DRAFT RESPONSE OF THE LAW REFORM COMMITTEE AND CRIMINAL BAR ASSOCIATION TO THE CONSULTATION PAPER ON SIMPLIFICATION OF CRIMINAL LAW: PUBLIC NUISANCE AND OUTRAGING PUBLIC DECENCY

1. The Law Reform Committee of the General Council of the Bar of England and Wales [together with the Criminal Bar Association] welcomes the opportunity to comment on the recent Law Commission consultation paper "Simplification of Criminal Law: Public Nuisance and Outraging Public Decency". We welcome the Law Commission's ambition to make proposals for the simplification of the criminal law (including evidence and procedure). We agree that simplification may be achieved by:

   (a) Giving the law a clearer structure;
   (b) Using more modern terminology;
   (c) Making the law in a given area more consistent with other closely allied areas of law; and
   (d) Making the law readily comprehensible to ordinary people by ensuring that it embodies sound and sensible concepts of fairness.

2. The last is particularly important in the sphere of criminal law because for the criminal law to operate justly it is essential that ordinary citizens understand the circumstances in which conduct or omission may be categorised as criminal. This concept is equally important to those who may be the victims of crime as to those who find themselves accused.

3. We respond to the proposals and questions set out in Part 7 in turn.

   Public Nuisance

   We provisionally propose that the offence of public nuisance be retained, and that its conduct element should remain in its present form as laid down in Rimmington.

4. For the reasons given in paragraphs 4.1 - 4.26 we agree that it is desirable to retain the offence.

   We provisionally propose that public nuisance should be found proved only when D is shown to have acted in the relevant respect intentionally or recklessly with regard to the creation of a public nuisance. That is, D must be shown to have intended to create, or realised that he or

she might generate, what ordinary people would regard as a public nuisance.

5. For the reasons set out in paragraphs 5.22 – 5.44 and in particular paragraphs (5.29-5.38) (5.40) we agree that the fault element should follow the subjective recklessness test as set out in *R v G* [2003] UKHL 50, [2004] 1 AC 1034. It is correct to say that in practice the offence of public nuisance tends to be reserved for more serious breaches where the statutory offences are not deemed to mark the gravity of offending. In those circumstances we agree that it is difficult to justify negligence-based culpability.

   We provisionally propose:

   To restate the offence in statutory form, while altering the fault element as proposed above; For this purpose to explore definitions alternative to that given in Archbold.

   Consultees are asked for their views on how the offence of public nuisance should be defined by statute to give effect to the above proposal.

6. We agree that it should have the fault element as proposed (i.e. a subjective test).

7. We also consider that in order to achieve greater certainty and to introduce the suggested clarification in respect of the fault element, it should be restated in statutory form.

8. Subject to one point, we think that the conduct element should broadly follow that presently contained in *Archbold* and approved in *R v Rimmington*.

9. We suggest:

   Public Nuisance

   A person shall be guilty of public nuisance if the following three conditions are satisfied:

   (1) A person, without reasonable excuse
   - a. does an act without lawful authority, or
   - b. omits to discharge a legal duty.

   (2) The effect of the act or omission is
   - a. to endanger the life, health, property or comfort of the public, or
   - b. to obstruct the public in the exercise or enjoyment of their rights, and

   (3) The person
   - a. intended the effect in sub-paragraph (2), or
   - b. realised his act or omission might have that effect.'

10. We have suggested the addition of the phrase 'without reasonable excuse' for two reasons. First it seems to us that (a) this gives effect to the suggestion of proportionality where a defendant has an explanation for his conduct, the issue being whether it is sufficient justification for the degree of nuisance caused (para 2.34). Secondly it will (in addition to the fault element) reinforce the need for use only in 'extreme and wilful instances' (para 4.22) and remove the generality of nuisance to the range of statutory offences that should ordinarily be deployed, in accordance with the dicta in *R v Rimmington*.

Outraging Public Decency

We provisionally propose that the offence of outraging public decency be retained, and that its conduct should remain in its present form as laid down in Hamilton.

11. We have reservations about whether the offence of outraging public decency should be retained. The force of the criticisms levelled at the offence of public nuisance (vagueness/ uncertainty, rule of law and overlap with statutory offences) are, it seems to us, far greater when applied to outraging public decency.

12. The offence carries a substantially higher degree of subjectivity than public nuisance. Whether an act can be regarded as falling within the definition of outraging public decency may depend upon the age, gender, ethnic, social or religious background or outlook of the person whose opinion is sought. The imposition of an objective element upon a jury requires, for the purposes of a judgment, the surrender of their own standards of decency or sense of outrage in favour of an abstract standard of the' reasonable' (para 6.13(a) or 'ordinary' person (used in the context of fault, para 5.52). Though we recognise that the 'reasonable man' concept is hardly alien to English law, in the singular area of indecency it becomes a flexible and arbitrary standard and renders a juror's task difficult, if not impossible to achieve. Most jurors are likely to regard themselves as reasonable people. Accordingly to find that a display is or isn't shockingly indecent when he or she hold a firm contrary view is an unlikely outcome.

13. Moreover the concept begs the question whether the notional views of the ordinary person prevail against those of a minority of people whose view may be different. Would the views of even a small minority have to be regarded as those of unreasonable or perverse people? Equally can a small minority of the population holding what now may be regarded as outdated or illiberal views be so characterised?

14. The problem may be compounded when considering the proposed fault element (para 5.52). Is the reference there to 'ordinary people' based upon the jury's view of the ordinary person or upon the defendant's view of 'ordinary people'?

15. We recognise that many straightforward cases will not present the conceptual or philosophical difficulties discussed above. It is for that very reason the vast majority of identifiably criminal conduct falls, or is capable of being defined, within statutory offences, mostly sexual. The concern we express relates to the variety of conduct for which there is no precedent of criminal sanction or where there may be no real or overwhelming consensus as to its impact.

16. It follows that we regard the case for the abolition of the offence of outraging public decency to outweigh that for its retention, whether in common law or a modified statutory form.

We provisionally propose that outraging public decency should be found proved only when D is shown to have acted in the relevant respect intentionally or recklessly with regard to the outraging of public decency. That is D must be shown to have intended to generate, or realised that he or she might generate outrage, shock or disgust in ordinary people.

17. If the offence is to be retained we favour its restatement in statutory form with the inclusion of the fault element as set out in para. 5.52.

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