proposed offence would also be wider than the civil law, since in most cases proof of special damage is required for an action for slander. The distinction has been abolished in the code states of Australia and in New South Wales for the purposes of criminal defamation, and proposed for abolition by the Australian Law Reform Commission: see paras. 4.6, 4.7 and 4.9, above.

by the proposal to exclude trivial defamation. We also propose that a new offence should cover publication by any means of communication, whether by writing, broadcasting, speech or otherwise. An oral defamatory statement addressed to a large gathering may be more damaging than some written statements published only to a few and there might therefore be a case for limiting the offence, so far as oral statements are concerned, to those made in public. We think, however, that some statements made in private, such as a whispering campaign about, say, a teacher or doctor, may be so damaging that the possibility of invoking a criminal sanction should not be excluded. Nevertheless, this is a matter upon which we should welcome comment.

5. Participation

8.15 We think that in any new offence of criminal defamation it should be necessary for the prosecution to prove participation in publication according to the normal principles of criminal responsibility. Thus while conviction for aiding and abetting publication might be possible in the appropriate case (if the necessary mental element is present), there would be no vicarious liability. The printers and distributors of written publications (for example, booksellers, newsagents and newsvendors) would not be guilty of the offence merely because the publication contained defamatory material. In all cases guilt would depend upon proof of the requisite mental element which we describe in detail below.¹⁷ Unless it were proved that the defendant knew of the material in question, had appreciated its character, and had believed it to be untrue, no prosecution could succeed. The prosecution of the ordinary bookseller, newsagent etc. would therefore in practice be likely to prove impossible.

17 See paras. 8.20 et seq., below.

6. Scope of publication

8.16 We have noted that publication to the person defamed appears to be sufficient publication for the purposes of criminal libel.¹⁸ In our view, this should no longer be the case: publication to a third party should be required,¹⁹ as in the civil law. We have considered whether a requirement should be made of some wider publication for proof of the crime, such as publication on more than one occasion or publication to more than one person, for example, to a specified number of people or to the public at large. Certainly the more frequent and the more widespread the publication of defamatory matter, the greater is the likelihood of a person's reputation being adversely affected in the estimation of reasonable people generally. On the other hand, it is not difficult to conceive of circumstances where a well-aimed publication of an untrue defamatory allegation to one person holding a key position may cause equal harm. Furthermore, any requirement as to the number of persons to whom publication must take place, or as to the number of occasions on which it must be published, would necessarily be arbitrary²⁰ and would, as we think, wrongly appear to condone publication of a deliberate lie before a smaller number of persons or on fewer occasions.

18 See para. 3.8, above.

19 As to qualified privilege in this context, see para. 8.46, below. Communication by one spouse to another of matter defamatory of a third party should not constitute publication, but communication by a third party to a spouse of matter defamatory of the other spouse should constitute publication. This follows the civil law rules: see Duncan and Neill, Defamation (1978), para. 8.20.

20 Cf. New Zealand Crimes Act 1961, s.216, under which slander is made an offence if the defamatory words are spoken "within the hearing of more than 12 persons ...". However, this offence has now been recommended for abolition: see paras. 4.10-4.11, above.

7. Limitations on publication

(a) Defamation of the dead

8.17 Should the offence extend to cover defamation of the dead? Provisionally, we think not, but there are cogent arguments for both points of view. A deliberate lie about a dead person could be published in order to make money out of a sensational story and the consequences could be damaging to a movement or to an organisation, such as a charity. The lie might be intended to cause that damage. Much distress could be caused to relatives. The wickedness of telling a deliberate lie is not reduced in ordinary morality because the victim has died, and it might be argued that, since one of the justifications for a new offence of criminal defamation to which we have pointed is the damaging effect which serious defamatory lies may have, not merely upon the individual concerned, but upon society in general, there is good reason for criminal proceedings to survive, or to be capable of being instituted after, the death of the person defamed. On the other hand, we are not convinced that there is any need for an extension of criminal liability to deal with defamation of the dead or for a prosecution to survive the death of a person defamed, and in the absence of a demonstrable need we think it important to adhere to the general principle already stated that criminal sanctions should not be any wider in scope than the civil law. Our provisional conclusion is therefore that the offence should extend only to defamation of those living at the time when proceedings take place.²¹

21 In this context it is worthy of note that provision is made for the Broadcasting Complaints Commission, established by the Broadcasting Act 1980, s.17, to consider and adjudicate on complaints of unjust or unfair treatment in sound or television programmes. In cases where the person affected has died, a complaint may be made by his personal representative, or by a member of his family or by some other person or body closely connected with the deceased: s.19(3).

(b) Companies

8.18 A company or other corporation may at present be the victim of a criminal libel²² and we propose no change in this respect. A deliberate lie about a corporation may cause great damage to a large number of people, to employees as well as shareholders, and may affect individuals within a company who are not identifiable as the controlling mind of the company.²³ Thus there are good reasons for enabling prosecutions for any new offence to be brought in respect of libels on companies. It will be sufficient for this purpose if the new offence refers to libels on a "person".²⁴

(c) Group libels

8.19 We have seen that the present law of criminal libel may be capable of penalising a libel on a group or class of persons, whereas the present civil law is not.²⁵ No change in the present civil law is proposed. In general, we see no justification for an offence of criminal defamation to be wider than the existing civil remedy.²⁶ On that basis, the new offence of criminal defamation would apply only in respect of libels on identifiable persons, which would, in addition to individuals, include

22 See para. 3.10, above.

23 E.g., an allegation that a drug should not have been marketed may reflect on the company's research chemists.

24 Under the Interpretation Act 1978, Sched. 1, "person" includes a body of persons incorporate or unincorporate. Thus a company struck off the register would not be capable of being libelled.

25 See para. 3.11, above.

26 See para. 7.3, above.

incorporated and unincorporated bodies.²⁷ In any event, the problems of defining a "group" of persons for the purposes of any new offence, capable of penalising group libels, are so intractable that we doubt whether any satisfactory solution could be found.

C. The mental element in the new offence,
and the burden of proof

8.20 For reasons given in Part VII our provisional conclusions are that a new offence of criminal defamation is required but that it should penalise only those who publish a defamatory statement about another, intending to defame that other person and knowing or believing that the statement was untrue. That proposal of principle has to be translated into terms which are capable of providing a basis for the definition in statutory form of a criminal offence which can be prosecuted and tried satisfactorily in accordance with the essential principles of our law of criminal procedure. Our proposal contains two main elements -

1. for the proof of guilt the defendant must have intended to defame;

and
2. he must be a deliberate liar in the sense that he must have known or believed that the defamatory statement was untrue.

27 As to libels on police officers and public servants, see paras. 7.36 et seq., above. Statements about the government and constitution which incite to violence with the intention of disturbing constituted authority may amount to seditious libel. We have made provisional proposals in relation to this offence in our Working Paper No. 72, Treason, Sedition and Allied Offences (1977), paras. 68-78.

1. Intention to defame

8.21 We think that it is wrong that a person should be criminally liable who does not, at the time of publication, realise that what he has published is in fact defamatory of someone else, i.e., that it would affect another person adversely in the estimation of reasonable people generally. (The question whether the statement was factually true or whether the maker believed it to be true is not relevant to the question whether the statement was defamatory.) There are two broad categories into which unintentional defamation may fall. First, the statement may appear entirely innocent but, because of facts unknown to the maker, was actually defamatory of the person about whom he was speaking.²⁸ Second, the maker of the statement may not realise that the statement referred to any living person although, if he had known that fact, he would at once have realised that it was defamatory of him.²⁹ In civil defamation these problems are dealt with by section 4 of the Defamation Act 1952 which makes detailed provisions for an offer of amends to be made. We do not think that these provisions are suitable for the criminal law; rather, we think that there should be no liability at all in such cases.

8.22 It would be possible to exclude unintentional defamation by requiring that the Crown should prove that the defendant intended to defame another. In the great majority of cases the intention could be proved by reference to the words used which would be words which were obviously defamatory. If the prosecution sought to rely upon an innuendo, it would have to prove that the defendant was aware of that innuendo. It may be said that

28 Cassidy v. Daily Mirror Newspapers Ltd. [1929] 2 K.B. 331.

29 E. Hulton & Co. v. Jones [1910] A.C. 20.

proof of intention to defame goes beyond proof of knowledge that the statement was defamatory. For example, a defendant might allege that the prosecution had failed to prove the necessary intent because it had not proved that the defendant did not believe that the person defamed had such a low reputation already that the statement in question could not cause him to be further adversely affected. If that could be seriously argued on the facts of a given case, it may well be right that the prosecution should nevertheless have to prove the necessary intent. Accordingly, it is our provisional view that a requirement that the defendant must be shown to have intended to defame would be a more satisfactory provision to cover the case of the unintentional defamation than a requirement that the prosecution prove that the defendant merely knew the statement to be defamatory.

2. The defendant's knowledge or belief that the statement was untrue

8.23 For reasons given in Part VII³⁰ we propose that in the new offence the defendant will be guilty only if he knew or believed, when he published it, that the untrue defamatory statement was in fact untrue. As a preliminary matter we deal with the terminology which in our view best conveys for the purposes of this Working Paper the concept of the underlined words. In our Report on the Mental Element in Crime we recommended that for the purposes of any enactment to which the provision was applied, "a person should be regarded as knowing that a particular circumstance exists if, but only if, either he actually knows or he has no substantial doubt that that circumstance exists".³¹ The Report made clear that this terminology was to be preferred because it was thought to

30 See paras. 7.19-7.29, above.

31 (1978) Law Com. No. 89, para. 49 and Appendix A, draft Criminal Liability (Mental Element) Bill, cl. 3.

have greater precision than any alternative, in particular the phrase "knowing or believing" which had been used in section 22 of the Theft Act 1968.³² However, Parliament has not as yet adopted the recommendations in our Report; it has indeed again adopted the terminology of "knows or believes" in the Forgery and Counterfeiting Act 1981.³³ Having regard to the recent clarification of "knowing and believing" by the decisions of the courts,³⁴ we do not consider that in the present context there is any significant difference of meaning between the two forms of words: both are equally apt to describe states of mind which extend beyond the knowledge which a person has gained from personal observation. In the interests of consistency we adopt the words which have recently been used in other statutes. Use of these words also assists discussion of the difficulties which we have experienced in making satisfactory provision for the mental element where it is clear that the defendant did not speak from personal observation when publishing his defamatory statement.

3. The burden of proof of knowledge or belief

(a) The problem stated

8.24 The effectiveness of a criminal offence depends upon whether it is defined in such terms, and supported by such procedural rules, that evidence of the facts relevant to the determination whether an offence has been committed can be brought before the court. All the evidence necessary to prove commission of the offence must be put

32 Ibid., para. 48.

33 See e.g., the offences of copying and using a false instrument and using a copy of a false instrument in ss. 2-4, and the coinage offences in ss. 15-16.

34 See R. v. Griffiths (1974) 60 Cr. App. R. 14 and R. v. Reeves (1979) 68 Cr. App. R. 331.

before the jury by the prosecution; the jury then considers that evidence and any further evidence put forward by the defendant and reaches a conclusion upon the whole of the evidence.³⁵ In most cases in crime the offence is proved by prosecution witnesses who can describe what the defendant did; and any necessary mental element may be proved by inference from the action of the defendant proved against him. In a prosecution under the proposed offence of criminal defamation there would, normally, be available to the prosecution evidence of the publication of the defamatory statement, and evidence to show that the publication was made by the defendant and that the statement was untrue. But in what cases could evidence be brought before the court with reference to any knowledge of the defendant about the truth or falsity of the untrue statement?

8.25 There is a clear difference between having direct knowledge of an observed fact and having a belief about a fact of which information has been received from another. In one category of cases, which we call the first category, a defendant will have played such a part in the facts asserted in the defamatory statement that, if the prosecution satisfies the jury that the statement was untrue, then the jury (subject to any special question of mental aberration) would have to accept that the defendant knew that the statement was untrue: an example of such a libel is that the defendant himself paid a bribe demanded by the chairman of a planning committee. If it is proved that no payment was made then the defendant must have known that the statement was false. In the second category of cases, the defendant will have alleged some wrongdoing against the victim of the libel in which the defendant claims to have played no part: for example, that the

35 It must be remembered that the defendant cannot be required to give evidence or call any evidence if he chooses not to do so.

person defamed has regularly demanded and received bribes as chairman of the planning committee from named or un-named applicants for planning permission. Proof that those allegations were untrue would by itself provide no evidence that the defendant knew or believed his allegation to be false. He might indeed have invented the whole of his story: but, on the other hand, he might have received convincing reports from apparently honest and credible witnesses that the bribe-taking had occurred. It might seem, in a particular case, exceedingly probable that the defendant had made up the story but he might have exercised his right to answer no questions and have avoided making any admission, whether express or implied as to his means of knowledge about the truth of the allegations; the prosecution would then be unable to prove that he did not know or believe that what he published was untrue. The relevant evidence would not be available to the prosecution and, in the absence of such evidence, the case could not proceed.

8.26 This statement of the problem makes clear that, if the ordinary principle applying to criminal offences, requiring the prosecution to prove each element of the offence beyond reasonable doubt, were to be adopted in the present context, the only cases in which all the evidence necessary for a successful prosecution could be made available to the court would be those falling within the first category described above; in effect those in which the defendant knew, by virtue of his personal observation of, or participation in, the relevant acts, that the statement in question was untrue, or in which the defendant

had admitted it to be untrue.³⁶ To make such evidence available in cases falling within the second, and much larger, category would in our view require the introduction of special procedural provisions. The nature of these provisions is considered below, after an examination of how this problem is currently met in other areas of the criminal law.

(b) How the problem is met in other crimes

8.27 A requirement that the prosecution must prove that the defendant knew or believed a particular fact would not be unique in the criminal law. For example, section 1(1) of the Perjury Act 1911 provides that -

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

The prosecution starts with the statement made by the defendant as a witness in evidence and he must normally have had direct personal knowledge of the facts to which his evidence was directed in order for his evidence to be

36 See R. v. Wicks (1936) 25 Cr. App. R. 168 and para. 2.15, above where the defendant was charged under both s.4 and s.5 of the Libel Act 1843 (see para. 3.30, above). The onus of proving, on a charge under s.4, that the defendant published a libel "knowing the same to be false", lies on the prosecution. But the falsity of the libel is presumed and the onus of proving the truth is on the defendant (see para. 3.30, above). In Wicks the defendant did not attempt to justify, and admitted that he knew well the character of the victim. This was taken to establish his knowledge of the falsity of the libel. Note also the rule of evidence that, where appropriate, failure to answer an accusation of crime may be evidence of an admission if it is clear to the jury that it amounted to an acceptance of the accusation by the defendant: R. v. Mitchell (1892) 17 Cox C.C. 503; R. v. Christie [1914] A.C. 545; R. v. Chandler [1976] 1 W.L.R. 585.

admissible. Proof that the facts stated were untrue will therefore generally prove the defendant's knowledge or belief of the untruth.

8.28 The old offence of receiving property knowing it to be stolen³⁷ gave rise to difficulties of proof having some similarity to those which will occur if a new offence of criminal defamation were to be enacted having the burden of proving knowledge or belief on the prosecution. Its modern counterpart is section 22(1) of the Theft Act 1968 which provides that -

"A person handles stolen goods if (otherwise than in the course of the stealing) knowing or believing them to be stolen goods he dishonestly receives the goods"

The defendant need not have had any direct connection with or knowledge about the theft of the goods; thus proof that the goods were in fact stolen is no evidence that he knew that they were stolen. Unless the defendant has made some admission, it is clear that in many cases the prosecution would have no evidence to show what his knowledge was. Principles have been developed by the law which have gone some way to deal with this difficulty. They have had the effect, at least since 1898 when the defendant was first made competent to give evidence in criminal proceedings generally, of causing the defendant to give evidence as to his knowledge or belief as to whether goods were stolen goods. This has been achieved by permitting the jury to draw an inference as to the knowledge of the defendant that goods were stolen from facts, evidence of which the prosecution are able to put before the court, unless evidence is given by the defendant, or by others, to rebut that inference. One of these

37 Larceny Act 1916, s.33(1) (repealed).

principles was introduced by statute as long ago as 1871.³⁸ Its modern counterpart, section 27(3) of the Theft Act 1968, now provides that, once evidence has been given of the defendant having had the stolen goods in his possession, then for the purpose of proving that he knew or believed those goods to be stolen goods, evidence may be given of his having had other stolen goods in his possession from any theft which occurred during the preceding 12 months; and, further, for that purpose evidence may be given that the defendant has within the preceding 5 years been convicted of theft or of handling stolen goods.

8.29 Another principle developed in cases of receiving stolen goods is that, where it is proved that the defendant had in his possession property which was shown to have been stolen a short time before he got possession, the jury can be directed that they may infer that the defendant knew that the goods were stolen if he has offered no explanation to account for his possession of the property, or if they are satisfied that any explanation, consistent with innocence, which he had given, was untrue.³⁹ The effect of this, as it now works in practice, is very similar to

38 See Prevention of Crimes Act 1871, s.19 (rep.) and Larceny Act 1916, s.43(1) (rep.). It is to be noted that, while the Criminal Law Revision Committee recommended the provisions of what is now s.27(3) of the Theft Act 1968 in its Eighth Report, Theft and Related Offences (1966), Cmnd. 2977 as an interim measure pending their review of the law of evidence, (*ibid.*, para. 158), in its Eleventh Report: Evidence (General) the Committee recommended its repeal, since the general recommendations in relation to admissibility of conduct of a defendant tending to show a disposition to commit certain offences would make it unnecessary: see (1972) Cmnd. 4991, para. 101(vii) and Annex 1, draft Criminal Evidence Bill, cl. 3.

39 See authorities cited in Archbold 41st ed., (1982), para. 18-169.

the placing of an evidential burden⁴⁰ on the accused. Where the prosecution can prove the necessary facts, the defendant must either take the risk of the jury concluding that he knew the particular goods to be stolen goods, or put before the jury evidence of how and in what circumstances he obtained the goods. If the jury reject his evidence, there is positive evidence of guilty knowledge upon which the jury may act, if they choose to do so, by means of the inference. If the jury think that the accused's account may be true, he must then be acquitted.

8.30 In other offences, to ensure that evidence is put before the jury, the law has found it necessary to impose burdens of proof, either evidential or persuasive, upon the defence.⁴¹ The difference between an evidential and a full persuasive burden is that in the former case the defendant need only introduce sufficient evidence before the court to raise an issue requiring consideration, with the final burden remaining upon the prosecution to make the jury sure of guilt. In the case of a persuasive burden, the defendant is required to persuade the jury on a balance of probabilities that he is entitled to the defence or exception.

40 See paras. 8.30-8.31, below.

41 In its Eleventh Report: Evidence (General) (1972), Cmnd. 4991, para. 140(iv), the Criminal Law Revision Committee said: "The real purpose, we think, of casting burdens on the defence in criminal cases is to prevent the accused, in a case where his proved conduct calls, as a matter of common sense, for an explanation, from submitting at the end of the evidence for the prosecution that he has no case to answer because the prosecution have not adduced evidence to negative the possibility of an innocent explanation".

8.31 In the serious crimes derived from the common law the burdens on the defendant are evidential only, save for the defence of insanity. The point can be explained by reference to self-defence. To wound another person is not a crime if the defendant acted in reasonable self-defence. The prosecution must first prove that the defendant wounded the victim. But if the defendant then raises an issue as to self-defence by actual evidence, whether by answers given by a prosecution witness, or evidence given by the defendant himself or on his behalf, the prosecution must then satisfy the jury beyond reasonable doubt that the wounding was not justified by being done in lawful self-defence.⁴²

8.32 In a considerable number of modern statutory offences the defendant may rely upon some excuse or qualification, and in such cases a persuasive burden is put upon the defendant, because knowledge of the facts relating to the excuse or qualification would in the ordinary course

42 R. v. Lobell [1957] 1 Q.B. 547; as to duress see R. v. Gill [1963] 1 W.L.R. 841 and Report on Defences of General Application (1977), Law Com. No. 83, paras. 2.9 and 2.32, and Appendix 1, draft Criminal Liability (Duress) Bill, cl. 2(2). See also R. v. Cousins [1982] 2 W.L.R. 621, 625, per Milmo J.

be with the defendant only.⁴³ In practice the defendant has to give evidence and may be cross-examined by the prosecution so that the matter is fully tested in evidence before the court.

(c) Possible special procedural provisions as to proof of knowledge

8.33 Our provisional conclusion above was that, if it is desired to put before the court all the evidence relevant to a case where a defendant has made an untrue defamatory statement in relation to a matter where there is no proof that he had direct personal observation of the matter in question - that is, cases falling within our second category⁴⁴ - some special procedural provision would be needed to make available evidence of the actual state of mind of the defendant. In the following paragraphs we discuss what form such a special provision might take. We invite comment upon the question whether, if a provision is thought to be necessary, any more satisfactory provision can be devised.

43 See e.g., Prevention of Crime Act 1953, s.1: penalising with up to two years' imprisonment and a fine on indictment anyone "who without lawful authority or reasonable excuse, the proof whereof shall lie on him, has with him in any public place any offensive weapon"; Sexual Offences Act 1956, s.30(2) which presumes anyone who knowingly lives with a prostitute "to be knowingly living on the earnings of prostitution [penalised under subs. (1)], unless he proves the contrary" (see also ss. 6 and 47); Misuse of Drugs Act 1971, s.28: proof of lack of knowledge to be a defence in proceedings for certain offences relating to possession of controlled drugs; Magistrates' Courts Act 1980, s.101: burden of proving any exceptions, excuses, etc. relied on by defendant to lie on him (the standard of proof is that of the balance of probabilities): Islington London Borough Council v. Panico [1973] 1 W.L.R. 1166).

44 See para. 8.25, above.

A provision relating to failure to give evidence

8.34 It must be emphasised that any requirement, in order to deal effectively with cases in the second category, must enable the prosecutor to put forward a prima facie case. Nothing similar to the statutory provisions dealing with possession of stolen goods would be appropriate; but the principle that possession of recently stolen goods requires explanation and that failure to explain it credibly provides evidence of guilty knowledge must be examined for this purpose. By analogy, it might be said that the publication of a deliberately defamatory statement which is shown to be false also requires explanation. In some cases a refusal to state the ground on which was based a belief in the truth of the defamatory statement might fairly be regarded as evidence of the absence of such grounds, and as material on which the jury might infer that the defendant knew the defamatory statement to be untrue.

8.35 In this context reference may be made to the recommendation of the Criminal Law Revision Committee in its Eleventh Report: Evidence (General) that in certain circumstances where the court considered that there was a case for the defendant to answer, the jury might draw an inference adverse to the defendant from his failure to give evidence when called upon to do so.⁴⁵ It is important to note that the inference to be drawn from the failure of the defendant to give evidence could under this recommendation only be a factor in support of the prosecution case, and could not provide the only evidence to prove a matter the burden of which lay on the prosecution. A provision to the effect that the court might infer the relevant state of mind from the defendant's failure to give evidence would go beyond the recommendations of the Eleventh

45 See (1972) Cmnd. 4991, Annex 1, draft Criminal Evidence Bill, cl. 5, and Annex 2, Notes on draft Criminal Evidence Bill, p. 216.

Report in as much as the jury could be invited to draw an inference against the defendant solely from his failure to give evidence: the prosecution would, on an issue where the burden of proof was upon it, be making its case only because the defendant had failed to give evidence. While undoubtedly effective, this would, in our view, not be a satisfactory approach. In substance it would place a burden upon the defendant without doing so expressly.

Notice of grounds of belief

8.36 Another method is a requirement that the defendant, before the hearing, give notice to the prosecution of his grounds for not knowing or believing the statement to be false. We refer to this in more detail later.⁴⁶ Here it suffices to observe that such provision would not work effectively for the purpose which we are considering. The jury could not assess the state of a man's knowledge as to the truth or untruth of a defamatory statement from a notice describing the sources of his information: for that purpose, evidence, whether direct or by permissible inference, is required. Further, evidence to support each necessary part of a prima facie case is required at the committal stage and a provision for such a notice before committal would not, we think, be practicable.

A provision relating to failure to explain means of knowledge

8.37 Another possible provision is one based upon an inference of knowledge of falsity derived from failure by the defendant to explain his means of knowledge, when told that the defamatory statement is false and asked for an explanation. This would not, we think, be satisfactory. To attach by statute a particular consequence to failure to answer would be oppressive. If the effective demand

⁴⁶ See para. 8.57, below.

for an explanation could be made by a person defamed before any authority to prosecute had been given, then any person who has published a defamatory statement would be faced with the choice of justifying his position or of providing evidence against himself, in the event that a prosecution were authorised. An alternative would be to provide that an effective demand for an explanation could be made only by the Director of Public Prosecutions after a decision to prosecute had been made; but this, too, would be unsatisfactory. Many of the difficulties raised in the previous paragraph would apply to the answers. In any event, such a provision would be unique in the criminal law,⁴⁷ and its interlocutory character would make it an undesirable precedent.

Shifting the burden of proof

8.38 It is our provisional view that the only special provision with reference to proof of knowledge which would work effectively is the imposition upon the defendant of a burden to raise by evidence an issue, or to show positively by evidence, that he did not know or believe the defamatory statement to be untrue. If such a burden were placed on him, that burden could be evidential only, or a full persuasive burden.

8.39 For the purposes of the proposed offence of criminal defamation, if an evidential burden were cast on the defendant, upon proof of the other elements of the offence he would be guilty unless it appeared from the evidence that when he published the statement he did not know or believe the statement to be untrue. If evidence

47 Cf. the provisions in ss.59 and 61 of the Sex Discrimination Act 1975 and ss. 50 and 52 of the Race Relations Act 1976: these are not in our view analogous since the D.P.P. (unlike the Equal Opportunities Commission and the Commission for Racial Equality) is not an investigative agency.

of this is given which is accepted by the jury, then an issue would be effectively raised as to his state of mind, and the normal burden would then be upon the prosecution to satisfy the jury that the defendant did not know or believe the statement to be false.

8.40 If the full persuasive burden were placed upon the defendant then, on proof of publication of an untrue and intentionally defamatory statement, he would be convicted unless he satisfied the jury that it was more probable than not that he did not know or believe the statement to be false.

8.41 It is our provisional conclusion that a merely evidential burden would not serve the purpose of causing to be before the court evidence of the defendant's state of mind as to the truth of the defamatory statement, and that a full persuasive burden is required. If an evidential burden were imposed, the defendant could cross-examine or call evidence of the means of knowledge which might have led him to make the statement, and thereby raise an issue, but he would not have to give evidence of what was his actual state of mind: the crucial question of his real state of mind would never be before the court.

4. Provisional conclusions

8.42 This discussion has, we think, demonstrated that special procedural rules are needed in order that the court may have available to it sufficient evidence, where the defendant makes an untrue defamatory statement, to constitute a prima facie case that he knew or believed it to be untrue. Such rules are required in order to cause a defendant to put before the court evidence of his state of mind in cases where his knowledge of the untruth of the statement is not based on his personal observation⁴⁸ - that

48 See paras. 8.25-8.26, above.

is, where it is alleged that he "believed", rather than "knew" in its strictest sense, that the statement was untrue. Our provisional view is that the only procedural rule which would work effectively is the placing on the defendant of a persuasive burden requiring him to satisfy the jury that it was more probable than not that he did not know or believe the statement in question to be false.

8.43 We have formed no provisional view as to whether a provision placing the persuasive burden on the defendant should form part of a new offence of criminal defamation and we ask for comments and views upon this point. The essential question is whether the social importance of being able to prosecute effectively (i.e., by a procedure which enables evidence of the relevant facts to be before the jury for their decision) in cases where the defendant's knowledge of the untruth of the statement at issue is not based on his personal observation justifies enactment of a special provision. It seems likely to us that a very grave case might occur within that category in which it would seem right to prosecute but in which, without the special provision as to onus of proof, the prosecutor would be unable to prove a prima facie case. It is, however, not infrequently the position now that with reference to offences of much greater gravity and social importance than the worst imaginable case of criminal defamation, it may be strongly suspected that a person has committed an offence but no prosecution can be started because of the absence of evidence. No special provision exists to assist the prosecution in such circumstances and there is no current proposal that any should be provided. But a special provision for our proposed new offence of criminal defamation may in our view be justified on several grounds. First, under that offence, before the state of mind of the defendant becomes relevant, the prosecution must already have discharged the substantial burden of proving that the defendant had published an intentionally defamatory

statement which was untrue and which was not trivial. Secondly, it does not seem to us that a burden on the defendant would work oppressively or unfairly against him, since the only matter which he will be required to prove is his own state of mind. Thirdly, that burden is only to show that he did not believe the statement at issue was a lie, and not that he positively believed it to be true; thus it is not in any sense a heavy burden to discharge. Finally, as we have seen,⁴⁹ there are a considerable number of offences which place a persuasive burden upon the defendant in circumstances where the matter at issue is peculiarly within his knowledge and thus may fairly require an explanation by him of a particular state of affairs.

8.44 Without a provision as to the burden of proof, the proposed offence of criminal defamation would be of definite but limited utility: it would permit the successful prosecution of someone who makes an untrue defamatory statement of another which by virtue of his own observation or activities he knows to be untrue.⁵⁰ With a special provision as to the burden of proof, the offence would enable prosecutions to be brought successfully in a wider range of cases where the defendant's knowledge of the falsity of the statement is not dependent on his personal observation. We welcome comments upon the question whether, in the light of the considerations which we have set out in this section of the Working Paper, an offence which is effective in this broader category of cases is desirable.

49 See para. 8.32, above.

50 Or makes an admission relative to the state of his knowledge or belief: see para. 8.26, above.

D. Defences

1. Absolute privilege

8.45 Absolute privilege is a complete defence to a civil action for defamation as well as to a prosecution for criminal libel (albeit with inconsistencies between the two as to the occasions on which it applies).⁵¹ Our general principle is that no one should be guilty of a crime in this sphere if he is not liable to a civil action. Thus, even though the offence under consideration would have a stringent mental element of intent to defame, and knowledge of or belief in the untruth of the statement, this should not, in our view, preclude the need to grant complete protection for statements made on particular occasions. We provisionally conclude that there should be a defence of absolute privilege for this offence, and that it should apply on the same occasions as it applies to civil defamation.

2. Qualified privilege

8.46 Having regard to our proposals as to the mental element for the offence, a defence of qualified privilege might be thought unnecessary. At present, a plea of qualified privilege will be defeated if the prosecution (or plaintiff) can show that the defendant was actuated by express malice in making the publication complained of, and an absence of belief in the truth of the defamatory statement is generally conclusive evidence of malice:

"The essence of malice in this context is that the defendant took improper advantage of the occasion which gave rise to the qualified privilege by making statements which he did not believe to be true, or for the purpose of venting his spite or ill-will towards the plaintiff, or for some other indirect or improper motive."⁵²

51 See paras. 3.20 and 6.6, above.

52 Report of the Committee on Defamation (1975), Cmnd. 5909, para. 239 (emphasis added).

To provide that qualified privilege should be a defence to the proposed offence of criminal defamation could, it seems to us, lead to substantial difficulty and confusion. The burden on the prosecution to show that a defendant was actuated by express malice would, in a criminal trial, only be discharged by proof beyond reasonable doubt. In the most usual case, therefore, the prosecution would, in order to defeat a plea of qualified privilege, have to prove beyond reasonable doubt that the defendant did not believe the statement in question to be true. Such a requirement would raise again the difficulties which we have encountered in our approach to the mental element when the issue relates to a matter, such as the defendant's state of mind, which is peculiarly within his knowledge.⁵³ In substance, the prosecution would probably be unable to establish malice except in those cases where the defendant's relationship to the facts was such that it was clear that he must actually have known the statement not to be true. There are, as we have seen, other means of defeating a plea of qualified privilege even where the defendant believed the statement to be true, but the difficulties which we think would attend the most usual means of establishing malice persuade us that the defence as it is known in the civil law ought not to be available for the offence of criminal defamation which we propose.

8.47 There is, however, as Lord Diplock pointed out in Horrocks v. Lowe, an exception to the general position where there is evidence of express malice:

"If it be proved that (the defendant) did not believe that what he published was true, this is generally conclusive evidence of express malice, for no sense of duty or desire to protect his own legitimate interests can justify a man in telling deliberate and injurious falsehoods about another save in the exceptional case where a

53 See para. 8.24, above.

person may be under a duty to pass on, without endorsing, defamatory reports made by some other person." (emphasis added)⁵⁴

Absurd consequences would result if no provision were made for this exceptional case. For example, it might lay open to prosecution a police officer reporting on allegations made about a victim of character assassination, or a lawyer passing on such material about his client. There appear to be two possible ways of dealing with it. The first would be to have a special provision restricted to the circumstances of the exception mentioned by Lord Diplock. The alternative would be to provide that qualified privilege should apply as in civil defamation, notwithstanding that, as we have already shown, such a provision might cause considerable difficulties in practice. Provisionally, we favour the first solution, which would in substance give a defence if the defendant passes on a defamatory statement made by some other person which he did not believe to be true in situations where he was under a duty to do so. We think that the concept of "duty" here should remain undefined and thus open to interpretation by the courts. The concept has appeared without definition in recent legislation,⁵⁵ and the occasions upon which it would fall to be examined would in any event be likely to be rare.

8.48 We think that the defendant should be required to give notice before the trial of his intention to rely on the defence of absolute privilege, and of the special defence described in the preceding paragraph.⁵⁶ Furthermore, it seems to us that the conditions applying in cases of civil defamation ought also to apply in cases

54 [1975] A.C. 135, 149-150.

55 See Forgery and Counterfeiting Act 1981, s.10(1)(c) and (2).

56 See further para. 8.57, below as to the question of giving notice of specified matters before trial.

under the proposed offence, since, as we have said, we regard it as important that in general no one should be guilty of criminal defamation who would not be liable at civil law. It follows that, as in the civil law, in relation to absolute privilege it will be a question of law for the judge whether, if the defence is raised, the occasion of the publication is protected; this will also be the case with the special defence referred to above, subject to any necessary findings of fact by the jury where the facts are in dispute.⁵⁷

3. Fair comment

8.49 The defence of fair comment can, if raised, at present be defeated by proof of express malice.⁵⁸ An offence which requires proof by the prosecution of intent to defame and proof by the defendant upon a balance of probabilities that he did not know or believe the statement at issue to be untrue would seem to make irrelevant a defence of fair comment.⁵⁹ If the defendant succeeds on the issue of the mental element, the prosecution will in any event have failed. If he does not succeed, the prosecution would in substance have shown that the defendant was actuated by malice, since this must mean that the jury found him not to have believed the statement which he published to be true. This would preclude a successful plea of fair comment. In any event, fair comment has played a negligible part even in the far broader offence of criminal libel.⁶⁰ We therefore conclude that there should be no defence of fair comment in the proposed offence.

57 See Duncan and Neill, Defamation (1978), para. 14.07.

58 Malice can be established by showing that the defendant was dishonest or reckless or actuated by spite, ill-will or any other indirect or improper motive.

59 A fortiori, if the burden is on the prosecution to prove that the defendant knew or believed the defamatory statement to be untrue: see paras. 8.42-8.44, above.

60 See para. 3.21, above.

E. Mode of trial and penalty

8.50 As the offence under consideration is intended to deal with none but really serious cases, we provisionally propose that, like criminal libel at present, it should be triable only on indictment.⁶¹ Under section 4 of the Libel Act 1843 there is a maximum penalty of two years' imprisonment and fine where knowledge of the falsity of the libel is proved. Provision needs to be made for the most serious cases where, for example, a defendant has repeated a blatant falsity after cautions or a previous conviction in respect of his allegations. Provisionally we think that two years' imprisonment⁶² would be adequate for the worst cases, but we welcome views on whether this maximum is too high, or too low.

8.51 We have considered whether the judge should have power, after a defendant has been convicted, to order the publication by him of a statement retracting his allegations,⁶³ with the sanctions attaching to contempt of court in the event of failure to do so. On the whole we think that this would be unsuitable for a jury trial, where the defendant's conviction will in all probability attract sufficient attention. This is, however, a matter on which we would welcome views.

61 Our provisional proposal for a summary offence dealing with "poison-pen" letters is discussed in Part IX, below.

62 By virtue of general provisions, the court would be able to impose a fine of any amount in lieu of or in addition to dealing with a convicted defendant in any other way in which the court has power to deal with him: Powers of Criminal Courts Act 1973, s.30(1) as amended by the Criminal Law Act 1977, Sched. 12.

63 Cf. the Scottish procedure of palinode: see para. 4.1, above.

F. Procedural provisions

8.52 Certain special procedural provisions seem to us to be necessary in order to ensure, first, that only such cases as ought to be brought under the proposed offence of criminal defamation are in fact brought and, secondly, that, while all the evidence which ought properly to be before the court is available to it, no unfair burden is imposed upon the defence. Such special provisions as are needed in this connection for proof of the mental element have already been considered.⁶⁴ Other provisions which in our provisional view are needed are described in the following paragraphs.

1. Conduct of proceedings by Director of Public Prosecutions

8.53 As we have seen, no criminal prosecution may be commenced against a newspaper for any libel published therein without an order of a judge in chambers having been obtained.⁶⁵ The person accused has the opportunity of being heard by the judge on the application for the order. No appeal lies from the judge's decision. This procedure is unique to criminal libel and owes its origin to an historical accident.⁶⁶ It is no part of the normal criminal process that a judge is involved in deciding whether, in his discretion, criminal proceedings may be brought. The present law also has the unusual feature that this provision only applies to the prosecution of a newspaper so that, for example, leave is not required to prosecute the publisher of a book.⁶⁷

64 See paras. 8.24 et seq., above.

65 Law of Libel Amendment Act 1888, s.8: see para. 3.25, above.

66 See para. 2.12, above.

67 For this reason no consent was required in Gleaves v. Deakin [1980] A.C. 477.

8.54 There are today many offences which may only be prosecuted by or with the consent of the Director of Public Prosecutions. Certain other offences may only be prosecuted with the leave of the Attorney General.⁶⁸ It is a constitutional convention that the Attorney General does not act in any political capacity when making a decision whether to authorise or refuse leave to bring a prosecution.⁶⁹

8.55 While we have no doubt, as explained above,⁷⁰ that leave should be required before proceedings are instituted for the proposed new offence of criminal defamation, we do not think it right that the present anomalous position should continue. Such leave should be given, in our view, by the Director of Public Prosecutions as in the case of other criminal offences, rather than by a judge in chambers. The Director's Office has acquired great experience in considering the factors relevant to the institution of criminal proceedings generally. He is able to take account of many matters concerning the public interest, some of which may not be taken into account by a judge in chambers who may not have that kind of experience. Furthermore, we consider that use of a judge at this stage

68 A current example of such a provision is the Theatres Act 1968, s.8: no proceedings under ss. 2, 5 or 6 of the Act or for an offence at common law committed by the publication of defamatory matter in the course of a performance of a play may be instituted without the consent of the Attorney General (emphasis added).

69 See J.Ll.J. Edwards, The Law Officers of the Crown (1964), pp. 245-246. The Attorney General is ultimately responsible to the House of Commons for the exercise of his discretion in cases where his consent or that of the Director of Public Prosecutions is a prerequisite to criminal proceedings: ibid., pp. 243-245.

70 See para. 7.14(6), above.

before the prosecution is initiated is not desirable as a matter of principle, save in exceptional circumstances such as we do not consider here to be present.⁷¹

8.56 In a prosecution for criminal defamation the person defamed is likely to have a strong personal interest in the result; this personal interest may well be quite different from the public interest which required the prosecution to be brought. Yet once the Director has given his consent, the conduct of the prosecution is in the hands of the prosecutor, save in the rare case where the Director decides to take over the prosecution. In our view it is essential that the personal interest of the person defamed should not dictate the conduct of the proceedings. For this reason, we consider that proceedings for the offence of criminal defamation which we provisionally propose should be conducted only by the Director of Public Prosecutions.⁷² Having satisfied himself that there is sufficient evidence of a prima facie case of the commission of the offence, he will exercise his judgment in the public interest not only as to whether the proceedings should be initiated but also as to how they should be conducted. We cannot think that the number of criminal defamation cases that are likely to come before the courts will be sufficient to cause this to be an unduly onerous burden on the Director.⁷³

71 See Mental Health Act 1959, s.141(2) which applies to civil actions as well as criminal prosecutions and the Administration of Justice (Miscellaneous Provisions) Act 1933, s.2(2) (as amended by the Criminal Appeal Act 1964, s.5, Sched. 2) (voluntary bill of indictment).

72 It may be noted that the Royal Commission on the Press ((1977) Cmnd. 6810) also recommended that private prosecutions for criminal libel should not be permitted and that prosecutions for the offence should be brought only by the D.P.P.: Final Report, ibid., para. 19.48.

73 Under the Prosecution of Offences Regulations 1978, S.I. 1978/1357, reg. 5, the Director may employ a solicitor to act as his agent.

2. Notice of grounds for belief

8.57 We think that there are substantial reasons for obliging the defendant to give particulars before the trial of his grounds for not believing the statement at issue to be false. Such particulars would be not unlike the notice presently required for evidence in support of an alibi under section 11(1) of the Criminal Justice Act 1967, which provides that "on a trial on indictment the defendant shall not without the leave of the court adduce evidence in support of an alibi unless ... he gives notice of particulars of the alibi". We think that any such provision should require the particulars to be delivered twenty-one days before trial. Such a provision would reduce the possibility of unnecessary delays in the hearing of the trial. It must be borne in mind that, in its absence, the defendant would be entitled to stay silent unless and until he chose to give evidence on his own behalf. Thus he might at the trial give evidence as to matters of which the prosecution had no advance warning. Witnesses who might rebut this evidence would probably not be instantly available and whether they would rebut or support the defendant's evidence would have to be investigated. The prosecution would then have no alternative but to ask for an adjournment of the trial while the necessary investigations were made and the witnesses made available to the court. Lengthy adjournments to criminal trials are extremely undesirable from every point of view, yet were the defendant to be allowed to keep silent as to the grounds of his knowledge or belief until he went into the witness box, such adjournments would be inevitable in an unacceptably high proportion of trials. The present law of criminal libel overcomes the problem to a great extent by placing the burden of proving truth and publication for the public benefit on the defence, but it requires particulars of both to be given by the defence in advance of the trial. In a civil action particulars of all allegations must be given

in order to prevent the other party being taken by surprise on any matter of fact. The requirement of advance particulars would eliminate these potential difficulties in the context of a new offence of criminal defamation. We are aware of the unusual character of such a requirement, but it seems to us to be essential for the reasons stated. We provisionally propose accordingly, but would particularly welcome views on the need for such a provision.

3. Notice before trial of requirement of proof of falsity

8.58 We contemplate that charges for our proposed new offence are likely to be brought only in cases where the prosecution's evidence as to the lack of truth of the defamatory statement is strong. If that is so, it is probable that in at any rate some instances the defendant will not wish to challenge the allegation that the statement was untrue; where there is a "not guilty" plea in such cases the principal point at issue will be the defendant's knowledge or belief as to the falsity of the statement. In these circumstances it would shorten trials if defendants were to make use of section 10 of the Criminal Justice Act 1967, which allows for proof of any facts by formal admission. But under the present law the defendant could not be compelled to do so and, if he declined, the prosecution would have to expend much time and money in gathering evidence upon a matter which at the trial the defendant might in any event not choose to contest. In these circumstances, it seems to us to be justifiable to require a defendant who intends to contest the allegation that the statement was untrue to indicate before the trial that he required the prosecution to prove that it was untrue. We do not think that this should be an absolute requirement: we think that the court should have the power in its discretion to allow the defence without giving notice to challenge the prosecution's statement that the publication was untrue, although such

leave would inevitably in many cases result in an adjournment of the trial in order to enable the prosecution to call the necessary evidence. These provisions would be unusual in character, but having regard to the apparent need for them, we propose accordingly, and welcome views upon the need for them.

4. Refusal to disclose sources of information

8.59 Three of the proposals which we have so far discussed impose a burden upon the defendant, one requiring him to prove on a balance of probabilities that he did not know or believe the statement at issue to be untrue, the others requiring him to give notice to the prosecution as to specified matters, including his grounds for not believing the statement to be false. The first requirement could be used as a means of forcing a defendant to disclose the sources of his information; so also could the need for actual proof of the falsity of the statement. There is therefore a possible danger to newspaper reporters and others, although it should be emphasised that, in so far as the proposed offence is aimed at the "character assassin", we do not envisage that our proposed offence would have any relevance to the responsible journalist. However, the above-mentioned requirements on the defence make it necessary to refer in this context to section 10 of the Contempt of Court Act 1981, which provides that:

"No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime."

Thus if in pursuance of either of the requirements to which we have referred, the defendant has to take the decision

whether to disclose a source of information for the statement at issue, and refuses to do so, he may be found guilty of contempt only if the court is satisfied on the grounds specified in the section that such disclosure is necessary.⁷⁴ Having regard to the provisions of that section we do not think it necessary for us to propose any special provision in this respect.

5. Proof of convictions

8.60 There is no provision for criminal libel corresponding to the provision in section 13 of the Civil Evidence Act 1968 which makes a conviction conclusive for the purpose of a civil action for defamation. Although it is unlikely that the Director of Public Prosecutions would prosecute where a person convicted of an offence sought to reopen the question of his guilt by means of criminal proceedings against someone for referring to his having committed the offence, nevertheless it seems to us to be right to make provision to eliminate this possibility. Accordingly, we propose that the offence should have a provision corresponding to section 13 of the Civil Evidence Act 1968.

6. Special verdict on finding of not guilty

8.61 We are conscious that a verdict of 'not guilty' on a prosecution for this offence may leave the reputation of the person about whom the statement in issue is made "in the air". Such a verdict, without more, would leave it unclear on what grounds it had been reached, in particular whether the jury found that the published statement was true or false. By contrast, any verdict

74 Of course, there is nothing to prevent the defendant disclosing the source of his information if he wishes. Indeed, the defendant may in some instances need to do so or face the possible consequences of being found guilty of the offence.

recorded by a jury in a civil action for defamation (where of course the burden of proving truth lies on the defendant on a balance of probabilities) leaves no room for doubt what view the jury has taken on that issue.

8.62 The type of case with which the proposed offence is designed to deal is not concerned with the reputation of the victim of the statement in issue: the grounds for bringing a prosecution are essentially the public interest in punishing the defendant for his conduct. But if the proceedings are of sufficient importance for the Director to institute proceedings, there must, in our view, be a sufficient public interest in knowing whether, in cases where a verdict of not guilty is returned, the jury has taken the view that the statement was true, or whether they have reached their conclusion on some other ground. Moreover, if proceedings may be taken irrespective of the victim's wishes in the matter, some protection must be given to him to guard against the consequences of a verdict of not guilty. Such a verdict might be reached, for example, because the jury concludes that, although the statement was false, the defendant did not know or believe it to be so.

8.63 For the foregoing reasons, it may be that, where the falsity of the statement has been in issue,⁷⁵ there should be a provision, in cases where a verdict of not guilty has been returned, for the court to require the jury to give a special verdict on the question whether they have found that there is insufficient evidence to prove beyond reasonable doubt that the statement at issue was untrue. It is possible that the victim of the statement might object to the jury being required to deliver such a verdict; the provisions might therefore be

75 This excludes cases where the defendant has admitted the falsity.

so framed that the court would require the verdict only at the request of the prosecution or of the victim himself. Ultimately any victim who was dissatisfied with the jury's special verdict would be free to take civil proceedings to clear his name, where, as we have pointed out, the burden of proving the truth of the statement would be on the defendant.⁷⁶ We have come to no final conclusion as to whether there should be a requirement of a special verdict, but if there is to be such a provision, we believe that the rules relating to majority verdicts should apply to it.⁷⁷ We welcome comment on this possible provision.

7. Concurrency with civil action

8.64 Under the present law a prosecution for criminal libel may be pursued before, after or at the same time as a civil action in respect of the same defamatory statement.⁷⁸ In the past it appears that this has engendered few, if any, problems in practice, but the difficulties which may be caused by civil and criminal proceedings arising from the same set of facts have become evident in recent cases.⁷⁹ If statutory provision for a new offence of criminal defamation is to be made, it is in our view desirable that some indication should be given of how any problems in this area would be met.

76 No problem of issue estoppel would arise in the civil proceedings, given the different burdens of proof and that the parties in the civil and criminal proceedings would not be identical.

77 See Juries Act 1974, s.17 and Practice Directions [1967] 1 W.L.R. 1198 and [1970] 1 W.L.R. 916.

78 Ex parte Edgar (1913) 77 J.P. 283 and see para. 3.23; above.

79 Particularly in regard to the privilege against self-incrimination where there is a likelihood of criminal proceedings following upon discovery of incriminating documents disclosed in civil proceedings: see Rank Film Distributors Ltd. v. Video Information Centre [1982] A.C. 380; but see now Supreme Court Act 1981, s.72.

8.65 The new offence which we propose is one which focusses upon the interests of the state in securing the defendant's conviction and punishment in a narrow range of cases, irrespective of the interests of the victim of the publication. It seems to us that if in these circumstances the Director chooses to institute proceedings, those proceedings ought to be concluded before any hearing of civil proceedings instituted by the person defamed. However, we do not at present take the view that special legislative provisions are needed to secure this result, since the court in civil proceedings already has a discretionary power to stay the hearing of a civil action until after the trial of the criminal offence. In our view, where civil proceedings have already commenced, and the Director then institutes proceedings, the appropriate course is for the court trying the civil action to direct that the civil action should not be permitted to proceed until after completion of the criminal proceedings.

PART IX

"POISON-PEN" LETTERS

9.1 There remains for consideration in this Working Paper one particular type of mischief, for which our proposed offence of criminal defamation in place of criminal libel would not be an appropriate sanction, namely "poison-pen" letters.

A. The problem stated

9.2 "Poison-pen" letters do not form a category which is known to the law, but the recipient of such a letter probably has no difficulty in recognising it if he has the misfortune to receive one. The contents may be defamatory of someone else or they may be defamatory of the recipient; but they may not be defamatory of anyone in the sense in which that word is used in law. The contents may be abusive, frightening or menacing but not defamatory. For example, a letter sent to an elderly lady living on her own stating that there is a man who can see her every time she goes to the bathroom and eventually he will come to get her would rightly be regarded as a poison-pen letter but is not defamatory. Nevertheless, the shock and fear caused to many a recipient of such a letter is far more unpleasant than any defamatory statement would be.

B. Are the existing sanctions adequate?

1. Criminal libel

9.3 One writer who has made a particular study of criminal libel has said that "in the last 150 years a far more usual defendant [to a charge of criminal libel] than a newspaper editor has been a writer of poison-pen

letters".¹ Criminal libel is an indictable offence but we doubt whether the Crown Court is necessarily the right court in which many of the senders of poison-pen letters should be prosecuted. Such offences, when the identity of the writer can be proved, seem to us often to be better tried more quickly, less formally and without the inevitable publicity of a trial in the Crown Court. Nor does it seem to us that defamation is the proper basis for charging the writer of such letters; any defamatory content is not likely to be the main reason why the writer should be prosecuted. Moreover, under the existing law if the defamatory statement has only been "published" to the person defamed it is only a criminal act if the publication tends to lead to a breach of the peace.² As we have seen,³ we do not consider that a tendency to lead to a breach of the peace is a satisfactory criterion for criminal libel⁴ and in any event many recipients of a poison-pen letter are the least likely to break the peace in consequence, because so many of such recipients are the elderly and lonely.

2. Other related provisions

9.4 If criminal libel is not appropriate or not available against the writer of a poison-pen letter, is there any other crime with which he may be charged? If there is, is it an appropriate crime? By "appropriate" in this context we mean an offence which is not disproportionate in its seriousness and in its maximum

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- 1 J.R. Spencer, "The Press and the Reform of Criminal Libel" in Glazebrook (ed.), Reshaping the Criminal Law (1978), p. 266.
 - 2 See para. 3.8, above.
 - 3 See para. 7.33, above.
 - 4 And under our proposed new offence of criminal defamation, a defamatory statement made to the victim alone would not be an offence: see para. 8.16, above.

penalty to the misbehaviour of sending a poison-pen letter, and also, for the reasons given above, an offence which is not triable only on indictment. In theory, the writer of such a letter might, if the facts allow, be charged with making a threat to kill⁵ or destroy or damage property,⁶ or the letter will constitute blackmail.⁷ But many poison-pen letters will not contain material such as to amount to one or other of these serious crimes and even if a letter did, the charge might well not be appropriate in the circumstances.

9.5 Some cases of poison-pen letters may be dealt with summarily in the magistrates' court on complaint by the procedure of binding over to keep the peace and be of good behaviour.⁸ However, this is not a criminal

5 Offences against the Person Act 1861, s.16 (as substituted by Sched. 12 to the Criminal Law Act 1977). The maximum penalty is 10 years' on indictment, or six months' or a fine of £1,000 on summary trial. The Criminal Law Revision Committee recommended that the offence should be extended to include threats to cause serious injury: see Fourteenth Report: Offences against the Person (1980), Cmnd. 7844, paras. 215-219.

6 Criminal Damage Act 1971, s.2. The maximum penalty is 10 years' on indictment, or six months' and a fine of £1,000 on summary trial.

7 Theft Act 1968, s.21 which penalises anyone "who with a view to gain for himself or another or with intent to cause loss to another ... makes any unwarranted demand with menaces". The offence is triable only on indictment with a maximum penalty of 14 years' imprisonment.

8 See e.g., Sawyer v. Bell (1962) 106 S.J. 177. In this case a woman who had published abusive and defamatory letters about two bishops of a diocese was held to have been properly bound over. The Divisional Court said that although no one should be bound over to be of good behaviour for mere words (unless they tended to a breach of the peace) there were certain public people (including members of the government and those concerned with the administration of justice) who were in need of special protection in advance, even from mere words, and that there was no reason why bishops should not be treated as public persons for this purpose.

offence.⁹ Yet not only is this conduct such that it ought to be a criminal offence, but many of those who send poison-pen letters are likely to be suffering from some condition of the mind which requires medical treatment or other help; binding over is not appropriate for those needing supervision.¹⁰ Others may be people who will desist once seen by a police officer carrying out a criminal investigation. A visit by a police officer may be more likely to have the desired effect if he is investigating a complaint of a crime rather than if there has been a complaint of conduct which can only be dealt with by a binding over order. Indeed, unless there is some evidence that the conduct in question amounts to a criminal offence, the police may well be reluctant to intervene at all. Finally, there are probably some writers of such letters who, if only for the protection of the recipients, ought to be in some form of custody, even if they are only there because of the persistence of their conduct after repeated warnings and attempts to persuade them to stop sending such letters. For these reasons we do not think that the possibility of a binding over order is sufficient to deal with the writers of poison-pen letters.

9.6 If a poison-pen letter is sent by post and is indecent or obscene, the sender may be guilty of an offence under s.11 of the Post Office Act 1953 which provides (so far as is relevant) that:

9 We are conducting a separate examination of this power under a reference from the Lord Chancellor under s.3(1)(e) of the Law Commissions Act 1965. The terms of our review are set out at para. 5.6, n. 9, above.

10 A magistrates' court can only make a hospital order under the Mental Health Act 1959 where a person has been convicted of an offence which is punishable on summary conviction with imprisonment: s.60.

- "(1) A person shall not send or attempt to send or procure to be sent a postal packet which -
- (a) ...
 - (b) encloses any indecent or obscene print, painting, photograph, lithograph, engraving, cinematograph film, book, card or written communication, or any indecent or obscene article whether similar to the above or not; or
 - (c) has on the packet, or on the cover thereof, any words, marks or designs which are grossly offensive or of an indecent or obscene character".

The penalty for this offence is, on summary conviction, a fine not exceeding £100 or, on conviction on indictment, imprisonment for a term not exceeding 12 months. In our view, this provision is not satisfactory for meeting the problem of poison-pen letters. It is limited to material sent through the post, to material which is obscene or indecent, and the magistrates' court cannot impose any form of custodial sentence. Nevertheless, the section does show that, apart from the more general offences of threatening to kill or to damage property (which may be tried summarily),¹¹ there is at least one statutory offence which can be tried summarily and which is apt to cover some poison-pen letters.

9.7 In addition to the offences already mentioned, we draw attention to the provision in section 49(1) of the British Telecommunications Act 1981 (re-enacting earlier provisions)¹² for a summary offence which penalises persons who make offensive telephone calls or send telex or telegram messages of a similar nature. This section provides as follows:

11 See para. 9.4, above.

12 The offence was first enacted in s.10 of the Post Office (Amendment) Act 1935.

"A person who -

- (a) sends, by means of a public telecommunication system (including any such system provided, under a licence, otherwise than by the Corporation), a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or
- (b) sends by those means, for the purpose of causing annoyance, inconvenience or needless anxiety to another, a message that he knows to be false or persistently makes use for that purpose of a public telecommunication system,

shall be guilty of an offence and liable on summary conviction to a fine not exceeding £200."

Since this offence applies primarily to oral and not written communications, except telegrams etc. it is not a possible offence with which to charge the sender of a poison-pen letter. Nevertheless, the significance of this offence for the present discussion lies in the fact that, with suitable adaptation and modification, it could serve as a basis for filling the apparent gap in the existing law for dealing with the problem of poison-pen letters.

C. Proposal for a new offence

9.8 We have examined the mischief of poison-pen letters and the possible ways in which the writers of such letters may be dealt with under provisions of the existing law. In our provisional view, the foregoing examination suffices to demonstrate that there is a gap in the criminal law which ought to be filled by an offence which is designed specifically to deal with this particular mischief.¹³ Our provisional view is that a statutory

13 Criminal sanctions have been advocated on a number of occasions: see e.g., J.R. Spencer, "Criminal Libel - A Skeleton in the Cupboard", [1977] Crim. L.R. 465 at pp. 471-472, who comments that "the civil law is ineffective to deal with them, because they usually need one of the kinds of treatment or restraint which only a criminal court is competent to order".

offence is required, which is broader than the offence under section 11 of the Post Office Act 1953,¹⁴ and which is intended to cover what is generally understood to be a "poison-pen" letter. Such a new offence should in our view be triable only in a magistrates' court. How then might the elements of such an offence be defined?

9.9 We have already suggested¹⁵ that section 49(1) of the British Telecommunications Act 1981, concerned with offensive telephone calls, might provide the basis for any new offence, but it would of course require suitable modification. For example, while the offence would not need to extend to offensive telephone messages,¹⁶ it would be necessary to penalise the person who delivers the letter to another in person or by any other means: the offence would not be confined to letters delivered by the Post Office. Secondly, we think that material which shocks should be specifically included. Thirdly, we think that the offence should carry with it the possibility of a custodial sentence being imposed, which in our view should not exceed six months. Apart from enabling offenders in the most serious cases to be sentenced to imprisonment, this would also enable those found to be in need of treatment for a mental disorder to be dealt with where appropriate by means of a hospital order.¹⁷

9.10 A number of issues remain for consideration. Should the offence be restricted to the delivery of letters and other forms of written communication or should the offence be drawn more widely so as to include the delivery of any article or matter which is offensive? The receipt

14 See para. 9.6, above.

15 See para. 9.7, above.

16 But see para. 9.16, below.

17 See n. 10, above.

of an offensive article or noxious matter may be just as distressing as the receipt of an offensive letter. Nevertheless if, as we suggest, the offence includes delivery of matter by means of the postal system or otherwise, inclusion of offensive or noxious matter might penalise someone who, for example, out of spite throws a quantity of horse dung over the fence into his neighbour's garden. An offence whose primary purpose is to prevent the sending of abusive or menacing letters need not be so widely drawn. On the other hand, we would not wish to see the delivery of offensive photographs, films or tapes escape merely because they are not communications in writing. Consideration should also be given to the inclusion of other non-written messages which are offensive, for example, articles such as blood-stained emblems and the like. In our provisional view, the essence of the offence ought to be the sending of any form of offensive communication, whether in writing or otherwise.

9.11 Another question is whether it is necessary to provide for some kind of mental element or alternatively, specific defences. There may be many occasions when it is necessary to communicate to others information which is shocking or even menacing and, as the sender knows, will inevitably cause anxiety or distress: for example, a letter stating that a close relative has been killed which the writer believes to be true; or a letter written by a husband warning his wife's lover not to come near to his house again. If these letters are not to be caught, some provision to exclude them will be required. Various possible solutions may be suggested.

9.12 One possibility would be to provide a defence of acting "without reasonable excuse", so that, if the issue were raised, the court would have to determine whether a reasonable person would have an excuse for sending the particular communication. While in many of the obvious

cases such a defence would be bound to fail, in others the question whether it was reasonable to send the communication may be far less easy to determine with the degree of consistency which is desirable, since the answer could depend largely on the court's opinion as to the strength of the language used. Provisionally, therefore, we do not favour having such a defence. We would prefer to see provision of a mental element. There are a variety of ways in which a mental element may be expressed in a statutory offence. A requirement of proof of an ulterior intention, such as an intention to cause needless anxiety, has the disadvantage of introducing complexities relating to the meaning of the term "intention", which perhaps makes it unsuitable for a summary offence of this nature. An alternative formulation is one used in the summary offence under section 49(1) of the British Telecommunications Act 1981,¹⁸ namely "for the purpose of causing annoyance, etc., to another". The expression "for the purpose of" appears to us to be readily understandable, and it avoids many of the difficulties associated with the word "intention".

9.13 So far as the purposes of sending the offensive, etc., communication are concerned, we do not favour following precisely the terminology of section 49(1) of the British Telecommunications Act 1981, which uses the formula "for the purpose of causing annoyance, inconvenience or needless anxiety". Of these three types of harm, the first two seem to us to be insufficiently serious for inclusion in the proposed offence, although we accept that they may be appropriate in the context of the telecommunications offence. Only the concept of "anxiety" properly reflects the real mischief which poison-pen letters cause, and we suggest that the state of mind indicated by the term "distress" might be included here as well. However, it will, we think, be necessary to qualify

18 See para. 9.7, above.

these concepts in some way, to avoid the risk that the offence might catch communications of the kind we have already indicated ought not to be caught:¹⁹ either "needless" (which is used in section 49(1)) or "unjustified" occur to us as possible qualifications. We do not know whether the term "needless anxiety" in section 49(1) has given rise to any difficulties or injustices in practice; indeed, it would be helpful to hear from those who have had experience in the working of this offence, in the absence of any reported cases. There is clearly some advantage in adopting a term which has been used in a similar type of offence for a number of years.²⁰ We therefore provisionally propose that there should be a requirement to the effect that the communication be sent "for the purpose of causing needless anxiety or distress". We emphasise again that we are not here drafting the precise terminology of the offence.

D. Provisional conclusion

9.14 To sum up, we provisionally propose a new offence of sending a poison-pen letter. The elements of the offence may best be described as penalising any person who causes any other person to receive a communication, written or otherwise, which is grossly offensive, or of an indecent, shocking or menacing character, for the purpose of causing needless anxiety or distress to that or any other person. The offence would be triable summarily with a maximum penalty of six months' imprisonment or a fine of £1,000, or both.

9.15 In so far as the present law of criminal libel might be justified on the basis that it is available to deal with such letters, our proposal for a summary offence

19 See para. 9.11, above.

20 See n. 12, above.

designed specifically to deal with that mischief removes that justification. We invite comments on the view we have taken of the need for a special offence to penalise those who send poison-pen letters and of our provisional proposal for it.

9.16 It will be observed that the offence which we propose would have much in common with section 49(1) of the British Telecommunications Act 1981. In principle, it seems to us desirable that there should be only one offence of this type dealing with all manner of offensive communications, by whatever means are used for conveying them. The principal differences between the two offences seem to us to be that cases may be brought under section 49(1) without the need to specify the purpose for which the communication was sent (see section 49(1)(a)), and that under the section no sentence of imprisonment may be imposed. Our proposed offence would require proof of a purpose to cause needless anxiety or distress, and would permit imprisonment for up to six months, partly to enable those in need of treatment for a mental disorder to be dealt with, where appropriate, by means of a hospital order.²¹ Despite these differences, we think it worthwhile to canvass the issue whether there should be only one offence, having the elements which we propose and applying also to offensive telephone calls; or alternatively whether section 49(1) should be amended so that both in form and in powers of sentence it corresponds more closely with the offence which we propose. We invite comments on these possibilities.

²¹ See para. 9.9, above.

PART X

SUMMARY OF PROVISIONAL CONCLUSIONS AND PROPOSALS

10.1 The following summarises the main provisional conclusions and proposals contained in this Working Paper on which we invite comment and criticism.

10.2 We have examined the common law offence of criminal (defamatory) libel as part of our programme of codification of the criminal law of England and Wales. Codification of the criminal law necessarily entails the abolition of all common law offences and their replacement, if required, by new statutory offences; the common law offence of criminal libel as such must therefore be abolished. Some of the provisions in the existing offence contain defects and anomalies which might be cured by minor amendment. However, there are features of the existing offence which are, in our view, undesirable as a matter of principle. Accordingly, we do not propose the enactment of a new statutory offence of criminal libel in terms similar to the existing common law offence (paragraphs 7.1-7.4).

10.3 We have considered the arguments for and against keeping some form of offence of criminal defamation. Our provisional conclusion is that on balance a statutory offence should be created in place of the common law offence, but that it should be very much narrower in scope. In our provisional view, an offence is required to penalise the worst sort of case, namely, the "character assassin" - the person who makes or publishes a deliberately defamatory statement about another, which is untrue and which he knows or believes to be untrue (paragraphs 7.5-7.16).

10.4 The elements of a new statutory offence of criminal defamation which we put forward for consideration may be summarised as follows -

The prohibited conduct

- (a) No statement should be the subject of criminal proceedings unless it was untrue, defamatory, and likely to cause the victim significant harm; the burden of proving these elements would lie on the prosecution (paragraphs 8.3-8.7).
- (b) "Defamatory" should be defined as "matter which in all the circumstances would be likely to affect a person adversely in the estimation of reasonable people generally" (paragraphs 8.8-8.13).
- (c) "Publication" would extend to any means of communication, whether by broadcasting, writing, speech or otherwise (paragraph 8.14).
- (d) It would be necessary to prove that the defendant himself was a party to the defamatory publication itself and not merely to the publication of the book, etc. in which it was contained (paragraph 8.15).
- (e) Publication to the person defamed alone would not suffice: publication would have to be to some third party (paragraph 8.16).
- (f) Publication of defamatory material about the dead or about a company struck off the register would not be a criminal offence (paragraphs 8.17-8.18).

The mental element

- (g) The defendant must have intended to defame and must have known or believed the statement to be untrue. The burden of proving the intent to defame should rest on the prosecution. As to the defendant's knowledge or belief, alternative proposals are made for consideration and comment: the first is that the burden should rest on the prosecution to prove that the defendant knew or believed the statement to be untrue; the second alternative, (put forward because of the difficulties of proof of knowledge of falsity in many cases) is that the burden should rest on the defendant to prove on a balance of probabilities that he did not know or believe the statement to be untrue (paragraphs 8.20-8.44).

Defences

- (h) The defence of absolute privilege would apply to the offence to the same extent as it applies to civil proceedings for defamation. There should be a special defence for a person who is under a duty to pass on a statement which he does not necessarily believe to be true (paragraphs 8.45-8.49).

Mode of trial and penalty

- (i) The offence should be triable only on indictment, with a maximum penalty of two years' imprisonment or a fine, or both (paragraphs 8.50-8.51).

Procedural provisions

- (j) The Director of Public Prosecutions should have sole responsibility for the conduct of proceedings (paragraphs 8.53-8.56).

- (k) The defendant should be obliged to give particulars before trial of the grounds of his not believing the statement to be false (paragraph 8.57).
- (l) The defendant should be obliged to give notice before the trial if he requires the prosecution to prove the falsity of the statement in question (paragraph 8.58).
- (m) There should be a provision corresponding to section 13 of the Civil Evidence Act 1968 (fact of conviction of any offence to be conclusive evidence of the commission of the offence) (paragraph 8.60).
- (n) Where the defendant has made no admission as to the falsity of the statement in issue, and the jury has returned a verdict of not guilty, there should be a provision whereby the court could require the jury to return a special verdict as to whether the statement in question was true (paragraphs 8.61-8.63).
- (o) Where both civil and criminal proceedings are in progress relating to the same publication, the judge in the civil action should have a discretion to stay that action until after trial of the criminal offence (paragraphs 8.64-8.65).

10.5 Our provisional conclusions on other issues arising out of our proposal to replace criminal libel with a new statutory offence of criminal defamation as described above are as follows -

- (a) There should be no criminal liability for defamatory statements which refer truthfully to a person's past misconduct (paragraphs 7.31-7.32).

- (b) The tendency of a defamatory statement to lead to a breach of the peace should not be the basis of any new offence of criminal defamation (paragraph 7.33).
- (c) In considering the need for a new offence, we have taken no account of the possible abolition of punitive damages in civil defamation (paragraphs 7.34-7.35).
- (d) We do not propose that any additional or special protection from defamation should be given to particular individuals or categories of people, such as the Sovereign and members of the Royal Family, persons prominent in the public service, and police officers (paragraphs 7.36-7.45).
- (e) Defamation of a group or class of persons, as such, should not be penalised (paragraph 8.19).

10.6 Finally, we provisionally conclude that a new summary offence is required to penalise those who write or send "poison-pen" letters. In substance, this offence would penalise any person who causes any other person to receive a communication, written or otherwise, which is grossly offensive, or of an indecent, shocking or menacing character, for the purpose of causing needless anxiety or distress to that or any other person. The maximum penalty for this offence would be six months' imprisonment or a fine of £1,000, or both (paragraphs 9.8-9.16).

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