

The Criminal LAWYER

Issue No 216

September/October 2013

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The Criminal Lawyer is published six times a year to keep the busy criminal law practitioner up-to-date with recent changes and developments in criminal law.

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- Published bi-monthly by Bloomsbury Professional Limited, Maxwellton House, 41-43 Boltro Road, Haywards Heath, West Sussex RH16 1BJ
- Telephone: 01444 416119
- Fax: 01444 440426
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■ ISSN 2049-8047

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The new criminal offence of reckless misconduct for bankers

Dr Nicholas Ryder

The United Kingdom government intends to implement a new criminal offence of reckless misconduct via the Financial Services (Banking Reform) Bill 2013-14.

One of the most fascinating questions regarding the most recent financial crisis is: 'Why haven't bankers through their reckless, immoral and unethical conduct been held accountable?'

Both the Prime Minister David Cameron and President Barak Obama have stated on numerous instances that they will seek to hold those bankers who contributed to the biggest financial crisis since the Great Depression accountable for their actions. But at the time of writing this article, not one single banker in the United States of America or the United Kingdom has been convicted for any criminal activity since the start of the financial crisis in 2007.

It has become abundantly clear since the start of the financial crisis that the current legislative measures that could have been used to hold bankers accountable for their actions are inadequate and must be reformed. Therefore, the Coalition government established the Banking Standards Commission,¹ who in June 2013 published its final report.² The chairman of the Banking Standards Commission, Andrew Tyrie, MP, stated:

'A lack of personal responsibility has been commonplace throughout the industry. Senior figures have continued to shelter behind an accountability firewall. Risks and rewards in banking have been out of kilter. Given the misalignment of incentives, it should be no surprise that deep lapses in banking standards have been commonplace ... where the standards of individuals, especially those in senior roles, have fallen short, clear lines of accountability and enforceable sanctions are needed'.³

The Banking Standards Commission recommended thus:

'There is a strong case in principle for a new criminal offence of reckless misconduct in the management of a bank ... [T]he fact that recklessness in carrying out professional responsibilities carries a risk of a criminal conviction and a prison sentence would give pause for thought to the senior officers of UK banks'.⁴

The Commission added that the offence would be:

'...pursued in cases involving only the most serious of failings, such as where a bank failed with substantial costs to the taxpayer, lasting consequences for the financial system, or serious harm to customers'.⁵

George Osborne said:

'We've already supported the recommendations on new criminal sanctions'.⁶

In July 2013, the government published its response to the Banking Standards Commission,⁷ and acknowledged that it needed to introduce appropriate measures to impose criminal penalties for

reckless misconduct for those involved in managing banks.⁸ However, the response of the Coalition government has been severely criticised by the Shadow Chancellor of the Exchequer, Ed Balls MP who stated:

'David Cameron promised to amend the banking reform Bill to implement the Parliamentary Commission's report, including its recommendations on deferring bonuses and criminal penalties for reckless misconduct. But for all the tough talk, he and George Osborne have totally failed to do so'.⁹

It is the responsibility of the Coalition government to determine 'which of the recommendations will go forward as amendments to its Banking Reform Bill'.¹⁰ The Financial Services (Banking Reform) Bill seeks to introduce a new criminal offence of reckless misconduct; this would make a welcome addition to the armoury of those agencies that have been given the unenviable task of prosecuting white collar crime associated with the financial crisis.

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Harassment: Protection from Harassment Act 1997 (as amended)

Alec Samuels

Harassment is widespread. Harassment takes many forms: stalking in the street; stalking at work or leisure; surveillance; doorstep calling; telephoning by journalist or salesmen or researchers; nuisance calls; cyber harassment; cyber bullying, by way of Twitter and Face Book and email and askfm. The psychological effect upon the victim, V, can be very serious: anxiety; fear; loss of sleep; loss of employment; loss of home; loss of family and friends, serious illness, even suicide. The harasser is usually a coward, harassing at a distance often anonymously.

Animal protesters and environmental activists

Another social evil that has emerged in recent years has been the mass harassment by the so-called environmentalists or green protesters harassing a company lawfully engaged in lawful scientific research or in constructing a motorway or drilling for shale gas or erecting a wind turbine farm or solar farm or telecom mast; or engaged in lawful badger culling.

The harassment can take many forms: blocking access; disabling vehicles (eg by cutting the brakes); trespass and illegal entry; criminal damage; violence; assaulting and obstructing police officers; damaging police vehicles; arson of police property; intimidation of employees or resisting arrest.

In August 2013 a judge granted an injunction against named persons and persons unknown, badger cull protesters who had burnt down tractors and threatened families in the West Country. In Balcombe in Sussex, anti-fracking protesters blocked the access roads to a drilling site and threatened to enter and damage the site and to endanger the safety of the workers.

Course of conduct amounting to harassment

The definition of harassment is that a person must not pursue a course of conduct which amounts to harassment of another, and which he knows or ought to know amounts to harassment of the other(s 1(1)).

A person must not pursue a course of conduct which involves harassment of two or more persons, and which he knows or ought to know involves harassment of those persons, and by which he intends to persuade any person not to do something that he is entitled or required to do, or to do something that he is not under any obligation to do. (s 1(1A)).

Causing alarm or distress

References to harassing a person include alarming the person or causing the person distress (s 7(2)). Thus the essence of harassment is causing alarm or distress. A course of conduct in relation to a single person must involve conduct on at least two occasions in relation to that person(s 7(3)(a)). There must be an element of repetition or persistence, or in the case of conduct in relation to two or more persons on at least one occasion to each of those two or more persons(s 7(3)(b)). That is, repetition or persistence over two or more persons.

Such conduct includes speech (s 7(4)).

As harassment can take many forms the definition has to be widely drafted to cover everything, though the lack of specificity makes for difficulty in individual cases. A 'catch all' definition can spread the

Endnotes

- 1 Parliamentary Commission on Banking Standards <http://www.parliament.uk/business/committees/committees-a-z/joint-select/professional-standards-in-the-banking-industry/news/>, accessed June 25 2013.
- 2 Parliamentary Commission on Banking Standards available from <http://www.parliament.uk/business/committees/committees-a-z/joint-select/professional-standards-in-the-banking-industry/news/>, accessed June 25 2013.
- 3 Parliamentary Commission on Banking Standards available from <http://www.parliament.uk/business/committees/committees-a-z/joint-select/professional-standards-in-the-banking-industry/news/>, accessed June 25 2013.
- 4 Parliamentary Commission on Banking Standards Changing banking for good (Parliamentary Commission on Banking Standards, London, 2013) at 516, para 1182.
- 5 Parliamentary Commission on Banking Standards Changing banking for good (Parliamentary Commission on Banking Standards, London, 2013) at 516, para 1183.
- 6 HM Treasury 'Speech by Chancellor of the Exchequer, RT Hon George Osborne MP, Mansion House 2013', June 19 2013, available from <https://www.gov.uk/government/speeches/speech-by-chancellor-of-the-exchequer-rt-hon-george-osborne-mp-mansion-house-2013>, accessed June 27 2013.
- 7 HM Treasury The Government's response to the Parliamentary Commission on Banking Standards (HM Treasury: London, 2013).
- 8 HM Treasury The Government's response to the Parliamentary Commission on Banking Standards (HM Treasury: London, 2013) at 11. At the time of writing it is envisaged that these measures will form part of the Banking Reform Bill that will be published in the autumn of 2013. See for example Watt, N 'Reckless misconduct proposals will be in banking reform bill, says PM', June 19 2013, available from <http://www.guardian.co.uk/business/2013/jun/19/reckless-misconduct-banking-ferguson>, accessed July 11 2013, Treanor, J 'Bankers will face jail for reckless misconduct, says George Osborne', July 9 2013, available from <http://www.guardian.co.uk/business/2013/jul/08/bankers-jail-misconduct-george-osborne>, accessed July 11 2013 and Parker, G 'George Osborne vows to get tough and raise standards in City', July 9 2013, available from <http://www.ft.com/cms/s/0/1c3a3a66-e71f-11e2-8a57-00144feabdc0.html#axzz2YkarYqma>, accessed July 11 2013.
- 9 Labour 'Osborne is continuing to duck the radical banking reform we need - Ed Balls', July 8 2013, available from <http://www.labour.org.uk/osborne-continuing-to-duck-radical-banking-reform-we-need.2013-07-08>, accessed July 11 2013.
- 10 Moore, J and Morris, N 'Bankers could face jail after report urges the Government to introduce new criminal offence for reckless management', June 19 2013, available from <http://www.independent.co.uk/news/uk/politics/bankers-could-face-jail-after-report-urges-the-government-to-introduce-new-criminal-offence-for-reckless-management-8664137.html>, accessed June 27 2013.
- 11 In Western countries the trial is a trial by jury and the jury system is a cornerstone of English legal system. The jury system is said to have begun during the reign of King Ethelred II (968-1016 AD). King Ethelred had made an ordinance that directed '12 things' to give evidence on oath regarding those they believed had committed a crime. By the time the Normans conquered England, in the eleventh century, they were using a form of trial by jury and some historians claim that trial by jury was already being used for cases of property disputes but not criminal disputes. Trial by jury was used by the time of the Grand Assize of Henry II (1133-89). (A jury is a body of persons all sworn to consider and give a verdict on a case).
- 12 It was John Rawls who set out many of the main ideas on justice in his treatise *A theory of justice* (1972). Rawls articulated a set of principles of justice which, he argued, was due to society being based on a social contract, emphasising the liberty of the individual. Rawls argued that the primary subject of justice must be the basic structure of society. It was Aristotle (384 – 322 BC) who made the distinction between natural justice, common to all humanity as a state of goodness, and conventional justice, which varies from state to state according to the history of those particular human communities.
- 13 That is, the law decided by courts and other officials (known as case law).
- 14 That is, the philosophy of law or legal theory – ie, the study, not of particular laws in specific countries but of the attributes of law in general in societies.
- 15 Law is littered with masculine values characterising the law, and this is symbolic of a patriarchic society, reflecting mainly the values of male members of society. Even literature is littered with the same reflection. For example, many novels feature male rather than female lawyers- novels such as Bernhardt, W *Death Row*; Connelly, M *The narrows*; Coughlin, W *Proof of intent*; LeCarre, J *Single and single*.
- 16 The Bible contains numerous entries and warnings against bribery, many of which are specific, as in Book of Proverbs, 17:23, which states: 'a wicked man taketh a gift out of the bosom to pervert the ways of judgment'. There are the ten commandments:
- 17 Socrates (470- 399 BC).
- 18 Plato (428-348 BC).
- 19 Although this is a far way off. See Beck, U (2000), *What is globalization?* Cambridge: Polity Press.
- 20 Criminal law concerns the principles of criminal liability, including the procedure on indictment and summary procedure and selected offences may be examined with reference to case law or judge-made law.
- 21 For instance, in the UK, there is 'restorative justice'.
- 22 A privacy breach may result in a loss of consumer trust and cause significant damage to the public perception of a firm. This can harm business relationships.
- 23 This means a disclosure which in the reasonable belief of the worker, tends to show a criminal offence, breach of any legal obligation, miscarriage of justice, danger to health and safety of any individual, damage to the environment or a deliberate cover-up of any of these.
- 24 For example, claims have been brought by employees seeking to rely on disclosures of alleged breaches of their own employment contracts.
- 25 Tribunals may have considerable sympathy with employees claiming that it was in the public interest to blow the whistle on alleged improper operation of the bonus system by a bank, even if it was their own interest affected.
- 26 In the draft Enterprise and Regulatory Reform Bill 2013.
- 27 Editor, 'Man arrested over British family murder in French Alps', Reuters, 24 July, 2013. See also, Peter Allen, 'Was Alps murder victim involved in a shady work deal? French police probe father's business deal. Tapes reveal the level of hatred between feuding brothers', Daily Mail, 6 September 2013. Note that the Ancey prosecutor Eric Maillard is leading this inquiry).

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ISSN 2049-8047



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