The Law Commission

(LAW COM. No. 123)

CRIMINAL LAW

OFFENCES RELATING TO PUBLIC ORDER

Laid before Parliament by the Lord High Chancellor pursuant to section 3(2) *of the Law Commissions Act* 1965

Ordered by the House of Commons *to be printed* 24*th October* 1983

LONDON
HER MAJESTY'S STATIONERY OFFICE
£7·65 net

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.

The Commissioners are—

The Honourable Mr. Justice Ralph Gibson, *Chairman.*

Mr. Stephen M. Cretney.

Mr. Brian Davenport, Q.C.

Mr. Stephen Edell.

Dr. Peter North.

The Secretary of the Law Commision is Mr. J. G. H. Gasson and its offices are at Conquest House, 37-38 John Street, Theobalds Road, London WC1N 2BQ.

OFFENCES RELATING TO PUBLIC ORDER

CONTENTS

208541 A2

OFFENCES RELATING TO PUBLIC ORDER

Summary In this Report the Law Commission examines, as part of its programme of codification of the criminal law of England and Wales, the four common law offences of affray, riot, rout and unlawful assembly. It recommends the abolition of the obsolete offence of rout. It recommends that the other offences in question be abolished and be replaced by four new statutory offences: new offences of affray and riot would replace the common law offences so named, and two offences penalising respectively acts and threats of group violence would replace unlawful assembly. The Report contains a draft Criminal Disorder Bill which would give effect to these recommendations.

208541 A4

THE LAW COMMISSION

Item XVIII of the Second Programme

CRIMINAL LAW

OFFENCES RELATING TO PUBLIC ORDER

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 recommendations for the abolition of the common law offences of affray, riot, unlawful assembly and rout and the replacement of the first three by new statutory offences. It also recommends the abolition of certain old statutory offences which in our view are obsolete or unnecessary. A draft Criminal Disorder Bill which would implement these recommendations is set out in Appendix A.

1.2 Our work in the field of offences relating to public order has been undertaken as part of our continuing programme of codification of the criminal law of England and Wales.[1] Our Working Paper on the subject[2] was published in 1982, and we pointed out that the group of offences with which it was concerned constitutes the one remaining major group of offences at common law which has not been examined in England and Wales by a law reform agency this century. The provisional proposals in our Working Paper evoked a response which has been of the greatest value to us in formulating the recommendations in this Report. A list of those commenting on the Working Paper is to be found at Appendix D.

A. Scope of this Report

1.3 It should be noted at the outset that this Report does not purport to be a comprehensive review of all aspects of the law relating to public order. As we have indicated, it is confined to the common law offences and certain statutory offences. Other official reviews have in recent years examined relevant areas of the law; in particular the Home Office have conducted a detailed examination of the Public Order Act 1936 and published a Green Paper jointly with the Scottish Office.[3] We understand that an announcement of the conclusions of that review is to be made in due course. Another inquiry was undertaken early in 1980 by the House of Commons Home Affairs Committee which investigated the operation of the Public Order Act 1936;[4] it included in its Report recommendations that we be invited to consider a number of technical matters.[5] More recently Lord Scarman

1 Second Programme of Law Reform (1968), Law Com. No. 14, Item XVIII, para. 2. See also Sixteenth Annual Report 1980–1981 (1982), Law Com. No. 113, paras. 1.8–1.11.
2 Offences against Public Order (1982), Working Paper No. 82.
3 Review of the Public Order Act 1936 and related legislation (1980), Cmnd. 7891.
4 Fifth Report of the Home Affairs Committee, The Law Relating to Public Order (1979–1980), H.C. 756–I.
5 See para. 1.7 and n. 19, below.

reported on The Brixton Disorders 10-12 April 1981.[6] In relation to the substantive law, Lord Scarman rejected the need for a " new Riot Act ",[7] but favoured a modern restatement of the law relating to public disorder, including the common law offences. Since, however, he saw no urgent need for piecemeal reform, he himself made no recommendations in relation to them.[8]

1.4 These inquiries into various aspects of the law relating to public order have narrowed the scope of our work, and we must indicate more precisely what has been excluded from our review and the reasons for that exclusion, particularly since some of our commentators considered that a proper examination of this area of the law required a wider review than that upon which we embarked with the publication of our Working Paper.

1.5 The most important aspect of the law relating to public order which falls outside the scope of our review is the Public Order Act 1936 and the related legislation which has been the subject of a review by the Home Office.[9] We took the view in our Working Paper,[10] with which there was no general disagreement, that since the Act is largely concerned with specialised matters such as the control of processions, the wearing of uniforms, and the administration and exercise of police powers, it was more suitable for examination and consultation by the Home Office, and that there was therefore no reason for us to conduct our own review of it. But the Act also contains in section 5 the widely used summary offence which penalises, in brief, threatening, abusive or insulting words or behaviour which is likely to occasion a breach of the peace.[11] Some of those commenting on our Working Paper contended that no review of the substantive offences relating to public disorder would be complete without taking into consideration this and other summary offences, such as those penalising wilful obstruction of a constable in the execution of his duty[12] and wilful obstruction of the highway.[13] This requires further consideration.

1.6 Section 5 of the 1936 Act has fallen within the terms of the Home Office review of that Act. However, as we explain in more detail below,[14] in considering a revised scheme of offences we have found it necessary to examine the scope of application of the section and how it operates in practice, particularly in the light of recent decisions made since the publication of our Working Paper, which have clarified its scope. Further consideration will no doubt be given to the terms of section 5 in the light of the recommendations in this Report. As regards the offences of obstructing the highway and obstructing a constable, they are quite extensively used, but, just as most of the provisions of the Public Order Act 1936 relate to the regulation of public processions, so these minor offences regulate, among other matters, the behaviour of assemblies, and the police frequently have resort to these offences for dealing with minor acts of

---

6 (1981) Cmnd. 8427. Lord Scarman was appointed by the Home Secretary under the Police Act 1964 to inquire into these disorders and " to report, with the power to make recommendations ".

7 *Ibid.*, paras. 7.31 *et seq.*; see further para. 1.7, below.

8 *Ibid.*, para. 7.40.

9 See note 3, above.

10 Working Paper No. 82, para. 1.5.

11 The section is set out in full at para. 5.3, n. 9, below.

12 Police Act 1964, s. 51(3); maximum penalty, one month's imprisonment and a fine of £200 (level 3 on the standard scale: see Criminal Justice Act 1982, s. 46).

13 Highways Act 1980, s. 137; maximum penalty, a fine of £50 (level 2 on the standard scale: see Criminal Justice Act 1982, s. 46).

14 See paras. 5.15–5.18, below.

unruliness arising in the course of assemblies. Our principal concern, however, is with the serious offences which are or should be available to deal with offences committed in serious disturbances to public order. Examination of the latter therefore does not in logic require us to extend our review to the former. Moreover, an offence such as obstructing the highway clearly has implications in other areas, such as the regulation of traffic, which go far outside the law relating to public order. Considerations both of the proper boundaries of our review and of convenience therefore lead us to exclude them from this Report.

1.7 The other matters excluded from our review may be dealt with more briefly. The question of whether there should be a new offence of failure to disperse after lawful warning (a "new Riot Act") has been considered by Lord Scarman[15] and, as announced by the Home Secretary,[16] the matter is under separate review. Accordingly we see no need to traverse the same ground. Moreover, the question whether or not there should be an offence is closely connected with the issue of the adequacy of police powers to preserve public order.[17] This is not a matter within the scope of our review, although we are, of course, concerned to ensure that these powers are not diminished as a consequence of our recommendations.[18] Similarly, since the issues which the House of Commons Home Affairs Committee recommended for our consideration related to the Public Order Act 1936 or to the scope of police powers,[19] we took the view, after consultation with the Home Office, that they fell more appropriately within their review.[20]

1.8 Finally, we mention another aspect of the common law. We do not examine in this Report the law relating to public nuisance, in so far as that common law offence[21] penalises disturbances to public order. The offence is used in many situations remote from such disturbances, and a disturbance to public order is not an essential element of it. But it has also been used to penalise obstructions to the highway, and in this context occasionally in connection with "sit-down" demonstrations in central London.[22] We said in our Working Paper that a review of public nuisance

15 The Brixton Disorders 10–12 April 1981 (1981), Cmnd. 8427, paras. 7.31 *et seq.*

16 See Home Secretary's statement to the House of Commons, *Hansard* (H.C.), 16 July 1981, vol. 8, col. 1402.

17 *Ibid.*, col. 1404.

18 See paras. 7.14 *et seq.*, below.

19 These were (*a*) whether, in regard to the part of section 3 of the Public Order Act 1936 which requires banning orders to apply to "all public processions or any class of public procession", an appropriate definition of "class" can be found (Report, para. 55); (*b*) whether it is necessary and desirable for both the Prevention of Crime Act 1953 and section 4 of the Public Order Act 1936 to contain provisions concerning the possession of offensive weapons at public meetings or in processions (*ibid.*, para. 87); (*c*) whether, if the existing powers regarding the removal of dangerous or offensive articles from demonstrators are seriously inadequate, these powers should be enlarged (*ibid.*, para. 90).

20 See para. 1.3, above.

21 Public nuisance is a misdemeanour at common law, triable either way (Magistrates' Courts Act 1980, Sched. 1), consisting of "... an act not warranted by law or an omission to discharge a legal duty, which act or omission obstructs or causes inconvenience or damage to the public in the exercise of rights common to all His Majesty's subjects": Stephen *A Digest of the Criminal Law* 9th ed., (1950), art. 235. See generally Smith and Hogan, *Criminal Law* 4th ed., (1978), pp. 764–769.

22 *R.* v. *Moule* [1964] Crim. L.R. 303, *R.* v. *Adler* [1964] Crim L.R. 304 and *R.* v. *Clark* (*No.* 2) [1964] 2 Q.B. 315. The conviction in the last-mentioned case was quashed on a misdirection. See also *Tynan* v. *Balmer* [1967] 1 Q.B. 91 (D.C.) where the defendant's use of the highway in picketing a factory was held to amount to a nuisance, for which in the circumstances he was held on appeal to have been rightly convicted of wilfully obstructing the police; and *Broome* v. *D.P.P.* [1974] A.C. 587 where in similar circumstances the defendant was held rightly convicted of wilfully obstructing the highway under what is now the Highways Act 1980, s. 137.

generally, or a review of it in so far as it is used to penalise highway obstructions (which is a relatively clearly defined aspect of its use) would be impracticable and would unduly protract our work; it would include many situations remote from the law relating to disturbances to public order. A separate review of the offence would be desirable. We adhere to that approach, but suggest that, if the offences which we recommend in this Report are enacted, it will be preferable for public nuisance not to be charged in situations where there are disturbances to public order: we believe that the statutory offences which would then be available, including the summary offences referred to in paragraph 1.6, above, would adequately meet all situations likely to arise.

B. Response to the Working Paper

1.9 Our Working Paper No. 82, Offences against Public Order, published in March 1982, provisionally proposed, first, the abolition of the four common law offences of affray, rout, riot and unlawful assembly and their replacement by three new statutory offences of affray, riot and unlawful assembly, and, secondly, the repeal of certain ancient statutory offences which appeared to us to be obsolete or unnecessary. Some of these statutes deal with disturbances in the vicinity of Parliament, and we raised for comment the issue whether special provisions were needed for the protection of Parliament. We examine these old statutes and the question of the protection of Parliament in Part VIII of this Report.

1.10 A large majority of those commenting on the Working Paper[23] agreed with its proposals relating to the common law offences, either without reservation or subject only to comments relating to matters of detail. In particular, this majority agreed with the proposal that there should be three new statutory offences which, in broad terms, would cover much the same ground as, and would retain a substantial number of the constituent elements of, the common law offences of affray, riot and unlawful assembly. Among these commentators were, first, various professional organisations and groups including the Council of Her Majesty's Circuit Judges, the Senate of the Inns of Court and the Bar, the Criminal Bar Association, The Law Society, the Prosecuting Solicitors' Society, the Justices' Clerks' Society and the Society of Labour Lawyers; secondly, representatives of the police, including the Commissioner of Metropolitan Police, the Police Superintendents' Association and the Police Federation; thirdly, government departments and officials, including the Home Office, the Lord Chancellor's Department, the Law Officers' Department and the Director of Public Prosecutions; and, fourthly, individuals including members of the judiciary and some academic commentators.

1.11 A second group of commentators had more substantial criticisms of our proposals, either upon particular aspects of them or upon our general approach to offences relating to public order and the structure of the offences proposed. For example, the General Council of the Trades Union Congress queried the need for an offence of unlawful assembly, and certain academic commentators also expressed reservations about this offence. Other academic comment was more general in scope[24] and the Society of Public Teachers

---

23 All those commenting are listed in Appendix D.

24 See e.g. A.T.H. Smith, "Law Commission Working Paper No. 82—Offences against Public Order", [1982] Crim L.R. 485.

of Law, in particular, submitted proposals for offences of somewhat narrower application.

1.12 A third group of commentators entirely opposed our proposals and considered that offences of affray, riot and unlawful assembly were unnecessary; these common law offences should, they submitted, be abolished without replacement. This group included the National Council for Civil Liberties, the Haldane Society, the Greater London Council and certain trades unions and representatives of trades unions. They argued that the proposed statutory offences would, as they alleged is the case with the existing common law offences, be vague, uncertain and arbitrary; that evidential difficulties arising in some situations in regard to proof of certain statutory offences (a matter highlighted in our Working Paper)[25] represented, not "difficulties", but rather the minimum standards which the criminal law should require; and that the existing statutory offences are entirely adequate to deal with violence against persons or property.

1.13 The submissions of all of our commentators have, as we have said, been of great value to us in our work on this Report. The many points raised by them are considered individually in the appropriate places in this Report, although we have not in general referred to commentators by name save where it might be of especial interest to be aware of the identity of those expressing a particular viewpoint.

C. Plan of this Report

1.14 The approach adopted by this Report differs to some degree from that of the Working Paper, mainly as a result of our detailed reconsideration of certain matters of principle in the light of comments made upon the Working Paper. We think it will assist in putting our approach in perspective if the recommendations of this Report relating to the common law offences and the principal considerations which led to the changes in this Report are summarised at the outset. Part II of this Report covers these matters. Successive parts then deal individually and in detail with the common law offences and our recommendations for their replacement, commencing in Part III with affray, the one common law offence which does not depend for liability upon the participation of a number of people, and continuing in Part IV with rout, for which no replacement is recommended. Parts V and VI deal respectively with unlawful assembly and riot. Part VII deals with certain ancillary matters common to some or all of the offences, such as powers of arrest without warrant, and the power of the courts to convict of alternative offences. Certain ancient and obsolete offences relating to disturbances to public order are dealt with in Part VIII. Appendix A contains a draft Criminal Disorder Bill which would give effect to our recommendations, and other appendices deal with statistical material and the law in other countries.

[25] See e.g. Working Paper No. 82, paras. 4.6–4.7 and paras. 3.3–3.5, below.

PART II

OUR PRINCIPAL RECOMMENDATIONS AND GENERAL APPROACH

A. Introduction

2.1 This Report presupposes that the offences which it recommends will ultimately form part of a criminal code.[1] It deals in the main with offences at common law. Conduct which is a criminal offence at common law is an offence because judges in the past have found it to be so; under a statutory code conduct is a criminal offence because the statute declares it to be so. Abolition of offences at common law and their replacement by new statutory offences entails consideration of the need for those offences and of their necessary extent.

2.2 The approach adopted in our Working Paper[2] was in the nature of a restatement in a modern statutory form of the present common law, eliminating what we considered to be certain anomalies and uncertainties, but retaining for the greater part the principal features of the structure and application of the common law offences. There were two principal reasons for this approach. In the first place, we stated that, while the common law exhibits some uncertainties, we were unaware of any substantial criticisms of the broad content of the common law offences. It appeared that there was general acceptance that offences which carry a heavy maximum penalty were required to penalise those involved in the most serious disturbances to public order. Secondly, we said that this area of the law is closely connected with the exercise of fundamental liberties of the subject and that in such an area it was necessary to move with caution in considering the ambit of any new offences.

2.3 Our general approach in this Report does not differ in principle from that of the Working Paper. There is clearly a strong general view that it would be unacceptable to abolish the common law offences without any replacement. Furthermore, we are satisfied that the offences which we recommend do not represent any encroachment on the fundamental liberties of the subject but are, rather, one means of giving effect to them. In so far as the offences are concerned with civil liberties, they are essentially intended to penalise the use of violence or intimidation by groups of people because such violence or intimidation goes beyond legitimate means of a public expression of views and becomes conduct which stifles such expression of views. The offences may therefore be regarded as upholding the fundamental liberties of the subject by penalising those who would infringe his liberty by violence or intimidation. At the same time, we recognise that the great majority of cases in which riot, unlawful assembly or affray are charged raise no issues concerning the fundamental liberties of the subject. They are straightforward cases of fighting or violent damage to property, generally committed in the streets or other public places. Because the law does not, in our view rightly, take account of the motives which caused an accused person to resort to violence, there is no distinction in law between cases where disturbances arise from protests originally peaceful in character but

1 See para. 1.2 and n. 1, above.

2 See Working Paper No. 82, para. 3.3; the offences provisionally proposed in the Working Paper are set out at paras. 3.1, 5.3 and 6.5, below.

which cease to be peaceful, and those where the motivation of the accused was mere loutishness or the hope of some personal gain.

2.4 In addition to these general considerations common to the approach of our Working Paper and this Report, two considerations raised by the consultation upon our Working Paper have substantially influenced the approach adopted in this Report. In the first place, new offences replacing the common law must be readily comprehensible and appropriate for the practical needs of combatting serious public disorder. It is therefore desirable to avoid defining any new offences in terms which are complicated by penalising too wide a range of conduct or by requiring a mental element excessively difficult to prove. On the other hand, the common law, particularly the offence of unlawful assembly,[3] is unclear as to what minimum conduct disruptive of public order should attract criminal liability. New offences which carry heavy penalties must so far as possible clarify this in order to prevent their application in circumstances falling short of the serious disturbances to the public peace which are the primary concern of the common law offences. The rest of this Part indicates how the factors here outlined have influenced our approach to each of these offences, and summarises the new offences recommended in this Report.

B. Unlawful assembly

2.5 We commence with unlawful assembly since, on consultation, both the common law offence and the reformulation of it in our Working Paper attracted the heaviest criticism on grounds of width and uncertainty. Irrespective of whether these observations were in all respects justified, we now take the view that for the future the threshold of behaviour which should attract criminal sanctions should be clarified: in particular, any new and serious offences pertaining to public disorder attracting substantial maximum sentences must be so drafted as to ensure that the offences cannot be invoked in circumstances where a gathering is peaceful in character, even if its purpose is such that it might at some future time cease to be peaceful. In *Brutus* v. *Cozens* Lord Reid said[4] that the concept used in section 5 of the Public Order Act 1936 of " threatening, abusive or insulting words or behaviour " was the criterion adopted by Parliament to solve the difficult question of how far freedom of speech or behaviour must be limited in the general public interest. We are content to adopt those words in a new group offence replacing unlawful assembly at common law in cases where the conduct of the defendant falls short of the use of violence. It follows that occasions where the defendant, as part of a group, was merely planning to use violence would not be an offence under our proposed scheme of offences, although at present such a person could be charged with unlawful assembly.[5]

2.6 The desire for clarity and reconsideration of possibly unsatisfactory concepts have also led us to abandon the concept of " breach of the peace " common to both the existing law and the Working Paper proposals. Although its meaning has to some degree been settled by recent authority,[6] some

---

3 See paras. 5.8 *et seq.*, below.
4 [1973] A.C. 854, 862; see further para. 5.11, below.
5 See para. 5.10 and n. 36, below. Charges of conspiracy would cover this situation.
6 See *R.* v. *Howell* [1982] Q.B. 416 and para. 5.14, below.

uncertainty remains,[7] and the concept therefore seems unsatisfactory for use as a principal element in any new statutory offence. Moreover, the formulation adopted by section 5 of the Public Order Act 1936—threatening etc. words or behaviour whereby a breach of the peace is likely to be occasioned—has its own drawbacks. It is now apparent that if in consequence of such behaviour there is no likelihood of a breach of the peace by any persons affected by the behaviour, even if, for example, they are put in fear that violence will be used against them, no offence is committed.[8] Some other concept is therefore required in any new offence which both ensures that any threats which are likely to cause a fear of violence are effectively penalised by the criminal law and discourages the notion that a breach of the peace is in contemporary circumstances an acceptable or likely reaction to threatening behaviour by others. Consequently we now recommend that threatening, abusive or insulting words or behaviour should be penalised if they are intended or likely to cause a fear of immediate violence or to provoke the immediate use of violence.

2.7 The common law offence has been so developed as to be capable of use both when a group are assembled for the purpose of using violence or provoking others to use violence *and* when a group are actually engaged in acts of violence;[9] thus it covers types of conduct which are different both in their nature and degree of criminality. In recommending new offences we think it more satisfactory to create offences which penalise the gravamen of the activities which actually take place: if the defendant uses threats, the offence should in terms penalise threats; if he uses violence, the offence should specifically penalise violence. Furthermore, we think there ought to be an offence dealing with public disorder referring explicitly to the use of violence as an element of the offence which falls short of the most serious offence of riot. These, in outline, are the reasons which lead us now to recommend two distinct offences in place of unlawful assembly at common law, penalising respectively the use by a small group of actual violence against persons or property, and the use by a small group of threatening words or behaviour intended or likely to cause fear of violence or provoke violence.

2.8 As regards the mode of trial, the common law offence is triable only on indictment. However, we now believe that it is necessary for there to be available offences which can properly deal with many of the participants in substantial incidents of public disorder by expeditious proceedings in the magistrates' courts. Thus we now recommend that the two offences replacing unlawful assembly, both of which would be less complex than the common law, should be triable either way, in the Crown Court or in magistrates' courts. The maximum penalties recommended must be set at levels which reflect the seriousness of the worst conduct penalised. But these penalties must, in our view, also bear an acceptable relationship with those imposed for related offences. They are therefore limited to a maximum of five years' imprisonment for the offence penalising group violence, and to two years' for the offence penalising group threats of violence.

2.9 In place of *unlawful assembly* at common law we accordingly

---

[7] See para. 5.14, below.
[8] *Parkin* v. *Norman* [1983] Q.B. 92, *Marsh* v. *Arscott* (1982) 75 Cr. App. R. 211; see para. 5.15, below.
[9] E.g. *R.* v. *Jones* (1974) 59 Cr. App. R. 120 (the Shrewsbury pickets case).

recommend the creation of two separate offences, one penalising group violence, and the other group threats of violence:

(*a*) *An offence to be known as* **violent disorder.** *Where three or more persons are present together using or threatening unlawful violence to persons or property, whether in a public or private place, and their conduct, taken together, is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety, each of those persons who uses unlawful violence commits the offence of violent disorder. The offence would be triable either way with a maximum penalty on indictment of five years' imprisonment and a fine.*[10]

(*b*) *An offence penalising* **conduct intended or likely to cause fear or provoke violence.** *Where three or more persons are present together, whether in a public or private place, using threatening, abusive or insulting words or behaviour which is intended or is likely either to cause another person to fear immediate unlawful violence to persons or property or to provoke the immediate use of such violence by another person, each of them commits the offence. The offence would be triable either way with a maximum penalty on indictment of two years' imprisonment and a fine.*[11]

C. Riot

2.10 With a new offence of violent disorder penalising acts of group violence with a maximum penalty of five years' imprisonment, could the law operate effectively in the field of public order without any offence of riot? We think not, for it is an offence " which derives its great gravity from the simple fact that the persons concerned were acting in numbers and using those numbers to achieve their purpose ".[12] In our view, to take part in a riot, that is, an occasion when the weight of numbers is used to achieve a common purpose with violence or threats of violence, should be a criminal offence and one which is more serious than it would be appropriate to charge under our new offence of violent disorder. For those who are the leaders on such an occasion or who take part in persistent and dangerous violence penalties greater than those available for violent disorder may well be appropriate. We would not expect that such an offence would be commonly charged: it should be reserved for the most serious occasions of violent disorder by a substantial number of persons.

2.11 However, we think that any offence of riot in the future must in terms refer to those matters which justify it being regarded as a serious offence with a higher penalty. Thus we now take the view that the minimum number required must substantially exceed the three persons specified by the common law. It is unsatisfactory to rely upon the consent to prosecute (in the Working Paper, of the Director of Public Prosecutions) in order to exclude the possibility of prosecution where the numbers fall short of something sufficiently substantial to amount to a riot. Any number is to some extent arbitrary, but we do not consider that it should be less than ten or

10 See Appendix A, draft Criminal Disorder Bill, cl. 2. The requisite mental element for this and the other offences is specified in cl. 5, while " violence " is defined in cl. 8(1).

11 See Appendix A, cl. 4.

12 *R.* v. *Caird* (1970) 54 Cr. App. R. 499, 505; see further para. 6.11, below.

twelve ; we have selected the latter.[13] We would expect that, in any disorder where proof of the question whether the numbers exceeded twelve presented a problem, the prosecution would be content to charge violent disorder. The element of common purpose to be found in the common law must also be retained in a new offence: the essential characteristic of a riot is that it involves a number pursuing their common purpose by means of violence. But it must also be made clear that the jury may, but are not bound to, infer the common purpose from what the defendant and the others involved were doing. For these reasons, the offence of riot recommended in Part VI of this Report, and outlined in paragraph 2.12, below, requires proof of a minimum of twelve persons pursuing a common purpose. In consequence, riot will in all probability be an offence which it will be possible and appropriate to charge only on infrequent occasions.

2.12 Accordingly, in place of *riot* at common law, we recommend the creation of a new offence to deal with mass violence to be known as **riot.** *Where twelve or more persons are present together, whether in a public or private place, using or threatening unlawful violence to persons or property for some common purpose (which may be inferred from their conduct) and their conduct, taken together, is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety, each of them who uses unlawful violence for the common purpose commits the offence of riot. The offence would require the consent of the Director of Public Prosecutions to the institution of proceedings and would be triable on indictment with a maximum penalty of ten years' imprisonment and a fine.*[14]

D. Affray

2.13 The new offence of violent disorder which we recommend will deal with a great many of the cases at present charged as affray, and in particular the serious cases which will merit a penalty as high as five years. Having regard to our scheme of offences and to the existence of related offences against the person, what need is there for a new offence of affray? The essence of the offence is unlawful fighting such as would put a bystander in fear. Even though many such cases would be dealt with as violent disorder, there will be others in which there will be insufficient proof of the participation of three or more persons, or where successful pleas of self-defence will reduce the numbers involved in unlawful violence below that minimum. There is, therefore, a place for a new offence of affray. On the other hand, reconsideration of this offence in the light of the others which we recommend and in the light of current sentencing practice has led us to the conclusion that it should be triable either way and that a maximum period of imprisonment of three years would be appropriate.[15]

2.14 Accordingly, in place of *affray* at common law, we now recommend the creation of a new offence to be known as **affray.** *Where two or more persons use or threaten unlawful violence against each other, or one or more persons use or threaten unlawful violence against another, whether in a public or private place, and the conduct of those using or threatening*

13 Under the Riot Act 1714 (repealed in 1967), if twelve persons were still assembled one hour after the order for dispersal, they were guilty of a felony; to this extent, the number twelve has some historical basis.

14 See Appendix A, cl. 1 and 6(2).

15 See paras. 3.55–3.64, below.

unlawful violence is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety, each of them commits the offence of affray. The offence would be triable either way with a maximum penalty on indictment of three years' imprisonment and a fine.[16]

E. Conclusions

2.15 The offences recommended in this Report do not differ greatly in their sphere of application from the present common law. However, we believe that they present a more coherent structure both in their constituent elements and their maximum penalties, and remove a substantial number of anomalies and uncertainties from the present law. By simplifying the constituent elements of the offences and defining them in terms of the actual conduct intended to be penalised by them, we consider that they would be both simpler to use in practice and more readily comprehensible to courts and to juries. Thus group threats to public order would be met by an offence specifically penalising threats ; group violence, which must be regarded as more serious than mere threats, would be met by an offence specifically penalising violence ; while the most serious acts of mass violence having a common purpose would be met by an offence of riot tailored accordingly with a higher maximum penalty. Specific provision would make each an alternative to the other,[17] so that if a defendant were to be found not guilty on a more serious count, he might nevertheless be found guilty of an alternative offence if the jury were sure from the evidence that he had committed that lesser offence. At the same time, by defining the scope of these offences with greater precision than the common law, we believe that they would clarify the boundary between that behaviour which, in the public interest, must be subject to severe criminal penalties and that which is acceptable as a legitimate public expression of views. Consequently, we are confident that none of our recommendations would be out of accord with the provisions of the European Convention on Human Rights, Article 11 of which provides that everyone has the right to freedom of peaceful assembly and to freedom of association with others.

2.16 The following Parts of the Report deal in detail with the new offences outlined in this Part. We commence with affray ; it is in the context of that offence, which is currently by far the most frequently used of the common law offences relating to public order, that many of the problems of scope and definition common to these offences most clearly arise in consequence of the decisions of the courts in relation to the common law.

16 See Appendix A, cl. 3.
17 See Appendix A, cl. 6(4).

PART III

AFFRAY

A. Definition and Working Paper proposal

3.1 It is convenient to determine the elements of the common law offence of affray by reference to the definition given in Smith and Hogan's *Criminal Law*,[1] which is based in large part upon two decisions of the House of Lords[2]—

> " 1. Unlawful fighting or unlawful violence used by one or more persons against another or others ; or an unlawful display of force by one or more persons without actual violence ;
> 2. in a public place or, if on private premises, in the presence of at least one innocent person who was terrified ; and
> 3. in such a manner that a bystander of reasonably firm character might reasonably be expected to be terrified."

The offence was for long in desuetude and was revived in modern times as recently as 1957.[3] Before that time it was regarded as obsolete ; yet serious fighting occured before then and no doubt was subject to criminal penalties, particularly under various offences against the person to which it will be apparent that affray bears a close relationship. Nevertheless, we concluded in our Working Paper that an offence of affray could not be dispensed with, and we proposed that there should be a new statutory offence of affray in place of the common law ; we considered that it should be similar to the common law offence with some clarification and narrowing of its elements. We described it in the following terms—

> " There should be a statutory offence of affray, triable only on indictment with a maximum penalty of ten years' imprisonment and a fine. The conduct penalised would consist of fighting, or acts of violence (other than mere threats or displays of violence) inflicted by one or more persons upon another or others. A person will be guilty of affray if, without lawful excuse, he fights or inflicts such acts of violence, provided that his conduct, together with that of any others involved, is such as would reasonably have caused any other person, if present, to be put in fear of his personal safety. The offence would be capable of commission in a public or private place."[4]

We have referred in general terms to the response to this proposal on the part of a minority of those commenting on it, who questioned the need for an offence of affray. This clearly requires further consideration.

B. The need for a separate offence

3.2 The common law offence is typically charged in cases of pitched street battles between rival gangs, spontaneous fights in public houses, clubs and at seaside resorts, and revenge attacks on individuals. It is sometimes

---

1 4th ed., (1978) p. 757.
2 *Button* v. *Director of Public Prosecutions* [1966] A.C. 591 and *Taylor* v. *Director of Public Prosecutions* [1973] A.C. 964.
3 *R.* v. *Sharp and Johnson* [1957] 1 Q.B. 552 was the first reported case for over 100 years.
4 Working Paper No. 82, para. 8.3.

charged on its own, but is often accompanied by charges of one or more other offences, most of them falling within the general rubric of offences against the person. These include the following—

TABLE OF OFFENCES[5] COMMONLY ACCOMPANYING CHARGES OF AFFRAY

SHORT DESCRIPTION OF OFFENCE	STATUTE	MAXIMUM PENALTY
Murder	(Common law)	Life (mandatory)
Manslaughter	(Common law)	Life
Unlawful wounding/causing grievous bodily harm with intent to do some g.b.h.	Offences against the Person Act 1861, s. 18	Life
Unlawful wounding/inflicting grievous bodily harm	Offences against the Person Act 1861, s. 20	5 years
Assault occasioning actual bodily harm	Offences against the Person Act 1861, s. 47	5 years
Common assault	(Common law)	1 year[6]
Possession of offensive weapons	Prevention of Crime Act 1953, s. 1	2 years[7]

These offences may also be charged instead of affray if the particular facts and the evidence available to the prosecution in each case warrants this course.

3.3 The abundance of other offences available to deal with unlawful fighting may suggest that, since the facts of all possible cases, upon examination, involve the commission of offences other than affray,[8] no offence having the elements of the common law is needed. In our Working Paper,[9] we took the view that abolition of the common law without replacement would in fact leave a significant gap in the law, because—

> " affray is designed to deal with a type of conduct in which, by contrast with offences against the person, both the identity of the victim and the extent of his injury are immaterial. . . . [W]hile the fact that serious injuries are inflicted in the course of an affray may affect the general level of sentences imposed, it is not necessary to show that the particular defendant inflicted those particular injuries on a particular victim. The essence of affray lies rather in the fact that the defendant participates in fighting or other acts of violence inflicted on others of such a character as to cause alarm to the public: it is essentially an offence against public order."

[5] It should be noted that all the offences listed with the exception of the last were recently the subject of a review by the Criminal Law Revision Committee: see Fourteenth Report, Offences Against the Person (1980), Cmnd. 7844. Implementation of the Report would not affect the arguments adopted in relation to offences against the person at paras. 3.3–3.9, below.

[6] There are two provisions for summary trial of common assault: with the consent of the accused as an either way offence, where the maximum penalty is six months' imprisonment or a fine of £1,000 or both: Magistrates' Courts Act 1980, ss. 17(1), 32(1) and Sched. 1; or summary trial under the Offences against the Person Act 1861, s. 42, maximum penalty two months' imprisonment and a fine of £200.

[7] This offence is also triable summarily with a maximum penalty of three months' imprisonment or a fine of £1,000 or both.

[8] See *Button* v. *D.P.P.* [1966] A.C. 591, 622 and *Taylor* v. *D.P.P.* [1973] A.C. 964, 979 and 981.

[9] See Working Paper No. 82, para. 4.6.

We further pointed out that, because of this distinction between affray and offences against the person, the prosecution's approach must differ, particularly in regard to the evidential requirements. All offences against the person, the gravity of which depend both on the extent of the injuries caused and the accompanying intention, require the prosecution to prove that the defendant committed the prohibited act in relation to a particular person even if that person cannot be identified by name. In a fight involving a number of participants it may not always be easy to assert that this was the case, although there may be abundant evidence as to the nature of the event in which the defendant was engaged. In one of the two decisions of the House of Lords to which we have referred, it was submitted, and the House clearly accepted, that—

> " if each one [of the participants] were charged with an assault, there might be great confusion and difficulties as to evidence and as to what injuries were inflicted by which person. Then the appropriate course is to charge an affray."[10]

3.4 Several commentators, among them the National Council for Civil Liberties, the Haldane Society, the Greater London Council and certain trades unions, were not convinced by these arguments. In their view, they were open to objection because an offence of affray undermines the safeguards provided by the more serious offences against the person. There are, from this point of view, substantial dangers of wrongful conviction if there is no detailed evidence of precisely what a defendant did; and if there is such evidence, he should be charged with the appropriate offence against the person. One commentator put this view at its bluntest in suggesting that " if there is insufficient evidence to convict a person of assault on another specific person, prima facie, there will also be insufficient evidence to show that he was fighting at all ".

3.5 In our view, the point of view thus expressed by our commentators ignores the reality of what occurs in street fighting. If a fight takes place, for example, late at night amongst a considerable number of people such as rival gangs of youths, precise identification of what is being done to whom in the course of a general melée at that time of day may well be impossible. It will, however, be clear that the participants concerned have engaged in acts of fighting or violence, or aiding and abetting others in such acts. If the incident as a whole is of a minor character, it may well be sufficient to charge the participants in the magistrates' courts with common assault or with an offence under section 5 of the Public Order Act 1936,[11] although it is clear that by its terms section 5 is intended to deal primarily with threats to public order rather than threats which have spilled over into actual violence.[12] However, in our view it cannot be right to adopt that course if a serious fight has taken place. In some instances there may be sufficient evidence to charge one of the serious offences against the person. But if the only evidence is of violent participation in the fight a charge of affray at common law is at present the only possible and, in our view, appropriate course which

10 *Button* v. *D.P.P.* [1966] A.C. 591, 620: and see *ibid.* at p. 628 and *Taylor* v. *D.P.P.* [1973] A.C. 964.

11 See para. 5.20 below.

12 In *R.* v. *Oakwell* [1978] 1YW.L.R. 32, the Court of Appeal held that on a charge of using threatening behaviour under the Public Order Act 1936, s. 5, the fact that the defendant was actually fighting and could have been charged with affray did not preclude a charge under s. 5 if there was evidence of such threats. Section 5 was at that time triable both on indictment and summarily: see para. 8.10, n. 22, below.

reflects the seriousness of the behaviour and the alarm which it causes to the public. We are, therefore, convinced that abolition of this offence without replacement—it is charged in about 1,000 cases every year[13]—would leave a significant gap in the law.

3.6 Another argument to be mentioned against replacement of the common law offence is that some Commonwealth countries which have adopted codes based up on the English draft Code of 1879,[14] which included an offence of affray, nonetheless makes no provision for this offence. This is certainly true of Canada and New Zealand.[15] However, we do not think that any firm conclusion can be drawn for this. It is not without significance that the law relating to unlawful assembly in New Zealand has been amended quite recently to strengthen the powers of the police to deal with certain situations which in this country would at present more readily be dealt with by charges of affray.[16]

3.7 In part the adverse views expressed by a minority of our commentators against a new offence of affray were occasioned by the fact that the offence which we provisionally proposed in our Working Paper was to carry the high penalty of a maximum of ten years' imprisonment, and was to have no mental element other than intent or recklessness as to the required act of fighting or violence. Such a high penalty for acts which consist in essence of unlawful fighting might be thought disproportionate to the social evil being penalised. This does, indeed, raise an important issue of principle in relation to sentencing. Any maximum penalty for a new offence must, we think, relate to the seriousness of the particular elements of the offence as provided by statute, and should not be set at such a level that it appears to take account of more serious matters with which a particular defendant may be involved, such as wounding or bodily harm inflicted upon another, which are irrelevant to the proof of the offence in question. This is a matter to which we return in the context of our consideration of the appropriate maximum penalty for a new offence.[17]

3.8 The nature of and penalty for the offence proposed in our Working Paper were also among the considerations which moved one commentator to suggest as an alternative to our proposal an offence of unlawful fighting in public, triable either way with a maximum penalty of three years' imprisonment.[18] We see much force in this and, although as we explain below[19] we do not consider that a restriction to public places would be justified, we now think that for the reasons set out later in this Part of the Report,[20] any new offence in place of affray should be triable either way with a maximum penalty substantially lower than that proposed in our Working Paper.

3.9 To sum up, we are not convinced by those commentators who suggested that there would be no need for a new offence if the common law of affray were abolished: we think it has an important function in any scheme

13 See Appendix B, below.
14 See Appendix C, para. 2, below.
15 *Ibid.*, paras. 8 and 9.
16 *Ibid.*, para. 9.
17 See para. 3.55, below.
18 See A.T.H. Smith, " Law Commission Working Paper No. 82—Offences against Public Order ", [1982] Crim. L.R. 485 at p. 489.
19 See paras. 3.23 *et seq.*, below.
20 See paras. 3.55 and 3.60, below.

of offences dealing with public order. However, the mode of trial and maximum penalties for such an offence are matters which require reconsideration.

3.10 Accordingly we *recommend* that, although the offence of affray at common law should be abolished,[21] it should be replaced by a new statutory offence. The elements of this offence are described in the next section.

C. Elements of a new offence

1. Summary

3.11 We *recommend* that there should be a new offence called *affray* to replace the common law. It would be triable either way with a maximum penalty of three years' imprisonment and a fine. Where two or more persons use or threaten unlawful violence against each other, or one or more persons use or threaten unlawful violence against another, whether in a public or private place, and the conduct of those using or threatening violence is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety, each of them should be guilty of this offence.

3.12 In the following paragraphs we consider in turn each element of the offence which we recommend, indicating what the present law is, how we propose that it be changed or clarified, and how our recommendations differ from those which we made in our Working Paper.

2. The Prohibited Conduct (Actus Reus)

(*a*) *Using or threatening violence*

3.13 Common law affray requires the defendant to have engaged in unlawful fighting or violence, or a display of force without actual violence. All recent reported cases appear to have involved actual fighting or violence and, although the element of display of force is accepted as part of the law,[22] precisely what this connotes is not clear: brandishing of a "fearful weapon" is probably sufficient, but not "mere words, unaccompanied by the brandishing of a weapon or actual violence".[23]

3.14 Primarily because of the absence of reported cases in recent times relating to the element of display of force, we proposed in our Working Paper[24] that mere threats or displays of violence should be excluded from any new offence replacing the common law. We pointed to the range of other offences capable of dealing with such threats,[25] and noted that the scheme of offences in the Working Paper made provision for penalties to be imposed for serious threats or displays of force by a group under the terms of the proposed statutory offence of unlawful assembly. Nevertheless, we stressed that, were evidence presented to us of the need to include threats within the new offence, the issue would require reconsideration.

3.15 A substantial majority of those commenting on our Working Paper approved our proposed exclusion of threats or displays of force. Cogent

---

21 See Appendix A, cl. 7(*a*).
22 See *R.* v. *Sharp and Johnson* [1957] 1 Q.B. 552, 559.
23 See *Taylor* v. *D.P.P.* [1973] A.C. 964, 987 *per* Lord Hailsham.
24 Working Paper No. 82, paras. 4.17–4.20.
25 Including the Prevention of Crime Act 1953 (possession of offensive weapons) and the Public Order Act 1936, s. 5.

evidence has, however, been presented to us by others which persuades us that our provisional proposal should be changed. In particular, it has been urged on us that there is no reason of substance why, in this context, a punch thrown which misses should be distinguished from one which lands on another person; and, if there were insufficient evidence to show that any of those accused actually succeeded in hitting another, no-one, upon our provisional proposal, would have been guilty of the offence, and a person who punched but missed would not, therefore, have been liable for aiding and abetting. And a person closely connected with an affray, such as an individual brandishing a razor, would if threats were excluded from the ambit of the offence, not be guilty of it. Some threats of violence might be met with charges of possessing an offensive weapon under the Prevention of Crime Act 1953; this, however, would only be the case if there were proof of such possession, and in the case of, say, a mob terrifying shoppers in a shopping precinct there may be insuperable difficulties in proving which person had a particular weapon.

3.16 These examples of the difficulties which could arise on our provisional proposals have impressed us. Perhaps the most persuasive argument is that, under those proposals, those engaged in what was in all respects one incident would have been capable of being prosecuted only by means of charges of different offences—affray and unlawful assembly—according to whether it appeared that they were hitting another or merely threatening to do so. In the context of street fighting such a distinction seems artificial: we believe, on reconsideration, that any offence which is aimed, in broad terms, at unlawful fighting to the terror of the public should be capable of penalising all those concerned in a particular incident, whether the evidence is that—

(i) in some cases blows actually landed on others,

(ii) in others it is uncertain whether blows landed, or

(iii) some defendants were merely threatening blows.

Under our provisional proposals, only those falling within (i) would have been liable to be penalised for affray. We now recommend that under any new offence persons in all three categories should be liable. This will enable the court to do justice on the whole of the evidence relating to a particular incident. It must be accepted, however, that a broadening of the categories of prohibited acts in this way would permit the offence to be charged when no-one was actually engaged in acts of fighting. On the other hand, common law affray can at present be charged where the relevant conduct consists of threats alone, but we have no evidence that the offence is used in that way save where it is justified by quite exceptional circumstances. We would expect no change in prosecution practice under any new offence replacing the common law.

3.17 Precisely which activities, then, should be penalised by a new offence? In our Working Paper[26] we referred to fighting or acts of violence inflicted etc., and we pointed out that there was authority for the view that "violence" of itself was capable of being interpreted to include the threatened use of violence.[27] The term "fighting" was used for the purpose of the Working Paper because it aptly described the kind of conduct with which

[26] Working Paper No. 82, para. 4.16.
[27] See e.g. *R.* v. *Howell* [1982] Q.B. 416, and para. 5.14, below.

many of the cases falling within a new offence would have to deal. In itself, however, it adds nothing to conduct described in terms of acts of violence, and is not apt to describe a conflict between two persons of whom one is merely defending himself.[28] And if threats are to be included within the prohibited acts, it is clearly necessary to avoid describing those acts in terms such as "infliction" which may imply the need for physical contact.[29] Moreover, in a modern penal statute it is desirable to make as clear as possible precisely which conduct is to be penalised; consequently, if threats of violence are to be covered, we think that this must be done expressly rather than left to the courts to interpret the ambit of the term violence. In this connection it is noteworthy that the one offence in recent years which uses the concept of violence, namely, the offence of violence for securing entry to premises under section 6 of the Criminal Law Act 1977,[30] expressly penalises anyone who "uses or threatens violence for the purpose of securing entry". "Threats" in this context, however, should in our view not include threats made by words alone: a mere altercation using threatening language does not constitute an affray at common law,[31] and we do not think the position should be changed under a new statutory offence. These considerations lead us to the conclusion that the conduct to be penalised is best described simply as *violence or threats of violence to the person*, with specific *exclusion of threats by words alone*. We *recommend* accordingly.[32]

3.18 We have considered whether the term "violence" requires further definition in the context of affray. In the context of the two offences of violent disorder and riot which we recommend in Parts V and VI of this Report, we consider such definition to be essential, for under those offences a defendant is guilty only if he is proved to have used actual violence. Affray, however, penalises the use of both threats and violence, and it may be, therefore, that the precise ambit of the latter is of less importance. But for the avoidance of doubt, and in the interests of consistency with these other two offences, the concept of violence has been given the same meaning wherever it occurs in the draft Bill.[33] Further discussion of the concept is to be found in the context of violent disorder and riot.[34]

(b) Against each other or one or more against another

3.19 The common law offence of affray requires only that one person be unlawfully fighting another: there is no need for both of them, or for a higher number, to be unlawfully fighting. This point was settled by the House of Lords in *Taylor* v. *D.P.P.*,[35] confirming earlier authority of the Court of Appeal.[36] Thus one person may be guilty of affray if he makes a violent, unlawful attack on another, whether that other defends himself

28 See para. 3.40, below.

29 Although there is authority for the view that threatened injury may in some circumstances amount to infliction of bodily harm: *R.* v. *Halliday* (1889) 61 L.T. 701.

30 This implemented the recommendations in our Report on Conspiracy and Criminal Law Reform (1976), Law. Com. No. 76: see Appendix 1, Draft Conspiracy and Criminal Law Reform Bill, cl. 7.

31 See *Taylor* v. *D.P.P.* [1973] A.C. 964, 987 *per* Lord Hailsham and para. 3.13, above.

32 See Appendix A, below, cl. 3(1) and 3(2).

33 See Appendix A, cl. 8(1).

34 See paras. 5.30 and 6.20, below.

35 [1973] A.C. 964. The appellant and a co-accused pleaded not guilty to making an affray. The co-accused was acquitted on the grounds that he was acting in self-defence but the appellant was convicted. The principal ground of appeal was that the judge had been wrong in law to direct the jury that one person found by them to be fighting could be convicted of affray. Both the Court of Appeal and the House of Lords dismissed the appeal.

36 *R.* v. *Scarrow* (1968) 52 Cr. App. R. 591 and *R.* v. *Summers* (1972) 56 Cr. App. R. 604.

(and is therefore not fighting unlawfully) or merely submits: there need be no reciprocity of violence.

3.20 In our Working Paper we took the provisional view that the law as decided by *Taylor* should not be changed, since—

> " the gravity of the individual's behaviour in affray lies in his participation in the violent conduct which constitutes the affray. Thus if at the trial of several defendants on charges of affray the evidence is found insufficient to convict more than one participant, there is every reason for him alone to be found guilty of the offence. Moreover, if the offence were to require proof that two persons were unlawfully fighting, where only one was being prosecuted the prosecution would have to exclude the possibility of self-defence in the defendant and in the person assaulted by him.[37] This could in some cases lead to undue complexity in summings-up and place an impossible burden on the prosecution."[38]

3.21 On consultation, there was almost unanimous support for our provisional view, with the exception of one organisation which urged that there be proof of a minimum of six participants before a charge of affray could be brought, and another which argued similarly for twelve. There is certainly an argument for the view that affray, like riot and unlawful assembly, is one of those offences which it is appropriate to use only on occasions when " the disturbance of the peace assumes a new dimension when more than one person is involved ".[39] But we think that the arguments advanced in the Working Paper greatly outweigh these considerations: if several defendants are charged with affray, and the evidence is sufficient to convict only one of them, we see no reason why he should not be guilty if there is sufficient evidence to show that he has used unlawful acts of violence or threats of violence against another, provided that his acts were such as to induce fear in others.[40] If such has been his conduct, we believe it to be unnecessary to place upon the prosecution the further burden of disproving acts of self-defence in others. Thus in a new offence it should be necessary to refer only to the use of threats or violence by one person against another. The more usual type of affray is, however, where one person is fighting another, the activity of both of them being unlawful. We think it would be useful in clarifying the ambit of the offence to cover both of these types of activity, the acts of the single person and the reciprocal acts, in its definition.

3.22 Accordingly, we recommend that *where two or more persons use or threaten unlawful violence against each other,* or *one or more persons use or threaten unlawful violence against another* this should, if the other requisite conditions are met, make each person liable for the offence of affray.[41]

(c) *In a public or private place*

3.23 An affray at common law may occur in public or in private. This was decided by the House of Lords in *Button* v. *D.P.P.*,[42] which corrected

---

37 Where a number were being prosecuted, the prosecution would have to exlcude the possibility of self-defence in the defendant and at least one co-defendant: see *Taylor* v. *D.P.P.* [1973] A.C. 964, 985–986 *per* Lord Hailsham.

38 Working Paper No. 82, para. 4.15.

39 *Taylor* v. *D.P.P.* [1973] A.C. 964, 969 (counsel for the appellant).

40 As to the element of fear, see paras. 3.29 *et seq.*, below.

41 See Appendix A, cl. 3(1).

42 [1966] A.C. 591.

the erroneous view, apparently accepted since about 1820[43] but not in accord with previous authorities,[44] that the offence could only be committed in a public place.

3.24 Our Working Paper proposed no change in the law in this respect[45] and most of our commentators agreed. However, a few supported a restriction to public places, principally on the grounds that disturbances in private places lack any " public " element, and that inclusion of private places would lead to an unnecessary extension of police powers: minor arguments at social gatherings between guests could be aggravated by the intrusion of the police and thus elevated to a serious offence.

3.25 On reconsideration, we see no reason to alter the views expressed in the Working Paper. We believe that any limitation of a new offence to conduct occurring in public would place a serious restriction upon it. Take, by way of illustration, the example of a large-scale fight which has broken out at a social gathering on private premises, for example a dance hall or discotheque to which on the occasion in question admission is by invitation only ; the fight spills out onto the adjacent roadside. Were a new offence to be restricted to conduct in public places, only those in this overspill would be liable to be penalised ; those engaged in the more serious fighting within would escape such liability, and if no-one volunteered evidence, they might escape liability altogether. Such a case illustrates the fine boundary which may often exist in practice between conduct in private and conduct in public, which in our view would make such a distinction illogical in any new offence, in addition to placing an unnecessary restriction upon it. It may be objected that inclusion of conduct in private places brings with it the danger that mere backyard fights will constitute a serious offence. But it must be observed, first, that, if this is a danger, it must already exist under the common law ; secondly, that the same consideration applies to the law of assault, and if charges are brought in relatively trivial circumstances, this is likely to be viewed with disfavour by the courts and to be reflected in the penalty imposed ; and, thirdly, the requirement that the conduct be sufficiently serious to instil fear in a reasonable bystander[46] must, we think, provide a genuine safeguard if embodied in statutory form.

3.26 The argument that inclusion of conduct in a private place would unduly extend police powers cannot, in our view, be sustained. As we have pointed out, such conduct is covered by the present law ; and it has for long been the case that, " where a constable hears an affray in a house, he may break in to suppress it, and, may in pursuit of an affrayer, break in to arrest him ; and also where those who have made an affray in his presence fly to a house and are immediately pursued by him ".[47] And whatever criticism

[43] In 1822 *Archbold* asserted without authority that the allegation " in a public street or highway " should be charged in the indictment and proved. This was followed in all subsequent cases: see *R.* v. *Hunt and Swanton* (1845) 1 Cox C.C. 177; *R.* v. *O'Neill* (1871) I.R. 6 C.L. 1; *R.* v. *Sharp and Johnson* [1957] 1 Q.B. 552; *R.* v. *Morris* (1963) 47 Cr. App. R. 202; *R.* v. *Clark*, *ibid.*, 203; *R.* v. *Mapstone* [1963] 3 All E.R. 930n.; *R.* v. *Kane* [1965] 1 All E.R. 705; *R.* v. *Allan* [1965] 1 Q.B. 130.

[44] Including writers such as Lambard, Fitzherbert, Dalton, Coke, Hale, Nelson, Hawkins and Burn. See Blackstone's *Commentaries* (1769), Vol. IV, p. 145 and *Button* v. *D.P.P.* [1966] A.C. 591, 626 *per* Lord Gardiner L.C.

[45] Working Paper No. 82, para. 4.21.

[46] See paras. 3.35 *et seq.*, below.

[47] *Stone's Justices' Manual* 112th ed., (1980), p. 3162 citing *Chitty's Constables*, 2nd ed., p. 59, 2 Hale 95, 1 Hawk. c. 63, 2 Hawk. c. 14, and 2 Hawk. c. 48, s. 8. (It may be noted that the quotation in the text is not cited in the current (115th) edition of *Stone*.) This authority was cited by the appellant in *Thomas* v. *Sawkins* [1935] 2 K.B. 249, 252; see also Avory J., *ibid.*, at p. 255.

may be levelled at the more general proposition that the police have the power to enter premises without permission for the purpose of preventing a reasonably apprehended breach of the peace,[48] we do not think that there can be any doubt that these powers currently exist where such a breach of the peace in the shape of violence or threatened violence to the person is actually occurring.[49]

3.27 We *recommend* that a new offence replacing common law affray should, like that offence, be capable of being committed in a public or private place.[50]

(*d*) *Such as would have caused any other person of reasonable firmness, if present, to fear for his personal safety.*

3.28 The common law is emphatic that "terror" is an essential ingredient of affray. In *Taylor* v. *D.P.P.* Lord Hailsham said that this element must not be weakened: "it is essential to stress that the degree of violence required to constitute the offence of affray must be such as to be calculated to terrify a person of reasonably firm character".[51] What is less clear is whether that degree of terror must be capable of impinging on people actually on the scene of the affray, or whether it is sufficient if a notional person is taken to be present. There seems to be a distinction under the present law for this purpose between public and private places. In regard to public places, it has been held[52] that it is not necessary to prove that any third person was present; it is sufficient that, if any ordinary person were to pass by, he might well be terrified. As to private places, in *Taylor* v. *D.P.P.* Lord Hailsham expressed the view, *obiter*, that it might have to be proved in such cases that a third party was present.[53] Smith and Hogan consider that, where the affray occurs in a private place, it must be proved that terror was in fact caused to at least one person actually present.[54] This summary of the present law raises a number of questions which must be discussed in relation to the requirements of a new offence—

(i) Should the element of terror be retained and, if so, how should it be expressed in legislation?

(ii) Should there be a requirement of the presence, or likely presence, of one or more innocent bystanders and, if so, must it be proved that they were actually terrified?

We examine these issues in turn, and under heading (iii) determine the elements of a new offence.

(i) Terror

3.29 The element of terror distinguishes affray from offences against the person and emphasises that not all acts of violence against the person

48 See the much-criticised decision in *Thomas* v. *Sawkins*, *ibid.*

49 See *R.* v. *Howell* [1982] Q.B. 416, and para. 5.14, below. These powers would have been unaffected by the Police and Criminal Evidence Bill considered by Parliament during the 1982–83 session: see cl. 8(6) and see further paras. 7.14 *et seq.*, below.

50 Since this means, in substance, that the offence should be capable of commission anywhere, there is no need for any definition of "public place". And see Appendix A, cl. 8(3).

51 [1973] A.C. 964, 987. See also *R.* v. *Sharp and Johnson* [1957] 1 Q.B. 552.

52 *R.* v. *Mapstone* [1963] 3 All E.R. 930n. But see *R.* v. *Farnill* [1982] Crim. L.R. 38 (Leeds Crown Court), n. 60, below.

53 [1973] A.C. 964, 988; but see also *Kamara* v. *D.P.P.* [1974] A.C. 104, 115–116 *per* Lord Hailsham.

54 *Criminal Law* 4th ed., (1978), pp. 758–759, citing *R.* v. *Summers* (1972) 56 Cr. App. R. 604, 613.

amount to an affray; it also marks the character of the offence as one against public order. It was for these reasons that we proposed in our Working Paper that this element should be retained in any new offence,[55] a proposal which was approved by most of our commentators. The great majority also approved our proposal to express this element in terms of "putting in fear" rather than "terror", which in our view was unsuitable as a term for legislation; we noted that our preferred concept had been used in recent legislation, albeit in the distinct context of terrorism.[56] Any distinction between "putting in fear" and "terror" is, we think, marginal, and we adhere to the view that this terminology is more appropriate for use in new legislation.

(ii) Innocent bystanders

3.30 It is convenient to consider the question of the requirement of the innocent bystander in relation to disturbances, first, in a public place and, secondly, in a private place.

In a public place

3.31 It seems to us that there are two principal arguments for requiring proof under a new offence of the presence of one or more innocent bystanders where the disturbance occurs in a public place: first, it is, it may be argued, a necessary restriction to avoid that offence being unduly widened, having regard to the similarities which it would bear to other offences against the person and, secondly, it would emphasise its status as an offence against public order. The first was, indeed, emphasised by a few of our commentators who urged, contrary to the view expressed in our Working Paper,[57] that any new offence should require proof of the presence of others besides those engaged in fighting. Only one commentator, however, argued that a bystander who was actually terrified should be produced in evidence. Such a requirement would in our view be likely to lead to the exclusion from the ambit of the offence of many cases of serious fighting. In the most serious cases, indeed, any bystanders who might have been present would in all likelihood leave the scene. In many other instances the only "bystanders" are likely to be the police who arrive on the scene to stop the fight; and they of all people are the least likely to be put in fear by the disturbance. Thus it cannot be right, in our view, to require proof of actual terror in any bystanders.

3.32 If we are right in this last conclusion, we can see no utility in a requirement of evidence that a bystander was actually present at or near the scene of a fight. The essence of the offence which we are recommending is that the defendant uses or threatens violence to the person of another of such a degree that it is capable of having serious repercussions upon the public peace, and as we said in our Working Paper[58]—

"the function of the bystander is really to act as a measure of the

---

55 See Working Paper No. 82, para. 4.23.

56 In the Prevention of Terrorism (Temporary Provisions) Act 1976, s. 14(1), "terrorism" is defined to include "any use of violence for the purpose of putting the public or any section of the public in fear". Under the Theft Act 1968, s. 8(1) "a person is guilty of robbery if he steals, and immediately before or at the time of doing so, and in order to do so, he uses force on any person or *puts or seeks to put any person in fear of being then and there subjected to force*" (emphasis added).

57 See Working Paper No. 82, para. 4.26.

58 Ibid.

requisite degree of violence. For this purpose it matters not whether there was a bystander close by, or a bystander who was actually terrified: his actual presence is, indeed, irrelevant. What is really in issue is whether a reasonable bystander, if present, would have been put in fear by the violence of the conduct in question. In practice, in most cases of affray there will be innocent bystanders who are witnesses to the fighting. It will be their evidence (coupled with the evidence of the participants in the fight and of the police) which will normally establish guilt. But . . . to elevate the giving of such evidence into a positive requirement without which there can be no conviction for the offence misapprehends the real function of the concept of the bystander in this offence."

To this, we would only add that in devising a suitable test for a new offence, care must be taken to ensure that (as Lord Hailsham stressed in the context of affray at common law)[59] the requirement here is a genuine element of the offence which cannot readily be watered down: any such dilution would weaken the status of the offence as one pertaining to public order.

3.33 If there is to be no requirement of the actual presence of bystanders, should there nonetheless be a requirement of the reasonable likelihood of the presence of others?[60] We think not, for reasons which we expressed in the following terms in our Working Paper[61]—

"In cases of very serious affrays, the mere fact of fighting would probably prevent members of the public approaching and at the first sign of trouble any bystanders who might have been there would have left. Consequently, the defence could argue that it was unlikely that any members of the public would have been present. We cannot think it right that a provision in a statutory offence should afford the opportunity of raising this argument. Moreover, inclusion of the provision would impose upon the jury the burden—in itself undesirable—of considering two hypothetical questions: first, whether it was reasonably likely that another person was present and, secondly, if it was, whether he would have been put in fear. In so far as the latter raises the question of what the reaction of the reasonable man would have been, this imposes no unusual burden, for it is a matter eminently suitable for decision by the jury. But in the first question the term "reasonable likelihood" refers, not to the beliefs or reactions of the reasonable man, but to the likelihood of an event occurring, viz., the presence of someone else in the locality. In our view, to require proof beyond reasonable doubt of the reasonable likelihood of the occurrence of an event would cause problems for both prosecution and jury. Furthermore, it may be argued that a "public place"[62] is by definition a place where a member of the public may be, and that the extra requirement of

---

59 See *Taylor* v. *D.P.P.* [1973] A.C. 964, 987, and para. 3.28, above.

60 In *R.* v. *Farnill* [1982] Crim. L.R. 38 (Leeds Crown Court) it was held that where an affray occurs in a public place it must be proved that there was a reasonable likelihood of a third party coming on the scene. On the facts of the case (involving a gang attack on "innocent persons" in a public house car park at 11.15 p.m.) there was no evidence of any such likelihood, and a plea of no case to answer was accordingly upheld.

61 See Working Paper No. 82, para. 4.27.

62 The definition of this term for the purposes of the Public Order Act 1936 in the Criminal Justice Act 1972, s. 33 "includes any highway and any other premises or place to which at the material time the public have or are permitted to have access, whether on payment or otherwise".

reasonable likelihood of the presence of others therefore involves an arbitrary qualification of the scope of that term."

In a private place

3.34 Where the disturbance occurs in a private place the arguments for requiring evidence of the presence of others who were terrified are more evenly balanced, and a few of our commentators disagreed with our provisional and tentative view that the same rules should apply, whether the disturbance takes place in public or in private.[63] It may be argued that, unlike a public place, there may be little or no likelihood of others, who are members of the public, being present in a private place, and without such a "public" element as part of the offence, it may in part lose its status as an offence relating to public order. On the other hand, those who fight in a private place may choose to do so in the knowledge that others may not be present; and there is a public interest in preventing unlawful fighting (other than minor struggles involving no attempt to cause actual bodily harm) whether it occurs in public or private and regardless of the consent of the participants.[64] Furthermore, there may be cases where the only bystanders present fear trouble and leave before the fighting starts, and it seems to us wrong that a prosecution should fail because of the absence of innocent bystanders during the actual fighting. And if bystanders were present and had stood their ground, declining to give evidence of fear despite abundant evidence of substantial violence, it would again seem wrong for a prosecution to fail on account of the unusual fortitude of the onlookers in a case where the average person of reasonable firmness would have been put in fear. In any event, we have seen how fine the distinction may be in some circumstances between conduct on private premises and in a public place,[65] and where the conduct at issue relates essentially to a single event occurring in both, it would be impracticable and illogical to apply different tests. These considerations persuade us that no distinction in relation to this element should be made between public and private places.

(iii) Recommendations for the new offence

3.35 In the light of the comments received upon our provisional proposals for these elements of a new offence in our Working Paper,[66] and of our further review of the arguments, we believe that the elements are best described in terms similar to those proposed in the Working Paper: the conduct of the defendant must be such as would have caused any other person of reasonable firmness, if present at the scene, to fear for his personal safety. Various criticisms were made of such a criterion, as expressed in the Working Paper, upon which it is appropriate to comment. Before mentioning them, however, it is necessary to bear in mind that, whatever test is selected, it must, as we have emphasised, form a genuine element of the offence which is incapable of dilution, leading to a needless expansion of the offence and a consequent weakening of its status as one pertaining to public order. The criticisms of our provisional proposals must in our view be measured against this criterion.

63 See Working Paper No. 82, para. 4.31.

64 See *Attorney-General's Reference (No. 6 of 1980)* [1981] Q.B. 715, 719, where the Court of Appeal so held in response to the question: "Where two persons fight (otherwise than in the course of sport) in a public place can it be a defence for one of those persons to a charge of assault arising out of the fight that the other consented to fight?".

65 See the illustration given in para. 3.25, above.

66 See Working Paper No. 82, para. 4.32.

3.36 One suggestion made by some commentators was that the words " of his personal safety " were unnecessary ; it was sufficient merely to state that the reasonable person was put in fear, and the additional words were a limiting factor where property was at risk. This, however, was intentional on our part: it is the reasonable person's fear for his physical safety which in our view is the factor which it is appropriate to specify in an offence which has as one element violence to the person.[67] Again, we think it right to specify such conduct as *would* give rise to fear in the reasonable person, rather than conduct which might do so: the purpose is to provide the necessary limitation upon the breadth of the offence.

3.37 Of a different kind were the suggestions that the test should refer, not only to the reasonable person's fear for his own safety, but also his fear for another's safety. It was suggested in particular that a person may fear for the safety, for example, of a child. These comments seem to us to misunderstand the nature of the test in question. It is essentially the test of the reaction of the hypothetical reasonable person ; in substance, therefore, that reasonable person may be " present " wherever the conduct is liable to give rise to the requisite degree of fear, and reference to the fear for another's safety, whether that of a child or anyone else, is superfluous.

3.38 It will be noted that we refer to conduct causing fear to a person of " reasonable firmness present at the scene ". Some comment on these quoted terms is needed. We refer to a person of " reasonable firmness " rather than a " reasonable person " since we are concerned with the reactions of the hypothetical bystander rather than the standards of conduct of the reasonable person. As regards " presence at the scene ", there may be some degree of uncertainty as to what is meant by " presence ", but we doubt whether it is possible or desirable to be more specific as to how far away from or how near to the disturbance the hypothetical person must be. Every case will to this extent depend on its circumstances, but we believe that a jury will sufficiently understand what is meant by " present at the scene ", that is, anyone who would have been in real danger of becoming involved in the disturbance. This means that the feelings of anyone actually involved in the disturbance, even if only as the passive victim of violence, cannot be used as a measure of the requisite degree of fear, although, of course, his evidence relating to the incident may assist in establishing whether it was of such a character that it would have put a person of reasonable firmness in fear. It also means that, whether or not the participants might be guilty of some other offence, not every fight will be penalised by affray: it seems unlikely, for example, that a personal quarrel between two people involving mutual assaults without the danger of the involvement of others, or, to take another example, a duel on an occasion when no-one else would be endangered,[68] would fall within the offence with the limitations which we recommend. This, we believe, is the right result: such incidents can hardly be said to give rise to the serious disturbance to public order with which the offence is intended to deal.

---

[67] As to the criteria for offences recommended in this Report which penalise attacks on persons and property, see paras. 5.35 and 6.26, below.

[68] See *Taylor* v. *D.P.P.* [1973] A.C. 964, 987 where Lord Hailsham seemed prepared to hold this example to be an affray at common law even in the absence of bystanders or their actual terror. Those engaging in duels will, of course, almost certainly commit an offence against the person.

3.39 To summarise, we *recommend* that, for the purposes of a new offence it should be necessary to prove that, whether the violence or threats of violence occurred in a public or private place, *the conduct of the defendant was such as would have caused any other person of reasonable firmness, if present at the scene, to fear for his personal safety.*[69]

(*e*) *The unlawfulness of the prohibited conduct*

3.40 We *recommend* that a new offence should provide expressly that the defendant will be penalised for using or threatening violence only if his acts are done unlawfully. This will make clear that, not only will any general defence apply according to the circumstances of the case, but that other defences, such as the common law defence of self-defence and the provisions of section 3 of the Criminal Law Act 1967 (use of force in making arrest etc.),[70] may in appropriate cases exonerate the defendant. The provisional proposal in our Working Paper for such an express provision was criticised by a few commentators as being unnecessary. However in *R.* v *Sharp and Johnson*[71] it was held by the Court of Criminal Appeal that self-defence was available as a defence to a charge of common law affray, reversing the decision at first instance where the court directed that the defence was immaterial. A new stautory offence should in our view put the matter beyond doubt in relation to this defence and any others which may be relevant in the circumstances. The draft Bill makes provision accordingly.[72] We note that self-defence was considered by the Criminal Law Revision Committee, who recently recommended its replacement by a defence in statutory terms,[73] and we are content that, if the Committee's recommended definition of self-defence is enacted before the offence which we recommend, this should apply to it in place of the common law defence.

3. The Mental Element (Mens Rea)

(*a*) *The present law*

3.41 The mental element required for the common law offence of affray seems in practice to be a matter of no importance. We are aware of no case in which the question has been raised notwithstanding that affray is charged over a thousand times a year. It seems fairly clear that the defendant does not have to intend to cause terror; nor does he have to be aware of the presence of bystanders or that the violence in which he is taking part is such as would have caused terror to a bystander. Since the essence of the offence is fighting, and since it is almost impossible to conceive of a situation in which a person is fighting by accident, it is not surprising that the mental element of the offence seems never to have been in issue in any reported case. By far the most likely situation in which a person claims that he did not realise what he was doing is when he is intoxicated, but the

---

69 See Appendix A, clauses 3(1) and 8(2).

70 See the Criminal Law Revision Committee's Fourteenth Report: Offences against the Person (1980), Cmnd. 7844, paras. 283 and 287; see also *R.* v. *Cousins* [1982] 2 W.L.R. 621.

71 [1957] 1 Q.B. 552; and see *R.* v. *Khan and Rakhman* [1963] Crim. L.R. 562 and *Taylor* v. *D.P.P.* [1973] A.C. 964, 983.

72 See Appendix A, clauses 3(1) and 8(1).

73 See the Criminal Law Revision Committee's Fourteenth Report: Offences against the Person (1980), Cmnd. 7844, paras. 281–288. The redefined defence would provide that a person may use such force as is reasonable in the circumstances as he believes them to be in the defence of himself or any other person, or in defence of his property or that of any other person, provided he fears an imminent attack.

law is now clear that in offences such as affray self-induced intoxication is no defence: the accused is treated as if he were sober.[74] Furthermore, common law defences such as self-defence apply to the offence[75] so that the situations in which mens rea can have any relevance are extremely limited. Yet the principle that the defendant must be shown to have a guilty mind is as applicable to this offence as it is to any other serious offence of this character. Thus it is an issue which we cannot ignore, even though it may be thought to be of little more than academic interest. In the discussion which follows, we concentrate upon the mental element in affray, but much of this is applicable also to the offences of violent disorder and riot recommended in Parts V and VI of this Report. Particular problems which may arise in connection with these offences are mentioned in the course of our discussion.

3.42 The question of the mens rea in statutory criminal offences which have a mental element expressed in terms of intent or recklessness has recently been considered by the House of Lords in *Commissioner of Police of the Metropolis* v. *Caldwell*[76] and *R.* v. *Lawrence*[77] and the Court of Appeal in *R.* v. *Pigg*.[78] As a result of these cases the law in other offences cannot be regarded as certain and, in the eyes of some, the whole treatment of the issue of recklessness by the courts is unsatisfactory. But in view of the comparative lack of importance of this subject in the context of the offence here under consideration, we do not intend to burden this Report with a detailed discussion of the difficulties and uncertainties in this area of the law. We shall seek to set out the position in broad terms, aware of the possibility that our statement may in some respects be an over-simplification, and then to state the conclusions which we have reached.

3.43 The Offences against the Person Act 1861 created many different criminal offences; the word which it consistently used to describe the mens rea that was a necessary element in the more serious offences which the Act created was "maliciously". This, as the courts have explained, requires "either (1) an actual intention to do the particular kind of harm that in fact was done; or (2) recklessness as to whether such harm should occur or not (i.e. the accused has foreseen that the particular kind of harm might be done and yet has gone on to take the risk of it)".[79] The mental element required for the common law offences of assault and battery is similar: the courts have decided that assault requires the defendant intentionally or recklessly to cause another person to apprehend immediate and unlawful personal violence, and that battery requires the defendant intentionally or recklessly to apply force to the person of another.[80] It is clear that recklessness here bears the same meaning as it does in the context of malice in the statutory

---

74 See *D.P.P.* v. *Majewski* [1977] A.C. 443 (assault occasioning actual bodily harm) and *Commissioner of Police of the Metropolis* v. *Caldwell* [1982] A.C. 341; and see para. 3.53, below.

75 See para. 3.40, above.

76 [1982] A.C. 341 (Criminal Damage Act 1971, s. 1(2)).

77 [1982] A.C. 510 (causing death by reckless driving, Road Traffic Act 1972, s. 1 as amended by the Criminal Law Act 1977, s. 50(1)).

78 [1982] 1 W.L.R. 762 (rape) (appeal allowed on other grounds [1983] 1 W.L.R. 6 (H.L.)).

79 *R.* v. *Cunningham* [1957] 2 Q.B. 396 (Offences against the Person Act 1861, s. 23—maliciously administering poison etc., so as to endanger life or inflict grievous bodily harm) in which the Court of Criminal Appeal approved the quoted definition of "malice" in Kenny, *Outlines of Criminal Law* (see 19th ed., (1966), p. 211).

80 *R.* v. *Venna* [1976] Q.B. 421, 428–429.

offences contained in the 1861 Act ;[81] and recklessness here applies to offences at common law by virtue of judicial construction.

3.44 In *Caldwell*[82] the defendant was charged under section 1 of the Criminal Damage Act 1971 which expressly states that the required mental element is that of intention or recklessness. The majority of the House of Lords held that, on a charge under section 1(1) of the Act of destroying or damaging property " reckless as to whether any such property would be destroyed or damaged ", the defendant is " reckless " if " (i) he does an act which in fact creates an obvious risk that property will be destroyed or damaged and (ii) when he does the act he either has not given any thought to the possibility of there being any such risk or has recognised that there was some risk involved and has nonetheless gone on to do it. "[83] The essential difference between this explanation of the word " reckless " as used in the 1971 Act and the word " reckless " as used to explain the meaning of the word " malicious " in the 1861 Act is that under the 1971 Act a person is guilty if there was a risk that his act would cause damage, *whether or not he was aware of that risk,* whereas under the 1861 Act and at common law a person is only guilty if it is proved that he did actually foresee the risk.

3.45 In reference to these different states of mind, the majority of the House of Lords thought it undesirable that a jury should have to draw what it considered to be the " fine " distinction between whether the defendant gave a thought to the risk in question or whether the matter never crossed his mind.[84] It is, however, important to note that the House did not say that they considered to be incorrect the interpretation earlier put by the courts upon the meaning of the word " reckless " in explaining the mental element required under the Offences against the Person Act 1861. They merely took the view that Parliament, in revising the law relating to damage to property, used a different terminology (that of " recklessness ") which was to be given the meaning favoured by the majority of the House.[85] Consequently, it would appear that the law relating to offences against the person (whether the common law or as stated in the 1861 Act) remains as it was stated before *Caldwell.* It may be that hereafter the courts will conclude that " recklessly ", when used in relation to the mental element of the common law offences of assault and battery or in relation to the word " maliciously ", has the same meaning as *Caldwell* and other cases cited above[86] have established that it has when used expressly in a statute. But that has not yet occurred and we have to take account of the fact that the mental element of the offences against the person in all probability differs from the mental element of those statutory offences where the word " recklessly " is expressly used. The difference is one which we believe to be of no practical importance in the context of the offences now under consideration in the sense that it would affect the way in which juries are likely to decide cases on the facts. However, if the mental element of those offences is to be stated, a conclusion has to be reached on how this is to be done in the light of the current state of the law.

---

81 *Ibid.*, at pp. 428–429; but see Addendum at p. 93, below.
82 [1982] A.C. 341.
83 *Ibid.*, at p. 354 *per* Lord Diplock.
84 *Ibid.*, at p. 352.
85 *Ibid.* Compare Lord Edmund-Davies at pp. 357–358.
86 See para. 3.42, above; but see Addendum at p. 93, below.

(*b*) *The possible options*

3.46 It seems to us that there are three possible ways of tackling the problem, and we explain them in the following paragraphs.

(i) No express mental element

3.47 Our first option would be to make no express provision for a mental element. This would have the result, in our view, that on the rare occasions on which the point might arise in the context of affray, the court would fall back on the general principles of mens rea as explained with reference to the common law offences of assault and battery.[87] There is no risk, we think, that the court would hold that the offence was one of strict liability, without any mental element. The advantage of this course is that, if the common law develops so that, for example, it is held that the principles of *Caldwell*[88] apply to common law offences, the court will be free to direct the jury accordingly. The principal disadvantage of this course is that there can be no certainty as to what the mental element is and, if and when the point arises, there will therefore be argument and uncertainty before it is resolved. Furthermore, many may think that it would be wrong in principle that the mental element of an offence should not be stated in the statute creating that offence, however unimportant in practice that mental element may appear to be. A further disadvantage is that, if the court follows the common law to the extent that a person may only be guilty if he either intended the result or actually adverted to the possibility of it, the mental element will differ from that in the statutory offences under the Criminal Damage Act 1971, even though the conduct which is the subject of the charge itself involved damage to property. The difference would, however, be one which would be favourable to the defendant.

(ii) Express provision for intention and recklessness

3.48 Our second possible option would be to provide that a person should be guilty of affray only if he intended to use violence or threats of violence or was reckless as to whether he did so. This would have the effect of applying the decision of the House of Lords in *Caldwell* as to the meaning of " recklessness ". Some consider that the decision in Caldwell is incorrect or unwelcome.[89] It is also inconsistent with an earlier recommendation of this Commission concerning the mental element in criminal offences.[90] Whatever view may be taken of *Caldwell*, such a provision would have the disadvantage that, whenever a person was charged with affray or one of the other offences here under consideration and an offence against the person (something which we consider to be likely to occur in practice in many cases), the jury would have to be directed as to the two different mental elements involved: the definition under the 1861 Act and at common law[90a] is more favourable to the defendant so that it would be necessary expressly to draw the attention of the jury to the distinction between the stated mental

87 See para. 3.43, above.

88 See para. 3.44, above.

89 See e.g. Glanville Williams, " Recklessness Redefined ", [1981] C.L.J. 252 and his articles " Divergent Interpretations of Recklessness " in (1982) 132 N.L.J. pp. 289, 313, 336; and see *Elliott* v. *C.* [1983] 1 W.L.R. 939 (D.C.).

90 Report on the Mental Element in Crime (1978), Law Com. No. 89; see Appendix A (Draft Criminal Liability (Mental Element) Bill), cl. 4(1) where the "standard test " of recklessness as to a result is stated to be: " Did the person whose conduct is in issue foresee that his conduct might produce the result and, if so, was it unreasonable for him to take the risk of producing it? ".

90a But see Addendum at p. 93, below.

element of the present offences and that which is derived from the authorities relating to offences against the person.

(iii) Express provision based on the common law and offences against the person

3.49 Our third option would be to make express provision which, while avoiding the term "recklessness", would reflect the substance of the law as we understand it to be under the Offences against the Person Act 1861 and the common law offences of assault and battery. This would have the advantage that, in directing the jury where the defendant was charged with one of the offences now under consideration and an offence against the person, the court could refer to the mental element in the same terms for both offences. On the other hand, if the defendant's conduct involved damage to property and he was also charged with an offence under the Criminal Damage Act 1971, the court might find it necessary to explain to the jury the different mental element required for that Act in accordance with *Caldwell*. Application of the common law in this way would, of course, involve retaining a mental element which the majority of the House of Lords in *Caldwell* did not favour. Furthermore, we think that express provision would be required to deal with self-induced intoxication. This would not be the case if either of the other two options discussed above were adopted.

(c) *Recommendations*

(i) The mental element

3.50 Notwithstanding the minimal practical importance of the matter in relation to the offences now under consideration, we have found the decision as to which of the above courses to follow one of difficulty. There are disadvantages in each course. On balance, and while the law relating to offences against the person remains as it is, we think that option (iii), above, is the best solution to recommend. One of our principal concerns is that affray and the other two offences with which we are here concerned should be readily understood by juries and that the task of both judges and juries should not be unnecessarily complicated. This is particularly important in the present context where two of the offences are offences which require for their commission several persons to be present and acting together, and where trials may involve several defendants whose part in a confused situation has to be proved to the satisfaction of the jury. Where affray is charged it is likely that one or more offences against the person may also be charged and, in such cases, were we to recommend that recklessness in its *Caldwell* sense should be part of its mental element, the judge would on the law as it stands at present have to explain to the jury the two different mental elements involved. This is a situation which we wish to avoid. It is true that, if the defendant is also charged with an offence under the Criminal Damage Act 1971 (where recklessness in its *Caldwell* sense applies) the judge will, in theory, have to explain the two different mental elements to the jury. It may be that some judges, conscious of their overriding duty to keep the matter comprehensible for the jury, will prefer not to explain the different mental element as laid down in *Caldwell*. But even if a judge failed to do so and directed the jury in accordance with the common law[90b] and the relevant offence against public order, the defendant could not complain, because such a direction would be more favourable to him than a direc-

[90b] But see Addendum at p.93, below.

tion relating to the charge of criminal damage which was based upon *Caldwell*. In reaching our conclusion we have, therefore, chosen that mental element which accords with closely related common law and statutory offences against the person which is the most favourable to the defendant. The difference between them in the context of the offences under consideration is likely to be slight, and we regard the arguments for consistency with the mental element in related offences against the person to be of great importance. Nevertheless, we do not suggest that this result can be regarded as wholly satisfactory: this would only be so if the mental element in offences against the person, offences of criminal damage and the offences under our recommendations were to be harmonised. At this stage we express no views as to whether such harmonisation would be best effected by provision of a mental element common to those offences containing an element of recklessness defined in accordance with *Caldwell* principles, or by a mental element consistent with that which we have chosen for the offences under consideration. This is clearly a matter which requires further consideration in the context of the work which is being carried out upon the general principles governing a Criminal Code.[91]

3.51 In choosing a mental element differing from recklessness as defined in *Caldwell*, we are conscious of the risk that, as we have mentioned,[92] the courts may in future conclude that " recklessly ", when used in relation to the mental element of common law assault and battery or in relation to the word " maliciously " under the Offences against the Person Act 1861, has the same meaning as *Caldwell* and other cases have established that it has when used expressly in a statute. Were that development to occur, it would follow that our recommendations would be out of line with the rest of the law relating both to offences against the person and criminal damage. We have stressed above that our choice of mental element has been finely balanced, and has been dictated in large measure by considerations of consistency with other related offences and the desire to avoid unnecessary complexity in the respective tasks of the judge and jury. If the possible changes in the mental element in offences against the person to which we have referred were to take place, we think it would be desirable for the mental element in our recommended offences of affray, violent disorder and riot to be amended to conform with those changes. We see no difficulty in this course: it would merely entail substitution of the concept of recklessness for the provisions which appear in our draft Bill.

3.52 These provisions, which are to be found in clause 5(1) of the draft Bill, state in substance, that, in the case of the offences of riot or violent disorder, a defendant commits those offences only if he intends to use violence or is aware that his conduct may be violent; in the case of affray, he commits the offence only if he intends to use or threaten violence or is aware that his conduct may be violent or threaten violence. The phrase " aware that his conduct may be " corresponds in substance with common law recklessness as used in offences against the person. It emphasises that the prohibited conduct, the use of threats or violence, does not here necessarily imply a particular result in terms of injury or damage to persons

[91] This work is being undertaken under the aegis of the Law Commission by a group of distinguished academic lawyers: see further Sixteenth Annual Report 1980–1981 (1982), Law Com. No. 113, paras. 1.6–1.7.

[92] See para. 3.45, above.

or property.[93] Clause 5(4) makes clear that the mental element in those offences where numbers are relevant requires to be proved only in respect of the person accused of the offence: the mental element, if any, of the other participants is irrelevant; so also is the self-induced intoxication of anyone other than the defendant himself. Separate provision is made in clause 5(2) for cases of self-induced intoxication, which we consider in more detail in the following paragraphs.

(ii) Self-induced intoxication

3.53 The general principle is that, where the prosecution has to prove recklessness as an element of the offence, then if due to self-induced intoxication the defendant was unaware of a risk of which he would have been aware had he been sober, he is to be treated as if he had been aware of that risk.[94] In other words, in cases of recklessness, self-induced (voluntary) intoxication is immaterial. This applies where the element of recklessness is specified by statute, and is presumably applicable also where recklessness is an element at common law, as in assault and battery, or is inferred through interpretation of the element of malice in offences against the person.[95] However, in making provision for a mental element in the recommended offences of affray, violent disorder and riot, while including a mental element which includes both intent and a form of recklessness, we have expressly avoided use of the term "recklessness". By so doing, we think that, in the absence of express provision, there would be a risk that in construing this provision the courts might conclude that the position of the defendant who was voluntarily intoxicated differed from a defendant who was accused of an offence of which recklessness is in terms an element. We do not think that the position of such a defendant should differ. Accordingly, to put the matter beyond doubt, we have made express provision in clause 5(2) for the defendant who is voluntarily intoxicated, whether by drink or drugs, etc. A person whose awareness is impaired as a result is deemed to have the awareness of one who is sober. In further clarification of issues which might otherwise be left in some doubt for resolution by the courts, clause 5(2) makes clear that intoxication caused solely by the taking or administration of a substance in the course of medical treatment is not to be regarded as self-induced intoxication for these purposes, while clause 5(3) defines intoxication as any intoxication by drink, drugs or other means or any combination of such means.

3.54 An issue in this context which in the absence of express provision is not easy to resolve is the burden of proof in cases where a defendant alleges that his intoxication was not self-induced, for example, where his drink has been "laced". The general principles applying in cases of involuntary intoxication cannot be regarded as entirely clear.[96] We think that in cases arising under our recommended offences express provision should be made to ensure that, if a defendant alleges that his intoxication was not self-induced in those instances where voluntary intoxication is

[93] See paras. 5.30 *et seq.*, below; and compare *R.* v. *Lawrence* [1982] A.C. 510, 525–526 *per* Lord Diplock.

[94] See *Archbold* 41st ed., (1982), para. 17–50, based on *D.P.P.* v. *Majewski* [1977] A.C. 443 as interpreted by *Commissioner of Police of the Metropolis* v. *Caldwell* [1982] A.C. 341.

[95] Although, as we have pointed out in para. 3.45, the meaning of recklessness in these contexts in all probability differs from its meaning when used expressly in a statute.

[96] Compare Smith and Hogan, *Criminal Law* 4th ed., (1978), p. 189 and *Archbold* 41st ed., (1982), para. 17–49.

deemed to have put him in the position of one who was sober, there should be a burden of proving this allegation resting upon the defendant. In cases where a defendant alleges that his intoxication was not self-induced, the means of proving that this was the case lie peculiarly within his knowledge. It therefore seems to us insufficient to provide that the defendant should be taken to have discharged the burden upon him if he does no more than adduce sufficient evidence to raise the issue that his intoxication was not self-induced (the " evidential " burden). In our view this is an instance where the defendant should be required to prove upon the balance of probabilities that his intoxication was not self-induced (the " persuasive " burden). Clause 5(2) of the draft Bill makes provision accordingly.[97]

4. Penalty and Mode of Trial

(a) *Penalty*

3.55 In our Working Paper[98] we proposed a maximum sentence for affray of ten years' imprisonment and a fine, on the basis that the maximum should be set at a level which would enable the courts to deal with the worst cases of premeditated attacks by those already possessing convictions for offences involving violence. We noted two cases in which sentences as high as eight years had been imposed.[99] The great majority of our commentators agreed with us ; a few suggested retention of the present maximum penalty of life imprisonment ; and some thought that a maximum of ten years could not be justified either in principle or by reference to the current practice of the courts.[100] We think the issue needs reconsideration, if for no other reason than that the offence which we now recommend includes within the prohibited conduct mere threats of violence, as distinct from actual violence to the person. But we observe at the outset that our recommendations must, in our view, bear a coherent relationship with both the current practice of the courts and the maximum sentences applicable under offences having a close relationship to the new offence in regard to the kind of conduct penalised. No departure from these criteria could be justified unless it were at some time to be accepted that new principles of sentencing should be applied to the generality of criminal offences.[101]

3.56 In our discussion of the elements of the offence, we stated that in our view the offence should be capable of penalising unlawful fighting whether involving actual violence or threatened violence.[102] A summary of the Court of Appeal's practice in relation to the common law is needed here. Currently

[97] It should be noted that if " recklessness " were to be made a specific element in substitution for the mental element which we recommend (see para. 3.51) no specific provision for self-induced intoxication would be required, since the general principles described in para. 3.53 would then apply to the offences in the draft Bill.

[98] See Working Paper No. 82, para. 4.41.

[99] *R.* v. *Luttmann* [1973] Crim. L.R. 127 (sentence of twelve years reduced to eight), *R.* v. *Bogan* (1972, unrep.) (ten years reduced to eight).

[100] See e.g. A. T. H Smith, " Law Commission Working Paper No. 82—Offences Against Public Order ", [1982] Crim. L.R., pp. 488–489.

[101] See e.g. Sentences of Imprisonment (Report of the Advisory Council on the Penal System) (1978); under these recommendations, new maximum penalties for the ordinary offender would be fixed at the level below which 90% of sentences of immediate imprisonment passed by the Crown Court for the particular offence have fallen in recent years (in the case of affray, 3 years (Report, p. 149)); but where the court was of the view that the nature of the offence and the character, conduct and antecedents of the offender demanded it, a determinate sentence of any length could be imposed. See further Morgan and Wells, " Two Problems in Offences against Public Order ", (1982) 132 N.L.J. 541.

[102] See para. 3.17, above.

it seems that there are three bands of sentences observable on the basis of Court of Appeal decisions on sentencing in cases of affray. In the case of spontaneous affrays, only exceptional violence will justify a sentence higher than eighteen months; where such violence is proved, then three years has been upheld. Where there has been an element of planning but a low level of violence, sentences of up to four years have been upheld, but where in such cases there has been a high degree of violence, sentences may vary from three to eight years or more according to the level of violence and the numbers involved.[103] However, three matters must be noted here. First, in what appear to be the only two cases in which sentences of eight years or more have been upheld, the defendant was also convicted of other offences. In one,[104] the defendant was also convicted 'inter alia' of wounding with intent to inflict grievous bodily harm (where the maximum sentence is life imprisonment) when in the course of a serious arranged fight between two rival gangs, he shot an opponent in the stomach at a range of six feet. In the other,[105] defendant G, convicted also of conspiracy to inflict grievous bodily harm, took a leading part in an arranged gang attack on an individual, who was left lying in the road and killed when run over by a vehicle driven by defendant C, who was also convicted of murder and conspiracy to inflict grievous bodily harm. Secondly, it is, we think, noteworthy that in recent years between 98 per cent and 99 per cent of all those convicted of affray and given a custodial sentence[106] were sentenced to periods of imprisonment of three years or less: only a handful of defendants were imprisoned for more than three years. Thirdly, it is relevant to note that the Court of Appeal has indicated[107] that it is desirable to impose the leading sentence for affray, and to impose other sentences to run concurrently. While this is readily understandable in the context of a common law offence for which there is no statutory maximum penalty, we take the view that, in a scheme of statutory offences, there must be a close and logical relationship between the maximum penalty for any new offence and the maxima for other offences arising from the incident in question for which the defendant might be charged. These include the offences against the person summarised in the Table at the beginning of this Part of the Report.[108]

3.57 The least serious of these offences, common assault, carries a maximum penalty on indictment of one year. The maximum for unlawful wounding is five years; under this section, no proof of intent to inflict bodily harm is required. Cases of unlawful wounding do not usually receive more than three years, although sentences of up to five years have been imposed in exceptional cases.[109] On the other hand, wounding with intent to inflict grievous bodily harm under section 18 of the Offences against the Person Act 1861, where the maximum is life imprisonment, generally

---

103 See Thomas, *Principles of Sentencing* 2nd ed., (1979), pp. 111–112 and *R.* v. *Bogan*, n. 105, below; as to planned and unplanned affrays, see *R.* v. *Annett and Moore* (1980) 2 Cr. App. R. (S.) 318. And see also Appendix B, below.

104 *R.* v. *Luttmann* [1973] Crim. L.R. 127; the sentence was reduced from twelve years to eight.

105 *R.* v. *Bogan* (1972) unrep.; see Thomas, *ibid.*, p. 111. Details are taken from the transcript. C was sentenced to life imprisonment for murder, eight years for conspiracy and ten years for affray, G to eight years for conspiracy and ten years, reduced on appeal to eight, for affray.

106 It seems that nearly half found guilty were fined: see Appendix B.

107 See *R.* v. *Wilson* (1981) 3 Cr. App. R. (S.) 30.

108 See para. 3.2, above.

109 See Thomas, *Principles of Sentencing* 2nd ed., (1979), p. 100.

attracts a higher range of sentence than affray, which reflects its requirement of an intent to harm a particular individual. Sentences of less than three years are rare; those involving an impulsive act of violence with the use of a weapon or an intent to inflict serious injury usually receive from three to five years, but up to eight years is imposed where there are aggravating factors such as premeditated infliction of grave injury, the use of a lethal weapon or absence of provocation. Sentences of over eight years are usually imposed only where grave injuries are deliberately inflicted during the course of another crime such as robbery or blackmail.[110]

3.58 As the cases cited above show, affray is often charged with other extremely serious offences for which the maximum sentences may range up to life imprisonment. In those offences, where proved, there is evidence at least of an intent to cause grievous bodily harm to a particular individual, or of a conspiracy or attempt to cause such harm to others (where the maximum penalty is the same as that of the completed offence).[111] But where the only offence which can be proved is the new offence which we recommend—and it is on this basis alone that the maximum penalty for it must be determined—conviction for it will indicate only that the defendant took part, whether by acts or threats of violence to the person, in a fight sufficiently serious to put others in fear of their personal safety. The maximum sentence must, we think, be capable of dealing adequately with a defendant in respect of whom there is evidence that he took a leading part in a large-scale disturbance causing extensive injuries and bloodshed. It must, however, be borne in mind that, ex hypothesi, evidence of the defendant actually inflicting such injuries or of an intent or attempt to do so would not be necessary for proof of a charge of affray. If there is such evidence, and a penalty of three years is thought to be insufficient, we see no reason why the defendant should not be charged with the appropriate offence, for which a higher maximum sentence would be available. Taking into consideration the current range of sentences imposed for related offences against the person and for affray, where, as we have noted, nearly 99% of defendants receiving a custodial sentence have in recent years been sentenced to three years' imprisonment or less, we have come to the conclusion that the maximum sentence where other offences cannot be proved should not exceed three years. If there are aggravating factors which might justify a higher sentence than this, the situations in which they occur are likely to provide sufficient evidence for proof of an appropriate offence against the person or a conspiracy or attempt to commit such an offence, carrying a higher maximum penalty. And if the disturbance is of a serious character, it is highly probable that the defendant will be guilty of the offence of violent disorder recommended in Part V of this Report, for which a maximum penalty of five years' imprisonment is recommended.

3.59 Accordingly, we *recommend* that the maximum penalty for the offence should be *three years' imprisonment and a fine*.[112]

(b) Mode of trial

3.60 Our Working Paper[113] proposed that the present position, under which affray is triable only on indictment, should be retained. We preferred

110 See Thomas, *ibid.*, pp. 93 *et seq.*
111 See Criminal Law Act 1977, s. 3 (conspiracy) and Criminal Attempts Act 1981, s. 4 (attempt).
112 See Appendix A, cl. 3(3).
113 See Working Paper No. 82, para. 4.43.

not to depart in this instance from the recommendations of the James Committee's Report on the Distribution of Criminal Business between the Crown Court and Magistrates' Courts,[114] which considered that affray should remain triable only on indictment because it "tends to involve a large number of defendants . . . cases are likely to last several days" and "difficult matters relating to the involvement of individual defendants often arise which . . . are particularly suitable for determination by a jury".[115]

3.61 Although a majority of our commentators approved our provisional proposal, several of them put forward strong arguments to the contrary which have led us to reconsider the issue. In particular we are impressed with the contention that there is at present no offence triable either way, or indeed triable only summarily, which is entirely appropriate to deal with minor outbreaks of street fighting.[116] It is true that section 5 of the Public Order Act 1936 is often used for this purpose, and such use has been approved.[117] Section 5 is by its terms, however, primarily intended to deal with threats to the peace, and there is much to be said for the availability of an offence which expressly deals with actual violence. This would be of particular value in magistrates' courts in the case of a defendant who on later occasions appears on similar charges; if his previous convictions relate solely to threatening behaviour, the court has little guidance as to whether he has previously committed offences involving the use of actual violence. The statistics relating to sentencing for affray lend support to the suggestion that an offence triable either way is needed; as the figures given in Appendix B indicate, a substantial proportion of those convicted of affray in recent years have received sentences which fall within the competence of magistrates to impose.

3.62 The arguments raised by the James Committee remain strong. The Committee expressly discounted the contention in regard to sentencing because of the evidential difficulties which they saw in the trial of many cases of affray. We do not underestimate the reality of these difficulties in many instances. It is for that reason that cases involving only a moderate degree of violence may not necessarily be suitable for trial in a magistrates' court;[118] whether a case is so suitable depends not only upon the degree of violence used but also upon an assessment of the difficulties likely to arise in the course of the trial in relation to the evidence, and the consequent likelihood that the trial may take a substantial period for its disposal. However, other serious offences are triable either way,[119] and we see no reason why the difficulties to which we have alluded should not be taken into consideration in deciding whether a case is suitable for summary trial. We are, therefore, not persuaded that in relation to a new offence it is necessary to adhere to

---

114 (1975) Cmnd. 6323.

115 *Ibid.*, at para. 131.

116 Apart from charges of assault (see para. 3.2, above) which, for reasons given in paras. 3.3 and 3.5 may not be available.

117 See para. 3.5, above and *R.* v. *Oakwell* [1978] 1 W.L.R. 32, n. 12.

118 Compare *R.* v. *Crimlis* [1976] Crim. L.R. 693.

119 See Magistrates' Courts Act 1980, Sched. 1; the offences there tabulated (which are not exhaustive: see s. 17(2)) include the Offences against the Person Act 1861, ss. 16 (threats to kill), 20 (inflicting bodily injury), 47 (assault occasioning bodily harm—common assault), offences under the Theft Act except robbery, aggravated burglary, blackmail, assault with intent to rob and certain burglaries including those using violence or threatened violence to the person in a dwelling, and offences under the Criminal Damage Act 1971 save for offences under s. 1(2).

the position as regards common law affray: we think that there are likely to be many cases in which summary trial would be possible and appropriate.

3.63 It remains only to consider whether the new offence is of such a character that it is suited to summary trial. It consists essentially of violence or threats of violence of such a nature as to cause fear to those in the vicinity and, as we pointed out,[120] not all cases of violence will be covered by the offence: the criterion of causing fear is, in our view, a genuine and restrictive one. Does the inherent seriousness of the offence preclude summary trial? In relation to this issue, it is noteworthy that, in specifying certain offences which were to be triable summarily for the first time, the Criminal Law Act 1977 excluded certain offences in the course of which acts or threats of violence occur.[121] On the other hand, that Act made threats to kill under section 16 of the Offences against the Person Act 1861 triable summarily for the first time, and inflicting bodily injury under section 20 of that Act has been so triable for many years. Moreover, it is clear that cases of violent fracas which, if our recommendations were implemented, would in all probability fall to be dealt with under the new offence, are already tried in magistrates' courts by charges under section 5 of the Public Order Act 1936.[122] Thus although the new offence is intended to deal with disturbances of a substantial character, we do not think that it would be unsuitable for summary trial in the appropriate cases.

3.64 For the foregoing reasons, we *recommend* that the new offence be *triable either way,* summarily in magistrates' courts or on indictment in the Crown Court.[123]

PART IV

ROUT

4.1 The common law offence of rout consists of a disturbance of the peace by three or more persons who assemble together with an intention to do something which, if executed, will amount to riot and who actually make a move towards the execution of their common purpose, but do not complete it.[1] Thus it agrees in all particulars with riot except that it may be complete without the execution of the intended enterprise.[2] *Archbold* states that indictments for the offence are not now drawn, as the jury can convict of rout on an indictment for riot if the complete riot is not proved.[3] Like all the common law offences examined in this Report, rout is punishable by a fine or imprisonment at the discretion of the court.

---

120 See para. 3.38, above.

121 E.g. burglaries in which any person in a dwelling is subjected to violence or the threat of violence; see now Magistrates' Courts Act 1980, Sched. 1 and n. 119, above.

122 See e.g. *R.* v. *Troke and others* (1977) unrep., cited in para. 8.11, below (a prosecution under the Metropolitan Police Act 1839, s. 54(13)).

123 See Appendix A, cl. 3(3).

1 *Redford* v. *Birley* (1822) 1 St. Tr. (N.S.) 1071, 1211, 1214, and see *Russell on Crime* 12th ed., (1964), vol. 1, p. 255.

2 See para. 6.2, below.

3 41st ed., (1982), paras. 25–12 and 25–17, citing *R.* v. *O'Brien* (1911) 6 Cr. App. R. 108.

4.2 Prosecutions for the offence appear to have been non-existent in modern times. As long ago as 1840 the Criminal Law Commissioners[4] criticised the distinction between the three offences of rout, riot and unlawful assembly as " unnecessary and inconvenient ", and the English draft Code of 1879, while providing for offences of unlawful assembly and riot, made no provision for rout.[5]

4.3 Our Working Paper[6] provisionally proposed abolition of the offence without replacement; this proposal met with universal agreement on consultation. Accordingly, we now *recommend* that the common law offence of rout be abolished without replacement.[7]

PART V

UNLAWFUL ASSEMBLY

5.1 In this and the next Part of this Report we consider in detail the major offences which have as an essential element the conduct of several people acting together. We commence with those offences which we recommend in place of unlawful assembly. While these are less serious in character than the offence of riot, it is in this context that we must examine such issues as the appropriate threshold for serious criminal offences in the field of public order, the justification for offences which, for convenience, may be termed " combination offences ", requiring the presence of several individuals acting together, and how, in the context of new statutory offences, the essential common law concept of breach of the peace is to be dealt with.

A. Present law

5.2 There is no agreement as to precisely what constitutes an unlawful assembly. This uncertainty is reflected in the recent case of *R.* v. *Chief Constable of Devon and Cornwall, Ex parte Central Electricity Generating Board*,[1] where members of the Court of Appeal differed in their assessment of the authorities upon what constitutes an unlawful assembly. Lord Denning M.R. remarked that—

" the old authorities, going back to Coke, Blackstone, Stephen and Archbold, all say that an unlawful assembly is an assembly of three or

---

4 242 Parl. Papers (Reports, 1840), Vol. 20, p. 1.
5 See Appendix C, para. 2, below.
6 See Working Paper No. 82, para. 5.4.
7 See Appendix A, cl. 7(*a*).

1 [1982] Q.B. 458. In this case peaceful protesters obstructed C.E.G.B. representatives from carrying out their duties on farmland which the C.E.G.B. were authorised by statute to inspect, thereby committing an offence under the Town and Country Planning Act 1971, s. 281(2). The C.E.G.B. requested the Chief Constable's assistance to enable it to carry out its duties by preventing further obstruction. On his declining such assistance, the C.E.G.B. applied for an order of mandamus requiring him to instruct police officers to remove the obstructers. The court dismissed the application, but held that the police were entitled to be present in order to prevent any breach of the peace such as was liable to occur if the C.E.G.B., as it was entitled to do, used minimum force to eject demonstrators who were breaking the law. See further, para. 5.8, below.

more persons with intent to commit a crime by open force. I think this case comes within that statement and I think it is still the law."[2]

On the other hand, Lawton L.J. said that—

> " if the obstructors are three or more in number and by conduct show an intention to use violence to achieve their aims or otherwise behave in a tumultuous manner . . . those present and forming part of the gathering will be committing the offence of unlawful assembly. . . . Comments in *Coke's Institutes* . . . and in *Blackstone's Commentaries* . . . which seem to show that an unlawful assembly can occur without the factor of either violence or tumult do not accurately state the modern law."[3]

This case suggests that it may no longer be safe to rely on the authority of the older institutional writers. Nonetheless it may be observed that the recent characterisation by Lord Hailsham of unlawful assembly as " only an inchoate riot "[4] is consonant with the earliest authorities, including Coke, who regarded unlawful assembly as an incipient riot.[5] It is, however, convenient to take as a working definition that put forward by Smith and Hogan,[6] which is similar to those of other recent writers[7]—

> " (1) An assembly of three or more persons ;
>
> (2) A common purpose (*a*) to commit a crime of violence or (*b*) to achieve some other object, whether lawful or not, in such a way as to cause reasonable men to apprehend a breach of the peace."

B. Working Paper proposals and response

5.3 The proposals in our Working Paper relating to affray and riot both excluded the use of threats of violence to persons or property from the ambit of the new statutory offences which we designed to replace the common law.[8] This was one reason which led us to the view that a new offence of unlawful assembly was needed in place of the common law. Threats of violence are currently dealt with also by charges under section 5 of the Public Order Act 1936.[9] Prosecutions under section 5, however, are triable only

---

2 *Ibid.*, at p. 471.

3 *Ibid.*, at pp. 473–474.

4 *Kamara* v. *D.P.P.* [1974] A.C. 104, 116, citing *Russell on Crime* 12th ed., (1964), vol. 1, p. 256.

5 See e.g. Lambard, *Eirenarcha* (1581), c. 19, p. 175 and Coke, 3 *Institutes*, p. 176. These and other authorities are discussed at length in Working Paper No. 82, paras. 2.43–2.48.

6 *Criminal Law* 4th ed., (1978), p. 750.

7 See *Archbold* 41st ed., (1982), para. 25–12, which relies with minor modifications on the definition in all editions of Stephen's *Digest of the Criminal Law*; D.G.T. Williams, *Keeping the Peace* (1967), p. 236; de Smith, *Constitutional and Administrative Law* 4th ed., (1981), p. 501. But compare Supperstone, *Brownlie's Law of Public Order and National Security* 2nd ed., (1981), p. 123: the offence " requires an assembling of three or more in such a manner as to give persons of ordinary firmness reasonable grounds to fear a breach of the peace "; the defendant must be proved to have " intended to use or abet the use of violence; or to do or abet acts which he knows to be likely to cause a breach of the peace ".

8 See paras. 3.1, above and 6.5, below.

9 As amended by the Race Relations Act 1965, s. 7 and the Criminal Law Act 1977, Sched. 1. This provides that—

> " Any person who in any public place or at any public meeting—
>
> (*a*) uses threatening, abusive or insulting words or behaviour, or
>
> (*b*) distributes or displays any writing, sign or visible representation which is threatening, abusive or insulting
>
> with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned, shall be guilty of an offence, and shall on summary conviction be liable to imprisonment for a term not exceeding six months or to a fine not exceeding £1,000 or to both."

summarily and do not apply to threatening behaviour which occurs on private premises or any other place to which the public does not have access. Particularly in the case of serious threats by a large number of people, section 5, we said, might not provide adequate penalties.[10] We also pointed out in our Working Paper that unlawful assembly penalises, not only the use by the defendant of threatening behaviour, but also conduct by the defendant designed to provoke others to cause a breach of the peace.[11] We considered that there was a need for a new statutory offence covering both these types of conduct, which were therefore expressely covered by the offence of unlawful assembly provisionally proposed in the Working Paper. The offence was to be triable on indictment with a maximum penalty of 5 years' imprisonment and a fine, and would have penalised anyone who knowingly and without lawful excuse took part in an unlawful assembly, consisting of—

" (*a*) three or more persons present together in a public or private place ;

(*b*) whose purpose is to engage in, or who are engaged in, a course of conduct which *either*—

(i) involves the use of violence or threats or displays of violence by some or all of those present ; *or*

(ii) has by means of threatening, abusive or insulting words or behaviour the object of provoking the use of violence by others ;

(*c*) and whose words or actions in that place would reasonably have caused any other person, if present, to apprehend an imminent breach of the peace. "[12]

Taken together, these paragraphs in substance reflected the present common law, and also clarified it in so far as subparagraph (*b*) (ii) defined with precision the principles of the law as settled by the cases of *Beatty* v. *Gillbanks* and *Wise v. Dunning*.[13]

5.4 The response to this proposal was largely favourable. There were, however, a variety of comments which favoured approaches differing somewhat from the one which we adopted. We have referred already to some commentators who thought the offence to be unnecessary.[14] Some other commentators, in particular the Council of Circuit Judges, the Justices' Clerks' Society and the Police Superintendents' Association favoured the offence being made triable either way, the Society arguing that magistrates' courts would be capable of dealing with many cases and imposing an adequate

---

10 See Working Paper No. 82, para. 6.10.

11 In *Beatty* v. *Gillbanks* (1882) 9 Q.B.D. 308, it was held that a man may not be convicted merely " for doing a lawful act if he knows that his doing it may cause another to do an unlawful act " (*ibid.*, at p. 314 *per* Field J.). In this case members of the Salvation Army proposed to march through a town knowing that, as on previous occasions, they might be opposed by the " Skeleton Army ". The local magistrates banned further processions, but their march took place, amidst opposition. Its leader was arrested and, on complaint alleging unlawful assembly, he and others were bound over. The order was quashed by the Divisional Court. But in *Wise* v. *Dunning* [1902] 1 K.B. 167, D held meetings in Liverpool, using language and gestures insulting to the local Roman Catholic population. His opponents and supporters committed breaches of the peace, though he himself was neither involved nor incited others. He was held properly bound over to keep the peace and be of good behaviour. See further Working Paper No. 82, paras. 2.57–2.63 and 6.11.

12 See Working Paper No. 82, para. 6.18.

13 See n. 11, above.

14 See paras. 1.11–1.12, above.

sentence. Others considered that the concept of "breach of the peace" should, if used, be defined. We were also presented with suggestions for alternative offences, some of them being based on a modified form of section 5 of the Public Order Act 1936. One of these suggestions[15] was, in substance, a section 5 offence dependent on an element of combination, requiring three or more to be using threatening, abusive or insulting behaviour; another[16] was similar to section 5 but eliminated the objective element ("whereby a breach of the peace is likely to be occasioned"), confining the offence to cases of intent. A common feature of these suggested offences was, first, the elimination of the concept of breach of the peace and the substitution of a concept based on violence or threats of violence to persons or property; and, secondly, trial either way, on indictment or in the magistrates' court. These and other detailed comments on our provisional proposals have caused us to reconsider them. We now examine the factors which have led us to conclusions which in some respects differ from those in our Working Paper.

C. Reconsideration of unlawful assembly

5.5 Before commencing this reconsideration, some preliminary matters deserve further mention. Our new offence of affray which replaces common law affray covers both the threat of violence and actual violence inflicted by an individual upon another or others in circumstances which disturb the public peace to an unacceptable degree. The offence of unlawful assembly proposed in our Working Paper also penalised violence and threats of violence, and any offence or offences which we now recommend in place of the common law must deal with both. But if affray also deals with both, is there any real need for further offences covering to a considerable degree the same prohibited conduct? Several reasons may be advanced which suggest that there is such a need. In the first place, the new offence of affray, like common law affray, does not deal with damage to property in circumstances of public disorder. We have explained in the context of affray the difficulties which may arise in relation to the charging in particular circumstances of offences against the person;[17] there may be similar difficulties in charging criminal damage in circumstances where a mob is on the rampage. However, we do not think it right that affray, which is designed to deal in essence with unlawful fighting, should be adapted to penalise in addition damage to property or the threat of damage to property in the context of public disorder: such an offence would be unsuited to the relatively straightforward fact situations which are its primary concern.[18] Secondly, an offence is needed which specifically penalises acts, not themselves necessarily violent, which provoke others to violence. Again, our new offence of affray does not deal with this and could not readily be adapted to do so, while the penalties for such behaviour under section 5 of the Public Order Act 1936 are limited to those which may be imposed on summary trial. In this connection, it is noteworthy that, at the time when it was recommended that section 5 should become triable only summarily, some anxiety was expressed by the James Committee at the disadvantage that this would have in reducing

15 From Professor A.W. Bradley.
16 From the Society of Public Teachers of Law.
17 See para. 3.5, above.
18 See further, Working Paper No. 82, paras. 5.12–5.14 where this issue is considered in the context of riot.

the maximum penalty available.[19] We believe that the offences which we recommend in place of unlawful assembly would substantially meet the Committee's concern. Finally, we emphasise the importance of the element of persons acting together or in combination. The new offence of affray is deliberately designed to deal with the accused in isolation, although it may well often be the case that in typical situations the accused will not be acting alone. We have given our reasons for defining the elements of that offence by reference solely to the conduct of the accused[20] and for recommending a relatively low maximum penalty. But where it can be proved that several individuals were present together and acting violently, their weight of numbers in itself increases the danger of their conduct and justifies the imposition of a higher penalty. Historically the law has attached importance to this element of numbers,[21] and we do not think that current circumstances can be said to have diminished its significance. As our survey of foreign law indicates,[22] this factor continues to be of importance in jurisdictions influenced by English common law. Both this Part and Part VI of this Report are therefore concerned with how best to formulate new offences penalising conduct in which the element of a number of people present and acting together is a principal feature.

1. The Need for Reconsideration

5.6 We adhere to the view expressed in our Working Paper that there is a need for an offence or offences, in place of unlawful assembly at common law, to penalise the two broad situations covered by that offence: that is, conduct by a number of individuals which gives rise to a fear of a breach of the peace, and conduct by such a number which is intended to provoke others to violence. Several considerations, however, have led us to reconsider the form and scope of a new offence. We believe that it was too wide in the scope of conduct which it proposed to penalise. Like the common law which it sought to codify, it proposed to penalise both a group whose *purpose* was to use or threaten violence or to provoke others to use violence and a group actually *using* acts of violence. In doing so, it would have penalised with one maximum penalty (of five years' imprisonment) types of conduct which differed both in their nature and in their degree of criminality. This had several undesirable consequences. First, the definition of the proposed offence itself was undeniably complex, a matter which did not go unremarked by our commentators, two of whom[23] thought it appeared "like a minefield for students of statutory interpretation." The triple requirement under paragraph (*b*) (ii) of the offence[24] of proof of knowledge, purpose and object is an indication that such comments were not without foundation. Secondly, the complexity of the proposed offence would have made it suitable only for trial on indictment, for which purpose it was, indeed, designed. However, we have been persuaded by some of our commentators that it is preferable for many incidents of public disorder, excluding, obviously, the more serious,

---

19 See Report on the Distribution of Criminal Business between the Crown Court and Magistrates' Courts (1975), Cmnd. 6323, para. 153.

20 See paras. 3.20–3.22, above.

21 See e.g. *R.* v. *Caird* (1970) 54 Cr. App. R. 499 (the Garden House Hotel riot at Cambridge), and see further para. 6.13, below.

22 See Appendix C, below.

23 See Morgan and Wells, "Two Problems in Offences against Public Order", (1982) 132 N.L.J. 541.

24 See para. 5.3, above.

to be dealt with expeditiously in the magistrates' courts, and that there is therefore a need for an offence or offences intermediate in the scale and triable either way, between the most serious offence of riot, which we propose should be triable only on indictment, and section 5 of the Public Order Act 1936, which is triable only summarily.

5.7 Other criticisms of our provisional proposals have also assisted our reconsideration. Several commentators disliked our use of the concept of breach of the peace as an element of an important offence without some more precise indication of its meaning, and for reasons which we expand upon below,[25] we have come to the conclusion that it is an unsatisfactory concept to use in major new statutory offences. Again, some commentators contended that the ambit of criminal liability was too extensive in so far as the offence would have been capable of penalising those whose conduct fell short of threats of violence, even though the purpose of their gathering might be to use such threats at some future time. If this is a valid criticism of the offence proposed in the Working Paper, it applies also to the common law, which for the most part that offence codified and clarified. But irrespective of whether this is the case, the contention does focus attention on a matter of fundamental importance, namely, what minimum disturbance to the public peace justifies the imposition of substantial penalties by means of new and serious offences designed to deal with public disorder. We deal with this in the following paragraphs, and in succeeding paragraphs examine the other problems raised by the considerations outlined above.

2. The Threshold of Criminal Sanctions

(a) *Situations excluded from criminal sanctions*

5.8 The case of *R.* v. *Chief Constable of Devon and Cornwall, Ex parte C.E.G.B.*[26] (" the *C.E.G.B.* case ") is a convenient illustration of the difficulties attendant on the rationalisation of the law in this area. The facts have been set out above,[27] as has the difference of opinion amongst the members of the Court of Appeal as to whether on those facts the offence of unlawful assembly had been committed. Any new provision replacing the common law must make clear beyond doubt whether the situation which arose in that case would amount to an offence under that provision. In essence, the case concerned a peaceful protest causing an obstruction which constituted a non-arrestable offence. The powers of the police to intervene depended on whether, on these facts, a breach of the peace could reasonably have been apprehended. Two members of the Court of Appeal considered that a breach could have been apprehended as soon as C.E.G.B. representatives exercised their right to use reasonable force to eject the protesters ;[28] but the third member considered that, " if those obstructing do allow themselves to be removed without struggling or causing uproar . . . the police will have no reason for taking action ".[29] It followed, on the latter view, that the police could inter-

25 See para. 5.14, below.

26 [1982] Q.B. 458. For comment on the case see Morris, " Passive Resistance and Police Powers ", (1982) 45 M.L.R. 454 and A.T.H. Smith, " Breaching the Peace and Disturbing the Public Quiet ", [1982] Public Law 212.

27 See para. 5.2, n.1, above.

28 See [1982] Q.B. 458, 471 *per* Lord Denning M.R., and 479 *per* Templeman L.J. Lord Denning also thought that the conduct of the protesters itself amounted to a breach of the peace: *ibid.*, at p. 471 and see para. 5.14, below.

29 *Ibid.*, at p. 476 *per* Lawton L.J.

vene only if and when disorder was likely to arise upon the lawful use of force.

5.9 In our view, any new provision replacing unlawful assembly should not seek to penalise situations such as that which arose in the *C.E.G.B.* case.[30] That situation was, as the Court of Appeal unanimously asserted, unlawful in so far as (non-violent) criminal offences of obstruction were being committed ; but major offences relating to public order should, we think, be confined in their application to cases where there is threatened disorder. Where, as in the instant case, there is some doubt as to the applicability of the substantive criminal law, we do not think that these doubts should be resolved by creation of a serious offence which might have the result of extending its ambit: we reiterate the view put forward earlier in this Report[31] that it is necessary to move with caution in an area which affects the fundamental liberties of the subject. In cases of apparently peaceful protest, exemplified by the *C.E.G.B.* case, which may go more or less closely to the point where a breach of the peace may be apprehended, it seems to us preferable for it to be left to the courts to decide in cases as they arise whether it was right that a breach of the peace might reasonably have been apprehended in the circumstances,[32] and whether such a breach is to be apprehended at the moment when lawful force is used to remove an unlawful obstruction or only if and when impediments prevent the peaceful exercise of such lawful force. When in such situations a breach of the peace may reasonably be apprehended, the police may intervene and, if wilfully obstructed in the execution of their duty, those responsible will commit an offence ;[33] alternatively the police may arrest the culprits with a view to obtaining an order binding them over to keep the peace.[34]

(*b*) *Threatening, abusive or insulting words or behaviour*

5.10 Quite apart from its complexity, the offence proposed in our Working Paper,[35] like the common law which it reflected, would not have left entirely beyond doubt the question whether conduct such as that in issue in the *C.E.G.B.* case fell outside its scope. This uncertainty stems, first, from the fact that, again like the common law, it would have penalised those whose conduct had not reached the stage of the use of threats (although it required a purpose to use threats)[36] and secondly, from its dependence upon an apprehension of a breach of the peace, which, as the *C.E.G.B.* case indicates, is a criterion capable of differing interpretations upon identical facts. We now think that in any new offence it would not be right to penalise those capable of being penalised by the common law who, while they may share a common purpose to use or threaten violence, have not reached the stage of demonstrating their adherence to that purpose by the

30 The situation is, of course, only illustrative; other parallel situations raising precisely similar questions could arise, e.g. in the course of peaceful trade union picketing where an obstruction of the highway occurs amounting to an offence under the Highways Act 1980, s. 137.

31 See paras. 2.2–2.3, above.

32 See further, para. 5.8, above.

33 Under the Police Act 1964, s. 51(3); see para. 1.6, above.

34 The Law Commission is currently examining the power to bind over to keep the peace and be of good behaviour.

35 See para. 5.3, above.

36 Compare Lord Denning's observation in the *C.E.G.B.* case, quoted in para. 5.2, above that the apparently peaceful protest amounted to " an assembly . . . to commit a crime by open force ", and thereby constituted an unlawful assembly.

use of threatening behaviour.[37] Moreover, we also think that the offence provisionally proposed in our Working Paper, in so far as it closely reflected the common law, did not take sufficient account of developments in the law occurring since the principles of the common law were fully established in the 19th century. The Public Order Act 1936, dealing with processions and with police powers in relation to them, covers much of the ground with which the common law previously had to deal, and the common law powers of the police have also been further defined in recent times.[38] It would be remarkable if, although a procession was not unlawful under the terms of the 1936 Act, participants in that procession were by the mere act of participation to commit an offence in consequence of the scope of any new offence relating to unlawful assemblies.[39]

5.11 By far the most frequently used offence dealing with threatened public disorder is section 5 of the Public Order Act 1936[40] which penalises " threatening, abusive or insulting words or behaviour " likely to occasion a breach of the peace. As *Brutus* v. *Cozens*[41] clearly demonstrates, behaviour is not insulting merely because it gives rise to a risk of a breach of the peace: the activities of the appellant in disrupting an international tennis match caused anger among spectators, some of whom tried to hit him as he was removed. Nonetheless, the magistrates found his behaviour, albeit annoying and irritating, not within the terms of section 5. The Divisional Court[42] disagreed with the magistrates, but the House of Lords restored their decision. Lord Reid's speech indicates the reasons for this—

> " Parliament had to solve the difficult question of how far freedom of speech or behaviour must be limited in the general public interest. It would have been going much too far to prohibit all speech or conduct likely to occasion a breach of the peace because determined opponents may not shrink from organising or at least threatening a breach of the peace in order to silence a speaker whose views they detest. Therefore vigorous and it may be distasteful or unmannerly speech or behaviour is permitted so long as it does not go beyond any one of three limits. It must not be threatening. It must not be abusive. It must not be insulting. I see no reason why any of these should be construed as having a specially wide or a specially narrow meaning. They are all limits easily recognisable by the ordinary man. Free speech is not impaired by ruling them out. But before a man can be convicted it must be clearly shown that one or more of them has been disregarded."[43]

---

37 In practice we think it would usually be difficult to prove the common purpose require by the common law unless the defendant had actually done something in pursuance of that purpose, such as the use of threats; but compare the cases cited in *Archbold* 41st ed., (1982) para. 25–4 (m), where charges of unlawful assembly, rather than conspiracy, were brought in certain cases of agreements to commit offences against the person.

38 See, as to powers of arrest, *R.* v. *Howell* [1982] Q.B. 416, and as to the citizen's power of arrest, *Lavin* v. *Albert* [1982] A.C. 546.

39 Compare Supperstone, [1982] Public Law p. 354 at p. 360.

40 See n.9, above for the full text of the section.

41 [1973] A.C. 854.

42 *Sub. nom. Cozens* v. *Brutus* [1972] 1 W.L.R. 484.

43 [1973] A.C. 854, 862. It has been suggested that this decision was " an implicit reaffirmation of the principle in *Beatty* v. *Gillbanks:* that one's lawful behaviour, however distasteful, does not become unlawful because of the reactions of others ": D.G.T. Williams, " The Law and Public Protest ", Cambridge/Tilburg Law Lectures: First Series (1979), p. 27 at p. 31. See further para. 5.13, below.

5.12 We have come to the conclusion that a new offence replacing unlawful assembly at common law should take as its minimum requirement the use of threatening, abusive or insulting words or behaviour. This, therefore, is our starting point. Obviously, there may be, as we point out below,[44] a need for other offences which penalise more serious forms of misbehaviour, where, for example, threats and abuse spill over into the use of actual violence. But if any new offence has as a major element penalties attached to words or behaviour having these characteristics, we take the view that it could not, in the light of Lord Reid's comments, be viewed as unduly restricting freedom of speech or conduct, and that these terms are acceptable and appropriate for defining the limits within which public protest may take place without incurring serious criminal penalties.[45]

5.13 We see a further advantage in employing, to the extent indicated, the terminology of section 5 of the 1936 Act. One objective of the offence proposed in our Working Paper was a clarification of unlawful assembly at common law in so far as it dealt with the provocation of others to use violence: the principle embodied in the decision of *Beattty* v. *Gillbanks*.[46] This it did by means of a specific, and fairly elaborate, provision.[47] However, by using the terminology of section 5, we believe any new offences would incorporate the essence, in greatly simplified form, of the principle of *Beatty* v. *Gillbanks*: provided a person's words or behaviour are not "threatening, abusive or insulting", he will commit no offence even if it provokes others to unlawful behaviour.[48] This terminology, then, represents in our view the appropriate threshold of criminality in any new and serious offence dealing with public disorder.

3. Breach of the Peace and Section 5 of the Public Order Act 1936

5.14 The other principal element of section 5 of the Public Order Act 1936 is the likelihood of the words or behaviour occasioning a breach of the peace. The apprehension of a breach of the peace was also an element of the offence of unlawful assembly proposed in our Working Paper, as it is of the common law crime. For several reasons we have concluded that it should not constitute an element in any new offence. In the first place, there is a margin of doubt as to what constitutes a breach of the peace which we think makes it unacceptable as a major element in any new statutory offence carrying heavy penalties. It is true that the decision of the Court of Appeal in *R.* v. *Howell*[49] has done much to clarify the meaning of

---

44 See para. 5.19.

45 We are aware of the suggestion that in some magistrates' courts the plain meaning of these words, as used in s. 5 of the Public Order Act 1936, appears sometimes to have been diluted, with the consequence that freedom of speech may have been unduly limited: see Supperstone, *Brownlie's Law of Public Order and National Security* 2nd ed., (1981) pp. 6 *et seq.*, particularly pp. 14–15. However the case of *Brutus* v. *Cozens* [1973] A.C. 854 indicates the remedy available for this should it occur.

46 (1882) 9 Q.B.D. 308; see n.11, above.

47 See para. (*b*)(ii) of the offence set out at para. 5.3, above.

48 Consequently, we do not favour the provision to be found in s. 86 of the New Zealand Crimes Act 1961 (as amended in 1973) (see Appendix C, para. 9) which states that "no one shall be deemed to provoke other persons needlessly and without reasonable cause by doing or saying anything that he is lawfully entitled to do or say". This attempt to incorporate the principle in *Beatty* v. *Gillbanks* (see n.11, above) appears to be superfluous, since it states in substance that a person is not to be penalised for what he may in any event lawfully say or do.

49 [1982] Q.B. 416. See in particular the dictum of Watkins L.J. at p. 426: "We cannot accept that there can be a breach of the peace unless there has been an act done or threatened to be done which either actually harms a person, or in his presence his property, or is likely to cause such harm, or which puts someone in fear of such harm being done".

the expression, but it remains a concept at common law, and dicta in the *C.E.G.B.* case are not consistent with *Howell*.[50] It cannot be regarded as certain in which direction the common law concept will develop. This uncertainty led some of our commentators[51] to urge the need for definition of the term. However, the concept is fundamental in the exercise of police powers and we do not think it desirable that it should be defined in one context and remain undefined in another; and as we have indicated, the question of police powers falls outside the scope of our work.[52]

5.15 There is, moreover, a further and more important reason for avoiding the concept of a breach of the peace, as it is used in section 5 of the 1936 Act, in the context of new offences. Under that section use of threatening, abusive or insulting words or behaviour is only an offence if it is done with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned. This aspect of section 5 has recently been examined by the Divisional Court in two cases which illustrate certain aspects of the section which we do not consider to be satisfactory for present purposes. In *Parkin* v. *Norman*[53] the defendant's conviction on a charge under section 5 for his behaviour in a public lavatory was quashed because, while that behaviour was capable of being regarded as insulting, on the facts of the case no breach of the peace was likely to result from that behaviour: the plain-clothes police officer who witnessed it was unlikely to break the peace in consequence of the behaviour and no third party was likely to have observed it. Even if any had done so, it was unlikely that it would have led him to have broken the peace. The court stressed that it was the likely effect of the conduct on those who witnessed it with which the section was concerned. In *Marsh* v. *Arscott*[54] the defendant used threatening and insulting words and behaviour to police officers in the car park of a shop. He was charged under section 5 of the Public Order Act. The incident occurred late at night and the court upheld the finding of the magistrates that no offence under section 5 was committed because the incident did not occur in a "public place". The court went on to consider what the position would have been if the defendant's threats and use of force towards the police had been unlawful.

> "In this event the defendant would have been responsible for breaching the peace. Thus, regardless of who was acting lawfully and who was acting unlawfully there was, at the time of the incident, a breach of the peace. However, that does not, in my judgment, mean that an offence was committed against this section. This section is describing breaches of the peace which are brought about, or are likely to be brought about, by other words or behaviour occurring earlier, although usually not very long before. The phrase "whereby a breach of the peace is likely to be occasioned" indicates that Parliament was con-

---

50 See [1982] Q.B. 458, 471 *per* Lord Denning M.R.: "There is a breach of the peace whenever a person who is lawfully carrying out his work is unlawfully and physically prevented by another from doing it . . . . If anyone unlawfully and physically obstructs the worker—by lying down or chaining himself to a rig or the like—he is guilty of a breach of the peace".

51 See e.g. A.T.H. Smith, "Law Commission Working Paper No. 82—Offences against Public Order", [1982] Crim. L.R. at pp. 493–494.

52 See para. 1.7, above; and see also Police and Criminal Evidence Bill, cl. 8(6) considered by Parliament during the 1982–83 session.

53 [1983] Q.B. 92 (D.C.).

54 (1982) 75 Cr. App. R. 211; the Divisional Court consisted of Donaldson L.J. and McCullough J. in both cases, the latter delivering the court's judgment in both.

cerned with cause and effect, i.e. with conduct which is likely to bring about a breach of the peace and not with conduct which is itself a breach of the peace and no more. Were this the law every common assault occurring in a public place would also be an offence against this section. Many such assaults will in fact be likely to lead very quickly to a breach of the peace, and these will be within the section ; but, without more, it is not enough that conduct which is threatening, abusive or insulting is of itself a breach of the peace. In the circumstances here, assuming the respondent to have been acting unlawfully in using threatening words and behaviour, no breach of the peace was likely to have been occasioned. No other person was likely to have broken the peace, and all that the police were likely to do was to arrest him, as they did. On that basis too an acquittal would, in my judgment, have been inevitable."[55]

These cases, and the earlier unreported case of *Ballard* v. *Blythe*,[56] established that the test to be applied under section 5 is, " what is the natural and probable result of the defendant's threatening, abusive or insulting words or behaviour? ".

5.16 There are many situations today in which a breach of the peace by one person cannot properly be held to be a likely consequence of another person using threatening, abusive or insulting words or behaviour. Both the above cases are examples of this situation ; there, the only people who were threatened, abused or insulted were policemen and, by virtue of their training and duties, policemen are unlikely themselves to break the peace in consequence of being threatened, abused or insulted. This is, however, not only true of policemen. If a group of young men are shouting insults and abuse at an elderly lady on the other side of the street, it would normally be unlikely that she would respond by herself resorting to violence against them or by putting them in fear that she would use violence against them. The same would, no doubt, hold true not only in respect of elderly ladies but also of many ordinary, peaceful, law-abiding citizens. Such people are likely either to put up in silence with the threatening, abusive or insulting words or behaviour or remove themselves from the scene as quickly as possible for fear of their own safety. Section 5 seems almost to assume that the normal reaction of a person to threatening, abusive or insulting words or behaviour is that he himself will resort to violence. We do not think that any such assumption is justified, at least in contemporary circumstances. Nor do we think that credence should be given to any such assumption. If section 5 is to be properly construed (and it is clear from the recent cases that it may not always have been so in the past), there will be many instances in which no offence is committed under the section but in which, in our view, the words or behaviour of those who are threatening, abusing or insulting ought to be

[55] *Ibid.*, at pp. 215–216. The court pointed out that the defendant might have been guilty of other offences, such as affray or assault, had he been charged with them (*per* Donaldson L.J. at p. 216).

[56] 3 November 1980, (D.C.) cited by the Div. Ct. in *Parkin* v. *Norman* [1983] Q.B. 92 at p. 100. Where a group are using threatening etc. words or behaviour and the only other persons present are the police, the facts may justify a charge under s. 5 against one of them if his words or behaviour incite the others so that they are thereby likely to occasion a breach of the peace: *Read* v. *Jones*, *The Times*, 21 May 1983 (D.C.). Having regard to the definition of breach of the peace in *R.* v. *Howell* (see n. 49, above), it would seem that in such circumstances any breach of the peace would necessarily entail or consist of an attack or threatened attack on the police or their property.

penalised by a criminal offence. We do not think it right that the use of threatening, abusive or insulting words or behaviour should be a criminal offence only if the likely reaction of someone else was that he would respond to it by himself resorting to violence. We believe that if those threatened, abused or insulted are made to fear that violence is likely to follow, the conduct in question is quite sufficiently anti-social to justify criminal sanctions, at least if done by a group. Citizens should be entitled to go about their business without being intimidated by such behaviour.

5.17 It may be thought that, on the authority of *R.* v. *Howell,* those who are put in fear by the defendant's conduct are already protected by section 5 because that case defines a breach of the peace as being " an act done or threatened to be done which either actually harms a person, or in his presence his property, or is likely to cause such harm, *or which puts someone in fear of such harm being done* ".[57] However, from the recent cases analysed above, it is clear that what section 5 is concerned with is threatening, abusive or insulting words or behaviour by one person which is intended to provoke a breach of the peace by *another* or which is likely to occasion a breach of the peace *by another.* What is relevant is whether another's acts occasioned by the defendant's behaviour will be a breach of the peace. Being put in fear is not a breach of the peace. In our view, therefore, section 5 does not cover conduct which intimidates another and it is that conduct which we think should be clearly stated to be a criminal offence.

5.18 Even if we are wrong in the view which we have expressed above in relation to the connection between the authorities upon section 5 of the Public Order Act 1936 and *R.* v. *Howell,*[58] it is clear that it is only by means of a most subtle and unsual interpretation of the section and the authorities that intimidatory conduct causing fear of violence could be brought within the express terms of section 5. Such subtle reasoning is, in our view, most undesirable in relation to criminal offences, particularly those which are likely to be frequently used in the lower courts. The prohibited conduct should be spelt out in clear terms. For this reason we think it should be stated that threatening, abusive or insulting words or behaviour by a group of persons which is likely to cause others to fear violence amounts to the commission of a criminal offence by members of the group.[59] We have therefore concluded that it would not be satisfactory to base any offence which we recommend upon the concept of occasioning a breach of the peace as used in the context of section 5 of the Public Order Act 1936.

4. Violence and Threatened Violence

5.19 We have pointed out[60] that the offence proposed in our Working Paper in place of unlawful assembly at common law was, we now think, too wide in the scope of conduct penalised by it because it covered both the purpose to use threats of violence and the use of violence itself. In this

---

57 [1982] Q.B. 416, 426 (emphasis added).

58 *Ibid.* See further L.J. Connor, " Public Disorder ", (1982) 146 J. P. 573, and also *ibid.*, p. 796.

59 See para. 5.43, below. In this connection, it is noteworthy that, in their Working Paper on Offences relating to Prostitution and Allied Offences (December 1982), the Criminal Law Revision Committee propose, as one of three offences to deal with " kerb-crawling ", one which would penalise a man accosting a woman from a motor car for sexual purposes so as to " put her in fear " (para. 3.44).

60 See para. 5.6, above.

respect it was similar to the common law offence of unlawful assembly which it sought to codify. The boundary between unlawful assembly and riot "is often not easily drawn with precision"[61] and in any event a person may at common law be found guilty of unlawful assembly as an alternative to riot. In such circumstances it is easy enough to provide evidence in proof of unlawful assembly from the activities of the participants, who proceed from the purpose to use threats to the perpetration of violence; if such violence has been preceded by the gathering of the crowd, it is not difficult to infer that that gathering amounted to an unlawful assembly.

5.20 In the same way it is to be expected that evidence in proof of charges of any new offence which penalised threatening, abusive or insulting words or behaviour would at any rate in a considerable proportion of cases be provided by evidence of the acts of the defendant subsequent to the threatening behaviour which is the essence of the prohibited conduct. Indeed, in the circumstances of disruptive behaviour by a group or crowd of people, the best evidence that some of them used threatening behaviour with intent to cause others to fear violence to persons or property may be that, subsequent to such threats, such violence in fact occurred, in which the defendant participated. In the context of section 5 of the Public Order Act 1936, the Court of Appeal has approved the bringing of a charge of threatening behaviour where the evidence was that the defendant had gone beyond mere threats to perpetrate actual violence,[62] and charges of threatening behaviour under that section where the defendant has been responsible for some violence are probably now common. But although it has been so held in relation to section 5, we do not consider it right that a new offence relating to public order should be structured upon the penalising of threats where the conduct which is in fact to be penalised consists of the use of actual violence.

5.21 Other considerations add weight to this conclusion. The offence of riot proposed in our Working Paper[63] was intended to be an extremely serious offence: this may be gauged by its proposed maximum penalty of fourteen years' imprisonment, and the requirement of the consent of the D.P.P. to the institution of proceedings in order to ensure that it would have been used only when the circumstances warranted it. We adhere to the view that, if there is to be an offence of riot, in whatever form it takes it must remain by far the most serious of the offences against public order. There will be many disturbances to public order in which it would be inappropriate for charges of riot to be brought on account of their less serious character, but where it might well be that summary charges under section 5 of the Public Order Act 1936 would be considered inadequate to meet the particular conduct in question. It is thus possible to foresee that, if new offences penalising threatening behaviour were enacted, they would become the offences most often resorted to in order to deal with violence which falls short of full-scale and serious rioting. They would, in substance, deal with the small-scale riot even though the conduct referred to in the statement of the offence was threats, rather than violence. We do not think that this would be a satisfactory outcome to our efforts to reform the common law; we believe that some offence short of riot expressed in terms of violence is needed to penalise the use of violence by a person who is part of a threatening group.

---

61 *R.* v. *Caird* (1970) 54 Cr. App. R. 499, 505.
62 *R.* v. *Oakwell* [1978] 1 W.L.R. 32.
63 See para. 6.5, below.

5. SUMMARY OF CONCLUSIONS

5.22 This reconsideration of our provisional proposals in regard to unlawful assembly has led us to the following conclusions—

(*a*) There is a need for an offence, or offences, penalising threats of violence by a group, or the provoking of others by a group to use violence, whether the threats of violence are directed against persons or property or both.

(*b*) However, conduct should not be penalised if it falls short of threatening, abusive or insulting words or behaviour; this type of conduct is the appropriate threshold for criminal sanctions in the field of serious offences dealing with public disorder.

(*c*) The conduct penalised must be such as may cause others to fear violence to the person or property or may provoke others to use such violence. In this context, it would be unsatisfactory to use the concept of conduct giving rise to an apprehension of a breach of the peace or conduct likely to occasion a breach of the peace.

(*d*) Separate offences are needed penalising threatening behaviour by a group and behaviour by a group involving the use of violence which falls short of a full-scale riot.

With these conclusions in mind, we now examine in detail the offences which we recommend in place of unlawful assembly at common law.

D. The new offences

1. THE NEW OFFENCES SUMMARISED

5.23 We *recommend* the creation of two new statutory offences having the following elements—

Violent disorder

Where three or more persons are present together using or threatening unlawful violence to the person or property, whether in a public or private place, and their conduct, taken together, is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety, each of those persons who uses unlawful violence commits the offence of violent disorder. The offence would be triable either way with a maximum penalty on indictment of five years' imprisonment and a fine.

Conduct intended to or likely to cause fear or provoke violence

Where three or more persons present together, whether in a public or private place, use threatening, abusive or insulting words or behaviour which is intended or is likely *either* to cause another person to fear immediate unlawful violence to the person or property *or* to provoke the immediate use of such violence by another person, each of them commits the offence. The offence would be triable either way with a maximum penalty on indictment of two years' imprisonment and a fine.

5.24 The offence of violent disorder is the more serious of the two, penalising an individual who, in the company of two or more others, uses actual violence against the person or property. Those others must also have at the relevant time been using, as a minimum, threats of violence, and

together their conduct must have been such as to put the reasonable person in fear of his personal safety. The offence is intended to deal with persons participating in public disorder whose conduct has gone beyond the stage of mere threats of violence, but in respect of whom a charge of the most serious offence of riot could not be brought. In this regard, it will be noted that, although there are some differences of detail, the offence resembles the common law offence of riot in so far as it requires proof of three persons present together, but it omits any requirement of proof of a common purpose. It is also noteworthy that, in so far as it penalises group violence against persons, the offence will serve to replace affray at common law in cases where that offence is currently used when three or more persons are unlawfully fighting. In a serious fight involving a number of participants, which is nonetheless not so serious as to amount to riot, charges of offences against the person, criminal damage, or possession of an offensive weapon might be brought against participants wherever the evidence showed that such offences had been committed. But they could also all be charged with violent disorder. If at the trial the evidence discloses that fewer than three persons were unlawfully participating in the violence, (for example, because of successful pleas of self-defence by some of those being tried for the offence), it would be open to the jury to find the defendant guilty of the offence of affray which we have recommended, if they are satisfied on the evidence that that offence has been committed.[64]

5.25 The other offence, which is concerned with threatening behaviour by a group, would penalise an individual who, in the company of two or more others acting similarly, uses such behaviour which is intended, or likely, to cause others to fear imminent violence or to provoke them to violence. It will be noted that, like section 5 of the Public Order Act 1936, it covers conduct which is *intended* to have specified consequences or is *likely* to have such consequences.[65] We have considered whether it is right that all such conduct should be penalised by a single offence or whether it might not be preferable in the context of an indictable offence to penalise by a heavier penalty conduct which is intended to cause fear of violence or provoke violence. There are arguments which may be raised in favour of the latter course. The presence of such an intention might in some cases be regarded as a factor aggravating the seriousness of the conduct, particularly when it is carried out by a group. Moreover, under section 5 the justices decide both questions of fact and the appropriate sentence, and may therefore take into account in sentencing the intent, if proven, of the defendant. On indictment, however, without a special verdict the jury can give no indication of whether by their finding of fact they consider the defendant to be guilty on the basis of a proved intent to cause fear or to provoke.

5.26 There are, however, other considerations which have led us to formulate a single offence. In the first place, the scheme of offences recommended in this Report covers the whole spectrum of conduct taking place in circumstances of public disorder, from the most serious use of violence by a defendant in the company of a substantial number of others with a com-

---

64 See further, para. 7.8, below.

65 See n. 9, above. In *R.* v. *John* [1971] Crim. L.R. 283 (Inner London Quarter Sessions, Judge Copplestone-Boughey) it was held that s. 5 creates two different offences according to whether the conduct was with intent to provoke, or likely to occasion, a breach of the peace. But compare *Parkin* v. *Norman* [1983] Q.B. 92, 96, and see paras. 7.12–7.13, below.

mon purpose,[66] to the mere use of threatening, abusive or insulting words or behaviour likely to cause a fear of violence. The offences are also expressly to be made alternatives to each other, so that, upon failure to convict of one, a jury may nonetheless convict of another, less serious, offence.[67] Were there to be a multiplicity of offences in which one differed from another only by the absence of one element, namely a proved intention to cause fear etc., it would in our view make for confusion in the minds of the jury: in some cases summings-up would necessarily be somewhat complex. On practical grounds, we therefore consider it preferable to limit the number of offences. Secondly, and of equal importance, we doubt whether there are in fact many cases in which behaviour used with the intent to cause fear of violence can properly be regarded as substantially more serious than behaviour which is merely likely to cause such fear. In the first case, unless there is an admission of purpose by the defendant, the court can only infer intent from the defendant's behaviour in the circumstances, while in the other the court must judge the defendant's behaviour to be likely in the circumstances to cause fear of violence. In either case it is probably only in rare instances that any defendant would be charged who would be unaware of the threatening, abusive or insulting character of his own behaviour, and it is primarily with such cases in mind that we have made provision for a mental element in this offence similar to that applying to the other offences recommended in this Report.[68] In the normal run of cases, however, the foregoing considerations suggest to us that there is relatively little distinction in the seriousness of the conduct to be penalised, whether that conduct is intended to cause fear or is merely likely to do so.

5.27 In the following paragraphs the constituent elements of each offence are examined in turn.

2. VIOLENT DISORDER

(a) The prohibited conduct (actus reus)

5.28 Under our draft Bill,[69] a person commits the offence of violent disorder if he uses unlawful violence provided two or more others present with him are themselves using or threatening unlawful violence. Taken together, this conduct, which may take place in public or in private, must be such as would cause a person of reasonable firmness present at the scene to fear for his personal safety.

Three or more persons present together

5.29 It will be noted that the offence denotes the element of "combination" or numbers which is common to both offences which replace unlawful assembly by the requirement that there be three or more persons present together. We have referred to the fundamental importance of this element, and the number has been set at three, which accords with the common law requirement in regard to both unlawful assembly and riot. It will be noted that, in referring to the requisite minimum of three persons "present together", there is no element of common purpose; nor is it necessary that

66 See the offence of riot recommended in Part VI.
67 See para. 7.8, below.
68 See para. 5.47, below.
69 See Appendix A, cl. 2.

the three should be acting in concert in the sense that they are doing the same acts or doing acts directed at the same object. It is, however, necessary that the conduct, taken together, should be such as would cause fear to a person of reasonable firmness present at the scene. Of course, not every case in which three or more people participate in the specified conduct will necessarily be regarded as appropriate to be dealt with under this offence. Prosecutors may well feel that some cases are not sufficiently serious to warrant proceedings for a " combination " offence and that this offence will be appropriate for use only when the extra gravity of the circumstances of the group's conduct is such as to justify prosecution for such an offence.

Using or threatening violence

5.30 The requisite three or more persons must be using or threatening unlawful violence. But no offence is committed unless one or more of those persons actually uses unlawful violence, as distinct from threats of violence ; and any one or more amongst the requisite number who does so commits the offence,[70] provided that the other essentials of the offence described in the following paragraphs are satisfied. This requirement of the use of actual violence is the most important distinction between the offence of violent disorder and the other offence which we recommend in place of unlawful assembly.

5.31 In the context of affray, we explained that the concept of violence required no definition for the purposes of that offence, since the offence, as we recommend it, penalises both threats and violence against the person. In the present context, however, we think that some further indication must be given of the precise ambit of the term " violence ". It here embraces violence against both persons and property, and this of course must be made clear. But we think that any definition must go further than this. A primary meaning of " violence " is the use of physical force causing injury or damage. If violence were defined simply as " violence directed against persons or property " the strict construction which must be given to a statutory criminal offence would result in that primary meaning being given to the words if the statute did not otherwise direct. Yet in the circumstances of violent disorder (and also in the circumstances of riot where we recommend the same statutory meaning for " violence "[71]) the evidence against participants would frequently show no more than that a defendant threw a missile in the direction of other people, or of the police, without available proof that physical harm or impact were caused, or that they were necessarily intended. In ordinary terms such conduct would be regarded as the use of violence ; but, if the statute were to be strictly construed as indicated, the defendant against whom only such evidence was available would escape liability. The common law solved this problem by making any participation, whether by active encouragement or promotion by words or actions, sufficient for guilt in the offences of unlawful assembly and riot, provided the necessary circumstances were proved. This is inappropriate in the context of statutory offences, which must define with precision the prohibited conduct, and we have indicated why separate offences which penalise

[70] Appendix A, cl. 2(1); and see, as to the meaning of " unlawful " in this context, para. 3.40, above and cl. 8(1). In so far as violence is directed against property, a defendant might also raise the defence of lawful excuse under the Criminal Damage Act 1971, s. 5.

[71] See para. 6.21, below.

specifically the use of threats and violence are in our view needed to replace them.[72]

5.32 We have examined a number of solutions to the question of defining violence for our present purposes, bearing in mind three criteria which we think are essential: any definition must be capable of overcoming the evidential difficulties to which we referred in the preceding paragraph; it must be kept sufficiently simple for ready comprehension by a jury; and it must preserve the essence of the concept that violence must be directed at persons or property. On this basis it would not be satisfactory to have a definition referring to particular offences against the person or property or attempts to commit them: if there is sufficient evidence of the former, they may, of course, be charged, while an attempt requires proof of the intent to commit the substantive offence.[73] It seems to us that any definition which depended upon proof of the intention (or apparent intention) of the defendant to achieve a particular consequence by his violent act would be unsatisfactory. In the circumstances of violent disorder or riot, evidence to prove what consequence the defendant must have intended by his violent act would often not be available because no observer could say where any missile landed, or at what it was apparently aimed.

5.33 The definition which we have adopted[74] emphasises the nature of violent conduct rather than its consequences. It provides, first, that for the purposes of violent disorder and riot, violence includes violent conduct towards both property and persons. Secondly, it provides that "it is not restricted to conduct causing or intended to cause injury or damage but includes any other violent conduct, for example, throwing at or towards a person a missile of a kind capable of causing injury which does not hit or falls short". The latter provision makes clear that violence is not limited to physical damage or injury; but, secondly, that it must in some way be violence towards persons or property; and the example is given of the throwing of a missile towards a person, capable of causing injury (a paper dart would thus not qualify), whether that missile falls short or wide of the mark. Many other examples of violence will amount to violent conduct upon these criteria, such as the wielding of a lethal instrument or the discharge of a firearm in the direction of another. The example is given because it explains the concept without the difficulties of a detailed list or extended definition. The conduct must be such that it can be regarded as violence towards persons or property and the jury must be sure that it was of such a character. The example makes plain the sort of conduct which, while not proved to have caused, or to have been intended to cause, injury or damage yet may be regarded as "violence".

In a public or private place

5.34 In common with all offences recommended in this Report, violent disorder may be penalised whether it occurs in a public or private place. As we have pointed out in the context of affray,[75] conduct which involves violence may in some cases have equally serious repercussions on the public

72 See paras. 5.19 *et seq.*, above; and see also para. 6.22, below.
73 Criminal Attempts Act 1981, s. 1(1).
74 See cl. 8(1); this definition of violence also serves for the offence in cl. 4 of conduct intended or likely to cause fear of violence etc.
75 See para. 3.34, above.

peace whether it occurs in public or in private, and for much the same reasons as we gave in that context we see no need to distinguish the two.

Putting a reasonable person in fear

5.35. The other principal element of the definition of violent disorder is the requirement that the acts of the three or more persons concerned must be such as would cause a person of reasonable firmness present to fear for his personal safety. This parallels the corresponding requirement in the new offence of affray, and as in the case of that offence the draft Bill makes clear that there is no need for the actual presence of another on the scene.[76] One factor which is relevant in the context of both this offence and the offence of riot recommended in Part VI of this Report, but which is not relevant to affray, is that these offences contemplate the use of violence against both persons and property. We have had, therefore, to consider whether the criterion of fear of personal safety is entirely apt for this offence. Could it ever be the case, for example, that the hypothetical bystander could be said to fear for his personal safety in the event of an attack upon an empty house? We think that each case will to a great extent be dependent upon its facts. The criterion requires the person of reasonable firmness to be deemed to be "present at the scene". If the property in question has been abandoned long before any attack occurs, or if any entry upon the property is made in such a way as would not alarm anyone who might be present in it, it may be that no offence will be committed. In any other case, we doubt if the courts would have any real difficulty in finding that the criterion has been satisfied.[77]

(*b*) *The mental element* (*mens rea*)

5.36 The requirements relating to the mental element and self-induced intoxication in this offence are the same as those which we have provided for the new offence of affray, and we have described in the context of that offence the considerations which have led us to our conclusions.[78] We see no need for further comment upon them in the present context.

(*c*) *Mode of trial*

5.37 Like the new offence of affray, and for the reasons given in relation to that offence,[79] we *recommend* that cases under the offence of violent disorder should be triable either way, in the magistrates' court or on indictment.[80] We would expect cases involving exceptional levels of violence or exceptional complexity to be committed for trial in the Crown Court, but we see no reason why other cases should not be dealt with summarily, in the same way as cases involving violence brought under section 5 of the Public Order Act 1936. To a substantial extent, we consider that the provision for summary trial of the offences of affray and violent disorder

[76] Appendix A, cl. 8(2); see further, para. 3.31, above.

[77] Thus in cases of riot at common law involving attacks on property, where the facts have shown that the persons present were put in fear of their safety, the courts have been prepared to hold that the element of alarm or terror required by the offence was present: see e.g. *Ford* v. *Receiver for the Metropolitan Police District* [1921] 2 K.B. 344 and *Munday* v. *Metropolitan Police District Receiver* [1949] 1 All E.R. 337, and compare *Field* v. *Receiver of Metropolitan Police* [1907] 2 K.B. 853 (all cases under the Riot (Damages) Act 1886): see further para. 6.2, below.

[78] See paras. 3.41 *et seq.*, above. And see Appendix A, cl. 5.

[79] See para. 3.60, above.

[80] Appendix A, cl. 2(2).

will answer the need felt by some of the commentators on our Working Paper for intermediate offences, more serious than section 5, to deal with public disorder. The expeditious disposal of such cases in the magistrates' court may often be the most effective means of quelling further disturbances of this character, although retention of the defendant's right to elect trial by jury does, of course, mean that not every case which might be suitable for trial in the magistrates' court will be disposed of in this way.

(*d*) *Penalty*

5.38 In the scheme of offences recommended in this Report the heaviest penalties are reserved for those guilty of the offence of riot. That offence, as we have mentioned in Part II of this Report and further explain below,[81] requires proof of an element of common purpose. This element is absent from the offence under consideration. Thus it is broad enough to penalise anyone who is a casual participant in public disorder rather than a fully-fledged rioter, the pure opportunist who has shared no purpose with anyone but has merely added his own act of violence to those of others. If such casual participation is proved but the acts of participation fall short of those required by the full offence of riot, we think it right that the courts should be in a position to impose a sentence somewhat more severe than would be appropiate for a similar offence committed outside the circumstances of public disorder; and such a sentence will in particular be justified in circumstances where a number of people are engaged in violent disorder. On the other hand, in relation to affray we have pointed out that the maximum penalty for a new offence in place of the common law must be assessed in relation to evidence which indicates only that a defendant took part in a fight sufficiently serious to put others in fear of their personal safety. This led us to the view that three years' imprisonment was the appropriate maximum for that offence.[82] While the element of numbers makes this a more serious offence than affray, similar considerations must be borne in mind. If a defendant is shown to have committed an act of violence in the course of violent disorder which involves a number of people, the maximum penalty must in our view be related to the worst case of such acts, rather than to some other offence which he may have committed but which has not been proved against him by verdict or plea.

5.39 These considerations lead us to the view that the appropriate maximum penalty for the offence of violent disorder when tried on indictment is five years'[83] imprisonment and a fine. Accordingly we so *recommend*.[84] The maximum penalty on summary trial, in this offence and others which we recommend in this Report should be triable in the magistrates' courts, will be the maximum which may be imposed by those courts,

---

81 See para. 6.23, below.

82 See para. 3.58, above.

83 It is noteworthy that, in *R.* v. *Main and Gawthorpe* (1982) 4 Cr. App. R. (S) 42, sentences of four and five years respectively (the latter reduced from eight) were imposed on M and G for unlawful assembly. These are the longest sentences imposed for this offence in recent years: see Appendix B, Table II. It appears that G made petrol bombs and that M aided and abetted their use, and that there was some evidence of the use to which they were to put these and other items. However, it is not apparent why there were no charges under the Criminal Damage Act 1971, s. 3 (possessing anything with intent to destroy or damage property: 10 years) or under the Explosive Substances Act 1883, s. 4 (making or possession of explosives under suspicious circumstances: 14 years).

84 Appendix A, cl. 2(2).

that is, six months' imprisonment and the "statutory maximum" fine,[85] currently £1,000.

3. Conduct Intended or Likely to Cause Fear or Provoke Violence

5.40 This offence is intended to penalise the use of threats rather than actual violence. We examine its constituent elements in the following paragraphs.

(a) *The prohibited conduct (actus reus)*

Threatening, abusive or insulting words or behaviour

5.41 We concluded that threatening, abusive or insulting words or behaviour should, as they do in section 5 of the Public Order Act 1936, constitute the "threshold of criminality" in any new offence intended to replace unlawful assembly at common law.[86] This conduct is therefore specified as that which is penalised by this offence.[87] It requires that the defendant be so behaving together with two or more others who are also using threatening, abusive or insulting words or behaviour. This provides the element of numbers which, in our view, may in circumstances of particular gravity justify a higher penalty than that available under section 5 of the 1936 Act.[88]

In a public or private place

5.42 Unlike section 5 of the Public Order Act 1936, but in common with the other offences recommended in this Report, this offence is to be capable of commission in a public or private place. In so providing we are adhering to the existing law in relation to unlawful assembly.[89] Moreover, we have pointed out in the context of affray[90] the narrow dividing line which in some situations separates conduct in private and public places, and the difficulties which might arise if the offence were to be confined in application to the latter. It is true that affray is concerned principally with violence to the person,[91] while the offence under consideration is concerned only with threatening, abusive or insulting behaviour. But the boundary between threats and violence may well in many circumstances be a narrow one[92] and, if a group of people are engaged in such behaviour to such a degree as to cause others to fear the likelihood of actual violence, it seems to us right in principle that the law should penalise it irrespective of whether it occurs in public or in private.

---

85 Under the Criminal Justice Act 1982, s. 74 this means the "prescribed sum" within the meaning of the Magistrates' Courts Act 1980, s. 32, i.e. £1,000 or such sum as is substituted for this by order of the Secretary of State.

86 See paras. 5.10–5.13, above.

87 Appendix A, cl. 4(1). Cl. 8(1) provides that such words or behaviour "includes the distribution or display of any written matter, sign or other visible representation"; this accords with s. 5 of the Public Order Act 1936 as substituted by the Race Relations Act 1965, s. 7.

88 See para. 5.29, above.

89 See *Kamara* v. *D.P.P.* [1974] A.C. 104; it is noteworthy that the conduct penalised by unlawful assembly in this case involved threats and physical force falling short of "serious violence" to the person: *ibid.*, p. 107.

90 See para. 3.34, above

91 Although, like the common law, the new offence of affray which we recommend covers threats of violence to the person.

92 See n. 89, above.

Fear of violence and provoking violence

5.43 The offence requires that each defendant use threatening etc. words or behaviour which is intended or is likely—

(*a*) to cause another person to fear immediate unlawful violence, or

(*b*) to provoke the immediate use of unlawful violence by another person.

5.44 This provision gives effect to our conclusion that, in any new offences replacing unlawful assembly at common law, the concept of the likelihood or apprehension of a breach of the peace should be avoided. To ensure that the whole spectrum of conduct in the field of public disorder which requires to be made the subject of criminal sanctions is effectively covered, a new offence should in our view instead penalise conduct which is intended or likely to cause others to fear violence or provoke them to violence.[93] Threats which intimidate are thus expressly penalised. In this context we have had to consider whether the offence should provide that the defendant's behaviour should cause another to fear violence to *his* person or property or to fear violence to person or property *in general.* In our view, it should be the latter. The former criterion would be substantially narrower than an apprehension of a breach of the peace ; according to *R.* v. *Howell,* where the Court of Appeal advanced what seems to be the current most widely-accepted view of what constitutes a " breach of the peace ",[94] this concept does not require the fear of personal violence, provided that someone appears likely to be harmed. On the other hand, the concept of fear of violence to the person or property in general is marginally wider than that of breach of the peace, since the latter may well be restricted, so far as damage to property is concerned, to such damage occurring in the presence of the person to whom it belongs.[95] Without these restrictions the offence will undoubtedly cover a broader area, but we think that this is justified. An example will illustrate the effect of the provision which we recommend. If a gang in one part of a town were to utter threats directed at persons of, for example, a particular ethnic or religious group resident in another part, an offence restricted to causing another to fear violence to *his* person could not be committed until the gang arrived in the latter part ; it would however be capable of being committed wherever the gang happened to be if the offence were to penalise, as we recommend, causing another to fear violence to the person simpliciter. Similarly, if the gang uttered threats against particular property situated in another part of the town—for example, a mosque or synagogue—an offence restricted to the intention to cause another to fear violence to *his* property would not be capable of dealing with the situation : but without this restriction it would in our view be effective for that purpose. Moreover, the concept of violence, the definition of which we have considered above,[96] appears to us to be less susceptible than that of breach of the peace to interpretation in such a way as to extend the ambit of these offences beyond situations dealing with substantial public disorder.[97] It is to be noted that the violence must, again in accordance with the other offences, be " unlawful " in character.

---

93 See paras. 5.15–5.18, above.

94 See para. 5.14 and n. 49, above.

95 See the definition of breach of the peace advanced by the Court of Appeal in *R.* v. *Howell* [1982] Q.B. 416 at p. 426, n. 49, above; it will be noted that in so far as this definition relates to acts done or threatened to be done to property, it requires the presence of the person whose property is harmed or threatened.

96 See para. 5.32, above.

97 See paras. 5.8–5.9 and 5.14, above.

5.45 As we noted above,[98] if no-one is present who is likely to be provoked to a breach of the peace, it may well be that no offence is committed under section 5 of the 1936 Act. How far might this consideration be applicable under the offence which we recommend? We think that, in so far as it penalises those who use threats etc. which are intended or likely to *provoke* others to use violence against persons or property the offence would be capable of interpretation in the same way as section 5, for to this extent it covers the provocation of others ; and if there is no-one present who can be provoked, the offence could not be committed. But in so far as the offence penalises threats which are intended or likely to *cause others to fear* violence to persons or property, we have, we believe, ensured that it is not dependent for its efficacy upon the likelihood of a reaction by others to the defendant's threatening behaviour. Nor does the offence require that anyone should feel himself to be threatened, abused or insulted.[99] It follows that, taking again the illustration given in the preceding paragraph, if a gang in one part of a town utters threats directed at the persons or property of a particular ethnic or religious group resident in another part, an offence would be committed before the gang reached the area concerned, even though those present in the place where the threats were uttered realised that those threats were not directed at them. On the other hand, if threats were to be uttered in a place where no-one else was present, for example, on an empty heath or in private premises where no-one else was present, it is our intention that no offence should be committed: it would be difficult, if not impossible, to prove an intent to cause fear to others or the likelihood that such fear would be caused. This is in our view the right result: where there is in fact no danger to the public peace, it seems right that the offence should have no application.

5.46 We have pointed out that the offence applies to disturbances in public and private places. However, some qualification is clearly needed to exclude from the offence a meeting on private premises at which those present threaten the use of violence at some time in the future, whether later the same day or on some future occasion, and we have therefore qualified the consequential element in the offence by inclusion of the test of immediacy.[100] Thus in the case of behaviour causing fear of violence, it must be the fear of immediate violence ; in the case of behaviour provoking the use of violence, it must be the immediate use of such violence.

(*b*) *The mental element* (*mens rea*)

5.47 Under this offence each one of the minimum of three persons must be proved to have used threatening, abusive or insulting words or behaviour which is intended or is likely to cause fear or provoke violence. Thus the offence parallels section 5 of the Public Order Act 1936, which similarly penalises in the alternative threatening etc. behaviour either with intent to provoke or such as is likely to occasion a breach of the peace. We have explained our

---

98 See para. 5.16, above.

99 In *Parkin* v. *Norman* [1983] Q.B. 92, the Divisional Court said in relation to s. 5 of the 1936 Act (*ibid.*, p. 99): " What is required is conduct of a threatening, abusive or insulting character which is likely in the circumstances to occasion a breach of the peace. If the conduct in question is of this character it does not, in our judgment, matter whether anyone feels himself to have been threatened, abused or insulted. Insulting behaviour does not lose its insulting character simply because no-one who witnessed it was insulted . . . . ".

100 The qualification of immediacy attached to the concept of breach of the peace which we included in the offence of unlawful assembly proposed in Working Paper No. 82 (see para. 5.3, above) was widely approved by our commentators.

reasons for retaining a structure similar in this respect to section 5. However, in relation to the offence of affray recommended in this Report, we have recommended that the use of threats, which forms one element of the prohibited conduct, should be accompanied by a mental element of intent to threaten or awareness that the conduct may threaten.[101] We have therefore had to consider whether the conduct penalised by the offence under discussion should be accompanied by a similar mental element ; in other words, whether the prosecution should be required to prove that in using threatening, abusive or insulting words or behaviour, the defendant so acted either intentionally or with awareness that his conduct might be of this character.

5.48 Under section 5 of the Public Order Act 1936, it seems reasonably clear that " threats, abuse and insults are within the section whether or not they were intended to be threats, abuse or insults ".[102] This, however, cannot in our view be conclusive as to whether a mental element should be required by our recommended offence, since it carries a heavier penalty and is triable on indictment. In that context, it must be questioned whether it would be fair and just to convict a person of an offence carrying a maximum penalty of two years' imprisonment if, although the behaviour of the three or more persons concerned was likely to cause fear or provoke violence, the defendant claimed that he was unaware that his language was abusive or insulting. For example, would it be just to convict if the words he used were on their face innocuous but were addressed to, or heard by, persons to whom, unknown to him, they were highly insulting? Or similarly if a particular person within hearing of the defendant were peculiarly susceptible to insults or abuse of the kind used by the defendant where the ordinary person would not be? In these cases the authorities provide no clear answer as to what the position might be under section 5 of the Public Order Act 1936.[103] It might be that in some cases the defendant would be found not guilty ; in others he might be found guilty but might in the circumstances suffer only a nominal penalty.

5.49 We think that in an offence substantially more serious than section 5, and carrying a heavier penalty, it would be right to put issues such as these beyond doubt. In our view this may be effected by providing for the same mental element in relation to the threatening, abusive or insulting words or behaviour as is required for the other offences recommended in this Report,

---

101 See paras. 3.50 *et seq.*, above and Appendix A, cl. 5.

102 *Parkin* v. *Norman* [1983] Q.B. 92 (D.C.), 98 *per* McCullough J. delivering the judgment of the court. He pointed out that the dictum to the contrary by Viscount Dilhorne in *Brutus* v. *Cozens* [1973] A.C. 854 at pp. 865–866 was not material to the decision and was not supported by the speeches of the four other members of the House of Lords; it is, however, noteworthy that that case was decided at a time when s. 5 was triable on indictment with heavier penalties. See also to the contrary Smith and Hogan, *Criminal Law* 4th ed., (1978), p. 762 and the commentary on *Parkin* v. *Norman* at [1982] Crim. L.R. 530.

103 *Jordan* v. *Burgoyne* [1963] 2 Q.B. 744 decided that a speaker, knowing that he is addressing an audience having varying views on the subject matter of his address, must take that audience as he finds them: if his words provoke a disturbance, he is guilty under s. 5. If he has no knowledge of the views of those to whom he speaks, it seems probable that " likely " in s. 5 is to be interpreted as likely in the eyes of the speaker or of the reasonable man in his place: " When you get the word ' likely ' it must mean likely in the eyes of the speaker, or rather of a reasonable man in the shoes of the speaker. If the speaker does not know that there are lunatics there, perhaps it cannot be said that a breach of the peace is likely; but if he knows that there are people there who are likely to react to what he says, it does not matter whether those people are reasonable or not." *per* Lord Reid, during the House of Lords hearing which refused leave to appeal in *Jordan* v. *Burgoyne* (*ibid.*), reported in *The Times*, 24 April 1963 and quoted in Dickey, " Some Problems Concerned with the Offence of Conduct Likely to Cause a Breach of the Peace ", [1971] Crim. L.R. 265 at p. 274.

that is, an intention on the part of the defendant to use such words or behaviour or an awareness that his words or behaviour may have that character. In most cases the proof of such intention or awareness will necessarily derive from the intrinsic character of the words or behaviour; their character will on their face be sufficient indication of the defendant's intention or awareness, having said the words or done the acts in question. To this extent, we doubt if the result will in the great majority of cases differ from proceedings under section 5. The extra requirement is in our view, however, justified by the factors of seriousness and penalty already mentioned, and the clarification of borderline cases to which reference was made in the preceding paragraph. *We recommend* accordingly.[104]

(*c*) *Mode of trial*

5.50 Like the offences of affray and violent disorder, and for the same reasons,[105] we *recommend* that this offence should be triable either way, in magistrates' courts or in the Crown Court.

(*d*) *Penalty*

5.51 We have recommended that the offence of violent disorder which, like the present offence, would require a minimum of three present together, should bear a maximum penalty on indictment of five years' imprisonment and a fine. That offence, however, penalises the use by the defendant of actual violence; this offence penalises mere threats of violence. We have also recommended that affray, which penalises the use of both threats and violence but which is not a "combination" offence, should have a maximum penalty on indictment of three years' imprisonment. It seems to us, therefore, that the maximum for the offence under consideration ought to be substantially less than that for violent disorder, and marginally less than that for affray: actual violence must, in our view, always be capable of being penalised by a heavier penalty than mere threats. At the same time, since this offence penalises the deliberate intention to cause fear of violence or to provoke violence, a substantial penalty for the worst cases—which may involve a large number of people and may precede the actual use of violence by only a very short period—is in our view required. Such a penalty is also called for where there is a conspiracy or incitement of a large group to provoke violence. We therefore *recommend*, as the maximum penalty for this offence, two years' imprisonment and a fine.[106] The maximum penalty on summary trial will be six months' imprisonment and a fine of £1,000.[107]

PART VI

RIOT

6.1 In this Part of the Report we deal with our recommendations for replacement of the common law offence of riot.

---

104 See Appendix A, cl. 5(1).

105 See para. 3.63, above.

106 Appendix A, cl. 4(2). Three years' imprisonment for unlawful assembly was imposed in *R.* v. *Jones* (1974) 59 Cr. App. R. 120 (C.A.) (the Shrewsbury pickets case) but the conduct alleged included actual fighting and damage to property. Two years is the maximum for the offence under the Public Order Act 1936, s. 5A (incitement to racial hatred) inserted by the Race Relations Act 1976, s. 70.

107 Appendix A, cl. 4(2); and see n. 85, above.

A. Present law

6.2 Recent cases in both the civil[1] and criminal[2] law have tended to follow the definition of riot given by Phillimore J. in the Divisional Court in *Field v. Receiver of Metropolitan Police,*[3] where the "necessary elements" of riot were stated to be—

> "(1) number of persons, three at least;
>
> (2) common purpose;
>
> (3) execution or inception of the common purpose;
>
> (4) an intent to help one another by force if necessary against any person who may oppose them in the execution of their common purpose;
>
> (5) force or violence not merely used in [and about the common purpose] but displayed in such a manner as to alarm at least one person of reasonable firmness and courage."

As its title suggests, this case concerned a claim brought under the Riot (Damages) Act 1886 but the decision nonetheless clearly equates "riotously" in the Act with the common law offence of riot.[4] This definition was approved by the Court of Criminal Appeal and applied in subsequent reported cases,[5] but, while it is binding on courts of first instance, it has never been considered by the House of Lords. Indeed, there seems to be no reported case in the House in which the elements of riot have been in issue.[6]

6.3 In *R* v. *Caird*[7] (in which the appellant who was convicted of riot did not criticise the trial judge's summing-up on the law) the Court of Appeal explained the nature of riot as follows—

> "Unlawful assemblies and riotous assemblies take many forms. Without, of course, attempting a full definition, the difference can be stated in broad terms applicable to occasions of the particular type under consideration. The moment when persons in a crowd, however peaceful their original intention, commence to act for some shared common purpose supporting each other and in such a way that reasonable citizens fear a breach of the peace, the assembly becomes unlawful. In particular that applies when those concerned attempt to trespass, *or* to interrupt *or* disrupt an occasion where others are peacefully and lawfully enjoying themselves, *or* show preparedness to use force to achieve the

---

[1] Under the Riot (Damages) Act 1886, which regulates the provision of compensation out of the police fund to individuals suffering loss or damage to property from "persons riotously and tumultuously assembled together".

[2] E.g. Stocker J.'s direction to the jury in the Bristol riots case (*R.* v. *Binns and others*, 2 February–20 March 1981 (unrep.)).

[3] [1907] 2 K.B. 853, 860. Phillimore J. relied on Hawkins' *Pleas of the Crown*, vol. 1, c. 65, ss. 1–5 (this definition is referred to in some current textbooks, e.g. *Archbold* 41st ed., (1982), para. 25–13, and *Stone's Justices' Manual* 115th ed., (1983), vol. 2, p. 4101) and referred to *R.* v. *Solely* (1705) 11 Mod. 100, 88 E.R. 922; *R.* v. *Langford* (1842) Car. and M. 602, 174 E.R. 653; *Drake* v. *Footitt* (1881) 7 Q.B.D. 201; *R.* v. *Cunninghame Graham and Burns* (1888) 16 Cox C. C. 420.

[4] See para. 7.25, below.

[5] E.g. *R.* v. *Wong Chey and others* (1910) 6 Cr. App. R. 59, *Ford* v. *Receiver for the Metropolitan Police District* [1921] 2 K.B. 344, *Munday* v. *Metropolitan Police District Receiver* [1949] 1 All E.R. 337.

[6] But see *London and Lancashire Fire Insurance Co. Ltd.* v. *Bolands* [1924] A.C. 836, 841 and 847.

[7] (1970) 54 Cr. App. R. 499, 504–505 (the Garden House Hotel riot in Cambridge).

common purpose. The assembly becomes riotous *at latest* when alarming force or violence begins to be used. The borderline between the two is often not easily drawn with precision."

B. Working Paper proposals and response

6.4 Our Working Paper accepted the need for a new offence of riot to replace the common law. We said that there are, in addition to the offences against the person which we have summarised in that Part of the Report dealing with affray,[8] wide offences relating to damage to property under the Criminal Damage Act 1971 and offences relating to the possession and use of explosives under the Explosive Substances Act 1883. Nevertheless there was a clear need for a separate offence of riot for the reasons set out in *R.* v. *Caird*—

> " [riot] derives its great gravity from the simple fact that the persons concerned were acting in numbers and using those numbers to achieve their purpose .... The law of this country has always leant heavily against those who, to attain such a purpose, use the threat that lies in the power of numbers."[9]

6.5 Accordingly, in our Working Paper.[10] we provisionally proposed a new statutory offence of riot triable on indictment, with a maximum penalty of fourteen years' imprisonment and a fine. This offence was to penalise any person who knowingly and without lawful excuse took part in a riot. A riot was to consist of—

" (*a*) three or more persons present together in a public or private place ;

(*b*) at least three of whom engage in an unlawful course of violent conduct ; and

(*c*) the violence of that conduct is such as would reasonably have caused any other person, if present, to be put in fear of his personal safety."

Conduct consisting of the mere threat or display of violence would not have sufficed for these purposes. Thus, by comparison with the common law offence, there was to be no requirement that the rioters assist each other against those resisting their common purpose ; mere threats of violence were excluded ; and for the concept of a " common purpose " there was to be substituted that on an " unlawful course of violent conduct ". This last requirement we regarded as clarification rather than a change in the law.[11] Charges of riot may at present be brought in circumstances which in non-legal terms it would be impossible to regard as a riot.[12] For this reason, and to ensure that the offence would be used only where it was proper in all the circumstances to do so, we proposed that the consent of the Director of Public Prosecutions should be required for the institution of proceedings.

6.6 The response to these proposals was largely favourable. A significant number of commentators, however, wanted the minimum number required

---

8 See para. 3.2, above.
9 (1970) 54 Cr. App. R. 499, 505.
10 See Working Paper No. 82, para. 5.19.
11 *Ibid.*, at para. 5.27.
12 See e.g. *R.* v. *Sharp and Johnson* [1957] 1 Q.B. 552 where Lord Goddard C.J. said that three men who enter a shop and " forcibly or by threats " steal goods commit the offence of riot. See also *Athens Maritime Enterprises Corporation* v. *Hellenic Mutual War Risks Association (Bermuda) Ltd.* [1983] 2 W.L.R. 425, 437.

before the offence could be committed to be raised from three to six or twelve and to reduce the maximum penalty from fourteen years' imprisonment to ten. It was further argued that the device of the D.P.P.'s consent was not the best means of ensuring that prosecutions would be brought only where the circumstances warranted it: the law ought to reflect more closely in this respect the realities of the situation. Others favoured retention of the concept of "common purpose", arguing that the elements of the proposed offence did not convey any sense that the participants were engaged in some concerted behaviour, an impression heightened by the absence of the need to show the intent of the rioters to help each other with force. And some wished to remove the element of knowledge from the mental element required of the defendant: mere participation in the riot without lawful excuse should suffice.

C. Reconsideration of riot

1. The Need for an Offence

6.7 Our Working Paper justified the retention of an offence of riot principally upon the ground that, notwithstanding the fact that many of those who participate in a riot nearly always commit some other offence, as emphasised by the Court of Appeal in *R.* v. *Caird*, "riot . . . is an offence which derives its great gravity from the simple fact that the persons concerned were acting in numbers and using those numbers to achieve their purpose".[13] The need for a high maximum penalty was justified on the ground that leading a riot, or taking a prominent part in a riot, should be regarded as extremely serious and a high maximum was needed to penalise those who incite or conspire to riot.[14]

6.8 Reconsideration of the need for an offence of riot must take account of our recommendation for an offence, to be known as violent disorder, which would penalise anyone in a group of three or more using violence or threats of violence who himself uses actual violence ; for this offence we recommend a maximum penalty of five years' imprisonment.[15] We pointed out that this offence of medium gravity would resemble common law riot in requiring three or more persons present together, although differing from it in the absence of any requirement of common purpose. It would deal with those engaged in substantial acts of violence in the course of public disorder as well as those currently penalised by common law affray where a crowd of people are engaged in fighting. Granted the existence of this offence, it could be argued that the criminal law in the field of public order could function adequately without an additional and more grave offence of riot. But it is our view that, if the common law offence of riot were abolished without replacement, the law would not be able to deal adequately with those who provoke or lead wide-scale public disturbances and who resist the efforts of the police to restore order. These are individuals whom it might well be impossible or inappropriate to prosecute by means of charges of offences against the person or property. In many cases, it may be that the circumstances of public disorder are such that evidence of the promotion or taking a leading part in disturbances will not be available ; but in others

[13] (1970) 54 Cr. App. R. 499, 505; see para. 6.3, above.
[14] See Working Paper No. 82, para. 5.16.
[15] See para. 5.23, above and Appendix A, cl. 2.

there may be evidence which is both relevant and admissible.[16] Such evidence, if it shows prolonged, active and direct participation in a major public disturbance, might well provide evidence of planning, promoting or leading it such as would justify charges of an offence carrying a penalty substantially higher than that available under our recommended offence of violent disorder.

6.9 Quite apart from the factors mentioned in the preceding paragraph, we think that the absence of an offence of riot from a new code of offences relating to public order might be regarded as failing to give sufficient recognition to the factors of the weight of numbers used for a common purpose to which, as we have seen,[17] considerable importance is attached by the common law. These, it seems to us, are essential factors to be taken into account in assessing the need for a distinct offence of riot carrying heavier penalties than those which we recommend for the offence of violent disorder.

6.10 We conclude that there is a need for a statutory offence of riot more serious than the offence of violent disorder in place of the common law which would enable the courts to deal appropriately with those promoting or taking an active part in a riot. But in order to justify its higher penalty any such offence must be clearly differentiated from the recommended offence of violent disorder. Before setting out our recommendations, we think it necessary to indicate in general terms the principal differences which we think should be made between the two offences.

2. Common Purpose

6.11 The essential differences which we see between the offence of violent disorder and a new offence of riot have by implication already been indicated in our references to *R.* v. *Caird*[18] where the Court of Appeal stressed the importance of the *common purpose* of the participants in a riot to be achieved by the use of *numbers.* In that case the court emphasised that the gravity of the common law offence is derived from the fact that participants are " acting in numbers and *using* those numbers to *achieve their purpose* "; again, " any participation whatever . . . derives its gravity from becoming one of those who, by weight of numbers, *pursued* a common and unlawful purpose . . .[and] *to attain such a purpose* use[d] the threat that lies in the power of numbers ".[19] It is to be noted, however, that the offence of riot proposed in our Working Paper[20] substituted for the common law concept of a common purpose a concept of " engaging in an unlawful course of violent conduct ". We intended by this substitution to clarify what we conceived to be the effect of the common law, but some of our

---

16 Charges of riot were not brought in the case of the Brixton disturbances in 1981, although the disturbances amounted to riots at common law: see Lord Scarman's Report on The Brixton Disorders 10–12 April 1981 (1981), Cmnd. 8427, paras. 3.98–3.100. But we draw attention to Lord Scarman's observation that " though the evidence is too slight to amount to proof in a court of law, it indicates plainly enough not only that there was a degree of direction but also that, after the disorders had begun, some strangers participated in the attack upon the police, some leaders emerged, and some used the disorders for the deliberate commission of criminal offences ": *ibid.*, para. 3.101.

17 See paras. 6.3 and 6.7, above.

18 (1970) 54 Cr. App. R. 499.

19 *Ibid.*, at p. 505 (emphasis added).

20 See para. 6.5, above.

commentators preferred the retention of the concept of common purpose as more accurately reflecting the idea of concerted action on the part of a number of people.

6.12 We think that there is substance in this criticism. Persons who engage in acts of public disorder vary in the range of their conduct from those who, as we put it, incite and lead a riot to those whom we have described as casual participants.[21] The latter include individuals who, observing that disorder is taking place, take the opportunity to add their own act of aimless violence or disorder, without any particular purpose in mind.[22] But the effect of omitting the element of common purpose in our Working Paper proposal was, we think, to cause the casual participant, the pure opportunist who has shared no purpose with anyone but has merely added his own act of violence to those of others, to be guilty of riot. There is, of course, no reason why an intention to achieve a common purpose, such as an attack on the police, may not be formed upon the instant of joining in: premeditation is no more required for such an intention than for an intent to do grievous bodily harm. If, however, the particular gravity of riot as an offence were to be based simply on committing an act of violence at the same time as other people commit similar acts, then the importance of the offence would lie, not in the common purpose of the defendant shared with others, but in the cumulative damage and injury caused by the common acts. In our present view, however, it is the possession of a common purpose by a number of people which constitutes the particular danger of riot. Of course, in many instances the course of conduct of the rioters taken as a whole will be strongly indicative of what the common purpose is; but the course of conduct must essentially remain no more than evidence, usually the strongest evidence, of what the conduct is intended to achieve. We therefore conclude that the possession of a common purpose should be an integral part of any new offence of riot.

3. Numbers

6.13 The weight of numbers used to achieve the common purpose was another factor which was stressed by the Court of Appeal in *R.* v. *Caird* as denoting the gravity of riot.[23] At common law the minimum number required for riot is three, and in our Working Paper[24] we proposed to retain that number. In order to ensure that prosecutions were brought only in really serious cases, we proposed that no proceedings for the offence should be instituted except by or with the consent of the Director of Public Prosecutions. We acknowledged that a number as low as three was difficult to reconcile with the rationale of the offence of riot as expressed in *Caird*, and that raising the number would restrict the offence to conduct more closely resembling a "riot" in its ordinary meaning. However, we thought that this would lead to evidential difficulties:

---

21 See para. 5.34, above.

22 The court in *Caird* stressed that anyone is rightly guilty of common law riot or unlawful assembly if he participates in them irrespective of the "precise form" of his participation (*ibid.*, p. 505) but the significance of these dicta must be assessed in the context of the court's emphasis upon the element of common purpose.

23 See quotations in paras. 6.7 and 6.11, above.

24 Working Paper No. 82, paras. 5.21–5.22.

"Although a higher number would require all the participants to be be charged together, it would be necessary to prove that they were all engaged in an unlawful course of conduct involving the use of violence. If the minimum number were as high as twelve, this might present difficulties for the prosecution, who would be required to give evidence, not merely as to the numbers of persons present (which in many cases might be substantially higher than twelve), but as to the numbers who were actually pursuing a particular course of unlawful conduct involving the use of violence. There would be similar problems in cases of serious disturbances over a wide area involving separate groups of persons smaller than twelve in number; here again the prosecution might encounter difficulties in proving that a combination of such groups exceeding the minimum of twelve were pursuing a particular course of conduct."[25]

6.14 As we have said, this issue raised a considerable amount of criticism amongst our commentators: while a majority accepted our provisional conclusion, a substantial proportion favoured a higher number such as six or twelve. Our suggestion that prosecutions could be confined to really serious cases by the control of the D.P.P. was criticised by some commentators as an inadequate way of denoting the serious nature of the offence: control by prosecutorial discretion was not a proper substitution for an offence so defined that it could *only* be charged in the really serious circumstances which justified it.

6.15 The issue now falls for consideration in a different context. We have recommended that there should be an offence of violent disorder, requiring no proof of a common purpose and a minimum of only three persons present together, which will penalise acts of violence in the course of such disorder with up to five years' imprisonment. This will, in practice, be adequate to deal with those to whom we have referred as the casual participants in riots and those engaged in widespread street fighting. A new offence of riot should be a very serious offence available to prosecute those seen to be taking a continuing, persistent or active part in large-scale public disorders, with an appropriately high penalty. Having regard to this, and to the rationale of riot as expressed in *Caird*,[26] we no longer take the view that a minimum number as low as three can be justified. The weight of numbers is an essential part of that rationale which we think must be reflected in the definition of the offence itself. We now take the view that the process of eliminating those cases which ought not to fall within its scope should not depend solely upon the D.P.P.: any offence of riot, if defined by reference to a small number of people, does not adequately reflect its purpose and rationale.

6.16 It is true that any offence of riot which has as one element a minimum number substantially higher than three, such as ten or twelve,

---

[25] *Ibid.*, para. 5.22.
[26] See paras. 6.7 and 6.11, above.

meets with the evidential difficulties to which our Working Paper referred.[27] We recognise that this may well mean that the offence could only be used on the relatively infrequent occasions of really serious and widespread public disorder where there is ample evidence of the required numbers. If the requirements are not, in the event, proved at the defendant's trial, there would remain the possibility of conviction as an alternative[28] of the offence of violent disorder. In situations of public disorder falling short of such large-scale disturbances, we would expect this offence to be used rather than riot.

4. CONCLUSIONS

6.17 Our reconsideration of the offence of riot has led us to the following conclusions—

(*a*) There is a need to replace the common law with a new offence of riot available to deal appropriately with those promoting or taking an active part in wide-scale public disorders, which would be more serious than the offence of violent disorder which we have recommended, and would carry a heavier penalty.

(*b*) To distinguish a new offence of riot from violent disorder, and to mark it as an extremely serious offence—

(i) it must retain as one element the possession of a common purpose, and

(ii) the minimum number required for the offence must be substantially greater than the three required at common law: such a low number does not reflect the gravity of the offence.

With these conclusions in mind, we consider the constituent elements of a new offence of riot.

D. Elements of a new offence of riot

6.18 We *recommend* that there be a new offence of riot in place of the common law, triable only on indictment with a maximum penalty of 10 years' imprisonment and a fine. Where twelve or more persons are present together, whether in a public or private place, using or threatening unlawful violence for some common purpose (which may be inferred from their conduct) and their conduct, taken together, is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety, each of those persons who uses unlawful violence for the common purpose commits the offence of riot. Proceedings should be brought only by or with the consent of the Director of Public Prosecutions.[29]

1. THE PROHIBITED CONDUCT (ACTUS REUS)

(*a*) *Twelve or more persons*

6.19 In our reconsideration of the Working Paper proposals we concluded that for a new offence of riot the minimum number required should

[27] See para. 6.13, above.

[28] See paras. 7.5 *et seq.*, below, and Appendix A, cl. 6(4), which permits convictions for violent disorder, affray, conduct intended or likely to cause fear or provoke violence, and assault as alternatives to riot where these offences are proved.

[29] Appendix A, clauses 1, 6(2) and 8(2) and (3).

be substantially more than the three required at common law.[30] Some commentators on our Working Paper who disagreed with our provisional proposals for retention of three suggested variously the number six, ten or twelve. Any number is bound to some extent to be arbitrary, but the one which is chosen must be substantial enough to indicate that the offence is concerned with " numbers ", who are using their strength of numbers to achieve a common purpose. We have noted that certain jurisdictions in the United States have chosen ten as the requisite number for their gravest offence of riot.[31] In this country the Riot Act 1714 (repealed in 1967) provided that, if twelve persons were still assembled after the statutory hour, they were guilty of a felony, and to this extent the figure twelve has some historical connection as the basis for a serious offence. We think that that figure is sufficiently large to constitute the number for the purposes of a new offence and *recommend* accordingly. A figure substantially less than this, such as half this number, would not, for the reasons given in our discussion of this issue, adequately reflect the purpose or seriousness of the offence.

(*b*) *Using or threatening unlawful violence*

6.20 The offence requires a minimum of twelve persons using or threatening unlawful violence. The word " threats " in this context, and in the context of violent disorder, does not, unlike its meaning in the context of affray, exclude threats in the form of words. While mere altercations may not be prosecuted as an affray, threats which include words may be part of the incident which constitutes violent disorder or riot.[32] " Unlawful " bears the same meaning as it does in all the offences recommended in this Report.[33]

6.21 In order to prove that the requisite circumstances exist, it would not be necessary to show that the defendant and eleven other persons were simultaneously using or threatening violence at the time when the defendant himself commits those acts of violence which make him guilty of the offence. Any such requirement would make the offence very difficult to prove.[34] The provisions in the draft Bill are intended to make it clear that the necessary circumstances consist of a continuing event requiring twelve or more people to be acting in the specified, unlawful way. Our purpose is to define the circumstances which must be proved to exist at the time when the defendant commits the act which makes him guilty of the offence of riot. We believe that, as the offence is now drafted, it would not be construed by the courts as requiring that the acts of each participant were in process at the particular moment when the defendant committed that act.

6.22 If there are at least twelve persons using or threatening unlawful violence with the necessary common purpose, then, provided that the other requirements specified in the following paragraphs are satisfied, any of those

---

30 See paras. 6.13–6.16, above.

31 See Appendix C, para. 13, n. 25 and para. 14.

32 See Appendix A, cl. 3(2).

33 See Appendix A, cl. 8(1), and para. 3.40, above. It seems clear that s. 3 of the Criminal Law Act 1967 (use of force in making arrest etc.), which permits use of such force as is reasonable in the prevention of crime, would apply in circumstances where e.g. a person is defending his property from rioters by himself throwing missiles, provided he is using no more force than is reasonable in the circumstances.

34 But compare s. 240.06 of the New York Penal Code, Appendix C, para. 14, below.

persons commits the offence if, having that purpose, he uses unlawful violence, as distinct from the mere threat of violence.[35] "Violence" here has the same meaning as it has in the context of violent disorder;[36] thus it will not be necessary to prove that those using violence actually commit, or attempt to commit, offences against the person or property, although the likelihood is that a high proportion of them will do so in the course of the riot. It will be noted that, unlike our Working Paper,[37] the draft Bill does not refer to a person "taking part" or "participating" in a riot. Such terminology would give rise to difficulties in defining the minimum degree of activity which attracts criminal liability and, without some clarification, might give the impression that little more was required than the defendant's presence on the scene and some kind of encouragement. This possibility led some of our commentators to fear that, in the confusion of a riot, there might be a danger of innocent bystanders being implicated in the offence. Any such danger is, we believe, eliminated by the requirement that the defendant must have used actual violence. The conduct of those whose activities fall short of this will in our view be adequately dealt with by charges of aiding and abetting etc., or of one of the alternative offences.[38]

(c) In pursuance of a common purpose

6.23 According to the definition proposed, the offence requires a minimum of twelve persons using or threatening unlawful violence in pursuance of a common purpose. Common purpose is an element of the offence at common law, and we have explained why we think a new offence of riot should retain this requirement.[39] Several aspects of it need comment. It should first be noted that it must be proved that all twelve persons had the common purpose. Any lesser requirement would in our view not reflect adequately the nature of the offence. For example, if there were a requirement that only three out of the twelve need possess a common purpose, this would not give effect to the essential concept, the danger of which was stressed as we have seen in *R.* v. *Caird*,[40] of a body of people who by weight of numbers are intent on achieving their purpose.

6.24 It is, however, important to clarify the concept of common purpose. Purpose in this context does not mean motive: the individual motives of participants in a riot are irrelevant. This is a matter which in the context of the common law has sometimes given rise to confusion, and has led on occasion to the view that the common law in this respect imposes a serious practical difficulty.[41] Nor does the element of purpose mean that there must

---

[35] Compare *R.* v. *Caird* (1970) 54 Cr. App. R. 499, 504–505, quoted in para. 6.3, above: "The moment when persons in a crowd . . . commence to act for some shared common purpose . . . the assembly becomes unlawful. . . . The assembly becomes riotous *at latest* when alarming force or violence begins to be used". Under our recommended offence of riot, twelve or more persons using mere unlawful threats with a common purpose do not attract liability for the offence of riot, but if one of them uses actual unlawful violence, he commits the offence of riot, provided that the other requirements of the offence (common purpose, the requisite degree of fear etc.) are met.

[36] See paras. 5.30–5.33, above.

[37] Working Paper No. 82, para. 5.44.

[38] See para. 7.5, below and Appendix A, cl. 6(4).

[39] See paras. 6.11–6.12, above.

[40] (1970) 54 Cr. App. R. 499; see para. 6.13, above.

[41] See e.g. Petty, "Mob Rules", (1981) 145 J.P. 334, 335.

be proof of some prior plan or agreement upon the action to be taken.[42] In most instances the common purpose of the group will be a matter of inference from their actual conduct, and the draft Bill includes a provision which puts this beyond doubt.[43] Thus, for example, if the rioters are attacking the police or resisting their efforts to restore order, or trying to occupy a police station, the common purpose may be identified accordingly and specified in such terms in the indictment. To this extent, the offence requires an accurate assessment of what the rioters are actually doing, but this, we believe, imposes no undue difficulty and, indeed, is no more than is required for any other offence. Of course, there may on occasion be other evidence of a common purpose, such as evidence of prior planning, which if available would clearly be admissible towards establishing it. But on some of these occasions it may be possible to bring charges of conspiracy to commit a riot or to commit other offences against the person or property.

6.25 It should finally be noted that the common purpose may be of any character: it is irrelevant whether the purpose stated is of a lawful or unlawful character, although in most instances it is to be expected that, having regard to the requirement of unlawful violence, the purpose itself will be unlawful. Nor need the purpose be of a private as distinct from a public character. At common law there remains some doubt as to whether conduct ceases to be riotous if the common purpose is of a public as distinct from a private nature so as to amount to treason by levying war. This distinction, if it exists,[44] is not preserved in the new offence.

(d) In a public or private place, so as to cause fear

6.26 The other elements which contribute to the requisite circumstances do not differ from the corresponding requirements in the new offences of affray and violent disorder. The riot may take place alike on public or private premises,[45] and the unlawful conduct of the twelve or more people concerned must be such as would cause a person of reasonable firmness present at the scene to fear for his personal safety.[46] No further explanation of these elements is needed in the present context.

2. THE MENTAL ELEMENT (MENS REA)

6.27 Subject to our comments in the following paragraph, the requirements relating to the mental element and self-induced intoxication in riot are the same as those provided for affray and violent disorder, and the reasons for making such provision have been described in the context of affray.[47]

6.28 Riot also requires the prohibited acts to be done in pursuit of a common purpose, and to this extent it resembles the common law offence.

---

42 It seems probable that the common law offence requires no such plan: see *O'Brien* v. *Friel* [1974] N.I.L.R. 29, 42 *per* Lowry L. C. J., an appeal against conviction for the summary offence of riotous behaviour applying in the Province (Criminal Procedure (Miscellaneous Provisions) Act 1968, s. 9), where reliance was placed on English authorities for the meaning of " riotous ".

43 Appendix A, cl. 1(1).

44 The only modern authority, a dictum of the Northern Ireland Court of Appeal (*O'Brien* v. *Friel* [1974] N.I.L.R. 29, 43 *per* Lowry L. C. J.) suggests that there is no such distinction.

45 See paras. 3.34 and 5.34, above.

46 See paras. 3.39 and 5.35, above.

47 See paras. 3.41 and 5.36, above.

This additional element is one for which proof is required in respect not merely of the defendant but of at least eleven other persons. But the mode of proof of this element will not differ from that of any other mental element: it will be a matter of inference from conduct, of admission and of any other relevant and admissible evidence which may be available, such as prior planning or agreement. We have explained elsewhere[48] that self-induced intoxication is immaterial where the prosecution is required to prove mere recklessness as an element of the defendant's conduct. This is not the case where an intent has to be proved: in such cases, if the offence does not include recklessness as an alternative, self-induced intoxication may prevent the formation of the mental element and the defendant in that event will not be liable.[49] The element of common purpose in the proposed offence of riot amounts in substance to a further mental element of intent. We would therefore expect that, if there were sufficient evidence to indicate that a defendant accused of riot was too intoxicated to have the common purpose, he could not be found guilty of riot. Nevertheless, if his intoxication was self-induced, he could be convicted as an alternative of violent disorder,[50] since the question of whether the defendant was too intoxicated to form an intent is under the draft Bill made irrelevant to liability for that offence.[51]

6.29 Although the element of common purpose has been retained, unlike the common law the new offence of riot does not contain the element of "an intention to help one another by force if necessary against any person who may oppose them in the execution of their common purpose".[52] We think this adds nothing essential to the proper delimitation of the offence; its exclusion in our Working Paper proposals was approved by virtually all our commentators.

3. Consent of the Director of Public Prosecutions

6.30 We have pointed out that, in so far as this offence will require a minimum of twelve people, this reduces the need to rely on the consent of the Director of Public Prosecutions to the institution of proceedings in order to sift out those cases which ought not properly to be charged as riot.[53] This does not, however, dispose of the question whether his consent is desirable on other grounds. Charges of riot may in some cases raise issues of some sensitivity which may in a broad sense be regarded as "political". We think that there are solid reasons for a consent provision in the case of the offence under consideration. It seems to us that the D.P.P. may in some cases have every justification for deciding in the public interest that the offence should not be charged, even though the conduct on the occasions in question in other respects fulfils the requirements of the offence. The proposal in our Working Paper for this requirement met with widespread approval, including that of the Director himself. We *recommend* such a provision accordingly.[54]

---

[48] See para. 3.53, above. For reasons given in para. 3.50, above, neither riot nor the other offences recommended in this Report use the concept of recklessness in the mental element.

[49] See the authorities cited at para. 3.53, n. 94, above.

[50] See para. 7.8, below.

[51] See paras. 3.53 and 5.36, above and Appendix A, cl. 5(2).

[52] See para. 6.2, above and Working Paper No. 82, para. 5.38.

[53] See paras. 6.15–6.16, above.

[54] Appendix A, cl. 6(2); this provision applies also to those who incite riot: see *R.* v. *Assistant Recorder of Kingston-upon-Hull, ex parte Morgan* [1969] 2 Q.B. 58. Conspiracy is covered by the Criminal Law Act 1977, s. 4(3), attempt by the Criminal Attempts Act 1981, s. 2(2)(*a*) and aiding and abetting etc. by the Accessories and Abettors Act 1861, s. 8.

4. MODE OF TRIAL

6.31 We think that the offence of riot is eminently suited for trial on indictment only. It is intended to deal with the most serious forms of public disorder. We therefore *recommend* that riot be triable only on indictment.[55]

5. PENALTY

6.32 Riot is designedly more serious than violent disorder, for which we recommend a maximum penalty of five years' imprisonment. We suggested a maximum of fourteen years for the offence of riot proposed in our Working Paper.[56] Many of our commentators agreed; one or two favoured life imprisonment; some thought our provisional proposal to be too high. On reconsideration we think that it is marginally too high, although the maximum must clearly be considerably greater than that recommended for violent disorder. Substantially more must be proved under the offence of riot by way of numbers and of common purpose. The maximum penalty must be adequate to deal with the worst case of someone found guilty of the offence, who will no doubt generally be a leader or principal participant in a major disturbance. But while the maximum must reflect the gravity of his conduct, it must be borne in mind that it will not be necessary to prove that the defendant injured another or damaged property. Upon that basis we take the view that the maximum ought not to be as high as those which may be imposed for the most serious offences against the person or property, or conspiracy to commit them. These considerations lead us to the view that the maximum penalty should be ten years' imprisonment and a fine. We *recommend* accordingly.[57]

PART VII

MISCELLANEOUS AND PROCEDURAL MATTERS

7.1 In this Part we examine certain matters common to all of the offences recommended in this Report, which include possible problems in relation to aiding, abetting and incitement, the position with regard to conviction of alternative offences and powers of arrest, and entry, search and seizure. We also deal with the implications of our recommendations in relation to existing legislation and related matters.

A. Aiding and abetting; incitement

1. AIDING AND ABETTING

7.2 In general, we do not think that the offences recommended in this Report give rise to any special difficulties in relation to the liability of secondary parties, those who aid, abet, counsel or procure these offences. The matter is mentioned only because the liability of those who aid and

---

55 Appendix A, cl. 1(2).

56 See Working Paper No. 82, para. 5.51.

57 Appendix A, cl. 1(2). There is a significant number of cases in recent years where the maximum penalty imposed for riot has been five years or more: see *R.* v. *Turnbull* [1962] Crim. L.R. 413 (five years); *R.* v. *Murphy* [1968] Crim. L.R. 118 (seven years); *R.* v. *Anderson and others, The Guardian,* 31 July 1970 (six and five years); *R.* v. *Pilgrim and Huggins, The Guardian,* 16 April 1982 (five years).

abet unlawful assembly and riot at common law is apparently not clearly distinguished from those who are liable as principals in the first degree.[1] On the other hand, the liability of those aiding and abetting affray at common law has been established by a series of cases, from which it is apparent, first, that mere presence at any affray is not enough to constitute aiding and abetting: there must be evidence that the defendant at least encouraged the participants by some means or another, although if the presence is prima facie not accidental, this may amount to such evidence.[2] Secondly, there must be proof that the defendant intended to encourage, and wilfully encouraged, the crime.[3]

7.3 In the new offences of affray, violent disorder and riot the prohibited conduct of the individual defendant is clearly defined, so that there should be little difficulty in understanding how the common law principles relating to secondary parties apply to them. These require knowledge of (or wilful blindness towards) the circumstances which must be proved in order to constitute the offence.[4] Thus, if an individual were accused of aiding and abetting a defendant charged with violent disorder, it would in addition to his acts of aiding and abetting be necessary to prove that he was aware of the events which constitute the circumstances requisite for the commission of the offence of violent disorder, that is, the presence of three or more persons using or threatening violence ;[5] while in the case of one accused of aiding and abetting a person charged with riot, it would be necessary to prove in addition to his acts of aiding and abetting that he was aware that there were twelve or more persons using or threatening violence in pursuance of a common purpose. If there were any doubts as to the knowledge of one alleged to be aiding and abetting a person accused of riot, he would in any event most probably be liable for the offence of conduct intended to, or likely to, cause fear or provoke violence, where liability depends on proof of threatening, abusive or insulting behaviour. Alternatively, charges of aiding and abetting affray or violent disorder would in appropriate circumstances be available.

2. Incitement

7.4 There seems to be no authority on the question whether, for the purposes of the common law offences of unlawful assembly or riot, a person incites the offence if he incites one person only to participate or whether the incitement must be directed towards three or more.[6] In the case of the new

[1] Reference may be made to the dictum of Sachs L. J. delivering the judgment of the Court of Appeal in *R.* v. *Caird* (1970) 54 Cr. App. R. 499, 505: " Any person who actively encourages or promotes an unlawful assembly or riot, whether by words, by signs or actions, or who participates in it, is guilty of an offence which derives its great gravity . . . " etc. see para. 6.7, above.

[2] *R.* v. *Allan* [1965] 1 Q.B. 130, 137 (C.C.A.).

[3] See *R.* v. *Clarkson* (1971) 55 Cr. App. R. 445 in which *Allan* (*ibid.*,) was considered, and *R.* v. *Jones and Mirrless* (1977) 65 Cr. App. R. 250.

[4] See *Johnson* v. *Youden* [1950] 1 K.B. 544, 546 *per* Goddard L. C. J. and Smith and Hogan, *Criminal Law* 4th ed., (1978), p. 123.

[5] A person who is himself one of the three or more who together are using or threatening violence may, if he is using threats, himself be aiding and abetting the defendant charged with violent disorder if he is aware that at least one other person is using violence or threats; together they constitute the minimum of three of whose conduct he must be aware.

[6] On incitement to riot generally, see *R.* v. *Sharpe* (1848) 3 Cox C.C. 288. In *R.* v. *Los* (Nottingham C.C.), *Daily Telegraph*, 21 October 1981, the incitement was at large: the defendant was convicted and sentenced to three years' imprisonment for incitement to riot, after posting leaflets headed " Burn Babylon Burn ", urging people to have bigger and better riots and to destroy the " system ".

statutory offences of riot and violent disorder which we recommend, we think that the requirements should be clear enough without further provision. As in the case of the aider and abettor, it must be proved that, in addition to the act of incitement the inciter knew of (or deliberately closed his eyes to) all the circumstances which rendered the act incited the offence in question.[7] It follows that in these two offences incitement to commit the offence must mean an incitement to do the prohibited acts in the circumstances which make them an offence. Thus in the case of violent disorder, to be liable for incitement it will be necessary for the inciter to incite another to use unlawful violence, knowing or intending that, when he does use violence he will be one of three or more present together using or threatening unlawful violence. Similarly, to be liable for incitement to riot, it will be necessary for the inciter to incite another to use unlawful violence, knowing or intending that, when he does use violence, he will be one of twelve or more using or threatening such violence with a common purpose.[8] The requirements will be similar in the case of the offence contained in clause 4 of the draft Bill, but in so far as by its terms it penalises behaviour preparatory to acts of violence in the form of threatened violence or threatening behaviour, the occasions for charges of incitement to commit it are likely to be fewer in number.

B. Conviction of alternative offences

1. On Indictment

7.5 Provisions already exist whereby if a jury find a person not guilty of the offence specifically charged in the indictment, but the allegations in it amount to or include, " expressly or by implication ", an allegation of another offence falling within the court's jurisdiction, the jury may find him guilty of it, or of an offence of which he could be found guilty on an indictment specifically charging it.[9] In deciding what was included in the indictment by " implication ", where it charges a major offence without setting out any particulars of the matter relied on, the correct test for ascertaining whether it contains allegations which impliedly include an allegation of a lesser offence is whether it is a necessary step towards establishing the major offence to prove the commission of the lesser offence ; in other words, whether the lesser offence is an essential ingredient of the major one. The subsection confines the court to looking at the allegations in the indictment and precludes it from looking at the depositions.[10] However, when the court has to decide what was included " expressly " in the indictment, the proper course is to look at the words of the indictment and if, after striking out all the averments which have not been proved, it leaves particulars of another offence within the court's jurisdiction which the accused can then and there defend, the judge can ask the jury to consider whether that other offence has been proved.[11]

7.6 In the context of the new offence of violent disorder we stressed that, in so far as the new offence of affray penalises a person who uses violence against another in circumstances giving rise to fear, conviction of that offence

---

[7] Smith and Hogan, *Criminal Law* 4th ed., (1978), p. 214.
[8] Compare New York Penal Code, s. 240.08, Appendix C, para. 14.
[9] Criminal Law Act 1967, s. 6(3). On this subsection generally, see *Archbold* 41st ed., (1982), paras. 4–462 and 4–463.
[10] *R.* v. *Springfield* (1969) 53 Cr. App. R. 608; see also *R.* v. *Wilson* [1983] 1 W.L.R. 356 (leave to petition H.L. allowed: *ibid.*, p. 379) and *R.* v. *Jenkins* [1983] 1 All E.R. 1000.
[11] *R.* v. *Lillis* [1972] 2 Q.B. 236.

should be regarded as an alternative to a conviction for violent disorder.[12] Thus if in a case of violent disorder involving the use of violence against the person the defendant is found not to have committed that offence because of insufficient evidence of the requisite number of three persons, it should be possible for the jury to convict of the new offence of affray. Similarly, we have mentioned the desirability of violent disorder being an alternative to riot.[13] So if in a case of riot the prosecution is unable to prove the requisite number or the intention to achieve a common purpose, it should be possible for the jury to convict of violent disorder (or again affray), provided that there is proof of the requisite number of three for that offence. And the offence penalising threatening words or behaviour[14] should also be an alternative to the other offences, in the event of it being proved that a particular defendant did no more than use threatening words.

7.7 In the light of section 6(3) of the Criminal Law Act 1967 and its current application, to what extent would the alternative verdicts which we have suggested are desirable be available without special provision? It seems to us doubtful whether, save in one case only, these would be so available. An allegation of violent disorder which fails on account of the absence of proof of numbers could not lead to a conviction of affray in the absence of special provision, since an indictment for affray would require an allegation specifically of violence to the person, while violent disorder would not: it is immaterial for the purposes of that offence whether the violence is directed against persons or property. The offence of using threatening, abusive or insulting words or behaviour requires either an intent or a likelihood of causing fear of immediate violence to person or property, or of provoking such violence; thus again, while concerned with conduct akin to violent disorder, its constituent elements differ. The only instance where it would in all probability be the case that one offence forms an "essential ingredient" of another is that of riot and violent disorder. The latter could, we think, properly be regarded as an essential ingredient of the former, so that a conviction for it would be an alternative to a conviction for riot by virtue of section 6(3) of the 1967 Act.

7.8 We have come to the conclusion that the position should be put beyond doubt, so that a jury may convict of alternative offences without the need for further and separate counts in the indictment. Accordingly the draft Bill provides[15] for violent disorder and affray to be alternative verdicts to riot, and for conduct intended or likely to cause fear to be an alternative to the foregoing offences. As we have pointed out, section 6(3) would in any event operate in relation to riot and violent disorder, but these offences have been included within the table of alternative verdicts provided by the draft Bill in order that the scheme may be seen as a whole.

7.9 One question remains with reference to alternative verdicts. It concerns the position which would arise upon the trial on indictment of charges of the proposed new group offence which penalises threatening, etc. words or

---

12 See para. 5.24, above. Unlike affray, violent disorder under our recommendations also penalises violent acts against property, and affray, unlike violent disorder, also penalises threatened violence against another: see paras. 3.17 and 5.30, and Appendix A, clauses 2(1) and 3(1).

13 See para. 6.16, above.

14 See para. 5.26, above.

15 Appendix A, cl. 6(4). Cl. 6(4)(*b*) ensures that affray and the cl. 4 offence are alternatives to riot, and that assault is an alternative to each offence.

behaviour by three or more persons: if the jury were satisfied that only one or two persons had used such words or behaviour with the necessary intent or likely consequence, it would without some special provision be necessary to direct the jury to acquit that person, or those two persons, although each was shown to have been guilty of the summary offence under section 5 of the Public Order Act 1936. We think that provision should be made so that such a result, which would not reflect well on the working of the criminal law, would be avoided by enabling the jury to convict of the summary offence. The penalty for the summary offence would be applicable. We do not expect that recourse would often be had to such an alternative verdict, because it is probable that prosecutions for the indictable offence would be commenced only in cases where there is clear evidence of participation by more than three persons (however many of them are charged) and in which the presence of numbers is seen to have added significantly to the gravity of the offence. Nevertheless the court and jury should not be compelled to acquit a person who has been proved to be guilty of a breach of section 5 merely because the case had been brought in the Crown Court on a charge of the group offence instead of in the magistrates' court. A similar provision exists with reference to the summary offence of careless driving which is provided as an alternative verdict on a charge of reckless driving.[16] We see no reason to think that the difference between the language of the proposed offence and section 5 are such as to make a provision for alternative verdict either unacceptable in principle or difficult to operate. Further consideration will no doubt be given to the scope of section 5 in the light of the recommendations in this Report.[17] If section 5 were amended to accord with the proposed group offences, the working of any provision for an alternative verdict would be to that extent simplified.

2. On Summary Trial

7.10 Section 6(3) of the Criminal Law Act 1967 does not apply to summary trials. Moreover, it seems that a magistrates' court has no jurisdiction to convict of a lesser offence than that charged even if it forms an ingredient of the greater offence.[18] Nor until recently was it thought that, in the absence of the defendant's consent, a magistrates' court might try more than one information alleging one offence at any one time.[19] The House of Lords, however, has by its decision in *Chief Constable of Norfolk* v. *Clayton*[20] held that the absence of the consent of the defendant is not "a complete and automatic bar" to the trial together of two or more informations "when in the justices' view the facts are sufficiently closely connected to justify this course and there is no risk of injustice to defendants by its adoption.... The justices should always ask themselves whether it would be fair and just to the defendant ... to allow a joint trial"[21] and if the answer is clearly in the affirmative they should order joint trial in the absence of consent.

---

[16] Road Traffic Act 1972, s. 177(4) and Schedule 4, Pt. IV, para. 3A(1) (added by the Criminal Law Act 1977, s. 65(4), Sched. 12).

[17] See para. 1.6, above.

[18] *R.* v. *Brickhall* (1864) 10 L.T. 385. This was cited (*sub. nom. R.* v. *Brickill*) in *Lawrence* v. *Same* [1968] 2 Q.B. 93, 98, which was overruled on other grounds by *Chief Constable of Norfolk* v. *Clayton* [1983] 2 W.L.R. 555.

[19] *Lawrence* v. *Same*, *ibid.*

[20] [1983] 2 W.L.R. 555.

[21] *Ibid.*, at p. 565 *per* Lord Roskill.

7.11 It follows from this decision that if separate informations are laid in respect of the offences of violent disorder, affray and conduct intended or likely to cause fear, the justices may, if they consider it fair and just to the defendant, try these informations together without his consent.[22] The question remains whether there should be some further provision analogous to that which we have recommended in relation to trials on indictment, enabling the magistrates' courts to convict of a lesser offence than that charged if the facts established the defendant to have been guilty of the lesser offence. On balance, we think that no further express provision should be made. It is arguable that a person charged in a magistrates' court with, for example, violent disorder may not be prepared, without notice, to defend himself in relation to a different offence such as affray. And on indictment the position differs in so far as the jury would have the benefit of the judge's direction on the two different offences. Accordingly, we make no further recommendation here: we think that the law, as now established by the House of Lords, is that which is fair and just to the defendant in the circumstances of summary trials of the offences triable either way recommended in this Report.

C. Duplicity of counts

7.12 Rule 7 of the Indictment Rules 1971 provides, inter alia, that when a statutory offence is stated in the form of the doing of acts in the alternative or with different intentions, or states any part of the offence in the alternative, then the acts, intentions or other matters may be stated in the alternative in the indictment. The decisions as to whether a particular enactment states one offence with alternative modes of committing it, or two or more separate offences, are not easy to reconcile.[23] Whatever the position may be as to duplicity in this context, similar considerations apply in the context of offences tried summarily by information.[24] The difficulties relating to duplicity are exemplified by the authorities relating to section 5 of the Public Order Act 1936 in so far as that section penalises, on the one hand, the use of threatening etc. words or behaviour with intent to provoke a breach of the peace and, on the other, the use of such behaviour whereby a breach of the peace is likely to be occasioned. There is authority[25] for the view that section 5 thereby creates two offences and that informations should therefore charge either conduct intended or conduct likely, but not both. On the other hand, no-objection seems to have been taken to an information charging both as one offence in *Parkin v. Norman*,[26] and *Archbold*[27] takes the view that the offence may be charged in one information in the alternative.

7.13 We are recommending the creation of an offence penalising conduct intended or likely to cause fear or provoke violence: see clause 4 of the draft Bill at Appendix A. This penalises conduct taking two different forms, that is, the use of threatening etc. words or behaviour intended or likely *either* to

---

22 Another consequence of the decision is to make otiose s. 4(2) of the Criminal Attempts Act 1981, recommended in our Report on Attempt, and Impossibility in relation to Attempt, Conspiracy and Incitement (1980), Law Com. No. 102, paras. 2.114–2.115, which permits trial together without consent of informations alleging an offence and an attempt to commit the offence.

23 See *Archbold* 41st ed., (1982), paras. 1-59 to 1-62.

24 See e.g. *Vernon* v. *Paddon* [1973] 1 W.L.R. 663 (D.C.).

25 *R.* v. *John* [1971] Crim. L.R. 283 (Inner London Quarter Sessions, Judge Copplestone-Boughey).

26 See [1983] Q.B. 92, 96 and para. 5.15, above.

27 41st ed., (1982), para. 25-8 (sc. " count " here means " information ").

cause another to fear unlawful violence *or* to provoke the use of unlawful violence by another. It is our intention that this offence should be charged as one, without the need for separate counts or informations, so that if in any particular case the court is not satisfied that the conduct was intended or likely to cause fear, it may, if satisfied as to the facts, nonetheless convict of conduct intended or likely to provoke violence. A similar situation might arise in the context of the new offence of affray in clause 3, where conduct is described in the alternative. In order to avoid the possibility that charges of these offences in single counts or informations might be held bad for duplicity, we *recommend* the inclusion of a provision which puts the matter beyond doubt. The draft Bill makes provision accordingly.[28]

D. Powers of arrest, search and seizure

7.14 In the following paragraphs we deal with the question whether special provisions are needed in respect of the police's powers of arrest, and of entry, search and seizure upon private premises. We noted at the outset of this Report[29] that the general issue of police powers is outside its scope, but it is clearly of fundamental importance to ensure that the introduction of a range of new offences to deal with public disorder does not diminish the existing powers at common law.

1. Powers to Deal with Breaches of the Peace

7.15 "Every citizen in whose presence a breach of the peace is being, or reasonably appears to be about to be, committed has the right to take reasonable steps to make the person who is breaking or threatening to break the peace refrain from doing so; and those reasonable steps in appropriate cases will include detaining him against his will. At common law this is not only the right of every citizen, it is also his duty, although, except in the case of a citizen who is a constable, it is a duty of imperfect obligation."[30] The concept of breach of the peace is thus fundamental to the exercise of police powers to secure public order, and to effect arrest of those whose conduct threatens that order. In more detail, the power of arrest for breach of the peace exists where—

> "(1) a breach of the peace is committed in the presence of the person making the arrest or (2) the arrestor reasonably believes that such a breach will be committed in the immediate future by the person arrested although he has not yet committed any breach or (3) where a breach has been committed and it is reasonably believed that a renewal of it is threatened."[31]

7.16 None of the offences which we recommend have as an element the concept of a breach of the peace and, indeed, we have explained why we thought it preferable to avoid using that concept.[32] Nevertheless, we have no doubt that in every case likely to arise in practice where one or other of our offences is committed a breach of the peace will have been committed

---

28 Appendix A, cl. 6(3).
29 See para. 1.7, above.
30 *Lavin* v. *Albert* [1982] A.C. 546, 565 *per* Lord Diplock.
31 *R.* v. *Howell* [1982] Q.B. 416, 426 *per* Watkins L. J. delivering the judgment of the Court of Appeal.
32 See paras. 5.14 *et seq.*, above.

or would be apprehended. This consideration is of particular relevance in the offence penalising conduct intended, or likely, to cause fear of violence or provoke violence,[33] which is designed to replace unlawful assembly at common law in so far as that offence deals with assemblies whose purpose is to use threats which cause an apprehension of a breach of the peace.[34] At common law, the authorities indicate that there is power to disperse an unlawful assembly using reasonable force if necessary.[35] This is, however, simply one aspect of the power to ensure that persons who break or threaten to break the peace refrain from doing so, and in our view no special provisions are required in consequence of the abolition of the common law offence to ensure that the police have adequate powers in this respect for the purpose of controlling or dispersing assemblies.

7.17 It is, of course, necessary to ensure that in all cases where there are substantial disturbances to public order the police have adequate powers of arrest without warrant where they believe that serious offences are being committed. Those powers currently exist in the case of arrestable offences,[36] which include all statutory offences with a maximum penalty exceeding five years' imprisonment. The common law offences of riot, unlawful assembly and affray are at present not " arrestable " under the statute, because they are non-statutory offences;[37] however, since all of these offences necessarily entail a breach of the peace, or the apprehension thereof, the powers of arrest to which we have alluded above[38] apply in respect of them. Under the scheme of offences recommended in this Report, riot and violent disorder would become arrestable offences. But the offence in clause 4 of the draft Bill which penalises conduct intended or likely to cause fear of violence, or to provoke violence, as well as the offence of affray in clause 3, would be non-arrestable, since the maximum penalties recommended in relation to them would be below the five-year minimum which is the general criterion applying to arrestable offences. It is difficult to postulate circumstances in which any of these offences would be committed without in practice giving rise to a breach or an apprehended breach of the peace,[39] and in which the common law powers of arrest to which we have referred would not therefore suffice. Nevertheless, to put the matter beyond doubt we think that specific provision ought to be made for a constable to be able to arrest without warrant anyone whom he reasonably believes to be committing these offences. We therefore *recommend* such powers in relation to the offences recommended in this Report for which the maximum sentence is less than five years' imprisonment.[40]

---

33 See para. 5.40, above.
34 See para. 5.2, above.
35 *O'Kelly* v. *Harvey* (1883) 15 Cox C. C. 435.
36 See Criminal Law Act 1967, s. 2.
37 They would become arrestable if cl. 16 of the Police and Criminal Evidence Bill before Parliament during the 1982–83 session were enacted, since the definition of arrestable offences would thereby be extended to *any* offences whose penalties exceed the five-year maximum: see cl. 16(1)(*b*).
38 See para. 7.15, above.
39 We have referred in para. 5.44, above to the fact that the definition of violence in the offence in clause 4 is slightly wider than the definition of a breach of the peace adopted by the Court of Appeal in *R.* v. *Howell* [1982] Q.B. 416; thus there is a possibility, more theoretical than real, that the threatening etc. behaviour penalised by the offences would not give rise to an apprehended breach of the peace; compare para. 7.16, above.
40 See Appendix A, cl. 6(1). It should be noted that there already exists a similar power of arrest without warrant in respect of offences under the Public Order Act 1936, s. 5: see s. 7(3).

2. Powers of Entry Without Warrant

7.18 It is unnecessary for our purpose to examine at length the position at common law with regard to powers of entry. It is sufficient to point out that certain powers of entry exist at common law which include that of dealing with or preventing a breach of the peace,[41] and also dealing with affrays.[42] In addition, while no general power exists for a police officer to enter premises to make an arrest without warrant, section 2(6) of the Criminal Law Act 1967 provides that, for the purpose of arresting a person who has committed an arrestable offence a constable " may enter (if need be, by force) and search any place where that person is or where the constable, with reasonable cause, suspects him to be."[43] Under the Police and Criminal Evidence Bill before Parliament during the 1982-83 session, the power would have been extended to cover certain offences under the Public Order Act 1936, including section 5.[44] As we have pointed out above,[45] the common law powers apply in respect of riot, unlawful assembly and affray at common law, but the powers under section 2(6) of the 1967 Act do not. Enactment of our draft Bill would make riot and violent disorder arrestable offences, but not the offences contained in clauses 3 and 4, where the maximum penalty recommended is below five years. However, in our view, the powers at common law should be preserved in relation to all the offences recommended in this Report, including those of our recommended offences which would otherwise be non-arrestable. We accordingly *recommend* that there be powers of entry without warrant for the purpose of arresting persons for the offences of affray, and of conduct which is intended or likely to cause fear of violence or provoke violence.[46] However, our draft Bill contains no provision giving effect to this recommendation, since it would be best included in any general legislation on the subject, such as any legislation derived from the Police and Criminal Evidence Bill to which reference is made above.

3. Powers of Search and Seizure

7.19 Modern statutes creating serious criminal offences frequently confer specific powers upon the police to enter and search premises and seize property which has been used in the commission of those offences.[47] There are no such powers in respect of the common law offences relating to public order, to which the powers permitted at common law apply.[48] The common law also governs the position in relation to seizure of property where no person has been arrested or charged.[49]

7.20 The Police and Criminal Evidence Bill before Parliament during the 1982-83 session would have effected changes in the law, following upon

---

41 *Thomas* v. *Sawkins* [1935] 2 K.B. 249.

42 See para. 3.26, above.

43 A similar power is conferred in respect of some of the offences of entering and remaining on property by the Criminal Law Act 1977, s. 11.

44 See para. 5.3, above.

45 See para. 7.17, above.

46 I.e. the offences in clauses 3–4.

47 See e.g. Theft Act 1968, s. 26 (search for and seizure of stolen goods), Criminal Damage Act 1971, s. 6 (search for things used or intended for use in committing offences of criminal damage), Forgery and Counterfeiting Act 1981, ss. 7 and 24 (search, seizure and forfeiture of specified articles used for forgery and counterfeiting).

48 See *Archbold* 41st ed., (1982), para. 15-78, citing inter alia *Chic Fashions (West Wales) Ltd.* v. *Jones* [1968] 1 A11 E.R. 229 and *Garfinkel* v. *Metropolitan Police Commissioner* [1972] Crim. L.R. 44.

49 See *Ghani* v. *Jones* [1970] 1 Q.B. 693.

the recommendations of the Royal Commission on Criminal Procedure.[50] Thus it provided among other matters for warrants for entry and search of premises for evidence relating to serious arrestable offences, and seizure of articles during such a search to prevent their concealment, loss or destruction.

7.21 Whether express powers of search and seizure wider than those provided at common law would be needed in relation to the offences recommended in this Report is a matter on which we do not consider it necessary to express a view.[51] If such powers are needed, there seem to be two ways in which provision could be made for them. Specific provision could be made for powers of search and seizure similar, for example, to those contained in section 6 of the Criminal Damage Act 1971. This would provide for search and seizure of things which have been used or are intended for use in the future to commit the offences recommended in this Report. Alternatively, matters could await any general legislation derived from the Royal Commission on Criminal Procedure or the Police and Criminal Evidence Bill. In the event of the latter course, however, we think it would be right to treat all of the offences in our draft Bill alike in regard to powers of search and seizure, even though those with maximum penalties below five years would not constitute arrestable offences under the general law. This is because the conduct penalised by the offences overlaps, and all of the offences are interconnected, in so far as they penalise violence and threatened violence of various degrees of seriousness, and alternative convictions are expressly made available in relation to each of them.

7.22 Accordingly, we make no specific recommendation in regard to powers of search and seizure, but express the view that, if provision is to be made for powers additional to those at present available at common law, any such provision should apply in respect of all the offences recommended in this Report.

E. Implications of our recommendations in relation to other legislation etc.

7.23 Finally in this Part of the Report we deal with the possible implication of our recommendations for existing legislation, most of which lies outside the criminal law, and other related matters.

1. Criminal Justice Act 1982

7.24 The only legislation referring in terms to the common law offences relating to public order which it is necessary for us to consider appears to be the Criminal Justice Act 1982. Section 32 enables the Home Secretary to order the early release from imprisonment of any class of prisoners specified in the order other than those who are serving a sentence for, inter alia, an "excluded offence". Part I of Schedule 1 to the Act specifies riot and affray as excluded offences. Statutory offences which are excluded offences for this purpose are specified in Part II of this Schedule. It would seem to be in accordance with the policy of the Act for Part II to specify our recommended offences of riot, violent disorder and affray, and the draft Bill makes provision accordingly.[52]

---

[50] (1981) Cmnd. 8092.

[51] The matter was not raised in our Working Paper and for reasons set out below we thought it premature to consult on it.

[52] Appendix A, cl. 6(5); see also cl. 9(1) and Schedule (repeals).

2. Riot (Damages) Act 1886 and Merchant Shipping Act 1894, Section 515

7.25 There has for many years been a connection between the definition of riot at common law and the circumstances under which compensation is payable out of the police fund.[53] This is because under the Riot (Damages) Act 1886 compensation is payable for damage to buildings etc. caused by persons " riotously and tumultuously assembled ", and " riotously " here bears the same meaning as it does at present in the criminal law.[54] Section 515 of the Merchant Shipping Act 1894 applies the compensation provisions of the 1886 Act to the owners of shipwrecked vessels which are plundered by persons " riotously and tumultuously assembled together ".

7.26 The 1886 Act is at present under review[55] and, if the Act is to be preserved, it will clearly be necessary to consider whether it is desirable to maintain the link in the Act with the new offence of riot which we recommend; similar considerations apply in respect of the provision in the Merchant Shipping Act 1894. Meanwhile, our draft Bill makes clear that its provisions would not apply to these Acts.[56]

3. Licensing Act 1964, Section 188

7.27 Section 188 of the Licensing Act 1964 makes provision for licensed premises to be closed on the order of the justices in or near the place where a " riot or tumult " happens or is expected to happen. The draft Bill would have no effect on this provision.[57]

4. Representation of the People Act 1983

7.28 Paragraph 16 of the rules relating to parliamentary elections contained in Schedule 1 to the Act provides for adjournment of nominations on any day interrupted or obstructed by " riot or open violence ". Again, the draft Bill would have no effect on this provision.[58]

5. " Riotous Behaviour " in Other Legislation

(a) *Ecclesiastical Courts Jurisdiction Act 1860*

7.29 Section 2 of the Ecclesiastical Courts Jurisdiction Act 1860 penalises, inter alia, any person guilty of " riotous, violent or indecent behaviour " in places of worship belonging to the Church of England and places of worship certified under the Places of Religious Worship Registration Act 1855. There appears to be little or no authority on the meaning of " riotous " in this context.[59] This offence is currently under review as part of our work on offences against religion and public worship.[60] We do not think that the

---

53 As defined by the Police Act 1964, s. 62 and Schedule 8.

54 See para. 6.2, above. *J. W. Dwyer Ltd.* v. *Metropolitan Police District Receiver* [1967] 2 Q.B. 970 established that the term " tumultuously " must also be considered: Lyell J. (pp. 979–980) said that the term gives " the impression . . . that the assembly should be of considerable size " and that it involved a concept additional to " riotously ". Both requirements must be satisfied to render the Act applicable.

55 See *Hansard* (H.C.), 16 December 1982, vol. 34, (Written Answers), col. *206*.

56 Appendix A, cl. 9(2).

57 *Ibid.*

58 *Ibid.*

59 The authorities bear mostly upon the meaning of " indecent ": see *Abrahams* v. *Cavey* [1968] 1 Q.B. 479.

60 Our Working Paper No. 79, Offences against Religion and Public Worship, published in 1981, provisionally proposes repeal and replacement of this section.

recommendations in this Report should affect the interpretation of this provision, and our draft Bill ensures that enactment of our new offences would not have such an effect.[61]

(b) Burial Laws Amendment Act 1880

7.30 Section 7 of this Act penalises, inter alia, any person guilty of " riotous, violent or indecent behaviour " at any burial under the terms of the Act (that is, burials without Church of England rites). Again, we are dealing with this provision in the context of our work on offences against religion and public worship[62] and recommend that the draft Bill appended to this Report should, if implemented, not affect its interpretation.

(c) " Riotous behaviour " in local legislation

7.31 Various local Acts penalise " riotous behaviour ". Some of these provide that section 28 of the Town Police Clauses Act 1847 (which penalises various nuisances) should, within the relevant area, be read and have effect as if certain additional acts and omissions specified in the local Act, which include " riotous behaviour ", were inserted in it. It seems that " riotous " in this context has at least on some occasions been interpreted to mean relatively minor acts of misbehaviour without the need for proof of the three or more persons with a common purpose required by the common law.[63] It is likely that these provisions will in due course lapse by virtue of the operation of section 262 of the Local Government Act 1972.[64] However, until that occurs, we do not think that enactment of our recommendations, if accepted, should affect the way in which these provisions are interpreted. The draft Bill will again ensure that this result is achieved.[65]

6. INSURANCE

7.32 Insurance policies commonly provide that the insurer is not to be liable for loss arising from various forms of civil commotion, including any large-scale civil disturbance which, for legal reasons, may not amount to a riot. Whether the wording of insurance policies will require amendment if our recommendations are implemented is a matter which will be for consideration by those in the insurance field. If such rewording is required, our consultation has indicated the importance of permitting an adequate period for this to be considered and carried out before legislation comes into force.[66]

---

61 Appendix A, cl. 9(2).

62 Our Working Paper No. 79, Offences against Religion and Public Worship proposes its repeal.

63 See J. C. Brooke-Taylor, " Riotous Behaviour ", (1981) 145 J.P. 286. Section 123 of the Derby Improvement Act 1879 referred to in this article was repealed by the Derbyshire Act 1981.

64 This sets out the procedure by which local legislation is to be rationalised in stages.

65 Appendix A, cl. 9(2).

66 Clause 10(2) provides for the Bill to come into force two months after it has been passed. This is now the standard period to be stipulated, but this would clearly have to be considered further in the light of the factor mentioned above and any other relevant factors.

PART VIII

MISCELLANEOUS STATUTORY OFFENCES RELATING TO PUBLIC ORDER

A. Introduction

8.1 In this Part of the Report we examine a number of statutory offences in the field of public order which are obsolete or seem archaic. We have already explained in the Introduction[1] the reasons why our review of statutory offences is limited to these few examples.

B. Offences relating to the prevention of disorder around Parliament

8.2 Two of these Acts may be dealt with very briefly. These are the Tumultuous Petitioning Act 1661 and the Seditious Meetings Act 1817, section 23.

1. Tumultuous Petitioning Act 1661

8.3 This Act was one of a number of measures aimed at restoring and maintaining order in the country in the period immediately following the Restoration of the Monarchy. The Act provides in section 1 that:

> "no person or persons whatsoever shall repair to His Majesty or both or either of the Houses of Parliament upon pretence of presenting or delivering any petition, complaint, remonstrance or declaration or other addresses accompanied with excessive number of people, nor at any one time with above the number of ten persons. . . . "

The maximum penalty for this offence is a fine of £100 and 3 months' imprisonment on indictment. We are unaware of any prosecution under the Act in modern times.[2]

2. Seditious Meetings Act 1817, Section 23

8.4 Section 23 of this Act places restrictions on certain meetings in Westminster during the sitting of Parliament. It provides that:

> "it shall not be lawful for any person or persons, to convene or call together or to give any notice for convening or calling together any meeting of persons consisting of more than fifty persons, or for any number of persons exceeding fifty to meet, in any street, square, or open place in the city or liberties of Westminster, or County of Middlesex, within the distance of one mile from the gate of Westminster Hall . . . , for the purpose or on the pretext of considering of or preparing any petition, complaint, remonstrance, declaration or other address to the King . . . , or to both Houses or either House of Parliament,[3] for alteration of matters in Church or State. . . . "

---

[1] See paras. 1.3 *et seq.*, above.

[2] Apparently the last occasion on which a prosecution was threatened was in 1908 against members of the suffragette movement: D. G. T. Williams, *Keeping the Peace* (1967), p. 203.

[3] The section only applies to meetings held on any day on which the two Houses meet and sit or " on any day on which His Majesty's Courts of Chancery, King's Bench [etc.] . . . shall sit in Westminster Hall . . . ". *Russell on Crime* 12th ed., (1964), vol. 1, p. 260 states " it is doubtful whether this applies to the sittings at the Royal Courts of Justice ".

Any such meeting or assembly is deemed to be an unlawful assembly, and carries the same maximum penalty: that is to say, it is at large. There have been no reported prosecutions since the 19th century.[4]

8.5 Response to our Working Paper[5] showed no opposition to our view that these Acts should be repealed. It is clear that no reliance is now placed upon them for the protection of Parliament, and irrespective of whether special provisions are to be made in that respect, we think that they can be dispensed with. Accordingly we *recommend* that they be repealed.[6]

3. Is a New Offence Needed?

8.6 The Working Paper raised as a separate issue the question whether special provisions are needed for the protection of the Houses of Parliament. Under the scheme of offences which we recommend in this Report, there would be several serious offences against public order available in cases of disorders in the vicinity of Parliament, as well as existing statutory offences, such as section 5 of the Public Order Act 1936 and wilfully obstructing the police or the public highway. These, of course, are, or are intended to be, of general application. In addition, the Commissioner of the Metropolitan Police is empowered to give directions under section 52 of the Metropolitan Police Act 1839[7] to prevent any obstruction of the streets in the immediate neighbourhood of the Houses of Parliament. He normally does so in pursuance of orders given to him by both Houses of Parliament at the commencement of each Session to keep the streets leading to Parliament open and unobstructed for Members and free of disorder.[8] It does not, however, appear that the exercise of the power under section 52 is dependent upon such sessional orders having been made: if there is any danger of obstruction, it is open to the Commissioner to give directions at any time. In any event, it is clear from the authorities[9] that sessional orders have no effect outside the precincts of the Houses of Parliament.[10] Moreover, it is noteworthy that the maximum penalty for contravening the Commissioner's directions is a fine of only £50 (level 2),[11] and that the directions do not affect assemblies or processions unless these are " capable of causing consequential obstruction to the free passage of members to and from the Houses of Parliament or

---

[4] It was invoked in 1932 when two defendants were bound over for inciting others to take part near Parliament in mass demonstrations against unemployment: *The Times*, 17 and 19 December 1932, and D. G. T. Williams, *op. cit.*, p. 203.

[5] See Working Paper No. 82, paras. 7.2–7.6 and 7.10.

[6] We also *recommend* repeal of the only other remaining substantive provision of the Seditious Meetings Act 1817, s. 29, which provides for forfeiture of licences of public houses where " any meeting for any seditious purpose " has been held with the knowledge of the landlord. Separate consultation on this provision has established that it is obsolete and unnecessary. Accordingly the draft Bill repeals the whole Act: see Appendix A, cl. 7(*b*), 9(1) and Schedule.

[7] This empowers the Commissioner—

> " to make regulations for the route to be observed by all carts, carriages, horses, and persons, and for preventing obstruction of the streets and thoroughfares within the metropolitan police district, in all times of public processions, public rejoicings, or illuminations, and also to give directions to the constables for keeping order and for preventing any obstruction of the thoroughfares in the immediate neighbourhood of Her Majesty's palaces and the public offices, the High Court of Parliament, the courts of law and equity, the police courts, the theatres, and other places of public resort, and in any case when the streets or thoroughfares may be thronged or may be liable to be obstructed. "

[8] See T. Erskine May, *Parliamentary Practice* 20th ed., (1983), pp. 223–224.

[9] Principally *Papworth* v. *Coventry* [1967] 1 W.L.R. 663 (D.C.).

[10] *Ibid.*, at p. 670.

[11] Metropolitan Police Act 1839, s. 54, Criminal Law Act 1977, s. 31 and Sched. 6 and Criminal Justice Act 1982, s. 46.

their departure therefrom, or disorder in the neighbourhood or annoyance thereabouts ".[12]

8.7 Is there a need to supplement these special provisions, or do they, in combination with the offences of general application relating to public order, give adequate protection to Parliament against, for example, a mass lobbying which threatens to get out of hand? Most of those commenting on this issue, which we raised in the Working Paper without expressing any conclusion of our own, thought that there was no need for any further provision: the powers of the police and the terms of existing or proposed legislation were regarded as adequate. In this context we attach the greatest weight to the views of the Commissioner, whose duty it is to secure good order in the vicinity of Parliament. Our understanding is that the Commissioner is satisfied with his present powers in this respect, although the maximum penalty for contravening his directions under section 52 of the Metropolitan Police Act 1839 is thought to be too low.

8.8 We have come to the conclusion that we need not recommend any fresh legislation designed specifically for the protection of Parliament. We have referred to the view that penalties under section 52 of the Metropolitan Police Act 1839 may be too low; if this is felt to be right, it is open to Parliament to raise them, but we make no recommendation ourselves.[13]

C. Minor offences of " threatening, abusive or insulting " behaviour

8.9 Section 54(13) of the Metropolitan Police Act 1839 makes it an offence for a person to—

> " use any threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or whereby a breach of the peace may be occasioned."

The conduct penalised must occur " in any thoroughfare or public place " within the limits of the metropolitan police district. This summary offence is now punishable with a maximum fine of £50 (level 2).[14] Section 35(13) of the City of London Police Act 1839 provides a similar offence for the City of London police area. These provisions and many more like them in local Acts and byelaws formed the basis of the offence in section 5 of the Public Order Act 1936, the operative words of which are in very similar terms.[15] Prior to the enactment of that section, there was no comparable national provision: conduct described in these terms was penalised in some districts but not in others. Although the introduction of section 5 was seen as correcting this " very curious "[16] situation, no steps were taken at the time to repeal any of these provisions. However, by virtue of section 262 of the Local Government Act 1972,[17] all of them, save for the two Acts

---

12 *Papworth* v. *Coventry* [1967] 1 W.L.R. 663, 671.

13 We have considered whether s. 52 of the 1839 Act should be modernised, but have concluded that it would not be right to undertake this in the context of reforms of the major offences relating to public order applying nationally; it would be appropriate for the section to be examined in the course of modernising the two Acts of 1839 applying to the Metropolitan and City of London Police: see para. 8.9, below.

14 Criminal Law Act 1977, s. 31 and Sched. 6 and Criminal Justice Act 1982, s. 46.

15 See para. 5.3, n. 9, above.

16 *Hansard* (H.C.), 16 November 1936, vol. 317, cols. 1362–3 (Sir John Simon, Home Secretary).

17 This sets out the procedure by which local legislation is to be rationalised in stages.

applying to London (to which section 262 does not apply), will have lapsed or been repealed before the end of 1986.[18]

8.10 In our Working Paper[19] we took the view that the overlap between section 5 of the 1936 Act and the two provisions applying in London could no longer be justified and that prosecutions for "threatening, abusive or insulting words or behaviour" likely to occasion a breach of the peace should throughout England and Wales be brought under section 5. Reservations have been expressed by the Metropolitan and City of London Police, and the Police Federation, who have stressed their preference for using the provisions under the two Acts of local application to deal with minor disturbances which do not call for the heavier penalties available under section 5.[20] Our attention has also been drawn to authorities[21] which refer to the need to consider carefully whether particular behaviour is sufficiently serious to warant proceedings under section 5. It must be pointed out, however, that these cases date from a period when section 5 was triable both summarily and on indictment.[22] The cases concerned charges tried on indictment, and the real question at issue was whether the conduct charged properly fell within the terms of section 5 as being "threatening, abusive or insulting behaviour" likely to occasion a breach of the peace; and it was in that context that the courts reminded those instituting proceedings that they "should consider very carefully, before having recourse to section 5 of the Public Order Act 1936, whether the facts reveal a state of affairs which justifies proceedings under that statute".[23] The same consideration is relevant in the context of the two offences applying in London since, as we have pointed out, there is no material difference between the operative words of these offences and section 5. We are therefore not persuaded that the authorities quoted are relevant in the present context.

8.11 We also take the view that, upon principle, the arguments for retention of the two offences are not persuasive. If no other city in the country now finds it necessary to have its own special provision, it does not seem to us that there is any strong reason for retention of such provisions in London alone. Where, as is the case under consideration, the terms of the offence of national application are in substance identical to those of local application and both are triable only in magistrates' courts, minor disturbances may be as effectively and properly dealt with by charges under the offence of national application and by the imposition of penalties which reflect the less serious character of the conduct in question; the fact that a disturbance is of a minor character does not, in our view, argue for the retention of minor offences with very low maximum penalties to deal with them. Indeed, elimination of the minor offences would avoid the possibility of charges being brought under them in cases where it transpires, upon

---

18 Many already have: for example, s. 416 of the Liverpool Improvement Act 1921 was repealed by the County of Merseyside Act 1980; s. 102 of the Manchester Police Regulation Act 1844 lapsed on 30 June 1981: see Greater Manchester Act 1981 and the Greater Manchester (Local Statutory Provisions) Order 1980 S.I. 1980 No. 1845.

19 See Working Paper No. 82, para. 7.22.

20 Section 35(13) of the City of London Police Act 1839 was used on 24 occasions between 1 January 1980 and 30 April 1982.

21 *R.* v. *Venna* [1976] Q.B. 421, 425 and *R.* v. *Ambrose* (1973) 57 Cr. App. R. 538, 540.

22 Between 1963, when the Public Order Act 1963 made s. 5 triable on indictment, and 1978, when the Criminal Law Act 1977 made it an offence triable only summarily.

23 *R.* v. *Venna* [1976] Q.B. 421, 425 *per* James L. J.

the evidence, that their maximum penalties are inadequate properly to punish the conduct in question. This possibility is by no means academic. In one case in 1977,[24] where charges under the Metropolitan Police Act 1839 were brought against eight youths who clashed with a rival gang, the stipendiary magistrate, as reported, complained in forceful terms about the low maximum penalty available to him and asked: "Why on earth are they not charged under the Public Order Act? ". Repeal of the London Acts would eliminate the possibility of such situations recurring without in any way affecting the ability of magistrates' courts to impose light penalties under section 5 where the facts warranted this course.

8.12 For these reasons, we take the view that section 54(13) of the Metropolitan Police Act 1839 and section 35(13) of the City of London Police Act 1839 should be repealed. We *recommend* accordingly.[25]

D. Other offences

8.13 The remaining offences may be dealt with more briefly. There are only two of them, the Shipping Offences Act 1793 and the possession of an offensive weapon under section 4 of the Vagrancy Act 1824.

1. Shipping Offences Act 1793

8.14 Section 1 of this Act[26] provides that—

> " if any seamen, keelmen, casters, ship carpenters or other persons, riotously assembled together to the number of three or more, shall unlawfully and with force prevent hinder or obstruct the loading or unloading or the sailing or navigating of any ship, keel or other vessel, or shall unlawfully and with force board any ship, keel or other vessel with intent to prevent, hinder or obstruct the loading or unloading or the sailing or navigating of such ship, keel or other vessel, . . . "

they are guilty of an indictable offence punishable with a maximum of 12 months' imprisonment.[27] The offence is no longer used. The conduct is adequately covered by offences against the person and property and the scheme of offences recommended in this Report.

2. Vagrancy Act 1824, Section 4

8.15 This penalises, inter alia, " every person . . . being armed with any gun, pistol, hanger, cutlass, bludgeon, or other offensive weapon, or having upon him or her any instrument with intent to commit an arrestable offence. . . . ". There is a maximum penalty of three months' imprisonment or a fine of £200 (level 3).[28] We have no evidence that this offence is now used. It has been superseded by the Prevention of Crime Act 1953 (possession of offensive weapon), the Firearms Act 1968, the Theft Act 1968,[29] the Criminal Damage Act 1971,[30] and the Criminal Law Act 1977.[31]

---

24 *R.* v. *Troke and others*, *The Times*, 19 July 1977 (a news item).

25 See Appendix A, cl. 9(1) and Schedule.

26 Originally temporary but made permanent by the Merchant Shipping Act 1801.

27 By s. 3, this is raised to 14 years for a second or subsequent offence. A prosecution must be commenced within 12 months of the commission of the offence (s. 8).

28 Magistrates' Courts Act 1980, s. 34(3) and Criminal Justice Act 1982, s. 46. Higher penalties may be imposed by the Crown Court if the offences are repeated: s. 5. The text of this offence is given as amended by the Criminal Law Act 1967, s. 10 and Sched. 2.

29 See s. 25 (going equipped for stealing etc.).

30 See s. 3 (possessing anything with intent to destroy or damage property).

31 See s. 8 (trespassing with a weapon of offence).

8.16 We see no need for the retention of either of these provisions.[32] It has been suggested to us that there is an advantage in being able to treat as a summary offence situations where a person entitled to be present on private premises produces a weapon in the course of a domestic dispute, but in our view any such case requiring the intervention of the law may appropriately be dealt with by charges of common assault.

8.17 We *recommend* the repeal of the Act of 1793, and of so much of section 4 of the 1824 Act as relates to the possession of an offensive weapon.[33]

PART IX

SUMMARY OF RECOMMENDATIONS

9.1 In this Report we *recommend* the abolition of the four common law offences of affray, rout, unlawful assembly and riot. In place of common law affray, unlawful assembly and riot, we *recommend* the creation of four new statutory offences, which are summarised in the following paragraphs. We further *recommend* the repeal without replacement of certain old statutory offences in the field of public order, to which reference is made below.

9.2 In place of *affray* at common law, there should be a new offence also to be known as **affray.** *Where two or more persons use or threaten unlawful violence against each other, or one or more persons use or threaten unlawful violence against another, whether in a public or private place, and the conduct of those using or threatening unlawful violence is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety, each of them would commit the offence of affray. The offence would be triable either way (either summarily or on indictment) with a maximum penalty on indictment of three years' imprisonment and a fine*[1] (Part III).

9.3 In place of *unlawful assembly* at common law there should be two separate offences, one dealing with group violence, the other with group threats.

(*a*) An offence to be known as **violent disorder.** *Where three or more persons are present together using or threatening unlawful violence to persons or property, whether in a public or private place, and their conduct, taken together, is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety, each of those persons who uses unlawful violence would commit the offence of violent disorder. The offence would be triable either way with a maximum penalty on indictment of five years' imprisonment and a fine*[2] (paragraphs 5.28-5.39).

---

32 The latter was recommended for repeal by the Home Office Working Party which reviewed the law relating to vagrancy and street offences, but this recommendation has not been implemented: see Working Party on Vagrancy and Street Offences, Working Paper (1974), paras. 206–212 and Report of the Working Party on Vagrancy and Street Offences (1976), para. 73.

33 See Appendix A, clauses 7(*b*), 9(1) and Schedule. The repeal of the Vagrancy Act provision includes that part of s. 4 dealing with forfeiture of weapons, which becomes otiose.

1 See Appendix A, draft Criminal Disorder Bill, cl. 3.

2 See Appendix A, cl. 2.

(*b*) An offence penalising **conduct intended or likely to cause fear or provoke violence.** *Where three or more persons are present together, whether in a public or private place, using threatening, abusive or insulting words or behaviour which is intended or is likely either to cause another person to fear immediate unlawful violence to persons or property or to provoke the immediate use of such violence by another person, each of them would commit the offence. The offence would be triable either way with a maximum penalty on indictment of two years' imprisonment and a fine*[3] (paragraphs 5.40-5.51).

9.4 In place of *riot* at common law, there should be a new offence to be known as **riot** to deal with the use of mass violence. *Where twelve or more persons are present together, whether in a public or private place, using or threatening unlawful violence for some common purpose (which may be inferred from their conduct) and their conduct, taken together, is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety, each of them who uses unlawful violence for the common purpose would commit the offence of riot. The offence would require the consent of the Director of Public Prosecutions to the institution of proceedings and would be triable on indictment with a maximum penalty of ten years' imprisoment and a fine*[4] (Part VI).

9.5 A person would be guilty of one or other of these offences only if he either *intended,* as the case may be, to use violence, or threaten violence, or use threatening, abusive or insulting words or behaviour, or *was aware* that his conduct *might* be of such a nature.[5] " Violence " here means any violent conduct, so that in relation to the offences recommended in paragraphs 9.3 and 9.4 it includes violent conduct towards both property and persons, and in relation to all offences it is not restricted to conduct causing or intended to cause injury or damage but includes any other violent conduct such as throwing at or towards a person a missile of a kind capable of causing injury which does not hit or falls short[6] (paragraphs 3.41-3.54 and 5.30-5.33).

9.6 The statutes recommended for abolition include section 54(13) of the Metropolitan Police Act 1839 and section 35(13) of the City of London Police Act 1839. These contain minor offences of threatening, abusive or insulting words or behaviour which are made unnecessary by section 5 of the Public Order Act 1936. Other statutory provisions recommended for repeal include the Tumultuous Petitioning Act 1661, the Shipping Offences Act 1793, the Seditious Meetings Act 1817, and section 4 of the Vagrancy Act 1824, so far as this penalises the possession of offensive weapons[7] (Part VIII).

---

[3] See Appendix A, cl. 4.
[4] See Appendix A, cl. 1 and cl. 6(2).
[5] See Appendix A, cl. 5(1).
[6] See Appendix A, cl. 8(1).
[7] See Appendix A, cl. 7(*b*), 9(1) and Schedule.

9.7 Existing offences relating to public order, together with those recommended in this Report, should be adequate for the protection of Parliament, but consideration might usefully be given to raising the maximum penalty (currently a fine of £50) for contravention of directions given by the Commissioner of the Metropolitan Police under section 52 of the Metropolitan Police Act 1839 to keep the streets in the vicinity of Parliament open and free of obstruction (paragraphs 8.6-8.8).

(*Signed*) RALPH GIBSON, *Chairman.*
STEPHEN M. CRETNEY.
BRIAN DAVENPORT.
STEPHEN EDELL.
PETER NORTH.

JOHN GASSON, *Secretary.*
29 *June* 1983.

ADDENDUM

After this Report was submitted, the House of Lords decided *R.* v. *Seymour* [1983] 3 W.L.R. 349. The House of Lords held that the element of " recklessness " has the same meaning (*viz.* the meaning given to it in *Caldwell* and *Lawrence*) in the offence of causing death by reckless driving contrary to section 1 of the Road Traffic Act 1972 (as substituted by section 50(1) of the Criminal Law Act 1977) and the common law offence of manslaughter by the reckless driving of a motor vehicle. In his speech, with which the other members of the House of Lords agreed, Lord Roskill said (*ibid.*, at p. 357) that " . . . once it is shown that the two offences co-exist it would be quite wrong to give the adjective ' reckless ' or the adverb ' recklessly ' a different meaning according to whether the statutory or the common law offence is charged. ' Reckless ' should today be given the same meaning in relation to all offences which involve ' recklessness ' as one of the elements unless Parliament has otherwise ordained ". In consequence, it would appear that the element of recklessness in the mental element of the common law offences of assault and battery now has the meaning given in *Caldwell* and *Lawrence*. To this extent, therefore, the discussion of the reasons given in paragraphs 3.41 *et seq.* of this Report for our recommendations relating to the mental element in the offences recommended in the Report requires to be modified. However, it would appear that the mental element denoted by the statutory term " maliciously " in the offences contained in the Offences against the Person Act 1861 is not affected by this decision. As we explained in paragraph 3.43, this was interpreted in *Cunningham* [1957] 2 Q.B. 396 to mean recklessness in the terms explained by that case. The House of Lords declined in *Caldwell* to indicate that *Cunningham* was wrongly decided, and has not done so in *Seymour*. Consequently, the difficulties described in paragraphs 3.41 *et seq.* relating to the mental element when offences against the person under the 1861 Act are charged together with an offence having a mental element of recklessness remain, in our view, unresolved. For this reason we do not consider that the dicta in *R.* v. *Seymour* require us to suggest the need to alter the conclusions to which we came in paragraphs 3.50-3.52 of the Report or to amend the draft Bill at Appendix A.

APPENDIX A

Draft
Criminal Disorder Bill

ARRANGEMENT OF CLAUSES

Clause

DRAFT

OF A

BILL

TO

Replace the common law offences of riot, unlawful assembly and affray and to abolish the common law offence of rout and repeal certain obsolete or unnecessary enactments.

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:—

Riot.

1.—(1) Where twelve or more persons are present together using or threatening unlawful violence for some common purpose (which may be inferred from their conduct) and their conduct, taken together, is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety, each of those persons who uses unlawful violence for the common purpose commits the offence of riot.

(2) The offence of riot is punishable on conviction on indictment with imprisonment for a term not exceeding ten years or a fine or both.

EXPLANATORY NOTES

Clause 1

1. This clause defines the constituent elements of a new statutory offence of riot in place of the common law offence, and makes provision for its maximum penalty.

2. *Subsection (1)*, which creates the offence, requires the presence together of twelve or more people using or threatening unlawful violence for a common purpose. Their conduct, taken together, must be such as would cause a person of reasonable firmness, if present on the scene, to fear for his personal safety. If these requirements are met, any one of the twelve or more persons who uses unlawful violence for the common purpose, and has the mental element specified in clause 5(1), commits the offence of riot. The subsection gives effect to the recommendations in paragraphs 6.18–6.26 of the Report.

3. For the avoidance of doubt, the subsection provides that the common purpose may be inferred from the conduct of the twelve or more persons involved: see Report, paragraph 6.24.

4. The terms " unlawful violence " and " violence " are to be construed in accordance with clause 8(1); and see paragraphs 3.17, 3.40 and 5.31 of the Report.

5. *Subsection (2)* provides for the offence of riot to be tried on indictment and for a maximum penalty of ten years' imprisonment and a fine. This gives effect to the recommendations in paragraphs 6.31–6.32 of the Report. By virtue of clause 6(2), proceedings for the offence may be brought only by or with the consent of the Director of Public Prosecutions.

6. In accordance with riot at common law, the offence is capable of being committed in a public or private place: see clause 8(3).

Violent disorder.

2.—(1) Where three or more persons are present together using or threatening unlawful violence and their conduct, taken together, is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety, each of those persons who uses unlawful violence commits the offence of violent disorder.

(2) The offence of violent disorder is punishable—

(*a*) on conviction on indictment, with imprisonment for a term not exceeding five years or a fine or both ;

(*b*) on summary conviction, with imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum or both.

Clause 2

1. Clauses 2 and 4 create two new offences in place of unlawful assembly at common law. Clause 2 defines the constituent elements of an offence of violent disorder, and makes provision for its maximum penalty.

2. *Subsection (1)*, which creates the offence, requires the presence together of three or more people using or threatening unlawful violence. Their conduct, taken together, must be such as would cause a person of reasonable firmness, if present on the scene, to fear for his personal safety. If these requirements are met, any one of the three or more persons who uses unlawful violence, and has the mental element specified by clause 5(1), commits the offence of violent disorder. The subsection gives effect to the recommendations in paragraphs 5.28–5.35 of the Report.

3. The terms "unlawful violence" and "violence" are to be construed in accordance with clause 8(1); and see paragraphs 3.17, 3.40 and 5.31 of the Report.

4. *Subsection (2)* provides for the offence to be tried either way, on indictment or summarily in the magistrates' courts. The maximum penalty when tried on indictment is to be five years' imprisonment and a fine, and when tried summarily, six months' imprisonment and a fine. The maximum fine which may at present be imposed by the magistrates' courts is £1,000. The subsection gives effect to the recommendations in paragraphs 5.37–5.39 of the Report.

5. Like unlawful assembly at common law, the offence is capable of being committed in a public or private place: see clause 8(3).

Affray.

3.—(1) Where two or more persons use or threaten unlawful violence against each other, or one or more persons use or threaten unlawful violence against another, and their conduct is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety, each of those persons commits the offence of affray.

(2) In subsection (1) " threaten " does not include the making of a threat by words alone.

(3) The offence of affray is punishable—

(*a*) on conviction on indictment, with imprisonment for a term not exceeding three years or a fine or both ;

(*b*) on summary conviction, with imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum or both.

EXPLANATORY NOTES

Clause 3

1. Clause 3 defines the constituent elements of a new statutory offence of affray in place of affray at common law and makes provision for its maximum penalty.

2. *Subsection (1)*, which creates the offence, defines the prohibited conduct as two or more persons using or threatening unlawful violence against each other, or one or more persons using or threatening unlawful violence against another. If the conduct of the person or persons using or threatening unlawful violence is such as would cause a person of reasonable firmness, if present on the scene, to fear for his personal safety, then each of them, if he has the mental element specified by clause 5(1), commits the offence of affray. The subsection gives effect to the recommendations in paragraphs 3.11-3.40 of the Report. By providing that there need be no more than one person using or threatening unlawful violence, the subsection gives statutory effect to the decision of the House of Lords in *Taylor* v. *D.P.P.* [1973] A.C. 964: see paragraphs 3.19-3.22 of the Report.

3. The terms "unlawful violence" and "violence" are to be construed in accordance with clause 8(1); and see paragraphs 3.17 and 3.40 of the Report.

4. *Subsection (2)* provides that threats in the context of affray exclude threats which are made by words alone. This preserves the position at common law, under which a mere altercation does not constitute an affray: see paragraphs 3.13 and 3.17 of the Report. However, such threats are not excluded from the constituent elements of the other offences created by the draft Bill.

5. *Subsection (3)* provides for the offence to be tried either way, on indictment or summarily in the magistrates' courts. The maximum penalty when tried on indictment is to be three years' imprisonment and a fine, and when tried summarily, six months' imprisonment and a fine. The maximum fine which may at present be imposed by the magistrates' courts is £1,000. The subsection gives effect to the recommendations in paragraphs 3.55-3.64 of the Report.

6. The offence is capable of being committed in a public or private place: see clause 8(3), which preserves in relation to affray the effect of the decision of the House of Lords in *Button* v. *D.P.P.* [1966] A.C. 591.

Conduct intended or likely to cause fear or provoke violence.

4.—(1) Where three or more persons are present together using threatening, abusive or insulting words or behaviour which is intended or likely—

(*a*) to cause another person to fear immediate unlawful violence, or

(*b*) to provoke the immediate use of unlawful violence by another,

each of those persons commits an offence.

(2) An offence under this section is punishable—

(*a*) on conviction on indictment, with imprisonment for a term not exceeding two years or a fine or both ;

(*b*) on summary conviction, with imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum or both.

Clause 4

1. Clause 4 creates an offence penalising the use by a group of threatening, abusive or insulting words or behaviour intended or likely to cause fear or provoke violence. Taken with the offence of violent disorder created by clause 2, it replaces unlawful assembly at common law.

2. *Subsection (1),* which creates the offence, requires the presence together of three or more persons using threatening, abusive or insulting words or behaviour. This conduct must be intended or likely either to cause another to fear immediate unlawful violence or to provoke the immediate use of unlawful violence by another. If these requirements are met, each of the persons who has the mental element specified by clause 5(1) commits the offence. The subsection gives effect to the recommendations in paragraphs 5.41-5.46 of the Report. In so far as the offence penalises threatening, abusive or insulting words or behaviour, it uses terminology identical to that appearing in section 5 of the Public Order Act 1936.

3. The terms " unlawful violence ", " violence " and " words or behaviour " are to be construed in accordance with clause 8(1).

4. *Subsection (2)* provides for the offence to be tried either way, on indictment or summarily in the magistrates' courts. The maximum penalty when tried on indictment is to be two years' imprisonment and a fine, and when tried summarily, six months' imprisonment and a fine. The maximum fine which may at present be imposed by the magistrates' courts is £1,000. The subsection gives effect to the recommendations in paragraphs 5.50-5.51 of the Report.

5. Like unlawful assembly at common law, the offence is to be capable of being committed in a public or private place: see clause 8(3).

Supplementary provisions as to mental element in offences.

5.—(1) A person is guilty of an offence under this Act only if he intends, as the case may be, to use or threaten violence or to use threatening, abusive or insulting words or behaviour or is aware that his conduct may be of that description.

(2) For the purposes of subsection (1) a person whose awareness is impaired by intoxication shall, unless he shows—

(*a*) that his intoxication was not self-induced, or

(*b*) that his intoxication was caused solely by the taking or administration of a substance in the course of medical treatment,

be taken to be aware of that of which he would be aware if he were not intoxicated.

(3) In subsection (2) " intoxication " means any intoxication, whether caused by drink, drugs or other means, or by a combination of means.

(4) This section does not affect the determination for the purposes of an offence under this Act of the number of persons who are, as the case may be, using or threatening violence or using threatening, abusive or insulting words or behaviour.

Clause 5

1. This clause contains provisions relating to the mental element required for the commission of offences under clauses 1-4, and to the effects of self-induced intoxication upon the awareness of those accused of these offences.

2. *Subsection* (*1*) makes provision for the mental element in all four offences . It provides that a person is guilty of an offence only if he intends, as the case may be, to use or threaten violence or to use threatening, abusive or insulting words or behaviour, or is aware that his conduct may be of that description. Thus in riot (clause 1) and violent disorder (clause 2), the defendant must intend to use violence or be aware that his conduct may be violent ; in affray (clause 3) he must intend to use or threaten violence or be aware that his conduct may be of that description ; and in conduct intended or likely to cause fear of violence or provoke violence (clause 4), he must intend to use threatening, abusive or insulting words or behaviour, or be aware that his conduct may be of that description. The subsection gives effect to the policy described in paragraphs 3.41 *et seq.* and 5.47 *et seq.* of the Report.

3. *Subsection* (*2*) makes provision for cases where, for the purposes of subsection (1), a person's awareness is impaired by intoxication. Its effect is that, if the defendant cannot prove that his intoxication was not self-induced (i.e. was involuntary) or was caused solely by the taking or administration of a substance in the course of medical treatment, he is to be deemed to be aware of that which he would have been had he been sober. This provision is similiar in effect to the law relating to voluntary intoxication as decided by the House of Lords in *Commissioner of Police of the Metropolis* v. *Caldwell* [1982] A.C. 341 in cases where a statutory provision includes " recklessness " as an element of an offence. The subsection lays upon the defendant the onus of proving that his intoxication was not self-induced or, as the case may be, was caused solely by the taking or administration of a substance in the course of medical treatment, the onus being discharged by the defendant on a balance of probabilities (a persuasive burden). The subsection gives effect to the policy recommended in paragraphs 3.53-3.54 of the Report.

4. *Subsection* (*3*) defines intoxication for the purposes of subsection (2).

5. *Subsection* (*4*) provides, in substance, that, when a person is charged with an offence where proof of a number of participants is required (i.e. riot, violent disorder and the offence under clause 4), the mental element specified in clause 5(1) requires to be proved only in relation to that person: the mental element of the other participants, if any, is irrelevant. This is inherent in the formulation of the offences, but the subsection is included for the purpose of putting the position beyond doubt.

Supplementary provisions as to arrest, prosecution, trial and punishment of offences.

6.—(1) A constable may arrest without warrant a person reasonably suspected by him to be committing an offence under section 3 or 4 (offences not arrestable under the general statutory power).

(2) Proceedings for an offence of riot or incitement to riot may be brought only by or with the consent of the Director of Public Prosecutions.

(3) For the purposes of the rules against charging more than one offence in the same count or information, sections 1 to 4 each create one offence.

(4) If at the trial on indictment of a person charged with an offence specified in column 1 of the following Table the jury are not satisfied that he is guilty of the offence charged, they may, if satisfied of his guilt, find him guilty—

(*a*) of the alternative offence specified in column 2 of the Table in relation to the offence charged, or

(*b*) of any offence of which they could find him guilty if he had been indicted for that alternative offence.

TABLE

	Offence	*Alternative*
1.	Riot.	Violent disorder.
2.	Violent disorder.	Affray.
3.	Affray.	Conduct intended or likely to cause fear or provoke violence.

1982 c. 48.

(5) The following entry shall be inserted at the end of Part II of Schedule 1 to the Criminal Justice Act 1982 (statutory offences excluded from provisions for early release of prisoners)—

"CRIMINAL DISORDER ACT 1983

26. Section 1 (riot)
27. Section 2 (violent disorder)
28. Section 3 (affray)."

Clause 6

1. This clause contains provisions relating to the arrest, prosecution, trial and punishment of the offences created in clauses 1-4.

2. *Subsection (1)* provides that a constable may arrest without warrant a person reasonably suspected by him to be committing an offence under clauses 3-4. The offences under clauses 1-2 are "arrestable" offences by virtue of section 2 of the Criminal Law Act 1967 because their maximum penalty is five years' imprisonment or more; thus specific powers in this respect in relation to these offences are not needed. The subsection gives effect to the recommendation in paragraph 7.17 of the Report.

3. *Subsection (2)* requires all proceedings for riot or incitement to riot to be brought by or with the consent of the Director of Public Prosecutions. Existing statutory provisions would ensure that this requirement would apply to proceedings for aiding and abetting, attempting or conspiring to riot: see paragraph 6.30 of the Report.

4. *Subsection (3)* provides that, for the purposes of the Indictment Rules 1971 (in particular, Rule 7), each of the offences created by clauses 1-4 creates one offence. This will ensure that a count in an indictment charging, for example, an accused under clause 4 with conduct intended or likely to cause fear *or* to provoke violence will not be held bad for duplicity (for charging two offences in the same count). The subsection also covers charges in informations tried summarily. The provision is intended to resolve doubts raised by decisions of the courts to which reference is made in paragraphs 7.12–7.13 of the Report.

5. *Subsection (4)* makes provision for a jury to return alternative verdicts on a charge of one or other of the offences created by clauses 1-4. Its practical effect is that—

(*a*) if on a charge of riot under clause 1 the jury are not satisfied that the accused committed that offence, they may, if satisfied of his guilt, find him guilty of violent disorder under clause 2, of affray under clause 3, of an offence under clause 4 or of assault;

(*b*) if on a charge of violent disorder under clause 2 the jury are not satisfied that the accused committed that offence, they may, if satisfied of his guilt, find him guilty of affray under clause 3, of an offence under clause 4 or of assault;

(*c*) if on a charge under clause 3 of affray the jury are not satisfied that the accused committed that offence, they may, if satisfied of his guilt, find him guilty of conduct intended or likely to cause fear or provoke violence under clause 4 or of assault.

The subsection supplements, and is without prejudice to the operation of, section 6(3) of the Criminal Law Act 1967, which also makes provision for conviction in certain circumstances of a different offence from that charged. It gives effect to the recommendations in paragraphs 7.5-7.9 of the Report.

Clause 6 (continued)

6. *Subsection (5)* is an amendment to the Criminal Justice Act 1982 consequential upon the abolition by the draft Bill of the common law offences of riot and affray, to which references are made in the 1982 Act. These references are repealed in the Schedule to the draft Bill, and references are substituted by this subsection to the corresponding offences under the draft Bill: see paragraph 7.24 of the Report.

Offences abolished.

7. The following offences are abolished for all purposes not relating to offences committed before the commencement of this Act—

(*a*) the common law offences of riot, rout, unlawful assembly and affray ;

(*b*) the offences under the following enactments—

13 Chas. 2 Stat. 1. c. 5. (i) section 1 of the Tumultuous Petitioning Act 1661 (presentation of petition to monarch or Parliament accompanied by excessive number of persons) ;

33 Geo. 3. c. 67. (ii) section 1 of the Shipping Offences Act 1793 (interference with loading or operation of vessel by seamen or others riotously assembled or boarding of vessel with intent to interfere) ;

57 Geo. 3. c. 19. (iii) section 23 of the Seditious Meetings Act 1817 (certain meetings within one mile of Westminster Hall when Parliament sitting deemed to be unlawful assemblies).

Clause 7

1. This clause abolishes the common law offences of riot, rout, unlawful assemby and affray. It also specifically abolishes certain obsolete, but not redundant, offences in accordance with our recommendations in Part VIII of the Report.

Interpretation.

8.—(1) In this Act—

"statutory maximum", in reference to the maximum fine on summary conviction of an offence triable either way, has the meaning given by section 74 of the Criminal Justice Act 1982 ;

1982 c. 48.

"unlawful violence" means violence not justified by law, for example, the law relating to self-defence or the prevention of crime or disorder ;

"violence" means any violent conduct, so that—

(*a*) except in the context of affray, it includes violent conduct towards property as well as violent conduct towards persons, and

(*b*) it is not restricted to conduct causing or intended to cause injury or damage but includes any other violent conduct, for example throwing at or towards a person a missile of a kind capable of causing injury which does not hit or falls short ;

"words or behaviour" includes the distribution or display of any written matter, sign or other visible representation.

(2) It is immaterial for the purposes of sections 1 to 3 whether any person other than those directly involved in the acts necessary for the commission of the offence is, or is likely to be, present at the scene.

(3) The offences under this Act may be committed in private as well as in public places.

Clause 8

1. This clause is the interpretation provision, defining and explaining certain terms used in clauses 1-4 creating the new offences.

2. In *subsection (1)*—

(*a*) the statutory maximum, by virtue of section 74 of the Criminal Justice Act 1982 means "the prescribed sum within the meaning of section 32 of the Magistrates' Courts Act 1980 (£1,000 or another sum fixed by order under section 143 of that Act to take account of changes in the value of money)";

(*b*) the provision explaining "unlawful violence" gives effect to the policy described in paragraph 3.40 of the Report;

(*c*) the provision explaining "violence" gives effect to the policy described in paragraphs 5.30-5.33 of the Report;

(*d*) the provision explaining "words or behaviour" is derived from section 5 of the Public Order Act 1936.

3. *Subsection (2)* provides that, for the purpose of the offences created by clauses 1-3, there need be no person present or likely to be present, other than the participants and their victims, at the scene where an offence takes place. Thus it makes clear that the requisite standard of fear which is an element of these offences is to be measured by reference to the reactions of a hypothetical person of reasonable firmness present at the scene. This gives effect to the recommendations of the Report, paragraphs 3.35-3.39, 5.35 and 6.26.

4. *Subsection (3)* provides that for the purpose of the offences created by clauses 1-4, an offence may take place anywhere, whether in public or in private. This gives effect to the recommendations in the Report, paragraphs 3.23-3.27, 5.34, 5.42 and 6.26.

Repeals and saving.

9.—(1) The enactments mentioned in the Schedule to this Act (which include enactments related to the subject matter of this Act but already obsolete or unnecessary apart from this Act) are repealed to the extent specified in the third column of that Schedule.

(2) Nothing in this Act affects the meaning of the word " riot " or " riotous ", or any similar expression, in any other enactment or instrument.

Clause 9

1. This clause makes provision for repeals, and certain savings in existing legislation.

2. *Subsection* (*1*) provides for the repeal of legislation specified in the Schedule.

3. *Subsection* (*2*) provides that the draft Bill shall not affect the meaning of such terms as "riot" or "riotous" in other legislation, such as the Riot (Damages) Act 1886. It gives effect to the recommendations in paragraphs 7.25–7.31 of the Report.

Short title, commencement and extent.

10.—(1) This Act may be cited as the Criminal Disorder Act 1983.

(2) This Act comes into force on the expiration of the period of two months beginning with the date on which it is passed.

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

EXPLANATORY NOTES

Clause 10

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

Section 9(1).

SCHEDULE

REPEALS

Chapter	Short title	Extent of repeal
13 Chas. 2. Stat. 1. c. 5.	Tumultuous Petitioning Act 1661.	The whole Act.
33 Geo. 3. c. 67.	Shipping Offences Act 1793.	The whole Act.
57 Geo. 3. c. 19.	Seditious Meetings Act 1817.	The whole Act.
5 Geo. 4. c. 83.	Vagrancy Act 1824.	In section 4, the words from " every person being armed " to " arrestable offence " and from " and every such gun " to the end.
2 & 3 Vict. c. 47.	Metropolitan Police Act 1839.	Section 54(13).
2 & 3 Vict. c. xciv.	City of London Police Act 1839.	Section 35(13).
1967 c. 58.	Criminal Law Act 1967.	In Schedule 2, paragraph 2(1)(*b*).
1982 c. 48.	Criminal Justice Act 1982.	In Part I of Schedule 1, the entries relating to riot and affray.

Schedule

1. The Schedule sets out the extent of the repeals effected by clause 9(1).

APPENDIX B

STATISTICS DRAWN FROM THE CRIMINAL STATISTICS

1. The Tables in this Appendix set out some statistics for recent years relating to the prosecution and trial of the common law offences against public order which are the subject of this Report. Save where indicated, the statistics in the Tables have all been drawn from the Criminal Statistics for England and Wales published annually by HMSO.

2. It will be observed that the Tables which follow include statistics for 1981, the year in which there occurred outbreaks of serious public disorder in a number of urban centres. Detailed information relating to the outcome of arrests during the civil disturbances of the summer of that year has been published in a separate statistical bulletin issued by the Home Office.[1] The bulletin shows that out of almost 4,000 persons arrested in the disorders,[2] almost 95 per cent were charged with a criminal offence. Details of charges were available for about 3,500 of these persons. Slightly more than half of this total (1,800) were charged with public order offences, a category which covers the indictable offences of riot, unlawful assembly and affray, as well as the summary offences against the Public Order Act 1936, offences of obstructing or assaulting a constable, obstructing the highway and being drunk and disorderly.[3] This category of offences is further broken down, but information relating to the three common law offences is not recorded for each individual offence. Of those charged with a public order offence, 47 were charged with one or other of the common law offences; of these, 27 were found guilty.[4] With regard to sentencing, only 4 of the 27 convicted defendants were given a sentence of immediate imprisonment.[5]

---

[1] Home Office Statistical Bulletin, " The Outcome of Arrests during the Serious Incidents of Public Disorder in July and August 1981 ", Issue No. 20/82, (October 1982).

[2] The bulletin analyses information based on special returns provided by 25 police forces in the areas " in which it was considered that an incident or incidents in July or August were more serious than might normally be expected ".

[3] Other offences charged were burglary, theft or handling stolen goods (760), offences relating to violence against the person (430) and offences relating to criminal damage (460).

[4] Bulletin, Table 6.

[5] *Ibid.*, Table 9.

TABLE I

Statistics drawn from the Criminal Statistics 1973–1981 relating to prosecution of the common law offences against public order

Offences recorded by Police

	1973	*1974*	*1975*	*1976*	*1977*	*1978*	*1979*	*1980*	*1981*
Riot[6]	18	6	10	4	2	5	3	6	31
Unlawful assembly[7]	7	16	6	7	10	9	11	19	14
Other offence against the State or public order[8]	331	322	340	305	233	269	512	503	724

Defendants for Trial[9] (Crown Court)

	1973	*1974*	*1975*	*1976*	*1977*	*1978*	*1979*	*1980*	*1981*
Riot	33	55	31	31	20	24	17	43	41
Unlawful assembly	96	139	28	46	48	56	69	96	210
Other offence against the State or public order	1,330	1,207	1,375	1,421	1,204	1,224	1,111	1,383	1,349
(Affray)[10]	—	—	—	(1,059)	(792)	(726)	(994)	(1,346)	(1,323)

Found Guilty

	1973	*1974*	*1975*	*1976*	*1977*	*1978*	*1979*	*1980*	*1981*
Riot	18	31	27	23	19	22	15	37	27
Unlawful assembly	85	124	26	43	44	51	68	90	195
Other offence against the State or public order	1,077	974	1,096	1,157	965	965	884	1,006	950
(Affray)[10]	—	—	—	(837)	(599)	(536)	(784)	(975)	(932)

[6] Apart from riot, the statistics nominally include the offence of riotously preventing the sailing etc. of ships, which has been obsolete for many years: see para. 8.14, above.

[7] The statistics nominally include here the offences of rout and unlawful political meeting in Westminster but neither offence has been prosecuted in recent years: see paras. 4.2 and 8.4, above.

[8] This category includes causing an affray, making a bomb hoax (from 1978), and (from 1976) offensive conduct conducive to a breach of the peace (s. 5 of the Public Order Act 1936). The last-mentioned offence has since become triable only summarily: see Criminal Law Act 1977, s. 15 and Schedule 1 (in force 17 July 1978).

[9] The figures for each of the categories of offences are higher than those " recorded by police "; they take account, inter alia, of offences in respect of which more than one defendant was committed for trial.

[10] The figures for affray in brackets are not separately recorded in the published Statistics, but were supplied to us by the Statistical Department of the Home Office.

TABLE II

Duration of Custodial Sentences[11] *Imposed by the Crown Court*
From the Criminal Statistics 1976–1981

Riot

Year	Borstal	Suspended Sentence	Immediate Imprisonment	Up to 6 months	6–12 months	12 months –2 years	2–3 years	3–5 years	Over 5 years	TOTAL
1976	—	8	2	2	—	—	—	—	—	10
1977	1	1	10	7	—	3	—	—	—	12
1978	9	—	8	3	4	1	—	—	—	17
1979	3	2	6	2	1	3	—	—	—	11
1980	3	2	24	2	1	7	6	8	—	29
1981	4	3	3	—	—	—	3	—	—	10
Unlawful assembly										
1976	1	1	5	4	1	—	—	—	—	7
1977	8	1	1	1	—	—	—	—	—	10
1978	4	9	2	—	1	1	—	—	—	15
1979	1	15	6	5	1	—	—	—	—	22
1980	2	25	6	4	2	—	—	—	—	33
1981	11	14	14	1	1	1	2	8	1[12]	39
Other offence against the State or public order [13]										
1976	97 (85)	169 (149)	199 (181)	59	49	45	35	11	—	465
1977	89 (73)	125 (94)	214 (164)	89	51	35	32	7	—	428
1978	64 (53)	145 (102)	200 (156)	85	46	39	26	4	—	409
1979	66 (63)	132 (116)	227 (218)	89 (84)	51 (50)	55 (53)	25 (24)	6 (6)	1 (1)	425
1980	131 (130)	181 (167)	265 (257)	96	75	55	34	5	—	577
1981	152 (151)	150 (146)	302 (286)	116	61	69	52	4	—	604

[11] Including Borstal training.
[12] 8 years reduced on appeal to 5 years: see *R.* v. *Main and Gawthorpe* (1982) 4 Cr. App. R. (S) 42 and para. 5. 39, n. 83, above.
[13] The figures for affray, as supplied to us by the Home Office, are those which appear in brackets: see Table I, footnotes 8 and 10, above.

APPENDIX C

OFFENCES RELATING TO PUBLIC ORDER IN OTHER LEGAL SYSTEMS

1. This Appendix summarises provisions relating to riot and kindred offences in common law and civil law jurisdictions.[1] Caution is needed in using this material to draw conclusions about foreign laws. The extracted part is only one part of the whole framework of the law of the jurisdiction concerned and also imperfections of translation in some cases may leave ambiguities.

A. English Draft Code 1879

2. Because many of the criminal law codes in the common law countries follow the English draft Code, the relevant provisions of that Code[2] are set out in full to provide a basis for comparison.

TITLE II. OFFENCES AGAINST PUBLIC ORDER, INTERNAL AND EXTERNAL

PART VI

UNLAWFUL ASSEMBLIES, RIOTS, BREACHES OF THE PEACE

Section 84

Definition of Unlawful Assembly

An unlawful assembly is an assembly of three or more persons who, with intent to carry out any common purpose, assemble in such a manner or so conduct themselves when assembled as to cause persons in the neighbourhood of such assembly to fear on reasonable grounds that the person so assembled will disturb the peace tumultuously, or will by such assembly needlessly and without any reasonable occasion provoke other persons to disturb the peace tumultuously.[3]

Persons lawfully assembled may become an unlawful assembly if they conduct themselves with a common purpose in such a manner as would have made their assembling unlawful if they had assembled in that manner for that purpose.

An assembly of three or more persons for the purpose of protecting the house of any one of their number against persons threatening to break and enter such house in order to commit any indictable offence therein is not unlawful.

---

[1] This Appendix is an updated and slightly expanded version of Appendix B in Working Paper No. 82.

[2] Report of the Royal Commission on the Law Relating to Indictable Offences (1879), C. 2345, Appendix.

[3] The Commissioners stated in the Report accompanying the draft Code that " in declaring that an assembly may be unlawful if it causes persons in the neighbourhood to fear that it will needlessly and without reasonable occasion provoke others to disturb the peace tumultously, we are declaring that which has not yet been specifically decided in any particular case ": *ibid.*, p. 20. This antedated *Beatty* v. *Gillbanks* (1882) 9 Q.B.D. 308, para. 5.3, above.

Section 85

Definition of Riot

A riot is an unlawful assembly which has begun to act in a tumultuous manner to the disturbance of the peace.

Section 86

Punishment of Unlawful Assembly

Every member of an unlawful assembly shall be guilty of an indictable offence, and shall be liable upon conviction thereof to one year's imprisonment.

Section 87

Punishment of Riot

Every rioter shall be guilty of an indictable offence, and shall be liable upon conviction thereof to two years' imprisonment with hard labour.

Section 88

Reading the Riot Act

It is the duty of every sheriff under sheriff and justice of the peace of any county, and of every mayor bailiff or other head officer, sheriff under sheriff and justice of the peace of any city or town corporate, who has notice that there are within his jurisdiction persons to the number of twelve or more unlawfully riotously and tumultuously assembled together to the disturbance of the public peace, to resort to the place where such unlawful riotous and tumultuous assembly is, and where the nature of the case requires it among the rioters or as near to them as he can safely come with a loud voice to command or cause to be commanded silence to be whilst the proclamation hereinafter mentioned is made, and after that openly and with loud voice to make or cause to be made a proclamation in these words, or to the like effect:

> "Our Sovereign Lady the Queen chargeth and commandeth all persons being assembled immediately to disperse themselves and peaceably to depart to their habitations or to their lawful business, upon the pain of being guilty of an offence, on conviction of which they may be sentenced to penal servitude for life.
>
> GOD SAVE THE QUEEN."

All persons shall be guilty of an indictable offence, and shall upon conviction thereof be liable to penal servitude for life, who—

(*a*) with force and arms wilfully and knowingly oppose obstruct hinder or hurt any person who begins or who is about to make the said proclamation, whereby such proclamation is not made; or

(*b*) continue together to the number of twelve for and do not disperse themselves within one hour after such proclamation has been made, or if they know that its making was hindered as aforesaid, then within one hour after such hindrance:

Provided that no person shall be prosecuted for any offence under this section unless such prosecution be commenced within twelve months after the offence committed.

Every one charged with an offence under this section may be arrested without warrant, and shall be bailable at discretion.

Section 89

Duty of Justice if Rioters do not Disperse

If the persons so unlawfully riotously and tumultuously assembled together as aforesaid, or twelve or more of them continue together, and do not disperse themselves for the space of one hour after proclamation made, or after such hindrance as aforesaid, it is the duty of every such sheriff justice and other officer as aforesaid and of all persons required by them to assist to cause such persons to be apprehended and carried before a justice of the peace ; and if any person so assembled is killed or hurt in the apprehension of such persons or in the endeavour to apprehend or disperse them by reason of their resistance every person ordering them to be apprehended or dispersed and every person executing such orders shall be indemnified against all proceedings of every kind in respect thereof: Provided that nothing herein contained shall in any way limit or affect any duties or powers imposed or given by Sections 49, 50, 51, 52, 53, 116, and 117 as to the suppression of riots before or after the making of the said proclamation.

Section 96

Definition of Affray

An affray is the act of fighting in any public street or highway, or fighting to the alarm of the public in any other place to which the public have access.

Every one who commits or takes part in an affray shall be guilty of an indictable offence, and shall be liable upon conviction thereof to one year's imprisonment with hard labour.

B. Scotland

3. Mobbing is an offence at common law[4] in Scotland. In a recent case[5] the High Court approved the following passage from a direction to the jury in 1842[6] as accurately stating the present law in Scotland:

---

[4] Under Scots law the maximum penalties for common law offences are fixed by the maximum powers given to the various courts of criminal jurisdiction. High Court—life imprisonment; sheriff and jury court—two years' imprisonment; sheriff summary court—three months' imprisonment and in certain instances six months' imprisonment; district courts—sixty days' imprisonment.

[5] *Hancock and others* v. *H.M. Advocate* 1981 S.C.C.R. 32: a number of defendants were charged with and convicted of mobbing in respect of incidents which were alleged to have occurred when a van driven by one of them had stopped at three places close to each other and certain of the passengers had left the van and become involved in the incidents. On appeal it was held that the Crown had proved only " a series of unconnected and fortuitous events and encounters which arose on an instant and involved directly only certain members of the group in the van, without any evidence of pre-knowledge or support or encouragement or countenance on the part of those passengers who were not active participants " (*ibid.*, pp. 45–46 *per* Lord Cameron). The verdicts of guilty were quashed.

[6] See *H.M. Advocate* v. *Robertson* (1842) 1 Broun 152 at pp. 192–193 *per* L.J-C. Hope.

"An illegal mob is any assemblage of people, acting together for a common and illegal purpose, effecting, or attempting to effect their purpose, either by violence, or by demonstration of force or numbers, or by a species of intimidation, impediment, or obstruction, calculated to effect their object. . . . It is not necessary that the purpose or object of the mob should have been previously concerted, or that they should be brought together and congregated with the view previously formed of effecting the object subsequently attempted. It is enough, that after they have been so assembled and brought together, finding their numbers, and ascertaining a common feeling, they then act in concert, and take up and resolve to effect common purpose. There must, however, be a common purpose and object, for which they are combined and acting in concert, after they are congregated and operating as such throughout the acts alleged to be acts of mobbing. That object or purpose must be unlawful."

4. No fixed minimum number of participants is required: "whether the group is large enough in any case to constitute a mob is a question of fact depending on circumstances and in particular on the nature of the group's behaviour".[7]

5. There is no direct equivalent to unlawful assembly in Scotland. This may partly be explained by the fact that breach of the peace is a substantive common law offence with a very wide application.[8] It is described by G. H. Gordon thus:[9]

"Typically a breach of the peace is a public disturbance such as brawling or fighting in public, shouting and swearing in the street, or any general tumult or interference with the peace of a neighbourhood. Whether or not any particular act amounts to such a disturbance is a question of fact depending on the circumstances of each case. . . .".

C. Other Common Law Systems

1. AUSTRALIA

6. Provisions very similar to those in the English draft Code are to be found in respect of the offences of unlawful assembly, riot and affray in the Criminal Codes of Queensland, Tasmania and Western Australia, and the draft Criminal Code Bill of the Northern Territory,[10] although in the latter only thirty minutes, not one hour, is permitted for dispersal after direction. The draft Code for the Australian Territories also follows in substance the English draft Code except that it does not contain any provision for the dispersal of rioters and it does contain an offence of rout. Moreover, riot is defined in terms of twelve or more persons. Riot is an offence at common law in New South Wales and Victoria but in the former there is also a statutory offence of unlawful assembly. Section 545C of the Crimes Act 1900 provides that:

---

[7] G. H. Gordon, *The Criminal Law of Scotland* 2nd ed., (1978), para. 40–02. The author cites as authority for this a case in which there was no actual outbreak of violence but only intimidation; 17 people were held to be sufficient to constitute a mob, but it was suggested that five would be too few (*Sloan* v. *MacMillan* 1922 J.C. 1, 6 *per* L.J-C. Scott Dickson).

[8] For recently reported examples, see *Duffield* v. *Skeen* 1981 S.C.C.R. 66; *Wilson* v. *Brown* 1982 S.C.C.R. 49.

[9] *Op. cit.*, para. 41–01.

[10] The second published draft was tabled in June 1981.

"(3) Any assembly of five or more persons whose common object is by means of intimidation or injury to compel any person to do what he is not legally bound to do or to abstain from doing what he is legally entitled to do, shall be deemed to be an unlawful assembly."

New South Wales also has common law offences of affray and rout but "where the intention is in any degree effected" the latter is usually prosecuted as a riot.[11]

7. Most states classify the offences as misdemeanours and the most common maximum penalty for the offence of riot is three years' imprisonment and for unlawful assembly and affray one year's imprisonment. New South Wales makes the offence of joining or continuing in an unlawful assembly punishable on summary conviction with imprisonment not exceeding six months or a fine not exceeding forty dollars.

2. Canada

8. The Criminal Code of Canada[12] follows the English draft Code but contains no offence of affray and allows only thirty minutes for dispersal after the proclamation has been read. Riot is an indictable offence carrying a maximum penalty of two years' imprisonment and unlawful assembly is punishable on summary conviction.[13]

3. New Zealand

9. The New Zealand Crimes Act 1961 follows the pattern of the English draft Code, although, as in Canada, it contains no offence of affray. Section 86(1), which contains the offence of unlawful assembly, was amended in 1973[14] and now provides that:

"An unlawful assembly is an assembly of 3 or more persons who, with intent to carry out any common purpose,[15] assemble in such a manner, or so conduct themselves when assembled, as to cause persons in the neighbourhood of the assembly to fear, on reasonable grounds that the persons so assembled—

(*a*) Will use violence against persons or property in that neighbourhood or elsewhere; or

(*b*) Will, by that assembly, needlessly and without reasonable cause provoke other persons to use violence against persons or property in that neighbourhood:

Provided that no one shall be deemed to provoke other persons needlessly and without reasonable cause by doing or saying anything that he is lawfully entitled to do or say."[16]

---

11 Watson and Purnell, *Criminal Law in New South Wales* (1971), p. 1187.

12 See sections 64–70 (1978 edition).

13 Under the Criminal Code there are five general divisions of maximum sentences of imprisonment for indictable offences. These are life, fourteen years, ten years, five years and two years. Where the offence is punishable by summary conviction imprisonment may be imposed for a period not exceeding six months except where otherwise provided by law.

14 Crimes Amendment Act 1973, s. 3.

15 See *R.* v. *Wolfgramm* [1978] 2 N.Z.L.R. 185 (C.A.).

16 The Minister of Justice stated that these provisions "will strengthen the powers of the Police to deal with some ugly situations which have recently become all too familiar in our cities . . . e.g., (1) those who set out to invade and disrupt other areas or descend on and take over restaurants; (2) groups taking over hotel bars, intimidating staff and other patrons; (3) gang clashes and retaliations; (4) organised gate-crashing at private parties.": see A.M. Finlay Q.C., "Police and Public Disorder", [1974] N.Z.L.J. 10.

Every member of an unlawful assembly is liable to imprisonment for a term not exceeding one year. Any person taking part in a riot is liable to imprisonment for a term not exceeding two years.

4. ST. LUCIA AND BELIZE

10. Although the English draft Code of 1879 is well-known, it is less widely known that another draft code was produced in 1874 at the request of the Colonial Office.[17] This was a draft criminal code for Jamaica which was to serve as a model for all the colonies, and although it was not adopted by Jamaica it does form the basis of the Criminal Code of St. Lucia (1889):

s. 638.—(1) If five or more persons together in any public or private place commence or attempt to do either of the following things, namely—

(*a*) to execute any common purpose with violence, and without lawful authority to use such violence for that purpose;

(*b*) do execute a common purpose of obstructing or resisting the execution of any legal process or authority;

(*c*) to facilitate, by force or by show of force or of numbers, the commission of any crime,

they are guilty of riot.

(2) Persons are not guilty of a riot by reason only that they, to the number of five or more, suddenly engage in an unlawful fight, unless five or more of them fight with a common purpose against some other person or persons.

(3) For the purpose of this section " violence " means—

(*a*) any criminal force or harm to any person;

(*b*) any criminal mischief to any property;

(*c*) any threat or offer of such force, harm, or mischief;

(*d*) the carrying or use of deadly, dangerous, or offensive instruments in such a manner as that terror is likely to be caused to any persons;

(*e*) such conduct as is likely to cause in any persons a reasonable apprehension of criminal force, harm or mischief to them or their property.

s. 639 Any magistrate, or, in the absence of any magistrate, any justice of the peace or any commissioned officer in His Majesty's military or naval service, in whose view a riot is being committed, or who apprehends that a riot is about to be committed by persons assembled within his view may make or cause to be made a proclamation in the King's name, in such form as he thinks fit, commanding the rioters or persons so assembled to disperse peaceably.

s. 640 If, upon the expiration of one hour after such proclamation made or after the making of such proclamation has been prevented by force, twelve or more persons continue riotously assembled together, any person authorised to make proclamation or any peace officer, or any other person acting in aid of such person or officer, may

[17] The background and history to this code and its author R. S. Wright is set out in M. L. Friedland, " R. S. Wright's Model Criminal Code: A forgotten chapter in the history of the Criminal Law ", (1981) 1 O.J.L.S. 307.

do all things necessary for dispersing the persons so continuing assembled or for apprehending them or any of them, and, if any other person makes resistance, may use all such force as is reasonably necessary for overcoming such resistance, and is not liable in any criminal or civil proceedings for having, by the use of such force, caused harm or death to any person. But nothing herein contained shall affect or limit the power to use such force as is in this section mentioned at any time before the expiry of one hour from the making of the said proclamation, or after the making thereof has been prevented, if in the circumstances it is reasonably necessary to use such force for the suppression, or to prevent the continuance of any riot.

11. The provisions of the new Criminal Code for Belize[18] relating to riot follow closely the wording of the St. Lucia Code but the code also contains a separate offence of unlawful assembly:

s. 233 If any persons assemble or be together with a purpose of committing a riot, each of them is guilty of a misdemeanour.

Section 251, dealing with dispersal of the rioters, unlike section 640 of the St. Lucia Code is not limited by time or numbers.

5. India

12. The Indian Penal Code of 1860[19] contains at Chapter VIII " offences against the public tranquillity " which include unlawful assembly, riot and affray:

141. An assembly of five or more persons is designated an " unlawful assembly " if the common object of the persons composing that assembly is—

(*a*) To over-awe by criminal force, or show of criminal force, the Central or any State Government of the Parliament or the Legislature of any State or any public servant in the exercise of the lawful power of such public servant ; or

(*b*) To resist the execution of any law, or of any legal process ; or

(*c*) To commit any mischief or criminal trespass, or other offence ; or

(*d*) By means of criminal force, or show of criminal force, to any person to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right ; or

(*e*) By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly.

---

[18] Gazetted 15 November 1980.
[19] See Ranchoddas and Thakore, *The Law of Crimes* 21st ed., (1966), p. 338.

146. Whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting.[20]

151. Whoever knowingly joins or continues in any assembly of five or more persons likely to cause a disturbance of the public peace, after such assembly has been lawfully commanded to disperse, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

If the assembly is an unlawful assembly within the meaning of section 141, the offender will be punishable under section 145.[21]

159. When two or more persons, by fighting in a public place, disturb the public peace, they are said to " commit an affray ".[22]

6. The United States of America

13. The American Law Institute's Model Penal Code (1962) does not contain any provisions dealing with unlawful assembly not amounting to riot. All revised codes follow the Model Code in eliminating a distinct offence of rout, but many jurisdictions follow New York[23] in maintaining riot and unlawful assembly as separate crimes. Section 250.1 provides:

(1) A person is guilty of riot, a felony of the third degree,[24] if he participates with [two][25] or more others in a course of disorderly conduct:

(*a*) with purpose to commit or facilitate the commission of a felony or misdemeanour;

(*b*) with purpose to prevent or coerce official action; or

(*c*) when the actor or any other participant to the knowledge of the actor uses or plans to use a firearm or other deadly weapon.

(2) Where [three][25] or more persons are participating in a course of disorderly conduct likely to cause substantial harm or serious inconvenience, annoyance or alarm, a peace officer or other public servant engaged in executing or enforcing the law may order the participants and others in the immediate vicinity to disperse . A person who refuses or knowingly fails to obey such an order commits a misdemeanour.

---

20 This offence carries imprisonment of up to two years and/or a fine—s. 147.

21 Sect. 145 provides for imprisonment of up to two years and/or a fine.

22 Affray is punishable with imprisonment of up to one month and/or a fine of one hundred rupees.

23 See para. 14, below.

24 Among the distinctive features of the adult felony sentencing and correction provisions of the Model Penal Code are three degrees of felonies. Articles 6.01–6.06 provide minima and maxima:

Degree	*Minimum*	*Maximum*
1st	1–10 years	Life
2nd	1–3 years	10 years
3rd	1–2 years	5 years

25 The number of required participants is placed in square brackets in order to indicate the possibility of reasonable alternatives. The majority of revised codes and proposals follow the Model Penal Code on this point although the critical number ranges from two in Illinois to ten in Michigan, with a substantial minority specifying five.

Section 250.2 provides:

(1) A person is guilty of disorderly conduct if, with purpose to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:

(*a*) engages in fighting or threatening, or in violent or tumultuous behaviour; or

(*b*) makes unreasonable noise or offensively coarse utterance, gesture or display, or addresses abusive language to any person present; or

(*c*) creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.

It should be noted that this offence of disorderly conduct, which can be used inter alia to charge the sort of conduct which in England and Wales is covered by the offence of affray, is not limited to conduct in public places or at public meetings.

14. The following offences are provided for in the New York Penal Code:

Section 240.05 *Riot in the second degree*

A person is guilty of riot in the second degree when, simultaneously with four or more other persons, he engages in tumultuous and violent conduct and thereby intentionally or recklessly causes or creates a grave risk of causing public alarm.[26]

Section 240.06 *Riot in the first degree*

A person is guilty of riot in the first degree when (*a*) simultaneously with ten or more other persons he engages in tumultuous and violent conduct and thereby intentionally or recklessly causes or creates a grave risk of causing public alarm, and (*b*) in the course of and as a result of such conduct, a person other than one of the participants suffers physical injury or substantial property damage occurs.[27]

Section 240.08 *Inciting to riot*

A person is guilty of inciting to riot when he urges ten or more persons to engage in tumultuous and violent conduct of a kind likely to create public alarm.[28]

Section 240.10 *Unlawful assembly*

A person is guilty of unlawful assembly when he assembles with four or more other persons for the purpose of engaging or preparing to engage with them in tumultuous and violent conduct likely to cause public alarm, or when, being present at an assembly which either has or develops such purpose, he remains there with intent to advance that purpose.[29]

---

26 A class A misdemeanour, maximum penalty—1 year.
27 A class E felony, maximum penalty—4 years.
28 A class A misdemeanour, maximum penalty—1 year.
29 A class B misdemeanour, maximum penalty—3 months.

D. Civil Law Countries

1. South Africa

15. The principal common law offence against public order in the criminal law of South Africa is " public violence ", which according to the leading textbook on criminal law[30] consists in—

> " the unlawful and intentional commission by a number of people acting in concert of acts of sufficiently serious dimensions which are intended forcibly to disturb the public peace or security or to invade the rights of others."

2. France[31]

16. *Article 314*[32] of the French Penal Code provided that when, as a result of a concerted action, conducted with open force by a group, violence or assaults are committed against persons, or goods are destroyed or damaged, the instigators and the organisers of that action, and also those who have willingly participated, are punishable . . . with imprisonment for a term of one to five years.

When violence, assault, destruction or damage which are categorised as crimes or misdemeanours [délits] are committed as a result of a meeting which is illegal or has been prohibited by Government authority, punishment shall be imposed on—

> 1. Those instigators and organisers of the gathering who failed to order the meeting to disperse as soon as they became aware of the violence, assault, destruction or damage: imprisonment for a term of six months to three years ;
>
> 2. Those who continued to participate actively in the gathering after the commencement of, and with knowledge of, the violence, assault, destruction or damage: imprisonment for a term of three months to two years.

Imprisonment for a term of one to five years will be imposed on those who join in a gathering, whether legal or not, with a view to themselves committing, or procuring the others present to commit violence, assault, destruction or damage.

Article 440

All looting of goods or merchandise, effects and personal property [propriétés mobilières], committed in a gathering or group and with open force is punishable with imprisonment for a term of ten to twenty years . . . .

17. The Law of 30 June 1881 on public meetings, and the Decree-law of 23 October 1935, concerning the regulation of measures relating to the better maintenance of public order, provide that with certain exceptions meetings may not be held on the public highway, and may not continue after

---

30 Hunt, *South African Criminal Law and Procedure* (1970) vol. II, pp. 74–75.

31 Paragraphs 16–19 are given in Law Commission translations.

32 Articles 314 and 440 of the Penal Code, passed in the wake of the Paris riots of 1968 and frequently invoked in the case of violent student and other protests, were repealed on 25 November 1981: see *The Times*, 27 November 1981.

11.00 p.m. Prior notification to the authorities is required for all processions, marches and gatherings and all demonstrations on the public highway. Such notification must give the names and addresses of the organisers, and must state the object, place, date and time of the demonstration. The demonstration may be banned if the authorities consider it to be such as might disturb public order. Penalties of up to six months' imprisonment and a fine may be imposed on those who supply an incomplete or misleading notification and on those who organise an undeclared or prohibited demonstration.

The Law of 10 January 1936 on combat groups and private militia provides (in part) as follows:

Article 1 provides for the dissolution of all societies or groups which (inter alia):

1. would provoke armed demonstrations on the highway;

2. would by their military organisation and form give the appearance of combat groups or private militia;

3. (added in 1972) would either provoke discrimination, hatred or violence against a person or group of persons by reason of their origin, or of their belonging or not belonging to an ethnic group, nation, race or particular religion, or would propagate ideas or theories tending to justify or encourage such discrimination, hatred or violence.

Article 2 punishes everyone who helps to support or recreate any such society or group with six months' or two years' imprisonment and a fine.

3. GERMANY

18. The German Penal Code provides:

Article 125 : Interference with the public peace

Anyone who uses or takes part in violent force against people or property, or threatens people with violent force which will be used by a group of people with combined forces in a way which endangers public safety, or who encourages a group of people to be prepared to perpetrate such action will be sentenced up to 3 years in prison provided the action is not subject to a heavier sentence under other regulations.

Article 125a : Serious interference with the public peace

In particularly serious cases under Article 125 the penalty will be a prison sentence of 6 months to 10 years. A particularly serious case is normally one in which the perpetrator:

(1) Has a gun with him;

(2) Carries another weapon in order to use it for the action;

(3) When due to the use of force a third person is in danger of death or serious injuries;

(4) Is looting or damaging substantially other people's property.

Article 126 : Acts endangering public peace

Anyone who disturbs the public peace by threatening action which is dangerous to the public peace will be sentenced to imprisonment for up to one year.

4. SWITZERLAND

19. The Swiss Penal Code (21 December 1937) (as revised incorporating modifications to 1 July 1971) provides:

Article 260 : Riot

Anyone who takes part in an assembly formed in public, and in the course of which violent acts are committed collectively against persons or property, is punishable with imprisonment or a fine.

No person will incur punishment if he withdraws when required to do so by the authorities without having committed any violent acts or incited others to commit them.

5. NORWAY

20. The Norwegian Penal Code 1902[33] provides:

Section 135

Anybody who endangers the general peace by publicly insulting or provoking hatred of the Constitution or any public authority, or publicly inflaming one group of the population against another, or is accessory thereto, shall be punished by fines or jailing or imprisonment up to one year.

Section 136

Anybody who brings about the occurrence of a riot with the intent to use violence against person or property, or to threaten therewith, or is accessory to bringing about such a riot, or who, during a riot where such intent has been revealed, acts as a leader, shall be punished by imprisonment up to three years.

To stay after an order to disperse has been given is an offence punishable with up to three months' imprisonment.

6. SWEDEN

21. The Swedish Penal Code of 1965[34] contains the following provisions:

Chapter 16 : of Crimes Against Public Order

S. 1. If a crowd of people disturbs public order by demonstrating an intention to use group violence in opposition to a public authority or otherwise to compel or obstruct a given measure and does not disperse when ordered to do so by the authority, instigators and leaders shall be sentenced to imprisonment for at most four years and other participants in the crowd's business to pay a fine or to imprisonment for at most two years for *riot.*

If the crowd disperses on order of the authority, instigators and leaders shall be sentenced for riot to pay a fine or to imprisonment for at most two years.

---

[33] As amended to 1 March 1961. See The American Series of Foreign Penal Codes, *The Norwegian Penal Code* (1961), transl. Harald Schjoldager.

[34] As amended, 1 January 1972. See The American Series of Foreign Penal Codes, *The Penal Code of Sweden* (1972), transl. Thorsten Sellin.

S. 2. If a crowd, with intent referred to in section 1, has proceeded to use group violence on person or property, whether a public authority was present or not, sentences for *violent riot* shall be imposed ; on instigators and leaders to imprisonment for at most ten years and on participants in the crowd's business to pay a fine or to imprisonment for at most four years.

S. 3. If a member of a crowd that disturbs public order neglects to obey a command aimed at maintaining order, or if he intrudes on an area that is protected or has been closed off against intrusion, he shall, if no riot is occurring, be sentenced for *disobeying police order* to pay a fine or to imprisonment for at most six months.

E. Conclusion

22. This survey of other legal systems shows that, while the civil law jurisdictions have offences drafted in characteristically broad terms, common law jurisdictions have in many instances retained offences similiar to the common law offences of unlawful assembly, riot, and affray and (in a few cases) rout. It is noteworthy that in most instances these offences are punishable with periods of imprisonment ranging up to only two years,[35] and that some of the civil law provisions also prescribe relatively low maximum sentences. However, no firm conclusion should be drawn from this survey in the absence of more detailed information about the contexts in which these and related offences, such as offences against the person and offences against the state, are in practice used.

[35] Following in this respect the English draft Code of 1879: see para. 2, above.

APPENDIX D

Organisations and individuals who commented upon Working Paper No. 82, "Offences against Public Order"

Organisations (including government departments)

British Insurance Association
Campaign for Homosexual Equality
Commission for Racial Equality
Commissioner of Police for the City of London
Commissioner of Police of the Metropolis
Council of Her Majesty's Circuit Judges
Criminal Bar Association
Director of Public Prosecutions
Greater London Council
Haldane Society
Home Office
Justices' Clerks' Society
Law Officers' Department
The Law Society
Lord Chancellor's Department
National Council for Civil Liberties
National Union of Mineworkers—Nottingham area
National Union of Public Employees
Police Federation
Police Superintendents' Association of England and Wales
Prosecuting Solicitors' Society of England and Wales
Salvation Army
Senate of the Inns of Court and the Bar
Society of Labour Lawyers
Society of Public Teachers of Law
Trades Union Congress
Union of Communication Workers

Individuals

Professor J. A. Andrews
Professor A. W. Bradley
Chief Metropolitan Magistrate (Mr. D. A. Hopkin)
Common Serjeant of London (His Honour Judge Tudor Price Q.C.)
The Hon. Mr. Justice Farquharson
Mr. T. C. Gibbons
His Honour Judge Lymbery Q.C.
The Hon. Mr. Justice McNeill
Mr. D. M. Morgan and Miss Celia K. Wells (New Law Journal)[1]
Mr. R. Perceval
Mr. Alec Samuels
The Deputy Serjeant-at-Arms (Major G. V. S. Le Fanu)
Mr. A. T. H. Smith[2]
Mr. M. Supperstone[3]

---

1 (1982) 132 N.L.J. 541.
2 [1982] Crim. L.R. 485.
3 [1982] Public Law 354.

Printed by HMSO St Stephen's Parliamentary Press

208541 Dd 0402085 C18 10/83

HER MAJESTY'S STATIONERY OFFICE

Government Bookshops

49 High Holborn, London WC1V 6HB
13a Castle Street, Edinburgh EH2 3AR
Brazennose Street, Manchester M60 8AS
Southey House, Wine Street, Bristol BS1 2BQ
258 Broad Street, Birmingham B1 2HE
80 Chichester Street, Belfast BT1 4JY

Government publications are also available through booksellers

ISBN 0 10 208584 6