BINDING OVER

LAW COMMISSION
LAW COM No 222

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The Law Commission

(LAW COM. No. 222)

BINDING OVER

REPORT ON A REFERENCE UNDER SECTION 3(1)(e) OF THE LAW COMMISSIONS ACT 1965

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

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LAW COMMISSION

BINDING OVER

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THE LAW COMMISSION

(Report on a reference to the Law Commission under Section 3(1)(e) of the Law Commissions Act 1965)

BINDING OVER

To the Right Honourable the Lord Mackay of Clashfern,
Lord High Chancellor of Great Britain

PART I
INTRODUCTION AND SUMMARY

1.1 In November 1980 your predecessor, Lord Hailsham of St Marylebone, made a reference to the Commission in the following terms:

> "To examine the power to bind over to keep the peace and be of good behaviour under the Justices of the Peace Act 1361 and at common law together with related legislation, to consider whether such a power is needed and if so, what its scope should be, and to recommend legislation accordingly, including such legislation upon procedural and any matters as appear to be necessary in connection therewith."

1.2 When this reference was made we had recently agreed with the Home Office that we would undertake a review of various aspects of the law relating to public order offences. We were aware at that time of the existence of a considerable amount of adverse comment on the law relating to binding over. This was mainly aimed at the ability of courts to bind over individuals who had not been charged with any offence. There were also known to be anomalies in the legislation connected with binding over which dealt with appeals and penalties. It was therefore considered appropriate[1] that the Commission should undertake this work at the same time as it undertook a review of the substantive law in relation to the preservation of binding over.

1.3 The topic with which this Report is concerned is the power of a court to bind someone over in a fixed sum, known as a recognisance, and for a fixed period, to keep the peace and/or to be of good behaviour whether or not he or she has been found guilty of an offence known to our criminal law. If the person bound over is brought back before the court and is found to have acted in breach of the peace and/or failed to be of good behaviour at any time during that period, he or she is liable to have the whole or part of the recognisance "estreated", or forfeited to the Crown. Payment will then be enforced as if the sum ordered to be paid was a fine.[2]

[1] See Fifteenth Annual Report 1979–80, Law Com No 107, para 2.15.
[2] Magistrates' Courts Act 1980, s 120(4).

1.4 The power to bind over is a power which goes back very deep into our history, long before an Act passed in 1361[3] gave one aspect of it statutory recognition, and it is only in the last thirty years that many aspects of this jurisdiction have come under increasingly critical scrutiny, not least by the judiciary.[4] Although the power cannot be exercised without the consent of the person who is to be bound over, he or she may be imprisoned if they are unwilling to give their consent. Except in cases which fall within the scope of the procedure prescribed by the Magistrates' Courts Act 1980,[5] the period for which a person may be bound over is, in theory at any rate, unlimited. In addition, in all cases there is, in theory again, no upper limit to the sum which the person bound over may be ordered to forfeit if found to be in breach of the terms of the order by which he or she agreed to be bound.

1.5 In 1983–4, with the assistance of your Department and with the co-operation of the Magistrates' Association, the Justices' Clerks' Society and the Society of Magisterial Officers, we undertook research into the extent to which binding over powers were then being used in practice in magistrates' courts. Research of this systematic kind had never previously been conducted into the use of these powers, and it proved of great value to us when we prepared our Working Paper for public consultation.

1.6 The publication of this paper was delayed, however, partly due to pressures of other work and partly because of the introduction into Parliament of what became the Public Order Act 1986. Although parts of this statute were based on our report on Offences Relating to Public Order,[6] the provisions relating to a new offence of disorderly conduct, which became section 5 of the 1986 Act, were quite new. Since this measure would be criminalising some of the conduct which might have previously led to a binding over, it was judged sensible[7] to wait and see the final outcome of the Parliamentary process before seeking views on the future of binding over.

1.7 In May 1986 we invited Mr Martin Wasik, of Manchester University, to prepare a Working Paper in collaboration with us, and this Working Paper was published in September 1987.[8] In addition to describing the present state of English law and

[3] The Justices of the Peace Act 1361. See Appendix B for the relevant extract from this Act, which is still on the statute book.

[4] See, for example, paras 4.44–4.45 below.

[5] Magistrates' Courts Act 1980, s 115(1). See paras 2.6–2.8 below.

[6] Criminal Law: Offences Relating to Public Order (1983) Law Com No 123, HC 85.

[7] See Twentieth Annual Report 1984–5, Law Com No 155, para 2.20.

[8] Criminal Law: Binding Over: The Issues, Working Paper No 103.

practice, the Working Paper contained a review of comparative arrangements in Scotland and Northern Ireland and a number of overseas jurisdictions.

1.8 The responses to consultation elicited such a stark divergence of views that the future progress of the project became very seriously delayed. The obscurity of the law which the project embraces, the irreconcilability of the conflicting views, and the need to give detailed consideration to the provisions of the European Convention of Human Rights, coupled with the need also to conduct a very detailed analysis of the effects of other developments in law and practice since 1980 made this complex project an obvious candidate for demotion whenever the Commission had to consider priorities within the work of the criminal law team. In 1990 we reported to you that the project was particularly affected by discontinuities in staffing and the need to give priority to matters of more immediate urgency:[9] the following year we explained that it was difficult to maintain continuity on the project owing to the inevitably rapid turnover amongst our temporary research assistants.[10]

1.9 In 1989–90, however, we had the opportunity of considering a policy paper prepared by our criminal law team. As a result we carried out a further limited exercise of consultation aimed at exploring the idea that if binding over were to be abolished, some form of judicial warning scheme might be devised to succeed it in those areas where its abolition might be thought to create an unsatisfactory gap in the armoury of remedies available to the court.

1.10 As we report in Part VI,[11] the results of this further consultation were totally inconclusive. They threw up just as many sharp divisions of opinion as the previous exercise in consultation. Our suggestions were assailed by all sides and were clearly unlikely to be productive of any fruitful progeny.

1.11 At the same time, as we make clear in this Report, the scene we are viewing in 1993 is in many ways quite different from the scene at the start of this reference in 1980. We describe the three main differences in Parts III and V of this Report.

[9] Twenty-Fifth Annual Report 1990, Law Com No 195, para 2.18.

[10] Twenty-Sixth Annual Report 1991, Law Com No 206, para 2.25.

[11] See paras 6.27–6.42 below.

1.12 First, a number of new Acts of Parliament have criminalised anti-social conduct which was previously only susceptible to a binding over order. These we describe in Part III. Section 5 of the Public Order Act 1986 is of particular relevance in this context.

1.13 Next, as we also explain in Part III, an impetus has been given in recent years to non-court disposals by the police and prosecuting authorities in cases which would previously have taken up court time and resulted in a binding over, with or without a conviction. Further developments on these lines were encouraged by the Royal Commission on Criminal Justice[12] and this modern trend would not fit comfortably with the continuation of a regime in which those who behaved in an anti-social way were brought to court, merely to be bound over at the end of the court hearing.

1.14 And thirdly, much more attention is now being paid to this country's duty to comply with its international obligations under the European Convention of Human Rights. In our view it is not now legitimate to ignore the provisions of the Convention in a law reform project of this kind, and as we observe in Part V, there are parts of the Convention which only serve to illuminate more clearly the difficulties with binding over which are already evident when they are viewed from the perspective of our English domestic law.

1.15 There can be no doubt that the majority of those who responded to our Working Paper were in favour of retaining the binding over powers with which this Report is concerned, although most of their supporters were willing to acknowledge that overdue changes needed to be made to some of the ways in which those powers were exercised. There can also be no doubt that the most fervent support for binding over came from those who had experience of the way those powers operated in practice, and that apart from two high court judges the most fervent opposition came from those who were more remote from the duty of administering justice in the front line. However, underlying a good deal of the support for binding over was the fear that if it was abolished its abolition would leave an unwarrantable gap in our law which could not readily be filled by any alternative arrangements. There was also, we felt, a tendency of those who supported binding over to be too ready to overlook the strength of the objections which were made to it on what we will call "uncertainty" and "natural justice" grounds.

[12] See paras 3.29, 3.31 below.

1.16 It was for this reason that we undertook a very thorough review of all the recent developments in law and practice which have taken place since 1980 to see if there really would be the gap in our law that was feared by so many respondents. We also undertook a study of the relevant provisions of the European Convention. This study led us to conclude that the very strong objections on "uncertainty" and "natural justice" grounds were reinforced by the Convention, particularly by Articles 5 and 6.

1.17 The outcome of all this work was that we reached two clear conclusions. First, that recent extensions of the criminal law had severely restricted, if not entirely eliminated, examples of the kind of conduct which, whilst not the subject of specific criminal offences, might legitimately be controlled by a quasi-criminal sanction such as binding over. And secondly, that those aspects of the binding over procedure which make the institution most attractive to its supporters are open to very substantial objection under the principles of natural justice. It follows that if binding over were to be retained, it would be necessary to make sweeping changes in its procedure which would effectively remove from the institution most of the advantages perceived by its supporters.

1.18 Our answers to the questions posed in our reference are, therefore, as follows:

(1) The power to bind over to keep the peace and be of good behaviour is no longer defensible if modern views of proper practice and procedure in our courts are to be respected;

(2) No satisfactory steps can be taken to remedy its many defects short of depriving the procedure of its informality which is regarded as one of its main attractions;

(3) Because so many of the forms of anti-social behaviour for which a binding over was formerly used are now subject to criminal sanctions under modern criminal statutes, there are now no areas in which the retention of the power is needed in a form which could be justified by modern standards of practice and procedure;

(4) We explored the possibility of creating a new form of judicial warning system to provide a means by which a court could give an accused person a warning as to his future conduct without burdening him with a formal criminal conviction, but we concluded that this would create more problems than it would solve;

(5) In the light of the unsurmountable objections to binding over which we identify in this Report, and taking into account these considerations and the modern developments in cautions and cautions-plus[13] and other diversionary schemes taking anti-social offenders out of the court system, we have concluded that it is now both proper and reasonable to recommend that binding over, of the type which is the subject of this reference, should be abolished without replacement.

1.19 In Part II of this Report we describe the present law. In Part III we give an explanation of the way in which law and practice have moved forward since 1980 in a number of very relevant respects. In Part IV we analyse the principal objections to binding over, on the grounds of uncertainty and unascertainability and on natural justice grounds, and conclude that its continuance in its present form is unacceptable as a matter of English domestic law. In Part V we consider the effect of the European Convention of Human Rights and find that this buttresses the conclusions we had already reached in Part IV. In Part VI we consider a few issues in which the abolition of binding over might appear to leave an unjustifiable gap in the law and conclude that these fears are unjustified. We also describe the inconclusive results of our consultation on a possible judicial warning scheme to replace binding over as a non-criminalising process for settling criminal cases. In Part VII we summarise our conclusions.

1.20 Appendix A contains a draft Bill which encapsulates our recommendations. Appendix B contains extracts from relevant English statutes, including the Justices of the Peace Act 1361, and Appendix C contains extracts from relevant Articles of the European Convention of Human Rights. In Appendix D we review the practical examples of binding over cases which were contained in the Working Paper and conclude that these are now all satisfactorily accommodated within other existing provisions of the law.

[13] See para 3.31 below.

PART II
THE PRESENT LAW

1. Historical origins

2.1 The origins of the powers to bind over are lost in history. They have been traced back in one form or another at least as far back as the tenth century,[1] a century which produced a number of laws which combined suretyship with local self-policing. By the end of the twelfth century the enforcement of oaths of the peace was entrusted to knights who were assigned for the purpose. This was the origin of the office of conservator of the peace from which the office of justice of the peace developed in the fourteenth century, and these conservators of the peace are believed to have exercised a common law power to bind people over to be of good behaviour if their acts or language were shown to be likely to endanger the public peace.[2]

2.2 In 1328 commissions of the peace were issued for the first time to justices of the peace. These gave them power to hear and determine criminal cases. There followed a period of experimentation, with the justices of the peace sometimes having the power to judge and sometimes not, as the lords of the manor resisted in Parliament what seemed to them a new and doubtful form of royal justice. Eventually, in the winter of 1360–1 the Act was passed which became the Justices of the Peace Act 1361.[3]

2.3 This Act which, as we have said,[4] is still on the statute book, expressed in statutory form[5] the express power possessed by justices to take of people who came before

1 King Athelstan changed the law so that someone under 15 years of age could only be put to death for an offence if he resisted or fled. "If he surrendered himself he was only to be imprisoned until some of his relations or friends would become security for him [until he has discretion] *ut semper ab omni malo abstineat*" (in order that he may always abstain from all wickedness). See the note by Emlyn ed. in Hale, The History of the Pleas of the Crown (1736) i, 23; citing Wilkins, Anglo-Saxon Laws (1721) p 70.

2 See *Lansbury v Riley* [1914] 3 KB 229, 235–7; Ex p *Seymour v Davitt* (1883) 15 Cox CC 242, in which May LCJ said at pp 250–251: "Burn and all the ancient writers on the subject treat sureties for the peace and sureties for good behaviour as of near affinity, and scarcely distinguishable".

3 In Working Paper No 103, para 2.1, we described how this Act was passed because of worries about the behaviour of troops returning to England following the treaty of peace with France in 1360.

4 See para 1.4, n 3 above.

5 In *Lansbury v Riley* [1914] 3 KB 229 Avory J said at p 236 that: "in my opinion the statute is not exhaustive of the magistrate's jurisdiction under such circumstances, but that they had long before that statute, whether they were called justices of the peace or conservators of the peace, power to bind over persons to be of good behaviour".

them[6] "sufficient surety and mainprise of their good behaviour towards the king and his people".

2.4 During the last 200 years the way in which the courts have exercised these ancient binding over powers has been heavily influenced by Blackstone.[7] He wrote that "a man may be bound to his good behaviour for causes of scandal, *contra bonos mores*, as well as *contra pacem*; . . . or for words tending to scandalize the government, or in abuse of the officers of justice, especially in the execution of their office. Thus also a justice may bind over all nightwalkers; eaves-droppers; such as keep suspicious company, or are reported to be pilferers or robbers; such as sleep in the day, and wake in the night; common drunkards; whore-masters; the putative fathers of bastards; cheats; idle vagabonds; and other persons, whose misbehaviour may reasonably bring them within the general words of the statute, as persons not of good fame".

2. The modern power to bind over

2.5 The modern power to bind a person over to keep the peace or to be of good behaviour is a power by which justices of the peace[8] may require any person before the court to enter into a recognisance (ie. to give a bond), with or without sureties, that for a specified period he will keep the peace and/or be of good behaviour. If he does not consent to enter into such a bond they may commit him to prison forthwith. If after giving his bond he fails to keep the peace, or is not of good behaviour, during the specified period, then the court may direct that the sum of money specified in the bond or, at its discretion, a lesser sum, be forfeited. It may not commit him to custody for breach of his recognisance.

3. The statutory complaint procedure

2.6 Section 115(1) of the Magistrates' Courts Act 1980 provides a statutory procedure by which a person may be brought to a magistrates' court when the only objective of the complainant is to have the respondent bound over.[9] This statutory power, which

[6] For the purposes of this Report we see no purpose in entering into the debate whether such sureties were to be taken "of all them that be of good fame" or "of all them that be not of good fame". The history of this debate is to be found in *Lansbury v Riley* [1914] 3 KB 229, 230–3 and in the Working Paper, para 2.2.

[7] Commentaries on the Law of England, New Edition (1811), iv, p 256.

[8] This expression includes justices of the High Court. See *Sharp and Johnson* [1957] 1 QB 552 per Lord Goddard CJ at pp 561–2.

[9] Section 115(1) provides: "The power of a magistrates' court on the complaint of any person to adjudge any other person to enter into a recognizance, with or without sureties, to keep the peace or to be of good behaviour towards the complainant shall be exercised by order on complaint".

resides in a magistrates' court rather than in individual justices, originated in the old commissions of the peace which we have described. The power was codified in section 25 of the Summary Jurisdiction Act 1879, and it has been restated with minor alterations in section 91 of the Magistrates' Courts Act 1952 and in section 115(1) of the 1980 Act.

2.7 Under this statutory procedure, once a complaint is lodged a magistrates' court may issue a summons directed to the person named in the complaint requiring him to appear and answer it. The complaint may be lodged by a police officer or by a lay complainant. Sections 51 to 57 of the Magistrates' Courts Act 1980 describe the jurisdiction of a magistrates' court to hear complaints and the procedure which is to be followed. Technically, this forms part of the magistrates' court's civil jurisdiction rather than its criminal jurisdiction, although the proceedings have been described as analogous to criminal proceedings.[10]

2.8 The court may not make any order under this statutory procedure until the end of its proceedings, after it has heard sworn evidence. It may then order the respondent to enter into a recognisance to keep the peace, or to be of good behaviour towards the complainant, as the case may be.[11] If he fails to comply with the order, the court may commit him to custody for a period not exceeding six months.[12]

4. Binding over powers outside the statutory complaint procedure

2.9 At one time it was thought that section 25 of the 1879 Act codified the entire law on binding over to keep the peace. However, it soon became clear that the provisions of this section were limited to the procedure on complaint, and that the personal powers afforded to justices both at common law and under the 1361 Act still survived.[13] Similar powers are possessed by the Crown Court[14] and by the judges of the Court of Appeal (Criminal Division).[15] Under these powers no offence need be proved, and at

[10] Per Denning LJ in *Everett v Ribbands* [1952] 1 All ER 823, 826. See also Lord Donaldson MR in *R v Bolton justices ex p Graeme* (1986) 150 JP 190.

[11] No specific conditions may be imposed in addition. Thus the courts have declared to be invalid purported conditions forbidding the carrying or use of a firearm (*Goodlad v Chief Constable of South Yorkshire* [1979] Crim LR 51); directing the person bound over to keep away from a specified nightclub for twelve months (*Lister v Morgan* [1978] Crim LR 292) or forbidding the person bound over to teach or try to teach anyone under the age of 18 for 3 years (*Randall* [1987] Crim LR 254).

[12] Or until he sooner complies with the order: Magistrates' Courts Act 1980, s 115(3).

[13] See Williams, "Preventive Justice and the Rule of Law" (1953) 16 MLR 417.

[14] See section 8 and Schedule 1 of the Courts Act 1971; and sections 8 and 45 of the Supreme Court Act 1981.

[15] *Sharp and Johnson* [1957] 1 QB 552; *Younis* [1965] Crim LR 305.

any stage of the proceedings any of the participants in the proceedings may be bound over, if a justice considers that the person's conduct is such that there might be a breach of the peace in the future, or that his behaviour was *contra bonos mores* (contrary to a good way of life). This expression has recently been held to mean conduct which had the property of being wrong rather than right in the judgment of the majority of contemporary fellow citizens.[16] We will call these powers the "forthwith powers".

2.10 Because no offence need be proved, these powers may be exercised before the conclusion of criminal proceedings, on withdrawal of a case by the prosecution, on a decision to offer no evidence, on an adjournment, or upon acquittal of the defendant. They may also be used in the course of proceedings before magistrates which were started by complaint. It has been said that they are exercisable as a measure of preventive justice.[17] Where binding over is imposed prior to conviction the justices of course have no power to add a penalty, such as a fine,[18] or any ancillary order, such as a compensation order. The power to bind over may also be used in relation to a defendant following his conviction for a criminal offence.

2.11 Justices are entitled to use their powers at common law to bind people over for the purposes of preserving order in court[19] in addition to their common law power to order a person interrupting or hindering proceedings to leave the court. These powers still exist, notwithstanding the wide statutory language of section 12 of the Contempt of Court Act 1981 which gives a magistrates' court jurisdiction to deal with anyone who "wilfully insults the justice or justices, any witness before or officer of the court or any solicitor or counsel having business in the court, during his or their sitting or attendance in court or in going to or returning from the court; or wilfully interrupts the proceedings of the court or otherwise misbehaves".[20]

[16] *Hughes v Holley*(1988) 86 Cr App R 130.

[17] See *Veater v G* [1981] 1 WLR 567, per Lord Lane CJ at p 574.

[18] *Davies v Griffiths* [1937] 2 All ER 671.

[19] See *Dean's case* (1599) Cro Eliz 689.

[20] Section 12(1) of the Contempt of Court Act 1981. Section 12(2) provides that any such person may be detained in custody until the court rises, and the court may commit him in custody for up to one month or impose a fine not exceeding £2,500, or both.

2.12 Finally, provided that there is material before the court giving sufficient ground for the making of an order,[21] there is a power, derived both from common law and from the 1361 Act, to bind over pending the hearing of a charge or when a case is adjourned.[22]

5. Arrest for breach of the peace as a route to court

2.13 A magistrates' court may, therefore, at any time require anyone before it to be bound over to keep the peace and to be of good behaviour, whatever may have been the route by which that person has come to attend court. One such route is by the exercise of the common law power of arrest. Although breach of the peace as such is not an offence known to English law,[23] a person may be arrested without warrant either for causing a breach of the peace or where it is reasonably apprehended that he is likely to cause a breach of the peace.[24] A recent judicial definition of breach of the peace is to the effect that it occurs when there is an act done or threatened to be done which either 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 through an assault, an affray, a riot, unlawful assembly or other disturbance.[25]

2.14 A person arrested in this way may later be charged with a substantive offence. However, even if the arrested person is not so charged, he or she may be brought before the justices to be bound over to keep the peace either under their common law powers or under the 1361 Act. If the justices are satisfied that there is a risk that the person before them would be likely to cause a breach of the peace in future unless they used their binding over powers, they do not have to make any finding that a breach of the peace has actually occurred before they proceed to exercise their powers.[26]

[21] Such as a risk of a breach of the peace in the future: *R v Aubrey-Fletcher, ex p Thompson* [1969] 1 WLR 872.

[22] The usual course in these circumstances would be to grant bail subject to any requirements imposed by the Bail Act 1976 s 3(6), but binding over orders are still sometimes imposed to achieve a similar effect. In *Brooks and Breen v Nottinghamshire Police* [1984] Crim LR 677 such an order was quashed on the basis that there was insufficient evidence before the magistrates to justify the making of the order.

[23] *R v County of London Quarter Sessions Appeals Committee, ex p Metropolitan Police Commissioner* [1948] 1KB 670 per Lord Goddard CJ at p 673.

[24] *Albert v Lavin* [1982] AC 546 per Lord Diplock at p 565.

[25] *Howell* [1982] 1QB 416.

[26] *R v Morpeth Ward Justices, ex p Ward* (1992) 95 Cr App R 215. See paras 4.23–4.24 below.

6. Two other binding over powers

2.15 This Report is restricted by its terms of reference[27] to an examination of the powers to bind over to keep the peace and be of good behaviour under the Justices of the Peace Act 1361 and at common law. It is worth mentioning, however, for the avoidance of confusion, that there are two other occasions when a court may exercise a power to bind over of a different type.

2.16 First, there is the common law power to bind over a defendant convicted in what is now the Crown Court to come up for judgment.[28] Where judgment is pending, or an appeal is pending, or in any other case where the circumstances make it expedient in the interests of justice, a convicted defendant may be required to enter into recognisances, with or without sureties, to come up for judgment within a reasonable, specified period, if called upon to do so, and meanwhile to keep the peace and/or be of good behaviour, or to observe conditions which are specified in the order.[29] A common law binding over counts as a sentence[30] and ranks as a penalty, and if a defendant breaks one of its conditions, he or she will be brought back to court and face a liability to be sentenced for the original offence, and not merely a liability to have his or her recognisances forfeited.

2.17 Secondly, there is a statutory power,[31] whereby if a child or young person is convicted of an offence the court may, with the consent of that person order the parent or guardian to enter into a recognisance to take proper care of him and exercise proper control over him. If the parent or guardian refuses consent and the court considers that refusal unreasonable, the court may order the parent or guardian to pay a fine not exceeding £1000.[32]

[27] See para 1.1 above.

[28] For this common law power, see *Spratling* [1911] 1 KB 77, per Pickford J at p 81. Its existence was recognised by section 1(7) of the Powers of Criminal Courts Act 1973 and section 79(2)(b) of the Supreme Court Act 1981. It is a power which can only be exercised by the Crown Court.

[29] See *Randall* (1986) 8 Cr App R(S) 433. The Firearms Act 1968 s 52(1) envisages a condition, in an appropriate case, that the offender should not possess, use or carry a firearm.

[30] *Williams* (1982) 4 Cr App R(S) 239.

[31] Now enacted in section 58(1) and (2) of the Criminal Justice Act 1991.

[32] Other provisions of this statutory scheme are also set out in sub-sections (3) and (5) of section 58 of the above Act.

7. The use of binding over powers in 1983

2.18 In the Working Paper[33] we described the results of a research study we commissioned in 1983. Because of the passage of time and events (such as the introduction of the Crown Prosecution Service and the enactment of the Public Order Act 1986 and other legislation) we do not now attach great significance to the detailed information which this study disclosed. A crude extrapolation of a month's returns produced an annual figure of 34,000 binding over orders made in magistrates' courts in England and Wales. An interesting finding, however, was that in 1983 nearly two-fifths of the 585 magistrates' courts which responded to the survey did not use their powers to bind over to keep the peace at all during the month for which the survey was conducted.

2.19 Of the total orders then imposed, 85% resulted from proceedings instituted by the police and 12% by way of arrest for breach of the peace. Only 3% arose from actions initiated by private individuals. Of those bound over, 96% were defendants, 2% were witnesses and 2% were complainants. 42% of those bound over were under 21 years of age. 79% of the binding over orders were both to keep the peace and be of good behaviour. Of the remainder, 12% were to keep the peace and 9% were to be of good behaviour. The survey indicated an average level of about £100 for the recognisances required, but the average in sample courts varied from under £40 to as much as £200. The average length of time for which the orders were to run was just over 13 months, with the average in sample courts varying between 10 and 21 months.

2.20 The Working Paper[34] also provided some information about binding over orders made in the Crown Court in 1980. Only 565 such orders were made that year, 110 as part of sentence and the remainder at an earlier stage or following the acquittal of the defendant. There was great variation in practice in different parts of the country, with Crown Courts in 12 of the 43 police force areas (including the West Midlands) not using binding over orders at all during that year, and two other areas (Merseyside and Metropolitan) accounted for almost a third of the total.

2.21 We also included in the Working Paper[35] a list of the types of cases in which binding over orders were currently being used. This list is repeated in Appendix D to this Report. It provides, we suggested, a representative picture of the range of cases in which binding over powers were used, drawn as it was from the cases which were

[33] Working Paper No 103, paras 4.1–4.4.

[34] Working Paper No 103, para 4.6.

[35] Working Paper No 103, para 5.2.

described to us in the research study, instances described by justices' clerks in their submissions to us, and others taken from reported cases and other sources. The first main group on the list covers the less serious end of the spectrum of conduct involving public disorder, the second covers relatively minor incidents which cause annoyance and distress, including certain forms of sexual behaviour in public, and the third relates to neighbour and domestic disputes. In Appendix D we also consider the other remedies or sanctions which the law now provides in respect of each type of anti-social behaviour we listed six years ago.

8. Particular features of the present law

Power to bind over at any time in the proceedings

2.22 Under the statutory procedure which is initiated by a complaint made pursuant to section 115 of the Magistrates' Courts Act 1980[36] the magistrates cannot make a binding over order until the hearing is concluded and they are satisfied that the respondent should be bound over. However, during the course of those proceedings and also during the course of any criminal proceedings before them they may decide to require either the respondent (or defendant) or the complainant or a witness to the proceedings to be bound over, pursuant to their common law powers or their powers under the 1361 Act.[37]

The standard of proof

2.23 The statutory procedure is, as we have said, started by complaint.[38] This is of course the way in which civil proceedings are initiated in the magistrates' court. However, although the proceedings have been described as analogous to criminal proceedings there is still no clear authority on the question whether the court should apply the criminal or the civil standard of proof when deciding whether facts exist which warrant a binding over order at the conclusion of the proceedings.

No need for admissible evidence

2.24 When a court makes a binding over order outside the section 115 procedure, there is no requirement that the facts on which the court relies as justification of its decision should be proved by admissible evidence.

[36] See para 2.6 above.
[37] See para 2.10 above.
[38] See para 2.6 above.

Some doubts about the court's powers

2.25 If in the course of section 115 proceedings the court decides to bind the respondent over either under its common law powers or under its 1361 Act powers there is no authority which makes it clear whether they can do so on grounds other than those specified in the complaint.

No formal rules of procedure in many cases

2.26 The procedure for making a binding over order when there has not been a conviction, or when a complaint has not been proved, is not governed by any formal rules, although in recent years the higher courts have insisted that attention must be paid to the fairness of the procedure which is adopted before such an order is made.[39] It has now been held that before justices make any such order there has to be material before them on which it could reasonably be judged that there was a risk of a breach of the peace occurring unless the respondent was bound over; that they have to tell him or her of the intention to bind him or her over and the reasons for it, so that representations can be made on his or her behalf; that consent to a binding over has to be given personally by the person being bound over; that inquiry should be made into his or her means before the recognisance is set; and that a binding over should be for a finite period.

No guidelines about the amount of recognisances

2.27 There are no guidelines as to the amount of any recognisances which may be demanded, although, as appears above, a person's means must be taken into account before the amount is fixed.

No link between the order's scope and the conduct complained of

2.28 These orders, when made, are made in entirely general terms, and allow for no attempt to relate the required future conduct to the specific misbehaviour which has led to the making of the order. A person cannot be bound over to keep the peace unless the justices are concerned that having regard to his or her conduct he or she may commit a breach of the peace in future or behave in a way which is likely to bring about a breach of the peace committed by others.[40] The common law power to bind someone over to be of good behaviour, either towards a named person or to the world in general, may be exercised even when no breach of the peace is apprehended, for example, when it is thought that the person to be bound over may otherwise continue

[39] *R v South Molton justices, ex p Ankerson* [1989] 1 WLR 40. See para 4.44 below.

[40] *R v Aubrey-Fletcher, ex p Thompson* [1969] 1 WLR 872; *R v South West London Magistrates' Court, ex p Brown* [1974] Crim LR 313.

to behave unlawfully[41] or, more vaguely, continue to create annoyance or distress to others. In a recent case[42] it was held that it was appropriate to bind a defendant over to be of good behaviour when her behaviour had been "offensive and contrary to standards of generally accepted behaviour". It was for the justices to apply their own standards in deciding whether this was the case.

Doubts whether an order imposed on a conviction can stand alone

2.29 Some people still express doubt whether a binding over imposed on a defendant convicted of a criminal charge can be the sole order imposed by the court, or whether some additional penalty, however nominal, must be imposed.[43] Although we believe that the position is reasonably clear, now that some provisions in old statutes have been repealed which referred to a court's power to punish certain offences both by fine and binding over, the point has never been authoritatively decided.

No limits to the length of custody in some cases

2.30 Section 115(3) of the Magistrates' Courts Act 1980 has made express provision for penalties in the event of any failure to comply with an order made under that section.[44] There appears to be no limit to the period of custody which may be imposed in the case of failure to comply with other binding over orders, such as those made in the absence of a criminal conviction,[45] although no doubt a higher court would quash an excessive period as perverse.

The procedure for forfeiting recognisances

2.31 Section 120(2) of the Magistrates' Courts Act 1980 does make it clear that a recognisance can only be declared to be forfeit by way of an order on complaint: the court cannot deal with it of its own motion and this provision is apt to cover all recognisances, however the original binding over order was made. It is also now clear that proceedings for forfeiture are civil in character[46] and only the civil standard of

[41] *R v Sandbach Justices, ex p Williams* [1935] 2 KB 192 (non-violent obstruction of a constable by warning others of his approach); *Bamping v Barnes* [1958] Crim LR 186 (persistent contravention of a byelaw about street photography).

[42] *Hughes v Holley* (1988) 86 Cr App R 130. See para 4.31 below.

[43] See the discussion in the Working Paper, para 2.20, and Stone's Justices' Manual 1993, Vol 1, para 3–540.

[44] Up to six months' imprisonment, or until the person concerned 'sooner complies with the order'.

[45] Section 31 of the Magistrates' Courts Act 1980 (limitation on powers of magistrates' courts to impose imprisonment) does not apply where no offence has been committed.

[46] *R v Southampton Justices, ex p Green* [1976] QB 11.

proof is required.[47] However, under these statutory provisions, only the magistrates' court which made the order can order the recognisance to be forfeited.[48]

2.32 In addition to the continuing uncertainties about practice and procedure in the court in which the binding over order is made, there remain some substantial difficulties over appeal procedures in the Crown Court when somebody other than a convicted defendant appeals.[49] No rules have been prescribed for dealing with these difficulties, which may lead to the Crown Court being obliged to allow an appeal for want of evidence even though the making of the original order was justified. There is no right of appeal at all to the Crown Court against the forfeiture of the whole or part of a recognisance or against an order for costs made at the same time.

2.33 Some courts are not sure whether the fact that someone has been bound over to keep the peace should be listed in his or her antecedents. Although section 7(5) of the Rehabilitation of Offenders Act 1974 excludes from a person's antecedents any order of the court "with respect to any person otherwise than on a conviction" the research conducted for the Commission nine years ago revealed that the procedures for recording binding over orders varied from court to court.[50]

9. Conclusion

2.34 It will be seen from this summary of the present law that although the courts have made great efforts in recent years to instil some recognition of the principles of natural justice into the procedures for making the binding over orders with which this Report is concerned, the procedures which govern the use of the powers are still far from satisfactory. There are also very great difficulties with the concepts of "breach of the peace" and "*contra bonos mores*". We will examine all these problems in Part IV below.

[47] *R v Marlow Justices, ex p O'Sullivan* [1984] QB 381.

[48] The Working Paper, para 3.5, contains a fuller discussion of this anomaly.

[49] Pursuant to section 1 of the Magistrates' Courts (Appeals from Binding Over Orders) Act 1956. There is a full discussion of these difficulties in the Working Paper, para 3.6 and in *R v Preston Crown Court, ex p Pamplin* [1981] Crim LR 338.

[50] See the Working Paper, para 3.11, for details.

PART III
SOME RECENT DEVELOPMENTS

A. THE EFFECT OF SOME RECENT ACTS OF PARLIAMENT

1. Introduction

3.1 Since the Commission embarked on this reference in 1980, Parliament has enacted a number of statutory provisions which bring within the compass of the criminal law various types of anti-social behaviour which were previously controlled only by binding over, so far as courts of criminal jurisdiction were concerned. Section 5 of the Public Order Act 1986 is the most significant of these provisions.

3.2 In this section we are concerned with describing the effect of these new provisions and how they have altered the law, and the way in which they now effectively cover anti-social conduct for which there were previously no criminal sanctions. We conclude that there are very few types of conduct remaining outside the scope of criminal sanctions which might reasonably be regulated by binding over.

2. The Public Order Act 1986

3.3 The 1986 Act created two new offences to deal with the sort of behaviour which had been previously covered, if at all, by section 5 of the Public Order Act 1936. Part I of the 1986 Act largely resulted from our report on offences relating to public order.[1] We accepted in that report that the terminology which was employed in section 5 of the 1936 Act ought to be preserved so far as practicable when the common law concept of "unlawful assembly" was translated into the language of a modern statute but 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".[2] This recommendation was accepted.

3.4 Under section 5 of the 1936 Act it was an offence to use threatening, abusive or insulting words or behaviour or to distribute any writing, sign or visible representation which was threatening, abusive or insulting with intent to provoke a breach of the peace or whereby a breach of the peace was likely to be occasioned. That section was repealed by the 1986 Act. It was replaced with two new sections.

3.5 The first of these, section 4, created an offence broadly along the lines of section 5 of the 1936 Act, but without relying any longer on the concept of breach of the peace. The other, section 5, created a wholly new offence.[3] This was a Government proposal, first made in the White Paper which preceded the presentation of the Public Order

[1] Criminal Law: Offences Relating to Public Order (1983) Law Com No 123.

[2] *Ibid*, p 49.

[3] See Appendix B for the wording of ss 4 and 5 of the 1986 Act.

Bill to Parliament.[4] The wording of this new section draws on the terminology which was used in section 5 of the 1936 Act, but the new offence is of a much wider scope.[5] This is evidenced by the presence of "disorderly behaviour" as a component of it, and by the replacement of the requirement that the behaviour was "likely to occasion a breach of the peace" with the lower threshold requirement that the conduct should take place "within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby".[6]

3.6 Section 5 was enacted in order to target "minor acts of hooliganism". Of major concern was behaviour directed at the elderly and other vulnerable groups, including members of ethnic minority communities. Such victims were thought unlikely, however great the provocation by threat, abuse or insult, to react by resort to violence, as the "breach of the peace" component of the 1936 offence required,[7] but the misbehaviour to which they were subjected was viewed as warranting an extension of the ambit of the criminal law. The Government's White Paper gave examples of the misbehaviour at which the new legislative provision was aimed:

> "hooligans on housing estates causing disturbances in the common parts of blocks of flats, blockading entrances, throwing things down the stairs, banging on doors, peering in at windows, and knocking over dustbins;
>
> groups of youths persistently shouting abuse and obscenities or pestering people waiting to catch public transport or to enter a hall or cinema;
>
> someone turning out the lights in a crowded dance hall, in a way likely to cause panic;
>
> rowdy behaviour in the streets late at night which alarms local residents."[8]

[4] Cmnd 9510, para 3.22.

[5] "The 1986 Act in sections 4 and 5 supersedes section 5 of the 1936 Act. The wording in the new Act is quite different". *Atkin v DPP* (1989) 89 Cr App R 199, per Taylor LJ at p 204.

[6] As McCullough J remarked in *DPP v Orum* [1989] 1 WLR 88 at p 95: ". . . what matters now is not the likely physical reaction to the conduct complained of, but the likely mental reaction to it".

[7] In para 5.16 of Law Com No 123 we instanced as persons *not* protected by the old section 5 "elderly ladies" and "many ordinary, peaceful, law-abiding citizens" as people who "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".

[8] Cmnd 9510, para 3.22.

3.7 The *actus reus* of this new offence may be committed in a similar way to that involved in the section 4 offence: by using threatening, abusive or insulting words or behaviour.[9] Significantly, it may also comprise "disorderly behaviour". For the meaning of "threatening, abusive or insulting words", it is appropriate to refer to the cases decided under section 5 of the 1936 Act in which their meaning was discussed. These words are to be given their "ordinary" meaning. Lord Reid said in *Brutus v Cozens*[10] that: "an ordinary sensible man knows an insult when he sees or hears it". And Taylor LJ in *Atkin v DPP*, a case on section 4 of the 1986 Act, remarked to the same effect: "So the exercise is one of purely looking at the wording of the section and deciding what the plain and natural meaning of the words is".[11] To decide whether words or behaviour were "threatening", "abusive", or "insulting" therefore involves questions of fact for the magistrates, so that it is difficult to estimate in advance precisely what conduct will be regarded as criminal. Although these expressions have been described as involving "strong" words,[12] some recent cases have allowed magistrates considerable latitude in discerning insult.[13]

3.8 "Disorderly behaviour" is not defined in the Act. It is likely to refer to the kind of behaviour described in paragraph 3.22 of the White Paper which falls short of threatening, abusive or insulting behaviour. As with "threatening", "abusive" and "insulting", the word "disorderly" seems likely to be given its "ordinary" meaning, thus making it extremely difficult to predict in advance precisely what action or series of actions will be regarded as disorderly behaviour.[14] Criticism has been voiced to the effect that this comes "perilously close to offending against the requirements of due

[9] Although the offence under s 5 is also expressed to be committed by displaying any writing, sign or other visible representation which is threatening, abusive or insulting, within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby (see s 5(1)(b)), displays may not easily breach the section. Sherr, *Freedom of Protest, Public Order and the Law* (1989) p 92, refers to a case at Horseferry Road Magistrates' Court in December 1987, in which three artists were prosecuted under s 5 for displaying a poster, depicting the Prime Minister in fishnet stockings, suspenders and wielding a whip. Two police witnesses admitted the poster was "amusing" and the stipendiary magistrate ruled that there was no case to answer.

[10] [1973] AC 854, 862.

[11] (1989) 89 Cr App R 199, 204.

[12] *Jordan v Burgoyne* [1963] 2 All ER 225, per Lord Parker CJ at p 227.

[13] For example, in *Masterson v Holden* [1986] 1 WLR 1017 the Divisional Court accepted that it was well within the reasonable discretion of magistrates to find that "objectionable" behaviour (displays of homosexual affection in public) was insulting through an implication that bystanders would find it objectionable.

[14] In *Lodge v DPP*, *The Times* 26 October 1988, the appellant who walked into the middle of the road shouting, kicking and gesticulating was considered to have engaged in disorderly behaviour likely to cause alarm.

process".[15] The Government noted the need for caution when, in the White Paper, it recognised that ". . . It is not easy to define the offence in a manner which conforms with the normally precise definitions of the criminal law, but which at the same time is sufficiently general to catch the variety of the conduct aimed at. The Government recognises that there would be justifiable objections to a wide extension of the criminal law which might catch conduct not deserving of criminal sanctions".[16]

3.9 There is a requirement in section 5 that there should be a person within the hearing or sight of the defendant[17] who is likely to be caused harassment, alarm or distress as a result of what the defendant is doing. The victim need not, however, be a witness in court, nor need he or she actually suffer harassment, alarm or distress. It is only necessary that the conduct complained of is likely to have this effect.[18]

3.10 The words "harassment, alarm and distress" are undefined, and are likely to be given their "ordinary" meaning. The words seem to entail a reaction which is less than the fear or apprehension of violence but more than irritation, disturbance or annoyance. In any particular situation each word will require careful scrutiny;[19] however, as in the case of the words "threatening, abusive and insulting", which are discussed in paragraph 3.7 above, the High Court will not disturb the findings of fact of justices if there was material on which the justices could reasonably have reached their conclusion. In *DPP v Orum* the Divisional Court ruled that a police officer "can be a person who is likely to be caused harassment and so on".[20] It held that its earlier decision in *Marsh v Arscott*,[21] which was to the effect that it must be presumed that a police officer was able to resist provocations to breach the peace, although "common

[15] Smith, "The Public Order Act 1986 (1) Part 1: The New Offences" [1987] Crim LR 156, 164.

[16] Cmnd. 9510, para 3.26.

[17] Public Order Act 1986, s 5(1)(b). See *Chappell v DPP, The Times* 16 November 1988. In this case the court considered it difficult to see how a person delivering a letter to another, who opened it in the absence of the sender, could be said to be a person who "uses . . . words or behaviour . . . within the hearing or sight of a person" who received it.

[18] "The prosecution will not necessarily have to produce the victim in court, but it will have to identify in each case who it was who was likely to be alarmed." *(Hansard* (HC) 30 April 1986, vol 96, col 960).

[19] As regards alarm, see *Lodge v DPP, The Times* 26 October 1988, cited at para 3.8, n 14 above, where the court held that where a person was accused of causing harassment, alarm or distress as a result of disorderly behaviour, contrary to s 5 of the Public Order Act 1986, it was not necessary that the person alarmed was concerned about physical danger to himself or herself; it might be alarm about the safety of an unconnected third party.

[20] [1989] 1 WLR 88, 93.

[21] (1982) 75 Cr App R 211.

sense as well as good law",[22] had no application where the sensibility of the officer rather than his or her tendency to violence was in question. Emphasis was, however, laid on the fact that each case would turn on its own facts: "frequently, words and behaviour with which police officers will be wearily familiar will have little emotional impact on them save that of boredom".[23]

3.11 The previous restriction that the *locus in quo* must be a public place has now been removed. That restriction is replaced by a "domestic dwelling" exception: ". . . no offence is committed where the words or behaviour are used, or the writing, sign or other visible representation is displayed, by a person inside the dwelling and the other person is also inside that or another dwelling".[24] The new offence now covers shouting over the garden fence, or shouting from the garden or street at people inside a dwelling-house, conduct which had previously been regarded as falling outside the *criminal* sanctions against disorder, and thus a paradigm case for binding over.[25] The 1986 Act, like its predecessor, does not, however, cover purely domestic matters.

3.12 As with section 4, section 5 contains a *mens rea* requirement that the defendant must intend or be aware of the threatening, abusive, insulting, or disorderly nature of his or her conduct.[26] Section 5, however, contains no requirement that the words or behaviour be directed "towards another person". Defences are provided to allow for the claim that the defendant was unaware of the impact his or her conduct was having, the most important of these being that he or she had no reason to believe that there

[22] [1989] 1 WLR 88, 93.

[23] *Ibid.*

[24] Public Order Act 1986, s 5(2). In *Chappell v DPP*, *The Times* 16 November 1988, where the question was whether the deposit of a letter containing threatening, abusive or insulting words through a letter box amounted to the use of such words within the meaning of s 5(1)(a) of the 1986 Act, the view of the Court was that s 5 plainly contemplated offences with a public element; s 5(2) made it clear that conduct taking place within a dwelling-house and having its effect solely on another person within that or another dwelling was excluded. Such conduct would, however, now fall within s 1 of the Malicious Communications Act 1988: see para 3.17 below.

[25] The change in the law is very clearly illustrated by *Wilson v Skeock* (1949) 65 TLR 418, a case concerned with a charge under s 5 of the 1936 Act in relation to aggressive insults hurled from a common back yard of a tenement block at a person in one of the flats. The magistrates found the charge proved, and bound the defendant over *on conviction.* The Divisional Court held that the conviction was wrong in law, because neither party had been in a "public" place, as the 1936 Act required. However, Lord Goddard CJ said that it would have been perfectly correct on the facts to bind the defendant over under the "forthwith" powers, and the actual binding over order was left in place for that reason. Under the 1986 Act, this defendant could almost certainly be convicted of disorderly behaviour and would certainly not obtain the benefit of the "dwelling" exemption.

[26] Public Order Act 1986, s 6(4).

was any person within hearing or sight who was likely to be caused harassment, alarm or distress as a result of what he or she was doing.[27] There is also a defence that the conduct of the defendant was reasonable, a defence which is likely to receive different interpretations in different courts.[28]

3.13 Section 5(4)[29] provides a power of arrest in cases where a constable has warned someone to stop engaging in "offensive conduct", and that person immediately engages in further "offensive conduct". "Offensive conduct" is defined as conduct which the constable reasonably suspects constitutes an offence under the section. This power co-exists with the power to arrest for breach of the peace,[30] because section 40(4) of the 1986 Act expressly preserves the common law powers to deal with or prevent breaches of the peace. It should be noted that a charge may be brought under section 5 without the arrest having been effected under that section.[31] It would therefore appear to be possible to arrest someone for breach of the peace and subsequently to charge that person with a section 5 offence.

3.14 We discuss in paragraphs 6.4–6.8 below the question whether a serious difficulty would arise for police officers dealing with "public" disorder if binding over were to be abolished, and thus the common law power of arrest for breach of the peace made more difficult to justify. However, so far as the content of the law, as opposed to its enforcement, is concerned, section 5 of the 1986 Act appears to cover every conceivable case in which it can legitimately be said that public order is threatened. Indeed, some people think that its ambit is unreasonably and dangerously wide.

3. Other legislation

3.15 We have referred in paragraphs 3.1 to 3.2 above to legislation, some of it recent, which covers activities which have been traditionally regarded as suitable subjects for binding over. We will now refer to that legislation in a little more detail.

[27] *Ibid*, s 5(3)(a).

[28] *Ibid*, s 5(3)(c).

[29] For the wording of s 5(4) and (5), see Appendix B.

[30] See further paras 6.4–6.8 below.

[31] Common law arrest powers may apply if there has been a breach of the peace and it is likely to be repeated, or the general arrest conditions of section 25 of the Police and Criminal Evidence Act 1984 may have been satisfied, or the constable may have enough evidence to proceed by way of summons.

4. Sexual Offences Act 1985

3.16 This Act created a specific criminal offence of kerb crawling, conduct which had previously been dealt with, if at all, by means of binding over.[32] The legislation resulted from a recommendation of the Criminal Law Revision Committee that specific criminal legislation was required in this area because it was "a serious and continuing nuisance" and more particularly because the existing remedy of binding over was "uncertain and inadequate".[33] The Act makes it an offence for a man persistently to solicit a woman or different women for the purposes of prostitution from a motor vehicle or in the immediate vicinity of a motor vehicle "that he has just got out of or off". It also makes it an offence so to solicit, whether persistently or not, in such a manner or in such circumstances "as to be likely to cause annoyance to the woman (or any of the women) solicited, or nuisance to other persons in the neighbourhood".[34] It has been held that magistrates are entitled to take into account their knowledge of a neighbourhood in determining whether or not nuisance is likely to be caused.[35]

5. Malicious Communications Act 1988

3.17 The Working Paper described cases in which the remedy of binding over had been used following the sending of anonymous or poison pen letters.[36] We examined this subject in our report on poison pen letters and concluded, following consultation, that the possibility of a binding over order was not a satisfactory substitute for a criminal offence.[37] Our report led to the passing of the Malicious Communications Act 1988. This Act makes the sending of a letter or other article an offence where it is indecent, grossly offensive, or threatening, or where it contains false information, if the purpose of sending it is to cause distress or anxiety to the recipient or to someone else to whom it was intended to be communicated.[38]

[32] See the commentary on *Hughes v Holley* in [1987] Crim LR 254. The use of binding over in such cases followed the decision in *Crook v Edmondson* [1966] 1 All ER 833 that it was not possible to charge a man who solicits a woman for intercourse in a public place under s 32 of the Sexual Offences Act 1956. This left an apparent loophole in the criminal law, which was sought to be filled by binding over.

[33] Criminal Law Revision Committee, Sixteenth Report (1984) Cmnd. 9329, para 36.

[34] Sexual Offences Act 1985, s 1(1). See Appendix B for the full wording of s 1.

[35] *Paul v Luton Justices, ex p Crown Prosecution Service* (1989) 153 JP 512.

[36] Working Paper No 103, p 41.

[37] Criminal Law: Report on Poison Pen Letters (1985) Law Com 147; para 2.13.

[38] See Appendix B for the full wording of s 1 of this Act.

6. Telecommunications Act 1984

3.18 Our research study recorded instances in which the remedy of binding over was used in cases of persistent telephoning.[39] Section 43 of the Telecommunications Act 1984 now contains three specific criminal offences in this area of anti-social behaviour. First, it is an offence to send a message which is grossly offensive, indecent, obscene or of a menacing character by means of a telephone. Secondly, it is an offence knowingly to send a false message by telephone for the purpose of causing annoyance, inconvenience or needless anxiety. And thirdly, it is now an offence to use the telephone persistently for the purpose of causing annoyance, inconvenience or distress.[40] This last offence is of particularly wide scope. It appears to criminalise all aspects of harassment by telephone which were previously dealt with by means of binding over.

7. Conclusion

3.19 These four Acts of Parliament, all enacted in the 1980s, demonstrate a striking pattern. On each occasion Parliament was concerned with an area of anti-social activity which was previously regulated by binding over. On each occasion the preferred solution was to introduce a new, usually summary, criminal offence to control the conduct in question. The upshot has been to leave very few types of conduct which might reasonably be regulated by binding over outside the scope of criminal sanctions.[41] In Appendix D we refer to the typical examples of binding over cases which were listed in the Working Paper. We find that these are now all covered by direct statutory provisions.

3.20 There remain a few cases where the position is still unclear, or where the law which now deals with them is particularly difficult or controversial. We deal with these cases individually in Part VI. In our view, however, the general position which now exists in relation to the availability of alternative sanctions renders it no longer legitimate to maintain that binding over has to be retained as a general remedy in order to cover lacunae in the criminal law.

[39] Working Paper No 103, pp 40–43.

[40] See Appendix B for the full wording of this section.

[41] On 6 November 1993 the Home Secretary announced in a speech at Didcot that he intended to seek parliamentary powers to enable the police to direct trespassers to leave land if they had reason to believe that they would seek to disrupt or prevent a lawful activity, with criminal sanctions for disobedience to such a direction. He also proposed new offences of obstructing country sports, or intimidating people involved in them.

3.21 We certainly do not consider that it is legitimate or satisfactory to retain binding over as a general concurrent remedy overlapping with specific and recently created criminal offences. As a matter of principle we consider that once Parliament has determined that certain types of conduct are sufficiently serious to be controlled by the criminal law – as for instance, on our advice, it determined in the case of poison pen letters[42] – it is not justifiable for the state to maintain concurrent quasi-criminal means of controlling that conduct. It is particularly relevant to note that all the legislation to which we have referred has been passed in the last ten years. In Part VI we describe the steps we took to discover whether there might possibly be a way of retaining in a more rational and less eccentric form the ability which the remedy of binding over at present provides for disposing of *criminal* charges by what is regarded as a non-criminalising sanction.

B. THREE OTHER RECENT DEVELOPMENTS

3.22 During the last ten years there have been three other developments in which new, modern procedures are being introduced to fill the place formerly occupied by binding over as a way of disposing of not very serious anti-social offences.

1. Cautions

3.23 The first of these developments is the use of police cautions, a process which began in the early 1970s.[43] This has proved to be a valuable way of keeping less serious offenders out of court.

3.24 In 1990 the Home Office circulated a set of national standards[44] to chief officers of police in an effort to create a framework of general principles and practice within which different police forces should operate. The philosophy which underlay the publication of this circular was that there was widespread agreement that the courts should only be used as a last resort, particularly for juveniles and young adults, and that diversion from the courts by means of cautioning and other similar forms of action might reduce the likelihood of re-offending.

[42] See para 3.17 above.

[43] See J A Ditchfield, Police Cautioning in England and Wales (London, HMSO, 1976). See also D P Farrington and T Bennett, Police cautioning of juveniles in London (1981) 21 BJ Crim 123; J Mott, Police decisions for dealing with juvenile offenders (1983) 23 BJ Crim 249; C Wilkinson and R Evans, Police cautioning of juveniles: the impact of Home Office Circular 14/1985 [1990] Crim LR 165, pp 172–3.

[44] Home Office Circular 59/1990: The Cautioning of Offenders.

3.25 Under these standards, a formal caution is to be recorded by the police, and its existence may influence the police in any decision whether or not to institute proceedings if the person should offend again. The expressed purpose of the cautioning system is to deal quickly and simply with less serious offenders, to direct them from the criminal courts and to reduce the chances of their re-offending. It is not, of course, a form of sentence and may not be made conditional upon the satisfactory completion of a specific task, such as reparation or the payment of compensation to the victim.

3.26 Under the national standards, a formal caution may not be administered unless there is evidence of the offender's guilt which is sufficient to give a realistic prospect of conviction, and the offender has admitted the offence and has given an informed consent to being cautioned.

3.27 In 1990 the Home Office made it clear[45] that it was aiming not only to promote more consistent practice both between and within police forces but also to increase the use of the caution for older offenders. Its use for juvenile offenders was well-established. Statistics show that 64% of male offenders aged between 14 and 17 were cautioned in 1989, a year in which only 14% of adult male offenders received cautions. In that year, 136,000 offenders were cautioned for indictable offences and a further 102,000 for summary offences (not including motoring offences).

3.28 Two years later, in 1991, both these figures had increased substantially.[46] 279,000 people in all were cautioned, 179,000 of them in relation to indictable or either way offences, mainly shoplifting. Of these, 27,300 were aged 10–13, 55,000 aged 14–16, 36,400 aged 17–20 and 60,400 aged 21 and over, and the total of 179,000 increased by 8% from the comparable figure in 1990. We have been told by the Home Office that the numbers cautioned for all offences (excluding motoring offences) in 1992 was 321,300.

3.29 The use of police cautioning has grown so much in recent years that there is now public concern that it is being used in relation to serious offences for which it was never intended.[47] Although the Royal Commission has encouraged its development in appropriate cases, the Home Office recently announced that it proposes to issue further guidance early in 1994 to clarify the present guidance on the use of cautions

[45] *Ibid.*

[46] See the Report of the Royal Commission on Criminal Justice (1993) Cm 2263, p 82.

[47] See Sean Enright, Charge or caution? [1993] NLJ 446–7.

pending ministerial decisions on the recommendations of the Royal Commission in this area. In a draft circular issued for consultation purposes in the autumn of 1993,[48] it is said that cautions should never be used for the more serious indictable-only offences such as attempted murder or rape, and only in the most exceptional circumstances for other indictable-only offences, regardless of the age or previous record of the offender. Other topics mentioned in the draft circular include more detailed advice about the use of cautioning for less grave offences, and strong advice that it should only be in exceptional circumstances that the use of more than one caution should be considered in relation to any one offender. On the other hand, the use of informal, non-citable cautions, in the street or at a police station, is encouraged in appropriate circumstances. In spite of this touch on the brakes, cautioning is on any view still likely to be used for many criminal cases which were inappropriately brought to a criminal court in the past, only to be disposed of by binding over because no court-imposed punishment was appropriate.

2. Public Interest Case Assessment schemes

3.30 In some probation service areas schemes exist which aim to increase the quantity and quality of the information which is available to the Crown Prosecution Service to enable them to consider fully the case for discontinuance in less serious offences. These schemes, which are based on magistrates' courts, are run by the probation service. Information is collected on offenders and it is then sent to the CPS in order to inform its decisions whether or not to continue with a prosecution. The Royal Commission on Criminal Justice reported[49] that in the scheme based on three magistrates' courts in Inner London, 31% of the reports submitted to the CPS in the latest year of operation had led to a decision to discontinue in the public interest.

3. Cautions plus

3.31 The Royal Commission also referred in its report[50] to what was happening in at least one police area where an informal system had been jointly developed between the police and the local probation service. Under this system, in addition to being cautioned the offender was co-operating with local social work agencies or the probation service or had agreed to consult a doctor or to attend a clinic. The Royal Commission was attracted by this development, particularly where the offender might be suffering from mental disorder or social handicap and criminal proceedings seemed inappropriate as a means of dealing with the case.

[48] Cautioning: Draft Circular, Home Office 1993.

[49] Report of the Royal Commission on Criminal Justice (1993) Cm 2263, p 83.

[50] *Ibid*, pp 82-3.

3.32 We have been told by the Home Office that there has been an increase in recent years in the overall number of juvenile liaison panels, many of which now advise on the cautioning of young adults as well as juvenile offenders. These panels commonly include representatives of the police, the probation service, the education service and social services. Many of the cautions which are administered after referral to a panel are accompanied by some sort of work with the offender, and the panel may also recommend that the offender performs acts of reparation to the victim. In some areas, such as West Glamorgan and Northamptonshire, schemes of this type have been quite extensively developed since the late 1980s. There is no reason to suppose that diversionary initiatives of this type will not continue to increase in quantity and quality.

C. CONCLUSION

3.33 In our opinion, the developments we have described in this Part show the way in which cases which were previously considered appropriate for binding over (for want of a more appropriate way of dealing with them) should be handled in future. Where it is considered appropriate to bring the anti-social offender to court, then the offence with which he is charged should be set out with clarity (and not by reference to vague concepts such as breaching the peace or behaving *contra bonos mores*) and the court should have the normal range of sanctions available to it for dealing with him, ranging from an absolute discharge to custody. If on the other hand, what he has done does not warrant taking up the time of a court, then there should be a range of methods of disposing of the matter available to the prosecution which do not necessitate a visit to court to obtain the very unsatisfactory remedy with which this Report is concerned.

PART IV
DIFFICULTIES WITH THE PRESENT LAW

A. INTRODUCTORY

4.1 In the Working Paper we reported that of the binding over orders recorded in the research study, three quarters were imposed either at a stage of criminal proceedings prior to conviction or at the conclusion of proceedings commenced by complaint. In other words, all these orders were made in circumstances in which there had been no conviction for a criminal offence. We suggested[1] that the main objection of principle which had been made to these binding over powers was that they were fundamentally unconstitutional. In this context we quoted the proposition of *Dicey* that "no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land".[2]

4.2 We also referred to the decision of the House of Lords in *Gouriet v Union of Postal Workers*[3] as endorsing the view that with very limited exceptions the only proper way of enforcing criminal sanctions was by prosecuting and punishing the offender after he had acted in breach of criminal law provisions.

4.3 This proposition met with a very mixed response from those who responded to the consultation. Although two high court judges regarded the existence of these powers as so unconstitutional as to justify their total abolition, other judges rejected the assertion that there was anything unconstitutional in a court having power to restrict, by the imposition of custodial or financial sanctions, the repetition or threat of conduct which, although it may not be criminal, is socially objectionable. This contrary view was also held by a number of organisations with considerable "hands on" experience within the criminal justice system. Academic opinion was also divided on this issue, while groups concerned with civil liberties supported the proposition wholeheartedly. The conduct of people protesting peacefully about political issues or adopting an unusual lifestyle, they argued, was neither criminal nor dangerous, although it may be distasteful to the magisterial "establishment". It should not therefore be penalised. Some academics, and one judge, expressed doubts whether the present arrangements could be reconciled with the European Convention.[4]

1 Working Paper No 103, para 6.2.

2 Dicey, *An Introduction to the Study of the Law of the Constitution* (10th ed 1959), Pt II, p 188. See further Williams, Preventive Justice and the Rule of Law (1953) 16 MLR 417, 419–420.

3 [1978] AC 435.

4 For which, see Part V below, and Appendix C.

4.4 Other respondents took the view that although the objections on constitutional grounds were logically sustainable, they were more theoretical than real and were outweighed by the practical advantages of retaining the present system. This group was concerned that if binding over was abolished, its abolition would leave a gap which would have to be filled somehow or other, probably by extending the criminal law to cover most of the forms of anti-social conduct which are now embraced by binding over, and that the cure was likely to be worse than the disease.

4.5 There was, therefore, a clear preponderance of opinion on consultation in favour of retaining the present system of preventive justice in spite of any objection of principle which could be raised against it. However, there was a very widespread realisation that there were many defects in the way in which the system operated at present, and many on all sides of the debate favoured reform, particularly on matters of procedure.

4.6 After analysing the responses on consultation, we determined to take a more detailed look on two aspects of binding over which appeared to be particularly inconsistent with modern thinking about appropriate court process. These were, first, the vaguenesses inherent in the concepts of breach of the peace and *contra bonos mores* which underpin the whole of the institution of binding over which we were asked to consider; and secondly, the formidable objections to it on the grounds that certain aspects of the procedure conflict with elementary principles of natural justice, together with other objections made on procedural grounds.

B. CRITICISMS OF THE CONCEPTS OF BREACH OF THE PEACE AND CONTRA BONOS MORES

4.7 In this section we will set out the main criticisms which have been made of the concepts of breach of the peace and *contra bonos mores*. Much of this criticism is just as relevant to binding over orders made under the complaint procedure prescribed by section 115 of the Magistrates' Courts Act 1980 as it is to orders imposed under what we will call the "forthwith" powers of magistrates or of the Crown Court. We discuss in the next section a number of serious criticisms which are peculiar to the "forthwith" powers, as well as procedural objections which go wider than these.

1. General criticisms

4.8 As we have described in Part II, the origins of the powers to bind over go back deep into history, long before the Justices of the Peace Act 1361 expressed one aspect of these powers in statutory form.[5] For all practical purposes in modern times the courts have been using one or other or both of the two aspects of the powers which were identified by Blackstone in the passage we have cited in paragraph 2.4 above. It appears from the survey reported in the Working Paper[6] that in practice most people subjected to these orders are now bound over both to keep the peace and to be of good behaviour. On consultation respondents tended on the whole not to differentiate between these two strands of binding over when they submitted their comments on the Working Paper.

4.9 A person is bound over to keep the peace or to be of good behaviour. However, it is difficult to say with any precision what conduct actually amounts to "keeping the peace" or "being of good behaviour". This problem gives rise to two difficulties: first, the difficulty of anticipating what conduct will trigger off the making of a binding over order; and secondly, once a person is bound over, the difficulty which he or she will have in ascertaining what kind of behaviour will result in breach of the order. In both respects, and in particular in relation to binding over powers which are based on "good behaviour", binding over falls short of what ought to be two elementary principles of criminal or quasi-criminal law. These require the law to be both certain and readily ascertainable.

4.10 The need to make our criminal law more certain and more readily ascertainable is one which has driven the work of this Commission in the field of criminal law over the last twenty years. The desirability for reform along these lines has been well recognised by the House of Lords, although if an old, vague common law offence was too well rooted in history the law lords have recognised that in their judicial capacity they have no power to change the law. A good example of judicial attitudes at that level in *R v Withers*[7] in which the supposed offence of conspiracy to effect a public mischief came under scrutiny. Viscount Dilhorne hoped that in future such a vague expression as "public mischief" would not be included in criminal charges because it introduced a wide measure of uncertainty, and this approach was echoed by Lord Simon of Glaisdale, who wished to see the law more luminous, coherent and comprehensible, and Lord Kilbrandon who also spoke of the desirability for certainty in our criminal

[5] See paras 2.1 to 2.3 above.
[6] See para 2.18 above.
[7] *R v Withers* [1975] AC 842.

law. Lord Diplock, for his part, after referring in explosive terms to the then condition of the law of conspiracy and welcoming the fact that this reproach to our criminal jurisprudence was engaging the urgent attention of this Commission, said resignedly that in the meantime the law must be administered as it was, and not as he thought it ought to be.[8]

4.11 Echoes of the same principles are to be found in a line of authority which shows that the courts may be willing to strike down or not give effect to provisions in delegated legislation that are not readily accessible to the public or that create criminal offences which do not state clearly what the citizen may or may not do if he or she is to avoid criminal sanctions. Although a bare majority of the House of Lords was unwilling to take this course in relation to regulations made under Special Powers legislation in *McEldowney v Forde*,[9] the principle is well recognised and has been applied at different times by the Court of Appeal[10] and the Divisional Court.[11]

4.12 Since 1973 the working papers and reports we have published have returned repeatedly to this theme that the criminal law must be both certain and accessible, and it has received widespread endorsement from those who have responded to our working papers. Thus in 1973 we said that it seemed to us not merely desirable, but obligatory, that legal rules imposing serious criminal sanctions should be stated with the maximum clarity that the imperfect medium of language could attain.[12] The following year we repeated this principle in another Working Paper when we said that if legislation did not cover every kind of previously unidentified wicked conduct this was the inevitable price which had to be paid for an acceptable degree of certainty as to the conduct to be penalised by the law.[13] Our view that this price was one which we believed to be worth paying was one which was supported by most of those who responded to that paper.[14] When we were concerned with the task of codifying the old common law offences in the field of public order we said that a criminal code must

[8] *Ibid*, per Viscount Dilhorne at p 861F, Lord Simon of Glaisdale at p 867G, Lord Kilbrandon at p 875B and Lord Diplock at p 862D-E.

[9] *McEldowney v Forde* [1971] AC 632.

[10] See *Blackpool Corporation v Locker* [1948] 1KB 349, per Scott LJ at pp 361, 370.

[11] See *Staden v Tarjanyi* (1980) 78 LGR 614, per Lord Lane CJ who upheld at p 623 a proposition that anyone engaged upon the otherwise lawful pursuit of hang gliding must know with reasonable certainty when he is breaking the law and when he is not breaking the law. cf *Nash v Finlay* (1901) 85 LT 682.

[12] Working Paper No 50 (1973) para 9.

[13] Working Paper No 57 (1974) para 44.

[14] Law Com No 76 (1976) para 3.18.

define with precision what conduct it is which is a crime.[15] And when we published our report on a Criminal Code[16] we reiterated our view that codification of the criminal law was desirable not only as a matter of constitutional principle but also because it offered instrumental benefits in the way of greater accessibility, comprehensibility, consistency and certainty. This view was again strongly supported by those we consulted.[17]

4.13 It follows that although the courts have been doing their best in recent years to give more precision to these vague common law concepts of breach of the peace and *contra bonos mores*, we needed to subject them to fairly detailed scrutiny in order to see whether they really were appropriate concepts to retain in our law when so much of it has been modernised in recent years.

2. Breach of the peace

4.14 Although breach of the peace is a legal concept of great antiquity, definitions of it are scarce. Writing in 1954, Glanville Williams observed that: "... The expression 'breach of the peace' seems clearer than it is" and he noted the "... surprising lack of authoritative definition of what one would suppose to be a fundamental concept in criminal law".[18] In 1983 we said[19] that: "... there is a margin of doubt as to what constitutes a breach of the peace which ... makes it unacceptable as a major element in any new statutory offence carrying heavy penalties". In this report we did, however, commend the recent decision of the Court of Appeal in *Howell*,[20] describing it as having "done much to clarify the meaning of the expression".

4.15 *Howell* does indeed contain the most comprehensive discussion of breach of the peace to date. The definition provided by Watkins LJ, which is in legislative form using terms which are an integral feature of an offence, makes it quite clear that the touchstone of breach of the peace is violence and not merely disturbance:

> "... 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."[21]

[15] Working Paper No 82 (1982) para 3.1.

[16] Law Com No 177 (1989).

[17] *Ibid*, para 2.12.

[18] Glanville Williams, "Arrest for Breach of the Peace" [1954] Crim LR 578.

[19] Criminal Law: Offences Relating to Public Order (1983) Law Com No 123, para 5.14.

[20] [1982] QB 416.

[21] *Ibid*, at p 426.

4.16 However, this definition left unclear at least two very important points. First, the court used a number of different expressions to delimit (or describe) the category of events which constitute *apprehended* breaches of the peace: threats of harm to a person, threats of harm to property, acts or threats which are likely to cause such harm, and acts or threats which put someone in fear of such harm are all mentioned in the above passage, apparently as alternatives.[22] Secondly, this modern definition did nothing to resolve a long-standing dilemma about the ambit of the law: is it directed not only at those who *cause* breaches of the peace but also at those who do an act, which to their knowledge but without their intending it, tempts others to breach the peace, and thus *occasions* a breach of the peace?[23]

4.17 The notorious case of *Beatty v Gillbanks*[24] illustrates vividly how difficult questions of causation may be. In that case members of the Salvation Army had marched through the streets of Weston-Super-Mare in the knowledge that they would meet forcible opposition from a rival organisation which called itself the Skeleton Army. Clashes had occurred on previous occasions, and on this occasion several Salvationists were arrested. On a complaint against them it was alleged that they were 'unlawfully and tumultuously assembled, with others, to the disturbance of the public peace and against the peace of the Queen'. The Divisional Court, in quashing a binding over order made by the justices, held that the parades of the Salvationists were not provocative but that their opponents, the Skeleton Army, had attacked them without justification and breaches of the peace had then ensued.

4.18 However, there would have been no disturbance if the Salvation Army had agreed to desist when so requested, so that their failure to desist could have meant that they, as well as the Skeleton Army, "caused" the breaches of the peace. Alternatively, if questions of causation can be affected by the subjective view of the actor, the view could have been formed that it was the Salvation Army which had "caused" the breaches of the peace by providing the occasion and temptation for the Skeleton Army

[22] See Williams, "Dealing With Breaches Of The Peace" (1982) 146 JPN 199. In *Howell* itself the justification which was given for the arrest of the accused was that "it was open to the jury to infer" from the evidence that the arresting officer "feared a breach of the peace arising from the imminent use of violence by [the accused]", ([1982] QB 416, 423) even though the officer himself seems to have thought that he had actually arrested the accused for swearing at a crowd of angry neighbours.

[23] Hart & Honore, *Causation in the Law* (2nd ed 1985), pp 374–376.

[24] (1882) 9 QBD 308.

to react, knowing as it did from previous encounters that such breaches were likely to occur.[25]

4.19 In addition to these problems of causal reasoning which are presented by the law of breach of the peace, there is the added difficulty that it breaches a general rule of legal policy that an act of (unlawful) violence cannot be regarded as being the natural consequence of (in other words, as caused by) a lawful though provocative act. This issue concerned the Divisional Court in *Wise v Dunning.*[26] In that case, which raised problems similar to those which arose in *Beatty v Gillbanks*,[27] Channell J said: "I agree . . . that the law does not as a rule regard an illegal act as being the natural consequence of a temptation which may be held out to commit it . . . but I think the cases with respect to apprehended breaches of the peace show that the law does regard the infirmity of human temper to the extent of considering that a breach of the peace, although an illegal act, may be the natural consequence of insulting or abusive language or conduct".[28]

4.20 In our report on Offences Relating to Public Order[29] we expressed the view that despite the authoritative definition which was attempted in *Howell*, breach of the peace ". . . remains a concept at common law. . . . It cannot be regarded as certain in which direction the common law concept will develop". In our view at that time the uncertainty stemmed from the inclusion in the definition of an "apprehension" of a breach of the peace. We considered this to be an expression which was capable of different interpretations on the same set of facts. The recent case of *R v Chief Constable*

[25] *Duncan v Jones* [1936] 1 KB 218, 223 per Lord Hewart CJ:

> ". . . The case stated which we have before us indicates clearly a causal connection between the [previous meeting] and the disturbance which occurred after it – that the disturbance was not only *post* the meeting but was also *propter* the meeting".

[26] [1902] 1 KB 167.

[27] See para 4.17 above.

[28] [1902] 1 KB 167, 179. Darling J said at p 178: "In my view the natural consequence of those people's conduct has been to create the disturbances and riots which have so often given rise to this sort of case . . . The natural consequence of such conduct is illegality. I think that the natural consequence of this 'crusader's' eloquence has been to produce illegal acts".

[29] See n 19 above, para 4.14.

of Devon & Cornwall, ex p Central Electricity Generating Board [30] was cited in paragraph 5.8 of that report as "... a convenient illustration of the difficulties attendant on the rationalisation of the law in this area".

4.21 In that case Lord Denning MR suggested that unlawful conduct is in itself a breach of the peace, even if it is neither violent nor an incitement to violence, but this view of the law does not appear to have been supported by authority and has not been followed in later cases. The majority view of the Court of Appeal was that a person will be subject to sanctions (in other words, arrest) in respect of breach of the peace if a reasonable (objective) view of his or her conduct is that there is a "real and imminent risk"[31] that it is likely to lead to violence by *others*. This statement of the law has the effect of prohibiting by state sanctions a peaceful demonstration which is unlawful only because it involves trespassing, which is not in itself a breach of the criminal law. In effect, the majority view seems to amount to an absolute refusal to accept that any protest or demonstration will remain non-violent in the face of an attempted removal of protesters by the use of lawful force.

4.22 The view of the Court of Appeal in *CEGB* was adopted in the specific context of binding over by the Divisional Court in *ex p Benjamin*.[32] In that case a decision to imprison Mr Benjamin for seven days for refusing to be bound over was upheld on the ground that there was ample evidence that a breach of the peace (by others) was not only possible but indeed probable if he indulged in future unbridled use of his conch shell trumpet in Brixton market, although this act was of course not in itself an act of violence.

[30] [1982] QB 458. See also now *McConnell v Chief Constable of Greater Manchester Police* [1990] 1 All ER 423, for which see n 39 below; and *Lewis v Chief Constable of Manchester, The Independent*, 23 October 1991, CA. The decision of the Court of Appeal in the *CEGB* case was not cited to the Divisional Court in *Moss v McLachlan* [1985] IRLR 76, a case arising out of the 1984 miners' strike when it preferred the earlier test suggested by Lord Parker CJ in *Piddington v Bates* [1960] 3 All ER 660 who held at p 663 that the police must reasonably anticipate a real, not a remote, possibility of a breach of the peace before they are justified in taking preventive action.

[31] [1982] QB 458, per Lawton LJ at p 476F.

[32] *R v Inner London Crown Court, ex p Benjamin* (1986) 85 Cr App R 267.

4.23 In *R v Morpeth Ward justices, ex p Ward,*[33] the Divisional Court held that justices had power to bind over field sports protesters at the end of the hearing of a complaint without having to make a specific finding that they had actually caused a breach of the peace on the occasion in question. The court held that provocative disorderly behaviour which was likely to have the natural consequence of causing violence, even if only to the persons of the provokers, was capable of being treated as conduct likely to cause a breach of the peace. In those circumstances justices were entitled to use their powers to bind the respondents over if they considered that they were likely, unless bound over, to cause a breach of the peace in future.

4.24 The effect of this decision is to make it difficult for those who wish to involve themselves in protests, and who have been bound over to keep the peace, to know what they may or may not do if they are not to lose their recognisances. This state of the law is the more remarkable since the only violence which it is feared the conduct will cause is likely to be to the persons of those who are being bound over, and the violence would clearly be a criminal assault for which in theory the persons bound over could claim compensation.[34]

4.25 It seems reasonably clear in the light of these three recent decisions that the violent tendencies of others can suffice to justify a person being bound over to keep the peace, but there is still uncertainty as to the precise circumstances in which this will be the case. There is also uncertainty as to whether the law is still directed at those who *occasion* a breach of the peace as well as those who *cause* it. In *Beatty v Gillbanks*[35] the Salvationists, although noisy and provocative, were not considered to have been disorderly, and this seems to be the only distinguishing feature when the facts of that case, in which binding over was not thought to be appropriate, are compared with *ex p Ward*[36] in which a different view was taken. In each case, on any reasonable objective view of the conduct in question, it was open to a court to find that there was a real and imminent risk that it was likely to lead to violence by others.

[33] (1992) 95 Cr App R 215. Protesters invaded a field in Northumberland where a pheasant shoot was in progress, shouting and swearing in an attempt to stop the shoot. One woman accused those with guns of being murderers, and a member of the shooting party said to one of the protesters "If you don't move I'll hit you". There was no evidence of any acts which physically harmed persons or property or put anyone in fear of such harm being done. The justices bound the protesters over to keep the peace for nine months.

[34] We have noted in n 41 to para 3.19 above that the present Home Secretary intends to seek more orthodox powers in future to control the activities of those who seek to disrupt country sports.

[35] See para 4.17 above.

[36] See para 4.23 above.

4.26 This review of the difficulties which are still being created by the continued employment of "breach of the peace" as a concept of English law underlines, in our opinion, the undesirability of retaining this concept in use in the 1990s. Whatever may have been the position in the nineteenth century, it is surely not right now to maintain a rule which enables a citizen to be restrained *on grounds relating to violence* because it is regarded as "natural" or to be expected that people will assault him if they consider him to have obstructed or insulted them. We remain of the view which we expressed in our report on Offences Relating to Public Order[37] when we declined to adopt "breach of the peace" as a ground for criminal sanctions; and in our opinion Parliament was also quite right, when it legislated for public order in the middle of the 1980s, to treat the kind of conduct described by Channell J as punishable on grounds of insult (as limited by section 5 of the 1986 Act[38]) and not as a category of violence.[39] Section 5 may be too wide for some people's liking, but at least it is less vague and more straightforward in indicating the true nature of what it seeks to punish, than is a law based on breach of the peace.

4.27 We have shown how it is now clear that the courts can bind people over not only in respect of violence or threatened violence, but also in respect of conduct which can reasonably be expected to cause or occasion violence by others, whether or not it has done so in the past. In Part III we expressed the view[40] that if the latter category of behaviour merits state control at all, section 5 of the 1986 Act now provides a sufficient sanction. Furthermore, the power of arrest which is now contained in section 5(4) of the 1986 Act requires some repetition of "offensive conduct" before an arrest can be made. In circumstances such as those which arose in the case of *Benjamin* this new statutory provision affords a reasonable means of warning the individual concerned about his or her behaviour and results in the matter being taken no further if the objectionable conduct is not repeated.

[37] See n 19 above.

[38] See para 3.5 above.

[39] See also *McConnell v Chief Constable of Greater Manchester Police* [1990] 1 All ER 423 where Glidewell LJ (at p 429D), holding that a breach of the peace could occur on private premises, indicated "... that the circumstances of the ... case, had they occurred after the 1986 Act came into force, might well have resulted in a charge against the present plaintiff under the 1986 Act". In that case on 21 March 1983 the plaintiff had refused to leave the manager's office of a carpet store, and was removed by a police constable. Once outside, he tried to re-enter. The constable, purporting to exercise his common law power of arrest, arrested him on a suspicion that he was guilty of conduct whereby a breach of the peace might be occasioned or that, if he allowed him to re-enter, such a breach of the peace might take place.

[40] See paras 3.5–3.6, 3.12–3.14 above.

4.28 For all these reasons we are of the clear opinion that as a matter of domestic English law[41] "breach of the peace" is an unsatisfactory and potentially oppressive criterion both for determining whether a person should be bound over and for determining whether an order containing an undertaking to keep the peace has been broken.

3. Good behaviour

4.29 The criteria which are applied where the order is to be of good behaviour are different from, and wider than, those which are applied by courts when judging whether a breach of the peace has occurred or is apprehended.[42] Accordingly, in *R v Sandbach ex p Williams,*[43] the Divisional Court firmly rejected the view that a person could not be bound over to be of good behaviour where there was no reason to apprehend a breach of the peace.[44] However, as in the case of binding over to keep the peace, there must be some reason to believe that there might be a repetition of the conduct complained of before an order to be of good behaviour can be made.[45]

4.30 On consultation there was no clear cut view on the question whether the power to bind over to be of good behaviour should be retained. Some respondents felt that the concept of being of good behaviour lacked sufficient precision and that powers to bind over should not extend beyond what was needed to keep the peace. Some felt that both powers should be retained in order to take account of variations in public attitudes. And others felt that since being of good behaviour includes keeping the peace,[46] it is unnecessary to have both types of order. One respondent expressed the view that if it was decided to restrict binding over to one head and then to restate this in statutory language, it would be easier to retain keeping the peace than good behaviour, because breach of the peace is a more well-defined concept. Although this observation is undoubtedly correct, it does not in our view provide any cogent support in itself for "breach of the peace" as a criterion for applying coercive sanctions.[47]

[41] For the effect of the European Convention, see para 5.6 below.

[42] See Working Paper No 103, para 3.2.

[43] [1935] 2 KB 192.

[44] See also *Bamping v Barnes* [1958] Crim LR 186 where it was held that binding over was appropriate in all cases in which it is apprehended that a person will do something against the law.

[45] In *Hughes v Holley* (1988) 86 Cr App R 130, Glidewell LJ commented at p 140: "It is correct, as a matter of law, that before the magistrates can exercise their power to bind over they must have some cause to believe that without a binding over order the defendant might repeat his conduct."

[46] This is a view also expressed in Working Paper No 103, para 3.2: ". . . there is no strict dividing line in the circumstances appropriate for the making of one or other of the orders; indeed on the face of it 'good behaviour' clearly must include 'keeping the peace'."

[47] For our views on breach of the peace, see paras 4.26–4.28 above.

4.31 Discontent over binding over to be of good behaviour goes back to the wording of the 1361 statute itself. This language has been criticised by the Pennsylvania Superior Court for appearing to "admit of any definition according to the experience and opinion of the definer".[48] Judicial commentary in this country has done little to clarify the width of magistrates' powers. Lord Hewart CJ, in response to a rhetorical question about the limits of magistrates' powers in this context, said: "The answer I give is that the matter is discretionary and the limits are to be found in discretion. We should assume that judicial powers, when given, will in all cases be exercised properly. . . ."[49] In *Hughes v Holley*,[50] where an order binding a defendant over to be of good behaviour was held to be appropriate where his behaviour had been *contra bonos mores*, Glidewell LJ said:

> "What is a good way of life is for the magistrates to decide . . . *contra bonos mores* is conduct which has the property of being wrong rather than right in the judgment of the vast majority of contemporary fellow citizens."[51]

4.32 Because the consequences of a failure to be of good behaviour may be either the imposition of binding over or up to six months' imprisonment for those who refuse to be bound over, it is important, in accordance with first principles,[52] that an individual should be able to ascertain in advance the interference with his or her liberty which is posed by the concept of behaviour *contra bonos mores*, and the steps which he or she has to take to avoid that interference. We have already expressed serious concern, however, about the width and vagueness of the notion of being of good behaviour and it is difficult, if not impossible, to define the limits of this power of control.

[48] *Commonwealth v Franklin* (1952) 92 A 2d 272, 286, noted in Working Paper No 103, para 10.25. See generally the observations of the US Supreme Court in *Connally v General Construction Co* (1926) 269 US 385, 391:

> ". . . a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law".

[49] *R v Sandbach ex p Williams* [1935] 2 KB 192, 195. By contrast, the Pennsylvania Superior Court in *Commonwealth v Franklin*, above, holding an order binding over an acquitted defendant under the 1361 Act unconstitutional, declared that statute an abdication of power by the legislature, which had transferred power to the judiciary in the guise of discretion, because the phrase "not of good fame" had no clear meaning. The statute was ". . . on its face, under the decided cases and as administered, fatally defective because of vagueness" (p 282).

[50] (1988) 86 Cr App R 130.

[51] *Ibid*, at p 139.

[52] See para 4.9 above for these principles.

4.33 Binding over has been variously described as "quasi-criminal",[53] "hybrid"[54] and at least "analogous to a criminal proceeding".[55] The process deserves all these descriptions. When we take into account the consequences which can follow the making of an order, the power to bind someone over when he or she has not committed a criminal offence *or* a breach of the peace, but has merely failed to be of good behaviour, places, in our view, unjustifiably wide discretion in the hands of the magistracy. In the Working Paper we cited a comment by Professor Glanville Williams, who found it "extraordinary" that magistrates should be able "to indulge their fancy by formulating their own standards of behaviour for those who come before them".[56] It is difficult to quarrel with that view.

4. Conclusions

4.34 We regard reliance on *contra bonos mores* as certainly, and breach of the peace as very arguably, contrary to elementary notions of what is required by the principles of natural justice when they are relied on as definitional grounds justifying the making of a binding over order. Because an order binding someone to be of good behaviour is made in such wide terms,[57] it fails to give sufficient indication to the person bound over of the conduct which he or she must avoid in order to be safe from coercive sanctions. Although breach of the peace is not as open to complaint on grounds of vagueness as is conduct *contra bonos mores*, this type of order is either concerned to control violence by the respondent, whether actual or threatened (in which case it would seem that he or she would be equally well, and much more appropriately, dealt with by the criminal law); or it becomes entangled in the vaguenesses which are inherent in the concepts of the apprehension or threat of violence by others. Both grounds for the making of a binding over order are therefore open to serious objection when one considers the principles which ought to underpin sound modern domestic English law.[58]

C. PROCEDURAL CRITICISMS

1. Conditions on orders

4.35 The difficulties which are caused by the imprecision of the concepts of breach of the

[53] See (1982) 146 JPN 196 ("quasi-criminal") and Harrison, "Binding-over, Recent Developments" (1984) 48 J Cr L 290, 292, describing the procedure as "hybrid".

[54] *Ibid.*

[55] *Everett v Ribbands* [1952] 1 All ER 823, per Denning LJ at p 827.

[56] Working Paper No 103, para 5.1.

[57] As to this, see also para 4.35 below.

[58] For the position under the European Convention, see paras 5.6–5.7 below.

peace and being of good behaviour[59] are compounded by the fact that it is not possible to attach specific conditions to a binding over order. In *Ayu*[60] the Court of Criminal Appeal drew a distinction in this context between a binding over order to come up for judgment and a binding over order under the Justices of the Peace Act 1361. The court held that conditions could be inserted in the former but not in the latter. This view was confirmed in *Goodlad v Chief Constable of South Yorkshire*[61] in which a provision contained in section 52 of the Firearms Act 1968 which appeared to allow a binding over to include a condition that the person bound over should not be permitted to carry a firearm, was held only to be applicable to cases of binding over to come up for judgment.[62]

4.36 The effect of these restrictions is that the person bound over can only be given the most general guidance as to what he or she must do to avoid forfeiture of the recognisance. Therefore, at least technically speaking, someone who is bound over to be of good behaviour will be in peril if he or she commits any further act which is deemed not to be "of good behaviour", even if it is an act very different in kind from the species of bad behaviour for which he or she was originally bound over.

4.37 We have received no evidence at all that this aspect of binding over leads to oppressive results in practice. Indeed, we are struck by the general absence of any evidence about the enforcement of binding over orders. This may be because such orders do indeed achieve their intended deterrent effect. Alternatively, as we strongly suspect, it may be that police practice on discovering a breach of a binding over order is to bring the same criminal charge in respect of the conduct which constitutes the breach as they could have brought in respect of the conduct originally complained of. Nevertheless, it does not appear to us to be right that so much reliance has to be placed on the discretion of prosecutors deciding not to enforce the literal terms of a court's order.

4.38 An order in the form of an injunction that a subject shall "keep the peace" or "be of good behaviour" is open to obvious objection. The order is of a court exercising at least a quasi-criminal jurisdiction, and by ordinary principles of English law it should be formulated with precision.[63]

[59] See Section B above.

[60] (1959) 43 Cr App R 31.

[61] [1979] Crim LR 51.

[62] See para 2.16 above.

[63] For the effect of the European Convention in this context, see paras 5.6–5.7 below.

4.39 In our view, therefore, if binding over was to be retained it would be necessary to substitute a much more precisely defined order for the types of order which are being made at present. On consultation, opinion on this point was divided. As on other points, those who have been closely involved in the administration of the binding over system were far less worried by natural justice considerations than were more detached observers. We are of the very clear opinion that as a matter of principle the concerns of the detached observers are well-founded.

2. Proof

4.40 A further objection of principle is that the matters alleged need not be proved beyond reasonable doubt.[64] As we have seen, the consequences of the making of an order can be the deprivation of liberty or the imposition of an order limiting the future behaviour of the person bound over. Because of these possible consequences, if binding over is to be retained there should be proof beyond reasonable doubt of the matters complained of before an order may be imposed.[65]

4.41 On consultation, a number of respondents favoured the adoption of the criminal standard of proof, while others argued that this would dilute the effectiveness of binding over by making the process slow and formalistic. Overall, however, surprisingly little interest was expressed in this issue. The response did, however, show that if, as we examine in more detail below, binding over was reformed to meet what we conceive to be the minimum mandatory requirements of due process, it would be likely to be substantially less attractive to its supporters than are the present arrangements.

3. The subject of an order

4.42 We have described the present position in paragraphs 2.5 to 2.10 above. The main difficulty, so far as the principles of natural justice are concerned, is that under the "forthwith" powers a binding over order is not limited to a defendant who is before the court. As Lord Parker CJ has said:

[64] See paras 2.24, 2.25 above, and Working Paper No 103, para 3.10. In *R v Aubrey-Fletcher ex p Thompson* [1969] 1 WLR 872 Edmund-Davies LJ said at p 874E that "there need not be proof of the matters complained of, but nevertheless the order cannot be made capriciously".

[65] If a defendant was acquitted on criminal charges it would not be possible to bind him or her over for the same behaviour if proof beyond reasonable doubt were required before the making of an order. The fact that civil courts apply a less heavy burden of proof before granting injunctions restricting people's conduct is irrelevant, since binding over orders are mandatory orders made by courts exercising quasi-criminal jurisdiction, and are usually made at the behest of the state.

"For my part I do not want to throw any doubt whatsoever upon the jurisdiction of justices to bind over not only the defendant but the complainant, and indeed witnesses who are before them."[66]

Acquitted defendants

4.43 A defendant who has been acquitted of a criminal charge may nevertheless be bound over.[67] Twenty years ago it was even held[68] that an acquitted defendant had no right to be heard before a binding over order was imposed upon him. Nor was it a breach of natural justice to make an order without the justices indicating to the acquitted defendant their intention to do so, although it was felt that it would be at least courteous, and perhaps wise, that this should be done.[69] This view was repeated a year later[70] when Lord Widgery CJ said: ". . . it is now established that an acquitted defendant may be bound over without having been given prior warning".

4.44 More recently, however, it has been held in the context of defendants in general that they should not only be told of any proposal to bind them over but they should also have the reasons for the proposal explained to them and be given an opportunity to make representations against it.[71] Furthermore, in *R v Liverpool City Justices, ex p Fraser and Fraser* Watkins LJ said:

". . . There is no such thing as natural justice unless parties are told why it is that they are being in a sense punished . . . It must always in my judgment be recognised by courts seeking to bind over a person before them, that there must be full explanation given to the party as to why that course is being taken and it must be plain to the justices that the parties fully understand why that course is being adopted."[72]

Complainants

4.45 There is clear authority supporting the proposition that complainants may be bound over.[73] However, the Divisional Court has said that justices should only bind over a prosecutor in exceptional circumstances where facts have emerged on a plea of

66 *Sheldon v Bromfield Justices* [1964] 2 QB 573, 577.

67 For a recent example see *R v Nottingham Crown Court, ex p Brace, The Times* 6 November 1989.

68 *R v Woking Justices, ex p Gossage* [1973] 1 QB 448.

69 *Ibid*, p 452.

70 *R v Hendon Justices, ex p Gorchein* [1974] 1 All ER 168, 170.

71 *R v South Molton Justices, ex p Ankerson and others* [1989] 1 WLR 40.

72 Unreported but noted in (1986) 150 JP 721–722.

73 See Working Paper No 103, para 2.23.

guilty.[74] In *ex p Gorchein*[75] it was held that a dictum of Lord Parker CJ in *Sheldon v Bromfield Justices*,[76] that it was elementary justice that a "mere witness" should be told if the justices are planning to bind him over, also applied to someone who is both a complainant and a witness as well as to a witness *simpliciter*. In *R v Wilkins*[77] Lord Alverstone made the general point that justices have the power to bind over any person who comes before them ". . . provided, of course, that the person bound over has had a reasonable opportunity of knowing the nature of the charge brought against him and of making his answer to it". However, where a complainant makes a disturbance in the face of the court, no court has yet ruled that he or she should be given a warning or the chance to make representations before being bound over.[78]

Witnesses

4.46 A witness called to give evidence in a case may be bound over, although in *ex p Gossage*[79] Lord Widgery said that a distinction must be drawn between witnesses and defendants: ". . . Not only do the witnesses come with no expected prospect of being subjected to any kind of penalty, but also the witnesses as such, although they may speak in evidence, cannot represent themselves through counsel and cannot call evidence on their own behalf."[80]

4.47 It has been suggested that the power to bind over witnesses may in certain circumstances deter people from attending court and giving evidence. This view is reinforced by the fact that the maximum penalty for failure to attend court as a witness is three months imprisonment, whereas refusal to consent to a binding over order can in theory result in up to six months imprisonment.

4.48 The emphasis which the Divisional Court has placed in recent years on the need for some sort of procedure to be followed which acknowledges the principles of natural justice before courts use their "forthwith" powers is a welcome move forward from the previous general rule that there was no obligation to hear a person before he or she was

[74] *R v Preston Crown Court, ex p Pamplin* [1981] Crim LR 338.

[75] See n 70 above.

[76] [1964] 2 QB 573.

[77] [1907] 2 KB 380, 384.

[78] *R v North London Metropolitan Magistrate, ex p Haywood* [1973] 3 All ER 50. In *Hill* [1986] Crim LR 457 the court held that before a spectator at a trial can be committed to prison for contempt of court, he or she must be told distinctly what the contempt is said to have been and no order should be made until a proper opportunity has been provided for submissions as to why such an order should not be made.

[79] See n 68 above.

[80] *R v Woking Justices, ex p Gossage* [1973] 1 QB 448, 451.

bound over. However, the whole possibility of someone being subjected to coercive sanctions on the spot, when he or she has attended court for a quite different purpose, remains open to legitimate criticism,[81] and this was expressed very forcefully by most respondents to the consultation process.

4.49 All these problems, allied to the general consideration that recourse to the "forthwith" procedure has an inherent potential for unfairness, lead us to conclude that if binding over were to be retained at all it should be limited to the process prescribed by section 115 of the Magistrates' Courts Act 1980. This would rob the institution of most of the informality and immediacy which is prized by its supporters, but we do not consider that these perceived advantages can be allowed to prevail, at least in the absence of any evidence of urgent practical need. In our view, there is no such evidence in respect of any of the cases in which the "forthwith" powers are typically employed.

4. Requirement of consent, and imprisonment for refusal of consent

4.50 One feature of binding over is that the person bound over must consent to be bound over before an order can be made. This requirement draws on an archaic need to obtain an acknowledgement that the person bound over had entered into a recognisance with the Crown. The majority view on consultation was that the idea of a contractual arrangement between the person bound over and the Crown was an outdated anomaly and that if binding over was to be retained consent should no longer be needed.

4.51 The requirement for consent is unrealistic because refusal to agree to be bound over may result in imprisonment.[82] A person can, in effect, be imprisoned for refusing to agree to submit to a process in which allegations against him or her do not have to be proved by admissible evidence. This anomaly is compounded by the fact that imprisonment is not available as a sanction for a later breach of the terms of the binding over order. The requirement for consent is common to both the "forthwith" powers and to the procedure on complaint under the Magistrates' Courts Act 1980.

[81] For the position under the European Convention, see para 5.18 below.

[82] See Working Paper No 103, para 6.3(c). In *The Guardian* 26 January 1993 a writer with recent experience of the process commented: "There is enormous pressure to accept a bind over even if you feel strongly that you are not guilty of any breach of the peace. For one thing, it shouldn't appear on your criminal record but, as friends have found, it does. More importantly, a refusal to be bound over can mean up to 6 months' imprisonment. I refused, and was, as the official papers put it, 'committed to custody for an indeterminate period' ".

4.52 There appears to be no limit to the term of imprisonment which can be ordered for refusal to enter into a recognisance under the "forthwith" powers.[83] There is a limit of six months with regard to the complaint procedure.[84]

4.53 The requirement for consent has given rise to particular difficulties with regard to the treatment of juveniles. In *Veator v G* it was held that because of section 19(1) of the Powers of Criminal Courts Act 1973[85] justices had no power to imprison persons under 17 for failure to enter into a recognisance.[86] In *Howley v Oxford*[87] it was held that the bar imposed by section 1(1) of the Criminal Justice Act 1982 on committing people aged under 21 to prison could be overcome by the application of section 9(1)(c) of the same Act. This section allows a court to commit an individual to be detained for a term of imprisonment which could have been imposed but for the defendant's age in the case of an offence kindred to contempt of court. It was held that a refusal to enter into a recognisance which was repeated twice in the face of the court amounted to such a "kindred offence". Because section 9(1)(c) does not allow the imprisonment of persons less than seventeen years of age, the approach taken in *Howley* cannot be used to imprison juveniles. It may be possible for the court to make an attendance centre order under section 17(1) of the Criminal Justice Act 1982. If that remedy is available, it might have been a more appropriate remedy in *Howley*, instead of the court having to have recourse to the doubtful expedient of the contempt of court legislation.

4.54 The decision in *Veator v G* raised the question whether or not the magistrates had the power to bind over juveniles at all. This issue was resolved in *Conlan v Oxford*[88] where it was held that magistrates retained the power to bind over a juvenile, but again only where he or she consented to the making of the order.

4.55 It was very difficult to identify any support at all for the power to imprison for refusal to consent.[89] It is quite clear to us that this aspect of the binding over rules must be abolished, whatever other changes might be made.

[83] S 31(1) of the Magistrates' Courts Act 1980, which limits the power of a magistrates' court to impose sentences of imprisonment, only applies where an offence has been committed. There is no evidence that a term of more than six months imprisonment has ever been imposed.

[84] Magistrates' Courts Act 1980, s 115(3).

[85] Now s 1(1) of the Criminal Justice Act 1982.

[86] [1981] 1 WLR 567, 576.

[87] (1985) 81 Cr App R 246.

[88] (1983) 5 Cr App R(S) 237.

[89] For the effect of the European Convention, see para 5.15 below.

4.56 The implications of such a step may not always have been appreciated by those who seek to make binding over respectable by removing one of its more obvious anomalies. If the criminal standard of proof was also required,[90] somebody who might be bound over under the present law would be free, as at the moment he or she is not, simply to refuse to co-operate in cases in which the allegations against him or her could not be proved by the standards required by the criminal law. This would be of obvious importance in connection with the present use of the powers to bind over in cases in which the court believes that the defendant has done something wrong, but the criminal charge against him or her has collapsed for lack of proof.[91]

4.57 Although the removal of the power to imprison for refusal to be bound over would be a principled reform, it would rob binding over of some of its usefulness as perceived by consultees. Nevertheless, the need to abolish this power is in our view so clear that considerations of practical utility cannot weigh against it, particularly when these considerations rest upon the perceived utility of being able to impose coercive sanctions on people who cannot be proved to have committed any offence at all.

5. Limits of the recognisance

4.58 All who are bound over are required to enter into a recognisance for a specified sum of money for a specified period of time. There does not appear to be any limit either under the "forthwith" powers or under the complaint procedure to the duration of the order or to the amount of the recognisance.[92] However, unless the amount is "trivial", there must be an inquiry into the means of the defendant before setting the level of the

[90] See paras 4.40–4.41 above.

[91] A graphic example is contained in an article by Mr CJI Bourke, a metropolitan stipendiary magistrate, in (1989) 153 JP 747, extolling the virtues of binding over when a wife withdraws a complaint against her husband on which a criminal charge had been based. Mr Bourke, however, emphasised that he would in such cases insist on seeing *some* evidence, for instance the wife's Criminal Justice Act statement. If the wife had withdrawn that statement "through fear", it is now possible that it could be used as evidence in *criminal* proceedings under ss 23(1) and (3)(b) of the Criminal Justice Act 1988. If on the other hand the statement was withdrawn because of a reconciliation, the appropriateness of binding over may be less apparent. We discuss such cases further below when we review the specific issue of domestic violence: see paras 6.9–6.19 below.

[92] In *R v Charles Edgar* (1914) 9 Cr App R 13, Pickford J said at p 14:

> "It is not necessary to decide whether there is power to order a recognisance to be entered into for life; we do not decide that there is no such power. It seems, however, that in all cases it has been the practice to limit the time for recognisance, and in no case has an indefinite time been inserted in the order. The Court thinks it is better, whether there is power to leave the time indefinite or not, that the usual practice should be followed, and a time inserted".

recognisance.[93] On consultation, most respondents agreed that there should be a limit to the period for binding over, although views differed between 12 months and three years as the appropriate period. There was less unanimity over the need to limit the amount of the recognisance, and there was a quite widespread view that courts were using their powers reasonably in this respect and should not be fettered by an upper limit.

6. Enforcement

4.59 We received very little comment from respondents on consultation about the procedure for enforcing a binding over order. All those who expressed views agreed that a recognisance should not be liable to be estreated unless a breach had been proved by evidence adduced before the court, although opinion was divided as to the requisite standard of proof to be applied. There was general agreement that any court before which someone bound over subsequently appeared should have power to deal with the breach of the terms of a binding over, whether the original order was made in the magistrates' court or the Crown Court.

7. Appeal procedures

4.60 Two issues were covered on consultation concerning appeals against an order estreating a recognisance. On the first, it was agreed that there should be a clear right of appeal against an order made by a magistrates' court estreating a recognisance. This should lie to the Crown Court, or to the Divisional Court on a point of law. The other, more difficult, issue was concerned with the representation of the prosecution on an appeal. Although its difficulty was generally recognised, no practical solution to the problem was suggested by anybody. One influential respondent was content to recommend that legislation should make provision for the "proper representation" of the justices and the prosecution, while not suggesting how this was to be achieved, while another suggested that the Crown Prosecution Service should be made responsible.

8. Objections in relation to demonstrations or protests

4.61 Binding over sometimes has the object, or the effect, of restraining persons who take part in demonstrations or protests, or who otherwise give voice to unwelcome opinions in public. There may well be difficulties under Articles 10 and 11 of the European Convention about the use of binding over in such circumstances[94] although

[93] *R v Central Criminal Court, ex p Boulding* [1984] QB 813.

[94] See paras 5.19–5.22 below.

there is no decided case in English national law which suggests any problems in this regard.

4.62 Because our conclusion is that binding over should be abolished, we do not expand further on these problems. It should be noted, however, that if binding over were to be retained its implications for freedom of speech and assembly would have to be specifically addressed.

D. WHAT WOULD BE ACCEPTABLE IF THESE CRITICISMS WERE TO BE MET

4.63 It may help to illuminate the points we have made in this Part of our Report if we indicate what would, in our view, be acceptable if binding over were to be retained.

4.64 As to matters of substance, it would be necessary to abolish the category of *contra bonos mores* as one of the grounds on which binding over orders could be made. If it were sought to retain grounds for binding over which went beyond breach of the peace it would be necessary to define what the limits of the law should be. Any definition which fulfilled the requirement of sufficient precision is not likely to add anything to the restrictions already imposed by section 5 of the Public Order Act 1986.

4.65 "Breach of the peace" is sufficiently certain to serve as the basis of a rule of law, provided that the element of "apprehended" breach of the peace, discussed in paragraphs 4.19–4.25 above, were omitted. However, if this element were to be omitted the criterion would become actual or threatened violence on the part of the respondent himself, conduct which would almost certainly overlap with some part of the criminal law.

4.66 As to matters of procedure, the following changes would, in our view, have to be made in relation to the procedure which should be followed.

4.67 In respect of applications under section 115 of the Magistrates' Courts Act 1980 we regard the present procedures for initiating the process and conducting the subsequent proceedings as satisfactory, subject to one proviso. This is that the essentially criminal nature of the process must be recognised by the application in binding over cases of the requirement of rule 100 of the Magistrates' Courts Rules that the summons ought to give "such particulars as may be necessary for giving

reasonable information of the nature of the charge".[95] There would, however, need to be a limit of, say, two years on a binding over, and it would also be necessary to provide that in fixing the amount of the recognisance the magistrates should be explicitly guided by the same principles as to amount (for example, the means of the defendant) as govern the imposition of fines.

4.68 In our view the framework of section 115 would have to take the place of the "forthwith" procedure, and the latter would have to be abolished. There have been some attempts to introduce the principles of natural justice into that procedure, but as we have already said, the end product is far from satisfactory, both in regard to the procedure used and in regard to the persons who may be subject to the order. A very real problem, however, lies in the fact that the attraction of the "forthwith" procedure is its "immediacy", a characteristic which does not always sit well with some fairly elementary requirements of natural justice.

4.69 It would also be necessary to provide that the order sufficiently informed the person to whom it was addressed of the conduct from which he or she should refrain.

4.70 It would follow from the abolition of the "forthwith" powers that the Crown Court would lose its only existing power to bind over. Recent cases[96] have indicated the need for restraint in exercising those powers, and there was criticism on consultation of the present procedural safeguards. If such safeguards, and the allied requirements of the European Convention, were to be genuinely met, a procedure something like that under section 115 would have to be provided. However, the circumstances in which binding over in its primary application is at present used in the Crown Court (principally to restrict acquitted defendants and witnesses) do not justify the introduction of some new and fairly elaborate procedures to meet those requirements.

4.71 We agree with the general thrust of the replies on consultation in relation to enforcement and appeals. We consider that if binding over were to be retained the following procedures would have to be followed.

[95] Rule 100 relates to proceedings before a magistrates' court "for an offence". It is, in the respect noted in the text, more stringent in its requirements than rule 98, which relates to the general procedure governing summonses on complaint.

[96] See *R v Swindon Crown Court, ex p Pawittar Singh* [1984] 1 WLR 449, cited in Working Paper No 103 at para 3.10, n 19.

4.72 The procedure for enforcement should be by *summons* in the magistrates' court, not by the present informal procedure, and that summons should be subject to the rules indicated in paragraph 4.67 above. The burden of proof should, consistently with principle, be the criminal burden.[97] An appeal to the Crown Court should lie against estreatment, and a mechanism must be found in order to ensure that the prosecution is represented there. This would be likely to be burdensome and cumbrous.

E. THREE SPECIFIC APPLICATIONS OF THE POWERS

4.73 We must now turn, finally, to three specific applications of binding over powers. These are the use of the powers as a sentencing option, in order to preserve order in court, and pending the hearing of a charge or when a case is adjourned.[98]

1. Binding over as a sentencing option

4.74 In the Working Paper we observed[99] that in the research survey carried out for the Commission ten years ago a convicted defendant was bound over to keep the peace at the sentencing stage in about a quarter of the cases in which binding over powers were used by magistrates. In this type of case the defendant has been convicted after a properly conducted trial. The problems over accommodating the principles of natural justice do not therefore arise, but a large number of the other difficulties which are inherent in the use of binding over remain. It would of course be possible to substitute a fine for an undefined period of imprisonment as the first line sanction if a person refuses to be bound over, but there will always be a residual problem in some cases where a person refuses to pay a fine.

4.75 In the Working Paper we canvassed views[100] about the need to retain binding over, as a species of preventive justice, in these circumstances, and we set it alongside a number of the other powers available to the court, such as a conditional discharge or a deferred sentence. We also suggested[101] that since the practical effect of binding over on sentence was equivalent to that of a suspended fine, reform could take the form of replacement of binding over by a specific statutory power to suspend, or partly

[97] Working Paper No 103 did not draw attention to recent authority in a contrary sense in the Divisional Court (*R v Marlow Justices, ex p O'Sullivan* [1984] QB 381, applying dicta on another point in the Court of Appeal in *R v Southampton Justices, ex p Green* [1976] 1 QB 11). We, however, respectfully consider that the judges in that case took far too mechanistic an approach by regarding the forfeiture of a recognisance as "merely a civil debt". Had the full arguments of principle been put before the court, its view might well have been different.

[98] See paras 2.11 and 2.12 above.

[99] Working Paper No 103, para 9.2.

[100] *Ibid*, paras 9.3–9.9.

[101] *Ibid*, para 9.10–9.11.

suspend, a fine. We pointed out that this was a sentencing alternative available in several different European countries, including France, Italy, Belgium and the Netherlands.

4.76 On consultation, respondents were divided along much the same lines as they were divided on many of the other issues raised in the Working Paper, although most were opposed to abolition. The consideration which affected most of those who wished to preserve binding over as a sentencing option was whether a conditional discharge was, or could be made, an adequate alternative to binding over. Arguments were put forward along the lines that since there can be no breach of a conditional discharge unless the convicted person commits another offence, a conditional discharge cannot be effective to restrain anti-social conduct which is not forbidden by the criminal law, whereas a binding over order can have this effect. It was also said that a conditional discharge may carry an inadequate sanction, in that, on breach, the penalty is the maximum for the original offence and no more.

4.77 There was no great enthusiasm for a new regime which might enable a court to couple a conditional discharge with a fine, something which is impossible at present since statute provides that a conditional discharge is a measure which may be imposed "where it is inexpedient to inflict punishment".[102] Nor was there any great enthusiasm for suspended fines. Fears were expressed that the power to suspend fines could lead to defendants being required to pay fines in due course which were far beyond their means; that enforcement would be difficult where a defendant's means had changed; or where he was convicted of a subsequent offence for which a sentence of imprisonment was appropriate; or where the level of a second fine had to be adjusted by reference to what was outstanding on the suspended fine.

4.78 We see nothing in the arguments of the majority to deflect us from the view that binding over as a sentencing option should be abolished. We consider it wrong in principle that a court should be enabled to exercise a power to bind someone over "to keep the peace", given all the difficulties inherent in this concept.[103] We have shown[104] how there are modern statutory provisions, not alluded to by respondents to consultation, to which prosecutors can have recourse if in future an offender does break the peace, and if defendants who broke the peace were regularly brought back to court to have their recognisances estreated (with all the difficulties inherent in that

[102] Powers of Criminal Courts Act 1973, s 1A(1).

[103] See paras 4.14–4.28 above.

[104] See paras 3.3–3.21 above.

procedure)[105] then exactly the same problems would arise as are said to be likely to arise in connection with a regime of suspended fines.

2. Preserving order in court

4.79 In the Working Paper we asked[106] whether there was now any need to retain the common law binding over power to preserve order in court, given the existence of the new statutory power in section 12 of the Contempt of Court Act 1981.[107] The view of most respondents who referred to this point was that the common law power was no longer necessary and that it *could* be abolished without any great harm being done. Some went so far as to say that it *should* be abolished.

4.80 The minority who disapproved the abolition of the common law power did so on two grounds. There was a view held by one respondent that it would be unwise as a matter of general policy to take a step which would be seen to diminish the authority of magistrates' courts. More specific arguments were expressed by bodies representative of the judiciary, practising solicitors and members of the Bar. These included the arguments that it may not be easy to prove "wilful" insult or interruption within the meaning of section 12, that the imposition of an immediate penalty may be too severe a sanction, and that the making of a binding over order does not involve the recording of a conviction. It was also argued that binding over has a potentially lasting effect, which immediate detention or fine does not, in that it may deter an offender from repeating threats and insults outside court.

4.81 We were unable to obtain any evidence from respondents of the extent to which the common law powers were being used in practice. Evidence from the Justices' Clerks' Society suggested that they were sparingly used. The main thrust of the responses we received were to the effect that the common law powers were no longer strictly necessary but that they could on rare occasions be a useful complement to the new statutory powers. It was suggested that if they were to be abolished, the scope of the statutory powers should be re-examined in order to ensure that they are sufficiently wide to cover all reprehensible disturbances in court.

4.82 In our opinion, the modern powers which are available to a court for preserving order in court are the appropriate method of achieving that end, and all the same objections apply to this species of binding over as apply to the other forms of it with which we

[105] See paras 4.59–4.60, 4.71–4.72 above.
[106] Working Paper No 103, para 2.17.
[107] See Appendix B.

have been concerned in this Report. It will usually be sufficient for justices, in the event of a disturbance, to detain the offender until the court rises.[108] If, on the other hand, a more severe penalty is thought appropriate, then Parliament has given the justices the appropriate powers in a recent statute. We are unimpressed by the suggestion that it may be difficult to prove that the insult was "wilful". This word merely requires the presence of *mens rea*, which is a correct and proper requirement for any coercive remedy. Anybody disturbing court business who is not "wilful" will, when corrected, explain this fact. Even if the statute did not contain this specific requirement it is inconceivable that any magistrate, on receiving such an explanation in plausible terms, would take coercive action.

4.83 In *R v Havant Justices ex p Palmer*[109] it was held that a threat made to a witness does not amount to an insult within the meaning of section 12 of the Contempt of Court Act 1981. It certainly amounts, if proved, to an attempt to pervert the course of justice, and we do not consider it appropriate to retain vague antique powers for use in those cases where the prosecution does not believe it has sufficient evidence to prove the commission of an offence.

3. Binding over pending trial

4.84 In the Working Paper we also asked[110] whether the power to bind over pending a criminal charge, or during an adjournment, was any longer necessary since the enactment of the Bail Act 1976.

4.85 Again, the general sense of the responses we received were to the effect that these powers were no longer *necessary*. Many respondents regarded them as potentially useful, and some expressed the additional view that in some situations they were more effective than the powers which were exercisable under the Bail Act.

4.86 The minority who were opposed to abolition contained representatives of organisations which had considerable experience of situations in which these particular powers are used. Some suggested that the test for imposing conditions under the Bail Act was too narrow to cover all situations where conditions are desirable. Others found the powers particularly useful on occasions where bail is opposed on the ground that the defendant is likely to commit further offences. One

[108] See the Contempt of Court Act 1981 s 12(2), which is set out in Appendix B.
[109] (1985) 149 JPR 609.
[110] Working Paper No 103, para 2.18.

very influential respondent contended that there should be no further restrictions on the courts' powers to impose conditions on a defendant given bail.

4.87 In general, it was reasonably clear from the responses we received that some of those who were closely involved in the work of magistrates' courts attach considerable importance to these powers, even if most respondents would be prepared to see them go as part of a general "tidying up" operation. It was suggested that if a decision was taken to abolish this power, then the provisions of the Bail Act 1976 should be looked at again in order to ensure that there is not an undesirable gap in the powers available to the courts in these circumstances.

4.88 In our view, there are exactly the same objections to the availability of the power in these circumstances as there are to its other uses. If it is believed that there would be a gap in the law because of a concern that alleged offenders will re-offend if given bail, then the efforts which are now being made to stiffen the provisions of the Bail Act furnish the appropriate mechanisms. This is no sufficient reason for retaining the use of binding over in these circumstances.

F. CONCLUSIONS

4.89 The scheme of any legislation to implement the basic requirements set out in paragraphs 4.63 to 4.72 above would be of a detailed and complicated nature. It would produce an institution of binding over which had been deprived of its application to many or all of the cases for which it was used outside the criminal law and also of its potential to bring about the imposition of coercive sanctions without the formality of proof or trial.

4.90 When we considered the considerable legislative effort which would be required to produce an acceptable regime for binding over and reflected that the necessary changes would rob the institution of most of the characteristics which are so much valued by its supporters, we became convinced that, unless there is any remaining practical need for binding over which is not met by other procedural mechanisms, the only rational course would be to recommend that it be abolished completely. Since in the remainder of this Report we have not been able to detect any such need, we have not invited Parliamentary Counsel to attempt to draft the necessary legislation, and a short draft Bill abolishing binding over altogether follows the end of this Report.[111]

[111] See Appendix A.

4.91 It was when we applied basic legal principle and good modern practice to the institution of binding over and explored what would be necessary if it was to be reshaped to comply both with sound principle and with good practice that we discovered that the consequence of the changes which would be needed would be to produce something very different from the institution which commended itself to the majority of the respondents on consultation. This is the reason why, in this instance, we have found it impossible to follow the majority view. We are also satisfied, after conducting a rigorous survey of existing law and practice which was not attempted by any of our respondents, that no significant gaps in social protection will be left by the abolition of binding over.

PART V
THE EUROPEAN CONVENTION ON HUMAN RIGHTS

A. THE ROLE OF THE CONVENTION

5.1 A number of the respondents to the Working Paper suggested to us that certain features of current law and practice in relation to binding over might in some respects contravene the requirements of the European Convention on Human Rights ("the Convention"). We were bound to take these observations very seriously, although we had not addressed them in the Working Paper. Although the United Kingdom has not yet incorporated the provisions of the Convention into English domestic law – so as to give individuals direct rights in terms of the Convention against the national state – it ratified the Convention as long ago as 1951, and by that ratification this country has undertaken obligations in international law that it will conform in its domestic practice with the terms and principles of the Convention.[1] It follows that whenever it contemplates any particular measure of law reform the United Kingdom, and therefore this Commission, should do its best to ensure that any law which it proposes, or which it confirms in place, does indeed conform with the requirements of the Convention.

5.2 In this Part of the Report we will be concerned to test some of the salient characteristics of binding over against those requirements. When we do so, however, we should emphasise that the principles underlying the Convention are not in any material sense different from the principles dictating the use of fair procedures that provide proper protection for the citizen which are an inherent part of English common law. Lord Donaldson MR said in a recent case that "you have to look long and hard before you can detect any difference between the English common law and the principles set out in the Convention, at least if the Convention is viewed through English judicial eyes."[2] His view has been borne out by our own study of the Convention in the context of binding over, since in every respect where difficulties actually or arguably arise under the Convention we have already concluded, in Part

[1] For that obligation, see Brownlie, *Principles of Public International Law* (4th ed, 1990), at pp 36–37; and *Exchange of Greek and Turkish Populations* (1925), PCIJ, series B, No 10, at pp 20, 21. As the European Commission on Human Rights has put it, in the specific context of the Convention: "the Contracting Parties have undertaken . . . to ensure that their domestic legislation is compatible with the Convention, and if need be to make any necessary adjustments to this end" (*Yearbook of the European Convention on Human Rights*, vol 2, p 234).

[2] *R v Secretary of State, ex p Brind* [1991] 1 AC 696, 717E. In a somewhat different context, it has been suggested by high judicial authority that there is no difference in principle between English law in the field of freedom of speech and the requirements of the Convention. See Lord Goff of Chieveley in *Attorney-General v Guardian Newspapers (No 2)* [1990] 1 AC 109, 283–4, and Lord Keith of Kinkel, with whom the other four law lords agreed, in *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534, 551F.

IV of this Report, that binding over is inconsistent with the principle that there should be certainty in our criminal law which we discussed in paragraphs 4.9–4.13 above. The Convention should, therefore, be seen not as an extraneous set of rules driving our conclusions in an otherwise unwelcome direction, but rather as a check-list, a valuable and in some respects more formalised restatement of those principles of English law by which we have already tested the subject-matter of this reference.[3]

5.3 Questions in relation to binding over arise under Articles 5, 6 and 10 of the Convention, relevant parts of which are set out in Appendix C to this Report. They relate to the need for certainty and ascertainability of a citizen's obligations, and to other issues concerned with arrest and detention, procedure and rights of defence, and freedom of speech.

B. CERTAINTY AND ASCERTAINABILITY OF A CITIZEN'S OBLIGATIONS

5.4 It is possible to detect a broad principle which underpins different specific provisions of the Convention. This is that coercive obligations can only be imposed on citizens through legal rules which are expressed with reasonable certainty. This certainty is needed not only to permit fair adjudication in the event of any breach of the rules, but also to enable citizens to know their rights and obligations. Binding over undoubtedly involves coercion, for instance in the taking and estreatment of recognisances, and also in the power to imprison someone who refuses to be bound over. The first question to be considered, therefore, is whether the grounds on which people can be bound over, breach of the peace and behaviour *contra bonos mores*, meet this broad general standard. This test, it will be observed, is no different from the standards of certainty and ascertainability which are now generally accepted as desirable as a matter of English law.[4]

5.5 The European Court of Human Rights ("the Court") has formulated two broad principles to illuminate this requirement of the Convention. First, the law must be "accessible": the citizen must have an adequate indication of the legal rules which are to be applied in any given case. Secondly, "a norm cannot be regarded as a 'law' unless

[3] The fact that citizens of the United Kingdom have now long enjoyed an individual right of petition to the European Commission of Human Rights (and thence, if their petition is declared admissible, to the European Court of Human Rights) has done much to make English lawyers more conscious of the influence of the Convention, and this influence is steadily growing, notwithstanding the fact that the Convention does not form part of our national law.

[4] See paras 4.9–4.13 above.

it is formulated with sufficient precision to enable the citizen to regulate his conduct."[5] We have therefore to assess the merits of "breach of the peace" and "*contra bonos mores*" against these two broad principles.

5.6 The Court has emphasised that rules which are coercively enforced must be carefully defined: "A wide interpretation would entail consequences incompatible with the notion of the rule of law from which the whole Convention draws its inspiration".[6] That said, however, the Court recognises the inevitability of a fairly wide margin of flexibility in the laws of national states, provided the rules have some objective basis.[7] We are inclined to think that in spite of the areas of uncertainty which still attend the definition of "breach of the peace",[8] this concept is now sufficiently limited not to fall foul of the basic requirement of certainty of law which the Convention imposes. We have reached this conclusion with some hesitation. We have already expressed the clear opinion[9] that breach of the peace, as that expression is currently understood in English law, is a potentially oppressive source of coercive obligations. We cannot, therefore, exclude the possibility that if the matter were tested, the Court might conclude that the concept permitted the imposition of obligations of unreasonable width and uncertainty.

5.7 We cannot express even that tentative view in respect of "*contra bonos mores*" or "good behaviour". A law which is based on concepts as uncertain as these is contrary to elementary notions of fair process. This is true whether the notions are the principles

[5] *Sunday Times v UK* [1979] 2 EHRR 245 at p 271. This case was concerned with the requirement that limitations on freedom of expression must be prescribed by "law", under Article 10 of the Convention: as to which see paras 5.19–5.22 below. The principles there stated would, however, seem to be no less valid when determining, for instance, whether a restriction on liberty is "lawful" under Article 5. Although not making express reference to US authority, the principles bear at least some resemblance to the "void for vagueness" doctrine which has been developed by American courts to strike down as unconstitutional legislation which gives the citizen insufficient indication of his obligations: see e.g. *Connally v General Construction Co* (1926) 269 US 385; and *Papachristou v City of Jacksonville* (1972) 405 US 156 ("vagrancy" ordinance held unconstitutional). As we observed in para 4.31, n 49 above, the binding over of an acquitted defendant under powers derived from the statute of 1361 was held to violate these principles in *Commonwealth v Franklin* (1952) 92 A 2d 272. The Pennsylvania Superior Court held that the phrase "not of good fame" had no clear meaning, and therefore the statute using that expression was ". . . on its face, under the decided cases and as administered, fatally defective because of vagueness": *ibid*, at p 282.

[6] *Engel v Netherlands* [1976] 1 EHRR 647; and see also *Lawless v Ireland* [1960] *Publ. ECHR*, series A, vol 3, at p 47 ("specific obligations imposed by law").

[7] Support for this broad approach can perhaps be drawn from *Brogan v UK* [1989] 11 EHRR 117.

[8] See paras 4.14–4.25 above.

[9] See paras 4.26–4.28 above.

of natural justice which form an inherent part of English common law,[10] or the principles which inform the Convention. In the same way that we have already found that a law of binding over which is based on that concept is offensive to English legal principle, so we have little doubt that if the point were tested, it would be found inconsistent with the requirements of the Convention.

C. ARREST AND DETENTION

5.8 Article 5 of the Convention[11] imposes some limitations on permitted arrest, detention or deprivation of a subject's liberty. These limitations exist both in respect of arrest in the course of a pre-trial process, and in respect of the grounds which may be used to justify loss of liberty after a trial or other investigation. In particular, arrest or loss of liberty for what might be called general law enforcement purposes[12] are only permitted in order (in broad terms) to enforce a court order, or to bring a person before a court for investigation or trial.

1. Arrest for breach of the peace

5.9 These provisions are of some importance in connection with the common law power to arrest for breach of the peace.[13] Although Parliament gave the police new powers of arrest and entry into premises in the Police and Criminal Evidence Act 1984, it preserved the existing powers to arrest for breach of the peace[14] and to enter premises to deal with or prevent a breach of the peace. Arrest for breach of the peace would appear to accord with the principles of the Convention only if it is a step on the way to a disposal by a court which is of a kind recognised by the Convention as justifying an arrest. Since breach of the peace is not, in itself, an offence, the only available disposal for a person so arrested is to bring the arrested person before a magistrates' court to be bound over. Because we are concerned in this Report with the question whether binding over should be abolished, we must consider the effect which the removal of that power would have on the power to arrest for breach of the peace. This in turn requires us to consider whether arrest, followed by binding over, is a legitimate ground of arrest under the Convention.

[10] See para 4.34 above.

[11] Set out in Appendix C, so far as is relevant.

[12] Specific provisions permit detention of persons of unsound mind, alcoholics, vagrants, deportees, or (in very limited circumstances) children.

[13] See paras 2.13–2.14 above.

[14] Police and Criminal Evidence Act 1984, ss 17(6) and 25(6).

5.10 The only possible provisions of the Convention which might legitimate arrest for breach of the peace followed by binding over are Articles 5(1)(b) and (c). These permit "the lawful arrest or detention of a person. . . (b) to secure the fulfilment of any obligation prescribed by law. . .[or] (c) effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence". If the concept of "breach of the peace" were to be judged too imprecise to satisfy the Convention's requirements of certainty of law,[15] then it would seem that arrest for breach of the peace would fall *in limine*. Even if this is not the case, however, there are other difficulties which need to be considered.

5.11 Article 5(1)(b) (arrest in order to secure the fulfilment of an obligation prescribed by law) would not appear to meet this case. The Court has emphasised that the "obligation" in question must be "specific and concrete",[16] as opposed to an obligation, such as an obligation to keep the peace would seem to be, which is generally binding on all members of society.[17]

5.12 As to Article 5(1)(c) (arrest for the purpose of *investigation of an offence*), it is open to question whether arrest for breach of the peace constitutes arrest for those purposes. Binding over, despite its significant elements of criminal process and liability,[18] purports to be civil in its nature, especially when, as in the case of persons arrested for breach of the peace, the binding over is enforced by what is undoubtedly a civil process under section 115 of the Magistrates' Courts Act 1980.[19] This impression of binding over as a means of regulating disputes between citizens, rather than as the exercise of state power against criminal acts, is reinforced by the consideration that the power of arrest for breach of the peace is available on the same terms to all citizens, and not just to constables.[20] It is also reinforced by the fact that the right to make a complaint of breach of the peace extends to cases where the breach of the peace is merely apprehended, and has not yet taken place.[21] There must be at least some danger that the civil nature of binding over proceedings will be taken, under the Convention, at face value, and that the subsequent hearing in the magistrates' court will not be regarded as qualifying as the investigation of an *offence* in Convention terms.

[15] See para 5.4 above.
[16] *Engel v Netherlands*[1976] 1 EHRR 647.
[17] *Aeneas* [1980] *Publ ECHR*, Series A, vol 39, pp 37–38.
[18] See paras 4.32–4.33 above.
[19] See para 2.7 above.
[20] *Howell* [1982] 1 QB 416, 426B.
[21] *Ibid*, at p 426C.

5.13 Some support is given to this possibility not merely by the civil nature of the proceedings, but also from the lack of any required connection between the conduct which is complained of and the scope of the binding over order.[22] What is in issue is not the correction of past conduct or punishment for such conduct, as would be characteristic of the investigation of an offence, but rather the prevention of future conduct.

5.14 These matters are far from clear. However, as we have explained above, there must remain a substantial doubt whether, if the matter were to be tested, the fact that an arrest for breach of the peace was made in order to initiate process for binding over would justify that arrest in Convention terms. What is certain is that in any event such arrest will not satisfy the requirements of the Convention unless it is made with the genuine intention of pursuing binding over proceedings. It has been held by the Court from the early days of the Convention that Article 5(1)(c) cannot justify an arrest to prevent future offences where no trial or court process is intended.[23]

2. Power to imprison for refusal to be bound over

5.15 A most remarkable feature of binding over is that, whilst in form recognisances to be of good behaviour are imposed by the agreement of the person bound over, he or she can be imprisoned if he or she declines a court's invitation to enter into such an agreement.[24] The justification for this procedure is obscure enough when it is only the standards of the common law, or of simple logic, which are being applied. In terms of the Convention, the procedure would seem to be completely insupportable. We have little doubt that a tribunal applying the Convention would feel obliged to take the institution of binding over at its face value, and would assess the giving of recognisances as a voluntary act. A person who does not want to perform that voluntary act commits no offence, disobeys no *order* of the court, and does nothing else which would justify deprivation of liberty under the Convention.

D. PROCEDURE AND RIGHTS OF DEFENCE

5.16 Article 6 of the Convention[25] provides for specific procedural protections for people who are charged with criminal offences. There has been some uncertainty in the jurisprudence of the Convention as to the extent to which the scope of Article 6

[22] See para 2.29 above.
[23] *Lawless v Ireland* [1961] *Publ ECHR,* Series A, vol 3.
[24] See para 2.5 above.
[25] Set out in full in Appendix C, so far as is relevant.

extends beyond institutions and procedures which are "criminal" in nature.[26] This particular point, however, would not seem to arise in respect of any binding over proceedings, even those pursued under section 115 of the Magistrates' Courts Act 1980. Although civil in nature, they have many criminal characteristics.[27] It follows that the unfortunately ambiguous nature of binding over procedures may well lead to their being considered to be of a criminal nature for the purposes of Article 6, even though the reverse side of the same ambiguity raises questions under Article 5(1)(c) as to whether the proceedings are for the investigation of an offence.[28] It would therefore be unwise to assume that binding over proceedings are not subject to scrutiny under Article 6.

5.17 The requirements of Article 6 would be regarded by any English criminal lawyer as axiomatically part of a fair trial, and there has never been any suggestion that orthodox English criminal (or civil) procedures fall foul of them in any way. Until recently, binding over proceedings did not follow, or at least it could not be certain that they would follow, those orthodox English rules. The rule that the person to be bound over did not have to be told the exact reasons on which the court proposed to proceed, so that he could make representations, was an example of this. In the same way that this was a departure from English principle, so, too, it gave rise to considerable difficulties under the Convention. The recent insistence by the higher courts on something resembling a fair procedure before a binding over order is made[29] has probably cured this objection, although it remains unfortunate that there are still no formal rules governing the procedure for binding over by what is aptly described as the summary process.[30]

5.18 However, there is one aspect of binding over which may not be accommodated so easily. The "forthwith" or summary procedure may be invoked not merely against the defendant in a criminal case in substitution for a conviction, but also against an acquitted defendant, or even a witness.[31] If the proceedings are properly handled, according to the more recent procedural requirements mentioned in paragraph 4.48 above, the grounds for binding over should be investigated anew, in effect as a new and separate trial. Nevertheless, even if this is done, there is something distinctly odd

[26] See e.g. *Annas v Austria* [1971] *Publ ECHR*, Series A, vol 13, p 39; *Engel v Netherlands* [1976] 1 EHRR 647.

[27] See paras 4.32–4.33 above.

[28] See para 5.12 above.

[29] See para 4.48 above.

[30] See para 2.27 above.

[31] See paras 4.43–4.46 above.

in a person being brought before the court to meet a particular charge successfully, only to be convicted on a quite different basis; or in someone being summoned as a witness only to be converted into a defendant. We think it likely that if such events were scrutinised under the Convention, a tribunal would need particular reassurance that in these ad hoc binding over proceedings the person who was to be bound over had received, for example, the "adequate time and facilities for the preparation of his defence" which Article 6(3)(b) affords to a person "charged with a criminal offence".

E. FREEDOM OF SPEECH

5.19 Binding over has sometimes been used, and has been criticised for being so used, with the object or effect of preventing the expression of certain views in public, or of preventing certain forms of public demonstration.[32] Articles 10 and 11 of the Convention[33] guarantee freedom of expression and assembly, subject to permitting a number of circumstances in which those rights may be restricted.

5.20 In most, or perhaps, all of the cases in which binding over could be properly used by a court under the present rules, one of those exceptions would very arguably be present. For instance, Article 10 permits limitations on the right to freedom of expression for the prevention of disorder or for the protection of the rights of others. Article 11, for its part, permits restrictions on freedom of (it should be noted, peaceful) assembly for the protection of rights and freedoms of others.

5.21 These restrictions must, however, be "prescribed by law and necessary in a democratic society". Whether any given inhibition is necessary in a democratic society is a matter of judgement which can only be determined ad hoc in any particular case. The Court has, however, adopted a fairly stringent approach. For example, in the *Sunday Times* case it held that there had to be shown "pressing social need" in order to prohibit, as a contempt, a newspaper article discussing a current case in a manner which might put pressure on the parties.[34]

5.22 Of more general importance is the requirement that the inhibition must be "prescribed by law". Binding over will not satisfy this requirement, whatever the circumstances of any particular case, unless the rules on which it is based meet the Convention's standards of certainty of "law". As we have suggested in paragraphs

[32] See para 4.61 above.

[33] Set out in Appendix C, so far as is relevant.

[34] For the domestic decision, see *A-G v Times Newspapers* [1974] AC 273. For the Court's (majority) ruling see [1979] 2 EHRR 245.

5.6–5.7 above, this standard is not attained by binding over on grounds of *contra bonos mores*, and may not be attained by binding over on grounds of breach of the peace. This means that there is a significant danger that binding over orders which have the effect of inhibiting freedom of speech or assembly will not benefit from any of the exceptions to Articles 10 and 11, and will therefore be illegitimate under those articles of the Convention, as well as under the other articles which we have discussed in this Part.

F. CONCLUSION

5.23 This survey of the particular requirements of the Convention which might be resorted to in cases of binding over has tended to reinforce our original impression that a reference to the worked-out principles of fairness and due process which have been developed under the Convention would show that the procedure falls short of basic requirements of certainty and fair procedure that are taken for granted in other areas of English domestic law.

PART VI
SOME AREAS OF PARTICULAR CONCERN: A JUDICIAL WARNING SYSTEM?

A. SOME AREAS OF PARTICULAR CONCERN

1. Introduction

6.1 In Part IV of this Report we gave our reasons for concluding that there was no sensible course open to us other than to recommend the abolition of binding over.[1] The effect of the discussion in Parts III and V has been to show that such a step would not be open to objection on practical or pragmatic grounds, because binding over does not fulfil any general social function which is not already supplied by other rules of law, mainly to be found in the criminal law. Not only does it not conform with the growing jurisprudence of the European Court of Human Rights,[2] but it is also out of tune with modern developments in statute law[3] and in the way in which less serious cases are increasingly being handled outside the court system altogether.[4]

6.2 In this Part we will be concerned to test the validity of these conclusions with particular reference to some of the issues which feature most prominently in any discussions of binding over and which are often quoted as demonstrating the merits of binding over as an institution. Our main purpose in conducting this review was to examine whether the abolition of binding over would leave gaps in the law which would have to be filled by some alternative procedural device.

6.3 These issues share no other unifying factor. Some of them arise from particular factual situations in which binding over is currently used or sought to be used. Others involve other institutions or practices which might be affected by the abolition of binding over. We deal with them in no specific order. We will begin with a topic which has to be considered in this context, the power of arrest for breach of the peace.

2. Arrest for breach of the peace

6.4 We have already described how someone may be arrested without warrant at common law either for causing a breach of the peace or where it is reasonably apprehended that he is likely to cause a breach of the peace.[5] These common law powers of arrest have been supplemented by explicit statutory powers of arrest in two recent Acts of Parliament. The "general arrest conditions" which are now contained in the Police and Criminal Evidence Act 1984[6] give a constable a power of arrest if he has reasonable grounds for believing, among other things, that arrest is needed to prevent

1 See in particular paras 4.89–4.91 above.
2 See Part V generally, and in particular para 5.23 above.
3 See paras 3.3–3.21 above.
4 See paras 3.22–3.31 above.
5 See para 2.13 above.
6 Section 25(3)(d)–(e).

physical injury or damage to property or an offence against public decency, or to protect a child or other vulnerable person. And the Public Order Act 1986[7] created a power of arrest in the case of threats, abuse or insults, if someone engages or continues to engage in such offensive conduct immediately or shortly after a constable has warned him to stop it.

6.5 Arrest for breach of the peace was not discussed in the Working Paper, except as an incidental part of the discussion of domestic violence. Moreover, we specifically excluded any issue relating to police powers from our review of Offences Relating to Public Order,[8] although we concluded in our report on that subject that all the existing police powers, including the power to arrest for breach of the peace, were supportable and desirable. For example, we expressed the view that "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".[9]

6.6 The much closer study we have directed at arrest for breach of the peace during this inquiry, however, indicates that it is vulnerable on a number of grounds. In particular we have indicated in paragraph 5.14 above that arrest for breach of the peace may be open to objection under the principles of the European Convention even when it is used as a preliminary to proceedings for binding over. The abolition of binding over might, therefore, not make a significant difference to arrest for breach of the peace. But even if we are wrong about this, and the availability of binding over does legitimate arrest for breach of the peace, we do not believe that the abolition of binding over, and hence the creation of a difficulty about using arrest for breach of the peace, will cause significant practical difficulty.

6.7 In relation to actual or threatened violence we show in paragraph 6.17 below that in the context of domestic violence this will almost always be the subject of a separate criminal offence, and the arrest powers of the Police and Criminal Evidence Act 1984 will be available.

6.8 In relation to offensive language or conduct which can now, however controversially, be a breach of the peace as an incitement to unlawful violence by others,[10] section 5(4) of the 1986 Act provides a power of arrest in the case of threats, abuse or insult. Some have expressed concern that this power is only exercisable when the accused is warned

7 Section 5(4).

8 Working Paper No 82, para 1.13; (1983) Law Com No 123, paras 7.15–7.17.

9 (1983) Law Com No 123, para 7.14.

10 See paras 4.20–4.26 above.

by a constable to stop and does not do so. Thus, it is alleged, the streetwise trouble-maker is at complete liberty to go round the corner and start all over again. We doubt whether this is a problem which is likely to arise very often. However, if it is thought that the statutory provision which has been so recently introduced is too limited, it would be preferable to strengthen it by amendment. We cannot accept that this example could justify the retention of the whole institution of binding over. Since we have not consulted on the point, we are not in any position to make recommendations about the creation of a separate power of arrest and process in cases which might at the moment be dealt with by an arrest for breach of the peace followed by binding over.

3. Domestic violence

6.9 The research study conducted in 1983 to 1984 revealed many instances of binding over in "domestic" disputes between husbands and wives, cohabiting couples or other family members, and several in cases of molestation by former spouses or of pestering a female by following or telephoning.[11] We should be reluctant to recommend the abolition of any remedy which played a valuable role in protecting the victims of domestic violence. We are convinced, however, that the functions currently performed by binding over in such cases not only can but should be performed in other ways.

6.10 Binding over is thought to have several attractions in this context. It was suggested in the Working Paper[12] that a difficult domestic situation may often be defused by the removal of the aggressor from the scene.[13] He may then be brought before the court on complaint and bound over, rather than prosecuted. This can offer immediate protection for the victim while acknowledging that prosecution may not be the most effective or desirable way of providing her with protection against future attack. If a prosecution is launched, the court may also use its powers of binding over when the prosecutor is unwilling to put a female complainant into the witness box. This may happen either at an early hearing or on the trial date, both when the prosecution has not wished to put pressure on an unwilling witness and when the prosecutor judges that binding over would be in the best interests of the complainant herself, in achieving some guarantee of future behaviour without putting her through the rigours of the trial process.

[11] Working Paper No 103, para 5.2(c); see also the Schedule to Appendix D below.
[12] Working Paper No 103, paras 7.8–7.9 and 7.12.
[13] Whether by way of arrest for breach of the peace or for an offence.

6.11 It is now widely acknowledged that, in deciding whether or not to pursue a prosecution, prosecuting authorities must be sensitive to the special problems faced by the victims of domestic aggression. We recognise that a woman who invokes the criminal process against a husband or cohabitant can find herself in an even more vulnerable position, whether through increased fear for her own safety or through economic, social or emotional pressures.[14]

6.12 However, binding over is not the appropriate solution to such problems, for two reasons. First, as was forcefully pointed out on consultation, in particular by women's groups and those who work in the domestic violence field, a mere binding over order is an inadequate and trivialising response to violent conduct.[15] For this reason, binding over should not be available in cases which ought to be prosecuted to conviction[16] and attract the appropriate sentence. Secondly, it should not be seen as an easy way out in cases where the prosecution is not to be pursued, whether for want of evidence or for any other reason. If the prosecution cannot or will not prove its case, it is wrong that a binding over should be imposed upon the accused on arbitrary grounds. The case for providing protection for the complainant should be properly explored and any protection afforded should be properly tailored to her needs and to those of her family.[17]

6.13 The obvious answer in such cases is to invoke the civil law. There is already a range of civil remedies for domestic violence and other forms of molestation. These are supported by coercive powers not found in other civil cases, principally the ability to

[14] Criminal Law: Rape within Marriage (1992) Law Com No 205, para 4.22.

[15] Specific instances are not generally quoted in the evidence, but it is instructive to consider the history set out in *Wilsher v Wilsher* [1989] 2 FLR 187, where Kerr LJ, describing an incident which led to the making of a non-molestation order, said that the accused was bound over when he "hit [his wife] about the head and caused her substantial injuries". Kerr LJ characterised this as an "incident of severe violence". See also the discussion of the attitude of the Crown Prosecution Service to domestic violence and the difficulties of obtaining co-operation from the victim in a court prosecution which is contained in House of Commons Home Affairs Committee, Third Report, Domestic Violence (Session 1992–93) HC 245-I ("the Home Affairs Committee Report"), paras 44–50; and the Statement of Prosecution Policy on Domestic Violence which forms Annex A to the Government Reply to the Third Report from the Home Affairs Committee, Cm 2269, June 1993.

[16] The improved powers which now exist, under the Criminal Justice Act 1988, ss 23 (1) and (3) (b), to admit hearsay evidence in criminal proceedings may well be relevant in this connection.

[17] See the Home Affairs Committee Report (see n 15 above), para 71 and Annex A to the Government Reply (see n 15 above) which shows in section 9 that modern prosecution policy is to recognise that a binding over order may be appropriate in some minor cases but is less likely to be regarded as an appropriate disposal in serious cases or cases where there is a history of violence.

attach a power of arrest to an injunction or order. However, there are gaps and inconsistencies in the remedies available at present, particularly in magistrates' courts.[18] The Commission has now published its report on domestic violence[19] in which we recommended that the remedies for domestic violence should be strengthened and standardised across all courts having jurisdiction in family proceedings.

6.14 We said in that report that there should be two basic remedies. A non-molestation order would be available between all people who have some form of family or household connection, described in our report as "associated persons".[20] An order dealing with the occupation of the family home would be available in favour of an applicant with a right to occupy the home against any associated person, and in favour of an applicant who is not so entitled against a cohabitant, former cohabitant or former spouse. Whenever there has been the use or threat of violence, the court should attach a power of arrest to specified provisions in the order, unless the applicant (or any relevant child) will be adequately protected without it.[21] If a person is arrested under such a power, all courts should have power to remand him either in custody or on bail. In our view, once these recommendations are put into effect, these remedies would provide a more than adequate substitute for binding over powers to regulate the conduct of any of the people we describe as "associated persons".

[18] See Working Paper No 103, paras 7.10–7.12; the problems are explored in more detail in Working Paper No 113, Domestic Violence and Occupation of the Family Home (1989).

[19] Family Law: Domestic Violence and Occupation of the Family Home (1992) Law Com No 207.

[20] Clause 2 of the draft Bill annexed to the Report reads: "For the purposes of this Act a person is associated with another person if–
(a) they are or have been married to each other,
(b) they are cohabitants or former cohabitants,
(c) they live or have lived in the same household, otherwise than merely by reason of one of them being the other's employee, tenant, lodger or boarder,
(d) they are relatives,
(e) they have at any time agreed to marry each other (whether or not the agreement has been terminated),
(f) they have or have had a sexual relationship with each other (whether or not involving sexual intercourse),
(g) they are the parents of a child or, in relation to any child, are persons who have or have had parental responsibility for that child (whether or not at the same time), or
(h) they are parties to the same family proceedings (other than proceedings under this Act)".

[21] The Home Affairs Committee supported these recommendations in its report (see para 6.12, n 15 above) at para 114.

6.15 One advantage of binding over is that it is imposed by the court rather than invoked by the victim herself. In some cases the victim is not yet ready or able to invoke a civil remedy on her own behalf. Hence, an important part of the package of proposals in our report was that where the police have been involved in an incident of molestation or actual or threatened violence, or its aftermath, they should have power to initiate proceedings for a non-molestation or occupation order on behalf of the victim.[22] This would enable them to respond sensitively to the needs of the case, whether or not a prosecution was also thought appropriate or desirable.

6.16 We were sorry to see that the House of Commons Home Affairs Committee recommended the rejection of this aspect of our proposals. We did not have the opportunity of discussing this point with the Committee, and we maintain our view that this change in police powers would be desirable.[23] We have shown in this Report how the ancient powers to arrest a person for breach of the peace and to bring him to court for the purposes of a binding over fall into something of a no man's land between the civil and the criminal jurisdiction of the magistrates' courts. It may therefore be simplistic to draw a rigid distinction between different aspects of police powers, by trying to pigeonhole them into the "civil justice system" or the "criminal justice system" in cases which arise from complaints of violence or threats of violence to the person.[24] The acceptance of our recommendations in this respect would go a long way to filling any gap which might be thought to exist once the wholly unsatisfactory remedy of binding over is abolished, as we recommend.

6.17 We also consider that the police's powers to intervene in a domestic violence context are not enhanced by the power to arrest for breach of the peace. As we have explained in paragraph 4.15 above, the touchstone of "breach of the peace" is now actual or threatened violence.[25] Bearing in mind that the crime of assault encompasses threats

[22] Law Com No 207, paras 5.18–5.23 and clause 17 of the draft Bill annexed to the Report.

[23] Home Affairs Committee Report (see para 6.12, n 15 above), paras 115–118; in their evidence to the Committee, the Association of Chief Police Officers opposed our recommendation, HC 245-II, p 26, while the Police Federation said that it should be welcomed as a positive step forward, HC 245-II, p 35; see also the Government Reply to the Home Affairs Committee Report (see para 6.12, n 15 above), paras 93–96.

[24] When the Government referred in its Reply to the Home Affairs Committee (see para 6.12, n 17 above), para 95, to a novel extension of police powers from a criminal function to a civil function it appears not to have taken into account the fact that this blurring of functions already exists in the context of binding over procedures.

[25] The difficulties of A tempting or causing B to be violent do not arise in this context, since it would hardly be reasonable to arrest a husband for a "breach of the peace" which consisted of conduct by him which was so unreasonable as to tempt his wife to employ violence against him; nor, indeed, *vice versa*.

of violence,[26] it is hard to envisage any incident of domestic violence warranting arrest which did not also amount to the commission of a crime. In such cases the police already possess powers of arrest under the Police and Criminal Evidence Act 1984[27] if, as would be likely to be the case, there are grounds for expecting physical injury or damage to property, or a need to protect a child or other vulnerable person.

6.18 It is possible that there may be some reluctance on the part of the police to use these new statutory powers of arrest. This problem should be resolved by education when police officers are being taught how to perform their duties of law enforcement. It will not be cured, and there should be no attempt to cure it, by encouraging the police to use other powers which are less well defined and less easily controlled, particularly when these powers rest not on recent legislation but on obscure and antique provisions of the common law. We appreciate that there may be a reluctance to force the police to pursue a prosecution in every case where arrest has seemed a sensible option the night before. This is one of the reasons why we explored the possibility of some form of judicial warning system, as we describe in paragraphs 6.27–6.42 below. There are, however, existing means of diverting people from the prosecution process[28] which could also be employed in appropriate cases.

6.19 There is of course no power to arrest for acts *contra bonos mores*, nor should there be, if for no other reason than that such a power would be extremely difficult to justify under Article 5.1(c) of the European Convention. Whether there should be instant sanctions against molestation falling short of violence[29] is therefore a question for consideration in the context of the civil remedies against molestation.[30] Molestation is often the aftermath of actual or threatened violence, so that under our proposals[31] a power of arrest could then be attached to an order. We do not, however, consider that such a power would be appropriate in a case where violence had never been used or threatened.

26 *Archbold, Criminal Pleading, Evidence and Practice* (1992 ed), para 19–166.

27 Police and Criminal Evidence Act 1984, s 25(3)(d)–(e).

28 See paras 3.23–3.29 and 3.31 above.

29 See Working Paper No 103, para 7.11.

30 In the recent case of *Khorasandjian v Bush* [1993] 3 WLR 476 the Court of Appeal dismissed an appeal against an injunction restraining the defendant from harassing a former girl friend with unwanted telephone calls to her parents' home where she was known to be living.

31 See para 6.14 above.

4. Neighbour disputes

6.20 In the Working Paper we treated these[32] alongside domestic disputes, but the issues are in our view somewhat different. Section 5 of the 1986 Act has, however, substantially widened the extent to which the criminal law is available in such cases.[33] This being so, we are unconvinced that further specific provision needs to be made. The methods of informal mediation which we reported in the Working Paper[34] would seem worthy of encouragement, but we have conducted no further study in that area.

5. Peeping Toms

6.21 Particular concern has been expressed lest the abolition of binding over would remove the only effective way of dealing with peeping Toms.[35] We consider, however, that section 5 of the 1986 Act now makes sufficient provision.

6.22 In *Nicholson v Gage*[36] it was held that the behaviour of a peeping Tom could be "insulting", but that no conviction could be obtained under section 5 of the Public Order Act 1936 where the only persons to see the behaviour were two policemen, because it could not be assumed that they would be likely to commit a breach of the peace. Under the 1986 Act, however, all that has to be established is that the observer is likely to be caused harassment, alarm or distress. The victim of the peeping Tom would clearly fall into this category, as, normally, would any third party. The latter point was confirmed in *DPP v Orum*[37] where the Divisional Court held that police constables could prima facie be caused harassment, etc, under the 1986 Act. Contrasting the position under the previous law, McCullough J said: ". . . what matters now is not the likely physical reaction to the conduct complained of, but the likely mental reaction to it. It is improbable in the extreme that any police officer would ever be provoked by threatening, abusive or insulting words or behaviour to cause a breach of the peace, but it is by no means impossible that such an officer may not feel harassed, alarmed or distressed as a result of such words or behaviour."

[32] See Working Paper No 103, paras 7.8–7.12.

[33] See the discussion of *Wilson v Skeock* in para 3.11, n 26 above.

[34] Working Paper No 103, para 7.3.

[35] See Working Paper No 103, para 5.3, and also the view expressed in *Hansard* (HC) 26 January 1960, vol 616, col 54, that a Bill to repeal the Justices of the Peace Act 1361 was a ". . . charter for peeping Toms and eavesdroppers".

[36] (1984) 80 Cr App R 40.

[37] [1989] 1 WLR 88.

6.23 The peeper has, necessarily, to be seen by someone before any action can be taken against him. We consider that a law which provides for sanctions to be taken against him if, but only if, the observer would reasonably be distressed by his conduct provides proper and adequate control of this type of behaviour. At the same time we are not impressed, any more than we were in the case of domestic violence, by arguments that it would be desirable for such conduct to be dealt with by non-criminal sanctions.

6. Unlawful parties and noise generally

6.24 This topic is dealt with here not because it has featured much in previous discussions of binding over, but because it has recently fallen into the category of "something ought to be done about it": a vague feeling which leads some to turn to binding over as a readily available social response.

6.25 In fact, binding over would be a most unsuitable deterrent, at least for very large parties which create a great deal of noise in their neighbourhood at night. Unless recognisances were set at an unprecedentedly high level, such people (even if they were caught on their second offence) might well be willing simply to pay up. The power of binding over in this respect would appear to be substantially less of a deterrent than a civil injunction.

6.26 In any event, the powers of local authorities to control nuisance by noise in their local area have been greatly strengthened by two very recent Acts of Parliament, the Environmental Protection Act 1990[38] and the Noise and Statutory Nuisance Act 1993.[39] The remedies provided by these statutes are not, however, designed for instant redress and become available only on breach of a notice and the willingness of a local authority to take the offender to court. If further powers are needed, then an example is available in Scotland, where legislation[40] empowers a police officer to require a person making certain types of noise to desist, on pain of a small financial penalty for non-compliance. If stronger powers are still needed, then a specific offence of making noise at night would be the appropriate legislative solution, coupled with special procedures to stop the noise and more rigorous criminal sanctions for

[38] Environmental Protection Act 1990 Part III (ss 79–82) contains new streamlined provisions for the control of statutory nuisances, including nuisance by noise.

[39] This Act, which comes into force on 5 January 1994, contains explicit provisions making noise in a street a statutory nuisance and strengthens the powers of local authorities to control noise from loudspeakers and audible intruder alarms.

[40] Civic Government (Scotland) Act 1982, s 54.

disobedience. This would be a legislative development in line with the other recent developments we have noted in Part III above.[41]

B. A JUDICIAL WARNING SYSTEM?

6.27 We are satisfied that there are substantial objections of principle to the retention of binding over to keep the peace or to be of good behaviour. These objections are, in summary, that the conduct which can be the ground for a binding over order is too vaguely defined; that binding over orders when made are in terms which are too vague and are therefore potentially oppressive; that the power to imprison someone if he or she refuses to consent to be bound over is anomalous; that orders which restrain a subject's freedom can be made without the discharge of the criminal, or indeed any clearly defined, burden of proof; and that witnesses, complainants or even acquitted defendants can be bound over without adequate prior information of any charge or complaint against them.

6.28 We considered carefully the practical implications of any recommendation we might make that binding over should be completely abolished, and in particular whether such a course would leave any unacceptable gap in the law. When we took into account the functions which are at present performed by binding over, and the alternative legal provisions which are now available in those cases,[42] there appeared to be only one area in which its abolition would leave a significant and possibly unacceptable gap in the law.

6.29 From the evidence we received, it appeared to us that there were some advantages in the present use of binding over by a court to give an accused person a warning as to his future conduct without burdening him with a formal criminal conviction. In some circumstances this leads to the saving of court time and public money. We therefore considered whether it would be practicable to introduce new rules and procedures which would serve to fulfil some part of these functions, if binding over itself were to be abolished.

6.30 In order to test the practicality of such a scheme we sent out an informal discussion paper in the summer of 1990 to a number of people and organisations who had responded to our original discussion paper or who had otherwise expressed interest in this subject. The object of this consultation exercise was to explore whether it would be possible to create some means whereby a criminal prosecution might be

[41] See paras 3.1–3.21 above.

[42] See paras 3.3–3.19 above.

"settled" with some form of warning being given by the court, but without a conviction actually being recorded. The adoption of such a course would avoid the consequences of a criminal conviction, which is sometimes disproportionate in social and employment terms, even if it is accompanied by an absolute discharge. It might also provide an alternative means of resolving social disputes, in particular some domestic and neighbour disputes, which are better disposed of without the necessity of making criminal findings.

6.31 The results of this second consultation exercise were totally inconclusive. This was in part due to the fact that a number of respondents were so attracted by the relative informality and looseness of the present binding over arrangements that they were very reluctant to contemplate their abolition in any circumstances. This difficulty aside, however, there was a considerable measure of agreement that if any alternative warning scheme was to be contemplated a lot of work would have to be done in working up the details of it. This discussion centred in particular on the scope and flexibility of the proposed system, on matters of procedural detail, and on its overall effectiveness in terms of saving costs and time.

6.32 On the scope of any warning scheme, it was argued that the extent to which such a scheme would be acceptable or workable in practice would be a matter of keen debate and that it would be best left to discussion between those who would be directly involved in the process. This point was emphasised by the responses we received from representatives of the police. These included comments to the effect that although greater certainty would probably be achieved, any warning scheme which purported to replace the vaguely defined but far-reaching binding over powers would have the appearance of being rather rigid in structure, and unwieldy and difficult to use. These respondents also stressed the fact that policing involved wider powers than merely enforcing the law, and that the proposed warning system was misleading in its noticeable assumption that those who would be subjected to it would be charged with criminal offences. A very experienced justices' clerk observed that the ability of the new procedure to provide a simple immediate restraint was limited, and he was anxious that justices would be left powerless in some circumstances if binding over was abolished and a warning scheme substituted for it. He suggested that if a warning system was to be introduced, then if an accused person was to re-offend in the future in a similar way he should be made to answer the original charge as well. Other respondents criticised the proposed scheme as being too narrow because it failed to take into account the existence of other ways of diverting people away from criminal prosecution, such as inter-agency initiatives and the use of formal and informal police cautioning.

6.33 On questions of procedure, there was concern among some respondents about the necessity for a defendant to make a formal admission of guilt as a precondition to the settlement of a case by a warning. They were troubled that this could result in uneven justice because an accused person might be admitting guilt only because he knew he was going to be let off with a warning. Two circuit judges and one justices' clerk observed that the binding over procedure was superior since no such admission was required and the order dealt directly with the defendant's future behaviour. A number of respondents drew our attention to the different types of police cautioning procedures which are now being developed. One respondent suggested that there were now so many non-prosecution disposals that this might mean that binding over was inappropriate or no longer needed in such cases.

6.34 A recurring criticism of the proposed new warning procedure was that it merely duplicated other methods which already existed within the legal system of diverting offenders away from the criminal process.[43] Virtually all our respondents acknowledged the usefulness of the binding over procedure in cases where the public interest favoured the bringing of a person before a court but did not justify pursuing the case to conviction or acquittal.

6.35 No clear response was received on consultation to our question whether there were any types of case for which a judicial warning procedure might be particularly suitable or unsuitable. We received a number of suggestions that it would form part of the armoury of options available to the court, and different respondents identified as possible candidates domestic disputes, minor or petty offences, disputes between neighbours, and cases where there was a need to defuse a potentially dangerous or violent situation in the absence of any specific criminal offence. In general, the cases suggested for a warning procedure covered every situation in which the public interest favoured the giving of some sort of formal reprimand. Examples of petty offences which might qualify for this sort of treatment were petty shoplifting, cases where there had been minor provocation or nagging, and nuisances who had failed to breach the criminal code. There was considerable concern expressed by some respondents that such a scheme should not be used in cases where no criminal offence was committed.

6.36 There were mixed views, too, on a proposal that the prosecution should undertake the responsibility of deciding whether a case was suitable for the suggested warning process and of telling the court, on a joint application, why it would be suitable,

[43] See paras 3.23–3.29 and 3.31 above.

although most respondents favoured this idea. Concern was expressed about the position of unrepresented litigants in this context. Most respondents felt that the court should have the power to decline to dispose of a case by a warning, even though both parties supported the proposal. One very influential respondent, who was not in favour of the scheme as a whole, said categorically that he doubted whether the warning procedure added usefully to the court's ability to dispose of criminal cases.

6.37 Most respondents favoured the court having an ability to dispose of a case by a warning even if no application to that effect had been made. This proposal was opposed, however, by one respondent who argued that to allow courts to impose warnings without the consent of the prosecution would be contrary to principle.

6.38 Opinion was almost equally divided on the proposition that it should be a precondition of an application for disposal of a case by warning that the accused should make a formal admission of the offence charged. Some suggested that to compel an admission of guilt would nullify the principle behind the warning system or lead to unnecessary trials taking place, and there was one suggestion that an offer by the accused to submit to the jurisdiction of the court would be sufficient. Worries were expressed that this requirement would lead to undesirable plea-bargaining and a waste of court time, given the existence of the police cautioning procedures.

6.39 There was an almost total absence of any consensus about the form which any warning should take or on the length of its operative period (up to two years, three years and five years being suggested by different respondents).

6.40 Again, there was little in common between respondents on the issue whether employers should be allowed to make inquiries about the existence of warnings or past warnings. Some feared that warnings would become equated with previous convictions, others felt that during the currency of a warning period information about a court warning should be made available, but not afterwards.

6.41 In general, respondents felt that it would be wrong to limit the warning procedure to cases in which the accused had had legal advice, although it was pointed out that duty solicitors are now available in most courts. One respondent expressed the fear that to allow the warning procedure to be used only in cases where there was legal representation would eliminate most of the cases in which it might be appropriate.

6.42 Finally, most respondents were strongly in favour of any warning scheme which might be adopted being available in the Crown Court as well as in the magistrates' courts.

PART VII
CONCLUSIONS AND RECOMMENDATIONS

7.1 For the reasons set out in this Report, we are of the very clear view that the powers of binding over which are the subject of this reference should be abolished without replacement. We are conscious that we are recommending the abolition of powers, reinforced over six hundred years ago by statute, which go back deep into our history. We are also conscious that the majority of those who responded to our consultation paper were in favour of the retention of those powers, and that a number of courts today still regard the availability of these powers as a flexible and useful means of defusing difficult situations and of taking the heat out of the court process by achieving a settlement of an acrimonious dispute without too much loss of face on either side and without the court having to make specific findings against anybody.

7.2 However, we are convinced for the reasons that we have given that there is no appropriate way of retaining these powers without depriving them of the informality which is regarded by many as their most attractive feature. Our inquiries showed that it was impractical to invent a new judicial warning scheme as a replacement to binding over, and if a court considers that the appropriate way of disposing of a case which has reached the court is by means of a caution, then there is already a police cautioning system in being, if both police and offender are willing to have recourse to it, and there is no other impediment to its use.

7.3 Although this does not form any part of the present reference, we consider that the common law power to bind over a defendant convicted in the Crown Court to come up for judgment[1] requires critical review at an early date, since it contains a number of the same objectionable features as the types of binding over with which we have been concerned in this Report.

7.4 In conclusion, *we recommend* that:

> the powers to bind over to keep the peace and be of good behaviour under the Justices of the Peace Act 1361 and at common law and in related legislation should be abolished without replacement.

7.5 Appendix A to this Report contains a draft Bill which gives effect to these recommendations.

(Signed) HENRY BROOKE, *Chairman*
TREVOR M. ALDRIDGE
JACK BEATSON
RICHARD BUXTON
BRENDA HOGGETT

MICHAEL COLLON, *Secretary*
14 December 1993

[1] See para 2.16 above.

APPENDIX A

Draft

Binding Over Bill

ARRANGEMENT OF CLAUSES

Clause

1. Abolition of powers of binding over to keep the peace or to be of good behaviour.
2. Repeals and consequential amendment.
3. Short title, commencement and extent.

SCHEDULE:—

Repeals.

A

BILL

INTITULED

An Act to abolish all powers of binding over to keep the peace or to be of good behaviour.

A.D. 1993.

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:—

Abolition of powers of binding over to keep the peace or to be of good behaviour.

5 **1.**—(1) All powers of binding over to keep the peace or to be of good behaviour—

(a) whether exercisable by justices of the peace or by courts of any description, and

(b) whether exercisable by virtue of any enactment or otherwise,

10 are hereby abolished, together with all concurrent powers of committal to prison or other detention exercisable in the event of a person declining to be bound over.

(2) The powers abolished by this section are abolished in relation to all purposes and circumstances for or in which those powers would have 15 been exercisable apart from this section.

(3) In particular, the abolition by this section of any power that, apart from this section, would have been exercisable on the conviction of an offender extends to the exercise of the power in those circumstances.

(4) Nothing in this section shall be read as applying to the power of the 20 Crown Court to bind over a convicted offender to come up for judgment when called upon but meanwhile to be of good behaviour.

Repeals and consequential amendment.

2.—(1) The enactments mentioned in the Schedule to this Act are hereby repealed to the extent specified in the third column of that Schedule.

1361 c. 1.

25 (2) The Justices of the Peace Act 1361 shall, so far as it confers any power abolished by section 1 of this Act, cease to have effect.

EXPLANATORY NOTES

Clause 1 implements the Commission's recommendation. It abolishes without replacement the powers to bind over to keep the peace and be of good behaviour under the Justices of the Peace Act 1361 and at common law and under Section 115 of the Magistrates' Courts Act 1980 and related legislation.[1]

Subsection (1) effects the abolition of the powers, and all concurrent powers exercisable in the event of a person declining to be bound over.

Subsection (2) is included to make it clear that all possible uses of the powers involved are covered by the abolition of those powers.[2]

Subsection (3) is included to make it clear that abolition of the powers extends to abolition of the powers in the event of the conviction of an offender.[3]

Subsection (4) is included to make it clear that the power of the Crown Court to bind over a convicted offender to come up for judgment, which is mentioned in Section 79(2)(b) of the Supreme Court Act 1981, is not affected by the provisions of Clause 1.[4]

Clause 2 deals with repeals and makes a consequential amendment.

[1] See para 7.4 above.

[2] See paras 4.73-4.88 above.

[3] See paras 4.74-4.78 above.

[4] See paras 2.16, 7.3 above.

1991 c. 53.

1980 c. 43.

(3) In section 58 of the Criminal Justice Act 1991 (binding over of parent or guardian), in subsection (3) (which applies section 120 of the Magistrates' Courts Act 1980), for "a recognisance to keep the peace" there shall be substituted "a recognisance such as is mentioned in that section; but a magistrates' court shall not, in connection with a recognisance entered into in pursuance of an order under this section, make a declaration of forfeiture under that section except by order made on complaint". 5

Short title, commencement and extent.

3.—(1) This Act may be cited as the Binding Over Act 1993.

(2) This Act shall come into force at the end of the period of two months beginning with the day on which it is passed. 10

(3) Nothing in this Act affects—

(a) any binding over order, or

(b) any order for committal to prison or other detention,

made before this Act comes into force; and anything that, apart from this Act, could have been done by virtue of, or in relation to, any such order may be so done as if this Act had not been passed. 15

(4) This Act extends to England and Wales only.

EXPLANATORY NOTES

Clause 3 deals with the short title, commencement date, and extent of the Bill and contains transitional provisions preserving the effect of orders made before commencement.

SCHEDULE

Section 2.

REPEALS

Chapter	Short title	Extent of repeal
1956 c. 44.	The Magistrates' Courts (Appeals from Binding Over Orders) Act 1956.	The whole Act.
1968 c. 69.	The Justices of the Peace Act 1968.	Section 1(7).
1971 c. 23.	The Courts Act 1971.	In Part I of Schedule 9, the entry relating to the Magistrates' Courts (Appeals from Binding Over Orders) Act 1956.
1980 c. 43.	The Magistrates' Courts Act 1980.	Sections 115 and 116. In section 120, in subsection (1)— the words from "a recognizance" to "court or" (where first occurring), and the words ", subject to subsection (2) below,", and subsection (2). In Schedule 7, paragraph 16.
1983 c. 20.	The Mental Health Act 1983.	Section 47(5)(b) except the final "and".
1985 c. 23.	The Prosecution of Offences Act 1985.	Section 3(2)(c). In section 15, in subsection (1) the definition of "binding over proceedings", and subsection (4).
1988 c. 34.	The Legal Aid Act 1988.	In section 19(5), in the definition of "criminal proceedings", the words from "and also" (where first occurring) to "good behaviour".

APPENDIX B
RELEVANT EXTRACTS FROM ACTS OF PARLIAMENT

Justices of the Peace Act 1361

First, that in every County of England shall be assigned for the Keeping of the Peace, one Lord, and with him three or four of the most worthy in the County, with some learned in the Law, and they shall have Power to . . . .

. . . and to take and arrest all those that they may find by Indictment, or by Suspicion, and to put them in Prison: and to take of all them that be [not] of good Fame, where they shall be found, sufficient surety and Mainprise of their good Behaviour towards the King and his People . . .

Magistrates' Courts Act 1980, s 115

s 115(1) The power of a magistrates' court on the complaint of any person to adjudge any other person to enter into a recognizance, with or without sureties, to keep the peace or to be of good behaviour towards the complainant shall be exercised by order on complaint.

. . . .

(3) If any person ordered by a magistrates' court under subsection (l) above to enter into a recognizance, with or without sureties, to keep the peace or to be of good behaviour fails to comply with the order, the court may commit him to custody for a period not exceeding 6 months or until he sooner complies with the order.

Contempt of Court Act 1981, s 12(1) and (2)

12 (1) A magistrates' court has jurisdiction under this section to deal with any person who –

(a) wilfully insults the justice or justices, any witness before or officer of the court or any solicitor or counsel having business in the court, during his or their sitting or attendance in court or in going to or returning from the court; or

(b) wilfully interrupts the proceedings of the court or otherwise misbehaves in court.

(2) In any such case the court may order any officer of the court, or any constable, to take the offender into custody and detain him until the rising of the court; and the court may, if it thinks fit, commit the offender to custody for a specified period not exceeding one month or impose on him a fine not exceeding £1,000, or both.

Telecommunications Act 1984, s 43

43 (1) A person who –

(a) sends, by means of a public telecommunication system, a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or

(b) sends by those means, for the purpose of causing annoyance, inconvenience or needless anxiety to another, a message that he knows to be false or persistently makes use for that purpose of a public telecommunication system,

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

(2) Subsection (l) above does not apply to anything done in the course of providing a cable programme service (within the meaning of the Broadcasting Act 1990).

Sexual Offences Act 1985, s 1

1 (1) A man commits an offence if he solicits a woman (or different women) for the purpose of prostitution –

(a) from a motor vehicle while it is in a street or public place; or

(b) in a street or public place while in the immediate vicinity of a motor vehicle that he has just got out of or off,

persistently or, subject to section 5(6) below, in such manner or in such circumstances as to be likely to cause annoyance to the woman (or any of the women) solicited, or nuisance to other persons in the neighbourhood.

(2) A person guilty of an offence under this section shall be liable on summary conviction to a fine not exceeding level 3 on the standard scale (as defined in section 75 of the Criminal Justice Act 1982).

(3) In this section "motor vehicle" has the same meaning as in the Road Traffic Act 1988.

Public Order Act 1986, ss 4 and 5

4 (1) A person is guilty of an offence if he –

(a) uses towards another person threatening, abusive or insulting words or behaviour, or

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

with intent to cause that person to believe that immediate unlawful violence will be used against him or another by any person, or to provoke the immediate use of unlawful violence by that person or another, or whereby that person is likely to believe that such violence will be used or it is likely that such violence will be provoked.

(2) An offence under this section may be committed in a public or private place, except that no offence is committed where the words or behaviour are used, or the writing, sign or other visible representation is distributed or displayed, by a person inside a dwelling and the other person is also inside that or another dwelling.

(3) A constable may arrest without warrant anyone he reasonably suspects is committing an offence under this section.

(4) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding 6 months or a fine not exceeding level 5 on the standard scale or both.

5 (1) A person is guilty of an offence if he –

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

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

within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.

(2) An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the writing, sign or other visible representation is displayed, by a person inside a dwelling and the other person is also inside that or another dwelling.

(3) It is a defence for the accused to prove –

(a) that he had no reason to believe that there was any person within hearing or sight who was likely to be caused harassment, alarm or distress, or

(b) that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the writing, sign or other visible representation displayed, would be heard or seen by a person outside that or any other dwelling, or

(c) that his conduct was reasonable.

(4) A constable may arrest a person without warrant if –

(a) he engages in offensive conduct which the constable warns him to stop, and

(b) he engages in further offensive conduct immediately or shortly after the warning.

(5) In subsection (4) "offensive conduct" means conduct the constable reasonably suspects to constitute an offence under this section, and the conduct mentioned in paragraph (a) and the further conduct need not be of the same nature.

(6) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

Malicious Communications Act 1988, s 1

1 (1) Any person who sends to another person –

(a) a letter or other article which conveys –

(i) a message which is indecent or grossly offensive;

(ii) a threat; or

(iii) information which is false and known or believed to be false by the sender; or

(b) any other article which is, in whole or part, of an indecent or grossly offensive nature,

is guilty of an offence if his purpose, or one of his purposes, in sending it is that it should, so far as falling within paragraph (a) or (b) above, cause distress or anxiety to the recipient or to any other person to whom he intends that it or its contents or nature should be communicated.

(2) A person is not guilty of an offence by virtue of subsection (l)(a)(ii) above if he shows –

(a) that the threat was used to reinforce a demand which he believed he had reasonable grounds for making; and

(b) that he believed that the use of the threat was a proper means of reinforcing the demand.

(3) In this section references to sending include references to delivering and to causing to be sent or delivered and "sender" shall be construed accordingly.

(4) A person guilty of an offence under this section shall be liable on summary conviction to a fine not exceeding level 4 on the standard scale.

APPENDIX C
RELEVANT EXTRACTS FROM THE EUROPEAN CONVENTION OF HUMAN RIGHTS

Article 5

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so . . .

Article 6

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law . . .

. . . .

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence . . .

Article 10

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority . . .

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society . . . for the prevention of disorder or crime, . . . for the protection of the reputation or rights of others . . .

Article 11

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others . . .

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society . . . for the prevention of disorder or crime . . . or for the protection of the rights and freedoms of others.

APPENDIX D
EXAMPLES OF CASES IN WHICH BINDING OVER POWERS WERE USED

1. During the research study which we commissioned in 1983, courts were asked to provide a factual summary of the cases in which a binding over was the eventual outcome. Using these examples, some instances provided by the Justices' Clerks' Society in its 1981 submission, and others taken from reported cases and other sources, a "representative picture of the range of use of binding over"[1] was built up in the Working Paper in which cases fell into three main groups: public order, annoyance and distress, and neighbour and domestic disputes. In this Appendix we have looked again at that "representative picture" in order to consider whether binding over still has in 1993 a contemporary value such ". . . that its repeal would weaken the courts' response to potential trouble".[2] The cases which were listed on pages 39 to 43 of the Working Paper are listed again in the Schedule to this Appendix, with commentary on each.

2. The effect of this examination is to show that much of the conduct we listed in the Working Paper may now be covered by the "offensive" conduct offence contained in section 5 of the Public Order Act 1986 (or, if more serious, by section 4 of that Act), by specifically-tailored criminal offences created in recent legislation, or by special sanctions under domestic violence legislation. Some of the examples listed in the Working Paper are only described there in general terms, and this makes it difficult to ascertain which, if indeed any, criminal sanction is in fact available or appropriate. In relation to such conduct, it will generally be difficult to determine whether *any* condemnation by the law is warranted. When we link certain conduct to certain sanctions in this Appendix, this attribution is not intended to be definitive. It is intended to indicate that that particular sanction is likely to be available, if a particular case of conduct described in these general terms is in fact regarded as sufficiently serious to justify the coercive intervention of the law.

3. The sanction which is afforded by section 5 of the Public Order Act 1986 is the most difficult to apply in this respect. In Part III we have described the difficulty of ascertaining the limits of this new offence, especially as regards "disorderly

1 Working Paper No 103, para 5.2.

2 Justices' Clerks' Society, *Power to Bind Over* (1981), p 8, cited by Working Paper No 103 at para 5.1.

behaviour",[3] a difficulty which was recognised by the Government in its White Paper.[4] During debates on the Public Order Bill, Lord Scarman struck an apposite note: "It is a salutary warning that we should not expect the whole of our lives, in public places or elsewhere, to be regulated in detail by a series of offences and punishments emanating from a clause of the most general application."[5]

4. It follows that when we suggest that section 5 would be applicable to some of the cases on the list, we must enter the following caveats:

(i) In a number of the cases the conduct may well be "disorderly", because it would seem to be open to magistrates to find almost any human acts outside a narrowly conformist range of behaviour to be within the ambit of this rather "weazel word";[6] but it might be going too far to say that those within the hearing or sight of the conduct were likely to be caused harassment, alarm or distress, as opposed to irritation;

(ii) The statutory *mens rea* requirement of intention or awareness as regards the "offensive" conduct must be borne in mind. This would appear to allow an individual to argue that he or she was unaware that the conduct was likely to be regarded as disorderly, etc. by any who witnessed it. Where the impugned conduct arises from an isolated event, it may be that this claim will carry weight; and

(iii) Section 5 makes three defences available to the defendant, which must be established by him or her on the balance of probabilities.[7] The defence afforded by section 5(3)(a) may be proving to be the most useful, given that the rationale behind it has been described as follows:

> "We wanted to provide a defence for the defendant who is not aware and has no reason to be aware that his behaviour is likely to cause alarm, harassment or distress, and we wanted to bring within the offence people whose behaviour would

[3] "Of course, disorderly behaviour can be very serious, can be very criminal and can be a real threat to public order; but disorderly behaviour may also be far from criminal, and, although not to be encouraged, equally ought not to be made a subject of the criminal law" per Lord Scarman (*Hansard* (HL), 16 July 1986, vol 478 col 937). Marston, *Public Order: A Guide to the 1986 Public Order Act,* p 99, cites *Kinney v Police* [1971] NZLR 924, where a New Zealand court recognised that the "disorderly conduct" offence, created by s 3D of the Police Offences Act 1927, ought not to be allowed to "scoop up all sorts of minor trouble". It was not designed to "enable the police to discipline every irregular or inconvenient or exhibitionist activity or to put a criminal sanction on over-exuberant behaviour".

[4] Cmnd 9510, para 3.26.

[5] Lord Scarman, *Hansard* (HL) 16 July 1986, vol 478, col 937.

[6] *Martin v Yorkshire Imperial Metals Ltd* [1978] IRLR 440, 441 per Arnold J.

[7] See Appendix B for the wording of this section.

be unlikely to harass a normal victim but who used their knowledge of the victim's weakness to make life miserable for a vulnerable person."[8]

Section 5(3)(c) was described in Committee as "a general safety net"[9] but the scope of this defence is difficult to ascertain, not least because, if the prosecution is to succeed, it will have to establish an intention to use conduct which is threatening, abusive or insulting. Such conduct would rarely be reasonable.

[8] House of Commons Standing Committee G, 13 February 1986, col 236.

[9] *Ibid*, at col 254.

SCHEDULE TO APPENDIX D

A. PUBLIC ORDER CASES

1. Disorderly behaviour in a public place – see section 5.

2. Argument in a DHSS office over benefit claim – see section 5.

3. Roadside dispute between drivers after a minor road accident – see section 5.

4. Rowdy behaviour late at night – see section 5 and note that the White Paper[10] indicated "... rowdy behaviour in the streets late at night which alarms local residents" as conduct at which the section was aimed.

5. Dispute between shopkeeper and customer – see section 5.

6. Dispute between employer and employee – see section 5 and note that even if this incident does not take place in "public" it only falls outside the 1986 Act if it occurs in a *dwelling*: section 5(3)(b).

7. Disorderly behaviour in out-patient ward at hospital – see section 5.

8. Shouting at passers-by outside a railway station – see section 5 and note the White Paper "... groups of youths persistently shouting abuse and obscenities or pestering people waiting to catch public transport".

9. Climbing on the roof of a bank and shouting at passers-by – see section 5 and note the White Paper[11] "groups of youths persistently shouting abuse and obscenities or pestering people waiting ... to enter a hall or cinema".

10. Causing disturbance by shouting, knocking on doors, etc. – see section 5 and note the White Paper "hooligans on housing estates causing disturbances in the common parts of blocks of flats, blockading entrances, throwing things down stairs, banging on doors, peering in at windows, and knocking over dustbins".

11. Disturbances following glue sniffing – see section 5.

[10] Cmnd 9510, para 3.22.
[11] Cmnd 9510, para 3.22.

12. Wife creating disturbance after husband's arrest – see section 5.

13. Drunk and disorderly – see section 91 of Criminal Justice Act 1967. Alternatively, section 5 of the 1986 Act may be applicable.

14. Refusing to leave licensed premises – see Licensing Act 1964, section 174 which provides that:

> "(1) Without prejudice to any other right to refuse a person admission to premises or to expel a person from premises, the holder of a justices' licence may refuse to admit to, or may expel from, the licensed premises any person who is drunken, violent, quarrelsome or disorderly, or whose presence in the licensed premises would subject the licence holder to a penalty under this Act.
>
> (2) If any person liable to be expelled from licensed premises under this section, when requested by the holder of the justices' licence or his agent or servant or any constable to leave the premises, fails to do so, he shall be liable to a fine not exceeding level 1 on the standard scale.
>
> (3) Any constable shall, on the demand of the holder of a justices' licence or his agent or servant, help to expel from the licensed premises any person liable to be expelled from them under this section, and may use such force as may be required for the purpose".

Alternatively, section 5 of the 1986 Act may be applicable.

15. Using insulting and abusive words – see sections 4 or 5 of the 1986 Act.

16. Minor assault – see section 42 of the Offences against the Person Act 1861 which provides that a "common assault" is punishable on summary conviction with two months' imprisonment or a fine not exceeding level 3 on the standard scale. In *Harrow JJ ex p Osaseri*[12] it was said that section 42 was probably ". . . intended to be reserved for cases of minor assault of the kind which commonly arise from disputes between neighbours, where the charge is brought by or on behalf of the complainant himself, the police seeing no need to intervene".[13] Alternatively, this may be covered by sections 4 or 5 of the 1986 Act.

[12] [1985] 3 All ER 185.

[13] *Ibid*, per Nolan J at p 192.

17. Threats to kill – the Criminal Law Act 1977, Schedule 12 substituted a new section 16 in the Offences against the Person Act 1861 providing that:

> "A person who without lawful excuse makes to another a threat, intending that that other would fear it would be carried out, to kill that other or a third person shall be guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding ten years".[14]

18. Groups of youths armed with sticks intent upon assaulting pupils at a neighbouring school – see sections 2 or 3 of the 1986 Act.

19. The persistent holding of meetings likely to cause disorder – see the powers of police under Part II of the 1986 Act which relate to the regulation of processions and assemblies.

B. ANNOYANCE AND DISTRESS

1. Peeping Toms – section 5 (see discussion in paras 6.21–6.23 above).

2. Looking in the windows of a girls' school – see section 5 and note the White Paper[15] which instanced ". . . peering in at windows . . ." as behaviour which might fall within the ambit of section 5; and see discussion of "peeping Toms" cited above.

3. Pestering a female by following or persistent telephoning – for the former, section 5 may be applicable:[16] for the latter, see Telecommunications Act 1984, section 43 (see para 3.18 above).

4. Indecent exposure – (1) a common law misdemeanour or (2) an offence under section 4 of the Vagrancy Act 1824. Section 5 may provide a further alternative charge.

5. Eavesdropping – the facts of the case cited in the Working Paper are unclear, which makes it difficult to establish whether any criminal sanction would apply. However, in severe cases where the behaviour is persistent, the conduct would appear to be at least arguably disorderly, and likely to cause harassment, as section 5 requires.

[14] Criminal Law Act 1977, Schedule 2 provides that the offence is triable either way.

[15] Cmnd 9510, para 3.22.

[16] *Police v Christie* [1962] NZLR 1109 held that the conduct of a man who had persistently followed a young woman at night thereby causing her distress, was "disorderly" – see the discussion of New Zealand law in n 3 above.

6. Sending anonymous or poison pen letters – Malicious Communications Act 1988 (see discussion at 3.17 above).

7. Kerb-crawling – Sexual Offences Act 1985 (see discussion at para 3.16 above).

8. Threatening suicide by standing on window ledge or jumping in front of cars – section 5 (see *Lodge v DPP*[17]).

9. Sexual intercourse in the back of a car on a main road at night – see section 5. The decision of the Divisional Court in *Masterson v Holden* appears to leave it open to magistrates to find that homosexual conduct in public between A and B, who do not know of the presence of C, is insulting to C.[18] If C can be said to be insulted by such behaviour, it may be that he or she could also be said to be similarly affected by the conduct described here. And if C, in one or both of these circumstances can be said to be insulted, it may also be that he or she can be said to be likely to be caused distress, in which case section 5 would be applicable.

10. Two men kissing and fondling each other in a public street – see the discussion at (9) above. Given that it was not shown against the homosexual couple in *Masterson v Holden*, to whose behaviour this example refers, that they were actually aware of the presence of bystanders who were insulted at what they, the defendants, were doing, the defence afforded by section 5(3)(a) would appear to be available to them.

11. Men going into ladies' lavatories – see section 5. The reference cited in the Working Paper is to the case of a man who had entered the ladies' lavatory of a theatre and had been seen to look over the partition of one compartment into another when it was being used by a lady attending the theatre. This conduct was reported to have "greatly shocked and annoyed the lady who had run out shrieking with fright".[19] The defences afforded by section 5(3) should protect the "innocent", for example, someone who entered for the purposes of issuing a warning in relation to a fire, etc.

12. Transvestism – see section 5. It is not easy to see how mere masquerading or dressing up falls within the ambit of section 5. In any given case the intentions of a defendant in so behaving, or the inference to be drawn from the conduct, will be among the important factors to consider. If, however, the case does not fall within section 5, it is dubious whether it should be subject to *any* criminal sanctions.

[17] See para 3.8, n 14 above.

[18] *Masterson v Holden* [1986] 1 WLR 1017. See para 3.7, n 13 above.

[19] (1949) 13 J Cr L 226, 227.

13. Members of protest groups chaining themselves to buildings – see section 5.[20]

14. Gesturing with toy gun from a motor vehicle – see section 5. Alternatively, section 17(1) of the Firearms Act 1968 may be applicable.

15. Street photographer persistently breaching byelaw prohibiting the soliciting of street custom – see section 222(1) of the Local Government Act 1972 which confers on local authorities power to institute and maintain proceedings to enforce obedience to public law within their administration areas for the promotion or protection of the interests of the inhabitants. This power is additional to the power at common law enabling the Attorney-General to proceed in such matters either ex officio or by relator action: see *Stoke-on-Trent Council v B & Q Ltd.*[21] It must, however, be established that the offender is not merely infringing the law but that he or she is "deliberately and flagrantly flouting" the law before the assistance of civil proceedings by way of injunction can be invoked: see *Stafford Borough Council v Elkenford Ltd.*[22]

16. Vagrants verbally abusing private individual – see sections 4 or 5.

17. Personal abuse to private individuals – see sections 4 or 5.

18. Threatening and abusive words and behaviour – see sections 4 or 5.

19. Blowing on a conch shell – see section 5.

C. NEIGHBOUR AND DOMESTIC DISPUTES

1. "Domestic" arguments between husband and wife or cohabitants or other family members – see paras 6.10–6.15 above.

2. Landlord and tenant disputes – see section 5.

3. Argument over money allegedly owed – see section 5.

4. Pestering a female by following or persistent telephoning – see B3 above.

[20] See *Melser v Police* [1967] NZLR 437 where demonstrators chaining themselves to the front door of the New Zealand Parliament building to protest about the Vietnam war during a visit by the U.S. President were found to have engaged in disorderly conduct contrary to s 3D of the Police Offences Act 1927, as inserted by s 2(1) of the Police Offences Amendment Act (No 2) 1960.

[21] [1984] 1 AC 754.

[22] [1977] 1 WLR 324, per Bridge LJ at p 330.

5. Molestation by an estranged spouse, or after a divorce – injunctive relief would appear to be available: Working Paper No 113, at paragraphs 4.2–4.3.

6. Arguments between neighbours in a block of flats over cleaning of the stairs – see section 5.

7. Minor assaults and threats – see A16 above. If the "minor assaults and threats" occur in the domestic, as opposed to neighbour, context, a specific domestic violence remedy may be available, quite apart from the general criminal law of assault (see paras 6.10–6.15 above).

8. Intrusive nosiness by a neighbour – the Working Paper based this example on a newspaper report[23] describing a neighbour who ". . . peers through windows, rummages through dustbins, lifts up manhole covers, pulls the tops off garden plants, stands by windows listening to conversations and removes letters and newspapers from letterboxes". The report indicated that the individual concerned had made "several previous court appearances" and had been fined and bound over. Given this, the effectiveness of binding over in the circumstances must in any event be doubtful. Defence counsel was reported as having described the problem as an "obsessive compulsory neurosis". Whether any response of the criminal law is appropriate in such a case must be an open question: but the conduct would appear to be at least arguably abusive, and certainly likely to cause harassment, as section 5 requires.

[23] *The Times*, 7 August 1987 (news item).

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