

The Law Commission

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CRIMINAL LAW

REPORT ON POISON-PEN LETTERS

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The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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REPORT ON POISON-PEN LETTERS

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POISON-PEN LETTERS

Summary . In this report the Law Commission examines the scope of existing provisions in the criminal law for dealing with persons who send poison-pen letters and similar material. This review arises out of the Law Commission's examination of the common law offence of criminal libel, as part of its programme of codification of the criminal law of England and Wales. The Commission recommends the creation of a new statutory offence to penalise persons who send or deliver poison-pen letters and similar messages to another for the purpose of causing distress or anxiety. The new offence would be triable only in a magistrates' court. The report contains a draft Malicious Communications Bill which would give effect to these recommendations.

THE LAW COMMISSION

CRIMINAL LAW

REPORT ON POISON-PEN LETTERS

*To the Right Honourable the Lord Hailsham of St. Marylebone, C.H.
Lord High Chancellor of Great Britain*

PART I

INTRODUCTION

1.1. This report contains our recommendation for a new statutory offence penalising persons who send or deliver "poison-pen" letters and similar matter for the purpose of causing distress or anxiety. A draft Malicious Communications Bill which would give effect to the recommendation is annexed at Appendix A.

1.2. Our work on the subject of poison-pen letters arose out of our examination of the common law offence of criminal libel as part of our programme of codification of the criminal law of England and Wales.¹ In November 1982 we published our Working Paper on Criminal Libel in which we put forward provisional proposals for reform of the law in this field and sought comments.² In the working paper we were primarily concerned with what new statutory offence or offences, if any, would be needed in place of the common law offence of criminal (defamatory) libel. In the final Part of the working paper (Part IX) we considered as a separate issue the problem of poison-pen letters. Although at present the person who sends a poison-pen letter may sometimes commit the offence of criminal libel if the contents of the letter are defamatory, more often than not this type of conduct will fall outside the scope of the common law offence. This will be so, for example, if the letter contains material which is abusive, frightening or menacing but is not defamatory.³ While there are statutory offences which may be used to penalise the writers of some poison-pen letters,⁴ there is no offence which is expressly intended to apply to this type of mischief. In the working paper we concluded that there appeared to be a gap in the criminal law for which a further and more specific sanction was required. We proposed that there should be a new offence to penalise persons who send poison-pen letters, and that this offence should be triable only in a magistrates' court.

1.3. We have decided not to make our final recommendations on criminal libel and poison-pen letters the subject of a single report, corresponding to the working paper, but to submit two separate reports, the first concerned with

¹Second Programme of Law Reform (1968) Law Com. No. 14, Item XVIII, para. 2.

²Working Paper No. 84, Criminal Libel (1982).

³See further paras. 2.4 *et seq.*, below.

⁴See further paras. 2.7-2.11, below.

poison-pen letters and the second concerned with criminal defamation. They deal with essentially different problems.

1.4. In relation to the subject-matter of this report, we have been greatly assisted by those who responded to the working paper proposal for a poison-pen letter offence.⁵ They confirmed almost unanimously our preliminary view that there is a gap in the existing criminal law which should be closed. With the exception of one commentator, who felt that the civil law provided or should provide sufficient remedy, all those who commented on our proposals for a poison-pen offence expressed strong support for such an offence. They included the Senate of the Inns of Court and the Bar, The Law Society, the Prosecuting Solicitor's Society, the Justices' Clerks' Society and government departments and officials, including the Lord Chancellor's Department and the Director of Public Prosecutions. Among academic commentators, the Society of Public Teachers of Law sent a detailed submission prepared by the Society's Criminal Law Reform Sub-Committee. One of the Sub-Committee's members, Mr. J. R. Spencer, contributed further with an article in the Criminal Law Review commenting on our working paper's proposals.⁶ We also had the benefit of the views of the Solicitor to the Post Office whose department is responsible, among other matters, for bringing prosecutions for the offence of sending indecent or obscene material through the post.⁷ We are grateful to all our commentators for the valuable help which they have given us.

1.5. In Part II we examine the need for a new offence, taking into account the scope of existing offences and the arguments raised by one commentator against our proposal. We conclude that the arguments in favour of an offence substantially outweigh the arguments against it. In Part III of the Report we consider the type of conduct which the new offence should penalise and in Part IV the elements of the new offence. Part V contains a summary of our recommendations. Appendix A contains a draft Bill to give effect to the recommendations, together with explanatory notes on the clauses. Appendix B lists the commentators on the working paper.

⁵See Appendix B.

⁶"Criminal Libel: The Law Commission's Working Paper", [1983] Crim. L.R. 524. Mr. Spencer's comments on the poison-pen offence are at pp. 531-532.

⁷Post Office Act 1953, s. 11: see para. 2.7, below.

PART II

CONSIDERATION OF THE NEED FOR A NEW OFFENCE

A. The nature of poison-pen communications

2.1. Poison-pen letters do not form a category which has ever been known to or defined under the criminal or civil law of England and Wales. While most people would probably have no difficulty in recognising a poison-pen letter if they were unfortunate enough to receive one, we have had to consider the characteristics which should distinguish a poison-pen letter, the sending of which is to be penalised, from any other form of communication. In the working paper¹ we provisionally defined a poison-pen letter as:

“a communication, written or otherwise, which is grossly offensive, or of an indecent, shocking or menacing character, [and which was sent] for the purpose of causing needless anxiety or distress [to the recipient] or any other person.”

2.2. In the remaining parts of this report, we shall consider in detail the precise definition of the proposed offence. However, in considering the need for a new offence we have thought it helpful that there should be borne in mind from the outset the broad nature of the communications which we think should be penalised.

B. Related offences and legal provisions

2.3. There is at present no criminal offence which specifically penalises persons who send poison-pen letters. There are certain offences which may be available for use in some such cases. We now outline these and analyse the reasons why they are, in our view and in the view of almost all our commentators, inadequate or inappropriate in this context.

1. CRIMINAL LIBEL

2.4. At present, what is a criminal libel is not defined by any statute. In outline, the offence consists of the publication of defamatory matter,² which is not trivial,³ in some permanent form. The defendant has a good defence if he proves that the statement was true and that its publication was for the public benefit.⁴ There is authority which states that publication only to the person defamed may be sufficient for the purposes of the crime if the defamatory matter has a tendency to lead to a breach of the peace. If there is no such tendency, publication to someone other than the person defamed is required.⁵ The offence is triable only on indictment in the Crown Court.

¹ See Working Paper No. 84, para. 9.14.

² Words are “defamatory” if they “contain that sort of imputation which is calculated to vilify a man, and bring him . . . into hatred, contempt and ridicule”: *Thorley v. Lord Kerry* (1812) 4 Taunt. 355, 364; 128 E.R. 367, 370, per Sir James Mansfield C.J. This passage was cited with approval by Viscount Dilhorne in *Gleaves v. Deakin* [1980] A.C. 477, 487.

³ See *Gleaves v. Deakin* [1980] A.C. 477, 487, and 495 and Working Paper No. 84, paras. 3.6-3.7.

⁴ Libel Act 1843, s. 6.

⁵ See *R. v. Adams* (1888) 22 Q.B.D. 66 (C.C.R.) and *Gleaves v. Deakin*, *ibid.*, at p. 490.

2.5. Prosecutions for criminal libel are now infrequent.⁶ However, one writer who has made a particular study of criminal libel prosecutions (including both reported and unreported cases) has suggested that, "in the last 150 years a far more usual defendant [to a charge of criminal libel] than a newspaper editor⁷ has been the writer of poison-pen letters".⁸ Criminal libel is essentially concerned with defamatory material. Whether a poison-pen letter is defamatory is not, in our view, the reason why the sender should be criminally liable. He should be liable because of the nature of the letter (which may or may not be defamatory) and his purpose in sending it. Most poison-pen letters are probably not defamatory in any event. Moreover, even if a poison-pen letter is defamatory, we do not think that the crime should depend upon a likely reaction being a breach of the peace nor that the crime should only be triable in the Crown Court.

2.6. The proposals in our working paper relating to criminal libel were all dependent upon the publication being defamatory. Whatever may be the final form of our proposals to replace the common law offence of criminal libel, they will not be expressly designed to penalise poison-pen letters as described in this report, and would not in fact apply to most of them.

2. POST OFFICE ACT 1953, SECTION 11⁹

2.7. It is an offence under section 11 of the Post Office Act 1953 for any person to send indecent or obscene material through the post.¹⁰ The maximum penalty on summary conviction is a fine not exceeding £2,000;¹¹ on conviction on indictment, the court may order imprisonment for a term not exceeding 12 months in addition to imposing a fine. From its terms, section 11 is evidently capable of use in some poison-pen cases. Nevertheless, as we pointed out in the working paper, the section has a number of limitations in this context:¹²

- (a) section 11 only applies to material sent through the post;
- (b) the offence can only be committed where the material was either indecent or obscene; and

⁶ Our working paper recorded only five cases of criminal libel where defendants were committed for trial between 1970 and 1980: *ibid.*, para. 2.21.

⁷ See Law of Libel Amendment Act 1888, s. 8 which prohibits the prosecution of libels in newspapers without the consent of a judge in chambers: Working Paper No. 84, paras. 3.25-3.27.

⁸ J. R. Spencer, "The Press and the Reform of Criminal Libel" in Glazebrook (ed.), *Reshaping the Criminal Law* (1978), p. 266.

⁹ See generally C. Manchester, "Obscenity in the Mail", [1983] Crim. L.R. 64.

¹⁰ This section provides (so far as is relevant) that:

- "(1) A person shall not send or attempt to send or procure to be sent a postal packet which—
- (a) ...
 - (b) encloses any indecent or obscene print, painting, photograph, lithograph, engraving, cinematograph film, book, card or written communication, or any indecent or obscene article whether similar to the above or not; or
 - (c) has on the packet, or on the cover thereof, any words, marks or designs which are grossly offensive or of an indecent or obscene character."

¹¹ See The Criminal Penalties etc. (Increase) Order 1984 S.I. 1984 No. 447 which doubled the maximum fines imposable by magistrates for all summary offences from 1 May 1984.

¹² See also Working Paper No. 84, para. 9.6.

- (c) magistrates' courts cannot impose any form of custodial sentence or any other sentence which depends upon there being a power to impose a custodial sentence.¹³

2.8. It was confirmed to us on consultation that section 11 can be useful for dealing with some cases of poison-pen letters. However, it has also been made clear to us that, when the question of a possible prosecution in such cases has arisen, in many instances the prosecuting authorities have not been able to bring a charge under section 11. The Solicitor to the Post Office commented that his Prosecution Division regularly receives enquiries from police officers and prosecuting authorities as to whether the sending of letters which are abusive, frightening or of a nuisance nature is an offence under the Post Office Acts. The advice has had to be that such letters are not covered by section 11 and that often the only available remedy seems to be to lay a complaint with a view to obtain an order for binding over.¹⁴

2.9. Section 11 was, in its origin, principally intended for the protection of Post Office officials.¹⁵ We doubt whether it would be possible or desirable to recommend amendments to section 11 so as to alter its scope to remove the limitations which make it unsuitable for use in prosecuting the authors of most poison-pen letters. On the other hand, we think that section 11 does provide some assistance to us in the formulation of a new offence and we are particularly grateful to the Solicitor to the Post Office for his assistance.

3. OTHER CRIMINAL OFFENCES

2.10. Some peculiarly vicious poison-pen letters may contain material which amounts to the offence of threatening to kill another person intending that that other would fear that the threat would be carried out.¹⁶ Likewise, the material might amount to a threat to damage or destroy property belonging to another with the same intent.¹⁷ In either case, a specific offence, triable either way, would have been committed. These offences are punishable with a maximum penalty of 10 years' imprisonment. There is also the offence of blackmail which penalises anyone who, "with a view to gain for himself or another or with intent to cause loss to another . . . makes any unwarranted demand with menaces".¹⁸ This offence is triable only on indictment and carries a maximum penalty of 14 years' imprisonment.

2.11. The offences considered above are all very serious offences. However, many poison-pen letters contain neither threats to kill, threats to damage or

¹³ For example, a magistrates' court can only make a hospital order under the Mental Health Act 1983 where a person has been convicted of an offence which is punishable on summary conviction with imprisonment: s. 37.

¹⁴ As to bind-over orders, see para. 2.12, below.

¹⁵ See Manchester, *op. cit.*, (n. 9, above) at p. 65.

¹⁶ Offences against the Person Act 1861, s. 16 (as substituted by Sched. 12 to the Criminal Law Act 1977). The Criminal Law Revision Committee recommended that the offence should be extended to include threats to cause serious injury: see Fourteenth Report: Offences against the Person (1980), Cmnd. 7844, paras. 215-219.

¹⁷ Criminal Damage Act 1971, s. 2.

¹⁸ Theft Act 1968, s. 21.

destroy property nor unwarranted demands with menaces; yet they may be poison-pen letters of the type which it should be an offence to send. Moreover, a mere written threat to injure, in contrast to a threat to kill, is not at present a criminal offence. Finally, the very serious charges which are here under consideration will, in our view, in many instances simply be inappropriate for use in the case of a poison-pen letter.

4. BINDING OVER¹⁹

2.12. We summarised in the working paper²⁰ our reasons for thinking that the possibility of proceeding against the sender of a poison-pen letter in the magistrates' court on complaint by the procedure of binding over to keep the peace and be of good behaviour was not a satisfactory means of dealing with those who send poison-pen letters:

“[Binding-over does not require the commission of] a criminal offence. Yet not only is this conduct such that it ought to be a criminal offence, but many of those who send poison-pen letters are likely to be suffering from some condition of the mind which requires medical treatment or other help; binding over is not appropriate for those needing supervision. Others may be people who will desist once seen by a police officer carrying out a criminal investigation. A visit by a police officer may be more likely to have the desired effect if he is investigating a complaint of a crime rather than if there has been a complaint of conduct which can only be dealt with by a binding over order. Indeed, unless there is some evidence that the conduct in question amounts to a criminal offence, the police may well be reluctant to intervene at all. Finally, there are probably some writers of such letters who, if only for the protection of the recipients, ought to be in some form of custody, even if they are only there because of the persistence of their conduct after repeated warnings and attempts to persuade them to stop sending such letters.”

2.13. No-one on consultation disagreed with our reasons for suggesting that, if the conduct was deserving of punishment, the possibility of a binding over order was not a satisfactory substitute for a criminal offence.

C. Could the civil law provide an effective remedy in poison-pen cases?

2.14. One of our commentators questioned whether the civil law and its remedies might not be a more satisfactory means of dealing with the writers of poison-pen letters than the creation of a new criminal offence. It was suggested to us that, where a person persistently sends poison-pen letters to another, an injunction to order that person to desist might provide an effective sanction. It was pointed out that, if such an injunction were to be ignored, the sender would be in contempt of court. The court would have powers similar to those available to a magistrates' court dealing with a criminal offence,

¹⁹ We are conducting a separate examination of this power under a reference from the Lord Chancellor under s. 3(1)(e) of the Law Commissions Act 1965.

²⁰ Para. 9.5.

including the power to fine or imprison the defendant or, in an appropriate case, to make him the subject of a hospital order.²¹

2.15. We do not consider that reliance on the civil law in these cases would adequately meet the problem presented by poison-pen letters. In the first place, it is not clear that the existing principles of tort law could provide the means for controlling all forms of poison-pen letters. It is tortious to send another a malicious falsehood which causes mental distress;²² and to publish to a third party a statement which is defamatory of another. Causing the delivery of a poison-pen letter into a dwelling, whether occupied by the recipient or someone else, would be a trespass upon the premises because it would not be within any implied licence, but civil complaint can only be made by a person entitled to sue for trespass in respect of the land concerned. Having regard to the limitations of the existing law of tort, if the civil law were to be treated as the means for controlling poison-pen letters, we have no doubt that a new tort would have to be created by statute expressly intended to meet the problem. Even if the civil law were changed in this way, we consider that, for a number of reasons, civil remedies would not be effective in very many cases.

2.16. First, the police would be reluctant to become involved in an investigation if the law only gave the recipient of the letter a civil remedy. In many cases it is difficult to trace the authors of this type of communication. Most recipients would be deterred from trying to identify the sender because of the need to hire, at his or her own expense, a private investigator or a handwriting expert. Recipients of poison-pen letters include, in all probability, the elderly, the frail and the lonely. Such people are unlikely to be able or willing to initiate a civil action yet they are a class of people for whom the law should provide protection. Again, the remedy of damages is only effective if the defendant has the means to pay them while the remedy of an injunction will only be enforceable by the particular plaintiff in whose favour it was given. If, therefore, a person sent similar poison-pen letters to many different people, each individual recipient would be left to bring his own separate action. Even if each obtained an injunction, no-one other than those particular plaintiffs would be protected by those injunctions. Finally, it remains our view, and it is a view which appears to have been shared by all the other commentators on our Working Paper, that in many cases the sending of a poison-pen letter is sufficiently evil conduct to justify making available to the court penal sanctions, whether or not a civil sanction is also available.²³

D. Does the number of poison-pen letters justify a new criminal offence?

2.17. So far as we are aware, there is no available statistical evidence as to the incidence of poison-pen letters being sent. This is not surprising in view of the fact that the law currently makes no specific provision for dealing with

²¹ See Contempt of Court Act 1981, s. 14(1) and (4).

²² *Wilkinson v. Downton* [1897] 2 Q.B. 57; *Janvier v. Sweeney* [1919] 2 K.B. 316 (C.A.).

²³ See e.g. Spencer, "Criminal Libel—A Skeleton in the Cupboard", [1977] Crim. L.R. 465, 471-472, who comments that "the civil law is ineffective to deal with [poison-pen letter writers], because they usually need one of the kinds of treatment or restraint which only a criminal court is competent to order".

them. There is little or no incentive at present for the victims of these letters to draw to the attention of the authorities the fact that one or more of such letters have been sent to them. We do not doubt that those who do in fact report incidents of this kind, either to a solicitor or to the police, are surprised and perhaps angry to learn that little or nothing can be done because there is no criminal remedy to hand. Those who commented on the working paper were clearly not of the view that poison-pen letters were so rare that nothing need be done about them. Rather, their comments were to the contrary. So far as we have been able to ascertain the receipt of poison-pen letters is, unfortunately, by no means a rare event. In this context it should be noted that it was stated in Parliament that on average over 500 obscene or offensive telephone calls are reported each day (including Saturdays and Sundays).²⁴ No doubt, as one commentator pointed out, in a great many instances the writer of a poison-pen letter cannot be identified, still less can he be identified to the point of the standard of proof required for criminal conviction. Nevertheless, we are satisfied that the incidence of poison-pen letters and the distress and anxiety which they cause to their recipients merits the creation of a new criminal offence.

E. Conclusion

2.18. The absence of any offence at present which penalises the sender of a "poison-pen" letter is a gap in the law which is capable of causing appreciable social harm which requires the creation of a new criminal offence.²⁵ In the next Part of this report we consider our approach to the offence which we recommend.

²⁴ See Para. 4.55, below.

²⁵ In coming to this conclusion we have taken into account the views expressed in the Home Office consultative document on Trespass in Residential Premises (1982), paragraphs 18-20 of which refer to some guiding principles kept in mind by successive Governments and Parliament in considering proposed legislation creating new criminal sanctions. These are in summary, first, that the behaviour in question is so serious that it goes beyond what it is proper to deal with on the basis of compensation as between one individual and another and concerns the public interest in general; secondly, criminal sanctions should be reserved for dealing with undesirable behaviour for which other, less drastic measures of control would be ineffective, impracticable or insufficient; and, thirdly, that a new offence should be enforceable, and clear in its scope and effect. See also *Hansard* (H.C.), 21 December 1984, vol. 70, col. 365 (written answers).

PART III

WHAT TYPE OF CONDUCT SHOULD THE NEW OFFENCE PENALISE?

3.1. It seemed to us, when making our provisional definition of a poison-pen letter in the working paper,¹ that there were two main characteristics of the type of communication which we thought should be penalised. First, the subject-matter of the communication could be characterised by such adjectives as “indecent, shocking, menacing or grossly offensive.” Secondly, the sender’s purpose was that the recipient should be frightened or distressed. Consultation has supported our view as to these two essential characteristics of a poison-pen communication. It was, however, pointed out that another not-uncommon form of malicious communication was one sent with the purpose that the recipient should be frightened or distressed but which was intended to achieve this purpose by containing deliberately false information. For example, a letter sent to a married woman stating that her husband, abroad on a business trip, had been killed would, if false and if sent in order to cause her distress or anxiety, rightly be characterised as a poison-pen letter.

3.2. In the working paper we had referred to a “communication” which had the characteristics in question. What we had in mind, as the title to Part IX of the working paper made clear, was poison-pen *letters*, using the word “letter” generally in the sense of the dictionary definition: “a missive, communication in writing, addressed to a person or body of persons; an epistle.”² While a definition of this type would probably cover most of the communications which we think should be penalised, further clarification is necessary for the purposes of a statute. For example, pictures, drawings and photographs should clearly be included whether or not accompanied by words. In addition, however, it seemed to us that an object such as a film, a video tape or a recorded sound cassette should also be included. In the case of some, such as the blind, communications in this form are the usual means of conveying messages. It would be most undesirable to include messages on paper conveyed to the brain via the eye, while excluding messages conveyed on magnetic tape, conveyed to the brain via the ear. The definition of the type of object on or in which the message might be conveyed therefore had, in our view, to be extended beyond what might be described as a “letter” to other types of article.

3.3. Thus far we had been considering only articles which might be described as a “communication” in the sense that they conveyed some message or information. But the article itself rather than the message, if any, that it conveyed might properly be characterised by the adjectives used to describe a poison-pen letter and, in addition, it might be sent for the purpose of causing needless anxiety or distress to the recipient. For example, an envelope containing human excrement pushed through the letter-box of a private house³ might be just as offensive or shocking to the recipient as a piece of paper with

¹ See Working Paper No. 84, para. 9.14 and para. 2.1, above.

² Oxford English Dictionary, Vol. VI, p. 218.

³ See, for reference to an instance of this, *Hansard* (H.C.), 28 February 1984, vol. 55, col. 143, and 16 April 1985, vol. 77, col. 137 (written answers).

offensive words on it and which was smeared with excrement. In other words, there might be some objects in relation to which any argument as to whether they were a "communication" and, if so, what they were communicating would be purposeless in the sense that a decision one way or another should not determine whether the conduct in question was or was not criminal. If the legislation were to refer only to articles which were communications it might be possible to mount such arguments. For example, an envelope containing broken glass which was put through the letter-box might well be thought to convey a menacing message whereas excrement might be said not to convey a grossly offensive message but, rather, simply to be grossly offensive in itself. It was this very type of argument which we considered would be undesirable. Accordingly, we concluded that even if the article did not convey any message and so might, perhaps, not properly be described as a "communication," the sending of such an article should constitute the offence if it itself had the necessary characteristics and was sent for the purpose in question.

3.4. Our considerations had, in one sense, taken us well beyond the original concept of a poison-pen *letter*. Our proposals had now been extended to cover a great many types of malicious communication which might be made by one person to another. We had, however, by no means covered all types of such communication. A malicious communication may be conveyed orally by one person to another by means of direct person-to-person speech. The speaker may use some device, such as an electric megaphone, by means of which he conveys his message and yet that message is heard by the recipient's ear without the aid of any device. The speaker may be speaking into the air in the normal manner but the recipient may be hearing the message through an instrument such as a hearing aid. The speaker may be speaking into some device and the recipient of the message may be receiving it through a similar device. The telephone and the radio are both means of communication which have such characteristics. Again, although the recipient may receive an article containing the message in question, the sender may never have sent such an article. For example, when a telegram or telex message is sent, the recipient does not receive what the sender has sent. The sender's message has been converted into electrical impulses and those have been used to create the article which the recipient actually receives.

3.5. All the above means of communication could be used for conveying a message or information having the characteristics of the information or message which would be contained in what everyone would recognise to be a poison-pen letter and, in addition, would be sent for the purpose of causing needless anxiety or distress to the recipient. Rather than seeking to limit the offence to articles which themselves had, or which contained a message which had, the relevant characteristics, should we therefore attempt to cover all forms of malicious communication? The harm to the recipient from receiving a telegram stating, falsely, that her husband had been killed in a road accident is just as great as the harm done by reading such a message written on a piece of paper conveyed through the Post Office. Extremely evil and frightening messages can easily be communicated by means of the telephone. In the not-too-distant future methods of electronic communication are likely to become common in which no article is ever conveyed from the sender to the recipient. The latter

may receive the message by reading it on a screen, by reading it on a piece of paper printed on his own printer or even by hearing it from an electronic voice. Once we had started on the course of seeking to penalise some forms of malicious communication, was there any logic in stopping short of seeking to penalise *all* forms of malicious communication save, perhaps, those which were to be expressly excluded for some over-riding reason of policy? On the other hand, to propose an offence which could apply to *any* form of communication would be to propose something far beyond anything considered in the working paper or on consultation; no-one had there suggested that our proposal was too narrow. Yet what we would now be considering might involve a substantial extension of the criminal law.

3.6. Within the Commission differing views have been expressed as to how far any new offence which we might recommend should be extended. Some of us might draw the boundary in one place, while others who are particularly concerned about the development of electronic communications might draw it in another. We are all agreed, however, that purely spoken communications made by one person to another without the intervention of any electrical, mechanical or other devices, should not be covered. To cover all spoken messages which are indecent or grossly offensive and which were spoken for the purpose of causing anxiety or distress to the hearer would be to propose an offence of enormous width, the commission of which could never be adequately policed. However, once any line is to be drawn between the type of communication which is to be criminal and that which is not to be criminal, seeming absurdities are created near the boundary line. For example, is a message spoken directly by one person to another not to be criminal while a message spoken by one person and heard through the hearing aid of another to be an offence? Wherever we have sought to draw the boundary we have found that it is possible to create examples which are an absurdity. In the light of this, we have been particularly impressed with the need to try to ensure that nothing is *included within* the definition of the offence which it seems absurd to include.

3.7. A second important consideration which has weighed with us is that most of the forms of communication which would not be within the new recommended offence if that offence were, in principle, limited to articles (including letters) which have the required characteristics and are sent for the defined purpose, will be sent by means of a "public telecommunication system", as that expression is defined in the Telecommunications Act 1984. Thus it is already an offence to send communications of the defined nature by the telephone, the telex or a telegram.⁴ Offences under that Act are not punishable with imprisonment and, to this extent, our proposed new offence would differ from those which already exist. Some types of communication might be altogether excluded. For example, a message sent by means of a purely internal private telephone system would not be within the Telecommunications Act and would not constitute an "article" for the purpose of the new offence. Such a system might not use a telephone but a visual display unit or a printer. However, if messages having the defined characteristics were sent in this way it would seem to be a matter which should be controlled by those in charge

⁴ See Telecommunications Act 1984, s. 43(1) and para. 4.53, below.

of the system in question. Messages sent by the radio would be excluded but the radio is already subject to a special régime of control and, again, it was not suggested on consultation that the radio is used for conveying the type of message which we have in mind. Finally, some more unusual types of communication, such as messages painted on a wall, would escape altogether although, in many cases, a person painting such a message would commit the offence of criminal damage.

3.8. In the end we have found ourselves faced with two broad alternatives. First, we could recommend an offence which, in principle, would extend to all forms of malicious communication except direct person-to-person speech. The Telecommunications Act 1984 would require amendment if this alternative were to be accepted. The resulting offence would represent a considerable extension of the present law in that not only would all forms of article, such as letters, be covered but also such types of communication as the radio, newspapers and even graffiti on the wall. Secondly, we could seek to limit the offence to articles, including letters, which had the required characteristics (such as being indecent or grossly offensive) or which conveyed a message having those characteristics. This is the area which is not covered by the law at present. If there can be said to be a gap, for all practical purposes (excluding messages on the radio) this is the gap. In connection with this second alternative, it might be possible to include intentionally causing another to receive a communication having the required characteristics in a form in which, if it had been sent in that form, would have been an offence (such as a telegram or other printed message).

3.9. We have, after much hesitation, decided to recommend the second of the above alternative courses but without the possible above-mentioned extension. We are aware that in recommending a narrower offence, conduct of seemingly similar criminality may have to be punished under two different statutes, one of which contains the sanction of imprisonment and the other of which does not. Indeed, an amendment to the Bill which became the Telecommunications Act was proposed in the House of Lords which would have made the relevant offence one which could be punished by imprisonment.⁵ The offence we recommend would fill an existing gap in the law and goes no wider than is clearly necessary for that purpose. It draws a clearly defined line which can be readily understood. In so doing we have sought to meet a demand with which we were strongly pressed on consultation and the meeting of which we consider would involve a real, if minor, improvement in the law.

⁵ See para. 4.55, below.

PART IV
THE NEW OFFENCE

A. The new offence summarised

4.1. We *recommend* the creation of a new statutory offence which would penalise the sending or delivering of poison-pen letters and the like. The new offence would penalise *any person who, without reasonable excuse, sends or delivers to another any article which, in whole or in part, (a) is of an indecent or grossly offensive nature, or (b) conveys a message of such a nature, an unwarranted¹ threat, or information which is false and known or believed by the sender to be false. The sender would only be guilty if his purpose, or one of his purposes, was that the article in question should cause distress or anxiety to the person to whom it is sent.* This offence would be triable only in a magistrates' court and the maximum penalty would be six months' imprisonment or a fine of £2,000 (level 5), or both.²

4.2. In the following paragraphs we consider each of the elements of the offence in turn, indicating, where relevant, how and why our recommendations differ from the working paper definition set out at paragraph 2.1, above.

B. The elements of the offence

1. THE MEANS OF COMMUNICATION

4.3. Section 11 of the Post Office Act 1953 applies only to offensive material sent through the post. It has been stated that in origin that offence was largely concerned with protection of Post Office officials, rather than with the likely effects of the offending material on recipients.³ Although poison-pen letters are perhaps more likely to be sent by post as one of the best ways of preserving the sender's anonymity, we saw no reason in the working paper to limit any new offence to any particular means of communication. Nor was any reason suggested to us on consultation which requires us to change our provisional proposals in this respect. Accordingly, we *recommend* that the offence should be capable of commission whichever method is chosen of sending the relevant material.

2. "SENDS OR DELIVERS"

4.4. Our working paper proposed that the offence should penalise any person who "causes any other person to receive" a poison-pen letter. It was pointed out to us on consultation that on this basis no offence would be committed if the communication were intercepted before it reached the intended recipient. It was therefore suggested that it would be desirable for commission of the offence to depend upon the sending of the communication rather than its actual receipt. We agree with this suggestion. We now think that it would be

¹ As to which threats are "warranted", see para. 4.40, below.

² See Appendix A, draft Malicious Communications Bill, cl. 1.

³ See paras. 2.7-2.9, above.

preferable to penalise conduct at an earlier stage and to require proof only that the defendant sent the offending material.

4.5. We considered whether it would be necessary specifically to refer to the person who sends the communication or "causes it to be sent", following, for example, provisions in the Unsolicited Goods and Services Act 1971 to this effect.⁴ We have decided that, while some such expression may have been thought necessary in that context, it is sufficiently clear in the context of the offence which we are recommending that, where one person asks another to put his poison-pen letter in the post-box, he himself "sends" the letter. Consequently, no further words are in our view needed.⁵ It will, on the other hand, be necessary specifically to cover the case where the person who composes the letter delivers it himself. Innocent deliverers, such as postal workers, must, of course, be excluded from possible liability.⁶ Subject to this, however, we *recommend* that the offence should penalise any person who sends or delivers the offending communication.⁷

4.6. Consideration has to be given as to whether special provisions are required in relation to these terms to determine the territorial extent of the offence; this is dealt with below.⁸

3. SCOPE OF MATTER SENT OR DELIVERED

4.7. In Part III of this report we discussed in general terms what should be the scope of the material or articles to be covered by the offence. The choices open to us were examined and we concluded that the offence should in this respect be a fairly narrow one limited to letters and articles having the specified characteristics or conveying a message having those characteristics. The offence will therefore exclude other forms of communication, such as those effected by oral means, by radio, telephone or other forms of electronic communication. It remains only to explain in more detail the scope of the offence, which is, of course, primarily concerned with the sending of poison-pen letters.

(a) *Material containing a message*

4.8. Letters having the specified characteristics (such as being indecent or grossly offensive)⁹ must clearly fall within the offence; but it should not be possible to evade the penalties imposed on the sending of such letters simply by the use of some other form of communication which cannot be described as a letter. For example, the new offence ought to cover all forms of written material whether it be a handwritten letter or matter which contains typing or printing. In many, if not most, cases the malicious message will consist of

⁴ See ss. 4(1) and 6(1).

⁵ We have already noted (para. 2.7, n. 10, above) that s. 11 of the Post Office Act 1953 refers to a person who sends or procures to be sent a postal packet. It might be argued that the difference in wording there indicated a limitation in the new offence which restricted liability where the physical act of despatch to the post box was performed by someone other than the person responsible for the letter. We think the courts would not accept such an argument which in our view would run contrary to the ordinary and natural meaning of the term.

⁶ See paras. 4.23 *et seq.*, below.

⁷ See Appendix A, cl. 1(1) and (3).

⁸ See para. 4.42, below.

⁹ See further, para. 4.13, below.

words, but this need not always be so, for example, if it takes the form of an offensive drawing, picture or photograph with or without any accompanying words; these, too, must be covered. Again, a film or video tape must be covered, since they may convey a message in a permanent and visible form. The fact that the contents and character of the message cannot be determined until the film is projected or the video tape is played back on a video cassette recorder is, in our view, no more relevant than the fact that the contents of a poison-pen letter cannot be ascertained until it is taken from the envelope in which it is sent.

4.9. In addition we think that the offence ought to cover the sending of communications which are reproduced in the form of sounds, for example, a tape recording. It is not difficult to envisage that a blind person, who may be accustomed to receiving tapes instead of letters, could be sent a tape-recording containing a malicious message putting him in fear and distress and in our view he should have the same protection as that accorded to a sighted person.¹⁰ Moreover, it would in our view be anomalous to cover the visual images of a film or video tape,¹¹ but not the sound upon a film or tape. We conclude, therefore, that the offence should be sufficiently wide to cover communications in the form of material from which sound may be reproduced.

(b) Material containing no specific message

4.10. We have found more difficult the question whether the offence should also cover the sending or delivery of objects which, although not falling within the kind of material already described, would nevertheless be highly offensive to any recipient and might cause much distress. We have in mind, for example, objects such as a bloodstained emblem or a parcel containing excrement delivered through the letterbox.¹² A possible objection to an extension of the offence to cover such articles is that it would be impossible to separate such instances, in terms of the object described, from others which could not remotely be regarded as in the nature of "poison-pen" communications. We gave the example in the working paper of horse dung thrown in spite over a neighbour's garden fence. Nevertheless, we have concluded that the arguments for penalising the sending or delivery of grossly offensive etc. articles are compelling. There seems to us to be no difference in kind between—

- (i) a letter containing a grossly offensive or threatening communication;
- (ii) a letter containing such a communication in the form of a picture &c., accompanied by words (perhaps inoffensive in character);
- (iii) a picture conveying in its context a grossly offensive or threatening message without words;
- (iv) a parcel containing an article or articles which in their context are grossly offensive or threatening in character, accompanied by words (perhaps inoffensive in character); and
- (v) a parcel as in (iv) without words.

If penalties are to be imposed in case (i), in our view it would be wrong as a

¹⁰ See para. 3.2, above.

¹¹ See para. 4.8, above.

¹² An instance of this occurring was referred to recently in Parliament; see *Hansard* (H.C.), 28 February 1984, vol. 55, col. 143, and 16 April 1985, vol. 77, col. 137 (written answers). See also, para. 3.3, above.

matter of policy, to exclude any of these cases from the ambit of the offence. In cases (iii) and (v), where there is a complete absence of writing,¹³ the answer to the question whether the picture or article is grossly offensive or threatening will depend upon the circumstances of the individual case, since articles which may be capable of delivery and causing distress, such as a blood-stained cloth or excrement, are not in themselves in all circumstances grossly offensive or threatening. But in our view the courts would have no difficulty in deciding by inference from the circumstances whether or not such articles were in the context grossly offensive or threatening in character and were intended to cause anxiety or distress in the recipient.

4.11. To sum up, the new offence should in our view cover all types of articles sent by one person to another save for those conveyed orally or by electronic means; it should cover writing of all descriptions, photographs and other images in a material form, tape recordings, films and video recordings, and articles or matter having the characteristics described in the following section.

4.12. The draft Bill achieves these objectives by penalising the sending or delivering of any article of a specified character, provided that the article concerned is sent with the requisite purpose. This omnibus term avoids the need for elaborate definition while clearly excluding oral or purely electronic messages of any description. Poison-pen letters and other material containing a specific message are distinguished simply as articles which convey a message of the specified character.¹⁴

4. CHARACTER OF THE MATTER PENALISED

4.13. Our working paper proposed that there should be provisions which identify the particular character of the material to be penalised by the new offence. We proposed that the communication should be "grossly offensive, or of an indecent, shocking or menacing character."¹⁵ We based this proposal in large part on the terms used in the offence of making offensive telephone calls¹⁶ save that we considered it necessary to incorporate a reference to material of a "shocking" character.

4.14. Comments on our proposal were again generally favourable. One commentator, however, thought that in respect of communications described as "indecent" or "shocking" the offence was "too widely drawn to be desirable" since these terms were too subjective. On the other hand, one or two commentators thought that the offence was not wide enough and that additional qualifying terms would be required. One in particular argued that "the sort of people who send poison-pen letters occasionally bombard their victims or their victims' associates with revelations about their victims' private lives, which can be extremely upsetting even if they are not quite grossly offensive, indecent, shocking or menacing". He pointed out that this behaviour might under the common law offence amount to criminal libel, even if the revelations

¹³ Apart, perhaps, from the address of the recipient.

¹⁴ See Appendix A, cl. 1(1).

¹⁵ See Working Paper No. 84, para. 9.14.

¹⁶ Now contained in the Telecommunications Act 1984, s. 43(1).

were true, and that such behaviour would fall outside our proposed statutory offence of criminal defamation, because truth there would be a complete defence. "Yet if D's sole purpose is to harass P by causing him needless anxiety or distress, there is much to be said for some sanction against D's behaviour even where the matter is true."¹⁷ In the light of these comments, we have reconsidered the terms qualifying the character of the communications to be covered by the new offence.

4.15. No criticisms were made in relation to the term "grossly offensive" and we are satisfied that this term should be incorporated in the new offence. In addition to its use in section 43(1) of the Telecommunications Act 1984,¹⁸ it has been used in other modern statutory offences, in particular, in section 11(1)(c) of the Post Office Act 1953. There do not appear to be any judicial decisions as to its meaning, but we have no reason to suppose that it has given rise to any difficulty.¹⁹

4.16. Nor was there criticism by our commentators of the term "menacing". We have, however, decided to use instead the term "threat" or the "conveying of a threat"; we found this more convenient in the course of defining precisely which kind of threat should be penalised by the Bill.²⁰ In our view, there is no difference of substance in the meaning of "threats" and "menaces".²¹

4.17. The term "indecent" overlaps to some extent with "grossly offensive", but both are used as alternatives in the offences in the Post Office and the Telecommunications Acts mentioned above. Whether or not something is indecent will be judged by an objective standard and magistrates have to decide what are the "recognised standards of propriety" and whether the contents in the particular circumstances of the case offend against those standards.²² Where terms such as "indecent" are used in statutory offences there is obviously some scope for magistrates (or juries, as the case may be) to bring their own judgment to bear in deciding whether or not something is of that character, but in view of the requirement of proof of a purpose to cause anxiety or distress,²³ we see no basis for objection on that ground.

4.18. We mentioned in paragraph 4.14 above that the term "shocking" was, like "indecent", criticised on the basis that it was too subjective in character and therefore too wide. Unlike the other descriptive terms, we are not aware of any offence which penalises material on account of its "shocking" character. This term was primarily intended to cover letters, etc., which, for example, tell of bad news known by the person responsible for sending it to be false.

¹⁷ J. R. Spencer "Criminal Libel—The Law Commission's Working Paper", [1983] Crim. L.R. 524, 531. And see paras. 2.4-2.6, above.

¹⁸ See para. 4.53, n. 73, below.

¹⁹ See Manchester, "Obscenity in the Mail", [1983] Crim. L.R. 64, 70.

²⁰ See para. 4.41, below.

²¹ See e.g. *Thorne v Motor Trade Association* [1937] A.C. 797, 806 (per Lord Atkin) and 817 (per Lord Wright). Other authorities on the meaning of "menaces" are referred to in *Archbold*, 41st ed. (1982), paras. 18-140 to 18-142, but these do not detract from the view expressed in the text.

²² *R. v. Stanley* [1965] 2 Q.B. 327, 333, per Lord Parker C.J.

²³ See paras. 4.25 *et seq.*, below.

Section 43(1) of the Telecommunications Act 1984²⁴ penalises much of what we intended to cover by referring in more direct terms to a person who “sends a message that he knows to be false”. On reconsideration, we think the term “shocking” is too vague and can be dispensed with. We have now omitted it.

4.19. Nevertheless, although most of the cases which ought to be covered by the offence fall within the description of “indecent, threatening or grossly offensive”, there remain certain types of letter which cannot be characterised in this way but are designed by the sender to cause distress or anxiety. One example is a letter to a mother stating what the writer knows to be false such as that her husband or son has been killed in an accident. Another is the person who writes to a mother stating truthfully that her son takes drugs or is a drug pusher. As regards the latter example, it would in our view be unacceptable to penalise a communication containing true statements which were not also grossly offensive or indecent or threatening in character, even if the purpose to cause anxiety or distress were present.²⁵ On the other hand, we think that the offence should penalise communications containing false statements where the sender knows or believes them to be false and where the purpose to cause anxiety or distress can be shown. The offence would in this respect, as in some others, form a parallel with section 43(1)(b) of the Telecommunications Act 1984.²⁶ Although it may only be possible in a small number of cases of this kind to prove both the sender’s knowledge or belief and his purpose, we think that such cases should be covered by the offence.²⁷

4.20. We have considered a further suggestion for widening the scope of the new offence to deal with persistent harassment by letter. This would again draw on section 43(1) of the Telecommunications Act 1984,²⁸ under which an offence is committed by a person who—

“sends by those means, for the purpose of causing annoyance, inconvenience or needless anxiety to another, a message that he knows to be

²⁴ See para. 4.53, n. 73, below.

²⁵ In relation to the offence of criminal libel, which is capable of penalising defamatory statements which are true but not published for the public benefit, we took the view that for the future in any offence of defamation the publication of the truth, however defamatory, should not constitute a criminal offence. We thought that the principle of free speech in a democratic society outweighed the arguments based upon concern for a person who long ago was guilty of misconduct and to whom much distress and damage might be caused by vindictive publication of the facts. To some extent similar considerations in our view apply in the present context, although there is a distinction to be made in so far as, in the case of a defamatory statement, the true statement is made to the world at large; here it is to the individual. Thus the present offence penalises statements made with the requisite purpose irrespective of whether they are true or false, provided that they are grossly offensive or indecent or threatening. See Working Paper No. 84, paras. 7.10 and 8.3.

²⁶ See para. 4.53, n. 73, below. That provision penalises a person who sends a message which he knows to be false. But a requirement of “knowledge” may be somewhat restrictive here, implying as it does direct knowledge of a fact observed by the person in question. We think that the more natural and appropriate expression in this context is “knowing or believing”, which would encompass a belief regarding a matter about which that person has no direct knowledge, where, for example, he has merely received information from another. See further Working Paper No. 84, para. 8.25.

²⁷ As with the other categories of communications to be penalised, it would not be necessary to show that the whole of the communication was of this character. As to the necessary link between the character of the communication and the requirement of purpose, see para. 4.33, below.

²⁸ See para. 4.53, n. 73, below.

false or persistently makes use for that purpose of a public telecommunication system” (emphasis added).

The offence thus covers many things besides the communication of offensive messages, including, for example, persistently telephoning someone in the middle of the night and hanging up as soon as the telephone is answered. It was suggested that this sort of conduct ought to be a criminal offence when done by a means of communication other than the telephone, such as by sending a torrent of letters. It seems to us, however, that a distinction can properly be drawn between one who persistently misuses the telephone system in the manner described (where apart from the obvious nuisance factor there is the risk, for example, that an engaged line might prevent an emergency call being received) and one who persistently sends letters the contents of which are not of a grossly offensive, indecent or threatening character. Although it may be possible to infer that a sender’s purpose in despatching a torrent of letters is to make a nuisance of himself and cause annoyance, if the contents do not fall within the terms we suggest, we believe that there is insufficient justification for an extension of the criminal law. The better remedy in these circumstances may be to consign such letters to the waste paper basket rather than to take them to the police station.²⁹

4.21. Accordingly, we *recommend* that the offence be limited to the sending of articles which are wholly or in part of a grossly offensive, or indecent or threatening character or which convey a message which is of that character or is false and known or believed to be false by the sender.³⁰

5. CAUSING ANXIETY OR DISTRESS?

4.22. One commentator suggested that proof that the communication actually caused anxiety or distress on the part of the recipient should be a prerequisite of a successful prosecution. But we think this would have several disadvantages. It would make prosecutions impossible in cases where the recipient was sufficiently strong-willed to be unaffected by this type of communication. It would also mean that the recipient would become an essential witness in almost every trial where there was a plea of not guilty, a result which, for reasons explained below,³¹ we would wish to avoid. We can see no grounds for imposing this substantial extra burden on the prosecution. The causing of anxiety or distress is, for reasons explained below, a factor which should appear as part of the mental element of the proposed offence.

6. THE MENTAL ELEMENT AND DEFENCES

(a) *Working paper proposals and response*

4.23. Our working paper proposed that it should be an ingredient of the offence that the person responsible for sending the communication should do so “for the purpose of causing needless anxiety or distress”.³² The justification for including a mental element in these terms was, as we said, that “there may

²⁹ There is also the possibility of an injunction for trespass; see para. 4.27, below.

³⁰ See Appendix A, cl. 1(1).

³¹ See para. 4.28, below.

³² Working Paper No. 84, para. 9.13.

be many occasions when it is necessary to communicate to others information which is shocking or even menacing and, as the sender knows, will inevitably cause anxiety or distress".³³ Communications of this kind must not fall within the scope of the offence. We considered, as an alternative to a mental element, whether to provide instead a defence of "reasonable excuse" as a means of excluding such cases. We provisionally rejected such a defence on the grounds that in some cases "the question whether it was reasonable to send the communication may be far less easy to determine with the degree of consistency which is desirable, since the answer could depend largely on the court's opinion as to the strength of the language used".³⁴

4.24. Several commentators expressed agreement with the working paper proposal, but some disagreed. Having regard to the scope and diversity of the criticisms made, detailed reconsideration of these elements is required.

(b) *The mental element*

4.25. One of the essential features which distinguishes poison-pen letters from other types of communication is that they are sent for the purpose of causing anxiety or distress.³⁵ Since a purpose of this nature broadly reflects the main rationale of the offence, some element of this character must, we think, be incorporated in the definition of the offence unless there are compelling reasons for not doing so.

4.26. On consultation two specific objections were made to the framing of the proposed offence in terms of a "purpose to cause anxiety or distress". The first objection was that, while an offence so defined would be effective against many poison-pen letter writers, it might well not be effective against some persons suffering from mental disturbance. If it is necessary, for example, to prove a purpose to cause anxiety or distress, and there is evidence of mental disorder in the sender of the letter, it may be impossible for the court to be satisfied, from the terms of the letter and the surrounding circumstances, that the defendant had formed any such purpose. Moreover, we recognise that among those who will write poison-pen letters a number will be likely to be suffering from a mental disorder and they may be in need of medical treatment or supervision. Conviction of such an offender would enable the court to make an appropriate order in the circumstances,³⁶ whereas acquittal would leave the court powerless; and no other action could be taken unless the state of the defendant was such as to justify the taking of steps under the Mental Health Act 1983 for compulsory admission to a mental hospital. We have considered whether it would be feasible to remove the requirement of a mental element and replace it with an objective test which would cause all persons, whether or not suffering from mental disorder, to be convicted of the offence if they were proved to have done the prohibited act of sending a sufficiently offensive letter. But to remove the mental element—namely, the purpose to cause distress etc.—would, in our view, discard the essential element of the wrongdoing which justifies the use of the criminal law in this context. A merely

³³ *Ibid.*, para. 9.11.

³⁴ *Ibid.*, para. 9.12.

³⁵ See para. 2.1, above.

³⁶ E.g., a hospital order under s. 37 of the Mental Health Act 1983.

objective requirement, such as proof of the likelihood of the letter causing anxiety or distress, would not only fail to reflect the essential evil in the writing of a poison-pen letter but would also either cause the offence in such terms to be unacceptably wide, or require other protective limitations and defences which would make the offence unacceptably complicated.

4.27. If the mental element is retained, as we recommend, we do not believe that any serious difficulties will be caused by the proper acquittal of the mentally deranged against whom that proposed mental element cannot be proved. Further, it is not every mental disorder which will either cause the sender of a distressing letter to be incapable of forming the intent to cause that distress, or render a court incapable of being made sure that he had formed it. We have no doubt that the mental element which we propose will be capable of proof in most cases where a person of disturbed mind is impelled to harass another with offensive letters. If a case occurs where, because the mental element cannot be proved, the defendant must be acquitted, the victim is likely to have learned the source of the distressing letters and will be able to disregard them or, when appropriate and useful, to take civil action to enjoin the sender.³⁷

4.28. The second objection to a requirement of a “purpose to cause anxiety or distress” was, in the view of one commentator, that it would be difficult for the prosecution to prove this element without calling the recipient of the letter to give evidence as a witness and allowing him to be cross-examined. This comment was made in the context of our provisional proposal which was in terms of “needless” anxiety or distress, and it was suggested that there was a subjective element in such terms, requiring evidence from the recipient to prove it. The Post Office pointed out that, when they had responsibility for prosecuting the offence under what is now section 43(1)(b) of the Telecommunications Act 1984,³⁸ they frequently encountered difficulties in persuading the recipients of telephone calls to give evidence as to the making of the calls in question. Recipients were often upset and nervous and were reluctant to come face to face with the alleged caller. It was suggested therefore that there might be the same reluctance on the part of the recipient of a poison-pen letter to give evidence and face the alleged sender in court.

4.29. As we explain below,³⁹ we do not now propose to retain the term “needless” in our description of the mental element, and in its absence, we do not think that the difficulties to which we have referred are likely to arise. We do not think that an offence penalising the sending⁴⁰ of an article with a specified purpose would require evidence to prove, in effect, that that purpose was achieved or, in a particular case, was likely to have been achieved.

³⁷ It seems that unsoundness of mind is no defence to civil proceedings save where the tort itself requires a particular mental state; the only mental state required in trespass is an intent to do the act complained of. See *Clerk and Lindsell on Torts* 15th ed. (1982), para. 2-39.

³⁸ See para. 4.53, n. 73, below. The offence was first enacted in the Post Office Amendment Act 1935, s. 10 and remained in Post Office legislation until 1981; see Post Office Act 1969, s. 78.

³⁹ See para. 4.37, below.

⁴⁰ See para. 4.4, above.

4.30. Accordingly, we do not accept that either of the objections to a mental element raised on consultation requires us to alter our provisional proposal that some mental element is required. The precise terms of that element is the next matter for consideration.

4.31. The choice appears to us to lie between “intention” and “purpose”. Our preference is for the concept of purpose, which we provisionally proposed to use in our working paper. We have decided that the concept of intention, while it may not greatly differ in substance, raises possible difficulties which we do not wish to import into the offence. In particular, differing views have been expressed as to the meaning of the concept of intention⁴¹ and we cannot be sure that in the present context it would bear a sufficiently restricted interpretation. On the other hand, the concept of purpose has been used in what is now section 43(1) of the Telecommunications Act 1984 without apparent difficulty and, as it has been interpreted elsewhere,⁴² the term conveys what is appropriate in this context, namely, a desire and an intention that the specified consequence—in this case distress and anxiety—should come about. We *recommend* accordingly.

4.32. A purpose to cause distress or anxiety may, of course, be only one of several purposes or motives which a person may have in sending a poison-pen letter, and, however strong may be the evidence of a purpose to cause distress or anxiety to be inferred from the terms of the communication itself,⁴³ a defendant may contend that he had some legitimate purpose in mind; for example, that causing the intended recipient distress was a mere step towards some other purpose.⁴⁴ In order to eliminate the possibility of any such argument being raised, we *recommend* that the offence should specify that it is the defendant’s purpose *or* among his purposes to cause anxiety or distress.

4.33. It must also be made clear that the two main ingredients of the offence, namely, the nature of the thing sent denoted by the descriptive terms and the element of purpose, are to be linked. Without such a linkage, the offence would be capable of penalising a letter which is entirely true save for a false statement which is immaterial to any purpose to cause anxiety or distress, and this would clearly be unacceptable. Provision is made for this linkage by the requirement in clause 1(1) of the draft Bill that it is only so much of the article sent or delivered as is grossly offensive etc., or is false and known or believed to be false that is relevant to the sender’s purpose.

4.34. Finally, we have considered the suggestion of some of our commentators that a wider formulation of the defendant’s purpose is needed, such as to cause “annoyance” or “offence”. In our view the mere causing of annoyance or offence is not sufficiently serious for the imposition of criminal sanctions,

⁴¹ See *R. v. Miller* [1983] 2 A.C. 161, 176–177 *per* Lord Diplock and *R. v. Moloney* [1985] 2 W.L.R. 648.

⁴² See *Chandler v. D.P.P.* [1964] A.C. 763, 790 *per* Lord Reid (construing “purpose” in the Official Secrets Act 1911, s. 1).

⁴³ This inference which may be drawn from the terms of the communication would in many, if not most, instances provide sufficient evidence in proof of the purpose to cause anxiety or distress, and no further express provision for this purpose is in our view needed.

⁴⁴ See paras. 4.36, *et seq.*, below.

and their inclusion would therefore widen the mental element unacceptably. “Anxiety” and “distress”, the terms used in the Telecommunications Act 1984,⁴⁵ in our view adequately describe the adverse consequence against which the offence should be aimed.⁴⁶

4.35. To sum up our conclusions on the mental element, we *recommend* that—

- (i) the defendant must be shown to have sent the article concerned to another for the purpose of causing him distress or anxiety;⁴⁷
- (ii) it should be sufficient that among the defendant’s purposes is the purpose of causing distress or anxiety to the person to whom the article is sent;⁴⁸
- (iii) the purpose of causing distress or anxiety must relate to so much of the article concerned as is grossly offensive etc., or is false and known or believed to be false by the sender.⁴⁹

(c) *Defences*

4.36. Bearing in mind the restrictive mental element which we have recommended, we must now consider whether there is a need for a provision to exclude those who for a legitimate purpose send communications which would otherwise fall within the terms we have recommended to describe the prohibited conduct. A solicitor’s letter threatening legal action, or a “dunning” letter, though “threatening”, would generally be excluded from the offence by the absence of the required state of mind of the sender. Nevertheless, such a letter may be “threatening” and thereby, even if incidentally, cause distress or anxiety. Moreover, there are cases where it is right that, although causing distress is part of the defendant’s purpose, he should not be convicted: for example, the person seeking payment of a debt owing to him may know that, without causing distress, it will not be paid. We have considered three possibilities for provision of further protection: qualifying the purpose by reference to the causing of “needless” distress or anxiety or some similar term (as proposed in our working paper); a defence of reasonable excuse; and a special provision as to unwarranted threats.

(i) “Needless” distress or anxiety

4.37. Several commentators did not approve of our proposal to refer to “needless” distress or anxiety. On reconsideration, we have concluded that the word would not satisfactorily exclude from liability those who for a legitimate purpose send communications which might otherwise be caught. The meaning of the term is vague: by itself it could mean unnecessary or inexpedient, and the way in which it would qualify distress etc. is therefore uncertain. We therefore do not recommend use of the term.

⁴⁵ See para. 4.53, n. 73, below.

⁴⁶ See Appendix A, cl. 1(1).

⁴⁷ See paras. 4.26–4.31, above.

⁴⁸ See para. 4.32, above.

⁴⁹ See para. 4.33, above and see Appendix A, cl. 1(1).

(ii) "Without reasonable excuse"

4.38. We have already referred to our reason for rejecting in the working paper a defence of reasonable excuse as an alternative to a mental element.⁵⁰ It seems to us that there is less force in the argument against the defence if the defence is included *in addition* to the mental element. There was some support on consultation for this approach amongst those who commented on this aspect of our proposals. With the stringent mental element which we recommend, the occasions on which a person would need to rely upon a defence of reasonable excuse would be fewer and the defence would, in our view, provide the means by which an exception might be made in some cases where there might otherwise be criminal liability. We *recommend* such a defence accordingly.

(iii) A special provision as to unwarranted threats

4.39. We remain, however, somewhat doubtful of the efficacy of a defence of reasonable excuse in all cases of the kind under consideration. Experience of this defence in other statutory offences⁵¹ shows that the courts are not usually prepared to give the defence a broad construction and there can, therefore, be no certainty that it would operate to exclude an ill-judged letter threatening legal action or the "dunning" letter in all cases where the sending of such a letter should not constitute an offence. Moreover, since the sending of such letters is accepted as in being in accordance with normal commercial practice, it seems to us wrong in principle that a person sending a letter of this kind should, if accused of the proposed offence, be obliged to invoke a defence which requires him to discharge a persuasive burden of proof (on the balance of probabilities). Such would undoubtedly be the requirement here, having regard to the limitation of the proposed offence to summary trial⁵² and the provisions of section 101 of the Magistrates' Courts Act 1980.⁵³ We are therefore persuaded that further provision is needed.

4.40. We have recommended a solution to the problem by adapting from section 21 of the Theft 1968 (blackmail) the definition of which "menaces" are to be regarded as "unwarranted" for the purpose of that offence.⁵⁴ The draft Bill provides that a threat which is not "warranted" is to be penalised, and by clause 1(2) a threat is "warranted" for these purposes only if:

⁵⁰ See para. 4.23, above.

⁵¹ E.g. under the Road Traffic Act 1972, ss.8(3) and 9(3): see *R. v. John* [1974] 1 W.L.R. 624 and *McGrath v. Vips* [1983] Crim.L.R. 628.

⁵² See para. 4.45, below.

⁵³ This provides that "Where the defendant to an information or complaint relies for his defence on any exception, exemption, proviso, excuse or qualification, whether or not it accompanies the description of the offence or matter of complaint in the enactment creating the offence or on which the complaint is founded, the burden of proving the exception, exemption, proviso, excuse or qualification shall be on him; and this notwithstanding that the information or complaint contains an allegation negating the exception, exemption, proviso, excuse or qualification."

⁵⁴ Sect. 21(1) provides that "A person is guilty of blackmail if, with a view to gain for himself or another or with intent to cause loss to another, he makes any unwarranted demand with menaces; and for this purpose a demand with menaces is unwarranted unless the person making it does so in the belief—

- (a) that he has reasonable grounds for making the demand; and
- (b) that the use of the menaces is a proper means of reinforcing the demand."

- (i) the sender uses the threat to reinforce a demand which he believes he has reasonable grounds for making; and
- (ii) he believes this use of the threat to be a proper means of reinforcing that demand.

It will be noted, first, that the provision is limited to cases in which a threat is used. This is in our view an appropriate limitation since it is unlikely that a dunning letter or a letter threatening legal action would contain other prohibited matter, that is, matter which is grossly offensive or indecent or to the sender's knowledge false. If and to the extent that it did, it would in our view be right that no defence other than one of reasonable excuse should be available. Secondly, the provision is limited to a threat containing a demand. Unconditional threats, such as an unqualified threat to injure the recipient, without the option of avoidance by complying with a demand, are not protected and a defendant in any such case (if charged under the proposed offence) would again have available only the defence of reasonable excuse.

4.41. In the form which it takes, the provision would, we think, require the prosecution in some cases to lead evidence from which may be inferred the defendant's lack of belief as to the reasonableness of the demand and propriety of the threats etc. We think that it would only be on rare occasions and in the clearest-cut case that a prosecution in respect of a communication containing what is alleged to be an unwarranted threat might be expected to succeed. This in our view achieves the right result: sufficient protection must, we think, be given to communications which form an accepted part of everyday commercial transactions. The burden of proof here would not differ from that under the proviso to section 21 of the Theft Act 1968: if the evidence raises the issues contained in either paragraph of clause 1(2), the prosecution must negative them beyond reasonable doubt.⁵⁵ But unlike section 21, the provision in the draft Bill does not take the form of a proviso. It seems to us that, in the context of section 21, there is some possibility of conflict with the principle laid down by the Court of Appeal in *R. v. Edwards*,⁵⁶ to the effect that, where an act is forbidden by statute subject to a proviso or excuse, it is for the defence to prove on a balance of probabilities that he was entitled to do the prohibited act. In the context of a summary offence there is, in addition, the burden of proof on the defendant to be discharged on a balance of probabilities as specified by section 101 of the Magistrates' Courts Act 1980 in the case of an offence containing a proviso or excuse.⁵⁷ It is therefore important in our view to avoid any provision cast in that form; hence the difference of approach in this respect between section 21 of the 1968 Act and the provision introduced in our draft Bill.⁵⁸

7. TERRITORIAL JURISDICTION

4.42. The draft legislation recommended in this report would not apply to the whole of the United Kingdom, but only to England and Wales. The author of a poison-pen letter is not, of course, confined to any jurisdictional boundaries

⁵⁵ See *Archbold*, 41st ed. (1982), para. 18-144 and the cases there cited.

⁵⁶ [1975] Q.B. 27, at p. 40, *per* Lawton L. J., giving the judgment of the court.

⁵⁷ See n.53, above.

⁵⁸ Appendix A, cl. 1(2).

when sending it to another. Thus a person in England and Wales may send the communication to someone in Scotland or elsewhere outside the jurisdiction. Conversely, he may post the communication from somewhere outside the jurisdiction to a person within England and Wales. At present there are no statutory provisions expressly governing the territorial jurisdiction of the criminal law of England and Wales. We made it clear in our Report on the Territorial and Extraterritorial Extent of the Criminal Law⁵⁹ that it is our policy to examine these problems in the context of the individual statutory offences we recommend as part of the process of codification of the law. Consequently, it is necessary to consider whether the person responsible for sending the letter in each of the above examples should be liable to conviction by the courts in England and Wales, and whether there is a need for any express provisions to clarify the position.

4.43. In broad terms, all crime is territorial.⁶⁰ But problems in determining where an offence has been committed may arise, in particular where the offence contains more than one main element, or where there is some doubt, on the language which is used where some element of the offence begins and ends. Thus in *Treacy v. D.P.P.*⁶¹ the question arose as to whether "making a demand" with menaces under section 21 of the Theft Act 1968 was complete if the demand was posted here to someone outside England and Wales. The House of Lords divided on this issue, holding by a majority of 3 to 2 that the offence had been committed. The offence which we are recommending, however, has been drawn in such a way that it will be clear that the offence will be complete when the defendant either "sends" or "delivers" the communication: its commission will not depend, for example, on the communication being received, or on its causing distress or anxiety. Thus we believe that no problem would arise of one element of the offence occurring in one jurisdiction and a separate element in another; nor would there be any problem in determining the place where a person either "sends" or "delivers" the communication. Applying the normal rules of construction, if the act of sending takes place in England and Wales, the offence would be committed regardless of whether it is received outside the jurisdiction. On the other hand, where the communication is received in England or Wales, but posted elsewhere, a charge of the offence could not be brought in England and Wales.

4.44. Some may take the view that it would be preferable to ensure that a person who sends a poison-pen letter from abroad is penalised, for the distress caused is the same from wherever the letter may be sent. This could not, however, be effected without specific provision for this purpose, penalising the sending of such letters from abroad. An offence in these terms would, we believe, be unacceptably wide unless specific provision were inserted to exclude liability in the event of the letters being intercepted abroad; and such complications seem to us undesirable in themselves. Moreover, inclusion of a territorial provision penalising acts done abroad in an offence triable only in a magistrates' court⁶² would be unusual. As it stands, the draft Bill makes clear that the

⁵⁹ (1978) Law Com. No. 91, paras. 6-8.

⁶⁰ See *Treacy v. Director of Public Prosecutions* [1971] A.C. 537, 551 per Lord Reid. See also *Air-India v. Wiggins* [1980] 1 W.L.R. 815, 819 per Lord Diplock.

⁶¹ *Ibid.*

⁶² See paras. 4.45-4.46, below.

primary purpose of the offence is the punishing of a wrong done within the jurisdiction, namely, the sending of a poison-pen letter.

C. Mode of Trial

4.45. Some cases which under the existing law involve the sending of a poison-pen letter may be dealt with on indictment in the Crown Court. Where, for example, the charge is one of criminal libel, trial on indictment is the only available mode of trial.⁶³ We suggested in the working paper that it was doubtful "whether the Crown Court is necessarily the right court in which many of the senders of poison-pen letters should be prosecuted. Such offences... seem to us often to be better tried more quickly, less formally and without the inevitable publicity of a trial in the Crown Court".⁶⁴ We received no adverse comment on our proposal that the poison-pen letter offence should be triable only in a magistrates' court.

4.46. We see no reason to alter our provisional view. In cases of this kind, where the circumstances are particularly grave, for example, involving a threat to someone's life, it will, if the facts allow, continue to be possible for the prosecution to charge one of the more serious offences, for example, under the Offences against the Person Act 1861,⁶⁵ as an alternative to the new offence. But in the case of almost all poison-pen letters, we would expect the prosecution to regard as sufficient the powers of the magistrates' court on summary trial. Accordingly, we *recommend* that charges of the new offence should be triable only summarily in a magistrates' court.⁶⁶

D. Penalty

4.47. Our working paper proposed that the maximum penalty currently available in magistrates' courts should apply in this case, that is six months' imprisonment or a fine of £2,000 (level 5)⁶⁷ or both. Only one commentator disagreed with our provisional proposal and suggested that three months might be more appropriate on the grounds that six months appeared excessive in comparison with the maximum penalty for making obscene telephone calls which is at present limited to a maximum fine of £400 (level 3), without the possibility of a sentence of imprisonment being imposed.⁶⁸

4.48. We must first explain why we favour giving magistrates' courts the power to imprison a person convicted of sending a poison-pen letter. In the working paper we gave two reasons: first, we could conceive of circumstances in very serious cases in which a sentence of imprisonment might be the only suitable form of punishment; secondly, the availability of a number of different

⁶³ There is one statutory exception to this in s.4 of the Newspaper Libel and Registration Act 1881, but this is of limited importance and of no relevance in the present context.

⁶⁴ See Working Paper No. 84, para. 9.3.

⁶⁵ See para. 2.10, above.

⁶⁶ See Appendix A, cl. 1(4).

⁶⁷ See Criminal Justice Act 1982, s.37 and the Criminal Penalties etc. (Increase) Order 1984 S.I. 1984 No. 447. At the time of publication of Working Paper No. 84 the maximum fine at level 5 was £1,000.

⁶⁸ Telecommunications Act 1984, s.43(1).

types of sentence in magistrates' courts depends upon the existence of the power to imprison in relation to the particular offence of which the defendant has been convicted. A magistrates' court cannot make a hospital order under what is now section 37 of the Mental Health Act 1983 unless the defendant has been convicted of an offence which is punishable on summary conviction with imprisonment. Since some of those who send poison-pen letters are likely to be suffering from some condition of the mind which requires medical treatment or other help, it is desirable that these powers should be available to magistrates. Thus we do not think that magistrates' courts should be limited, as they are in the case of section 43(1) of the Telecommunications Act 1984, to the imposition of a monetary penalty. In our view, a sentence of imprisonment, or one of the alternative forms of sentence which depends on the existence of that form of penalty, should be available for the new offence.

4.49. So far as the length of the maximum term of imprisonment is concerned, comparison with the offence of making obscene telephone calls does not persuade us that the penalty should be lower than the six months' which we originally proposed. In setting the maximum level of sentence, we bear in mind a number of factors, in particular, that it must be no higher than is necessary for the particular offence in question and must be broadly in line with the existing penalties for offences covering comparable types of behaviour. In our view, a penalty of six months' imprisonment might very well be justified in the case of a person who persistently sends particularly objectionable poison-pen letters. Indeed, we are aware of several cases brought under existing common law and statutory offences where penalties of at least six months' imprisonment have been imposed for this type of behaviour.⁶⁹ We also take into account the fact that, on the one hand, the maximum penalty for an offence under section 11 of the Post Office Act 1953 is twelve months' imprisonment on indictment, but that, on the other, under section 43(1) of the Telecommunications Act 1984, magistrates' courts have no powers of imprisonment. While section 11 covers the sending of indecent or obscene matter by post (and is to that extent comparable to the offence which we are recommending), it also covers the sending of dangerous substances through the post, which clearly justifies the possibility of trial on indictment and a higher maximum penalty. Taking these factors into account, we think that a maximum of six months' imprisonment for the present offence would not be out of line with the maximum penalties for these related offences.

4.50. Accordingly, we *recommend* that the maximum penalty for the new offence should be six months' imprisonment or a fine of £2,000 (level 5), or both.⁷⁰

⁶⁹ See e.g. *R. v. Penketh* (1982) 146 J.P. 56, in which Mrs. X, a widow with a young child, heard a broadcast in which an appeal was made for a pen friend for P. Out of kindness she wrote to P and he replied. Soon he began to bombard her with letters and she did not want to hear from him further. P then wrote to her son's headmaster and others stating that he was the natural father of her child. He pleaded guilty to criminal libel and was placed on probation for three years with a condition that he wrote no letters to, and made no attempt to contact, Mrs. X or anyone connected with her. After repeated breaches of various probation orders, P was sentenced to eighteen months' imprisonment (reduced on appeal to nine months').

⁷⁰ See Appendix A, cl. 1(4).

E. Attempts

4.51. In paragraph 4.5, above, we recommend that the new offence should penalise any person who "sends or delivers" any article to which it applies. Should it, as one commentator suggested, be possible for a charge of an attempt to commit this offence to lie? The Criminal Attempts Act 1981 provides that the offence of attempt only applies to an offence which, if it were completed, would be triable as an indictable offence: an attempt to commit a summary offence is not itself an offence under the general law.⁷¹ Thus, separate provision would be required if conduct amounting to an attempt to "send or deliver" were to be penalised.

4.52. We have already seen⁷² that section 11 of the Post Office Act 1953 penalises any person who sends or *attempts* to send material prohibited by that section. That section is aimed primarily at protecting employees of the Post Office rather than the recipients or intended recipients of postal packets. By contrast, the main purpose of the new offence would be to protect recipients from the distress and anxiety which poison-pen letters are capable of causing. While we have accepted that commission of the offence should not depend on proof of receipt of the letter by the victim, and that the offence must therefore be formulated from the standpoint of the sending of the article concerned, we do not believe it is necessary to penalise persons who have not reached the stage of sending it, whether by putting it in the post, leaving it at a Post Office or giving it to another to post. Accordingly, we do not recommend that it should be possible to charge an attempt to commit the new offence.

F. Telecommunications Act 1984, section 43(1)

4.53. At various points in this report we have referred to the fact that the new offence which we recommend borrows some of its elements from the offence of making nuisance telephone calls contrary to section 43(1) of the Telecommunications Act 1984.⁷³ In our working paper,⁷⁴ we said that in principle it seemed to us desirable that there should be only one offence dealing with all manner of offensive communications, whatever means are used for conveying them. We therefore suggested that there might be only one new offence with the elements proposed and applying also to nuisance telephone calls, or alternatively that what is now section 43(1) might be amended so that both in form and in powers of sentence it corresponds more closely with the poison-pen offence. There was, however, only a limited response to these suggestions.

⁷¹ See Criminal Attempts Act 1981, s.1(4).

⁷² See para. 2.7, above.

⁷³ Sect. 43(1) provides as follows:—

"A person who—

- (a) sends, by means of a public telecommunication system, a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or
- (b) sends by those means, for the purpose of causing annoyance, inconvenience or needless anxiety to another, a message that he knows to be false or persistently makes use for that purpose of a public telecommunication system;

shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale."

⁷⁴ Working Paper No. 84, para. 9.16.

4.54. On further consideration, as regards the possible amalgamation of the two offences, we have decided not to make any recommendations which would require repeal of section 43(1) of the Telecommunications Act 1984. We have explained in Part III of this report that the offence which we recommend deliberately excludes, for the reasons there set out, the sending of offensive messages by telephone or other means of electronic communication. Despite certain similarities between our offence and the offence of making nuisance telephone calls, a number of significant differences remain; in particular the offence in section 43(1) is substantially wider in so far as it does not require proof of a mental element. We think that any possible amalgamation of the two offences would produce a very cumbersome offence which would inevitably have to be broken down into separate components. Ultimately, we do not think that there would be any advantage to be gained by this course.

4.55. In regard to the suggestion for amending section 43(1), we have noted that Parliament recently had the opportunity of increasing the maximum penalty under it. In the House of Lords a backbench amendment to the relevant clause in the Telecommunications Bill would have provided a maximum penalty of six months' imprisonment for the offence as an alternative to a fine.⁷⁵ During the short debate on the amendment, concern was expressed by its proponents about the large number of reported cases of nuisance telephone calls (some 500 each day) and the fact that many of these calls had a terrifying effect on the, often lonely, people who received them.⁷⁶ In opposing the amendment, the Lord Advocate said that, because of the width of the offence, many of the cases brought under it were petty cases for which it would be undesirable to send offenders to prison. He also drew attention to the offence proposed in our working paper for dealing with the sending of grossly offensive communications and suggested that it might be better to await the outcome of our review before proceeding. Consequently the amendment was withdrawn and the maximum penalty remains a fine of only £400.

4.56. We ourselves have decided not to make any recommendation in this report for increasing the penalties under section 43(1) because it is not a matter on which we have undertaken any full consultation. However, if it is felt by the government departments concerned and others that it is desirable to bring forward further measures for dealing with the more serious cases of obscene telephone calls, we think that there are two possible alternative courses which might be adopted. One would be to raise the penalty for the offence under section 43(1) of the Telecommunications Act 1984 to include a sentence of imprisonment. This would have the consequence, as was pointed out in the recent debates,⁷⁷ that the power to imprison would be conferred in respect of a very widely drawn offence. The alternative course would be to leave section

⁷⁵ See *Hansard* (H.L.), 20 February 1984, vol. 78, cols. 612-615. The amendment was moved by Earl De La Warr.

⁷⁶ In *R. v. Norbury* [1978] Crim. L.R. 435, for example, the defendant was convicted of the common law offence of public nuisance after having confessed to having made a total of 605 obscene telephone calls to 495 women chosen at random from the telephone directory. This offence was presumably charged in preference to the statutory offence because of the low monetary penalty (then a fine of £50) available for the latter.

⁷⁷ See para. 4.55, n.75, above.

43(1) as it stands, and to extend the offence we are recommending in this report so as to cover communications made by means of a public telecommunication system.⁷⁸ We have not followed this course, for the reasons given in Part III; but if it were adopted, two separate offences would then be available for dealing with nuisance telephone calls. The existing offence with a relatively low maximum penalty might be used for the less serious cases, while the new offence, with a maximum penalty of six months' imprisonment or a fine of £2,000 might be reserved for the more serious. In our view, if the problem of nuisance calls is considered sufficiently serious to warrant higher penalties than may be imposed at present, the second course presents advantages over the first, but, as we have indicated, we ourselves make no recommendation on the matter.

⁷⁸ See paras. 3.5-3.9, above as to the exclusion of telephone messages etc. from the new offence.

PART V

SUMMARY OF RECOMMENDATIONS

5.1. In this report, we *recommend* the creation of a new statutory offence to penalise persons who send or deliver poison-pen letters and other similar forms of malicious communications (Part II).

5.2. The offence would cover the sending, not only of poison-pen letters, but any messages conveyed by pictures or photographs, film, tape or recorded sound, as well as the sending or delivery of offensive matter such as excrement or blood-stained articles of clothing, none of which is specifically penalised by the criminal law. It would, however, not cover the sending of messages by purely oral or by any electronic means (Part III).

5.3. The offence would penalise anyone who, without reasonable excuse, sends or delivers to another person an article which—

- (a) is, in whole or in part, of an indecent or grossly offensive nature; or
- (b) conveys a message of that nature, or an unwarranted threat, or false information,

if the sender's purpose is that the article should cause the person to whom he sends it distress or anxiety (paragraphs 4.3–4.38).

5.4. For the purposes of the offence a threat is “warranted” only if the person sending or delivering the article in question uses the threat to reinforce a demand which he believes he has reasonable ground for making, and he believes the use of this threat to be a proper means of reinforcing the demand (paragraphs 4.39–4.41).

5.5. A person sending an article conveying false information would only be penalised by this offence if he knew or believed it to be false (paragraph 4.19).

5.6. The offence would be triable only in a magistrates' court and the maximum penalty would be six months' imprisonment or a fine not exceeding level 5 (currently £2,000) on the standard scale, or both (paragraphs 4.45–4.50 and clause 1(4)).

5.7. It should not be an offence to attempt to commit the new offence (paragraphs 4.51–4.52).

5.8. We make no recommendations in this report for any changes to the offence of making indecent or obscene telephone calls now contained in section 43(1) of the Telecommunications Act 1984. However, if it is thought that the penalty for this offence, currently limited to a fine of £400 (level 3), is inadequate for the more serious cases, consideration might be given *either* to

adapting the offence which we recommend to cover communications made through a public telecommunications system, *or*, less advantageously given the width of the existing offence, to increasing the maximum penalties for that offence (paragraphs 4.53-4.56).

(Signed) RALPH GIBSON, *Chairman*
TREVOR M. ALDRIDGE
BRIAN DAVENPORT
JULIAN FARRAND
BRENDA HOGGETT

J. G. H. GASSON, *Secretary*
18 June 1985

APPENDIX A

Malicious Communications

DRAFT

OF A

BILL

TO

Make provision for the punishment under the law of England and Wales of persons who send or deliver certain articles for the purpose of causing distress or anxiety.

BE IT ENACTED by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

- Sending etc. certain articles to cause distress or anxiety.
- 1.—(1) A person who, without reasonable excuse, sends to another any article which—
- (a) is, in whole or part, of an indecent or grossly offensive nature;
 - or
 - (b) conveys—
 - (i) a message which is of such a nature;
 - (ii) a threat which is not warranted; or
 - (iii) information which is false and known or believed to be false by the sender;

is guilty of an offence if it is his purpose (or among his purposes) that the article concerned, so far as falling within paragraph (a) or (b) above, should cause the person to whom he sends it distress or anxiety.

(2) For the purposes of this section a threat is warranted if the sender—

- (a) uses the threat to reinforce a demand which he believes he has reasonable grounds for making, and
- (b) believes that this use of the threat is a proper means of reinforcing the demand,

but not otherwise.

Malicious Communications

(3) This section applies to a person who delivers anything as it applies to a person who sends it; and accordingly, in the application of this section to a person who delivers anything, references to the sender are to be construed as references to that person.

(4) A person guilty of an offence under this section shall be liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale (which has the meaning given by section 75 of the Criminal Justice Act 1982) or to both.

EXPLANATORY NOTES

Clause 1

1. This clause defines the constituent elements of a new statutory offence which would penalise the sending or delivery of poison-pen letters and the like, and makes provision for its mode of trial and penalty.

2. *Subsection (1)*, which is the offence-creating provision, states that the offence is committed if a person without reasonable excuse sends to another an article which, in whole or in part, (a) is of an indecent or grossly offensive nature, or (b) conveys a message of such a nature, an unwarranted threat, or information which is false and known or believed by the sender to be false. It further provides that such an article only falls within the terms of the offence if it is the sender's purpose, or among his purposes, to cause the person to whom he sends it anxiety or distress. The subsection gives effect to the recommendations in paragraphs 4.3-4.35 of the report.

3. By its reference to the sending of an article, the offence covers the sending, not only of letters, but also of objects the purpose of which is to cause anxiety and distress, for example, a parcel of excrement or a blood-stained emblem. It also covers the sending of film, tapes or video recordings containing messages which have this purpose. But the offence does not cover the sending of messages by purely oral or electronic means, for example, telephone or telex messages. See further, report, Part III.

4. It is not necessary that all of the letter or other article concerned should possess the specified character: the effect of the words in clause 1(1) "so far as falling within paragraph (a) or (b)" is that it is sufficient for commission of the offence that part only of the letter etc. has this character.

5. The offence does not require proof that the sender's *only* purpose is to cause anxiety or distress: it is sufficient that it is among his purposes. This is intended to overcome difficulties which could arise if, notwithstanding the plain and obvious purpose of the letter to be inferred from its character, the defendant were to claim that he had some legitimate purpose as well as some lawful excuse for sending it.

6. *Subsection (2)* provides that a threat is "warranted" if the sender uses the threat to reinforce a demand which he believes he has reasonable grounds for making, and he believes this use of the threat to be a proper means of reinforcing the demand. This gives effect to the recommendation in paragraphs 4.39-4.41 of the report for the protection of those sending letters in the ordinary course of business for such purposes as enforcement of debts or intimations of legal proceedings. In substance it adapts from section 21 of the Theft Act 1968 (blackmail) the definition of which "menaces" are to be regarded as "unwarranted" for the purpose of that offence.

7. *Subsection (3)* provides that the offence may be committed by anyone who delivers an article as it may be committed by anyone who sends it. Thus a person delivering an article of the specified character commits an offence in

the same way as one who sends it. However, a person, such as a Post Office worker, who delivers a letter or other article in the ordinary course of his work will not commit the offence, unless (which is unlikely) he can be shown to have had the purpose specified in subsection (1) of causing distress or anxiety. The subsection gives effect to the recommendation in paragraph 4.5 of the report.

8. *Subsection (4)* provides for the offence to be tried summarily in the magistrates' courts and for a maximum penalty of six months' imprisonment or a fine not exceeding level 5 on the standard scale of maximum fines, which is currently £2,000, or both. The subsection gives effect to the recommendations in paragraphs 4.45-4.52 of the report.

Malicious Communications

Short title, commencement and extent. 2.—(1) This Act may be cited as the Malicious Communications Act 1985.

(2) This Act shall come into force at the end of the period of two months beginning with the day on which it is passed.

(3) This Act does not extend to Scotland or Northern Ireland.

EXPLANATORY NOTES

Clause 2

1. This clause provides for the short title, commencement and extent of application of the Bill.

APPENDIX B

ORGANISATIONS, JOURNALS AND INDIVIDUALS COMMENTING ON WORKING PAPER NO. 84: CRIMINAL LIBEL

(Those marked with an asterisk commented upon Part IX,
"Poison-pen letters")

- British Printing Industries Federation
- *Mr. Derek Davis
The Right Honourable Lord Denning
 - *Director of Public Prosecutions
 - *Mr. Jeremy J. Evans
Sir James Goldsmith (*The Times*, 1 December 1982 (letter))
The Lord Goodnan, C.H.
Haldane Society
 - *Holborn Law Society
 - *Home Office
 - *Justices' Clerks' Society
Mr. William Kimber (*The Times*, 1 December 1982 (letter))
 - *Justice of the Peace (26 February 1983)
 - *The Law Society
 - *The Law Society's Gazette (9 March 1983)
Mr. Philip Lewis
 - *Lord Chancellor's Department
Mr. E. A. Marsh
New Law Journal (2 December 1982)
Police Federation of England and Wales
 - *The Police Superintendents' Association of England and Wales
 - *The Post Office
 - *The Press Council
 - *Prosecuting Solicitors' Society of England and Wales
Mr. Geoffrey Robertson ([1983] Public Law 208)
 - *Society of Public Teachers of Law
Solicitor to the Department of Health and Social Services for Northern Ireland
The Spectator (27 November 1982)
 - *The Senate of the Inns of Court and the Bar¹
 - *Mr. J. R. Spencer ([1983] Crim. L.R. 524)
 - *Mr. Alastair Stewart
 - *Professor G. J. Zellick

¹ The Commission received two sets of comments from the Senate. The first took the form of a submission by Anthony Arlidge Q.C. approved by the Committee of the Criminal Bar Association, with comments by the Senate's Law Reform Committee. The second consisted of a memorandum of comments prepared by Anthony Hoolahan Q.C., Richard Rampton, Derek Grange-Bennett and Michael Bloch, under cover of further comments by the Senate's Law Reform Committee.

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