IN THE MAGISTRATE'S COURT
OF THE FALKLAND ISLANDS

MC/CRIM/57/13
MC/CRIM/66/13
MC/CRIM/67/13

REGINA

-v-

KEVIN MCLAREN

JUDGMENT ON POINT OF LAW

BEFORE THE SENIOR MAGISTRATE sitting at the Law Courts, Stanley, Falkland Islands.
Hearing held on 13th January 2014.
Judgment delivered on 20th January 2014.

Simon Rowe, Crown Counsel and Rosalind Cheek, Principal Crown Counsel for the Crown
Simon Crowder, Falkland Islands Legal Practitioner, for the Defendant

Introduction

1. Kevin McLaren is charged with a number of sexual offences, involving 4 alleged victims. He has pleaded Not Guilty to all matters and a series of trials dealing with these offences is presently set to begin on 19th February 2014. These trials are listed before me, with a total time estimate of 3 weeks.

2. On 13th January 2014 a Plea and Directions/Case Management hearing took place in the case. As part of that hearing a number of preliminary points were considered by the Court. These involved points of law and

admissibility and, in accordance with the provisions the *Criminal Procedure and Investigations Ordinance,* I considered it appropriate to designate the hearing a preparatory hearing. Section 33 of the Ordinance permits me, as the trial judge, to:

"make a ruling as to
(a) any question as to the admissibility of evidence; or
(b) any other question of law relating to the case.

3. At this preparatory hearing the Crown were represented by Mr Rowe, Crown Counsel (Prosecution). The Defence were represented by Mr Crowder, Legal Practitioner. Ms Cheek, Principal Crown Counsel and Head of Legal Services also attended for a short time to assist the Court with a number of question which Mr Rowe, having only been in the Islands for a short time, was unable to do.

4. One of the offences with which Mr McLaren has been charged is an offence contrary to section 2 *of the Protection from Harassment Act* 1997 which states that:

(1)A person who pursues a course of conduct in breach of section 1 is guilty of an offence.
(2)A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding six months, or a fine not exceeding level 5 on the standard scale, or both.

Section 1 states that:

(1)A person must not pursue a course of conduct— .
(a)which amounts to harassment of another, and
(b)which he knows or ought to know amounts to harassment of the other.
.
(2)For the purposes of this section, the person whose course of conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other.

(3)Subsection (1) does not apply to a course of conduct if the person who pursued it shows— .
(a)that it was pursued for the purpose of preventing or detecting crime,
(b)that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or
(c)that in the particular circumstances the pursuit of the course of conduct was reasonable.

The issue with which the Court is concerned

5. The subject of this judgment relates to one of the issues raised at the preparatory hearing, namely whether an offence under s.2 of the *Protection from Harassment Act 1997* is actually one which is part of Falklands Law. After hearing from both parties and reading a number of skeleton arguments on the point I indicated that I wished to reflect on the submissions that had been made, consider the matter further and deliver judgment later. I do so now.

Background

6. It is accepted by all those who practice in the Courts of the Falkland Islands that Falkland Islands Law is difficult to locate, to access, and, at times, comprehend. This is an issue to which I must return in due course. I therefore consider that it is particularly important for the Courts to do what they can to make their judgments as clear as possible so as to enable those members of the public who are interested to gain an insight into how the Courts operate and thereby, I hope, understand the basis for the decisions that are taken. The Courts are, after all, are Her Majesty's Courts and the law is that which governs all of Her Majesty's subjects and should not be thought of as the sole preserve of lawyers.

7. As a consequence, the judgment that follows is necessarily lengthy as it seeks to set out some of the background as to how laws are created and interpreted in these Islands as well as dealing in more detail with the point which is specifically at issue.

How does an English Statute become part of Falkland Islands' Law

8. In somewhat simplistic terms Falkland Islands Law consists of its own legislation which includes Ordinances from colonial days, those made by the Islands Legislature and subsidiary regulations and orders made by either the Governor or more recently, as more powers have been devolved to Islands themselves, by the Governor in Council. In addition, a large amount of the Law of England and Wales applies ("English Law" – I use this term not out of any disrespect for the Principality but it is how it is referred to in Falkland Islands legislation). English Law might be part of Falkland Islands' Law either by direct or indirect application. The *Interpretation and General Clauses Ordinance* is the primary piece of Island legislation which deals with how English Law is to be applied.

9. So far as the *Protection from Harassment Act 1997* is concerned:

   a) there is no specific Falkland Islands' Ordinance which deals with the same subject matter as is dealt with by the *1997 Act*. A number of Falkland Islands' Ordinances have been created over the years to deal with areas of law which have their own statutes in England. For instance, the present *Road Traffic Ordinance* deals with many of the same issues relating to behaviour on the roads as were covered English Law statutes in the 1960's and 70's. As a local Ordinance it was able to take account of local circumstances, for instance by providing for evidence of drink driving by breath test only and not blood and urine which the Islands' would have had difficulty in testing at the time.

   b) there is no Ordinance which specifically brings its provisions into force in the Islands. English legislation has been brought into force in the Islands by specific reference to it in the past. By way of example the *Sexual Offences Ordinance 2005* specifically brought into force the majority of the *Sexual Offences Act 2003*, albeit with a number of specific amendments and modifications to suit local circumstances.

   c) there is no reference to it in the *Crimes Ordinance.* Described in its long title as *"An Ordinance to make better and further provision in relation to crimes"* the *Crimes Ordinance*, which came into force in 1989, not only sets out a significant number of offences in its own

provisions but also specifically sets out, in a Schedule, a large number of English Acts which it adopted as being suitable to apply to the Islands at that time.

Section 6 of the *Crimes Ordinance* states:

[Ord23.1s6]6 English statutory offences adopted
(1) The English Acts mentioned in Part 1 of Schedule 1 apply in the Falkland Islands to the extent mentioned in and subject to such modifications and exceptions as are set out in that Part.
[S. 2/Ord. 10/92/w.e.f. 10/7/92.]

Although the *Protection from Harassment Act 1997* postdates the *Crimes Ordinance* there have been a considerable number of amendments to the *Crimes Ordinance* which have specifically added a number of other English Acts to the Schedule since 1989. There is a lengthy amending Ordinance in 1997 itself. However, it is conceded by the Crown that the provisions of the *Protection from Harassment Act 1997* have not been added to the Schedule of the *Crimes Ordinance.*

10. There are therefore a number of mechanisms for offences to be specifically created or incorporated into Falkland Islands Law. Indeed, Mr Rowe, for the Crown, accepts that the *Protection from Harassment Act 1997* could have been specifically incorporated into Falkland Islands Law, but that it wasn't.

11. The Defence submit that, had the Legislature meant the *Protection from Harassment Act 1997* to apply it could, and should, have been incorporated by a specific Ordinance or by adding the Act, by amendment, to Schedule 1 to the *Crimes Ordinance.* They say that the fact that the 1997 Act was not incorporated into Falkland Islands Law in this way is significant and demonstrates that it was not the intention of the Legislature for it to apply.

12. However, The Crown submit that the fact that the 1997 Act is not specifically incorporated into Falkland Islands Law matters not because

the relevant provisions, including the offence under s.2, is automatically incorporated in Falkland Islands Law by virtue of s.78 of the *Interpretation and General Clauses Ordinance.*

13. The incorporation of changes to statutes, such as amendments, by reference to a provision within a general interpretation statute is not unusual and versions of such provisions are seen in the legislation relating to a number of the British Overseas Territories which do not have the same ability and resources to scrutinise and specifically legislate as do other larger jurisdictions. In general terms such provisions are meant to ensure that, if an English Act has been adopted as being part of the Law of the Territory, the most up to date version is being used.

14. Section 78 of the Falkland Islands *Interpretation and General Clauses Ordinance* states:

Construction of reference to imperial enactment

(1) A reference in any written law of the Falkland Islands to any imperial enactment or to any provision, part or division thereof shall be construed as a reference to the same as it may from time to time be amended (provided that the enactment, provision, part or division referred to is not wholly repealed without being replaced), and as a reference to any imperial enactment or to any provision, part or division of any imperial enactment substituted therefore, but this subsection shall not have effect so as to apply as part of the written law of the Falkland Islands-

(a) any amendment of an imperial enactment, provision, part or division thereof where that amendment is enacted or made after the cut-off date; or

(b) any imperial enactment, provision, part or division of any imperial enactment substituted after the cut-off date for any imperial enactment, provision, part or division of an imperial enactment which applied as part of the written law of the Falkland Islands on the cut-off date.

[S. 3(a)/Ord. 13/04/w.e.f. 13/8/04.]

(2) Without prejudice to subsection (1), a reference in any written law of the Falkland Islands to an imperial enactment shall be construed as extending to any later imperial enactment enacted or made before the cut-off date which-

(a) modifies or augments that earlier imperial enactment or any other imperial enactment which amends or is substituted for that enactment;

(b) amends or is substituted for any imperial enactment applying by virtue of paragraph (a).

(7) In this section "cut-off date" means 31st July 2004.

15. In considering the terms of s.78 itself it can be seen that in the Falkland Islands a "cut-off" date has been created. As a result the general updating provisions, as set out in the Interpretation and General Clauses Ordinance, do not have any affect in respect of amendments etc. to English Acts etc. in force in the Falkland Islands if those amendments come into force after 31st July 2004 (the "cut-off" date). It is right to say that the reasoning and rationale for this particular provision is not entirely clear.

16. It should also be noted that, in addition, as well as reference to amendments s.78(2) makes specific reference to modification and augmentation.

17. At one point Mr Rowe suggested that s.78 might be thought of as a catch all provision, to mop up matters which the Legislature may not have dealt with. Whatever its purpose, he submits that the effect of s.78 is to make s.2 of 1997 Act part of Falkland Islands Law because it augments both the *Offences Against the Person Act 1861* and the *Public Order Act 1996*.

18. It is right to say both the *Offences Against the Person Act 1861* and the *Public Order Act 1996*, are listed in the Schedule 1 to the original *Crimes Ordinance 1989*, albeit not in full (indeed there are three pages of changes to the *Public Order Act 1986* listed in the Schedule itself). Those Acts are, therefore, referred to in "a written law of the Falkland Islands".

19. The Defence submit that, on proper construction of s.78 of the *Interpretation and General Clauses Ordinance*, the relevant provisions of the 1997 Act cannot be said to augment either the *Offences Against the Person Act 1861* or the *Public Order Act 1996.* Consequently, they submit that the offence under s.2 of the *Protection from Harassment Act 1997,* with which Mr McLaren is charged, is not known to Falkland Islands Law.

The status and effect of s.6 of the Revised Edition of the Laws Ordinance

20. It might, therefore, be thought that the sole question for me to decide is whether the s.2 of the *Protection of Harassment Act 1997* is, in fact, an augmentation to the *Offences Against the Person Act 1861* and/or the *Public Order Act 1996*, or not. Regrettably, the position is not quite that simple.

21. In support of their contention that s.2 of 1997 Act does augment the *Offences Against the Person Act 1861* or the *Public Order Act 1996* the Crown rely upon an entry which is contained in the hard copy loose leaf volumes version of the Revised Edition of the Laws ("the loose leaf version") which states, under Title 23 *"Criminal Law"* within the subsection called *"Imperial Enactments"(*at 23 Imp/37), as follows:

PROTECTION FROM HARASSMENT ACT 1997
(1997, c.40)

Extent of application

The whole Act, except section 8 to 11 (inclusive) and 13.

and in the notes to that entry:

Applicable by virtue of Interpretation and General Clauses Ordinance (Title 67.2), s.78, as an augmentation of the Offences Against the Person Act 1861 and the Public Order Act 1986 (applicable as indicated above).

22. I must first consider the status of the Revised Edition of the Laws as relied upon and the status of this entry. However, the task of carrying this out is complicated by a number of features and in trying to answer this question I must digress a little in order to set the scene to my deliberations.

23. A number of volumes of the various pieces of legislation that were applicable to the Falkland Islands at any given time, essentially reference books of Falkland Islands Law, have been published over the years. For example, I have seen a copy of the Ordinances of the Colony of the Falkland Islands 1915 which was produced under *"The New Edition of the Ordinances Ordinance, 1911"* and which I presently have on loan from the Governor's study, and two volumes from 1951, published pursuant to the *Revised Edition of the Laws Ordinance 1943* and found in the dustier recesses of the Court Library. My research reveals that the latest Ordinance on the subject in one from 1991 although it has been subsequently amended. I can find amendments from 1998 and 2006.

24. The Revised Edition of the Laws was originally created in book form but later took on a loose leaf format and up until about 12 years ago it seems that changes and updates were made by the insertion of new loose leaf entries in accordance with the applicable Ordinance. Later amendments made to the 1991 Ordinance directed the creation of a CD-ROM disc each year which was to set out the law in its latest revised format. All this was meant to be done by a Law Commissioner as appointed by the Governor.

    The *Revised Edition of the Laws Ordinance 1991* (as amended), which is the version that it is accepted is presently in force, states:

    Section 3 Appointment of Commissioner

    (1) The Governor ***shall*** *appoint a fit and proper person to prepare and publish, or cause to be prepared and published, a Revised Edition of the Laws of the Falkland Islands and from time to time to maintain and further revise such Revised Edition in accordance with this Ordinance.(emphasis added).*

Section 4

(1) The Revised Edition as most recently revised ***shall*** *be published at least annually on CD-ROM by a publisher approved by the Governor and* ***shall*** *be so published with reference to the laws in force on the date specified therein ("the revision date").(emphasis added)*

The next subsection has different numbers according to its source.

It is

(3) According to the disc provided by the Attorney General's Chambers

but

(2) According to the 2006 original Ordinance

Each publication ("issue") of CD-ROMs containing the Revised Edition to be published in accordance with subsection (1) ***shall*** *be authorised by Order made by the Governor which* ***shall*** *be published in the Gazette, and that issue* ***shall*** *come into operation and issues published by reference to earlier revision dates shall thereupon cease to be operative.(emphasis added).*

25. In my judgment, it is perfectly clear that both the requirement to appoint a Law Commissioner and the requirement to publish a CD-ROM disc on an annual basis are clearly mandatory ones. It might be that the changes directing annual versions of a disc were meant to deal with the inevitable increase in legislation associated with any society as it becomes more advanced. Whatever the reason, Ms Cheek candidly concedes that, despite being fully aware of these problems for some considerable time, there has been a complete failure to comply with either of these mandatory requirements for many years. The last appointed independent Law Commissioner, seems to have been the eminent academic lawyer, Dr Milner. Research shows that he was appointed in 1991, but that he has not held the appointment for many years. Although it would appear that a previous Attorney General may have stood in to take on the role on some sort of basis, for a little time, there has been no Law Commissioner of any

kind for a long time. It is not entirely clear why these legal obligations have been ignored.

26. In addition, although a number of CD-ROM discs continue to be prepared by an external commercial organisation on the instructions of the Attorney General's Chambers for some time now, Ms Cheek makes it clear that these discs cannot be relied upon as providing a full and accurate version of the law, and that they have never been authorised by any Governor under the terms of the Revised Edition of the Laws Ordinance, or otherwise. Again it is not clear why accurate versions cannot be produced or why the Attorney General's Chambers continue to obtain versions which they accept do not fully and accurately reflect the Law and which, therefore, cannot be relied upon.

27. Consequently, in seeking to discover what law actually applies in the Falkland Islands we are left with trying to work from a loose leaf version which is significantly out of date and therefore no longer accurate and a CD-ROM disc which is not complete and, I am told, in places not accurate. It does not need me to say that this is far from satisfactory.

28. Ms Cheek therefore advises that the only way to have any real certainty as to the law as it presently stands, is to first go to the last authorised version of the Revised Edition of the Laws, the loose leaf version, which is out of date, and then physically go through each and every piece of legislation published in the Falkland Islands which purports to deal with the area of law under consideration. In addition, and assuming s.78 is relied upon, it would appear that one would also have to go through each and every piece of potentially relevant UK legislation to consider what might be applicable.

29. I have tried to do this in relation to the *Revised Edition of the Laws Ordinance 1991*, by considering the amending legislation that is listed on the present CD-ROM disc under the Revised Edition of the Laws heading. I am naturally cautious about doing this as I have had to rely on the accuracy of the CD-ROM disc to give me the information as to what these amendments were, conscious that the Crown concede that the disc itself cannot be regarded as accurate.

30. The results of this exercise are troubling indeed and give rise to as many questions as they answer.

31. For instance, and by way of example only, one has to only look as far as the Interpretation section (Section 2) of the *Revised Edition of the Laws Ordinance* in the format as it seems presently to be in force to begin to have serious concerns. The Section states:

"further revision" *means any subsequent revision of the Revised Edition of the Laws of the Falkland Islands, carried out under the authority of section 4(2) of this Ordinance;*

This is of concern because according to the disc version of the Ordinance section 4(2) (according to the disc) does not give any such authority dealing instead with information that might be put on the disc itself. Section 4(3) seems to be the section that allows for a further revision to be authorised.

However looking at the original printed version of the 2006 Ordinance itself there seems to be 2 sections labelled 4(2) and there is no reference to a s.4(3) at all. I am unclear as to whether there has been a Correction Order at some time to make one of the original versions of s.4(2) become s.4(3). If not, one must ask on what authority has the disc been changed.

"Law Revision Order" *means an order made by the Governor under section 4(4) of this Ordinance;*

Section 4(4) no longer exists in the presently applicable Ordinance and it does not seem to have been replaced.

"laws" *means the enactments specified in section 7(1) of this Ordinance;*

Section 7 was repealed in 2006.

"relevant revision date" *in respect of the Revised Edition means the date as at which the Governor shall specify by order under section 4(4) that the Revised Edition represents the laws of the Falkland Islands; and in respect of each further revision means 1st January in the year of such further revision or such other date as the Governor may by order specify as a relevant revision date;*

The previous comments relating to ss.4(2) and 4(3) apply.

"Revised Edition" *means the Revised Edition of the Laws of the Falkland Islands to be prepared under the authority of this Ordinance and shall include, where the context admits-*

(a) any volume of the Revised Edition, and

(b) the Revised Edition as revised by any further revision carried out in accordance with section 4(2);

The previous comments in relation to s.4(2) are repeated.

32. Unfortunately the rest of the Ordinance is littered with these problems as well. Section 6(2) for instance refers to an order made under s.4(2), with the problems I have identified, as does section 12 (somewhat ironically as that section purports to deal with *"Corrections of errors and omissions"*).

33. Although there remains the question as to when one of the versions of s.4(2) as originally drafted became s.4(3) it is important to note that the majority, if not all of the mistakes, are within the relevant legislation, which was passed by the Legislature, itself.

34. Indeed, notwithstanding the general irony of a piece of legislation which is meant to try to bring clarity to the law being in such a state with so many apparent mistakes, Ms Cheek and Mr Rowe for the Crown invite me to try to apply the Ordinance notwithstanding the mistakes that are apparent and accepted. They invite me to read s.4(2) as meaning the version now labelled s.4(3) on the disc, although they seem at a loss to help me as to how I must read references to s.4(4) which does not exist.

35. In particular they invite me to look at section 6(2) of the *Revised Edition of the Laws Ordinance* which states:

(2)Subject to subsection (3) the issue of the Revised Edition last authorised by Order under section 4(2) shall be deemed accurately to reflect the law of the Falkland Islands as at the revision date in relation to which it is issued.

36. Firstly, on a strict reading of the section, and in light of the two versions of s.4(2) with one now seemingly having become s.4(3) there must be doubt as to whether there actually is a version of the Revised Edition which has been authorised by Order under section 4(2). Secondly, the loose leaf version upon which I am invited to rely is significantly out of date and has not been subject to the consideration of an independent Law Commissioner, and the regular reviews which, in my view, the *Revised Edition of the Laws Ordinance 1991* clearly intended should take place.

37. However, for the purpose of considering this point in more depth, I will put those concerns to one side for a moment, read s.4(2) to mean 4(3), and proceed upon the basis that, however unsatisfactory the position might be in relation to the last revision of laws, the loose leaf version is the relevant version of the Revised Edition of the Laws, at least as a baseline, from which I must start.

38. The first question for me then to consider is whether the terms of section 6(2) (specifically the reference to "deemed" contained therein) require me to follow the view that is set out in the Revised Edition of the Laws loose leaf version as to whether the relevant provisions of *Protection of Harassment Act 1997*, namely that they augment the *Offences Against the Person Act 1861* and the *Public Order Act 1986* (by virtue of the provisions of s.78 of the *Interpretation and General Clauses Ordinance*), apply. In other words, is the effect of s.6(2) to prevent me from even considering whether the conclusion of the author of that particular entry, as expressed in the loose leaf version, is correct.

39. The Defence submit that I cannot be prevented from considering whether the entry in the loose leaf version is correct. They submit that interpretation of the law is a matter for the Court and that the entry dealing with the *Protection from Harassment Act 1997* is no more than a view, an opinion, taken by the author of the loose leaf version (whether that was the last independent Law Commissioner or a previous Attorney General or someone else). They submit that to prevent the Court considering the matter themselves would be to permit the law to be interpreted and then effectively made on the opinion of one person (the author of the entry in the loose leaf version) who is neither elected or a

member of the judiciary, and without any proper debate or argument. Consequently, there would be no effective scrutiny at all (save perhaps for Judicial Review) as to how the augmentation provision of s.78 of the *Interpretation and General Clauses Ordinance* should operate and what English Laws should be applied by that section. In short, the Defence say that the entry purports to remove from the Court the powers which lie with the judiciary to interpret legislation, and that this cannot have been the intention of the Legislature.

40. In addition, the Defence refer to Section 6(3) which states.

Subsection (2) shall not preclude any court from receiving in evidence any officially published copy of any law in force in the Falkland Islands but, unless that court is satisfied that the Revised Edition is manifestly in error in the relevant particular, the court shall in relation to that particular prefer the copy of the law published in the Revised Edition to any other copy.

41. The Crown have vacillated on their submissions as to the effect of this provision. In the original skeleton argument on the point, submitted by Mr Rowe, the Crown invited me to conclude that the effect of both sections was that I would be bound to follow what was set out in the loose leaf version unless I concluded that it was manifestly in error. Subsequently, Ms Cheek again conceded, that I was not bound to follow the loose leaf version entry if I considered that it was manifestly in error. However, Mr Rowe, at least initially in argument before the Court, seemed to retract from this stance and make further submissions on the matter suggesting that Section 6(3) might be read as the Court, only being able to conclude the loose leaf version was manifestly in error, if that view was arrived at as a result of receiving in evidence an officially published copy of any law in force in the Falkland Islands.

42. In my judgment, I am not satisfied that the entry in respect of the *Protection from Harassment Act 1997* is anything more than an opinion that can be scrutinised by the Court. Even if I am wrong about that I am satisfied that a proper reading of section 6(3) gives the Court an ability to disregard what is set out in the Revised Edition of the Laws if the Court

concludes that any entry is manifestly in error and that this is not dependent on receiving into evidence any other officially published law. In summary, the effect of s.6(2) and s.6(3) is to merely create a presumption that can be rebutted if the Court considers it right to do so in accordance with the test to be applied.

43. To conclude otherwise would be to give the author of the loose leaf version (or indeed any version) of the Revised Edition of the Law the power to effectively both interpret and make laws. I am satisfied that it was not the intention of the Legislature, in the passing of the *Revised Edition of the Laws Ordinance 1991*, to remove from them their ultimate power of law-making or to remove from the Court the responsibility that it has to scrutinise and interpret the laws.

44. I am supported in this view by further reference to the *Revised Edition of the Laws Ordinance* itself. Section 10 sets out the *"Miscellaneous powers of Commissioner"*. Although it gives the Law Commissioner quite extensive powers to make the laws easier to access and understand, and even to correct minors errors, it is subject to section 11 of the Ordinance which says:

The powers conferred on the Commissioner by this Ordinance shall not be taken to imply any power in him to make any alteration or amendment ***in the substance*** *of the law or part thereof (emphasis added).*

45. *The Protection from Harassment Act 1997* creates offences not previously known to the law of England and Wales. It provides for penalties including custody. In my judgment the 1997 Act clearly deals with matters of substance.

46. Whilst the entry in the loose leaf version might provide an opinion, indeed a learned opinion, on whether the *Protection from Offences Act 1997* does augment other statutes which are in force, I am satisfied that sections 10 and 11 prevent such an opinion becoming an authoritative and unchallengeable statement as to the law. To decide otherwise would be to give power to the Law Commissioner to alter or amend the substance of the Law which, in my judgment, is expressly forbidden by s.11.

47. The Prosecution also sought to suggest, in a far from enthusiastic submission, that an offence or offences contrary to the provisions of the *Protection from Harassment Act 1997* had been before the Court, in the past, without challenge. I consider that there is no force in this argument. The point now falls to be considered and it has been. I can find no previous argued challenge, I have seen no ruling and I have not been directed to any precedent on the matter.

48. Although it has been somewhat of a struggle to get to this point, I am satisfied that the effect of section 6(2) is not to deprive the Court of the ability to consider whether an entry in the Revised Edition of the Laws is correct or not and therefore I have the power to consider whether the Protection from Harassment Act 1997 does augment the Offences Against the Person Act 1861 and/or the Public Order Act 1986.

Do the relevant provisions of the *Protection from Harassment Act 1997* augment the *Offences Against the Person Act 1861* and/or the *Public Order Act 1996*

49. Finally, therefore, I am able to turn to the fundamental question that I have to consider, namely does the *Protection from Harassment Act 1997* augment the *Offences against the Person Act 1961* and/or the *Public Order Act 1986.*

50. Reference was made at the preparatory hearing as to s.7 of the *Crimes Ordinance* and s.83 of the *Interpretation and General Clauses Ordinance* and what effect those provisions might have on this issue. On further consideration of these provisions I am satisfied that they are not directed towards specifically adopted English statutes, which both the *Offences against the Person Act 1861* and the *Public Order Act 1986* are by virtue their inclusion in the Schedule to the *Crimes Ordinance*, but are meant to relate to English Law which was adopted by virtue of it being in force in 1900. I therefore do not consider it necessary to consider these provisions further for the purposes of this judgment.

51. What then does augment mean? The Chambers Dictionary defines it as "to increase, to make larger". The Oxford Dictionary defines it as "to make something greater by adding to it". To augment something is

therefore to add to that thing. It seems to me that there are a number of examples of this in statute.

52. For instance, although the *Public Order Act 1986* creates offences contrary to s.4 and s.5, it was clearly felt that this was not adequate to cover all areas of behaviour contrary to public order and so Parliament created a further offence by the implementation of s.154 of the *Criminal Justice and Public Order Act 1994* in the form of s.4A of the *Public Order Act 1994.* Section 154 of the Act specifically sets out the following:

Offence of causing intentional harassment, alarm or distress.

In Part I of the Public Order Act 1986 (offences relating to public order), after section 4, there shall be inserted the following section—
4A Intentional harassment, alarm or distress.

Section 154 then goes on to define the offence, set out possible defences and prescribe a penalty.

53. Whilst s.154 does not amend or modify the *Public Order Act 1986*, in that it does not change what was already in the Act, the section does, in my judgment, very clearly enlarge the scope of the *Public Order Act 1986,* that is it augments that Act by specifically adding to it. It can be seen that it specifically adds to the Act itself and specifically says that is what it is doing.

54. Another example is found in the insertion of s.2A and s.4A into the *Protection of Harassment Act 1997* itself by the *Protection of Freedoms Act 2012.* Again these sections are specifically added to the original Act. Again the provisions of the *Protection of Freedoms Act 2012* provide for these new offences to be inserted into the *Protection from Harassment Act 1997* itself. This again enlarges the scope of the *Protection from Harassment Act 1997.* In other words it augments the original Act.

55. The *Crime and Disorder Act 1998* which deals with the creation of racially aggravated versions of established offences might, and I stress might, also be argued to augment other Acts.

56. Sections 28-32 of the *Crime and Disorder Act 1998* create racially aggravated versions of a number of offences. For instance s.29 states

Racially or religiously aggravated assaults.
(1)A person is guilty of an offence under this section if he commits— .
(a)an offence under section 20 of the Offences Against the Person Act 1861 (malicious wounding or grievous bodily harm);
(b)an offence under section 47 of that Act (actual bodily harm); or
(c)common assault,
which is racially or religiously aggravated for the purposes of this section.
(2)A person guilty of an offence falling within subsection (1)(a) or (b) above shall be liable—
(a)on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both;
(b)on conviction on indictment, to imprisonment for a term not exceeding seven years or to a fine, or to both.
(3)A person guilty of an offence falling within subsection (1)(c) above shall be liable—
(a)on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both;
(b)on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine, or to both.

57. Reference is made in the later Act to the original section in the earlier Act, and the racially aggravated offence requires proof of the offence under the original Act before the later offence can be even be considered. Although the *Crime and Disorder Act 1998* does not specifically insert the racially aggravated provisions into the earlier Acts it seems to me that there may be an arguable point that s.29 of the *Crime and Disorder Act 1998* does augment, or add to, the *Offences Against the Person Act 1861.* However, I do not feel it necessary to decide this point, I have not heard specific argument on it and I do not proposed to rule upon it.

58. However, both of these examples are, in my view, in stark contrast to the provisions of the *Protection from Harassment Act 1997* itself.

59. Section 2 of the *Protection from Harassment Act 1997* creates an offence which requires a course of conduct, and which is directed towards a specific person. It does not, however, require proof of any specific assault or any injury to that person and it does not require any specific public order element. The 1997 Act was designed to try to deal with what was commonly called 'stalking' and section 2 creates a new offence, criminalising a new area of behaviour.

60. It is of particular note that there is no reference at all to either the *Offences Against the Person Act 1997* or the *Public Order Act 1986* within the entirety of the *Protection from Harassment Act 1997*, let alone a specific reference to its relevant provisions being inserted into the other Act.

Summary of the arguments

61. The Crown invite me to conclude that a later Act can augment an earlier Act if it deals with a subject matter that is in some way similar to that dealt with in the original Act. Essentially their submission seems to amount to the following: the *Offences against the Person Act 1861* deals with offences against people as does the *Protection from Harassment Act 1997* (although the Crown concede that the later Act does not actually require an assault or injury of any kind to be made out). Equally they say that the *Public Order Act 1986* deals with behaviour that might leave people feeling harassed, as does the *Protection from Harassment Act 1987* (although they concede that the relevant offences in the *Public Order Act 1986* do not require an actual victim and are directed towards keeping order in public). Therefore, say the Crown, the *Protection of Harassment Act 1997* deals with the same areas of law as do the earlier Acts, so it can legitimately be said to augment them.

62. The Defence say that the *Protection of Harassment Act 1997* creates a new area of criminal offending, criminalising behaviour which was not previously covered by specific legislation, and is therefore not the same

area of law. In any event, they submit, to adopt such a wide interpretation of s.78 as the Crown urge upon the Court ignores the very clear terms of s.78 itself. In particular the Defence point to actual of wording s.78, which talks of the later Act modifying or augmenting *"**that** earlier imperial enactment"* (emphasis added) and does not, for instance, say 'modifying or augmenting an area of law with which the earlier act is generally (or even specifically) concerned'.

63. In addition, the Defence say that in interpreting the intention of s.78, the Court must have regard to the general principles that laws should be accessible and certain and that the approach urged by the Crown would be to require the public to engage in a considerable amount of guesswork as to what criminal offences do apply by virtue of s.78 of the *Interpretation and General Clauses Ordinance.* They say that under the Crown's interpretation the public could not be sure what offences applied unless and until a Court was to specifically rule on the matter after an specific offence came before it.

64. As I touched upon at paragraph 18 above, the Defence further submit that if the Legislature had meant for the new offences created by the *Protection from Harassment Act 1997* to apply there were statutory mechanisms for this to be achieved. The fact that these mechanisms were not used, which the Crown accept were open to them, is an indication that they did not consider that the offences should be incorporated in Falkland Islands Law.

Conclusion and reasons

65. Having considered all the arguments, it is my judgment that the provisions of the *Protection of Harassment Act 1997* are not incorporated into Falkland Law as an augmentation to either the *Offences Against the Person Act 1861*, or the *Public Order Act 1986* or both.

66. Although there is a clear rationale for having general interpretation and updating provisions in societies such as the Falkland Islands, where resources for statutory scrutiny and amendment are more limited than in other larger jurisdictions such as England and Wales, the effect of such provisions should be measured, in the sense of not producing

unacceptable uncertainty in the law. Any legislation, in particular that which seeks to criminalise behaviour and prescribe punitive consequences for its breach, should be accessible and clear so that people can know or at least find out what rules they must live by. Where the effect of the application of a general updating section such as s.78 might be to introduce new offences into Law, which have not been specifically scrutinised by the Islands' Legislature, considerable caution should be exercised in its interpretation, which is what I have done.

67. Section 78 very clearly and specifically refers to a later Act augmenting *"**that** earlier imperial enactment"*. It does not refer to augmenting a general or even a specific subject matter. The fact that the Crown, when asked, could not say which of the two English Acts the *Protection from Harassment Act 1997* augments, preferring to suggest that it sits somewhere in the middle and augments both, is far from convincing and, to my mind, demonstrates that their submission is based on the notion that the 1997 Act generally augments a subject matter, namely criminal law (or even criminal law that deals with offences that might affect people), rather than any specific *"earlier imperial enactment"* as is required by the terms of s.78.

68. The *Protection from Harassment Act 1997* is, in my judgment, a stand-alone Act which was introduced to create new offences and civil procedures to deal with the problem of stalking. It neither inserts provisions into any other Act, nor does it create offences which are reliant on others being established and which are set out in other Acts. The 1997 Act contains no reference at all to the *Offences against the Person Act 1861* or the *Public Order Act 1986.* Remove the *Offences against the Person Act 1861* and the *Public Order Act 1986* from the statute book and the *Protection from Harassment Act 1997*, and its provisions, would still remain.

69. Although the *Protection from Harassment Act 1997* may add to the general body of criminal law or even the criminal law dealing with offences that affect other people, which is, of course a feature of most if not all of criminal legislation it does not in my judgment augment either of the *"earlier imperial enactments"* which the Crown claim that it does.

Having had regard to the principle that legislation should provide as much certainty in the law as it can, so that people know what rules they must live by, I am of the view that s.78 cannot and should not be read in the wide way urged upon me by the Crown.

70. For the avoidance of doubt I am therefore satisfied that the entry in the Revised Edition of the Laws as set out in the loose leaf version, which suggests that the *Protection from Harassment Act 1997* does augment the earlier Acts, is manifestly in error.

Further comments about the state of the Laws

71. At times, and to use a local analogy, trying to navigate Falkland Islands' Law frequently feels like paddling the rough South Atlantic seas to South Georgia, in a canoe, without a compass and, at times, without a paddle.

72. Let me say this *"I have to say that this is an extremely unsatisfactory situation state of affairs where the law of any country is uncertain to the extent that we don't know what's in force, when you can't bring any prosecutions without certainty and it's not fair that any citizen should be subject to law which is not certain. I agree that section s.78 trying to work out whether something is in force or not required some mental gymnastics and that may be something which needs to be looked at as to how we achieve the necessary certainty under the law".*

73. The concerns of the judiciary about the state of the laws are not new. The words I have quoted above are not mine, although they clearly deal with some of the same concerns that I have. They were the words of the Judge in a case in 2002 where the Crown withdrew a prosecution because it was discovered, post charge, that the offence to be tried was not actually part of Falkland Islands' Law.

74. I raised the issue of the state of the laws within weeks of my arrival on the Islands well over two years ago and judicial concerns clearly go back much further than that. I have since then been told that things are being done. An expert came to the Islands almost a year ago now and reported shortly afterwards. Yet despite this the state of the law remains as it does, nothing substantive has actually been achieved, we still have no

Independent Law Commissioner and the law becomes more confusing, difficult and inaccessible with each new piece of legislation.

75. I have touched upon the irony of the very Ordinance which is meant to produce clear and certain law itself being littered with mistakes. It is difficult to understand how an Ordinance with so many mistakes was passed given that, one assumes, the Legislation was carefully scrutinised by both the Attorney General's Chambers and the Legislature before becoming law. Those who practice in these courts know only too well that this is not an isolated example.

76. Laws deal with how people are to behave, they deal with the intervention of the state into the lives of others, they seek to regulate how individuals, organisations, and businesses should act towards each other, they provide the authority to remove people's liberty, to remove children from their parents, to make orders with significant financial consequences against others. They provide the very bedrock for any civilised society. There is nothing amusing in uncertainty in any law, in mistake after mistake in drafting, in the lack of accessibility so that that very few can even begin to even find which law applies let alone begin to interpret it.

77. It is, of course, for the people of the Falkland Islands, as expressed through their elected representatives, and brought into force through the constitutional and other statutory provisions relating to the processes of law making, to decide what laws they wish to live by.

78. It is the responsibility of the courts to apply the Law. However, in order to do so it must be clear what the laws are and they must be accessible. Of course there are laws in these Islands but these laws are neither clear nor accessible to the people, or indeed to the lawyers. The state of the laws at present is, in my judgment, a real threat to the rule of law and continues to present a risk to justice being properly done.

C J Gumsley

The Senior Magistrate

20th January 2014