



**Law
Commission**

Reforming the law

Simplification of Criminal Law:
Public Nuisance and Outraging Public Decency

**50
YEARS**

The Law Commission

(LAW COM No 358)

SIMPLIFICATION OF CRIMINAL LAW: PUBLIC NUISANCE AND OUTRAGING PUBLIC DECENCY

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

The Law Commissioners are:

The Right Honourable Lord Justice Lloyd Jones, *Chairman*
Stephen Lewis
Professor David Ormerod QC
Nicholas Paines QC

The Chief Executive of the Law Commission is Elaine Lorimer.

The Law Commission is located at 1st Floor, Tower, 52 Queen Anne's Gate, London SW1H 9AG.

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THE LAW COMMISSION

SIMPLIFICATION OF CRIMINAL LAW: PUBLIC NUISANCE AND OUTRAGING PUBLIC DECENCY

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THE LAW COMMISSION

SIMPLIFICATION OF CRIMINAL LAW: PUBLIC NUISANCE AND OUTRAGING PUBLIC DECENCY

To the Right Honourable Michael Gove MP, Lord Chancellor and Secretary of State for Justice

CHAPTER 1 INTRODUCTION

- 1.1 In 2010 we published a consultation paper on the common law offences of public nuisance and outraging public decency (“the CP”).¹ This contained provisional proposals:
- (1) to replace both those offences in statute; and
 - (2) to strengthen the fault element of both offences by introducing a requirement of intention or recklessness.
- 1.2 This report forms part of our wider project on simplification of the criminal law.² As explained in Part 1 of the CP, the purpose of simplification is to review old common law offences, consider whether they are still necessary, and if so consider how they could be restated in statute in a simpler and more comprehensible form.

PUBLIC NUISANCE

- 1.3 Public nuisance is a common law offence. It has been defined as follows:

A person is guilty of a public nuisance (also known as common nuisance), who (a) does an act not warranted by law, or (b) omits to discharge a legal duty, if the effect of the act or omission is to endanger the life, health, property or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all Her Majesty’s subjects.³

It typically consists either of an environmental nuisance, such as carrying on works producing excessive noise or smells, or of offensive or dangerous behaviour in public, such as noisy parties and hanging from bridges. It also

¹ Simplification of Criminal Law: Public Nuisance and Outraging Public Decency (2010) Law Commission Consultation Paper No 193.

² Our recent report on Simplification of Criminal Law: Kidnapping and Related Offences, (2014) Law Com No 355, also forms part of the simplification project.

³ P J Richardson (ed), *Archbold: Criminal Pleading, Evidence and Practice* (2015) (hereinafter “*Archbold*”), para 31-40.

includes obstructing the public highway, though now this is also a statutory offence.⁴

1.4 Public nuisance is a tort as well as a crime, and the definitions of the tort and the crime are identical,⁵ except that a private individual can sue for the tort only if he or she suffers damage over and above the effect on the general public. Unlike most crimes of comparable seriousness, public nuisance contains no requirement that the defendant intended or was reckless about whether his conduct caused the relevant kind of harm. The fault requirement is the same in the crime as in the tort: namely, that the defendant ought reasonably to have foreseen the consequences of the act or omission.

1.5 In the CP we provisionally proposed that:

- (1) the offence of public nuisance should be replaced in statute; and
- (2) the new offence should have a requirement that the defendant intended to cause or was reckless about causing the kind of harm involved in the offence.

1.6 In this report we consider the choice between the following options:

- (1) adopting the proposals set out in the CP;
- (2) replacing public nuisance in statute, reproducing the offence as it is or with minor changes, but with no change to the fault element;
- (3) abolishing the offence without replacement; or
- (4) leaving the offence at common law.

OUTRAGING PUBLIC DECENCY

1.7 Outraging public decency is also a common law offence, and was formerly regarded as one form of public nuisance. The offence can consist of any act or display fulfilling the following conditions:

- (1) it must be lewd, obscene or disgusting to such an extent as to outrage minimum standards of public decency as judged by the jury (or other tribunal of fact) in contemporary society;⁶
- (2) it must occur in a place which is accessible to or within view of the public;⁷ and

⁴ Highways Act 1980, s 137.

⁵ Para 2.18 below. Cases about the offence regularly cite cases about the tort, without suggesting that there is any difference: for example, para 18 of Lord Bingham's speech in *Rimmington* (para 2.2 below), refers to the civil case of *A-G v PYA Quarries* [1957] 2 QB 169 as "the leading modern authority on public nuisance".

⁶ *Hamilton* [2007] EWCA Crim 2062, [2008] QB 224 at para 30; para 2.38 below.

⁷ Para 2.45 below.

- (3) two or more persons must be present during the act or display, whether or not they are aware of the act or display or are outraged by it.⁸
- 1.8 The act or display must be deliberately undertaken by the defendant. But beyond this there is no requirement of fault. The defendant need not intend or believe that, or be reckless whether, the act or display is indecent.⁹ Nor need the defendant know, believe, or expect that any person will witness it or be outraged by it, or indeed that any person will be present at all.¹⁰
- 1.9 As with public nuisance, in the CP we provisionally proposed that the offence should be restated in statute, with an added requirement that the defendant should intend or be reckless about the risk that a person will be outraged.¹¹ In this report we discuss the same four options as in the case of public nuisance.

THE RESPONSES

- 1.10 We received a total of 13 responses to the CP.
- (1) Approximately half of the responses expressed agreement with our proposals to restate the offence of public nuisance in statute and include a requirement of intention or recklessness. The rest either commented on particular points or confined their comments to outraging public decency; none expressed opposition to our proposals.¹²
- (2) Similarly, approximately half of the responses expressed agreement with our proposals on outraging public decency. Three more considered that the offence should be restricted further or abolished, and one considered that the proposals would make the offence too narrow. The rest either commented on particular points or confined their comments to public nuisance.¹³

STRUCTURE OF THIS REPORT

- 1.11 Chapter 2 of this report describes the current law. The first half describes the offence of public nuisance, and the second half describes the offence of outraging public decency; the final paragraphs describe the separate common law offence of conspiracy to outrage public decency.
- 1.12 Chapter 3 of this report discusses how the law should be reformed. It is divided in the same way as Chapter 2.
- 1.13 Our conclusions and recommendations are set out in Chapter 4. Briefly, these are as follows:

⁸ *Rose v DPP* [2006] EWHC 852 (Admin), [2006] 1 WLR 2626.

⁹ *Gibson and Sylveire* [1990] 2 QB 619, 627.

¹⁰ *Bunyan and Morgan* (1844) 1 Cox CC 74.

¹¹ CP para 5.52. CP para 6.13 mentioned a different possibility: that the defendant should intend or be reckless about the risk that the act or display is objectively indecent: see para 3.89 below.

¹² For details, see para 3.5 below.

¹³ For details, see para 3.91 below.

- (1) The offence of public nuisance should be replaced by a statutory offence. This, like the existing offence, should cover any conduct which endangers the life, health, property or comfort of a section of the public or obstructs them in the exercise of rights belonging to the public.
- (2) This offence should require that the defendant either intended, or was reckless as to the risk of, the adverse effect on the public caused by that conduct. The defendant should not be guilty of the offence if his or her conduct was reasonable in the circumstances as he or she knew or believed them to be.
- (3) The offence of outraging public decency should also be replaced by a statutory offence. This, like the existing offence, should cover any act or display of an obscene or disgusting nature sufficient to outrage contemporary standards of decency, provided that it occurs in a place which is accessible to or within view of the public; but there should be no requirement that two persons should be present.
- (4) This offence should require that the defendant either knew that the act or display was obscene or disgusting¹⁴ and occurred in a place which is accessible to or within view of the public, or was reckless as to the risk that this might be so. Again the defendant should not be guilty of the offence if the defendant's conduct was reasonable in the circumstances as he or she knew or reasonably believed them to be.
- (5) The common law offence of conspiracy to outrage public decency is unnecessary and should be abolished without replacement.

ACKNOWLEDGMENTS

- 1.14 We thank the academics, experts, practitioners, officials and representatives of interest groups we have consulted. These include: Professors John Spencer and Matt Dyson of the University of Cambridge, Professor Alisdair Gillespie of Lancaster University, Professor Susan Edwards of the University of Buckingham, Neil Parpworth of De Montfort University, Professor Chris Ashford of Northumbria University, Professor Jason Neyers of Western University, Ontario, Katy Waterman and Andrew Glover of the Crown Prosecution Service, Richard Barker of the Forestry Commission, Richard Conway of the Health and Safety Executive, Christopher Wilkinson of the British Transport Police, Dan Wiley of the Environment Agency, Richard Broadbent of Natural England, Anna Hunt of DEFRA, Ian Leete of the Local Government Association, Sue Pennison of the Drinking Water Inspectorate, Malcolm Boura of British Naturism, Mark Smith of the West Mercia Police, Jan Bye of the Bar Council, Janet Arkinstall of the Law Society, Howard Price of the Chartered Institute of Environmental Health, Tony Kilner of the Association of Council Secretaries and Solicitors, and Pauline Dall of MIND.

¹⁴ That is, was aware of the physical features that made it obscene or disgusting: the defendant's own evaluation of indecency should, as in the existing law, be irrelevant.

CHAPTER 2

CURRENT LAW

2.1 In this chapter, we describe the existing offences of public nuisance and outraging public decency (including the separate common law offence of conspiracy to outrage public decency). In analysing the offences, we use the following terminology, which is commonly used in legal textbooks and academic literature when discussing criminal offences.

- (1) The “external elements” of an offence are the elements of the offence other than those relating to the defendant’s fault. They divide into:
 - (a) conduct elements: what the defendant must do or fail to do;
 - (b) consequence elements: any result that must be proved to be caused by the defendant’s conduct (for example, in murder, that the victim dies); and
 - (c) circumstance elements: other facts relating to the conduct or the victim which affect whether the defendant is guilty or not (for example, in rape, that the victim does not consent).
- (2) The “mental element” (or “fault element”) is the state of mind which must be established to show that the defendant is culpable, such as intention, recklessness, negligence, knowledge or belief or the lack of it.

PUBLIC NUISANCE

2.2 A detailed discussion and historical analysis of this offence was provided by Lord Bingham in the conjoined appeals of *Rimmington and Goldstein*;¹ a full discussion is also contained in Part 2 of the CP. The central concept is “the suffering of common injury by members of the public by interference with rights enjoyed by them as such”, or more briefly “the requirement of common injury”.² Lord Bingham, giving the leading speech in the House of Lords, sets out a variety of different formulations used over the last few centuries,³ culminating in the current definition in *Archbold*:⁴

A person is guilty of a public nuisance (also known as common nuisance), who (a) does an act not warranted by law, or (b) omits to discharge a legal duty, if the effect of the act or omission is to endanger the life, health, property or comfort of the public, or to

¹ [2005] UKHL 63, [2006] 1 AC 459.

² Lord Bingham, above, at para 6.

³ Paras 8 to 11 of speech; CP para 2.19.

⁴ *Archbold* para 31-40.

obstruct the public in the exercise or enjoyment of rights common to all Her Majesty's subjects.⁵

Conduct element

2.3 Public nuisance can be based on the defendant's single act, course of conduct or failure to act when under a legal duty.

- (1) An example of public nuisance involving a single act is *Ong*,⁶ where the defendant was convicted of conspiracy to commit public nuisance by switching off the lights at a Premiership football match.⁷
- (2) An example of public nuisance arising from a course of conduct is *Attorney-General v PYA Quarries*,⁸ concerning quarrying and blasting near a built-up area.
- (3) An example of public nuisance based on an omission is *Attorney-General v Tod Heatley*,⁹ where the defendant failed to prevent others from using his land as a rubbish tip.

2.4 In the CP we criticised the formulation "an act not warranted by law", as this suggests that there is a requirement of illegality independent of the common injury caused.¹⁰ The offence should not be presented as requiring conduct that, first, is unlawful and, secondly, causes common injury. Rather, it should be conduct causing common injury, for which there is no legitimate excuse. The need for excuse (or "warrant") does not arise until the common injury is established.

2.5 This suggested meaning appears to coincide with the way in which the offence is used in practice.¹¹ The point made in the CP is not a problem affecting the existing offence, but rather a point to be borne in mind if the offence is restated in statute.

Consequence element

2.6 The central feature of public nuisance, on which all else turns, is Lord Bingham's "requirement of common injury". Traditionally, this takes two forms. One is danger, annoyance or loss of amenity affecting those present in a local area,

⁵ This definition was accepted as the current standard in para 36 of the speech. At the time, the text of *Archbold* read "life, health, property, *morals* or comfort": the House of Lords accepted the definition "save for the reference to morals".

⁶ [2001] 1 Cr App Rep (S) 404, discussed CP para 2.13.

⁷ Denning LJ in *A-G v PYA Quarries* [1957] 2 QB 169, 192 also refers to the possibility of a public nuisance consisting of a single act: CP para 2.13.

⁸ [1957] 2 QB 169. This was a civil case.

⁹ [1897] 1 Ch 560.

¹⁰ CP para 2.9. In Canada, the offence is indeed interpreted as containing such a requirement: *Thornton* (1991) 3 CR (4th) 381, affirmed by the Supreme Court of Canada [1993] 2 SCR 445; CP para 2.66.

¹¹ As pointed out in CP para 2.18 in connection with *AG v PYA Quarries* (above), blasting and quarrying are not in themselves unlawful acts.

such as noises and smells. The other is an infringement or obstruction of a public right such as a right of way.

- 2.7 However, the definition in *Archbold*, and the previous definitions cited in *Rimmington*,¹² spread the net rather wider than this and include anything that endangers the life, health, property or comfort of the public, without any necessary connection to a local area or an identified public right. For this reason, the offence has been used in cases of hoax telephone calls to the emergency services;¹³ persistent telephone calls to a policewoman, likely to disrupt the operation of the station switchboard;¹⁴ obscene telephone calls;¹⁵ and accumulating materials for a bomb factory.¹⁶
- 2.8 The facts of *Rimmington* involved a campaign of racist hate mail sent to members of ethnic minorities. It was held that this, being a series of acts targeted at individuals rather than conduct affecting the public at large, fell outside the scope of the offence: the cases of *Norbury* and *Johnson*, concerning nuisance telephone calls, were disapproved. According to the House of Lords, including cases of this kind would destroy the coherence of the offence and cut it adrift from its intellectual moorings.¹⁷ If the offence were interpreted in such an expanded form, it would be indistinguishable from the supposed offence of public mischief, which was held not to exist in *DPP v Withers*.¹⁸
- 2.9 *Rimmington* was followed in *DPP v Fearon*.¹⁹ In that case the defendant approached and solicited an undercover police officer. It was held that this single act could not be a public nuisance. Even though it occurred in a known vice area, the defendant's act in relation to that single victim cannot be aggregated with those of others in the same area to constitute a public nuisance.
- 2.10 The prosecution must prove that the effect of the defendant's conduct on members of the public was either to cause actual harm (including loss of amenity) or to create a risk of harm. As stated in the *Archbold* definition, the effect of the defendant's conduct must be to *endanger* life, health, property or comfort.
- 2.11 Older definitions of public nuisance²⁰ speak of annoyance "to all the [Queen's] subjects". Lord Justice Romer, in *PYA Quarries*, pointed out that this cannot be taken literally, or no public nuisance could ever be established.²¹ More recent

¹² Paras 8 to 11 of Lord Bingham's speech. The relevant passages are set out in CP para 2.19.

¹³ *Madden* [1975] 1 WLR 1379.

¹⁴ *Millward* (1986) 8 Cr App R (S) 209.

¹⁵ *Norbury* [1978] Crim LR 435 and *Johnson* [1997] 1 WLR 367.

¹⁶ *Bourgass* [2006] EWCA Crim 3397.

¹⁷ Speech of Lord Bingham, para 37.

¹⁸ [1975] AC 842.

¹⁹ [2010] EWHC 340 (Admin), [2010] 2 Cr App R 22 (DC); see case comment by D Ormerod, [2010] Criminal Law Review 646.

²⁰ Eg Blackstone's *Commentaries* vol iii p 216.

²¹ [1957] 2 QB 169, 181; see also D Ormerod and K Laird, *Smith and Hogan's Criminal Law* (14th ed 2015) (hereinafter "*Smith and Hogan*") p 1262.

definitions suggest that a nuisance is “public” if either or both of the following conditions are satisfied.²²

- (1) The nuisance must affect a class of the public, such as the inhabitants of a local neighbourhood or a representative cross-section of them.²³
- (2) It must infringe rights belonging to the public as such. For example, every member of the public is entitled to use a public right of way. Obstructing the highway thus potentially affects everyone entitled to use it, even though only a few people may actually attempt to do so and experience the obstruction. Similarly, a noise or smell in a public place may actually affect only a small number of local residents, but potentially affects any member of the public who may go there.

Fault element

2.12 There is no requirement of intention or recklessness in the offence of public nuisance; the fault element is one of negligence. The defendant is liable if he or she knew or ought to have known of the risk of the kind of nuisance that in fact occurred.

- (1) In *Sedleigh-Denfield v O’Callaghan*²⁴ (a civil case) flooding was caused by a ditch and grating placed on the defendant’s land by the local council. It was held that, though the defendant did not create the nuisance, he was liable for continuing it if “with knowledge or *presumed knowledge* of its existence he fails to take any reasonable means to bring it to an end”.²⁵
- (2) In *Shorrock*²⁶ the defendant allowed a party on his field, at which loud music was played. On appeal against conviction for public nuisance, it was held that the mental element for the crime is identical to that for the tort. The correct test is that the defendant is guilty:

if either he knew or he ought to have known, in the sense that the means of knowledge were available to him, that there was a real risk that the consequences of the licence granted by him in respect of his field would be to create the sort of nuisance that in fact occurred.²⁷

- (3) The question was considered most recently in Goldstein’s appeal in *Rimmington and Goldstein*.²⁸ Mr Goldstein had enclosed some salt in an envelope together with a cheque, as a joking allusion to the age of the

²² In CP para 2.31 we discuss whether these requirements are alternative or cumulative, and express the view that they are alternative, in accordance with the definition in *Archbold*.

²³ *PYA Quarries* [1957] 2 QB 169, 183, cited in CP para 2.23.

²⁴ [1940] AC 880.

²⁵ Italics ours.

²⁶ [1994] QB 279.

²⁷ [1994] QB 279, 289, cited in CP para 2.40.

²⁸ [2005] UKHL 63, [2006] 1 AC 459.

debt he was paying off with the cheque; the salt leaked at the postal sorting office and caused an anthrax scare. It was held that, even on the test as laid down in *Shorrock*, Goldstein was not guilty, as there was no reason to suppose that he knew or should have known that the salt would leak. It was not sufficient that he knew or should have known that, *if* the salt leaked, disruption could be caused.

- 2.13 In Goldstein's appeal, it was argued for the appellant that the test should be one of "subjective recklessness"; that is, that the defendant was in fact aware of the risk, and unreasonably chose to take it.²⁹ The House of Lords rejected this argument; however, this made no difference to the result.

Vicarious liability

- 2.14 There can be vicarious liability for the offence of public nuisance.³⁰ That is, an employer can be liable for nuisances caused by his or her employees.³¹ In *Stephens*³² the owner of a slate quarry was held to be guilty of public nuisance when his workmen obstructed a river by tipping slag into it, even though he had given specific orders that they should not do this. Mr Justice Mellor explained that the proceedings, though criminal in form, were civil in nature: the criminal forum was only used because there is no such thing as an action in tort by the public and the public could not otherwise get redress.³³

Intoxication

- 2.15 A final question is what impact a defendant's voluntary intoxication might have on his or her potential liability for public nuisance. The criminal law draws a critical distinction between crimes of "specific intent" and "basic intent". If the crime is classified as one of specific intent, the defendant cannot be convicted if he or she was too intoxicated to form the intention required. In a crime of basic intent, a person can be convicted without having had the necessary mental fault at the time of the offence, subject to the rules on voluntary intoxication.³⁴
- 2.16 Since public nuisance does not require proof that the defendant had any intent at all, and can be committed by an inadvertent omission to take proper care, it is a crime of basic intent. Omitting to take care because of intoxication is the same as omitting to take care for any other reason. As public nuisance is an offence of basic intent, a defendant's claim that he or she acted in a state of intoxication, voluntarily induced, will provide no excuse.

²⁹ G [2003] UKHL 50, [2004] 1 AC 1034 held that this test, of "subjective recklessness", applied for the statutory offence of criminal damage.

³⁰ For vicarious liability in criminal law, see *Archbold* paras 17-25 to 17-29; D Ormerod (ed), *Blackstone's Criminal Practice* (2015) ("*Blackstone's*") paras A6.8 to A6.11; *Smith and Hogan* 10.2 (pp 310 to 320). For vicarious liability in tort, see *Clerk and Lindsell on Torts* (21st ed, 2014) chapter 6.

³¹ *Archbold* para 31-44; *Blackstone's* para B11.93; *Smith and Hogan* para 32.11.4, p 1264.

³² (1865-66) LR 1 QB 702.

³³ The relevant passage is quoted in full in CP para 2.43.

³⁴ *Smith and Hogan* para 11.4.3, pp 356 to 366; *Majewski* [1977] AC 443, [1976] 2 All ER 142 (HL).

Civil and criminal aspects of public nuisance

- 2.17 A public nuisance has three legal consequences:
- (1) a private person can bring proceedings in tort, seeking damages, an injunction or both, but only if that person has suffered “special damage”, that is to say, if he or she is particularly affected by the nuisance over and above the effect on the general public;
 - (2) the Attorney General, or a local authority,³⁵ may apply for an injunction to remove the nuisance; and/or
 - (3) the person responsible for the nuisance may be prosecuted in the criminal courts for the offence of public nuisance.
- 2.18 Apart from the requirement of special damage in the case of an individual wishing to sue in tort, the definition of public nuisance for all three purposes is identical. In *Shorrock*³⁶ Mr Justice Rattee concluded:

Indeed, given that the common law criminal offence is the causing of a public nuisance simpliciter, it would, in our judgment, be a surprising result to find that proof of the facts which would have entitled the Attorney-General to succeed in a relator action³⁷ against the landowner concerned may not be sufficient to found an indictment for the criminal offence. We conclude that this is not the true position.

Jurisdiction

- 2.19 As with all offences, the question arises whether the offence of public nuisance includes a case where the defendant’s actions, or the results of those actions, occur outside England and Wales. There has been no authority on this specifically concerning public nuisance. For offences in general, courts now favour what is known as the “substantial measure principle”, in which the courts of England and Wales have jurisdiction to deal with a case if a substantial part of the prohibited conduct or result takes place in this jurisdiction.³⁸

Mode of trial and sentence

- 2.20 Public nuisance is triable either way: that is to say, either in the Crown Court or in a magistrates’ court.³⁹ As in all common law offences where statute does not provide to the contrary, when it is tried in the Crown Court there is an unlimited power of imprisonment.⁴⁰

³⁵ Using its powers under Local Government Act 1972, s 222: CP para 2.50.

³⁶ [1994] QB 279, 289.

³⁷ A “relator action” is one in which the Attorney-General allows an individual to apply for an injunction by bringing proceedings in the name of the Attorney-General.

³⁸ *Smith (Wallace Duncan) (No 4)* [2004] EWCA Crim 631, [2004] QB 1418; *Sheppard* [2010] EWCA Crim 65, [2010] 2 All ER 850. For general discussion of the principles, see *Archbold* paras 2-33 and 2-34 and *Blackstone’s* paras A8.5 and A8.6.

³⁹ Magistrates’ Courts Act 1980, s 17(1) and Sch 1.

⁴⁰ *Archbold* para 31-49; *Blackstone’s* para B11.86.

Current use of the offence

- 2.21 The offence of public nuisance was traditionally used to deal with obstructing the public highway (including rivers) and activities causing a loss of amenity in the neighbourhood (for example by noises and smells). Today, however, these activities are largely covered by other offences and procedures. Obstructing the highway is an offence under section 137 of the Highways Act 1980. Other local nuisances are largely covered by a very comprehensive and detailed regime of “statutory nuisance”⁴¹ procedures operated by local authorities; local authorities also have the power to make bye-laws to suppress nuisances.⁴²
- 2.22 In current practice the offence of public nuisance is mainly used for various forms of misbehaviour in public. Anecdotal evidence from the College of Policing gives, as typical examples, obstructing the highway, hanging from bridges, lighting flares or fireworks at football matches, extinguishing floodlights at matches, littering forests with excrement and hosting acid house parties.
- 2.23 In Chapter 3⁴³ we give a list of recent prosecutions for public nuisance, derived from reported sentencing appeals, practitioners’ websites and newspaper reports. In addition to the activities mentioned in the last paragraph, common examples are hoax telephone calls, aggressive behaviour in public and causing a police siege by attempting or threatening to blow up or set fire to oneself or a house. In 2009 a group of men pleaded guilty to conspiracy to commit public nuisance by making videos threatening bombings.⁴⁴
- 2.24 It should be noted that a few of these examples, in particular those involving telephone calls, may be inconsistent with *Rimmington* and suggest that the limitations on the scope of the offence imposed in that case have yet to be completely reflected in practice.

Offences alternative to public nuisance

- 2.25 As mentioned above, the conduct traditionally covered by public nuisance is now often dealt with using a variety of other offences and procedures. We list some of them below.

Environmental offences

- 2.26 Environmental offences include offences under the Food and Environment Protection Act 1985,⁴⁵ the Environmental Protection Act 1990,⁴⁶ the Water

⁴¹ Environmental Protection Act 1990, ss 79 and 80. See para 2.29 below.

⁴² Local Government Act 1972, s 235 and following.

⁴³ Para 3.8 below.

⁴⁴ “Three guilty of bomb conspiracy” <http://news.bbc.co.uk/1/hi/uk/7528483.stm> (last visited 7 May 2015).

⁴⁵ Sections 1 (contravening an emergency prohibition concerning a food health hazard), 2 (failing to comply with a direction given as condition of allowing an act otherwise forbidden by an emergency prohibition), 9(1) (carrying on certain activities (such as moving silt) without a licence), 9(2) (making a false statement to obtain a licence) and 16(12) (contravention of regulations governing pesticides).

⁴⁶ Sections 33 (illegal waste disposal or treatment), 78M (failing to comply with remediation notice), 80(4) (failing to comply with abatement notice for statutory nuisance) and Part VI (relating to genetically modified organisms).

Industry Act 1991,⁴⁷ the Water Resources Act 1991 and Part 1 of the Clean Air Act 1993 (emitting dark smoke). In addition, there are offences against regulations made under the Pollution Prevention and Control Act 1999, in particular:

- (1) the Offshore Chemicals Regulations 2002,⁴⁸
- (2) the Offshore Petroleum Activities (Oil Pollution Prevention and Control) Regulations 2005;⁴⁹
- (3) the Environmental Permitting (England and Wales) Regulations 2010,⁵⁰ and
- (4) the Waste (England and Wales) Regulations 2011.⁵¹

2.27 It should be noted that many of the above offences consist not of causing nuisances such as pollution but rather of contraventions of a licensing scheme intended to prevent pollution in the future; indeed in some cases there is no substantive pollution offence. This is particularly true of the Environmental Permitting (England and Wales) Regulations 2010, which are largely concerned with water discharge and facilities.

2.28 Most of the above offences⁵² are prosecuted by the Environment Agency or the Drinking Water Inspectorate. It appears that the Environment Agency seldom prosecutes for public nuisance⁵³ and that the Drinking Water Inspectorate never does so.⁵⁴ The Forestry Commission, Natural England and the Health and Safety Executive inform us that they never prosecute for public nuisance either.

Local authority powers

2.29 Local authorities have a duty to issue abatement notices in respect of a statutory nuisance, and power to prosecute for breach of such a notice. Statutory nuisances include any premises, smoke, fumes or gases, dust, steam, smells, accumulations or deposits, animals or insects, artificial light or noise that are prejudicial to health or a nuisance.⁵⁵

⁴⁷ Section 70 (supplying water unfit for human consumption).

⁴⁸ SI 2002/1355.

⁴⁹ SI 2005/2055.

⁵⁰ SI 2010/675.

⁵¹ SI 2011/988.

⁵² The major exception is the offence of failing to comply with an abatement notice for statutory nuisance, which is prosecuted by local authorities: see next paragraph.

⁵³ For one case where it did, see *Environment Agency v Milford Haven Port Authority and Andrews* [1999] 1 Lloyd's Rep 673.

⁵⁴ The Drinking Water Inspectorate operates under powers delegated by the Secretary of State under Water Industry Act 1991, s 86. This includes power to prosecute for offences under that Act and other enactments in relation to the quality and sufficiency of water supplied, but there is no mention of power to prosecute for any common law offence.

⁵⁵ Environmental Protection Act 1990, s 79. The definition is set out in full in CP para 2.54.

- 2.30 Local authorities have powers to make byelaws for the suppression of nuisances;⁵⁶ there are also powers to make byelaws under other statutes. “Nuisances” in this context appear to cover offensive or inconvenient behaviour as well as environmental nuisances. In addition, local authorities are required to carry out their functions under the Licensing Act 2003 with a view to promoting “the licensing objectives”, one of which is the prevention of public nuisance.⁵⁷ They also have powers under the Noise Act 1996 to issue warning notices for night-time noise, to give fixed penalty notices and in some cases to enter and seize noise-making equipment.
- 2.31 Local authorities can apply for injunctions against a public nuisance or prosecute for the common law offence of public nuisance.⁵⁸ Informal consultation with the Local Government Association suggests that local authorities rarely prosecute for public nuisance and that the scope for doing so will be further reduced by the introduction of the procedures under the Anti-Social Behaviour, Crime and Policing Act 2014.

Offences of public misbehaviour

- 2.32 The following examples of offences overlapping with behavioural nuisance are listed in *Rimmington* and in the CP:
- (1) Public order offences, in particular violent disorder,⁵⁹ affray⁶⁰ and threatening or abusive behaviour.⁶¹
 - (2) Other offences of public misbehaviour, such as drunk and disorderly behaviour,⁶² harassment,⁶³ indecent exposure,⁶⁴ voyeurism⁶⁵ and holding raves in breach of statutory requirements.⁶⁶
 - (3) Bomb hoaxes.⁶⁷
 - (4) Obstructing the highway.⁶⁸
 - (5) Postal and communications offences, including sending a substance intending to induce a belief that it is noxious,⁶⁹ sending through the post

⁵⁶ Local Government Act 1972, s 235 and following.

⁵⁷ Licensing Act 2003, s 4(2)(c).

⁵⁸ Local Government Act 1972, s 222.

⁵⁹ Public Order Act 1986, s 2. This offence requires three or more persons.

⁶⁰ Public Order Act 1986, s 3.

⁶¹ Public Order Act 1986, ss 4, 4A and 5.

⁶² Criminal Justice Act 1967, s 91.

⁶³ Protection from Harassment Act 1997, s 1.

⁶⁴ Sexual Offences Act 2003, s 66.

⁶⁵ Sexual Offences Act 2003, s 67.

⁶⁶ Criminal Justice and Public Order Act 1994, s 63.

⁶⁷ Criminal Law Act 1977, s 51.

⁶⁸ Highways Act 1980, s 137.

⁶⁹ Anti-terrorism, Crime and Security Act 2001, s 144.

anything likely to injure a postal worker or anything indecent or obscene,⁷⁰ sending indecent, threatening or false communications⁷¹ and improper use of a public electronic communications network.⁷²

- 2.33 There are also procedures under the Anti-Social Behaviour Act 2003, in particular landlords' remedies for anti-social behaviour,⁷³ penalty notices for graffiti and fly-posting⁷⁴ and an offence of failing to comply with a remedial notice about high hedges.⁷⁵
- 2.34 The Anti-Social Behaviour, Crime and Policing Act 2014⁷⁶ provides for injunctions against anti-social behaviour.⁷⁷ These replace the former procedure of Anti-Social Behaviour Orders (ASBOs)⁷⁸ with effect from 23 March 2015.⁷⁹
- 2.35 The same Act introduces criminal behaviour orders,⁸⁰ community protection notices,⁸¹ remedial orders,⁸² public spaces protection orders,⁸³ closure notices⁸⁴ and closure orders,⁸⁵ as well as making further provision for landlords and tenants.⁸⁶ These provisions were all commenced on 20 October 2014.⁸⁷

OUTRAGING PUBLIC DECENCY

- 2.36 Outraging public decency is a common law offence, and is discussed in detail in Part 3 of the CP. It has two main requirements:

⁷⁰ Postal Services Act 2000, s 85.

⁷¹ Malicious Communications Act 1988, s 1.

⁷² Communications Act 2003, s 127.

⁷³ Anti-Social Behaviour Act 2003, ss 12 to 17.

⁷⁴ Anti-Social Behaviour Act 2003, s 43.

⁷⁵ Anti-Social Behaviour Act 2003, s 75.

⁷⁶ K Brown, "Replacing the ASBO with the injunction to prevent nuisance and annoyance: a plea for legislative scrutiny and amendment" [2013] *Criminal Law Review* 623.

⁷⁷ Anti-social Behaviour, Crime and Policing Act 2014, s 1.

⁷⁸ ASBOs were introduced by Crime and Disorder Act 1998, s 1: repealed by Anti-social Behaviour, Crime and Policing Act 2014, Sch 11 para 24(a) with effect from 23 March 2015.

⁷⁹ Anti-social Behaviour, Crime and Policing Act 2014 (Commencement No 8, Savings and Transitional Provisions) Order 2015 (SI 2015/373) art 4.

⁸⁰ Section 22. See P Jarvis, "Say Hello to the CrimBO" (linked from Blackstone's Criminal Practice Quarterly Update Issue 1 Autumn 2014, 9) at <http://global.oup.com/fdscontent/academic/pdf/law/CrimBO.pdf> (last visited 5 May 2015).

⁸¹ Section 43.

⁸² Section 49.

⁸³ Section 59.

⁸⁴ Section 76.

⁸⁵ Section 80.

⁸⁶ Described in J Luba, "The new Anti-social Behaviour Act 2014 – what it means for landlords and tenants" [2014] *Landlord and Tenant Review* 87 and 165.

⁸⁷ Anti-social Behaviour, Crime and Policing Act 2014 (Commencement No 7, Saving and Transitional Provisions) Order 2014 (SI 2014/2590), art 3(a).

- (1) The indecency requirement. There must be an act of a lewd, obscene or disgusting character; and it must be of such a character that it outrages minimum standards of public decency as judged by the jury in contemporary society.
- (2) The publicity requirement. The act must be in a public place, or at least in a place which is accessible to or within view of the public. Further, the act must be in the presence of two or more persons, whether or not those persons actually witness the act or are outraged by it.

The act

2.37 The types of conduct that have been held to constitute outraging public decency are wide ranging. These include: indecent exposure,⁸⁸ masturbating or other sexual activities (real or simulated) in public,⁸⁹ publishing a magazine with contact advertisements for gay men,⁹⁰ intimate filming of women without their consent,⁹¹ exhibiting a sculpture consisting of a human head with freeze-dried human foetuses as earrings,⁹² nude bathing in inhabited areas,⁹³ disinterring a corpse for dissection,⁹⁴ indecent pay-per-view exhibitions,⁹⁵ exhibiting a picture of sores,⁹⁶ procuring girls to be prostitutes⁹⁷ and urinating on a war memorial.⁹⁸ Several of them may not amount to this offence as it is now interpreted.⁹⁹

The indecency requirement

2.38 In *Hamilton*,¹⁰⁰ the indecency requirement was described as follows:

⁸⁸ *Sidley* (1662) 1 Sid 168, 82 ER 1036; *Watson* (1847) 2 Cox CC 376, 10 LTOS 204; *Holmes* (1853) 1 Dears CC 207; *Thallman* (1863) Le & Ca 326, 169 ER 1416; *Wellard* (1884) 14 QBD 63; *Walker* [1996] 1 Cr App R 111.

⁸⁹ *Bunyan and Morgan* (1844) 1 Cox CC 74, 3 LTOS 453; *Orchard* (1848) 3 Cox CC 248, (1848) 13 JP 269; *Elliot* (1861) Le & Ca 103; *Harris* (1871) LR 1 CCR 282, [1861-73] All ER Rep Ext 1308; *Mayling* [1963] 2 QB 717, 47 Cr App Rep 102; *May* (1990) 91 Cr App Rep 157, [1990] Crim LR 415; *Lunderbech* [1991] Crim LR 784; *Rose v DPP* [2006] EWCA 852 (Admin), [2006] 1 WLR 2626; *F* [2010] EWCA Crim 2243, (2010) 174 JP 582.

⁹⁰ *Knüller (Publishing, Printing and Promotions) Ltd v DPP* [1973] AC 435, [1972] 2 All ER 898.

⁹¹ *Choi* [1999] EWCA Crim 1279, [1999] 8 Archbold News 3, CA; *Hamilton* [2007] EWCA Crim 2062, [2008] QB 224 at [21].

⁹² *Gibson and Sylveire* [1990] 2 QB 619, [1991] 1 All ER 439.

⁹³ *Crunden* (1809) 2 Camp 89, 170 ER 1091; *Reed* (1871) 12 Cox CC 1.

⁹⁴ *Lynn* (1788) 2 Term Rep 733, 100 ER 394.

⁹⁵ *Saunders* (1875) 1 QBD 15.

⁹⁶ *Grey* (1864) 4 F & F 73, 176 ER 472.

⁹⁷ *Delaval* (1763) 3 Burr 1434, 97 ER 913; *Howell and Bentley* (1864) 4 F & F 160, 176 ER 513.

⁹⁸ *Laing* (unreported guilty plea) <http://www.timesonline.co.uk/tol/news/uk/crime/article6933293.ece> (subscription only).

⁹⁹ For this point, see para 2.43 below. For example, contact advertisements, as in *Knüller*, would not normally constitute this offence at the present day.

¹⁰⁰ [2007] EWCA Crim 2062, [2008] QB 224 para 30.

The first element is one that constitutes the nature of the act which has to be proved. It has to be proved both that the act is of such a lewd, obscene or disgusting character and that it outrages public decency. (i) An obscene act is an act which offends against recognised standards of propriety and which is at a higher level of impropriety than indecency; see *R v Stanley*.¹⁰¹ A disgusting act is one “which fills the onlooker with loathing or extreme distaste or causes annoyance”; *R v Choi* (7 May 1999, unreported).¹⁰² ... (ii) It is not enough that the act is lewd, obscene or disgusting and that it might shock people; it must, as Lord Simon made clear in the *Knüller* case,¹⁰³ be of such a character that it outrages minimum standards of public decency as judged by the jury in contemporary society. As was pointed out, ‘outrages’ is a strong word.

Lewd, obscene or disgusting

- 2.39 The first limb of this definition answers the question of quality, “what does obscenity mean”. The definition focuses on the kind of reaction to be expected of a typical bystander: shock, loathing, distaste, disgust, annoyance. It is clear that the offence is not confined to sexual indecency,¹⁰⁴ and that it is irrelevant whether the act has a tendency to deprave or corrupt.¹⁰⁵
- 2.40 The cases most commonly relate to activities which can be seen or heard and which may disgust members of the public who see or hear them. In *Hamilton*,¹⁰⁶ the court observed:

There is no reason why in principle the nature of the act cannot be witnessed in another way such as hearing; we therefore accept the argument of the prosecution that the nature of the act can be capable of being witnessed by means other than seeing.

It is of course possible to be shocked by something one hears rather than sees. However, as argued in the CP, the offence does not extend to an act that is merely shocking to hear *about* at second hand.¹⁰⁷ For example, we very much doubt that the old cases about procuring girls to be prostitutes,¹⁰⁸ neither of which

¹⁰¹ [1965] 1 All ER 1035, [1965] 2 QB 327.

¹⁰² [1999] EWCA Crim 1279, [1999] 8 Archbold News 3, CA (footnote ours).

¹⁰³ [1973] AC 435, [1972] 2 All ER 898.

¹⁰⁴ CP para 3.19.

¹⁰⁵ CP para 3.18. For both points, see *Gibson and Sylveire* [1990] 2 QB 619, [1991] 1 All ER 439, concerning the foetus earrings. There is a separate offence of conspiracy to corrupt public morals.

¹⁰⁶ [2007] EWCA Crim 2062, [2008] QB 224 para 34.

¹⁰⁷ CP para 3.23.

¹⁰⁸ *Delaval* (1763) 3 Burr 1434, 97 ER 913; *Howell and Bentley* (1864) 4 F & F 160, 176 ER 513.

involved any public display, would be held to constitute the offence as it is now interpreted.¹⁰⁹

Of such a character as to outrage public decency

2.41 The second limb of the indecency requirement in *Hamilton* answers the question of degree, “how obscene does it need to be”. Two points arise here:

- (1) First, the degree of shock or disgust has to be fairly high if it is to amount to “outrage”, which is a strong word.
- (2) Secondly, the test is an objective one. That is, the question is how it would appear to a jury, and not how it would affect anyone actually present or likely to come by: there is no suggestion in the cases that the standard of outrage required should vary with the type of person likely to witness it. In *Saunders*,¹¹⁰ concerning a pay-per-view booth on Epsom Downs, it was no excuse that the display would only be witnessed by those who had paid to come in and were therefore unlikely to be shocked by it. Conversely, the offence does not appear to be committed if the act would not be regarded as offensive by the general public but does offend a special local public with particular sensitivities.

2.42 In short, both limbs of the indecency requirement are purely descriptive of the character of the act or display. There is no requirement that any person be actually outraged,¹¹¹ or that they are likely to be, or even that the act is observed at all.¹¹² In technical language, the offence does not have a consequence element (meaning a result that must be proved to have been caused).¹¹³

2.43 One final point is that the meaning of indecency and outrage must follow current standards, as assessed by a jury. The fact that a given activity has been held to constitute the offence in the past is not a binding precedent for the future, since standards change. In *Knulier*¹¹⁴ Lord Simon said:

I think the jury should be invited, where appropriate, to remember that they live in a plural society, with a tradition of tolerance towards minorities, and that this atmosphere of toleration is itself part of public decency.¹¹⁵

¹⁰⁹ CP paras 3.8 to 3.11. In *Criminal Law: Report on Conspiracy and Criminal Law Reform* (1976) Law Com No 76 para 3.32 we interpreted those cases as authority for the existence of a separate common law offence of conspiracy to debauch an individual. Depending on the circumstances, they might now amount to the offence of conspiracy to corrupt public morals rather than conspiracy to outrage public decency.

¹¹⁰ (1875) 1 QBD 15.

¹¹¹ *Mayling* [1963] 2 QB 717, 47 Cr App R 102 (CCA).

¹¹² Para 2.49 below.

¹¹³ For the meaning of the terms “consequence element”, “fault element” and similar, see para 2.1 above.

¹¹⁴ [1973] AC 435, 495.

¹¹⁵ And as stated in fn 99 to Chapter 2 above, the facts in *Knulier* itself would almost certainly not now be held to outrage current standards of decency.

- 2.44 On similar reasoning, in the Canadian case of *Labaye*¹¹⁶ it was held that, having regard to current moral standards and the risk of social harm, a swingers' club (a place where couples meet to exchange sexual partners) where entry requirements were effectively monitored was not a "bawdy house" within the relevant legislation.

The publicity requirement

Public place

- 2.45 The act must occur in a public place. This does not necessarily mean a place to which the public has a right of access. In *Wellard*¹¹⁷ the offence was committed while the defendant was trespassing in fields that were private property but where other trespassers sometimes came. Similarly the offence can be committed in a private house (for example on the roof or near a window) if people in the street or the house opposite can see the activity in question.¹¹⁸ By contrast, in *Walker*¹¹⁹ the defendant exposed himself to his daughter and another girl in his own home: it was held that this was not "in public", as it was not in a place to which the general public had access and was not in public view.
- 2.46 Although there is no binding English authority, it appears likely that "place" must be interpreted literally and does not include an internet site. The question has been considered in Hong Kong. In *HKSAR v Chan Yau Hei*¹²⁰ the defendant posted a politically inflammatory message on an internet forum. The Hong Kong Court of Final Appeal accepted that the message might have been of such a nature as to cause outrage. However, it also held that the offence must be committed in a physical, tangible place which is accessible to or within view of the public. The court cited one of the judgments in *Kneller (Publishing, Printing and Promotions) Ltd v DPP*¹²¹ to the effect that, in this offence, the word "public" referred to the place in which the offence is committed rather than the body of persons capable of being affected by it.
- 2.47 It would of course be possible for the offence of outraging public decency to be committed by means of a display from an internet page, if for example it were projected on to a large screen, or a person showed the page to bystanders on a mobile internet-enabled device.¹²² But in that case the offence would be committed by the person who projected or showed the image, rather than the person who originally posted it.¹²³ It would be no different from a case in which indecent photographic images were projected by mechanical means.

¹¹⁶ [2005] 3 SCR 728, 2005 SCC 80, cited *Archbold* paras 20-245 and 20-246. See also *Kouri* [2005] 3 SCR 789, 2005 SCC 81.

¹¹⁷ (1884) 14 QBD 63.

¹¹⁸ *Rouverard* (unreported) 1830; *Thallman* (1863) Le & Ca 326, 169 ER 1416.

¹¹⁹ [1996] 1 Cr App R 111.

¹²⁰ [2014] HKCFA 18.

¹²¹ [1973] AC 435, 494-5.

¹²² Para 63 of judgment in *Chan Yau Hei* [2014] HKCFA 18.

¹²³ The original poster might be guilty of another offence, for example under the Communications Act 2003.

Two person rule

- 2.48 The other aspect of the publicity requirement is that the act must take place in the presence of two or more persons. In *Rose v DPP*,¹²⁴ a couple performed an act of oral sex in a bank foyer within view of a CCTV camera and the recording was viewed by a bank official some hours later. It was held that the offence was not committed, as the act was not performed in the presence or view of two or more persons.¹²⁵
- 2.49 It is not necessary that those two persons present, or indeed any person, should actually have witnessed the act in question.¹²⁶ In *Hamilton*¹²⁷ the defendant filmed up women's skirts in a supermarket by means of a hidden video camera attached to a wheeled backpack. It was held that the offence was committed as there were numerous people present, even though no one observed Hamilton's activities and his actions did not come to light until the recordings were examined some time later.
- 2.50 In short, the requirement is not that two persons saw the act, but that two persons could have seen it. This opened up a further ambiguity, namely whether it is necessary that two persons were actually present, or only that they could have been.¹²⁸ This doubt was resolved in *F*.¹²⁹ In that case the defendant parked his car so that he could watch some boys playing football nearby. He then masturbated, but covered himself up with a piece of paper whenever anyone came near. He was however observed by a woman who by chance looked out of a window opposite. The trial judge was invited by the parties to make a ruling before the commencement of the trial about the application of the two-person rule. He decided that, on the facts disclosed by the prosecution's witness statements, the two-person rule was not satisfied and that the trial should not proceed. On appeal under section 58 of the Criminal Justice Act 2003 (concerning "adverse rulings"), this ruling was upheld by the Court of Appeal: as explained in *Hamilton*, the requirement is that at least two people *were* present and were *capable* of seeing the nature of the act and being affected by it.

Fault element

- 2.51 Outraging public decency is an offence of strict liability. Again this should be considered under the headings of the indecency requirement and the publicity requirement.

¹²⁴ [2006] EWHC 852 (Admin), [2006] 1 WLR 2626, [2006] 2 Cr App R 29.

¹²⁵ See also the earlier cases of *Watson* (1847) 2 Cox CC 376, 10 LTOS 204 and *Webb* (1848) 3 Cox CC 183, 12 LTOS 250, 1 Den 338, 344.

¹²⁶ This question was left open in *Webb* (above) and *Elliot* (1861) Le & Ca 103.

¹²⁷ [2007] EWCA Crim 2062, [2008] QB 224 para 34.

¹²⁸ P Rook and R Ward, *Sexual Offences Law and Practice* (4th ed 2010) ("*Rook and Ward*") para 14.43. This question too was left open in *Elliot* (above).

¹²⁹ [2010] EWCA Crim 2243, (2010) 174 JP 582. See also *Rook and Ward*, First Supplement to the Fourth Edition (2014), para 14.43.

The indecency requirement

2.52 In *Gibson and Sylveire*¹³⁰ Lord Lane CJ accepted the prosecution argument that:

... the object of the common law offence is to protect the public from suffering feelings of outrage by such exhibition. Thus, if a defendant *intentionally* does an act which *in fact* outrages public decency,¹³¹ the public will suffer outrage whatever the defendant's state of mind may be. If the defendant's state of mind is a critical factor, then, he submits, a man could escape liability by the very baseness of his own standards.

2.53 That is, the defendant must intend to perform some physical act. But the defendant need not intend or believe that, or be reckless as to:

- (1) whether the act or display is indecent;
- (2) whether it will or might be perceived by others as indecent; or
- (3) whether any person will in fact experience outrage (as explained above,¹³² such outrage or the risk of it is not an ingredient of the offence).

2.54 It is not clear from the cases whether the offence is committed if the defendant was unaware of the content of the thing shown; for example if a person accessed a website in the presence of others not knowing of its pornographic content. Presumably, if the person was truly unaware of the nature of the site and disconnected from it as soon as possible, no prosecution would be brought. This may explain the lack of reported cases on this question.

The publicity requirement

2.55 There is no requirement that the defendant is aware of a risk that the act will be seen or witnessed. In *Bunyan and Morgan*¹³³ two defendants performing indecent acts together were found guilty, even though they were unaware of being observed and, in the words of the judgment, "would have sought as much privacy as they could". Similarly the conviction in *Hamilton* was upheld although he was clearly counting on not being seen.

2.56 It would seem, on similar reasoning, that the defendant need not be aware of the presence of the two persons. In *Bunyan*, for example, the defendants were only observed through a window and were unlikely to be aware of the presence of persons outside.

2.57 The cases do not state whether the defendant need be aware that the place is a public one. Given the decision in *Bunyan* it would seem not: the defendants in that case presumably thought that they had complete privacy, albeit in a private room of a public house.

¹³⁰ [1990] 2 QB 619, 627.

¹³¹ Our italics.

¹³² Para 2.42 above.

¹³³ (1844) 1 Cox CC 74.

Intoxication

- 2.58 As with public nuisance, the question arises whether intoxicated conduct can constitute the offence.¹³⁴ Again, the answer depends on whether the offence is classified as one of basic or specific intent. As we have seen, outraging public decency is an offence of strict liability. Since there is no fault element, it follows that the offence is one of basic intent. This view is confirmed by *Rook and Ward*,¹³⁵ which states that the offence is “one of basic intent, such that voluntary intoxication through drink or drugs will provide no excuse”.

Jurisdiction

- 2.59 We consider that the offence of outraging public decency is committed if either the defendant’s conduct or the resulting display, sight or sound occurs in England and Wales.

Mode of trial and sentence

- 2.60 The offence can be tried either in the Crown Court or in a magistrates’ court.¹³⁶ On conviction in the Crown Court, the power of imprisonment is unlimited.¹³⁷

Current use of offence

- 2.61 The most common uses of the offence, as evidenced by a case sample provided by the Crown Prosecution Service, are for exposure, masturbation or other sexual activity in public and taking intimate videos in public without the consent of the subject (“upskirting”).¹³⁸

Offences alternative to outraging public decency

- 2.62 There is an offence of exposure, consisting of intentionally exposing one’s genitals intending someone to see them and be caused alarm or distress.¹³⁹ There are also offences of voyeurism (observing a person doing a private act, for sexual gratification),¹⁴⁰ intercourse with an animal, sexual penetration of a corpse and sexual activity in a public lavatory.¹⁴¹

¹³⁴ For the meaning of this, see para 2.15 above.

¹³⁵ *Rook and Ward* para 14.54.

¹³⁶ Criminal Justice Act 2003, s 320(2).

¹³⁷ *Archbold* para 20-240; *Blackstone’s* para B3.345.

¹³⁸ Para 3.93 below.

¹³⁹ Sexual Offences Act 2003, s 66; for the full definition, see para 3.100 below.

¹⁴⁰ Sexual Offences Act 2003, s 67; for the full definition, see para 3.105 below.

¹⁴¹ Sexual Offences Act 2003, ss 68 to 71.

- 2.63 There are also offences concerned with indecent publications and displays.¹⁴² In some cases the behaviour might amount to the offence of behaviour likely to cause harassment, alarm or distress.¹⁴³

CONSPIRACY TO OUTRAGE PUBLIC DECENCY

- 2.64 The charge in the leading case of *Knüller (Publishing, Printing and Promotions) Ltd v DPP*¹⁴⁴ was not “outraging public decency” but “conspiracy to outrage public decency”. However, with the exception of *Shaw v DPP*,¹⁴⁵ most of the previous cases which it cited concerned outraging public decency without any mention of conspiracy.¹⁴⁶
- 2.65 Before 1977 conspiracy was a common law offence, consisting of an agreement either to do an unlawful thing or to do a lawful thing in an unlawful way. “Unlawful” in this context did not necessarily mean involving a criminal offence: it also included acts that were wrongful in civil law or contrary to public policy or good morals. Particular types of common law conspiracy were conspiracy to defraud, conspiracy to corrupt public morals and conspiracy to outrage public decency.
- 2.66 Section 1 of the Criminal Law Act 1977 created a new statutory offence of conspiracy, consisting of an agreement to commit an offence. Section 5 abolished the common law offence of conspiracy, with the exception of conspiracy to defraud and:

... the offence of conspiracy at common law if and in so far as it may be committed by entering into an agreement to engage in conduct which—

- (a) tends to corrupt public morals or outrages public decency; but
- (b) would not amount to or involve the commission of an offence if carried out by a single person otherwise than in pursuance of an agreement.

That is, both conspiracy to corrupt public morals and conspiracy to outrage public decency were preserved, but only where the conduct agreed upon did not itself constitute an offence.

¹⁴² Eg the Obscene Publications Acts; Theatres Act 1968, s 2; Indecent Displays (Control) Act 1981; Metropolitan Police Act 1839, s 4; Children and Young Persons (Harmful Publications) Act 1955.

¹⁴³ Public Order Act 1986, s 5. This offence was used when a person walked naked through a town centre: *Gough v DPP* [2013] EWHC 3267 (Admin), [2014] Crim L R 371. For his appeal to the European Court of Human Rights, see *Gough v UK* [2014] ECHR 49327/11, [2014] All ER (D) 313 (Oct). See *Rook and Ward*, para 14.129 and following; *Rook and Ward* (First Supplement to Fourth Edition) para 14.132.

¹⁴⁴ [1973] AC 435, 494-5.

¹⁴⁵ [1962] AC 220, [1961] 2 All ER 446. This case concerned the publication of the “Ladies’ Directory”, which was a list of contact details of prostitutes.

¹⁴⁶ *Delaval* (1763) 3 Burr 1434, 97 ER 913 and *Howell and Bentley* (1864) 4 F & F 160, 176 ER 513, concerning procuring girls to be prostitutes, were charged as conspiracy: see fn 109 above.

- 2.67 In the CP¹⁴⁷ we argued that the meaning of “outraging public decency” is identical in the offence of that name and in the offence of conspiracy. It follows that any “agreement to engage in conduct which ... outrages public decency” is necessarily an agreement to engage in conduct amounting to or involving the commission of an offence. As a result, common law conspiracy to outrage public decency cannot now apply in any circumstances.¹⁴⁸ The correct charge in such a case is under section 1 of the Criminal Law Act 1977 for the statutory offence of conspiring to commit the common law offence of outraging public decency.¹⁴⁹
- 2.68 At the time that the Criminal Law Act 1977 was passed, it was still an arguable view¹⁵⁰ that there was no common law offence of outraging public decency but only specific common law offences of indecent exposure and public exhibition of indecent acts and things.¹⁵¹ It was therefore reasonable to preserve the offence of conspiracy to outrage public decency for reasons of caution. However this view was a minority one even then,¹⁵² and is certainly not sustainable after *Hamilton*.¹⁵³

¹⁴⁷ CP paras 3.12 to 3.15.

¹⁴⁸ One could argue that an act of consensual sexual intercourse in public cannot be “carried out by a single person”, so that an agreement to do so is still within the offence. We believe that the offence of outraging public decency is committed separately by each partner, and that “by a single person” means simply “otherwise than pursuant to a conspiracy”.

¹⁴⁹ *Smith and Hogan* para 13.3.5.3, p 524.

¹⁵⁰ Maintained by Lord Reid in *Kneller (Publishing, Printing and Promotions) Ltd v DPP* [1973] AC 435, 457-8. However, he held that conspiracy to outrage public decency did not exist either.

¹⁵¹ Criminal Law: Report on Conspiracy and Criminal Law Reform (1976) Law Com No 76, para 3.24.

¹⁵² Law Com No 76, para 3.23.

¹⁵³ [2007] EWCA Crim 2062, [2008] QB 224.

CHAPTER 3

REFORMING THE OFFENCES

INTRODUCTION

- 3.1 The first half of this chapter discusses public nuisance, and the second half discusses outraging public decency (including conspiracy to outrage public decency). Within each offence, the order of discussion is as follows:
- (1) the proposals in the CP;
 - (2) the responses to consultation;
 - (3) evidence about the use of the offences; and
 - (4) options for reform.
- 3.2 For each of the offences, the main options are as follows:
- (1) following the scheme of the CP (offence restated in statute with strengthened fault element);
 - (2) restating the offence in statute without altering the fault element (but possibly with other changes);
 - (3) abolishing the offence without replacement; or
 - (4) leaving the offence at common law.

PUBLIC NUISANCE

The consultation paper

- 3.3 In the CP we provisionally proposed that the offence of public nuisance should be restated in statute. We proposed that the external elements of the offence should remain as laid down in *Rimmington* but that the fault element should be strengthened. Specifically:
- ... public nuisance should be found proved only when D is shown to have acted in the relevant respect intentionally or recklessly with regard to the creation of a public nuisance. That is, D must be shown to have intended to create, or realised that he or she might generate, what ordinary people would regard as a public nuisance.¹
- 3.4 We also proposed “to explore definitions alternative to that given in *Archbold*”. The reason for this was stated above:² the *Archbold* definition, which speaks of an “act not warranted by law”, suggests that there is a requirement of illegality which must be satisfied before the question of common injury is considered.

¹ CP para 5.44.

² Para 2.4 above; CP para 2.9. See also para 3.39 below.

Responses to consultation

3.5 We received a total of 13 responses to the CP. Of these, three³ were concerned solely with outraging public decency. Out of the ten remaining responses:

- (1) Five agreed with our proposals to restate the offence in statute and introduce a fault element. Of these, two⁴ believed that the definition in *Archbold* was adequate, two⁵ agreed that it should be reformulated, and one⁶ did not address the question.
- (2) The Crown Prosecution Service broadly supported our proposals, but advocated that there should be two offences: a more serious offence based on intention or subjective recklessness, and a summary-only offence based on objective recklessness. They agreed that “without reasonable excuse” should be used in preference to “act not warranted by law”.
- (3) The West Mercia Police made no comments on the proposals, but believed they would have little effect on anti-social behaviour, given the small number of prosecutions.
- (4) The Chartered Institute of Environmental Health made no comments on the proposals, but sought reassurance that they would not impact on the definition of statutory nuisance.
- (5) Mind, the mental health charity, made no comments on the proposals, but wanted to ensure that all decisions were governed by the principles of the Mental Capacity Act 2005 and “the principle of diverting offenders with mental health issues out of the criminal justice system wherever possible”. We have treated this as a response in support of our proposal on fault, as strengthening the fault element could help to protect people with limited capacity (whether because of mental health issues, learning disabilities or any other reason) from conviction for such a serious offence.
- (6) Mr Roger Sheriff was concerned with a statutory exemption contained in the Civil Aviation Act 1982, but had no comment on the proposals.

Evidence of current use

3.6 Over the period from 2003 to 2013 inclusive, on average 151 defendants per year were proceeded against for public nuisance in a magistrates’ court (including cases later transferred to the Crown Court). Of these, 65 were convicted in the magistrates’ court and 8 received an immediate custodial sentence.

3.7 In the same period, on average 22 defendants per year were tried for public nuisance in the Crown Court. Of these, 14 were convicted. Including cases tried

³ British Naturism, Chris Ashford and David Burrowes MP.

⁴ The Criminal Law Committee of the Law Society and the Law Reform Committee of the Bar Council; the Bar Council favoured adding “without lawful excuse” to the definition.

⁵ The Justices’ Clerks Society and the Association of Council Secretaries and Solicitors.

⁶ Anthony Edwards.

in a magistrates' court and committed to the Crown Court for sentence, 20 defendants were sentenced per year. Of these, 9 were sentenced to immediate custody; 2 of them for a term up to 6 months, and another 1 for a term over 6 months but not exceeding a year. In the whole period, one defendant received a sentence of life imprisonment.⁷

- 3.8 Since the confirmation of the definition of the offence and its application in *Rimmington*, prosecutions for public nuisance have been brought for misbehaviour involving roads and bridges, jumping into a river during a boat race, hoax and nuisance telephone calls, making videos threatening to bomb aircraft, threatening to commit suicide or set fire to a house, aggressive behaviour in public and glue sniffing in public. A detailed list of these cases, together with other offences that could have been charged, is given below.⁸

Options for reform

- 3.9 Consideration of reform must address the following questions:

- (1) Is an offence of public nuisance needed?⁹
- (2) If so, should it be restated in statute?¹⁰
- (3) What conduct should the new offence address: is the existing offence over- or under-inclusive?¹¹
- (4) Is the existing standard of fault appropriate, or should a stricter fault element be introduced as proposed in the CP?¹²

(1) Is an offence of public nuisance needed?

- 3.10 The history of public nuisance is set out in detail in an article by Professor John Spencer.¹³ This article was frequently referred to in *Rimmington* and in the CP. He argued that the offence of public nuisance was so vague, and covered so many different kinds of actions, that it could not be considered a coherent offence. He further argued that it could be abolished without loss, as all or most instances were covered by specific offences.

- 3.11 In the CP we argued against this for the following reasons:

- (1) Since the decision in *Rimmington*,¹⁴ the offence can no longer be criticised as formless and indefinite.

⁷ Figures supplied by the Ministry of Justice.

⁸ Table following para 3.16 below.

⁹ Para 3.10 and following, below.

¹⁰ Para 3.32 below.

¹¹ Para 3.34 and following, below.

¹² Para 3.50 and following, below.

¹³ "Public Nuisance — a critical examination" [1989] *Cambridge Law Journal* 55.

¹⁴ [2005] UKHL 63, [2006] 1 AC 459.

- (2) Human inventiveness being so great, it is desirable to have a general offence for culpable acts that injure the public but do not fall within any of the specialised offences.
- (3) The penalties for the specialised offences are limited, and there are cases of serious deliberate or irresponsible misbehaviour where higher sentencing powers are required.

RATIONALE OF OFFENCE

3.12 One question is the nature of the right or interest which public nuisance seeks to protect. In our view, its proper use is to protect the rights of members of the public to enjoy public spaces and use public rights (such as rights of way) without danger, interference or annoyance. This preserves the analogy with private nuisance, which gives similar protection to the right of individuals to the reasonable enjoyment of their property and the unimpeded use of their private rights of way.¹⁵ This view receives some support from *Rimmington*.¹⁶ One question raised in that case was whether the offence of public nuisance is certain and coherent enough to satisfy the general principle of the rule of law and the requirement of certainty under the European Convention on Human Rights.¹⁷ It was held that the offence does reach that standard of certainty, but only if it is interpreted narrowly enough to exclude cases consisting of a series of acts against individuals.¹⁸

3.13 The offence, interpreted on the analogy of private nuisance as suggested above, and following *Rimmington*, expresses a clear concept and achieves predictability. In contrast, if the offence is interpreted and used as a catch-all offence for general misbehaviour, it will lose any unifying concept. As stated in *Rimmington*, this wide interpretation would amount to re-inventing the obsolete offence of public mischief.¹⁹

OVERLAP WITH OTHER OFFENCES

3.14 Spencer also argues that there is no need for a generalised offence of public nuisance, as all or most instances are covered by specialised statutory offences. This raises two questions:

- (1) Are all instances of public nuisance in fact covered by other offences?
- (2) Where public nuisance overlaps with another offence, is it always preferable to use that other offence?

¹⁵ For a full discussion of the relationship between public and private nuisance, see J Pointing, "Public nuisance: beyond Highway 61 revisited" [2011] *Environmental Law Review* 25. On his analysis, the basic difference is that private nuisance is "property based" while public nuisance is "rights based".

¹⁶ [2005] UKHL 63, [2006] 1 AC 459 .

¹⁷ Article 7 of the Convention. See R Clayton and H Tomlinson, *The Law of Human Rights* (2nd ed 2008), paras 11.507 to 11.514.

¹⁸ Para 2.8 above.

¹⁹ Para 2.8 above, last sentence; Lord Bingham's speech, para 37. Public mischief was held not to be an offence known to the law by the House of Lords in *Withers* [1975] AC 842, [1974] 3 All ER 984.

If the answer to both of these questions is yes, this would suggest that the offence of public nuisance never needs to be used and is therefore redundant.

Extent of overlap

- 3.15 Since *Rimmington*, the activities in the table below have been successfully prosecuted as public nuisance. The sample is not complete, and is derived from reported sentencing appeals, practitioners' websites and newspaper reports. We describe the facts in general and anonymous terms, except in the case of reported sentencing appeals.
- 3.16 In the third column of the table, opposite the description of each incident we suggest offences that could have been charged instead of public nuisance, where available. In the fourth column we state the maximum sentences for those offences. We are not suggesting that those alternative offences would in every case be an adequate substitute for public nuisance.

Incident charged as public nuisance	Sentence imposed	Possible alternative charge	Maximum available sentence for adults
Attempting or threatening suicide by jumping from motorway bridges or high buildings	4 months suspended; 8 weeks suspended		
Standing on the wrong side of a barrier on a motorway bridge ²⁰	6 months		
Climbing on bridges	6 months		

²⁰ *Dallinger* [2012] EWCA Crim 1284, [2013] 1 Cr App R (S) 38.

Incident charged as public nuisance	Sentence imposed	Possible alternative charge	Maximum available sentence for adults
Urinating onto a road from a footbridge and throwing things onto the road	8 weeks suspended	Depositing things to create danger or annoyance on the highway ²¹	Fine not exceeding level 3 ²²
		Causing danger to road users ²³	On indictment, 7 years' imprisonment or an unlimited fine or both (triable either way)
Failing to clear mud from outside a farmyard, causing a motorcyclist to lose control of his vehicle and sustain fatal injuries	custodial sentence (length not stated)	Depositing things to create danger or annoyance on the highway ²⁴	Fine not exceeding level 3 ²⁵
		Causing danger to road users ²⁶	On indictment, 7 years' imprisonment or an unlimited fine or both (triable either way)
Failing to control horses on a highway, thus causing a collision	2 years 4 months	Obstructing the highway ²⁷	Fine not exceeding level 3 ²⁸
		Various offences of driving to the common danger ²⁹	Fines at levels 1 ³⁰ -2 ³¹

²¹ Highways Act 1980, s 161.

²² Currently £1000: Criminal Justice Act 1982, s 37; *Blackstone's* para E15.9.

²³ Road Traffic Act 1988, s 22A(1)(a): "causing anything to be on or over a road...in such circumstances that it would be obvious to a reasonable person that to do so would be dangerous".

²⁴ Highways Act 1980, s 161.

²⁵ Currently £1000: Criminal Justice Act 1982, s 37; *Blackstone's* para E15.9.

²⁶ Road Traffic Act 1988, s 22A(1)(a): "causing anything to be on or over a road...in such circumstances that it would be obvious to a reasonable person that to do so would be dangerous".

²⁷ Highways Act 1980, s 137.

²⁸ Currently £1000: Criminal Justice Act 1982, s 37; *Blackstone's* para E15.9.

Incident charged as public nuisance	Sentence imposed	Possible alternative charge	Maximum available sentence for adults
		Criminal damage ³²	10 years' imprisonment
Recklessly driving onto a motor-racing track	8 months	Causing harm by furious driving ³³	2 years' imprisonment
		Dangerous driving ³⁴ , or causing injury by dangerous driving ³⁵	2 years and 5 years respectively
Jumping into a river during a boat race	6 months	Bathing, swimming or diving in the Thames without permission ³⁶ (or equivalent bye-laws for other rivers)	Level 5 fine ³⁷
		Obstructing public navigation rights ³⁸	£50 fine, plus £2 daily for ongoing infringement ³⁹

²⁹ Highways Act 1835, s 78 (level 1 fine); (within London) Metropolitan Police Act 1839, s 54 (level 2 fine); (outside London) Town Police Clauses Act 1847, s 28 (level 3 fine; may not apply to horses not drawing a carriage).

³⁰ Currently £200: Criminal Justice Act 1982, s 37; *Blackstone's* para E15.9.

³¹ Currently £500: Criminal Justice Act 1982, s 37; *Blackstone's* para E15.9.

³² Criminal Damage Act 1971, s 1.

³³ Offences Against the Person Act 1861, s 35

³⁴ Road Traffic Act 1988, s 2. The availability of this offence would depend on whether the racetrack was considered, as a matter of fact, to be a "road or other public place". The s 192(1) definition of "road" includes both "public highways" and "roads to which the public have access". Since a racetrack is neither maintainable at the public expense, nor a road in the sense of going from place to place, this would seem to be a borderline case. See generally K McCormac and P Wallis, *Wilkinson's Road Traffic Offences* (26th ed 2014) vol 1, chapter 1 section 6.

³⁵ Road Traffic Act 1988, s 1A. Depending on the circumstance, it could be s 3 instead (careless or inconsiderate driving; level 5 fine (currently unlimited)).

³⁶ Port of London Thames Byelaws, byelaws 20 and 21.

³⁷ Currently unlimited: Criminal Justice Act 1982, s 37, read with Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 85 (commencing 12 March 2015: SI 2014/504 and SI 2015/664).

³⁸ Thames Conservancy Act 1932, s 79 (and equivalents, if any, for other rivers).

³⁹ Thames Conservancy Act 1972, Schedule to s 22.

Incident charged as public nuisance	Sentence imposed	Possible alternative charge	Maximum available sentence for adults
Substituting a drug in a chemist's shop ⁴⁰	12 months	Administering poison or noxious thing with intent to injure, aggrieve or annoy ⁴¹	5 years
Hoax phone calls to a charity ⁴²	3 years	Improper use of a public electronic communications network ⁴³	Level 5 fine ⁴⁴
Hoax bomb calls (2 cases)	2 years; 18 months	Bomb hoaxes ⁴⁵	7 years
Making video threatening bombing of aircraft (charged as conspiracy to commit public nuisance, together with other charges concerned with the plan to carry out the bombing) ⁴⁶	4 defendants; overall sentences from 22 to 40 years; report did not state specific sentence for public nuisance	Threats to kill ⁴⁷ Threatening to destroy or damage property ⁴⁸ Terrorist offences ⁴⁹	10 years 10 years
Causing a police siege by attempting or threatening to blow up or set fire to oneself or a house (2 cases)	2 years 8 months immediate; 12 months suspended (in other case)	Threatening to destroy or damage property (including threatening to destroy or damage one's own property to endanger the life of another) ⁵⁰	10 years ⁵¹

⁴⁰ *McGuire* [2012] EWCA Crim 2680.

⁴¹ Offences Against the Person Act 1861, s 24.

⁴² *Wood* [2012] EWCA Crim 156, [2012] 2 Cr App R (S) 49.

⁴³ Communications Act 2003, s 127.

⁴⁴ Unlimited, see fn 37 above.

⁴⁵ Criminal Law Act 1977, s 51.

⁴⁶ "Three guilty of bomb conspiracy" <http://news.bbc.co.uk/1/hi/uk/7528483.stm> (last visited 7 May 2015).

⁴⁷ Offences Against the Person Act 1861, s 16.

⁴⁸ Criminal Damage Act 1971, s 2.

⁴⁹ *Blackstone's* section B10, in particular paras B10.28 and B10.82.

⁵⁰ Criminal Damage Act 1971, s 2.

Incident charged as public nuisance	Sentence imposed	Possible alternative charge	Maximum available sentence for adults
Group making videos of themselves abusing elderly persons in public	committed to Crown Court for sentence; sentence not reported	Threatening or abusive behaviour ⁵²	Level 3 fine – 6 months' imprisonment, depending on offence
Exposure while urinating in public	6 weeks suspended	Outraging public decency	Life imprisonment
Causing damage at a rave	community service order	Criminal damage ⁵³	10 years
Brandishing a knife in public	suspended sentence (length not reported)	Assault	6 months or a fine
		Offences concerned with offensive weapons and bladed articles ⁵⁴	Up to 4 years, depending on offence
Head-butting care staff and threatening to drink weed killer	1 year	Assault or battery	6 months
Sniffing glue in public	not sentenced by time of report	No specific offence, but could be dealt with by ASBO or under the Anti-Social Behaviour, Crime and Policing Act 2014	

⁵¹ If actual damage was caused (or attempted: Criminal Attempts Act 1971, s 4(1)(b)) with the same intent to endanger life, then the maximum sentence is life. If actual damage was caused and the attack was arson then, regardless of the intent to endanger life, the penalty is also life: Criminal Damage Act, s 4.

⁵² Public Order Act 1986, ss 4, 4A and 5.

⁵³ Criminal Damage Act 1971, s 1.

⁵⁴ These are numerous: *Archbold* chapter 24; *Blackstone's* section B12; *Smith and Hogan* para 17.16 (p 806 and following). For a summary, see the CPS guidance at http://www.cps.gov.uk/legal/l_to_o/offensive_weapons_knives_bladed_and_pointed_article/ (last visited 7 May 2015).

Incident charged as public nuisance	Sentence imposed	Possible alternative charge	Maximum available sentence for adults
Abusive emails to a police officer	community rehabilitation order	Sending indecent, threatening or false communications ⁵⁵	6 months and/or fine
		Improper use of a public electronic communications network ⁵⁶	Level 5 fine ⁵⁷

3.17 One traditional use of the public nuisance offence is in relation to obstruction of the highway. There is now a statutory offence of obstructing the public highway.⁵⁸

3.18 Many other acts traditionally prosecuted as public nuisance, such as carrying on noxious trades, would now fall under various environmental offences or contravene a licensing scheme,⁵⁹ and in our sample of prosecutions since *Rimmington*⁶⁰ none of the facts seem to fall within the environmental category. Nevertheless, Neil Parpworth⁶¹ argues that public nuisance has a continuing role to play in this field.

3.19 Most of the recent prosecutions for public nuisance, as set out in the table above, concern various forms of misbehaviour in public rather than environmental nuisance. In the sample just mentioned, most but not all of the acts in question would be covered by other offences.

3.20 The resulting picture is somewhat paradoxical.

- (1) Historically the core examples of public nuisance are obstructing the highway and creating local nuisances such as noise and smells. These are the cases in which we argue above⁶² that it would be legitimate to prosecute for public nuisance given the underlying purpose of the offence. However, these are also the very cases most likely to be covered by other offences.

⁵⁵ Malicious Communications Act 1988, s 1.

⁵⁶ Communications Act 2003, s 127.

⁵⁷ Unlimited, see fn 37 above.

⁵⁸ Highways Act 1980, s 137. The penalty is a fine not exceeding level 3.

⁵⁹ Para 2.26 and following, above.

⁶⁰ Table following para 3.16 above.

⁶¹ N Parpworth, "Public nuisance in the environmental context" [2008] *Journal of Planning and Environment Law* 1526.

⁶² Para 3.13 above.

- (2) More recent examples of public nuisance involve general public misbehaviour. Following *Rimington* and our reasoning above, some of these should not be charged as public nuisance. However, these are the cases in which it is often harder to find an alternative offence to charge.

3.21 In the table above, some of the cases involving behaviour on bridges and the case about glue sniffing in public do not appear to be covered by any other offence. In other cases, another offence was available but the sentencing powers appear to fall well short of what was required; namely the cases about failing to control horses, hoax calls to charities and the video of elder abuse.

Is there value in an offence of public nuisance in cases where a more specific offence is available?

3.22 As noted above,⁶³ this is a question raised by Spencer's argument. In response it seems that in light of the examples in the table above there may be cases where, even though another offence is available, public nuisance is the more appropriate charge to bring. If so, it will be right to retain the offence of public nuisance, possibly in statutory form.

- (1) There is a general principle that, when the same conduct is covered by both a statutory and a common law offence, the statutory offence is the one that should be charged unless there is a good reason to the contrary.⁶⁴ So as long as public nuisance remains a common law offence, it follows that, in cases of overlap, the statutory offence should generally be the one charged.
- (2) If however public nuisance becomes a statutory offence, this preference will no longer operate. The question will then be whether to charge a broader or a narrower statutory offence.

Overlap between broad and narrow offences

3.23 At a more theoretical level, there is nothing to dictate that, whenever a broader offence overlaps with a narrower one, the narrower one is always preferable. Douglas Husak in his book on over-criminalisation presents the following arguments:

- (1) Where conduct is already covered by an offence, further offences covering the same conduct should not be created, unless it is important to draw attention to some aggravating feature (such as motivation by racial hatred) that is not featured in the older offence.⁶⁵
- (2) If there is already a general offence such as dangerous driving, it is unnecessary to create offences covering particular forms of it such as using a mobile phone while driving.⁶⁶

⁶³ Para 3.14(2) above.

⁶⁴ *Rimington*; this principle is discussed in full in para 3.75 and following, below.

⁶⁵ *Overcriminalization* (2008) p 153 and following.

⁶⁶ *Overcriminalization* p 38 and following.

- 3.24 This last example is instructive in the present context. In response to Husak, it could be argued that the offence of using a mobile phone while driving is similar to that of driving through a red light: not every instance of such conduct creates danger, but a road system in which everybody knows that such conduct is prohibited is safer overall. The creation of a separate but overlapping offence may therefore be justifiable.
- 3.25 The relationship between public nuisance and many of the specialised offences is arguably of this kind. Two examples are as follows:⁶⁷
- (1) Often, environmental offences consist not of creating pollution or other nuisances but of contravening the terms of a licensing system designed to prevent pollution in the future.⁶⁸ Such offences can properly coexist with an offence of causing serious environmental harm, in the same way that an offence of driving without a licence can coexist with an offence of dangerous driving.⁶⁹
 - (2) Many non-criminal mechanisms of control, such as the procedures under the Anti-Social Behaviour, Crime and Policing Act 2014,⁷⁰ take the form of orders designed to prevent misbehaviour in the future. These too can properly coexist with offences of major misbehaviour here and now.

We expand on both of these points below.⁷¹

- 3.26 There may also be cases where the conduct is covered by a statutory offence, but that offence is not adequate to label or punish the full extent of the defendant's wrongdoing. An example is the case of a person who causes a police siege by threatening to burn his house down.⁷² The threat is covered by the offence of threatening to destroy or damage property,⁷³ which includes threatening to destroy or damage one's own property to endanger the life of another. The powers of punishment are adequate, as this offence, depending on the circumstances, carries a maximum sentence of ten years or life imprisonment. However, as a matter of labelling, this offence does not reflect the disruption caused by the incident, such as the necessity to cordon off and evacuate the area. Causing this disruption is properly described, and prosecuted, as public nuisance.

⁶⁷ We do not suggest that the "environmental" and "behavioural" categories exhaust the scope of public nuisance. Highway cases arguably constitute a third category.

⁶⁸ For example, the offence of polluting controlled waters under the Water Resources Act 1991, s 85 is now superseded by the scheme of the Environmental Permitting (England and Wales) Regulations 2010 (SI 2010/675).

⁶⁹ J Pointing, "Public nuisance: beyond Highway 61 revisited" [2011] *Environmental Law Review* 25, defends the use of public nuisance "in a civil action involving threats to the life, health, comfort and safety of the public, as well as an offence for egregious environmental crimes".

⁷⁰ Paras 2.34 and 2.35 above.

⁷¹ Para 3.27 and following, below.

⁷² <http://www.derbytelegraph.co.uk/Jail-Mackworth-man-hour-siege-police/story-15933991-detail/story.html#ixzz3JcQzvpDf> (last visited 7 May 2015).

⁷³ Criminal Damage Act 1971, s 2.

Environmental nuisance

- 3.27 The practice in environmental cases follows the “enforcement pyramid” advocated by regulation theorists:⁷⁴ informal persuasion, warning letters, enforcement notices, criminal penalties, and removal of licence to do business as a last resort. Within the realm of criminal penalties we may discern a similar pyramid: offences of not observing the regulatory system, statutory offences directly involving particular nuisances or the risk of them, and the more serious offence of public nuisance as a last resort.⁷⁵ Arguably, it makes sense to keep public nuisance as the apex of the pyramid, reserving it for the most serious cases of deliberate or irresponsible misbehaviour.⁷⁶ Most of the particular offences and procedures we have listed have limited penalties, and often involve a two-step process of first giving a notice and then waiting for non-compliance. This is not always adequate for the most serious and urgent cases.
- 3.28 As against this, it appears that public nuisance is now seldom if ever used in environmental cases: as mentioned above,⁷⁷ the Environment Agency, the Drinking Water Inspectorate, the Forestry Commission and the Health and Safety Executive do not prosecute for public nuisance. This may just show how effective the regulatory scheme is: pollution hazards are stopped before they reach the stage of constituting a public nuisance. However, it still makes sense to have a major offence of last resort, for pollution hazards on such a scale as to have a significant detrimental effect on the life of a neighbourhood. If that offence is little used because that stage is seldom reached, that is all to the good.

Behavioural nuisance

- 3.29 The behaviour covered by community protection notices and public spaces protection orders under the Anti-Social Behaviour, Crime and Policing Act 2014 is of a similar breadth and content to that covered by public nuisance.
- (1) Community protection notices may be issued if (a) the conduct of the individual is having a detrimental effect, of a persistent or continuing nature, on the quality of life of those in the locality and (b) the conduct is unreasonable.⁷⁸

⁷⁴ For example I Ayres and J Braithwaite, *Responsive Regulation* (1992), cited in S Bell and others, *Environmental Law* (8th ed 2012), pp 292 and 293.

⁷⁵ For a general discussion of criminal and regulatory offences, see our consultation paper on Criminal Liability in Regulatory Contexts (2010) Law Commission Consultation Paper No 195, which followed and supplemented the recommendations in R Macrory, *Regulatory Justice: Making Sanctions Effective* (Better Regulation Executive), (Final Report, November 2006). This argues that, in general, criminal offences should only be created where moral reprobation is intended, and that the fault element in any offences should be proportionate.

⁷⁶ This is one reason for our recommendation (para 3.58 below) that the offence should have a fault element consisting of intention or recklessness. This will tend to exclude minor incidents of inadvertent behaviour.

⁷⁷ Para 2.28 above.

⁷⁸ Section 43; commenced 20 October 2014 by Anti-social Behaviour, Crime and Policing Act 2014 (Commencement No 7, Saving and Transitional Provisions) Order 2014 (SI 2014/2590), art 3(c).

- (2) Public spaces protection orders may be made if activities carried on in a public place have had a detrimental effect on the quality of life in the locality and the activity is likely to carry on.⁷⁹

It could therefore be argued that, since the CP was published, the balance has changed and an offence of public nuisance is no longer necessary.

3.30 As against that, the following points could be made:

- (1) Community protection notices and public spaces protection orders are no substitute for an offence: they come closer to the court's common law power to grant an injunction against a public nuisance.⁸⁰
- (2) These powers operate through a two-step procedure: the notice or order is made, and there is an offence of failure to comply with it. This is not sufficient for serious cases where immediate prosecution is required.
- (3) The penalties are limited. The maximum penalty for failure to comply with a community protection notice is a level 4 fine for an individual⁸¹ or £20,000 for a body corporate. The maximum penalty for failure to comply with a public spaces protection order is a level 3 fine;⁸² it appears that only an individual can commit this offence.

3.31 In conclusion, given these procedures there is less need for public nuisance as a stop-gap for minor misbehaviour not covered by specific offences or procedures. But it will continue to be needed for serious deliberate or irresponsible misbehaviour for which the specific offences and procedures are not adequate.

(2) Restating the offence in statute

3.32 It is in general desirable that the criminal law should be contained in statute, as this gives potential offenders clear notice of what conduct is forbidden and what the consequences will be. Restating common law offences in statute is one of the purposes of our wider project on simplification of the criminal law, of which this report forms part. Further, in what follows we recommend some changes to the offence of public nuisance, in particular the introduction of a fault element consisting of intention or recklessness. We therefore consider that the offence of public nuisance should not be left as a common law offence but should instead be restated in statute. We discuss possible names for the new offence below.⁸³

3.33 **We consider that there is benefit in the continued existence of an offence of public nuisance, but recommend that this offence should be restated in statute.**

⁷⁹ Section 59; commenced 20 October 2014 by Anti-social Behaviour, Crime and Policing Act 2014 (Commencement No 7, Saving and Transitional Provisions) Order 2014 (SI 2014/2590), art 3(c).

⁸⁰ Para 2.17(2) above.

⁸¹ Currently £2,500: Criminal Justice Act 1982, s 37; *Blackstone's* para E15.9.

⁸² Currently £1,000 (as above).

⁸³ Para 3.69 and following, below.

3.34 We now need to consider:

- (1) the scope of the offence;⁸⁴
- (2) whether the offence should have a requirement of fault, and if so in what form;⁸⁵
- (3) alternatively, whether it should be a defence that the defendant took due care to prevent the nuisance from occurring;⁸⁶ and
- (4) how to ensure that the offence will be reserved for cases where it is needed.⁸⁷

(3) The scope of the offence

3.35 A new statutory offence of public nuisance would need to satisfy the requirement of reasonable certainty as laid down in *Rimmington*. In that case, Lord Bingham expressed the view that this requirement was satisfied by the existing offence.⁸⁸

I would for my part accept that the offence as defined by Stephen, as defined in *Archbold* (save for the reference to morals), as enacted in the Commonwealth codes quoted above and as applied in the cases ... referred to in paras 13 to 22 above is clear, precise, adequately defined and based on a discernible rational principle. A legal adviser asked to give his opinion in advance would ascertain whether the act or omission contemplated was likely to inflict significant injury on a substantial section of the public exercising their ordinary rights as such: if so, an obvious risk of causing a public nuisance would be apparent; if not, not.

It would therefore seem sensible to base the definition of the new offence on one of these formulations: that is, either the definition in Stephen's draft criminal code, or the definition in *Archbold*, or one of the Commonwealth definitions.

3.36 Out of these, we prefer the definition in *Archbold*. This specifies two alternatives: the effect must be either to endanger the life, health, property or comfort of the public or to obstruct them in the exercise of public rights. The earlier definitions, by contrast, make the two conditions cumulative.⁸⁹ This is a defensible approach, but depends on interpreting the reference to "rights" broadly, as including not only enforceable rights such as public rights of way but also the general right of the public to enjoy public spaces without danger, interference or annoyance. The *Archbold* formulation puts it beyond doubt that these cases are included in the

⁸⁴ Para 3.35 and following, below.

⁸⁵ Para 3.50 and following, below.

⁸⁶ Para 3.60 and following, below.

⁸⁷ Para 3.71 and following, below.

⁸⁸ *Rimmington*, para 36.

⁸⁹ Para 2.11 above.

offence whether the reference to “rights” in the second limb is interpreted broadly or narrowly.⁹⁰

3.37 That is not to say that the definition in *Archbold* should be used exactly as it stands. The language is somewhat archaic, and the style is typical of judicial decision rather than legislation. There are also specific problems, which we consider below.

3.38 The external elements of the new offence should be considered under three heads:

- (1) the defendant’s conduct;
- (2) the persons affected by that conduct; and
- (3) the nature of the injury caused.

THE DEFENDANT’S CONDUCT

3.39 The definition in *Archbold*, like the other definitions descended from Stephen’s draft criminal code, speak of doing “an act not warranted by law” or omitting to discharge a legal duty, in either case with the effect of common injury. Both above⁹¹ and in the CP⁹² we criticised this formulation as illogical. “Not warranted by law” is a somewhat old-fashioned way of saying “without lawful excuse”. An offence should first state what the forbidden conduct is and then specify its consequences and how far it must be the defendant’s fault. It is only after all this has been proved that there is any need to ask whether there is an excuse for it.⁹³ Making an “act not warranted by law” the primary part of the definition, before considering the consequences of the act, puts the cart before the horse.

3.40 Accordingly, the existing scope of the offence would be more appropriately stated in a form such as: (a) conduct by the defendant (including omission to perform a legal duty) (b) causing the relevant public injury (c) without lawful authority or reasonable excuse.⁹⁴

THE PERSONS AFFECTED

3.41 The *Archbold* definition speaks of the potential effect on “the public”. As we have seen, public nuisance need only impinge on a representative cross-section of the public, either in general or in a particular locality.⁹⁵ In any new statutory offence, references to the “public” should read “the public or a section of the public”.

⁹⁰ CP para 2.31. At para 3.45 below, we recommend that “rights” should be given its broad meaning.

⁹¹ Para 2.4 above.

⁹² CP para 2.9.

⁹³ A Simester, “Mistakes in Defence” (1992) 12 *Oxford Journal of Legal Studies* 295.

⁹⁴ This is a suggestion for how to describe the existing offence, not a draft of a new offence. Other issues, such as whether there should be a fault element, need to be resolved before such a draft can be considered.

⁹⁵ Para 2.11 above.

- 3.42 The second limb of the definition in *Archbold* speaks of “rights common to all Her Majesty’s subjects”. This might be expressed in more modern language as “the public at large”, as foreign visitors can also use rights of way or be inconvenienced by a nuisance. In this case, however, the reference should not be extended to a section of the public. A right of way belongs to all members of the public. It is their right that is obstructed, even if only a few members of the public attempt to use the right of way and experience the obstruction.⁹⁶

THE INJURY CAUSED

- 3.43 The first limb of the definition in *Archbold* speaks of endangering “the life, health, property or comfort of the public”. However, in everyday speech the word “comfort” is wide and vague, and a definition using it could include very trivial reasons for displeasure. Also, one does not normally speak of “endangering” comfort. In practice one would wish the offence to cover conduct which puts members of the relevant section of the public at risk of harm of the following types:

- (1) death, personal injury or disease;
- (2) loss or damage to property; or
- (3) serious distress, annoyance, inconvenience or loss of amenity.

- 3.44 The exact wording of any new offence will be a matter for those who draft the relevant statute and cannot be settled at this stage. One possibility would be for the definition to use a general term such as “serious harm”, and then contain a definition of serious harm which lists the above types of harm. An example of this kind of drafting is contained in section 29 of the Police Reform Act 2002, which provides:

For the purposes of this Part a person is adversely affected if he suffers any form of loss or damage, distress or inconvenience, if he is put in danger or if he is otherwise unduly put at risk of being adversely affected.

- 3.45 The second limb speaks of the obstruction of “the public in the exercise or enjoyment of rights common to all Her Majesty’s subjects”. In the existing offence, the reference to obstruction of the “rights” of the public is interpreted broadly, to include the general right of the public to go about its business without interference or annoyance; it is not confined to specific and enforceable rights such as a right of way. If similar wording is used in the definition of the new offence, it should be interpreted equally broadly: for example, the offence should cover the case of the person who interrupted a boat race by jumping into the Thames.⁹⁷

POSSIBLE EXCLUSIONS

- 3.46 So far, we have discussed how best to define the new offence so as to reproduce the external elements of the existing offence of public nuisance. There would be

⁹⁶ Para 2.11(2) above.

⁹⁷ This doubt was raised by one academic whom we consulted.

a case for making the definition rather narrower than the existing offence as defined in *Archbold* and the other formulations to which Lord Bingham refers. For example:

- (1) the offence could be specifically limited to conduct infringing the right of members of the public to enjoy public spaces, and use public rights such as rights of way, without danger, interference or annoyance; or
- (2) the offence could be drafted to exclude conduct falling within another offence.

3.47 We consider it undesirable to incorporate either of these limitations into a statutory definition.

- (1) Explicitly limiting the offence to local nuisances could create difficulties of definition, and might fail to cover conduct which certainly endangers or annoys a significant section of the public but cannot be geographically circumscribed.⁹⁸
- (2) It would also be undesirable to exclude all conduct covered by other offences. Exclusions of this kind have caused problems in the past.⁹⁹ Also, as mentioned above,¹⁰⁰ there will be cases where the conduct is certainly covered by another offence but that offence is not adequate to express the full effect and gravity of the defendant's behaviour.

3.48 **We recommend that the external elements of the offence of public nuisance should consist of:**

- (1) **voluntary conduct by the defendant (including omissions, where the defendant is under a duty at common law or by statute);**
- (2) **which causes:**
 - (a) **serious harm to members of the general public or a section of it;**

or

 - (b) **obstruction to the public or a section of it in the exercise or enjoyment of rights common to the public at large.**

3.49 **In the foregoing recommendation, serious harm to a person means that that person suffers:**

⁹⁸ An example might be creating a computer virus which causes major disruption. We do not know of any cases where this has been prosecuted as public nuisance, but we see no reason in principle why it should not be.

⁹⁹ For example, Criminal Law Act 1977, s 5(1) as originally enacted was interpreted in *Ayres* [1984] AC 447 as meaning that conspiracy to defraud did not include an agreement to engage in conduct which would necessarily amount to an offence. This exclusion was removed by Criminal Justice Act 1987, s 12(1). For the equivalent problem in relation to conspiracy to outrage public decency, see para 2.64 and following, above.

¹⁰⁰ Para 3.26 above.

- (1) death, personal injury or disease;
- (2) loss or damage to property; or
- (3) serious distress, annoyance, inconvenience or loss of amenity;

or is put at risk of suffering any of these things.

(4) What should the fault element be?

3.50 The general presumption is that offences should contain a requirement of fault, and are to be interpreted as doing so unless the statute creating them rules it out expressly or by necessary implication.¹⁰¹ In *G*¹⁰² Lord Bingham said:

First, it is a salutary principle that conviction of serious crime should depend on proof not simply that the defendant caused (by act or omission) an injurious result to another but that his state of mind when so acting was culpable. This, after all, is the meaning of the familiar rule *actus non facit reum nisi mens sit rea*.¹⁰³ The most obviously culpable state of mind is no doubt an intention to cause the injurious result, but knowing disregard of an appreciated and unacceptable risk of causing an injurious result or a deliberate closing of the mind to such risk would be readily accepted as culpable also.

In other words, the presumption is in favour of a fault requirement, and that requirement should generally take the form of intention or subjective recklessness (that is, consciously and unreasonably taking the risk of the injurious result).

3.51 The existing offence of public nuisance requires proof of a result or consequence.¹⁰⁴ danger to the life, health, property or comfort of the public or obstruction of public rights. Following Lord Bingham in *Rimmington* we refer to this as “the requirement of public injury”. In the CP, we provisionally proposed that the offence should be redefined so that the defendant is only guilty if he or she either intended the public injury to occur or was reckless as to whether it occurred or not.¹⁰⁵ Recklessness here means that the defendant was aware of a risk of such injury occurring as a result of the conduct in question, and nevertheless unjustifiably engaged in that conduct.¹⁰⁶

3.52 One argument for introducing a fault element for public nuisance is connected with the breadth of the offence. All offences should be defined with a reasonable degree of certainty. However, there is a need for additional precision in the case of offences which may be committed inadvertently, so as to give potential

¹⁰¹ *B v DPP* [2000] 2 AC 428, [2000] 1 All ER 833; *K* [2001] UKHL 41, [2002] 1 AC 462; *Smith and Hogan* 7.2, p 178 and following.

¹⁰² [2003] UKHL 50, [2004] 1 AC 1034, para [32].

¹⁰³ “The act does not make the guilty person, unless the mind be guilty” (footnote ours).

¹⁰⁴ For the meaning of the terms “consequence element”, “fault element” and similar, see para 2.1 above.

¹⁰⁵ CP para 5.44.

¹⁰⁶ *G* [2003] UKHL 50, [2004] 1 AC 1034.

offenders fair warning and enable them to take measures to avoid committing these offences.¹⁰⁷ It is anomalous that a broad, flexible offence like public nuisance should not require any foresight of consequences.

3.53 Further arguments for a stronger fault element are as follows:

- (1) Public nuisance is a serious offence,¹⁰⁸ with no limit on the sentence that can be imposed.¹⁰⁹ It is unjust that defendants should be exposed to such a serious sanction unless there is equally serious fault on their part.
- (2) The facts constituting public nuisance often overlap with those of offences with a fault element consisting of intention, recklessness or foresight of harm, such as criminal damage and offences under the Public Order Act 1986. We argued in the CP that it is appropriate that public nuisance should have a similar fault element to these.¹¹⁰
- (3) The less serious instances of environmental public nuisance generally also fall within a number of specialised offences or regulatory mechanisms, not least the regime of statutory nuisance under the Environmental Protection Act 1990. These offences are often offences of strict liability, but have limited sentences. It is entirely reasonable that unintentional nuisances should be dealt with by means of these specialised offences and mechanisms, while the more serious offence of public nuisance with its higher maximum sentence should be reserved for cases of intentional or reckless conduct.¹¹¹
- (4) The same point could be made about behavioural nuisance. Most instances of this will fall within public order offences, or can be dealt with under the Anti-Social Behaviour Act 2003 or the Anti-Social Behaviour, Crime and Policing Act 2014. Public nuisance should be reserved for the most serious instances of deliberate or irresponsible misbehaviour.

3.54 We therefore consider that the offence should incorporate a fault element of intention or recklessness. These should have their normal legal meanings, as described in the next two paragraphs. Whether these meanings should be stated explicitly in statute or left to judicial interpretation as a matter of general law is a question which need not be answered at this stage. It would be a matter for those drafting the legislation. For present purposes, we set out these meanings only as an indication of the kind of fault element which we consider the offence should have.

3.55 Intention exists if the defendant either acted in order to bring about the result in question or was aware that it was a virtually certain result if the defendant's

¹⁰⁷ W Chan and A Simester, "Four functions of mens rea" [2011] *Cambridge Law Journal* 381 discusses the relationship between the requirement of fault and the requirement of fair warning.

¹⁰⁸ It is triable either in the Crown Court or in a magistrates' court: Magistrates' Courts Act 1980, Sch 1 para 1.

¹⁰⁹ For the sentences actually imposed, see paras 3.6 and 3.7 above.

¹¹⁰ CP paras 5.9 and following.

¹¹¹ Compare paras 3.23 to 3.25 above.

purpose (whatever it might be) was achieved. Our report on Murder, Manslaughter and Infanticide¹¹² states the current law as follows, and we consider that the same meaning should be understood in the context of the recommended offence of public nuisance:

... the jury should be directed that they may find that D intended [a forbidden result],¹¹³ if they are sure that D realised that [that result] was certain (barring an extraordinary intervention)¹¹⁴ if D did what he or she was set upon doing.¹¹⁵

- 3.56 In the case of *G*¹¹⁶ the House of Lords adopted the definition of recklessness contained in clause 18(c) of the Criminal Code Bill forming part of the Law Commission's Report on Criminal Law: A Criminal Code for England and Wales and Draft Criminal Code Bill.¹¹⁷

A person acts recklessly ... with respect to — (i) a circumstance when he is aware of a risk that it exists or will exist; (ii) a result when he is aware of a risk that it will occur; and it is, in the circumstances known to him, unreasonable to take the risk.

In our later report on Legislating the Criminal Code: Offences against the Person and General Principles,¹¹⁸ we refined this to “in the circumstances as D believes them to be”. We propose to adopt the same definition, with “knows or believes”, to cover all eventualities.

- 3.57 As with most offences requiring intention or recklessness,¹¹⁹ public nuisance should be a crime of basic intent. That is, it should be possible to convict a defendant for this offence even though he or she was voluntarily intoxicated and as a result did not form the state of mind constituting the fault element of the offence.

- 3.58 **We recommend that the offence of public nuisance should contain a fault element, consisting of intention to cause, or recklessness as to causing:**

(1) serious harm to members of the general public or a section of it, or

¹¹² (2006) Law Com No 304 para 3.14.

¹¹³ In original, “to kill V or to cause V serious injury”. We have here adapted the extract so as to include offences other than murder.

¹¹⁴ In original, “that V was certain (barring an extraordinary intervention) to die or suffer serious injury”.

¹¹⁵ In our view, a person will think that a consequence is virtually certain to occur so long as he or she thinks that it will be virtually certain *if they do as they mean to do*. Eg, if someone plants a home made bomb on a plane intending to detonate it when the plane is in mid-air, given that they mean to detonate it, they can be taken to foresee the deaths of the passengers as virtually certain to occur even if they realise that the home made bomb is unreliable and might fail to detonate as planned. (Footnote in original.)

¹¹⁶ [2003] UKHL 50, [2004] 1 AC 1034.

¹¹⁷ (1989) Law Com No 177, vol 1.

¹¹⁸ (1993) Law Com No 218.

¹¹⁹ For example, malicious wounding or inflicting grievous bodily harm under Offences Against the Person Act 1861, s 20; criminal damage under Criminal Damage Act 1971, s 1(1).

- (2) **obstruction to the public or a section of it in the exercise or enjoyment of rights common to the public at large.**

3.59 **In the foregoing recommendation:**

- (1) **“intention” means that the defendant acted in order to bring about that harm or obstruction; the jury or other tribunal of fact may also find that the defendant intended that harm or obstruction if they are sure that he or she realised that it was certain to occur (barring an extraordinary intervention) if the defendant did what he or she was set upon doing;**
- (2) **“reckless” means that:**
- (a) **the defendant was aware of a risk that his or her conduct might cause serious harm or obstruction, and**
- (b) **it was, in the circumstances as the defendant knew or believed them to be, unreasonable to take that risk.**

Defences and excuses

3.60 The existing offence is defined in *Archbold* as an “act not warranted by law or omission to perform a legal duty” which causes the relevant public injury, and we argue above¹²⁰ that this means that the Crown must disprove any suggestion that there is legal justification or excuse for the defendant’s conduct. Whether or not the new offence contains a fault element, it should contain an exception to cover cases where the defendant was aware that the conduct in question might cause serious harm or obstruction to the public but there was a good reason for that conduct. One possibility is to create a defence similar to that in section 50 of the Serious Crime Act 2007. This defence exists if the defendant knew certain circumstances existed and “it was reasonable for him to act as he did in those circumstances”. It also exists if the defendant believed that certain circumstances existed, the belief was reasonable and “it was reasonable for him to act as he did in the circumstances as he believed them to be”.¹²¹

3.61 The defence would include cases where the defendant’s conduct is in exercise of a right under Article 10 (freedom of expression) or 11 (freedom of assembly and association) of the European Convention on Human Rights. Under section 3 of the Human Rights Act 1998, legislation must be read and given effect in a way which is compatible with the Convention rights; accordingly, references to reasonableness would be read as including the exercise of Convention rights.¹²²

¹²⁰ Para 3.39 and following, above.

¹²¹ For the background to this defence, see our report on Inchoate Liability for Assisting and Encouraging Crime (2006) Law Com No 300, paras 6.18 to 6.26. The primary purpose of this defence was to avoid criminalising actions which could reasonably be expected in the normal course of life though one consequence might be the occurrence of the forbidden harm.

¹²² It is somewhat difficult to imagine examples in which this point arises in connection with public nuisance. It is much more likely to arise in connection with outraging public decency, see para 3.164 below.

DUE DILIGENCE

- 3.62 One other possibility needs to be discussed. Instead of containing a fault element, the new offence of public nuisance could be constructed in such a way that it contained a “due diligence defence”. In other words, should it be a strict liability offence to cause a public nuisance unless the defendant’s action was reasonable?
- 3.63 Many offences, particularly in the regulatory, environmental and health and safety spheres, follow this approach. That is, they do not require that the defendant intended to cause harm or was reckless, but they do provide that the defendant is not liable if he or she can show that reasonable care or due diligence was used. One could therefore formulate an offence of public nuisance with no requirement of intention or recklessness, but making it a defence for the defendant to prove that he or she could not reasonably foresee, or else took reasonable care to avoid, the harm or obstruction caused.
- 3.64 We consider that this would be undesirable, for the same reasons that it would be undesirable to maintain an offence which can be committed by negligence. Such a standard is appropriate for civil liability, or for a narrowly defined environmental or regulatory offence of low to medium gravity. (It is also appropriate for offences of failing to exercise control over criminal behaviour, such as the offence of failing to prevent bribery.¹²³) However, most public nuisances already fall within offences of this kind, or within offences of strict liability proper. If there is a justification for retaining public nuisance, it is for serious and deliberate or irresponsible behaviour for which these offences are not an adequate sanction.
- 3.65 **We recommend that the offence of public nuisance should incorporate a defence of reasonableness**, in addition to the requirement of intention or recklessness recommended above.

Jurisdiction

- 3.66 We consider it unnecessary to make any specific provision for cases where the defendant’s conduct or the resulting nuisance occurs outside England and Wales. This question should be decided according to general principles of law rather than rules specific to one offence.

Procedure and sentencing

- 3.67 It appears from the sentencing statistics¹²⁴ and from our sample¹²⁵ that sentences for public nuisance vary widely, and that both sentences of 6 months or less and sentences considerably in excess of this are frequently imposed. **We recommend that the new offence of public nuisance, like the existing offence, should be triable either in the Crown Court or in a magistrates’ court.**
- 3.68 At present the sentencing powers for public nuisance are unlimited. We have no specific recommendation about what the sentencing powers for the new offence should be. As the offence is intended to address serious cases for which other

¹²³ Bribery Act 2010, s 7.

¹²⁴ Paras 3.7 and 3.8, above.

¹²⁵ Table following para 3.16 above.

offences are not adequate, if a maximum sentence is set it should be high enough to cover these cases.

Name of the offence

3.69 One question is whether the new offence should be called “public nuisance” or given a different name.¹²⁶

(1) The argument for retaining the existing name is that this would demonstrate continuity with the common law offence, and in particular with the tort of the same name.

(2) The arguments for changing the name are:

(a) The new offence differs from the existing one in some respects, for example in the fault element. A new name could reflect these changes.

(b) The word “nuisance” in ordinary speech includes several situations which do not fall within the scope either of the existing offence or of any offence devised to replace it. In particular, following *Rimmington* the offence does not cover “nuisance calls”. The Home Office also uses a description of “nuisance behaviour” that is far wider than the offence.¹²⁷

3.70 Despite the above, we do not see a realistic alternative to “nuisance”, which is used with a similar meaning in many other statutes. We therefore provisionally suggest that the new offence be described as “intentionally or recklessly causing a public nuisance”, though questions of naming are ultimately for those who draft the relevant statute.

Charging practice

3.71 A statutory offence of intentionally or recklessly causing a public nuisance, defined as suggested above, will, like the existing offence, be very broad and cover many cases falling within narrower and more specific statutory offences. There remains the question of how to encourage the targeted use of public nuisance for cases within the proper sphere of the offence as laid down in *Rimmington*, and of more specific offences where these are available and adequately address the nature and gravity of the defendant’s wrongdoing.

3.72 There are three points to be made about the proper use of the offence:

(1) We argue above,¹²⁸ that the proper use of the offence is to protect the right of members of the public to enjoy public spaces, or use public rights

¹²⁶ In Canada there is a statutory offence of “common nuisance”; in New Zealand it is “criminal nuisance”. In both countries the crime is narrower than the tort: CP para 2.62 and following.

¹²⁷ For example, in its report on “Defining and measuring anti-social behaviour”, Development and Practice Report 26, p 4 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/116655/dpr26.pdf (last visited 13 May 2015).

¹²⁸ Para 3.12 above.

such as rights of way, without danger, interference or annoyance. The sample given above¹²⁹ indicates that the present offence is frequently used for miscellaneous misbehaviour falling well outside this category.

- (2) That sample also indicates that, even after *Rimmington*, the offence has not always been kept within the limits the court imposed. In particular, it has been used for nuisance calls.¹³⁰
- (3) It is also desirable to avoid using the offence in cases where a more narrowly targeted offence with a limited penalty is adequate for the defendant's conduct; among other reasons, this secures better (because more detailed) labelling. This means that the penalty will be that specifically provided for the particular kind of wrongdoing, and that the defendant's criminal record will be more informative.

3.73 The first and second points concern the use of the existing offence. As the definition of any new statutory offence is designed to replicate the existing offence as closely as possible (apart from the strengthened fault element), the creation of the new offence will neither exacerbate nor mitigate these problems. The third point is the one most likely to cause difficulty with a new offence.

THE CHOICE BETWEEN A STATUTORY AND A COMMON LAW OFFENCE

3.74 At present, there is a strong presumption that, as public nuisance is a common law offence, it is preferable to charge an offence created by statute.

3.75 In *Rimmington*, Lord Bingham said:¹³¹

Where Parliament has defined the ingredients of an offence, perhaps stipulating what shall and shall not be a defence, and has prescribed a mode of trial and a maximum penalty, it must ordinarily be proper that conduct falling within that definition should be prosecuted for the statutory offence and not for a common law offence which may or may not provide the same defences and for which the potential penalty is unlimited.

However, his Lordship also said that:¹³²

I would not go to the length of holding that conduct may never be lawfully prosecuted as a generally-expressed common law crime where it falls within the terms of a specific statutory provision, but good practice and respect for the primacy of statute do in my judgment require that conduct falling within the terms of a specific statutory provision should be prosecuted under that provision unless there is good reason for doing otherwise.

3.76 These observations have been applied in later cases.

¹²⁹ Table following para 3.16 above.

¹³⁰ *Kavanagh* [2008] EWCA Crim 855, [2008] 2 Cr App R (S) 86.

¹³¹ Para [30].

¹³² Para [30].

- (1) In *Bright*¹³³ it was held that it is not necessarily wrong to pass a sentence for conspiracy to defraud that exceeds that available for the statutory fraudulent trading offences covering the same conduct.
- (2) Similarly in *Dosanjih*¹³⁴ it was held that it is not necessarily wrong to pass a sentence for conspiracy to cheat the Revenue that exceeds that available for the equivalent statutory offence.
- (3) In *Norris*¹³⁵ it was held that the offence of conspiracy to defraud cannot be used to prosecute price fixing. However, the main reason for this decision was not that there are other offences concerned with price fixing and cartels that are more suitable but that, following the observations in *Rimington* about the need for certainty, the offence of conspiracy to defraud cannot be extended to include such cases.

3.77 In short, where a narrower statutory offence overlaps with a broader common law offence it is generally preferable to charge the statutory offence. However it is not an abuse of the process of the court to charge the common law offence.¹³⁶ There may be reasons for the prosecution to charge the common law offence instead, for example if the statutory offence does not do justice to the full gravity of the defendant's conduct.

3.78 The central feature of the principle is that a statute should take precedence over the common law. Statutes containing criminal offences provide a clear statement from Parliament that the conduct is forbidden. The effect of the *Rimington* principle is that for as long as public nuisance remains a common law offence, it is generally preferable to use statutory offences covering the same behaviour unless there is good reason not to do so.

SHOULD THIS PREFERENCE BE PRESERVED?

3.79 If a statutory offence of public nuisance is created, this presumption will no longer apply. However, it will still be necessary for prosecutors to choose between charging this offence and charging one of the specific environmental or behavioural offences. The question will then become simply whether it is preferable to use a broader or a narrower statutory offence.¹³⁷

3.80 We consider that, even if public nuisance becomes a statutory offence, it will still be preferable to use more specific statutory offences when available, provided that these fully reflect the gravity and nature of the defendant's wrongdoing. At

¹³³ [2008] EWCA Crim 462, [2008] 2 Cr App R (S) 102.

¹³⁴ [2013] EWCA Crim 2366, [2014] 1 WLR 1780.

¹³⁵ *Norris v United States* [2008] UKHL 16, [2008] 1 AC 920.

¹³⁶ An apparent exception to this is *Dady* [2013] EWHC 475 (QB), where it was held that the judge should not allow conspiracy to defraud to be charged by voluntary bill of indictment when there is an offence under the Copyright, Patents and Designs Act 1988 (or conspiracy to commit that offence) that covers the facts. This however can be explained by the fact that a voluntary bill of indictment is an exceptional procedure that should not be used except for a very good reason: *Gadd* [2014] EWHC 3307, [2014] All ER (D) 187 (Oct).

¹³⁷ For a comparison of opinions in favour of broader or narrower offences, see Reform of Offences against the Person (2014) Law Commission Consultation Paper No 217, paras 3.10 to 3.14.

present this result is achieved by the principle in *Rimmington* that a statutory offence should be preferred to a common law one. Once that principle no longer applies (because public nuisance will have become a statutory offence) it will be desirable to preserve this preference by other means.

- 3.81 If a statutory offence of public nuisance is created, the CPS may wish to consider drawing up prosecution guidelines to clarify the proper scope of the offence. Among other things, this guidance could state that the offence should not be used when a more specific offence is available except for good reasons.
- 3.82 Any such prosecution guidelines would apply to the CPS and would no doubt be communicated to other prosecuting authorities. They would not apply to private prosecutions; however, in a case where a private prosecution is brought not in accordance with the guidelines, it would be open to the CPS to take over and discontinue the proceedings.¹³⁸

Summary of recommendations on public nuisance

- 3.83 There is a need for an offence of public nuisance, but the existing common law offence should be replaced by a statutory offence.
- 3.84 The new offence of intentionally or recklessly causing a public nuisance should be formulated so as to cover:
- (1) voluntary conduct by the defendant (including omissions, where the defendant is under a duty at common law or by statute);
 - (2) which causes:
 - (a) serious harm to members of the general public or a section of it, or
 - (b) obstruction to the public or a section of it in the exercise or enjoyment of rights common to the public at large;
 - (3) where the defendant intended that conduct to cause, or was reckless as to whether it would cause, such harm or obstruction;
 - (4) unless the defendant's conduct was reasonable in the circumstances as he or she knew or reasonably believed them to be.
- 3.85 In the foregoing recommendation:
- (1) serious harm to a person means that that person suffers:
 - (a) death, personal injury or disease;
 - (b) loss or damage to property; or
 - (c) serious distress, annoyance, inconvenience or loss of amenity;or is put at risk of suffering any of these things.

¹³⁸ Prosecution of Offences Act 1985, s 6(2).

- (2) “intended” means that the defendant acted in order to bring about that harm or obstruction; the jury or other tribunal of fact may also find that the defendant intended that harm or obstruction if they are sure that he or she realised that it was certain to occur (barring an extraordinary intervention) if the defendant did what he or she was set upon doing;
- (3) “reckless” means that:
 - (a) the defendant was aware of a risk that his or her conduct might cause serious harm or obstruction, and
 - (b) it was, in the circumstances as the defendant knew or believed them to be, unreasonable to take that risk.

3.86 The new offence should be triable either in the Crown Court or in a magistrates’ court.

Saving for civil consequences of public nuisance

3.87 As explained above,¹³⁹ public nuisance is not only a crime. It also gives rise to a right of action in tort, and to the right to apply for an injunction to stop or remove the nuisance. The word “nuisance” is also used in many statutes.¹⁴⁰ Concern has been expressed that abolishing the common law offence of public nuisance would have the effect of undermining these procedures as well.¹⁴¹ **We recommend that any statute abolishing or replacing the common law offence of public nuisance should contain a saving provision to the effect that nothing in the Act shall prejudice the availability of any civil procedure or affect the meaning of nuisance in any other statute.**

OUTRAGING PUBLIC DECENCY

The consultation paper

3.88 In the CP we provisionally proposed that the offence of outraging public decency should be restated in statute. There should be a strengthened fault element, to the effect that the defendant must be shown to have intended to generate, or realised that he or she might generate, outrage, shock or disgust in ordinary people.¹⁴²

3.89 We did not propose any particular wording for the offence, but suggested the following outline as a basis for discussion.¹⁴³

¹³⁹ Para 2.17 above.

¹⁴⁰ For example the statutes concerning local authorities referred to in para 2.29 and following, above.

¹⁴¹ For example, in the response of the Chartered Institute of Environmental Health. J Spencer, “Public Nuisance — a critical examination” [1989] *Cambridge Law Journal* 55 (para 3.10 above) p 80, expressed the view that “if the crime of public nuisance were completely abolished, with it would also go the possibility of obtaining an injunction to stop one”.

¹⁴² CP para 5.52.

¹⁴³ CP para 6.13.

- (1) The conduct element would be performing any activity or creating any display or object:
 - (a) which is of such a nature as to be likely to cause a reasonable person witnessing it shock, outrage or humiliation (the indecency requirement),
 - (b) in such a place or in such circumstances that it may be witnessed by two or more members of the public (the publicity requirement).
- (2) The fault element would be intention that these two conditions (indecency and publicity) obtain, or recklessness as to whether they will obtain.

3.90 The formulation of the fault element in the suggested outline (intention or recklessness as to the indecency requirement and the publicity requirement) is not exactly the same as that in the main proposal (intention or recklessness as to generating outrage, shock or disgust). We discuss below¹⁴⁴ whether the difference is significant, and if so which formulation would be preferable.

Responses to consultation

3.91 We received 13 responses to the CP. Three of these¹⁴⁵ were confined to public nuisance and did not address outraging public decency. Out of the ten remaining responses:

- (1) Three¹⁴⁶ agreed with our proposals.
- (2) The Crown Prosecution Service advocated that there should be two offences: a more serious offence based on intention or subjective recklessness, and a summary-only offence based on objective recklessness. They also suggested the abolition of the rule that two persons should be actually present.
- (3) Chris Ashford considered that the test should be whether the act was likely (rather than capable) to be seen and cause outrage, and that the defendant realised this.
- (4) British Naturism were concerned that our formulation might have the effect of lowering the standard of indecency required to constitute the offence, and make the offence over-inclusive. In subsequent correspondence they welcomed the proposal to introduce a strengthened fault element.

¹⁴⁴ Para 3.141 and following, below.

¹⁴⁵ Roger Sheriff, Chartered Institute of Environmental Health, Association of Council Secretaries and Solicitors.

¹⁴⁶ Anthony Edwards, the Justices' Clerks Society and the Law Society.

- (5) The Bar Council and the Criminal Bar Association¹⁴⁷ advocated abolishing the offence without replacement.
- (6) David Burrowes MP was concerned that our proposed reforms might have the effect that the offence no longer covered the case of a person who urinated on a war memorial while drunk. In later correspondence we explained that this would not be the case.¹⁴⁸
- (7) The West Mercia Police made no comments on the details of the proposals, but believed they would have little effect on anti-social behaviour, given the small number of prosecutions.
- (8) Mind made no comments on the proposals, but wanted to ensure that all decisions were governed by the principles of the Mental Capacity Act 2005 and “the principle of diverting offenders with mental health issues out of the criminal justice system wherever possible”. We have treated this as a response in support of our proposal on fault, as strengthening the fault element could help to protect people with limited capacity (whether because of mental health issues, learning disabilities or any other reason) from conviction for such a serious offence.

Evidence of current use

- 3.92 Over the period from 2003 to 2013 inclusive, on average 212 defendants per year were proceeded against in a magistrates’ court for outraging public decency (including cases later transferred to the Crown Court). Of these, 108 were convicted in the magistrates’ court and 10 received an immediate custodial sentence.
- 3.93 In the same period, on average 63 defendants per year were tried in the Crown Court for outraging public decency. Of these, 48 were convicted. Including cases tried in a magistrates’ court and committed to the Crown Court for sentence, 65 defendants were sentenced per year. Of these, 17 were sentenced to immediate custody; 7 of them for a term up to 6 months, and another 5 for a term over 6 months but not exceeding a year. In the whole period, one defendant received a sentence of life imprisonment.
- 3.94 In a random sample of 47 prosecutions in 2014, it was found that most instances fell within the following categories:
- (1) exposure of genitals (8 cases);
 - (2) masturbation in public (21 cases);
 - (3) real or simulated sexual activity in public (8 cases);
 - (4) making intimate videos without consent (“upskirting”) (8 cases).

¹⁴⁷ Joint response of the Law Reform Committee of the General Council of the Bar and the Criminal Bar Association.

¹⁴⁸ Para 3.158 below.

Two cases did not fall into any of these categories: one involved a sexual assault and the other involved making child pornography, and in both cases other charges were brought in addition to outraging public decency.¹⁴⁹

Options for reform

3.95 As with public nuisance, consideration of reform of outraging public decency must address the following questions:

- (1) Is an offence of outraging public decency needed?¹⁵⁰
- (2) If so, should it be restated in statute?¹⁵¹
- (3) What conduct should it address: is the existing offence over- or under-inclusive?¹⁵²
- (4) Should a fault element be introduced as proposed in the CP?¹⁵³

(1) Is an offence of outraging public decency needed?

3.96 The questions raised by the offence of outraging public decency are:

- (1) Is it justified to have an offence designed to protect the public from being offended rather than from tangible harm?
- (2) If so, is it justified to have an offence designed to guard against the *risk* of being offended, as opposed to criminalising the causing of actual offence?
- (3) Are there other offences covering all or most of the same behaviour as the current offence?

3.97 There has been considerable academic debate about the legitimacy of criminalising offence as opposed to physical or economic harm.

- (1) It has been argued, on utilitarian grounds, that preventing serious offence to individuals is as legitimate a goal of criminal law as preventing any other kind of harm or suffering.¹⁵⁴
- (2) As against that, Simester and von Hirsch¹⁵⁵ argue that this states the principle too broadly: giving offence should only be criminalised when it takes the form of a recognisable wrong such as invasion of privacy or insulting behaviour. On that reasoning, public exhibitionism is wrong because it impedes the right of members of the public to enjoy public

¹⁴⁹ Figures supplied by Ministry of Justice.

¹⁵⁰ Para 3.96 below.

¹⁵¹ Para 3.110 below.

¹⁵² Para 3.112 below.

¹⁵³ Para 3.135 below.

¹⁵⁴ J Feinberg, *Offense to Others* (1987) p 1.

¹⁵⁵ *Crimes, Harms, and Wrongs* (2011) ch 6.

spaces without having unwelcome sights and sounds forced on their attention.¹⁵⁶

On either view, it is justified to create or retain an offence of outraging public decency: it is not a tool for the enforcement of morals but a protection of the right to enjoy public spaces without annoyance.¹⁵⁷

- 3.98 Given this justification for the offence in general, it is also justified for it to be aimed at keeping public spaces free from sights and sounds that might cause offence, rather than at punishing actual offence: to wait for actual offence to occur is to intervene too late.¹⁵⁸
- 3.99 The third question is whether there are statutory offences covering all or most of the same behaviour as outraging public decency, thus making the outraging offence unnecessary. In discussing this we follow the categories in the sample given above.

EXPOSURE

- 3.100 There is an offence of exposure under section 66 of the Sexual Offences Act 2003, which, like outraging public decency, can be tried either in the Crown Court or in a magistrates' court:

66. Exposure

(1) A person commits an offence if–

- (a) he intentionally exposes his genitals,¹⁵⁹ and
- (b) he intends that someone will see them and be caused alarm or distress.

(2) A person guilty of an offence under this section is liable–

- (a) on summary conviction,¹⁶⁰ imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;
- (b) on conviction on indictment,¹⁶¹ to imprisonment for a term not exceeding 2 years.

¹⁵⁶ Simester and von Hirsch (above), p 98.

¹⁵⁷ This was also argued in the CP, para 4.33.

¹⁵⁸ For the criminalisation of risks of remote harms, see Simester and von Hirsch (above) ch 5. We discuss this further at para 3.113 and following, below.

¹⁵⁹ "He" here includes "she" (Interpretation Act 1978, s 6) and "genitals" includes the genitals of both sexes.

¹⁶⁰ In a magistrates' court.

¹⁶¹ In the Crown Court.

3.101 This offence requires intention¹⁶² to cause alarm and distress, and therefore addresses “flashing” rather than exposure in general.¹⁶³ Other instances of exposure, where there is no intention of being seen, can only be prosecuted as outraging public decency.¹⁶⁴

PUBLIC SEXUAL ACTIVITY

3.102 There is no statutory offence relating to masturbation or other sexual activity, real or simulated, in public. In a theatrical or similar context, it could fall within section 2 of the Theatres Act 1968 (obscene performances of plays) or the Indecent Displays (Control) Act 1981.

3.103 There are also prohibitions of particular forms of sexual activity, whether in public or not, for example:

- (1) intercourse with an animal;¹⁶⁵
- (2) sexual penetration of a corpse;¹⁶⁶
- (3) sexual activity in a public lavatory;¹⁶⁷ or
- (4) engaging in sexual activity in the presence of a child¹⁶⁸ and causing a child to watch a sexual act.¹⁶⁹

3.104 Except for these specialised examples, outraging public decency is the only offence available for offensive sexual activity in public.¹⁷⁰

INTIMATE VIDEOS

3.105 There is an offence of voyeurism, and this too can be tried either in the Crown Court or in a magistrates’ court. It is defined as follows:¹⁷¹

¹⁶² And would therefore appear to be an offence of specific intent. That is, the defendant would not be guilty if he or she was so intoxicated by drink or drugs as to be unable to form the required intention.

¹⁶³ It is not clear whether there is a requirement that anyone actually saw the organs exposed: *Rook and Ward* para 14.62 (and corresponding passage in supplement).

¹⁶⁴ Or in some instances under local byelaws.

¹⁶⁵ Sexual Offences Act 2003, s 69. Outraging public decency has been charged in bestiality cases: in a recent case the defendant was sentenced to 4 years’ imprisonment (the maximum for the s 69 offence being 2 years): <http://www.standard.co.uk/news/uk/factory-worker-cleared-of-having-sex-with-shetland-pony-is-jailed-for-outraging-public-decency-10014913.html> (last visited 18 May 2015). Outraging public decency is the only offence that can be charged for sexual activity with an animal not involving penetration.

¹⁶⁶ Sexual Offences Act 2003, s 70.

¹⁶⁷ Sexual Offences Act 2003, s 71.

¹⁶⁸ Sexual Offences Act 2003, s 11.

¹⁶⁹ Sexual Offences Act 2003, s 12.

¹⁷⁰ Apart from possible breach of local byelaws.

¹⁷¹ Sexual Offences Act 2003, ss 67 and 68.

67. Voyeurism

- (1) A person commits an offence if—
 - (a) for the purpose of obtaining sexual gratification, he observes another person doing a private act, and
 - (b) he knows that the other person does not consent to being observed for his sexual gratification.
- (2) A person commits an offence if—
 - (a) he operates equipment with the intention of enabling another person to observe, for the purpose of obtaining sexual gratification, a third person (B) doing a private act, and
 - (b) he knows that B does not consent to his operating equipment with that intention.
- (3) A person commits an offence if—
 - (a) he records another person (B) doing a private act,
 - (b) he does so with the intention that he or a third person will, for the purpose of obtaining sexual gratification, look at an image of B doing the act, and
 - (c) he knows that B does not consent to his recording the act with that intention.
- (4) A person commits an offence if he installs equipment, or constructs or adapts a structure or part of a structure, with the intention of enabling himself or another person to commit an offence under subsection (1).
- (5) A person guilty of an offence under this section is liable—
 - (a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;
 - (b) on conviction on indictment, to imprisonment for a term not exceeding 2 years.

68. Voyeurism: interpretation

- (1) For the purposes of section 67, a person is doing a private act if the person is in a place which, in the circumstances, would reasonably be expected to provide privacy, and—
 - (a) the person's genitals, buttocks or breasts are exposed or covered only with underwear,
 - (b) the person is using a lavatory, or

(c) the person is doing a sexual act that is not of a kind ordinarily done in public.

(2) In section 67, “structure” includes a tent, vehicle or vessel or other temporary or movable structure.

3.106 The offence must be committed for the purpose of sexual gratification. The same act, done for some other purpose such as blackmail or humiliating the victim, does not fall within the offence.¹⁷²

3.107 One difficulty is that taking intimate videos without consent (“upskirting”), as in *Hamilton*, will often not fall within this offence, even when done for sexual gratification. The offence requires the victim to be doing a private act, or to be in a place such as a lavatory or a changing room where some degree of exposure or nudity may occur but one can reasonably expect privacy. Neither of these conditions is fulfilled when the victim is fully dressed in a public place.¹⁷³ For this reason, the charge brought is invariably outraging public decency.¹⁷⁴

CONCLUSION

3.108 In conclusion, abolishing the offence of outraging public decency would leave a gap in the law, as there would be no offence that addresses:

- (1) upskirting;
- (2) exposure where there is no intention to cause alarm or distress; or
- (3) masturbation or other sexual activity in public that does not involve exposure.

3.109 One option would be to extend the existing offences of indecent exposure and voyeurism to cover these cases. There is some logic to this in the case of upskirting, as this could be argued to involve a different wrong from most other instances of outraging public decency: the fundamental mischief in these cases is not creating disgusting sights in public but infringing the dignity of individuals. For this reason, Alisdair Gillespie argues that, though in current law upskirting is covered by the offence of outraging public decency, this is unsatisfactory and it would be preferable to have a specific offence, of the kind that exists in New Zealand.¹⁷⁵ However, reform of these offences falls outside our present terms of reference. In these circumstances it would be sensible either to retain the offence of outraging public decency or to create a statutory replacement for it.

¹⁷² *Rook and Ward* para 14.86.

¹⁷³ A Gillespie, “‘Up-skirts’ and ‘down blouses’: voyeurism and the law” [2008] *Criminal Law Review* 370.

¹⁷⁴ *Choi* [1999] EWCA Crim 1279, [1999] 8 Archbold News 3; *Hamilton* [2007] EWCA Crim 2062, [2008] QB 224; para 3.94(4) above.

¹⁷⁵ Crimes (Intimate Covert Filming) Amendment Act 2006; A Gillespie (above) p 378.

(2) Restating the offence in statute

- 3.110 As argued above in connection with public nuisance,¹⁷⁶ it is generally desirable that criminal law should be contained in statute, and this is part of the purpose of our simplification project. Also, in what follows we recommend certain changes to the offence, in particular the incorporation of a fault element consisting of intention or recklessness. We therefore consider that the offence should be restated in statute rather than left as a common law offence. We discuss possible names for the new offence below.¹⁷⁷
- 3.111 **We consider that there is a need for an offence of outraging public decency, but recommend that the existing common law offence should be replaced by a statutory offence.**

(3) The scope of the offence

- 3.112 The conditions of the existing offence are, first, that the act is lewd, obscene or disgusting enough to outrage the standards of decency of reasonable people¹⁷⁸ and, second, that it occurs in a place which is accessible to or within view of the public and in the presence (though not necessarily in the actual sight or hearing) of two or more persons.¹⁷⁹

THE INDECENCY REQUIREMENT

- 3.113 There is no need to prove that any person was in fact disgusted or outraged, or even that there was a real risk of this happening. The offence is committed even if no one saw the act in question, or if those who did see it remained in a state of robust indifference.
- 3.114 In short, the rationale of the offence is protective: it guards against the risk of people being distressed by disgusting sights and sounds. If public places are kept free from those sights and sounds the risk of people being outraged by them is reduced.
- 3.115 There are strong reasons of convenience for retaining an offence in this form rather than introducing a new offence with a requirement of actual outrage. Very often the main prosecution witnesses will be police officers, who are likely to become case-hardened in the course of their careers and may not be believed when they give evidence of their disgust. Conversely, it would be highly controversial to extend the offence to acts which are not likely to outrage the general public but which do outrage a particular section of the public.
- 3.116 Accordingly, we consider that the indecency requirement should remain in its present form.
- 3.117 The question arises how it should be worded.

¹⁷⁶ Para 3.32 above.

¹⁷⁷ Para 3.174 below.

¹⁷⁸ The indecency requirement.

¹⁷⁹ The publicity requirement.

- (1) The description of the offence in *Hamilton* speaks of the act or display as being “lewd, obscene or disgusting”; further, it must outrage minimum standards of decency.
- (2) The word “lewd” is clearly misleading, as it concentrates too narrowly on sexual indecency and makes it sound as if the mischief is inappropriate stimulation rather than disgust or offence.¹⁸⁰
- (3) In common law contexts, “obscene” is simply a stronger synonym for “indecent”. As Lord Parker observed in *Stanley*.¹⁸¹

The words “indecent or obscene” convey one idea, namely, offending against the recognised standards of propriety, indecent being at the lower end of the scale and obscene at the upper end of the scale.

However, there is another use of the word, derived from the Obscene Publications Acts, to refer to matter that may corrupt or deprave. The use of “obscene” on its own could therefore be misleading.

- (4) *Hamilton* further elucidates the offence by describing the expected public reaction: loathing, disgust, annoyance, extreme distaste, shock. However, referring to these by name could give the misleading impression that these reactions must actually be experienced by one or more members of the public. On the other hand, using the corresponding adjectives (“loathsome, disgusting, annoying, distasteful, shocking”) would tend to weaken the definition: as pointed out in the CP,¹⁸² it is not sufficient that a normal member of the public would think “how shocking”.
- (5) “Indecent” is the most general word of all that kind, and fits the name of the offence as well as the requirement that minimum standards must be outraged. However, used on its own it includes fairly low levels of offence; while “grossly indecent” has undesirable overtones of particular (and outdated) sexual offences.
- (6) We therefore propose to retain the words “obscene or disgusting”. The advantage of this is that the presence of the word “disgusting” gives some guidance to the intended meaning of “obscene”, and makes it less likely to be interpreted as meaning that it may corrupt or deprave.

3.118 We recommend that a new offence of outraging public decency should require an act or display that is:

- (1) obscene or disgusting;**
- (2) to an extent sufficient to outrage minimum standards of public decency as judged by the jury or other tribunal of fact in contemporary society.**

¹⁸⁰ The CP, at para 3.17, makes a similar point about “indecent”.

¹⁸¹ [1965] 1 All ER 1035, 1038.

¹⁸² CP para 3.23.

THE PUBLICITY REQUIREMENT

3.119 There are some questions about the publicity requirement.

- (1) Should the requirement of a public “place” remain as currently interpreted, or should the offence be extended to indecent displays on the internet?¹⁸³
- (2) Should the requirement that two persons be actually present be retained?¹⁸⁴
- (3) Should the offence include a case where, though the place is theoretically open to the public, only those willing to witness the display are in fact likely to come by, so that the risk of outrage is reduced to a minimum?¹⁸⁵

The requirement of a public place

3.120 The CP proposed that the offence should be defined to include behaviour “in such a place *or* in such circumstances that it may be witnessed by two or more members of the public”.¹⁸⁶ This implies that a visible presence for the act or display in a particular locality is not required and that the offence can be committed by any means which can bring the act or display to public attention.

3.121 Since the CP was published, the Hong Kong Court of Final Appeal has held, in *HKSAR v Chan Yau Hei*,¹⁸⁷ that the offence must indeed be committed in a public place and that dissemination through the internet is not sufficient.¹⁸⁸

3.122 In the earlier case of *Knüller (Publishing, Printing and Promotions) Ltd v DPP*,¹⁸⁹ the House of Lords held that the offence can be committed by publishing indecent advertisements inside a magazine. Technically, the two cases can be reconciled: in *Knüller*, the magazines were on display in a physical public place. However, it is hard to find a convincing rationale for the distinction. In both cases, the defendant used an ordinary means of publication and it is in the option of an individual reader whether to look inside the magazine or access the website as the case may be.

3.123 Nevertheless, we consider that the public place requirement is sound and that changing it would make the offence unacceptably wide. The offence should be used to control public displays rather than as a tool of censorship: as argued

¹⁸³ Para 3.120 and following, below.

¹⁸⁴ Para 3.126 and following, below.

¹⁸⁵ These cases may be excluded either by altering the definition of a “public place” or by introducing a consequence element or fault element for the offence: para 3.131 and following, below.

¹⁸⁶ CP para 6.13.

¹⁸⁷ [2014] HKCFA 18.

¹⁸⁸ Para 2.46 above.

¹⁸⁹ [1973] AC 435, 494-5.

above,¹⁹⁰ the justification of the offence is that it protects the right of the public to enjoy public spaces without annoyance.

3.124 One other question should be considered. Article 8 of the European Convention on Human Rights requires respect for a person's private and family life, and it could be argued that this gives the individual (within certain limits) the right to do what he or she wishes in the privacy of his or her own home. As we have seen,¹⁹¹ the offence of outraging public decency can be committed in the home provided that it is within view of a place where the public can go; it therefore potentially interferes with this right. However, this right may be restrained by law where necessary in a democratic society "for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others". It would, for example, be justified to restrain an individual from carrying on chemical experiments in the home which cause large quantities of foul smelling gas to pour out into the street. Restraining obscene or disgusting activities that are clearly visible from the street falls within the same justification.

3.125 **We recommend that, in the new offence of outraging public decency, there should be a requirement that the act or display must be in a place which is accessible to or within view of the public.**

The two person rule

3.126 We consider that the requirement that two persons be actually present is something of a historical relic. The older view was that the act had to be within the actual sight of two persons:¹⁹² indictments normally contained words such as "to the great disgust and annoyance of divers of Her Majesty's subjects within whose purview such behaviour was committed".¹⁹³ Professor Sir John Smith QC, in his case commentary on *Lunderbeck*,¹⁹⁴ argued that wording like this is a formality of pleading and does not mean that members of the public must actually see the act, still less that they must be disgusted by it. It was not until *Hamilton*¹⁹⁵ that it was firmly established that there is no need for even one person to see the act.¹⁹⁶

3.127 That being so, the two person rule no longer fulfils its original purpose of showing actual public outrage. It is now only relevant as confirming that the place was indeed one to which members of the public have access.

3.128 The rule does perform one useful function, by excluding some cases where the defendant thought that he or she was alone and therefore had no reason to

¹⁹⁰ Para 3.97 above.

¹⁹¹ Para 2.45 above.

¹⁹² *Webb* (1848) 3 Cox CC 183, 1 Den 338; *Elliot* (1861) Le & Ca 103, 169 ER 1322.

¹⁹³ *Mayling* [1963] 2 QB 717, 47 Cr App R 102.

¹⁹⁴ [1991] *Criminal Law Review* 784.

¹⁹⁵ [2007] EWCA Crim 2062, [2008] QB 224.

¹⁹⁶ Some older cases suggested that there was a need for at any rate one person to see the act or display. The question in *Hamilton* was whether this was a requirement of the offence or was only there because otherwise there was no evidence that it had happened: see CP para 3.36. At the present day, when evidence may be obtained from CCTV recordings and other means, there is no justification for requiring the physical presence of a person.

suppose that anyone would be offended: *F*¹⁹⁷ (the case of the man masturbating in the car) is a case in point. To some extent it compensates for the absence of any fault element in the offence.

3.129 We discuss below¹⁹⁸ the question whether a new offence of outraging public decency should contain a fault element and/or a defence of reasonable excuse, and recommend that it should contain a fault element.¹⁹⁹ If this recommendation is followed, there will be no need to retain the two person rule. If however the recommendation is not followed and outraging public decency remains an offence of strict liability, the two person rule should be retained.

3.130 **We recommend that**, subject to the implementation of our recommendations for a fault element, **the new offence should not contain a requirement that two persons are present at the place of the act or display.**

CONSEQUENCES: THE LIKELIHOOD OF CAUSING OFFENCE

3.131 At present the offence is proved if the act or display was objectively indecent, if it was in a place which is accessible to or within view of the public and two persons were present, whether or not disgust or annoyance occurred or was likely. We rejected, above,²⁰⁰ the possibility of adding a requirement that any person was in fact disgusted or annoyed. Should there instead be a requirement to prove that there was a risk of outrage? To put it another way, should the defendant be exempt from liability if the indecent act occurred in a public place but other circumstances exist which reduce the risk of outrage to a minimum?

3.132 The cases we have in mind here are where a display is open to the public but clearly labelled so that only a self-selecting public, that is unlikely to be offended, is likely to come in. There are several possible arguments for excluding such cases from liability:

- (1) First, one could argue that these cases do not truly concern a section of the public, but only a limited group of persons.
- (2) Secondly, one could argue that people who persist in viewing something despite clear warnings of its nature do not deserve the protection of the law, as they are offended by their own choice.
- (3) Thirdly, one could argue that it is unfair to describe such cases as “outraging public decency” as the risk of outrage has in fact been reduced to a minimum. Defendants in such cases have not created a great enough risk to deserve punishment.
- (4) Fourthly, one could argue that, whether or not outrage occurs, such defendants should be excused because they have taken reasonable measures to reduce the risk of outrage and it is not their fault if it occurs.

¹⁹⁷ [2010] EWCA Crim 2243, (2010) 174 JP 582.

¹⁹⁸ Para 3.135 and following, below.

¹⁹⁹ Para 3.140 below.

²⁰⁰ Para 3.115 above.

3.133 We comment on these arguments in turn:

- (1) The first argument is valid in the case of a private club. But in cases concerning a wider interest group the point is not that the interest group is limited in numbers but that it is selected in such a way as to minimise the risk of offence. If a pornographic film is shown to a hand-picked audience who have chosen to see it, it is unlikely to cause offence and there is a case for excluding it from liability. If however the very same audience were then, without their consent, shown graphic scenes of mutilation, they could reasonably experience shock and disgust, and prosecution would be justified. But this distinction cannot depend on the size of the audience: they must be a "section of the public" for the purposes of both displays or of neither.
- (2) As against the second argument, there are cases where a person has a legitimate interest in monitoring situations likely to cause disgust; for example an RSPCA inspector investigating a circus where animals are systematically mistreated or a police officer investigating child pornography. Admittedly in these cases, normally charges based on animal cruelty or indecent images would be brought, rather than charges connected with the effect on the investigator. We are not here arguing that there needs to be an offence specifically to protect these individuals. The examples are only given to show that it is not always true that a person who knows what to expect cannot reasonably complain of being offended.
- (3) One could give effect to the third argument by introducing a consequence element into the offence, namely that the defendant's conduct has caused a danger that members of the public will experience disgust or annoyance. This would be additional to the basic requirement that an indecent act has occurred in a place which is accessible to or within view of the public. We consider that introducing such a requirement would over-complicate the offence and obscure its basic purpose, which is to safeguard the right of the public to enjoy public spaces by keeping them clear of disgusting sights and sounds. That is, once an indecent display is created in a public place, some risk of disgust or annoyance can be presumed: proof of such risk should not be an additional requirement of the offence.

A variant of this approach would be to create a defence: the defendant would not be liable if he or she could prove that, in the circumstances, there was little or no danger that members of the public would experience disgust or annoyance. This would be a possible approach, but would complicate the offence.

- (4) A more promising way of achieving the same protection for defendants would be through the fourth argument: that the defendant did not realise there was a risk of outrage occurring and/or took measures to prevent it. It would then be unnecessary to consider whether there was a risk of outrage in fact. This argument would suggest that the solution is to introduce either an element of subjective fault or a defence of reasonable

care. We discuss these possibilities below, under the headings of the fault element²⁰¹ and defences and excuses.²⁰²

3.134 **We do not recommend introducing a requirement that the defendant's conduct resulted in a risk of causing disgust or annoyance to members of the public.**

(4) Should there be a fault element for outraging public decency?

3.135 At present there is no fault element in relation to either the indecency requirement or the publicity requirement of the offence. The theoretical arguments about the desirability of a fault element have already been discussed above in relation to public nuisance.²⁰³ In one respect these arguments are stronger for outraging public decency than for public nuisance: at present outraging public decency, unlike public nuisance, has no requirement of negligence and is a true offence of strict liability.

3.136 There are three possible ways in which to exclude from the offence cases where the defendant's conduct lacks culpability:

- (1) In the CP²⁰⁴ we provisionally proposed a fault element consisting of intention or recklessness in relation to both the indecency requirement and the publicity requirement.²⁰⁵
- (2) Elsewhere in the CP²⁰⁶ we suggested a different fault element. In this scheme, the defendant would only be guilty if he or she intended that one or more persons would in fact be disgusted or annoyed, or was reckless as to whether this would happen. This would be an "ulterior" fault element, as the causing of disgust or annoyance is not an ingredient of the external elements of the offence. If this scheme were adopted, it would be unnecessary to introduce any fault element in relation to the indecency and publicity requirements.²⁰⁷
- (3) The third alternative would be to introduce defences of reasonableness, for example defences equivalent to those in section 5 of the Public Order Act 1986.²⁰⁸

ARGUMENTS FOR INCLUDING A FAULT ELEMENT IN THE OFFENCE

3.137 The arguments for including a fault element are much the same as in the case of public nuisance.²⁰⁹

²⁰¹ Para 3.135 and following, below.

²⁰² Para 3.162 and following, below.

²⁰³ Para 3.52 and following, above.

²⁰⁴ CP para 6.13.

²⁰⁵ Para 3.142 below.

²⁰⁶ CP para 5.50.

²⁰⁷ Para 3.152 below.

²⁰⁸ Discussed in para 3.162 and following, below.

²⁰⁹ Para 3.52 and following, above.

- (1) Outraging public decency is a serious offence, which carries an unlimited sentence, and should only be established when there is a correspondingly serious level of fault.²¹⁰
- (2) The content of the offence depends on moral concepts and emotional reactions such as “indecent”, “obscenity”, “disgust” and “outrage”, and for this reason the offence carries a strong moral stigma. In other words, it labels a convicted defendant in the eyes of the public as guilty of a moral fault. It is unfair that this label should be applied unless the defendant was in fact morally to blame for what occurred.²¹¹
- (3) The offence is very broad. We argue in the CP²¹² that its boundaries are defined with reasonable certainty, for example for the purposes of the European Convention on Human Rights. However, it does not have the narrow focus and scientific exactness of the regulatory and road traffic offences where strict liability is most typically found. Strict liability is more appropriate for offences where the forbidden conduct is so precisely defined that potential offenders can put in place suitable compliance strategies. It is therefore most suitable for narrowly defined regulatory offences such as carrying on a specified trade or activity without a licence.²¹³
- (4) There are statutory offences of less seriousness in place to criminalise less serious forms of misconduct, and outraging public decency should be reserved for the most serious cases.²¹⁴

3.138 We consider that the first three arguments make a strong case for introducing a fault element in some form. We are less convinced by the fourth argument. Unlike in the case of public nuisance, the most significant alternative offences to outraging public decency do contain fault elements. Indecent exposure requires intention to cause alarm or distress. Voyeurism involves deliberate conduct undertaken for the purpose of sexual gratification. Exposure or sexual activity in public, or voyeuristic activities, where such an intention was not present therefore fall outside the scope of these offences and can only be prosecuted as outraging public decency.

3.139 The resulting picture is anomalous. Indecent exposure, if prosecuted under the statutory offence, requires intent to cause alarm or distress and incurs a punishment of up to two years’ imprisonment.²¹⁵ An identical act of exposure prosecuted as outraging public decency does not require proof of intent but incurs a sentence of up to life imprisonment.

²¹⁰ Compare para 3.53(1) above for public nuisance.

²¹¹ This argument specifically concerns outraging public decency and does not apply to public nuisance.

²¹² CP para 4.29 and following.

²¹³ Compare para 3.52 above for public nuisance.

²¹⁴ Compare para 3.53(3) and (4) above for public nuisance.

3.140 **We recommend that the offence of outraging public decency should include a fault element.**

3.141 As stated above,²¹⁶ this could take two forms: a fault element concerning the elements of the offence (“the first model”),²¹⁷ or a fault element concerning actual outrage or the risk of it (“the second model”).²¹⁸

THE FIRST MODEL: FAULT CONCERNING THE ELEMENTS OF THE OFFENCE

3.142 One way of including a fault element is to require that the defendant must intend, or be reckless about, each of the external elements of the offence. This is in accordance with the “correspondence principle” advocated by many legal academics.²¹⁹ The argument for this is that, if any factor is important enough to make the difference between guilt and innocence, awareness of that factor or of the possibility of it should be an element of the offence. Otherwise potential defendants will not know whether they are committing the offence, and the requirement of fair warning is not met.²²⁰

3.143 Following this approach, the new offence of outraging public decency would require that:

- (1) the defendant voluntarily performed an act or created a display, knowing of its nature or being reckless as to its nature (although there would be no requirement that the defendant himself or herself would classify the behaviour as indecent); and
- (2) the defendant knew that the act or display was in a place to which the public had access or where it could be seen by members of the public, or was reckless as to whether this was the case.

Recklessness, in both cases, means that the defendant was aware of the nature or possible nature of the display (or, as the case may be, that it might be in a place which is accessible to or within view of the public) and unreasonably proceeded with it.²²¹ This was the test suggested in the formulation of the proposed offence in paragraph 6.13 of the CP.

²¹⁵ This kind of conduct technically falls within outraging public decency. But following the principle in *Rimmington* [2005] UKHL 63, [2005] 1 AC 459, except in special circumstances it should not be prosecuted as such, given that the statutory offence of exposure is available.

²¹⁶ Para 3.136 above.

²¹⁷ Para 3.142 and following, below.

²¹⁸ Para 3.150 and following, below.

²¹⁹ For a discussion of the correspondence principle, see A Ashworth and J Horder, *Principles of Criminal Law* (7th ed 2013) p 75. Further sources are given in Reform of Offences against the Person: A Scoping Consultation Paper (2014) Law Commission Consultation Paper No 217, para 3.35 and following.

²²⁰ W Chan and A Simester, “Four functions of mens rea” [2011] *Cambridge Law Journal* 381.

²²¹ G [2003] UKHL 50, [2004] 1 AC 1034.

Fault in relation to indecency

- 3.144 The absence of a fault element in relation to the indecency requirement has been justified on the argument that, if a defendant's own view of what is indecent were relevant, then "a man could escape liability by the very baseness of his own standards".²²² Of course it would be wrong for a defendant to be acquitted on the ground that applying his or her warped standard of morality the conduct was not indecent. However, the argument is not valid if the defendant's claim is that he did not know the nature of the act or the physical content of the thing displayed.²²³
- 3.145 If the proposal to introduce a fault element is adopted, it will be necessary to clarify this. It will not be necessary to establish that the defendant intended or was reckless about the level of indecency; that assessment of the level of indecency and whether it outrages current standards will be for the jury or magistrates. The requirement of knowledge or recklessness would relate to those physical features of the act or display which, objectively speaking, make it indecent or outrageous by the standards of ordinary members of the public.²²⁴

Example. A person using a projector to give a public presentation clicks on a link giving access to a pornographic web page. If it was a genuine mistake and the person was trying to access a different (and innocuous) web page the fault element will not be satisfied. But if he or she knew of the contents of the web page but thought that the audience would not, or should not, find it offensive, the fault element is satisfied and the offence is committed.

Fault in relation to publicity

- 3.146 For the purposes of the offence of outraging public decency, a place can be public in three senses.
- (1) It could be a place to which the public have lawful access, such as a street or a park.
 - (2) It could be a place which is private property, but where nevertheless trespassers are in the habit of going.²²⁵
 - (3) It could be a place closed to the public, but into which members of the public can see, for example by looking through a window.²²⁶
- 3.147 There will very rarely be cases in which a defendant will not know whether a place is public in the first sense, though cases involving blind people could be conceived. In such a case, if the defendants genuinely believed that they were in

²²² Para 2.52 above.

²²³ Para 2.54 above.

²²⁴ Compare the defence of ignorance of the nature of the article in Obscene Publications Act 1959, s 2.

²²⁵ *Wellard* (1884–85) LR 14 QBD 63.

²²⁶ *Bunyan* (1844) 1 Cox CC 74.

a private room we consider that it would be entirely right to exclude them from criminal liability.

3.148 The second case is more likely to give rise to problems in practice if a fault element is introduced. An example might be if, in order to engage in consensual sexual activity, a couple trespasses in a wood forming part of a private golf club. They could argue that they genuinely believed that they were alone and that no one else was likely to come by. As against this, it could be argued that they must know that, where they could go, others could follow; including members of the club who were lawfully on the land.

3.149 The third case is the most likely to be affected by the introduction of a fault element.

(1) In *Bunyan*²²⁷ two men engaged in sexual activities in what they believed was a private room, and were unaware that a servant girl could see through the window from an adjacent room. Here it might reasonably be argued that the defendants ought to have drawn the curtain and that, if they did not, they must be aware of some risk of being observed. Nevertheless, it would be possible to conceive of a case on closely similar facts in which the defendants genuinely had no reason to suspect that they might be observed.

(2) In *F*²²⁸ a man sat and masturbated in his car near a place where boys were playing football, but was careful to cover himself up with a sheet of paper whenever anyone came near. Nevertheless he was observed by a neighbour looking out through a window. It was held that the judge was right to rule that there was no case to go to trial. However, this ruling depended on the fact that F's act was in the presence of one person and not two; had there been two neighbours, the trial could have been allowed to proceed and F might have been convicted.

We consider that it would be fairer to exclude liability in cases in which the defendant genuinely believed that the place was a private one which members of the public could not observe.

THE SECOND MODEL: FAULT CONCERNING OUTRAGE OR THE RISK OF IT

3.150 As explained above, outraging public decency need not involve any actual risk that members of the public will be disgusted or annoyed: the risk is presumed from the facts that the act is indecent and occurs in a place which is accessible to or within view of the public. Nevertheless, avoiding the risk of such outrage must be part of the rationale of the offence, even though it is not an ingredient of it.

3.151 That being so, it is arguable that morally speaking the defendant is only at fault if he or she consciously intended to cause disgust or annoyance to members of the public, or consciously took the risk of it. This would suggest a different fault element from that discussed above. The defendant would only be liable if he or she intended to cause disgust or annoyance to one or more members of the

²²⁷ (1844) 1 Cox CC 74.

²²⁸ [2010] EWCA Crim 2243, (2010) 174 JP 582.

public, or was reckless as to whether such disgust or annoyance would be caused. This was the fault element proposed in paragraph 5.50 of the CP.

- 3.152 If the new offence contained this fault element, it would be unnecessary to provide for any fault in relation to the indecency and publicity requirements. Once a defendant actually intends to cause outrage, or is recklessly indifferent to it, it is morally irrelevant whether he or she also believes that the act would be considered indecent by a reasonable person or occurs in a place which is accessible to or within view of the public.
- 3.153 In one respect this would appear to make for a simpler offence than the first model, namely fault as to the indecency and publicity requirements: the offence would have three ingredients²²⁹ instead of four.²³⁰ It would also avoid the problem of how to exclude the defendant's subjective view of what is indecent: the deciding factor would be the defendant's expectations of the effect on the viewer.²³¹
- 3.154 This appearance of simplicity is misleading as, on the second model, the structure of the offence would be both unusual and potentially problematic.
- (1) A great many offences require intention or recklessness as to the external elements of the offence: an example is criminal damage, where the defendant must intend or be reckless about causing damage.
 - (2) Similarly there are several offences of "ulterior intent", where the defendant must intend something over and above the external elements of the offence:²³² an example is wounding with intent to cause grievous bodily harm.²³³
 - (3) By contrast, there are comparatively few offences of ulterior intent or *recklessness*, though this is not unknown: an example is criminal damage intending to endanger life, or being reckless as to whether life would be endangered.²³⁴ This has however given rise to problems about whether there are in substance two offences, and whether a charge must always specify whether intention or recklessness is alleged.²³⁵

²²⁹ Indecency; publicity; and intention or recklessness as to causing outrage.

²³⁰ Indecency; publicity; intention or recklessness as to indecency; and intention or recklessness as to publicity.

²³¹ Paras 3.144 and 3.145 above.

²³² On ulterior intent generally, see J Horder, "Crimes of Ulterior Intent", in A Simester and A Smith (eds), *Harm and Culpability* (1996) p 153; J Child, "The structure, coherence and limits of inchoate liability: the new ulterior element" (2014) 34 *Legal Studies* 537.

²³³ Offences Against the Person Act 1861, s 18.

²³⁴ Criminal Damage Act 1971, s 1(2).

²³⁵ *Hardie* [1985] 1 WLR 64, [1984] 3 All ER 848. Another problem is that such an offence would probably be an offence of specific intent, which cannot be committed if the defendant is too intoxicated to appreciate the risk: *Smith and Hogan* para 29.2.1, p 1169.

COMPARING THE TWO MODELS IN PRACTICE

- 3.155 There is one other major problem in creating an offence with a fault element in accordance with the second model. In a case on the facts of *Hamilton*, where the defendant secretly filmed up women's skirts, the defendant would be able to argue that he did not intend to cause outrage, and was not reckless, as he was doing his utmost to avoid detection. On the analogy of *Goldstein*,²³⁶ the offence would be interpreted as requiring the defendant to be aware of the risk of detection and consequent outrage: it would not be sufficient that he knew that he *would* cause outrage if detected. This form of conduct ("upskirting" as it is known) is quite common²³⁷ and there is clearly a need to ensure that those who engage in it can be prosecuted.
- 3.156 On the first model (fault as to the elements of the offence), there would be no problem in prosecuting upskirting. Hamilton knew that he was in a public place; he knew what he was doing; therefore, given an offence in this form, the fault requirement would be satisfied.
- 3.157 On the second model (knowledge or recklessness about causing outrage), upskirting would not be included in the offence. It would be necessary to create a new offence, or to modify the offence of voyeurism to include it.²³⁸ This could cause considerable complications, as well as being outside the scope of this project.
- 3.158 For all these reasons, we consider that the first model should be adopted. As the fault element can be satisfied by recklessness, the offence should continue to be a crime of basic intent so that voluntary intoxication by drink or drugs would be no excuse.²³⁹
- 3.159 As with the public nuisance offence,²⁴⁰ we make no recommendation about whether the definition of the new indecency offence should contain explicit definitions of intention and recklessness: that is a matter for those drafting the statute. Here we simply state what we consider the fault element of the offence should be.
- 3.160 **We recommend that the fault element of the offence of outraging public decency should be that the defendant:**
- (1) knew of the nature of the act or display, or was reckless as to whether the act or display was of that nature; and**
 - (2) knew or intended that the act or display was or would be in a place which is accessible to or within view of the public, or was reckless as to whether or not this was the case.**

²³⁶ Para 2.12(3) above.

²³⁷ Para 3.94 above.

²³⁸ Para 3.109 above.

²³⁹ For the existing law, see para 2.58 above. For the analogous recommendation on public nuisance, see para 3.57 above.

²⁴⁰ Para 3.54 above.

3.161 In the foregoing recommendation:

- (1) the “nature” of an act or display means those characteristics, facts and circumstances which in fact make it obscene or disgusting (whether or not the defendant considers that it is indecent or believes that it will outrage generally accepted standards of decency);
- (2) “reckless” means that:
 - (a) the defendant was aware of a risk that the act or display might be of that nature, or (as the case may be) that it might be in a place accessible to or within view of the public, and
 - (b) it was, in the circumstances as the defendant knew or believed them to be, unreasonable to take that risk.²⁴¹

Defences and excuses

3.162 In our discussion of public nuisance, we suggested that the definition of any new offence should contain a defence of reasonableness, for example wording similar to section 50 of the Serious Crime Act 2007.²⁴² It would be equally possible to incorporate such a defence into the offence of outraging public decency. This would exclude cases such as the following.

- (1) A morgue official displays a mutilated dead body for identification by next of kin. This may well cause distress and disgust, but it is done for a valid public purpose.
- (2) The facts of *Bunyan*.²⁴³ two people engaged in sexual activities in what they believed to be a private room, and were unaware that anyone was looking through the window. If they had taken all reasonable precautions to secure privacy and had no reason to believe that they were observed, this could amount to a “reasonable excuse”.
- (3) A person arranges a showing of a sexually explicit play or film, and has taken care to signpost it in such a way that everyone who comes in is aware of the nature of the contents. This may still incur prosecution for other offences, such as those under the Theatres Act 1962, but would not (under this proposal) amount to outraging public decency.

3.163 This proposal is independent of the proposal to introduce a fault element, though there is some overlap. The defendants in a case like *Bunyan* could equally argue that they were not reckless and that they had a reasonable excuse.²⁴⁴

²⁴¹ Compare the definition in public nuisance, para 3.59 above.

²⁴² Para 3.60 above.

²⁴³ (1844) 1 Cox CC 74.

²⁴⁴ If the offence is drafted with a fault element, the argument about recklessness is logically prior to that about reasonable excuse. If there is no recklessness, there is nothing to excuse. Also, the conditions are not identical: recklessness is excluded if the defendants honestly believed that there was no risk of observation; for a reasonable excuse this belief must also be reasonable.

Conversely, the concept of recklessness requires that the decision to proceed with the conduct, while aware of the risk, was unreasonable. To that extent a defence of reasonableness is already implied.

- 3.164 However, this argument does not apply in cases of intentional rather than reckless conduct. There may be cases where a person arranges a publication or a display, knowing or even intending that it will cause outrage, but has a valid reason for doing so. Reasons could include drawing attention to a matter of pressing public concern,²⁴⁵ arguing controversial views or creating a work of art. Criminalising or punishing such activities could be held to be an unjustified restraint of freedom of expression under article 10 of the European Convention on Human Rights.²⁴⁶ However, the definition of intention, unlike that of recklessness, does not contain any exception for reasonable or justified conduct.
- 3.165 Accordingly, cases of this last kind would not be excluded from the offence by the introduction of a fault element into the offence. They would however be caught by a reasonableness defence, as that defence would need to be interpreted in a way compatible with the Convention.²⁴⁷
- 3.166 In conclusion, **we recommend that, whether or not the new offence of outraging public decency includes a fault element, it should contain a defence of reasonableness.**

A DEFENCE OF REASONABLENESS INSTEAD OF A FAULT ELEMENT?

- 3.167 The converse question is: if there is a defence of reasonableness, is there any need for a fault element? One alternative to introducing a fault element would be to create a defence similar to that in section 5 of the Public Order Act 1986:

- (3) It is a defence for the accused to prove—
- (a) that he had no reason to believe that there was any person within hearing or sight who was likely to be caused [harassment, alarm or distress],²⁴⁸ or
- (b) that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the writing, sign or other visible representation displayed, would be heard or seen by a person outside that or any other dwelling, or
- (c) that his conduct was reasonable.

²⁴⁵ For example, a charity publishing images of casualties in a war zone or animals that have been cruelly treated.

²⁴⁶ This was argued by Gibson and Sylveire (in the case of the foetus earrings) in their appeal to the European Court of Human Rights: *S and G v UK* App No 17634/91. The court held that the restriction was prescribed by law and pursued a legitimate aim. See also R Clayton and H Tomlinson, *The Law of Human Rights* (2nd ed 2008) paras 15.287 to 15.289.

²⁴⁷ Human Rights Act 1998, s 3. *Percy v DPP* [2001] EWHC Admin 1125, [2002] *Criminal Law Review* 835; discussed S Bailey and N Taylor, *Bailey, Harris and Jones: Civil Liberties, Cases, Materials & Commentary* (6th ed 2009) pp 348 to 350.

²⁴⁸ This is the wording of s 5. If the definition were adapted for outraging public decency, words such as “disgust or annoyance” would be substituted.

This would solve the *Bunyan* problem, and be a substitute both for the fault element recommended above and for the defence of reasonableness.

3.168 We see no advantage in this, compared to the fault element as recommended above. In effect, it introduces a fault element by another name, with two differences:

- (1) the burden of proof is on the defendant;
- (2) the defence concerns the existence of reason to believe, rather than actual belief.

3.169 Further, the first limb of the defence is ambiguous. Does “likely to be caused outrage” mean “likely to be caused outrage, if he or she saw or heard the act or display” or “likely to see or hear and be outraged”? A defence in this form could well exclude upskirting cases such as *Hamilton* from liability: a defendant could argue that there was no reason to believe that any person within hearing or sight would be outraged, given that the defendant took every precaution to ensure that no one would see him or her.

3.170 **We do not recommend that the new offence of outraging public decency should contain a defence equivalent to that in section 5 of the Public Order Act 1986.**

Jurisdiction

3.171 We consider it unnecessary to make any specific provision for cases where the defendant’s conduct or the resulting nuisance occurs outside England and Wales. As with public nuisance, this question should be decided according to general principles of law rather than rules specific to one offence.

Procedure and sentencing

3.172 It appears from the sentencing statistics²⁴⁹ that sentences for outraging public decency vary widely, and that both sentences of 6 months or less and sentences considerably in excess of this are frequently imposed. **We recommend that the new offence of outraging public decency should be triable either in the Crown Court or in a magistrates’ court.**

3.173 At present the sentencing powers for outraging public decency are unlimited. We have no specific recommendation about what the sentencing powers for the new offence should be. As the offence is intended to address serious cases for which other offences are not adequate, if a maximum sentence is set it should be high enough to cover such cases.

Name of the offence

3.174 The new offence could have the same name as the existing one, or it could be renamed. Possibilities are “public indecency”, “indecent conduct in public”, “serious offence to public decency”.

²⁴⁹ Paras 3.92 and 3.93 above.

3.175 One question is whether to retain the word “outrage” as part of the name of the offence.

- (1) The advantage of retaining the word “outrage” is that it makes clear that the offence only covers extreme instances: public standards of decency must be not only infringed, but infringed to a degree regarded as outrageous.
- (2) The disadvantage of retaining the word “outrage” is that it can suggest either outraging a person or outraging a standard. (“I was outraged” has very different connotations from “This is an outrage to common sense”.)

3.176 Another question is whether to define the offence in terms of “decency” or of “indecentry”. Again there are arguments both ways.

- (1) “Decency” has two meanings. It can mean the physical absence of indecent sights, sounds or behaviour; or it can mean the public’s expectation of not being affronted by them. It is clearer and simpler to describe the offence by reference to the presence of indecent sights, sounds and behaviour. The offence, both in its existing form and as recommended below, has two external elements, the “indecentry requirement” and the “publicity requirement”: “public indecentry” neatly encapsulates both.
- (2) On the other hand, “indecentry” is unfortunate in two respects: it can denote fairly low levels of offensiveness, and it is too often a euphemism for sexual conduct.²⁵⁰ The scope of the offence is wider than that.

3.177 As a provisional description, we suggest “seriously offending public decency”. What name is ultimately chosen is a matter for those drafting the relevant statute.

Summary of recommendations on outraging public decency

3.178 There is a need for an offence of outraging public decency, but the existing common law offence should be replaced by a statutory offence.

3.179 The new offence of seriously offending public decency should be formulated so as to cover:

- (1) voluntary conduct by the defendant;
- (2) involving or resulting in an act or display which:
 - (a) is obscene or disgusting, to an extent sufficient to outrage minimum standards of public decency as judged by the jury or other tribunal of fact in contemporary society; and
 - (b) occurs in a place which is accessible to or within view of the public;
- (3) that the defendant:

²⁵⁰ Compare the point made about “gross indecentry”, para 3.117(5) below.

- (a) knew of the nature of that act or display, or was reckless as to whether the act or display was of that nature; and
 - (b) knew or intended that the act or display was or would be in a place which is accessible to or within view of the public, or was reckless as to whether or not this was the case;
- (4) unless the defendant's conduct was reasonable in the circumstances as he or she knew or reasonably believed them to be.

3.180 In the foregoing recommendation:

- (1) the "nature" of an act or display means those characteristics which in fact make it obscene or disgusting (whether or not the defendant considers that it is indecent or believes that it will outrage generally accepted standards of decency);
- (2) "reckless" means that:
 - (a) the defendant was aware of a risk that the act or display might be of that nature, or (as the case may be) that it might be in a place accessible to or within view of the public, and
 - (b) it was, in the circumstances as the defendant knew or believed them to be, unreasonable to take that risk.

3.181 This offence should be triable either in the Crown Court or in a magistrates' court.

CONSPIRACY TO OUTRAGE PUBLIC DECENCY

3.182 For the reasons given in Chapter 2,²⁵¹ we consider that the common law offence of conspiracy to outrage public decency performs no function and should be abolished. This could be done by removing the words "or outrages public decency" from section 5(3)(a) of the Criminal Law Act 1977. In every case in which such a charge might have been brought (before 1977) it will be possible, instead, to charge statutory conspiracy to commit the new offence of outraging public decency.

3.183 We need to consider what the position would be if a new statutory offence of outraging public decency were created but the common law offence of conspiracy to outrage public decency were not abolished. The meaning of "outrage public decency" in the common law conspiracy offence would presumably remain as it was at common law, and not be interpreted as a reference to the new statutory offence. If the new statutory offence were drafted in such a way as to be narrower than the old, there would be renewed scope for the conspiracy offence. It would cover any agreement to engage in conduct which falls within the old outraging offence but not the new.

3.184 However, under our recommendations the new offence would not be narrower than the old: the only change would be that the new offence would contain a fault element. The presence of this element makes no difference to the argument, as a

²⁵¹ Para 2.64 and following, above.

conspiracy to commit any offence, even an offence of strict liability, necessarily involves an intention that someone should commit that offence.²⁵² We therefore consider that, if the new offence were created, the offence of conspiracy to outrage public decency would, as at present, perform no useful function.

- 3.185 **We recommend that the common law offence of conspiracy to outrage public decency should be abolished. All prosecutions for such a conspiracy should instead be under section 1 of the 1977 Act.**

²⁵² *Smith and Hogan* para 13.3.3.5, p 502.

CHAPTER 4

CONCLUSIONS AND RECOMMENDATIONS

PUBLIC NUISANCE

- 4.1 We consider that there is benefit in the continued existence of an offence of public nuisance, but recommend that this offence should be restated in statute.¹
- 4.2 We recommend that the external elements of the offence of public nuisance should consist of:
- (1) voluntary conduct by the defendant (including omissions, where the defendant is under a duty at common law or by statute);
 - (2) which causes:
 - (a) serious harm to members of the general public or a section of it;or
 - (b) obstruction to the public or a section of it in the exercise or enjoyment of rights common to the public at large.²
- 4.3 In the foregoing recommendation, serious harm to a person means that that person suffers:
- (1) death, personal injury or disease;
 - (2) loss or damage to property; or
 - (3) serious distress, annoyance, inconvenience or loss of amenity;
- or is put at risk of suffering any of these things.³
- 4.4 We recommend that the offence of public nuisance should contain a fault element, consisting of intention to cause, or recklessness as to causing:
- (1) serious harm to members of the general public or a section of it; or
 - (2) obstruction to the public or a section of it in the exercise or enjoyment of rights common to the public at large.⁴
- 4.5 In the foregoing recommendation:
- (1) “intention” means that the defendant acted in order to bring about that danger or obstruction; the jury or other tribunal of fact may also find that the defendant intended that danger or obstruction if they are sure that he

¹ Para 3.33 above.

² Para 3.48 above.

³ Para 3.49 above.

⁴ Para 3.58 above.

or she realised that it was certain (barring an extraordinary intervention) if the defendant did what he or she was set upon doing;

- (2) “reckless” means that:
- (a) the defendant was aware of a risk that his or her conduct might cause danger or obstruction, and
 - (b) it was, in the circumstances as the defendant knew or believed them to be, unreasonable to take that risk.⁵

4.6 We recommend that the offence of public nuisance should incorporate a defence of reasonableness.⁶

4.7 We recommend that the new offence of public nuisance should be triable either in the Crown Court or in a magistrates’ court.⁷

4.8 We recommend that any statute abolishing or replacing the common law offence of public nuisance should contain a saving provision to the effect that nothing in the Act shall prejudice the availability of any civil procedure or affect the meaning of nuisance in any other statute.⁸

OUTRAGING PUBLIC DECENCY

4.9 We consider that there is a need for an offence of outraging public decency, but recommend that the existing common law offence should be replaced by a statutory offence.⁹

4.10 We recommend that a new offence of outraging public decency should require an act or display that is:

- (1) obscene or disgusting;
- (2) to an extent sufficient to outrage minimum standards of public decency as judged by the jury in contemporary society.¹⁰

4.11 We recommend that, in the new offence of outraging public decency, there should be a requirement that the act or display must be in a place which is accessible to or within view of the public.¹¹

4.12 We recommend that the new offence should not contain a requirement that two persons are present at the place of the act or display.¹²

⁵ Para 3.59 above.

⁶ Para 3.65 above.

⁷ Para 3.67 above.

⁸ Para 3.87 above.

⁹ Para 3.111 above.

¹⁰ Para 3.118 above.

¹¹ Para 3.125 above.

¹² Para 3.130 above.

- 4.13 We do not recommend introducing a requirement that the defendant's conduct resulted in a risk of causing disgust or annoyance to members of the public.¹³
- 4.14 We recommend that the offence of outraging public decency should include a fault element.¹⁴
- 4.15 We recommend that the fault element of the offence of outraging public decency should be that the defendant:
- (1) knew of the nature of that act or display, or was reckless as to whether the act or display was of that nature; and
 - (2) knew or intended that the act or display was or would be in a place which is accessible to or within view of the public, or was reckless as to whether or not this was the case.
- 4.16 In the foregoing recommendation:
- (1) the "nature" of an act or display means those characteristics, facts and circumstances which in fact make it obscene or disgusting (whether or not the defendant considers that it is indecent or believes that it will outrage generally accepted standards of decency);
 - (2) "reckless" means that:
 - (a) the defendant was aware of a risk that the act or display might be of that nature, or (as the case may be) that it might be in a place accessible to or within view of the public, and
 - (b) it was, in the circumstances as the defendant knew or believed them to be, unreasonable to take that risk.¹⁵
- 4.17 We recommend that, whether or not the new offence of outraging public decency includes a fault element, it should contain a defence of reasonableness.¹⁶
- 4.18 We do not recommend that the new offence of outraging public decency should contain a defence equivalent to that in section 5 of the Public Order Act 1986.¹⁷
- 4.19 We recommend that the new offence of outraging public decency should be triable either in the Crown Court or in a magistrates' court.¹⁸

¹³ Para 3.134 above.

¹⁴ Para 3.140 above.

¹⁵ Para 3.160 above.

¹⁶ Para 3.166 above.

¹⁷ Para 3.170 above.

¹⁸ Para 3.172 above.

CONSPIRACY TO OUTRAGE PUBLIC DECENCY

- 4.20 We recommend that the common law offence of conspiracy to outrage public decency should be abolished. All prosecutions for such a conspiracy should instead be under section 1 of the 1977 Act.¹⁹

(Signed) DAVID LLOYD JONES, *Chairman*

STEPHEN LEWIS

DAVID ORMEROD

NICHOLAS PAINES

ELAINE LORIMER, *Chief Executive*

4 June 2015

¹⁹ Para 3.185 above.

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