



**Trinity Term
[2026] UKSC 20**

On appeal from: [2025] EWCA Crim 748

JUDGMENT

**R (Respondent) v McCafferty and others
(Appellants)**

before

**Lord Reed, President
Lord Sales, Deputy President
Lord Leggatt
Lady Simler
Lord Doherty**

**JUDGMENT GIVEN ON
14 July 2026**

Heard on 21 April 2026

Appellants

Benjamin Newton KC

Laura Stockdale

Maria Liddiard

(Instructed by Hodge Jones and Allen)

Respondent

David Perry KC

Victoria Ailes

Rachel Hughes

(Instructed by CPS Appeals & Review Unit)

LORD LEGGATT (with whom Lord Reed, Lady Simler and Lord Doherty agree):

Introduction

1. Section 78 of the Police, Crime, Sentencing and Courts Act 2022 has replaced the common law crime of public nuisance with a statutory offence. The offence can be committed in either of two ways. One way (the first limb) is by an act or omission which “creates a risk of, or causes, serious harm to the public or a section of the public”. The other way (the second limb) is by an act or omission which “obstructs the public or a section of the public in the exercise or enjoyment of a right that may be exercised or enjoyed by the public at large”.

2. This appeal is concerned with the second limb of the offence and with what constitutes “a right that may be exercised or enjoyed by the public at large”. The essential question is whether there is such a right to pass to and from private business premises over a road which is a private way and not a highway. The short answer is “no” because what distinguishes a private way from a highway is that the public at large does not enjoy a right to use it. It follows that obstructing passage on such a road can only amount to an offence of public nuisance if the first limb of the offence is satisfied and the defendant’s conduct creates a risk of, or causes, serious harm to the public or a section of the public. That has not been alleged here.

The facts

3. The six appellants (whom we will refer to as “the defendants”) are jointly charged with an offence of intentionally or recklessly causing a public nuisance contrary to section 78(1) of the 2022 Act. The charge relates to their conduct on 8 September 2022 in obstructing passage to and from a dairy works as part of a protest. The protest was one of several carried out on successive days by members of a group who call themselves “Animal Rebellion”.

4. The dairy works are owned and operated by Müller UK and located within the Stonebridge Cross Industrial Estate near Droitwich. The industrial estate comprises various plots of land owned by the businesses which occupy them. We will refer to the plot on which the dairy works are situated as “the Müller site”. The common parts of the estate are owned by an investment company. They include a road called Pointon Way. This is a no through road which provides the only road access from the main Kidderminster Road (A442) to the various business premises within the estate. There is a sign on Pointon Way stating: “PRIVATE LAND CCTV is in operation and no trespassing is permitted”. A public bridleway just outside the perimeter of the estate runs roughly parallel with Pointon Way for part of its route, but the Müller site and other business

premises within the estate can only be reached from the bridleway by walking from it onto the industrial estate.

5. The Müller site is surrounded by a fence with a gatehouse at the main entrance which controls entry for vehicles from Pointon Way. This entrance provides the only means of vehicular access to the site.

6. Shortly after 8am on 8 September 2022 a group of protesters, who included the defendants, approached the main entrance to the Müller site on foot. As a result of earlier protests, Müller UK had placed temporary fencing panels made of metal mesh on Pointon Way in front of the main entrance. The defendants either chained themselves to this temporary fencing or sat down on the road in front of it and stuck themselves to the road surface with glue. They remained there for around four hours until they were removed by the police and arrested. During this time, because of their actions, no vehicles could enter or leave the site. Pedestrians were able to enter or leave the site by passing through a gap in the temporary fencing with the permission of Müller UK staff. Those affected by the defendants' conduct included, among others, employees who had finished working on a night shift and were unable to drive home.

The offence charged

7. Section 78 of the 2022 Act provides:

“Intentionally or recklessly causing public nuisance

(1) A person commits an offence if—

(a) the person—

(i) does an act, or

(ii) omits to do an act that they are required to do by any enactment or rule of law,

(b) the person's act or omission—

(i) creates a risk of, or causes, serious harm to the public or a section of the public, or

- (ii) obstructs the public or a section of the public in the exercise or enjoyment of a right that may be exercised or enjoyed by the public at large, and
 - (c) the person intends that their act or omission will have a consequence mentioned in paragraph (b) or is reckless as to whether it will have such a consequence.
- (2) In subsection (1)(b)(i) ‘serious harm’ means—
 - (a) death, personal injury or disease,
 - (b) loss of, or damage to, property, or
 - (c) serious distress, serious annoyance, serious inconvenience or serious loss of amenity.
- (3) It is a defence for a person charged with an offence under subsection (1) to prove that they had a reasonable excuse for the act or omission mentioned in paragraph (a) of that subsection.
- (4) A person guilty of an offence under subsection (1) is liable—
 - ...
 - (b) on conviction on indictment, to imprisonment for a term not exceeding 10 years, to a fine or to both.
 - ...
- (6) The common law offence of public nuisance is abolished.”

8. In prosecuting the defendants, the Crown did not rely on the first limb of the offence contained in section 78(1)(b)(i). A case might have been advanced that the defendants' conduct in preventing vehicles from entering or leaving the Müller site for some four hours caused, or created a risk of, serious harm in the form of serious inconvenience or annoyance to a section of the public. The Crown chose, however, to rely only on the second limb of the offence contained in section 78(1)(b)(ii) thereby avoiding the need to satisfy that requirement. The particulars of the offence specified in the indictment allege that the six defendants:

“without reasonable excuse, did an act, namely prevented access to and egress from the Müller UK production site, and that obstructed the public or a section of the public in the exercise or enjoyment of a right that may be exercised, or enjoyed by the public at large, intending or being reckless that it would have such a consequence.”

The proceedings

9. The defendants all pleaded not guilty to the charge and were sent to the Crown Court at Worcester for trial. The trial began on 22 April 2025 before His Honour Judge Jackson and a jury. The first and second appellants (James McCafferty and Osian Dixon) were represented by counsel; the other four defendants were unrepresented. The prosecution case was presented over four days. At the end of the prosecution case, the defendants submitted that there was no case to answer. As summarised in the judge's written ruling, their argument was that the public at large does not have a right to travel along Pointon Way, because it is a private road, or to enter or leave the Müller site, because it is on private premises. There was therefore no evidence before the jury that the defendants had obstructed the exercise or enjoyment of a right which may be exercised or enjoyed by the public at large, which is an essential element necessary for a conviction. The judge accepted this argument and ruled that there was no case to answer.

10. The prosecution sought to appeal this ruling and a hearing took place before the Court of Appeal (Criminal Division) on 7 May 2025. For reasons given in a judgment of the court (Holroyde LJ, Goss and McGowan JJ), delivered by Holroyde LJ, leave to appeal against the judge's ruling was granted, the appeal was allowed, and an order was made for the proceedings in the Crown Court to be resumed: [2025] EWCA Crim 748. The jury was subsequently discharged to enable the defendants to seek permission to appeal to the Supreme Court. The Court of Appeal certified that the proposed appeal raised a question of general public importance, and this court granted permission to appeal.

11. The certified question is:

“Are persons who go to private business premises, whether as employees, customers, suppliers or for some other reason connected with the business, a section of the public exercising or enjoying a right which may be exercised or enjoyed by the public at large, within the meaning of section 78(1)(b)(ii) of the Police, Crime, Sentencing and Courts Act 2022, when they (a) approach, (b) enter and/or (c) leave the premises?”

The defendants’ concessions and the Court of Appeal’s conclusions

12. In argument before the Court of Appeal, a distinction was drawn between cases where the owner of private land invites or permits particular persons to enter onto the land and cases where the owner permits the public generally to do so. Defence counsel accepted that, in the latter situation, members of the public have “a right that may be exercised or enjoyed by the public at large” within the meaning of section 78(1)(b)(ii). They also accepted that this is so even if entry is subject to one or more conditions, such as the purchase of a ticket, provided that it is offered to all members of public and not just to a particular person or persons or to a section of the public.

13. Based on these concessions, the Court of Appeal concluded, at para 17 of the judgment, that “[t]he public at large have a right to attend places and events or to use facilities and services which are offered to the public at large, and the fact that their right is subject to conditions does not” alter this conclusion. They discussed some examples, at paras 18–20:

“18. To give a common example: if the public are invited to attend a music concert or festival, whether held on public land or in private premises, they will be exercising or enjoying a right within the ambit of the subsection if they do attend; and that is so, even though they can only exercise the right by paying an admission fee, and even though they may be required to obey rules such as a requirement of a bag search. A person who obstructs their attendance may therefore be guilty of an offence contrary to section 78.

19. Similarly, the public at large have a right to travel on a bus or train; and those who do travel will be exercising or enjoying a right within the ambit of the subsection, even though they have to pay for the service and will be subject to certain rules. A person who obstructs their travel by blocking the road, or by interfering with the railway signals, may therefore be guilty of an offence contrary to section 78.

20. To give one further example, where a landowner allows the public to use a convenient path across his land during the day, but closes and locks gates at each end of the path at night, the public at large have a right within the ambit of the subsection to use the path, even though they can only do so at certain times or for certain purposes, and even though the landowner could if he wished withdraw the right at any time. A person who obstructs the path at a time when it is open to the public may therefore be guilty of an offence contrary to section 78.”

14. Applying this interpretation of section 78(1)(b)(ii) to the facts of this case, the Court of Appeal thought it important that the acts complained of occurred on Pointon Way and not on the Müller site itself. They recorded defence counsel as having conceded that, although Pointon Way is a private road, the public at large have a right to pass along it. On the facts, anyone approaching the entrance to the Müller site had their passage obstructed. Vehicles were prevented from gaining access to the site; and those on foot had their ability to approach the entrance to the site impeded or rendered less convenient and were therefore also obstructed. Similarly, anyone who wished to leave the Müller site had their passage obstructed. In each case the relevant obstruction occurred on Pointon Way. On this basis the Court of Appeal concluded that the acts of the defendants had obstructed the public or a section of the public “in the exercise or enjoyment of a right that may be exercised or enjoyed by the public at large”.

15. In their written case for this appeal, at paras 27 and 28, counsel now representing all the defendants repeated the concessions made in the Court of Appeal. As leading counsel for the Crown, Mr David Perry KC, pointed out, if those concessions were correctly made, the reasoning of the Court of Appeal is unassailable and the appeal must fail. In his oral submissions on behalf of the defendants, Mr Benjamin Newton KC pointed to the wording of the indictment and the fact that the only acts specified in the particulars of the offence are preventing access to and egress from the Müller site. He emphasised that the public at large have no right of access to and egress from the Müller site, as only employees who work there and others visiting the site for reasons connected with the business of Müller UK are permitted to enter it. But this does not answer the point that the manner in which access to and egress from the Müller site was prevented or impeded by the defendants was by obstructing passage on Pointon Way. If, therefore, the public at large have a right to pass along Pointon Way to approach the Müller site, it follows that the defendants’ acts fell within the second limb of the offence.

16. A court is not, however, bound to accept a concession made by a party to the proceedings when the point conceded is one of law. As Lord Diplock said in *Bahamas International Trust Co Ltd v Threadgold* [1974] 1 WLR 1514, 1525:

“It is for the judge to decide for himself what the law is, not to accept it from any or even all of the parties to the suit; having so decided it is his duty to apply it to the facts of the cases. He would be acting contrary to his judicial oath if he were to determine the case by applying what the parties conceived to be the law, if in his own opinion it was erroneous.”

17. The parties were notified before the hearing of this appeal that the court wished to hear argument on whether the proposition accepted by the Court of Appeal in para 17 of its judgment (see para 13 above) is correct in law. Having heard such argument, we have concluded that this proposition and the concessions on which it was based are erroneous.

18. We do not accept, first of all, that the public at large are authorised to pass along a private road such as Pointon Way. In general, the only people who may lawfully use a private road are the owner or other occupier of the land and anyone who has been granted a right of way along the road or permission to use it by the occupier. We would assume that Müller UK, and other occupiers of business premises to which Pointon Way provides access, have a private right (in the nature of an easement) of way along the road to go to and from their premises and that this right extends to their employees and other visitors. But there is no evidence to suggest that any right or permission to use Pointon Way has been granted to anyone else.

19. It may well be that the use of Pointon Way by other people for other purposes is tolerated in the sense that, apart from the display of the sign referred to at para 4 above, no active steps are taken to prevent such use. But that does not mean that someone who has no business at any of the premises on Pointon Way, but who chooses to walk along it for some other purpose—for example, to take exercise or because it is a convenient route to their destination—is acting lawfully. Such a person is in law a trespasser even if the trespass is tolerated. We see no basis for inferring that the investment company which owns Pointon Way has granted permission to the general public to use the road. Indeed, the sign displayed shows that it has not.

The language of section 78(1)(b)(ii)

20. Even if such permission had been granted, it would not constitute a right within the meaning of section 78(1)(b)(ii). There is a legal distinction, which is well understood, between a right of way or other right to use land and a mere licence or permission to do so. A right of way is an interest in land which others owe a duty not to interfere with. A licence merely makes it lawful for the licensee to do what would otherwise be a trespass. And, unlike a right of way (or similar right), a licence is dependent on the continuing consent of the owner of the land and can always be revoked (unless the landowner contracts not to do so). The majority of us consider that the language of section

78(1)(b)(ii) is clear in this respect and that the term “right” as used in this provision would not reasonably be understood to include a licence or permission. A person given permission by the landowner to enter private land is thus not exercising a “right” within the meaning of the subsection; and the fact a landowner permits the general public to enter the land, either unconditionally or subject to conditions, is not the same as the public having a “right” to do so.

21. Even if the use of the word “right” is regarded as ambiguous, we are all agreed that this is the correct interpretation of section 78(1)(b)(ii). It is an important principle that a person should not be subjected to a criminal penalty on the basis of a doubtful interpretation of the law. The principle applies with particular force where the penalty involves depriving the person of their liberty. So, if a statutory provision which creates a criminal offence punishable with imprisonment can reasonably be understood in two ways, the narrower interpretation should be preferred. Of the many authorities affirming this principle, it is sufficient to cite the statements of Lord Esher MR in *Tuck & Sons v Priester* (1887) 19 QBD 629, 638 (“If there are two reasonable constructions we must give the more lenient one. That is the settled rule for the construction of penal sections”); Lord Reid in *Sweet v Parsley* [1970] AC 132, 149 (“it is a universal principle that if a penal provision is reasonably capable of two interpretations, that interpretation which is most favourable to the accused must be adopted”); and Lord Hailsham of St Marylebone LC in *R v Allen (Christopher)* [1985] AC 1029, 1034 (“in a penal section of this kind any ambiguity must be resolved in favour of the subject and against the Crown”).

22. Here a member of the public reading section 78 and wanting to know what conduct is prohibited might, to put it no higher, reasonably understand the reference to a “right” that may be exercised or enjoyed by the public at large to mean a right in the strict sense and not as including a licence or permission. Either that is the only reasonable meaning of the language used or, if the language is ambiguous, the ambiguity should be resolved in favour of that meaning.

23. There are further reasons for reading section 78(1)(b)(ii) in this way. There is a clear and rational distinction between obstructing the exercise of a right which others owe a duty not to interfere with and obstructing the enjoyment of a permission. By contrast, it would be arbitrary and uncertain to distinguish between permissions granted or offered to all members of the public and permissions granted or offered to many, or all but a few, members of the public so that whether a criminal offence has been committed depends on the precise scope of the permission. According to the interpretation contended for by the Crown and accepted by the Court of Appeal, obstructing entrance to, say, a privately owned shopping mall or sports ground or car park may be an offence under section 78(1)(b)(ii) if admission is offered to all members of the public but not if some subset of the public (however small) is excluded. It is hard to see why this should be regarded as a legally relevant distinction. It is equally hard to make sense of the suggested distinction between a conditional offer of access to land made to the public at large and an offer of access made only to those members of the public who satisfy the condition.

24. One of the examples given by the Court of Appeal of a situation said to be covered by the second limb of the offence is an offer or invitation to the public to attend a music concert or festival (see para 18 of the judgment quoted at para 13 above). It is said that those who attend the concert are exercising a right enjoyed by the public at large even though they are required to pay an admission fee. But the existence of that restriction might be thought to show that the public at large do not have a right to enter the premises where the concert is taking place. It cannot sensibly make a difference whether the fee is payable at the door or whether entry is restricted to those who have bought tickets in advance: in either case the public at large do not enjoy a right of access. The fact that tickets have been offered for sale to the public does not mean that the public at large have a right to attend the concert: the only section of the public who could be said to have such a right are those who have bought tickets.

25. Even if entry is free but is conditional on a bag search, it is far from clear why the arrangement should not be characterised as one in which entry to the premises is limited to a section of the public—those not carrying a bag with prohibited contents. And what if certain individuals or members of a particular group who caused trouble in the past are refused permission to enter by the organiser? Does that mean that there is no “right” to attend enjoyed by the public at large? If not, why not? If so, why should the fact that a few people are excluded determine whether preventing or impeding others from entering is capable of being an offence within section 78(1)(b)(ii)? We do not see any satisfactory answer to these questions.

26. In our opinion, the distinction between an owner of real property who invites particular persons or a particular class of persons to enter it and an owner who invites those who satisfy certain conditions or restrictions to enter the property is uncertain, unstable and unsustainable as a basis for determining whether conduct that obstructs entry is criminal. This is another reason for rejecting the interpretation of section 78(1)(b)(ii) conceded by defence counsel to be correct and adopted by the Court of Appeal.

27. Our conclusion is still further reinforced by considering the historical context of section 78. As will be seen, the two limbs of the statutory offence codify a distinction present in the common law between two types of public nuisance. The second limb of the offence has its origin in cases of obstructing free passage along a highway. Understanding the nature of the right interfered with in such cases informs the meaning of the reference in section 78(1)(b)(ii) to a “right that may be exercised or enjoyed by the public at large”.

Highways

28. The law of highways forms one of the most ancient parts of the common law. In its original meaning the term “highway” referred to a right of way for the King and his subjects. Later the term came also to be used to denote the land over which the right may

be exercised. Historically, highways were substantial thoroughfares between towns open to all forms of traffic. Thus, Sir Edward Coke in his *Commentary on Littleton* (1628) distinguished “three kinds of ways whereof you shall reade in our ancient books”. The first was a footway; the second a footway and horseway; and the third contained the other two and was also a way for vehicles. This third category was itself twofold: “viz, regia via, the king’s highway for all men, et communis strata, belonging to a city or towne, or between neighbours and neighbours”: Co Litt 56a.

29. By the early eighteenth century it was accepted that all the kinds of way to which Coke referred could be highways. In *R v Saintiff* (1704) 6 Mod 255; 87 ER 1002, Holt CJ said that “the word ‘highway’ is the genus of all public ways, as well cart, horse, and foot ways, and yet an indictment lies for any one of these ways, if they be common to all the Queen’s subjects having occasion to pass there”. And in *R v Hammond* (1716) 10 Mod 382; 88 ER 773 the Court of King’s Bench ruled that the words “communis strata” (common street) and “Regia via” (the King’s highway) had become “synonymous expressions and signify the same thing”.

30. The understanding that highways were restricted to thoroughfares leading, if not from town to town, then from one public place to another, persisted for longer. Eighteenth century text writers averred that only a way “which is common to all the King’s people, whether it lead directly to a market town, or only from town to town, may properly be called a highway”: see *Hawkins’ Pleas of the Crown* (1716), vol 1, ch 76, s 1, p 201; *Burn’s Justice of the Peace and Parish Officer* (1755), vol 1, p 508. Robert Wellbeloved in *A Treatise on the Law relating to Highways* (1829), ch 1, p 1 set out “to prove that the proper definition of a highway is, ‘Any thoroughfare which is open to all the king’s subjects’” and, to that end, to establish that “there can be no highway where there is no thoroughfare”. As late as 1876 Lord Coleridge CJ could say that “the common definition of a highway that is given in all the text-books of authority is, that it is a way leading from one market-town or inhabited place to another inhabited place, which is common to all the Queen’s subjects”: *Bailey v Jamieson* (1876) 1 CPD 329, 332. But by then the realities of urban life had rendered that view outdated. In *Rugby Charity Trustees v Merryweather* (1790) 11 East 375n; 103 ER 1049 Lord Kenyon CJ had insisted that a cul-de-sac (Lamb’s Conduit Street in London) could be a highway: “And as to this not being a thoroughfare, that can make no difference. If it were otherwise in such a great town as this, it would be a trap to make people trespassers.” Lord Ellenborough CJ expressed a similar view in *R v Lloyd* (1808) 1 Camp 260; 170 ER 950. There were contrary opinions. But the point was conclusively resolved in favour of the broader view by the decision of the Court of Queen’s Bench in *Bateman v Bluck* (1852) 18 QB 879, which has not since been doubted: see eg *Souch v East London Railway Co* (1873) LR 16 Eq 108, 110 (where Sir Richard Malins V-C was “astonished” to hear the contrary argued); and *Vernon v Vestry of St James, Westminster* (1880) 16 Ch D 449. Even so, a way that can only be accessed by crossing private land with the permission of the landowner cannot be a highway: see *Kotegaonkar v Secretary of State for Environment, Food and Rural Affairs* [2012] EWHC 1976 (Admin); [2012] ACD 105.

31. What has always been, and still is, the essential characteristic of a highway at common law is that it is a way, following a defined route, over which all the King's subjects (or, in modern terminology, the public at large) have a right to pass freely. A way not open to the public at large, but only to a section of the public such as the members of a particular parish, is not a highway: see eg *Poole v Huskinson* (1843) 11 M & W 827; 152 ER 1039; *Vestry of Bermondsey v Brown* (1865) LR 1 Eq 204; *Farquhar v Newbury Rural District Council* [1909] 1 Ch 12.

32. Traditionally the right of the public at large was conceived as solely one of passage. As it was put in *Rolle's Abridgment* (1668), p 392: "In a highway the King has nothing but the passage for himself and his people" ("En un hault Chimin le Roy nad auter sorsque le passage pur lui & ses peuple"); and see *Goodtitle, ex dimiss Chester v Alker and Elmes* (1757) 1 Burr 133, 143; 97 ER 231, 236 (Lord Mansfield CJ). A description of the right which in more modern times has often been quoted is a "right for all Her Majesty's subjects at all seasons of the year freely and at their will to pass and repass without let or hindrance": see *Ex parte Lewis* (1888) 21 QBD 191, 197 (Wills J). This description must now be qualified since the House of Lords decided (by a majority) that the right of the public at large is not solely one of passage but extends to use of the highway for any reasonable purpose, including peaceful assembly, which does not unreasonably impede the primary right of the public to pass and repass: *Director of Public Prosecutions v Jones (Margaret)* [1999] 2 AC 240.

33. The right of way over a highway has often been likened to an easement, the difference being that the right belongs to everyone rather than to the owner of a dominant tenement: see eg *Dovaston v Payne* (1795) 2 H Bl 527, 531; 126 ER 684, 686 (Heath J); *Rangeley v Midland Railway Co* (1868) LR 3 Ch App 306, 311 (Lord Cairns); *Harrison v Duke of Rutland* [1893] 1 QB 142, 154 (Lopes LJ). As Lord Hope of Craighead said in the *Margaret Jones* case at pp 268–269:

"A highway is a way over which there is a public right of way. A public right of way is similar to but not in all respects the same as an easement of way. The right is exercisable by anyone whether he owns land or not, whereas an easement is a right exercisable by the owner of land for the time being by virtue of his estate in the land of which he is the dominant proprietor. There are other differences. But a public right of way closely resembles an easement of way in regard to the nature of the user from which its creation may be inferred and the nature of the use which may be made of it."

34. Under the common law a highway is created by dedication of the way to the public by the owner of the land over which it passes and acceptance of that dedication by the public. Dedication may be express but, as Lord Hope noted, may also be inferred in the

same manner as an easement from uninterrupted open use “as of right”. In *Trustees of the British Museum v Finnis* (1833) 5 C & P 460, 465; 172 ER 1053, 1056, Patteson J explained:

“If a man opens his land, so that the public pass over it continually, the public, after a user of a very few years, would be entitled to pass over it, and use it as a way; and if the party does not mean to dedicate it as a way, but only to give a license, he should do some act to shew that he gives a license only. The common course is, to shut it up one day in every year, which I believe is the case at Lincoln’s Inn.”

35. There is now a statutory presumption of dedication which originates from the Rights of Way Act 1932 (now repealed) and specifies a definite period of use which suffices to establish a right of way. Section 31(1) of the Highways Act 1980 provides:

“Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.”

36. The Highways Act also provides a specific means of preventing any presumption of dedication from arising. Section 31(3) states that where the owner of the land “has erected in such manner as to be visible to persons using the way a notice inconsistent with the dedication of the way as a highway”, then “the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway”. It is doubtless having regard to this provision that the notice mentioned at para 4 above has been erected on Pointon Way.

37. There is a right of free passage on a navigable river enjoyed by every member of the public which is similar to the right of free passage on a highway over land: see eg *Williams v Wilcox* (1838) 8 Ad & E 314; 112 ER 856; *Orr Ewing v Colquhoun* (1877) 2 App Cas 839; *Tate & Lyle Industries Ltd v Greater London Council* [1983] 2 AC 509, 537. The only other common law rights that may be enjoyed by the public at large are rights to navigate and fish in tidal waters: see eg *Blundell v Catterall* (1821) 5 B & Ald 268; 106 ER 1190; *Brinckman v Matley* [1904] 2 Ch 313; *Alfred F Beckett Ltd v Lyons* [1967] Ch 449. Further rights of the public at large have been created by statute, such as

rights under section 2 of the Countryside and Rights of Way Act 2000 to enter and remain on land classified as “access land” for the purposes of open-air recreation.

38. Rights that may be exercised by the public at large may be contrasted not only with easements and other rights held by particular persons but also with rights exercisable by the (fluctuating) members of a local community. Examples of the latter are rights to use a town or village green for sports and pastimes and other customary rights such as a right of all the inhabitants of a town to take water from a certain well or spring (*Race v Ward* (1855) 4 E & B 702; 119 ER 259) or a right of way across land enjoyed by the inhabitants of a parish to reach the parish church (*Brocklebank v Thompson* [1903] 2 Ch 344).

The common law offence of public nuisance

39. As described in two seminal scholarly articles, the concept of public nuisance was born when Bracton and Britton writing in the thirteenth century drew an analogy between nuisances involving the blocking of a private way and the blocking of a highway: see FH Newark, “The Boundaries of Nuisance” (1949) 65 LQR 480, 482; and JR Spencer, “Public Nuisance – A Critical Examination” (1989) 48 CLJ 55, 58. But whereas the blocking of a private way was a tort actionable by a person whose right of way was obstructed, the blocking of a highway—because it was a wrong done to the public at large rather than to any individual—was a criminal matter for the local courts. In the sixteenth century the law was modified to allow a person who suffers special damage over and above that suffered by the public generally to bring a civil action. The cases accepting that such a claim could be brought were initially all cases in which the plaintiff had suffered “greater hurt or inconvenience than any other man had” as a result of an interference with passage on a highway: see *Anon* (1536) YB Mich 27 Hen VIII, fo 27, pl 10 (Fitzherbert J); *Williams’s Case* (1595) 5 Co Rep 73a; 77 ER 163; and further cases cited by Newark at p 484.

40. The connection between a highway (understood at the time to be limited to a thoroughfare between towns) and what distinguishes a “common” (ie public) nuisance from a private nuisance was spelt out in *Hawkins’ Pleas of the Crown* (1716), vol 1, ch 76, s 1, p 201. This stated that, where “a way lies open to all the King’s subjects, a nuisance therein is a common nuisance” and is punishable by indictment. By contrast:

“a way to a parish church, or to the common fields of a town, or to a private house, or perhaps to a village which terminates there, and is for the benefit of the particular inhabitants of such parish, house or village only, may be called a private way, but not a highway, because it belongeth not to all the King’s subjects, but only to some particular persons, each of whom, as it seems, may have an action on the case for a nuisance therein.”

See also Burn's Justice of the Peace and Parish Officer (1755), vol 1, pp 508–509.

Other cases of public nuisance

41. Once the idea of public nuisance as analogous to private nuisance took root, the scope of the offence expanded to include other matters which could found a claim for private nuisance by an occupier of land when they caused annoyance or a hazard to the general public—for example, piling rubbish in public places so as to increase the risk of disease, setting up butcher's stalls in the street and leaving entrails in the gutters, or generating industrial fumes: see Sir John Baker, *An Introduction to English Legal History*, 5th ed (2019), pp 462–463. The law of public nuisance proved useful in controlling anti-social behaviour and came to be applied to a miscellany of misdemeanours, described by Spencer, at p 59, as “a rag-bag of odds and ends which we should nowadays call ‘public welfare offences’” and by Denning LJ as “a multitude of sins” (*Southport Corp'n v Esso Petroleum Co Ltd* [1954] 2 QB 182, 196). Examples from reported cases cited by Sir John Baker, at p 463, include such diverse wrongs as keeping a dovecote, using amplified sound at night, beating feathers in the street, damaging the highway with an excessively large goods vehicle, and being a common scold. Bawdy houses and other places of ill repute were also indictable nuisances.

Attempts at codification

42. It was only when efforts were made in the nineteenth century to codify English criminal law that there was a serious attempt to identify an organising principle or principles for the offence of public nuisance. In 1877 Sir James Fitzjames Stephen drafted a code in the form of *A Digest of the Criminal Law*. This included, at article 176, the following definition of a “common nuisance”:

“A common nuisance is an act not warranted by law or an omission to discharge a legal duty, which act or omission obstructs or causes inconvenience or damage to the public in the exercise of rights common to all Her Majesty's subjects.”

Commenting on this definition, the first edition of *Clerk & Lindsell on The Law of Torts* (1889), p 303, stated:

“The only rights common to all Her Majesty's subjects are rights of free passage along a public highway by land or water, and rights of fishing in navigable tidal water. A public nuisance, therefore, consists in some interference with the comfortable

use by the public of a highway or with the public right of fishing.”

The problem with the definition was that it did not accommodate the much broader class of misdemeanours which had been treated as public nuisances by the common law.

43. In 1878 Stephen introduced a draft criminal code based on his Digest to Parliament as a Bill. This included, at section 108, a revised definition of a common nuisance which now had two limbs:

“A common nuisance is an act or a series of acts or an omission to discharge a legal duty—

- (a) which obstructs or causes inconvenience or damage to any of Her Majesty’s subjects in the exercise or enjoyment of any right common to all Her Majesty’s subjects, whether such act or omission is or is not convenient to a number of persons larger than the number so obstructed or inconvenienced or damaged; or
- (b) which endangers the life, health, property, or comfort of the public, or of any part of it, either by causing actual danger thereto, or by causing a state of things which must produce such actual danger unless some person exercises in reference thereto a degree of care, skill, or prudence, the continual exercise of which in such situations is unusual.”

44. Stephen’s Bill was withdrawn after a second reading. It was then referred to a Royal Commission on the Law Relating to Indictable Offences, chaired by Lord Blackburn and which included Stephen as its driving force. The *Report of the Royal Commission appointed to consider the law relating to indictable offences* (1879) (C 2345), appending a “draft code embodying the suggestions of the Commissioners”, was presented to Parliament in 1879 and the draft code was introduced as the Criminal Code (Indictable Offences) Bill. Section 150 defined a common nuisance more succinctly than Stephen’s previous draft:

“A common nuisance is an unlawful act or omission to discharge a legal duty, which act or omission endangers the lives safety health property or comfort of the public, or by

which the public are obstructed in the exercise or enjoyment of any right common to all Her Majesty's subjects."

This definition, distinguishing as it does two different ways of committing the offence of public nuisance, is the progenitor of section 78 of the 2022 Act.

45. Parliament was dissolved in 1880 before the Bill was passed and the Commissioners' draft code was never enacted in England. But it formed the basis of legislation adopted in many countries which were then British dominions or colonies. The Canadian Criminal Code enacted in 1892 (section 191), the New Zealand Criminal Code Act 1893 (section 140) and the Tasmanian Criminal Code Act 1924 adopted verbatim the definition of a common nuisance contained in the Commissioners' draft code. A modified version of the Commissioners' draft code prepared by the Chief Justice of Queensland, Sir Samuel Griffith, was enacted as the Criminal Code Act 1899 (Queensland). The definition of a common nuisance in section 230 of that Act was materially similar to the Commissioners' definition. The Queensland Code was adopted by Western Australia in 1902, by Northern Nigeria in 1903 and afterwards by other British colonies in Africa, by Cyprus in 1928 and by Palestine in 1936: see ML Friedland, "Codification in the Commonwealth: Earlier Efforts" (1990) 2 Crim LF 145, 156-157.

Rimmington

46. In *R v Rimmington (Anthony)* [2005] UKHL 63; [2006] 1 AC 459 a challenge was made to the continued validity of the common law crime of public nuisance. The House of Lords rejected the contention that the crime had ceased to have any practical application or legal existence, holding that the question of abolition was a matter for Parliament (para 31). The appellants also argued that the crime lacked the precision and clarity of definition necessary to meet the requirements of either the common law or article 7 of the European Convention on Human Rights (which prohibits the punishment of acts which were not punishable, or not ascertainably punishable, when done). This argument succeeded in part. The House of Lords held that it had been illegitimate, and offended the requirement of clarity and precision, to include within the scope of the offence persistent and vexatious telephone calls made to separate individuals (as occurred in one of the cases under appeal). It was held to be an essential element that the defendant's conduct involved an injury to the community or a significant section of it as a whole rather than an injury caused to separate individuals (para 37).

47. Subject to this point, Lord Bingham of Cornhill (with whom the rest of the committee agreed) accepted that the offence as defined by Stephen, as enacted in Commonwealth codes based on the Commissioners' draft code and (save in one respect) as defined in *Archbold, Criminal Pleading, Evidence and Practice* (2005 edition), was

sufficiently “clear, precise, adequately defined and based on a discernible rational principle” (para 36). The definition in *Archbold*, at para 31–40, stated:

“A person is guilty of a public nuisance (also known as common nuisance), who (a) does an act not warranted by law, or (b) omits to discharge a legal duty, if the effect of the act or omission is to endanger the life, health, property, morals, or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all Her Majesty’s subjects.”

Lord Bingham approved this definition save for the reference to morals (as did Lord Rodger, concurring, at para 45).

The Law Commission report

48. Not long after *Rimmington* was decided, the Law Commission considered the common law offence of public nuisance as part of a project on simplification of the criminal law. The general aim of the project was to place a range of common law crimes in statutory form or, if those crimes have become redundant, to recommend their abolition: see the Law Commission consultation paper *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency* (2010) (Law Com CP No 193), para 1.5. The conclusion reached by the Law Commission in its final report was that the offence of public nuisance should be retained but, rather than being left as a common law offence, should be “restated in statute”: see *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency* (2015) (Law Com No 358) (HC 213), para 3.33. Some changes were recommended, in particular the introduction of a fault element consisting of intention or recklessness: see para 3.58.

49. In assessing whether the offence was still needed, the Law Commission saw its proper use as being “to protect the rights of members of the public to enjoy public spaces and use public rights (such as rights of way) without danger, interference or annoyance”: para 3.12. It was said that this rationale “preserves the analogy with private nuisance, which gives similar protection to the right of individuals to the reasonable enjoyment of their property and the unimpeded use of their private rights of way” (para 3.12); and that, interpreted in this way, the offence “expresses a clear concept and achieves predictability” (para 3.13).

50. After reviewing recent successful prosecutions for public nuisance, the Law Commission noted, at para 3.20(1), that:

“Historically the core examples of public nuisance are obstructing the highway and creating local nuisances such as noise and smells. These are the cases in which we argue above that it would be legitimate to prosecute for public nuisance given the underlying purpose of the offence.”

51. Consistently with the view taken in *Rimmington*, the Law Commission proposed that the definition of the statutory offence should be based on the definition in *Archbold*. They explained, at para 3.36:

“This specifies two alternatives: the effect must be either to endanger the life, health, property or comfort of the public or to obstruct them in the exercise of public rights. The earlier definitions, by contrast, make the two conditions cumulative. This is a defensible approach, but depends on interpreting the reference to ‘rights’ broadly, as including not only enforceable rights such as public rights of way but also the general right of the public to enjoy public spaces without danger, interference or annoyance. The *Archbold* formulation puts it beyond doubt that these cases are included in the offence whether the reference to ‘rights’ in the second limb is interpreted broadly or narrowly.”

52. In discussing the persons affected, they said, at para 3.42:

“The second limb of the definition in *Archbold* speaks of ‘rights common to all Her Majesty’s subjects’. This might be expressed in more modern language as ‘the public at large’, as foreign visitors can also use rights of way or be inconvenienced by a nuisance. In this case, however, the reference should not be extended to a section of the public. A right of way belongs to all members of the public. It is their right that is obstructed, even if only a few members of the public attempt to use the right of way and experience the obstruction.”

53. With regard to the injury caused, the Law Commission considered that the first limb of the definition in *Archbold* was expressed too broadly. In particular, they criticised the reference to the “comfort” of the public as wide and vague, observing that “it could include very trivial reasons for displeasure”: see para 3.43. To address this concern and give greater precision and clarity to the offence, the Law Commission proposed that the first limb should be confined to conduct causing or creating a risk of “serious harm”,

accompanied by a definition of “serious harm” in terms materially identical to the definition subsequently adopted in section 78(2) of the 2022 Act.

54. Consideration was given to explicitly limiting the offence to local nuisances. But the Law Commission thought that this could create difficulties of definition and might fail to cover conduct which endangers or annoys a significant section of the public but cannot be geographically circumscribed: para 3.47. An example was given of creating a computer virus which causes major disruption.

55. The discussion of public nuisance by the Law Commission supports the view that the two limbs of the statutory offence are aimed at different mischiefs. The first limb is aimed at conduct which causes or has the potential to cause serious annoyance or other serious harm to a section of the public such as those present in a local area. The second limb is aimed at conduct which obstructs the exercise of a right that belongs to all members of the public - the paradigm case being the right of passage along a highway.

56. There is one paragraph of the Law Commission report, however, which blurs this distinction. It is relied on by the Crown in this case and was endorsed by the Court of Appeal (at para 13 of their judgment) as a correct approach to the interpretation of section 78. Commenting on the definition in *Archbold*, the Law Commission said, at para 3.45:

“The second limb speaks of the obstruction of ‘the public in the exercise or enjoyment of rights common to all Her Majesty’s subjects’. In the existing offence, the reference to obstruction of the ‘rights’ of the public is interpreted broadly, to include the general right of the public to go about its business without interference or annoyance; it is not confined to specific and enforceable rights such as a right of way. If similar wording is used in the definition of the new offence, it should be interpreted equally broadly: for example, the offence should cover the case of the person who interrupted a boat race by jumping into the Thames.”

57. The opinion of the Law Commission about how words used in defining the statutory offence should be interpreted is not itself an aid to what the words should be taken to mean. In his concurring judgment Lord Sales suggests that the Law Commission’s opinion could be relied on as such an aid to interpretation if the conditions laid down in *Pepper v Hart* [1993] AC 593 were satisfied, which they are not in this case. The rest of us do not agree with that suggestion. In our view, the opinion expressed by the Law Commission about how the proposed statutory wording should be interpreted must be assessed purely on its merits: there can be no assumption that it was adopted by Parliament. Four points may be made about the above paragraph.

58. First, we consider that it is based on a mistaken premise. We do not accept that, in the common law offence, obstruction of “rights common to all Her Majesty’s subjects” was interpreted broadly, to include a “general right of the public to go about its business without interference or annoyance”. No authority is cited to support this claim. We have traced the historical connection between the offence of public nuisance and the law concerning highways and noted that the “rights common to all Her Majesty’s subjects” protected by the common law were the right of free passage along a highway and the cognate rights of free passage on a navigable river and to navigate and fish in tidal waters. The reason why the definitions of the offence proposed in the Commissioners’ draft code, adopted in many Commonwealth countries, and set out in *Archbold*, required a second limb was precisely that “obstructing the exercise or enjoyment of rights common to all Her Majesty’s subjects” did not capture the many other cases of public nuisance involving annoyance or other harm to the public. If the reference to “rights” had been interpreted broadly so as to include a general “right” of the kind posited by the Law Commission, it would not have been necessary to formulate a separate limb to bring within the scope of the offence conduct which “endangers the lives, safety, health, property or comfort of the public”.

59. Second, the “general right” contemplated is extremely wide and vague. It is quite unclear what counts as business which members of the public are entitled to go about without interference or annoyance such that anyone who infringes this right commits a criminal offence whether or not the defendant’s conduct creates a risk of, or causes, serious (or indeed any) harm. If the second limb of the statutory offence were interpreted as including such a right, the offence would, in our view, fail to satisfy the requirement recognised in *Rimmington* and by the Law Commission itself (see eg paras 3.13 and 3.35 of the report) that the scope of the offence must be clear, precise and adequately defined.

60. Third, interpreting the second limb of the statutory offence as encompassing such a “general right” would also be inconsistent with the Law Commission’s recommendations that the statutory offence should, like the definition in *Archbold*, have two separate (and alternative) limbs and that the first limb should be limited to conduct causing or creating a risk of “serious harm” (see para 53 above). The reason given for making the two limbs of the offence alternatives was to put it beyond doubt that all the cases which in the Law Commission’s view ought to be covered by the offence are indeed included *without* adopting the broad interpretation of the second limb (see para 3.36 of the report, quoted at para 51 above). In addition, adopting the broad interpretation would create a substantial overlap between the two limbs and would potentially bring within the scope of the offence conduct capable of causing annoyance that does not satisfy the threshold of serious harm which the definition of the first limb was intended to impose. This would undermine the coherence and legitimacy of the statutory scheme.

61. Fourth, the only reason given for suggesting that the second limb of the statutory offence should be interpreted broadly was that “for example, the offence should cover the case of the person who interrupted a boat race by jumping into the Thames”. This is a

reference to an unreported case in which, during the Oxford-Cambridge Boat Race in 2012, a protester jumped into the River Thames and swam into the path of the crews causing the race to be halted. The protester was found guilty of public nuisance and sentenced to six months' imprisonment. However, this conduct was covered by the second limb of the offence on the narrow interpretation of that limb, as it obstructed the exercise of the right of free passage on a navigable river. A jury could also find that the defendant's conduct fell within the first limb of the offence by creating a risk of, or causing, serious annoyance not only to those taking part in the race but to thousands of spectators. Positing a general right of the public to go about its business without interference or annoyance obscures rather than assists the analysis of such a case. It is unclear what business which the public has a right to go about is supposed to have been interfered with. It is both implausible and unnecessary to assert that there is a "right common to all Her Majesty's subjects" either to participate in or enjoy without interruption the experience of watching a particular sporting event.

Cases decided under the 2022 Act

62. We were referred to four cases decided since section 78 of the 2022 Act came into force. *R v Trowland* [2023] EWCA Crim 919; [2024] 1 WLR 1164 and *R v Hallam (Julian)* [2025] EWCA Crim 199; [2025] 4 WLR 33 were both sentencing appeals following convictions of protesters whose conduct had obstructed road traffic on the M25 motorway. These were therefore straightforward cases of obstructing the public in the exercise or enjoyment of their right to pass freely along a highway.

63. In *R v Smith (Joshua)* [2024] EWCA Crim 1040; [2025] KB 415, the defendants staged a protest by climbing over a fence and sitting down on the track during the British Grand Prix Formula 1 motor race at Silverstone. As recorded in the Court of Appeal's judgment in that case, at para 5, the Silverstone circuit is on private land and spectators (including the defendants) were admitted only on payment of an admission charge. The defendants were not prosecuted under section 78(1)(b)(ii) and no allegation was made that they had obstructed the exercise or enjoyment of a right that may be exercised or enjoyed by the public at large. They were prosecuted and convicted of an offence under section 78(1)(b)(i). The issue on their appeal was whether the judge had been right to reject a submission of no case to answer and leave to the jury the question whether the defendants had created "a risk of serious harm to the public or a section of the public". This involved arguments about who can properly be regarded as "a section of the public". It was in that context that the Court of Appeal said, at para 44:

"We also reject the submission made by some of the appellants to the effect that an offence of public nuisance could not be committed on private land to which the public would only be admitted upon purchasing a ticket. There is nothing in s78 which limits its ambit in such a way. The section is concerned

with harm to ‘the public or a section of the public’. Persons do not cease to be members of the public when they enter (for example) a racecourse or sports stadium.”

64. Counsel for the Crown sought to derive assistance from this passage as showing that it is no legal impediment to a conviction for public nuisance that the acts said to constitute a public nuisance are carried out on private land. That is only true, however, in relation to the first limb of the offence, which is not in issue on this appeal. The *Joshua Smith* case provides no support for the proposition that obstructing passage on a private road (or racing track) can constitute an offence under the second limb.

65. The facts of the fourth case, *Director of Public Prosecutions v Bailey* [2022] EWHC 3302 (Admin); [2023] KB 392, were similar to the facts here. Protesters blocked a private road in front of the entrance to a dairy works. Unlike the present defendants, they were charged with an offence of aggravated trespass, contrary to section 68 of the Criminal Justice and Public Order Act 1994. The Act specifically provides that the offence cannot be committed on a road which is a highway: see section 68(5). But, as provided in section 68(1), it applies when a person trespasses on private land and:

“in relation to any lawful activity which persons are engaging in or are about to engage in on that or adjoining land, does there anything which is intended by him to have the effect —

- (a) of intimidating those persons or any of them so as to deter them or any of them from engaging in that activity,
- (b) of obstructing that activity, or
- (c) of disrupting that activity.”

66. In *Bailey* the defendants were not aware that the road which they obstructed was a private road and not a highway and the issue was whether an intention to trespass is an element of the offence. A Divisional Court held that it is not, observing, at para 43:

“In most cases ... it will be plain that the protest is taking place on private land. It will be equally plain that the protesters do not have the permission of the occupiers to go onto the land. If there is any room for doubt, then, in our judgment, it is consistent with both the spirit and purpose of the legislation that the responsibility for this lies with the trespasser. What matters

in the context of this offence is whether the person is a trespasser, not whether they intended to trespass.”

67. This decision provides one answer to a submission made by the Crown on this appeal that it would be a surprising outcome if the defendants’ actions in the present case in obstructing the road giving access to and from a dairy works were incapable of constituting a criminal offence. As the defendants were trespassing on private land, they could have been charged with aggravated trespass. As noted earlier (see para 8 above), they could also have been charged with an offence of public nuisance contrary to section 78(1)(b)(i) of the 2022 Act, like the defendants in *Joshua Smith*. But as the obstruction was of a private way and not a highway, section 78(1)(b)(ii) does not apply.

Is there a public right of egress?

68. The Crown has a fallback argument. This is that even if—as we have concluded—the term “right” in section 78(1)(b)(ii) of the 2022 Act refers to a right strictly so called and not to a mere permission, the public at large have a right of egress from the Müller site despite having no right of entry. Mr Perry submitted that any member of the public who successfully gains entrance to the site—whether as a lawful visitor or a trespasser—has a right to depart. The owner of the land could require a member of the public to leave, but neither the owner nor anyone else (except in special circumstances such as exercising a power of arrest) could lawfully prevent a member of the public from doing so. As this right to depart does not depend on having any right to be on the premises in the first place, it is a right enjoyed by all members of the public.

69. We do not accept this argument. Whether a person is a trespasser on private land does not depend on whether the person is coming or going. Someone who enters the industrial estate or the Müller site without permission remains a trespasser until they leave the estate or the site as the case may be (unless permission to be present is granted in the meantime). They do not cease to be trespassing when they decide to leave or head towards the exit. A trespasser whose passage is prevented or impeded when on the way out is not obstructed in the exercise or enjoyment of a right of way that may be exercised or enjoyed by the public at large any more than is a trespasser whose passage is prevented or impeded when they are entering the premises.

70. Everyone, including a trespasser, has a right not to be imprisoned without lawful authority. False imprisonment is both a civil wrong and a crime under the common law. But a partial interference with freedom of movement does not amount to imprisonment. If a road is blocked so that a person is prevented from exercising a right of way, then unless the effect is to confine the person within a particular space, that person has not been imprisoned: see *Bird v Jones* (1845) 7 QB 742. Here although the defendants’ actions prevented all those who were on the Müller site from leaving the industrial estate

in vehicles, they did not imprison anyone within the Müller site or the industrial estate. The defendants could not, therefore, have been charged with false imprisonment. Even if anyone had been falsely imprisoned, that would be a separate wrong and a different criminal offence from the offence of intentionally or recklessly causing a public nuisance.

The scope of the second limb

71. In the light of our analysis, we can answer the certified question set out at para 11 above as follows. Persons who go to private business premises for a reason connected with the business are not exercising or enjoying a right which may be exercised or enjoyed by the public at large within the meaning of section 78(1)(b)(ii) of the 2022 Act when they enter or leave the premises. That is because the public at large do not have a right to be on private premises. Employees, customers, suppliers and others may lawfully visit the premises only if they have been given permission by the owner or occupier to do so.

72. Whether such persons are exercising a right which may be exercised or enjoyed by the public at large when they approach the premises depends on whether the land over which they are passing is a highway. If it is, then they are exercising such a right. But if, as in this case, the land is a private road over which only persons granted a private right of way or permission by the owner or occupier of the land may lawfully pass, then they are outside the scope of section 78(1)(b)(ii) of the 2022 Act.

73. We have already commented on the first of the examples discussed by the Court of Appeal at paras 18-20 of its judgment (quoted at para 13 above). If the public are invited to attend a music concert or festival, whether held on public land or in private premises, they will not be exercising or enjoying a right within the scope of section 78(1)(b)(ii) if they do attend.

74. The second example postulates that the public at large have a right to travel on a bus or train and that a person who obstructs their travel by blocking the road, or by interfering with the railway signals, may therefore be guilty of an offence contrary to section 78(1)(b)(ii). This elides two distinct questions. A person who pays the fare or satisfies other applicable conditions has a contractual right to travel on a bus or train. But this has no bearing on whether someone who obstructs their passage by blocking the road or interfering with the railway signals may be guilty of an offence contrary to section 78(1)(b)(ii). Whether persons travelling on a bus whose passage is obstructed are exercising a right falling within section 78(1)(b)(ii) depends, as discussed, on the nature of the road and whether it is a highway. It is irrelevant whether they are travelling on a public bus or in a private car or are using any other means of transport.

75. Similarly, the question whether interfering with railway signals may be an offence under section 78(1)(b)(ii) depends, not on the relationship between passengers and the

carrier, but on whether the public at large have a right of way along the railway track. They do not. As Lord Esher MR said of such an argument in *Butler v Manchester, Sheffield and Lincolnshire Railway Co* (1888) 21 QBD 207, 211:

“To say that a passenger by railway from London to Liverpool is to have an easement all over the line between those places seems to me really ridiculous ...”

76. The final example given by the Court of Appeal is that of a landowner who allows the public to use a convenient path across his land during the day, but closes and locks gates at each end of the path at night. Here it is plain from the description that the path is not a highway which the public at large have a right to use. There is merely a licence or permission granted by the landowner to use the path at certain times. A person who obstructs the path at a time when it is open to the public could not therefore be guilty of an offence under section 78(1)(b)(ii).

Disposal

77. For the reasons given, the judge was correct to rule that the evidence adduced by the prosecution at the trial disclosed no case to answer on the single count of the indictment with which the defendants were charged. Had the prosecution not appealed against that ruling, the judge would have been bound to direct the jury to return a verdict of not guilty. As a condition of seeking leave to appeal to the Court of Appeal, the prosecution was required to—and did—inform the court that it agreed that, if leave to appeal was not obtained or the appeal was abandoned before it was determined, the defendants should be acquitted of the offence: see section 58(8) of the Criminal Justice Act 2003. Similarly, if the Court of Appeal had dismissed the appeal and confirmed the judge’s ruling that there is no case to answer, the judge or the Court of Appeal would have been required by section 61(7) of the 2003 Act to order that the defendants be acquitted of the offence. Section 35(3) of the Criminal Appeal Act 1968 enables this court, for the purpose of disposing of this further appeal, to exercise the powers of the Court of Appeal and make the order which we decide that the Court of Appeal should have made. The result of allowing the appeal and confirming the judge’s ruling that there is no case to answer must therefore be to order that the defendants be acquitted.

78. On behalf of the Crown, Mr Perry has sought to resist this conclusion. He has invited the court to consider whether the judge should have permitted the prosecution to apply to amend the indictment to allow the case to proceed under section 78(1)(b)(i) or for another offence (such as aggravated trespass). He submits that, if so, it is open to the court, rather than confirming the judge’s ruling that there is no case to answer, to reverse or vary that ruling. Where the judge’s ruling is reversed or varied on appeal, the court may order under section 61(4)(b) of the 2003 Act that a fresh trial may take place in the

Crown Court. An application to amend the indictment would still need to be made in the Crown Court but, if such an application were successful, a fresh trial on an amended indictment could then take place.

79. The defect in this argument is that the prosecution did not need permission from the judge to apply to amend the indictment. There was nothing to stop them from making such an application. But the prosecution did not make such an application at the trial. They chose to rely only on section 78(1)(b)(ii) of the 2022 Act. They did not seek to amend the indictment to allege an offence under section 78(1)(b)(i) or another offence and ask the judge to rule that the case could proceed to a verdict on that basis. There is therefore no basis for arguing that the judge ought to have allowed the case to proceed on such a basis rather than ruling that there is no case to answer. It is equally not open to an appeal court to reverse or vary his ruling on the basis that he did not consider an application to amend the indictment which the prosecution did not choose to make. The only proper course in these circumstances is for this court to confirm the judge's ruling that there is no case to answer.

80. Accordingly, the appeal will be allowed, the judge's ruling confirmed and an order made that the defendants be acquitted of the offence.

LORD SALES (CONCURRING):

81. I have found this case perhaps less straightforward than my colleagues, albeit I have come to the same conclusion. I should briefly explain my own reasoning.

82. This appeal is concerned with the interpretation of section 78 of the Police, Crime, Sentencing and Courts Act 2022 ("section 78", set out at para 7 above), in particular in respect of the phrase "a right that may be exercised or enjoyed by the public at large" in subsection (1)(b)(ii).

83. There is a long and complex history of the tort of public nuisance and the associated crime of public nuisance. It was reviewed in detail in the Law Commission Consultation Paper entitled *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency* (2010) (Law Com CP No 193) ("the Consultation Paper") and in the Law Commission report with the same title (2015) (Law Com No 358) ("the Law Commission Report").

84. The Consultation Paper and the Law Commission Report were part of a Law Commission programme of simplification of the criminal law, to give complex areas of criminal law deriving from the common law a clearer structure, to use more modern terminology, to make the law in a given area more consistent with other closely allied

areas of law and to make the law “readily comprehensible to ordinary people by ensuring that it embodies sound and sensible concepts of fairness” (para 1.1 of the Consultation Paper). Simplification was conceived as being aimed at making only relatively modest legal changes, which might include recommending that a common law offence be restated in statutory form, thus achieving partial codification (para 1.4 of the Consultation Paper).

85. The Consultation Paper summarised the common law background of public nuisance as follows (para 1.12):

“The term ‘public nuisance’ has historically been used in two senses. In a narrow sense, it referred to activities which affect the safety or amenity of an area. In a wide sense it referred to a family of public order offences, including public nuisance proper, outraging public decency and keeping a disorderly house, and several offences now abolished such as being a nightwalker or a common scold. In recent years the tendency has been to confine public nuisance more closely around the environmental category of activities and to treat outraging public decency and keeping a disorderly house as separate offences. All these offences were developed by the King’s Bench in the seventeenth and eighteenth centuries in reaction to perceived social evils, though public nuisance proper also has older roots. They had in common a vagueness of outline and a reluctance to define a fault element, as the purpose was to remove the nuisance rather than to reform the offender.”

86. In the Consultation Paper the Law Commission set out (at para 1.14) the questions it wished to address in relation to the offences reviewed in it: whether the offence was still necessary; whether the factual ingredients of the offence should be revised; “whether the fault element should be strengthened to require intention or recklessness, in line with more usual criminal offences”; and whether the offence should be restated in statutory form. At para 1.15 the Law Commission set out its proposal regarding the offence of public nuisance, that it should be restated in statutory form and that the prosecution should be required “to prove that the defendant intended a public nuisance ... to occur, or was reckless as to whether his or her conduct would amount to or cause such an occurrence.”

87. Part 2 of the Consultation Paper set out a review of the existing common law in relation to the offence of public nuisance. It began by setting out a traditional definition of public nuisance taken from the 2010 edition of *Archbold’s Criminal Pleading, Evidence and Practice* (“Archbold”), which had been approved in *R v Rimmington* [2005] UKHL 63; [2006] 1 AC 459:

“A person is guilty of a public nuisance (also known as common nuisance), who (a) does an act not warranted by law, or (b) omits to discharge a legal duty, if the effect of the act or omission is to endanger the life, health, property or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all Her Majesty’s subjects.”

This definition (“the *Archbold* definition”) drew upon a similar definition given in the nineteenth century by Sir James Stephen in *A Digest of the Criminal Law*.

88. The Consultation Paper set out an argument in response to an article by J R Spencer, “Public Nuisance – A Critical Examination” [1989] 48 CLJ 55, which called for the abolition of the offence, arguing that it was so wide and its definition so fluid that it lacked the certainty required of a criminal offence and that the area of its operation had largely been covered by various specialised and precise statutory offences. The Consultation Paper identified and reviewed areas of ambiguity and uncertainty in the *Archbold* definition. At paras 2.21–2.28 it identified three kinds of public nuisance. The classical instance was said to be obstruction of a public highway, by analogy with private nuisance: “to obstruct a private right of way is an injury to the owner of that right, so to obstruct a public right of way is an injury to the public at large ... one or more members of [which] find themselves obstructed in the exercise of a right that belongs to the public as such”; and the *Archbold* definition reflected this (para 2.22). The second kind of public nuisance was one which affects the amenity of a neighbourhood; the third consisted of offensive behaviour in public. As to the type of injury contemplated, the *Archbold* definition treated the reference to rights common to Her Majesty’s subjects as an alternative to endangering life or comfort (para 2.31), whereas another formulation in the draft Criminal Code of 1879 envisaged a two-step test: (i) does an act endanger the safety or amenity of the public or obstruct them in the exercise or enjoyment of their rights? And (ii) in order to be criminal, it must also endanger the lives or safety of the public or injure an individual (para 2.32).

89. The Consultation Paper provisionally proposed that the offence of public nuisance be retained, and that its conduct element should remain in its present form as laid down in *Rimmington* (para 4.27). It also proposed that the fault element should be intention or recklessness that a public nuisance would be caused (para 5.1). This recommendation as to the mental element was important, because an offence, such as public nuisance, which may be met by imprisonment should be regarded as truly criminal in nature, and not a merely administrative or regulatory transgression (paras 5.30 and 5.43). The Consultation Paper expressed the view that the offence should be defined by statute (para 6.2), and that definitions other than the *Archbold* definition should be explored (para 6.8).

90. The Law Commission reviewed consultation responses and proceeded to produce the Law Commission Report. In chapter 2, the Law Commission again reviewed the

current state of the law. Traditionally, the requirement of “common injury” expressed in *Rimmington* took two forms: (i) danger, annoyance or loss of amenity affecting those present in a local area; and (ii) “an infringement or obstruction of a public right such as a right of way” (para 2.6), also described as infringement of “rights belonging to the public as such” (para 2.11) (with an example given of “obstructing the public highway”: para 3.17).

91. Chapter 3 of the Law Commission Report set out proposals for reform of the offence of public nuisance. The rationale of the offence was stated to be “to protect the rights of members of the public to enjoy public spaces and use public rights (such as rights of way) without danger, interference or annoyance” (para 3.12). “Jumping into a river during a boat race” was given as an example, which overlapped with a lesser offence of obstructing public navigation rights (para 3.16). The Law Commission’s view was that the offence should be restated in statute (paras 3.32-3.33). It preferred the *Archbold* definition, which specified two alternatives (“the effect must be either to endanger the life, health, property or comfort of the public or to obstruct them in the exercise of public rights”), as compared with other options which “make the two conditions cumulative”: para 3.36. It said (*ibid*) that the cumulative approach was defensible, but it depended:

“on interpreting the reference to ‘rights’ broadly, as including not only enforceable rights such as public rights of way but also the general right of the public to enjoy public spaces without danger, interference or annoyance. The *Archbold* formulation puts it beyond doubt that these cases are included in the offence whether the reference to ‘rights’ in the second limb is interpreted broadly or narrowly.”

This was supported by a footnote:

“[see Consultation Paper] para 2.31. At para 3.45 [of the Law Commission Report], we recommend that ‘rights’ should be given its broad meaning.”

92. At para 3.44, the Law Commission Report stated that “the exact wording of any new offence will be a matter for those who draft the relevant statute and cannot be settled at this stage”. Para 3.45 stated that in the existing offence:

“the reference to obstruction of the ‘rights’ of the public is interpreted broadly, to include the general right of the public to go about its business without interference or annoyance; it is not confined to specific and enforceable rights such as a right of way. If similar wording is used in the definition of the new

offence, it should be interpreted equally broadly: for example, the offence should cover the case of the person who interrupted a boat race by jumping into the Thames”.

This paragraph was emphasised by the Court of Appeal (paras 12–13 of the judgment) as setting out the correct approach to the interpretation of section 78(1)(b)(ii), albeit it was not used by that court as the foundation for a structured analysis of the interpretation to be adopted.

93. At para 3.48, the Law Commission Report recommended that the external elements of the offence of public nuisance should consist of (1) voluntary conduct by the defendant (2) which causes serious harm to members of the general public or a section of it or “obstruction to the public or a section of it in the exercise or enjoyment of rights common to the public at large”. At paras 3.50–3.59 it discussed the fault element which should be required, making the point (para 3.53), among others, that public nuisance is a serious offence with no limit as to sentence, so it would be unjust that defendants should be exposed to such a serious sanction unless there is equally serious fault on their part. The Law Commission’s recommendation was that the offence should contain a fault element, consisting of intention to cause, or recklessness as to causing, serious harm to members of the public or a section of it or “obstruction to the public or a section of it in the exercise or enjoyment of rights common to the public at large” (para 3.58).

Discussion

94. The enactment of section 78 was a significant legal event, by which Parliament deliberately removed the criminal offence of public nuisance from the common law and put it into statute. At that point, the ambit and definition of the offence became a matter of statutory interpretation.

(a) The approach to statutory interpretation

95. As observed by Lord Nicholls of Birkenhead in *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349 (“*Spath Holme*”), 396 (as one out of many authorities),

“Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context”.

96. The context is the circumstances in which Parliament chose to use the words in the provision. It includes both the particular circumstances which framed the specific decision to adopt an enactment and the wider constitutional background against which Parliament promulgates legislation. Both aspects of the context are relevant here.

97. Lord Nicholls went on (p 397):

“In identifying the meaning of the words used, the courts employ accepted principles of interpretation as useful guides ... The principles of interpretation include also certain presumptions ...

Additionally, the courts employ other recognised aids. They may be internal aids. Other provisions in the same statute may shed light on the meaning of the words under consideration. Or the aids may be external to the statute, such as its background setting and its legislative history.”

(b) The meaning of the word “right”

98. Like many words, the word “right” is capable of bearing a range of meanings. The principal question in this appeal is, which particular meaning within that range is the one which Parliament intended it should have?

99. In my view, it cannot be said, without further analysis, that there is a single obvious answer to that question. The word “right” in section 78 refers to rights as recognised by the law, but English law employs the word “right” to mean different things in different contexts.

100. In two famous articles in 1913 and 1917, later republished in a book entitled “Fundamental Legal Conceptions as Applied in Judicial Reasoning”, the American legal philosopher WN Hohfeld dissected the loose language of rights used in cases and produced a philosophically rigorous typology of different types of legal entitlement which existed in various contexts, using different terms to distinguish between them. The articles reflected the fact that the use of the language of “rights” in the common law was varied and imprecise. Hohfeld’s terminology is analytically helpful, but it cannot be said that it has been adopted into the law itself.

101. Sometimes, the word “right” as used in statutes and judicial decisions connotes an entitlement wholly under the control of the right-holder. Sometimes, it connotes an

entitlement which the right-holder is able to assert against some particular other person in a specific situation, even though the right-holder might not be able to assert such an entitlement against some other person in a different context. There are many contexts in which English law uses the word “right” in this latter relational sense.

102. The difference is significant in the present case. The hearings in the courts below proceeded on the basis that the general public had a right to use the privately owned approach road to the Müller site. Their entitlement to use the road was based on a licence which it was taken the owner of the road had given the public to use it. That entitlement was not a right which the general public enjoyed and could assert against the entire world, including the landowner who owned the road, since the landowner could withdraw the licence at any time. On the other hand, it was an entitlement which, while the licence was extant, members of the public could assert against other persons seeking to deny them use of the road.

103. Assessed in relational terms, a licensee on land with the permission of the landowner is entitled to resist being removed or obstructed in use of that land by a trespasser acting without the authority of the landowner. The licensee can perfectly properly be said to have a “right” as against the trespasser to be on the land and to use it.

104. Indeed, that is a common way in which English law uses the word “right”, for two reasons. First, much of English law regarding real and movable property is framed in relational terms, depending on which particular person claiming the right to have or to use the property has a superior claim against the other particular person making a similar claim, so as to resolve disputes without resorting to concepts of ultimate ownership in the stronger sense of “right” referred to above. Secondly, unlike some legal systems, English law is typically framed around the remedies which it makes available in particular situations, so that the existence of a right is inferred from the availability of a remedy. The pattern tends to be “ubi remedium, ibi ius” (where there is a remedy, there is a right), rather than “ubi ius, ibi remedium” (where there is a right, there should be a remedy), as is the pattern in some other legal systems.

105. The Court of Appeal recorded (para 26) that “it was realistically accepted on behalf of the defendants that although it is a private road, the general public have a right to pass along it”. This was not an absurd position to adopt, but it implicitly assumed that the word “right” bore a relational rather than more absolute meaning, as referred to above. Although counsel for the defendants did not formulate a different submission with precision, the hearing in this court developed so that the defendants were permitted to resile from that concession, in order that the real underlying issue of the proper interpretation of section 78 could be examined by this court.

106. It is not difficult to imagine situations in which a landowner might grant a licence to all members of the public to come on to their land and use it in a particular way. On one interpretation of section 78, which the parties and the Court of Appeal previously assumed was correct, that would be a situation in which it could be said that rights existed (in a relational sense) which could be exercised or enjoyed by the public at large. That would not be a sense completely removed from ordinary usage. If a protester stopped a member of the public from proceeding down the approach road in the present case, that person would perfectly properly be able to say, “But I have a right to go along here”.

107. Moreover, it could be said that in the context of the offence of public nuisance, it is interference with the rights that the public happen to have at a particular point in time (ie when the interference occurs) and in the particular context (where they are seeking to pass along the road, or enjoy some space which has in fact been made available to the entire public by the grant to them by the owner of the land of a licence to use it) which is what should matter. That is because the offence of public nuisance is concerned to regulate, among other things, a contest between the general public and the person (the defendant) who is interfering with what they want to do.

108. On the other hand, as explained by Lord Leggatt, it is clearly also possible for the word “right” to be interpreted as having a more limited and stringent meaning, along the lines referred to above.

109. I do not consider that there is an obvious natural meaning which the word “right” bears in the context of section 78. One way of expressing this is to say that the word is ambiguous; another is to say that, absent further analysis, I am unable to be confident which meaning Parliament intended the word should have. Either way, I find it necessary to analyse the position further in order to decide which meaning is correct.

(c) The particular circumstances of the enactment of section 78

110. As Lord Diplock and Lord Simon of Glaisdale put it in their joint speech in *Maunsell v Olins* [1975] AC 373, discussing what is sometimes called the mischief rule (*Heydon’s Case* (1584) 3 Co Rep 7a), and would now be regarded as a matter of purposive construction of legislation, at pp 391 and 395:

“Statutory language, like all language, is capable of an almost infinite gradation of ‘register’ – ie it will be used at the semantic level appropriate to the subject matter and to the audience addressed (the man in the street, lawyers, merchants etc). It is the duty of a court of construction to tune in to such register and so to interpret the statutory language as to give it the primary meaning which is appropriate to that register ...

The first task of a court of construction is to put itself in the shoes of the draftsman—to consider what knowledge he had and, importantly, what statutory objective he had—if only as a guide to the linguistic register [of the provision]. Here is the first consideration of the ‘mischief.’ Being thus placed in the shoes of the draftsman, the court proceeds to ascertain the meaning of the statutory language. In this task ‘the first and most elementary rule of construction’ is to consider the plain and primary meaning, in their appropriate register, of the words used. If there is no such plain meaning (ie, if there is an ambiguity), a number of secondary canons are available to resolve it. Of these one of the most important is the rule in *Heydon’s Case*. Here, then, may be a second consideration of the ‘mischief.’”

111. Where legislation is preceded by, and is intended to give effect to, a report by the Law Commission, the report may be referred to in construing the legislation: *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020), section 24.9. As Lord Diplock put it in *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 281, referring to an equivalent situation involving a recommendation in an official report, “the report itself may be looked at by the court for the limited purpose of identifying the ‘mischief’ that the Act was intended to remedy, and for such assistance as is derivable from this knowledge in giving the right purposive construction to the Act”. See also *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 (“*Black-Clawson International*”).

112. The important question, however, is what assistance can properly be derived from the report. That depends on the use which is sought to be made of the report in resolving some issue of doubt which has arisen in the interpretation of the statute. The text of the report is not the text of the statute and does not stand as a surrogate for that text. Where a report is laid before Parliament as the basis for the exercise of its legislative power, it may have the effect that some things are taken as read by the parliamentarians participating in that exercise. But again, it is necessary to examine what exactly those things are.

113. Such a report will usually be a strong indication of the general purpose of the Act which follows from it. This will inform the court interpreting the Act about the register in which Parliament is using the language it has chosen, in the manner explained by Lord Diplock and Lord Simon in *Maunsell v Olins*, above. As it was put in *R (PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28; [2023] 1 WLR 2594, para 41: “The purpose and scheme of an Act of Parliament provide the basic frame of orientation for the use of the language employed in it”. Sometimes, the guidance provided in this way by a report may assist in resolving the issue of doubt about the meaning of particular words used in the Act, but sometimes the guidance it provides will be at too high a level of abstraction to do that in a decisive way. It is the latter that is the position here, as regards

the guidance provided by the Law Commission Report in relation to the meaning of the word “right” in section 78.

114. In my opinion, a Law Commission report or other report can be used in an appropriate case to provide specific guidance as to the meaning which Parliament intended a particular word or phrase to have in the Act which followed from that report. There is no bright line rule of interpretation which forbids this. The authors of *Bennion, Bailey and Norbury on Statutory Interpretation* refer (p 730) to the possibility that a report may be used as evidence as to the meaning of a doubtful word or phrase, and say “[a]s a matter of principle there seems to be no reason why official reports should not be admissible to ascertain the meaning of a provision at least in the circumstances corresponding to those in which *Pepper v Hart* [[1993] AC 593] makes reports of legislative debates admissible for that purpose”. I agree. As Lord Browne-Wilkinson pointed out in *Pepper v Hart* at p 635 the distinction between the two types of case (use of material to identify the mischief aimed at by, ie the purpose of, the Act and the specific intention of Parliament in using the words set out in the Act) “is highly artificial ... Given the purposive approach to construction now adopted by the courts in order to give effect to the true intentions of the legislature, the fine distinctions between looking for the mischief and looking for the intention in using words to provide the remedy are technical and inappropriate”. See also the *PACCAR* judgment, concerning the equivalent issue which arises in relation to use of explanatory notes as an aid to interpretation, at para 42 (“[r]eference to the explanatory notes may inform the assessment of the overall purpose of the legislation and may also provide assistance to resolve any specific ambiguity in the words used in a provision in that legislation. Whether and to what extent they do so very much depends on the circumstances and the nature of the issue of interpretation which has arisen”).

115. I would endorse the suggestion in *Bennion, Bailey and Norbury on Statutory Interpretation* that where a report is being used in this way in an attempt to fix a specific meaning on a particular word or phrase in the Act the strict conditions laid down in *Pepper v Hart*, at p 640, are applicable. See also *Darwall v Dartmoor National Park Authority* [2025] UKSC 20; [2025] AC 1292, paras 41–43. This is essential to ensure that there is a proper reason for looking beyond the words of the statute for other guidance and to ensure that the guidance is so clear on the question at issue that it is proper to infer that Parliament proceeded to legislate on the footing that this was the meaning to be given to the word or phrase. Adapting the *Pepper v Hart* conditions as appropriate for the current context, those conditions are that (a) the legislation is ambiguous or obscure, or leads to an absurdity; (b) the material relied upon is set out in a report which is identified as the foundation or reason for Parliament’s decision to legislate; and (c) the statements relied upon are clear and unambiguous as to the meaning to be given to the specific word or phrase in the Act.

116. In my judgment, the statement in the Law Commission Report at para 3.45 (para 92 above) referred to by the Court of Appeal and, I would add, the footnote to para 3.36

(para 91 above) do not satisfy condition (c) that the guidance provided is clear and unambiguous. Although it might be said that at these points the Law Commission Report provides some contextual support for the contention that Parliament meant to use “right” in the wider, less specific sense referred to above, the references are not precise, nor are they unambiguously clear. The Law Commission did not produce a draft Bill and expressly stated that the drafting of the Act would be left to others. It did not have a legislative text before it on which it was commenting. Even if one took a different view, on analysis, putting it at the very highest, the guidance provided by the Law Commission Report as to the specific meaning to be given to the word “right” in section 78 is weak.

(d) The constitutional background

117. In *Black-Clawson International*, at p 645, Lord Simon captured two important dimensions of the constitutional background to statutory interpretation:

“Courts of construction interpret statutes with a view to ascertaining the intention of Parliament expressed therein. But, as in interpretation of all written material, what is to be ascertained is the meaning of what Parliament has said and not what Parliament meant to say. ... [But] interpretation cannot be concerned wholly with what the promulgator of a written instrument meant by it: interpretation must also be frequently concerned with the reasonable expectation of those who may be affected thereby. ... in statutory construction, the court is not solely concerned with what the citizens, through their parliamentary representatives, meant to say; it is also concerned with the reasonable expectation of those citizens who are affected by the statute, and whose understanding of the meaning of what was said is therefore relevant. The sovereignty of Parliament runs in tandem with the rule of objective law.”

See also *Spath Holme*, at p 397, per Lord Nicholls.

118. Where a statute sets out a criminal offence, the latter dimension assumes particular importance. Citizens must have fair notice of the circumstances in which they may commit the offence set out in statute. This is sometimes called the principle against doubtful penalisation (see *Bennion, Bailey and Norbury on Statutory Interpretation*, section 26.4): “A person should not be penalised except under clear law”.

119. This is a factor of great weight, albeit one which is capable of being outweighed by other objective indications of legislative intention: *ibid*, p 831. Its force will depend on the circumstances of the particular case: “One factor that is likely to influence the

weight given to the presumption is the severity of the detriment ... If the detriment is severe, the principle will be correspondingly powerful”: *ibid*, p 831. Given the serious nature of the criminal offence set out in section 78 and in light of the ambiguity about the meaning of the word “right” in that provision, this indication regarding the narrow meaning of that word is very strong.

120. Furthermore, the relevance of the seriousness of the offence in defining its ambit was a factor highlighted by the Law Commission, in the parts of the Consultation Paper and the Law Commission Report which proposed a heightened and more stringent mental element for the offence. So there is no indication that the Law Commission was advising Parliament to override the normal legislative presumption applicable in this field.

(e) A contest of interpretive factors

121. Where interpretive factors point in different directions, it is necessary for the interpreter to assess their relative weights in the particular context and so determine which of the opposing constructions of the statutory provision they favour on balance: *Bennion, Bailey and Norbury*, p 423. As Lord Reid said in *Maunsell v Olins*, at p 382, where an Act is ambiguous:

“Then rules of construction are relied on. They are not rules in the ordinary sense of having some binding force. ... They are aids to construction, presumptions or pointers. Not infrequently one ‘rule’ points in one direction, another in a different direction. In each case we must look at all relevant circumstances and decide as a matter of judgment what weight to attach to any particular ‘rule.’”

122. The interpretive indications discussed above have to be weighed against each other. Other interpretive considerations are also relevant here, as set out in the judgment of Lord Leggatt. In my view, in the context of section 78, in the contest between the interpretive indications to which resort may be made to resolve the ambiguity about the meaning of the word “right” in section 78, the balance comes down firmly in favour of the narrow interpretation of that word, as identified by Lord Leggatt.